

**CASE NO. 126**

*(Arbitral Award of 14 November 2014)*

1. *Despite the inaccuracy in the name of the Ukrainian Chamber of Commerce and Industry in the arbitration clause of the Contract, the Arbitral Tribunal comes to the conclusion that the Parties agreed on the jurisdiction of the ICAC at the UCCI, and accordingly acknowledges its jurisdiction to hear the present dispute.*

2. *The Arbitral Tribunal notes that the rate of the fine differs between the English and the Ukrainian versions of the Contract, being 0.05% in the former and 0.5% in the latter version.*

*The Respondent has also stressed this discrepancy, arguing that the rate established by the Contract is 0.05%, and the rate of 0.5% referred to in the Statement of Claim was erroneous.*

*In turn, the Claimant stated that the Ukrainian text of the Contract has priority over its English version because the case was being considered at the ICAC at the UCCI.*

*Having carefully considered the provisions of the Contract as well as the arguments of both parties, the Arbitral Tribunal finds the Respondent's argument more convincing as reflecting the intention of the parties and the true course of their agreement while concluding the Contract.*

*The Arbitral Tribunal also finds that the Contract's text has been authenticated in English and Ukrainian languages and it is plain from the Contract that none of them prevails in case of doubt. In the opinion of the Arbitral Tribunal, the Claimant is apparently unable to demonstrate the contrary. Besides, the Arbitral Tribunal notes that the above point taken by the Claimant is not a matter of interpretation of the Contract but a matter of a mistake which shall be operative against the Claimant.*

*Therefore, in calculation of the amount of fine the rate of 0.05% shall be applied. On this basis the amount of the fine shall be re-calculated.*

3. *According to the paragraph 8 of Resolution of the Plenum of the High Commercial Court of Ukraine No.14 of 17 December 2013, the accrual of the rate of inflation on the principal amount of debt in a foreign currency is not possible, since the inflation rate is established only for the national currency of Ukraine – hryvnia.*

*Since the amount of principal debt is expressed in USD, the Arbitral Tribunal holds that the Claimant's reliance on article 625 of the Civil Code of Ukraine cannot be given as support. The Claimant's claim regarding the recovery of inflation rate accordingly fails.*

*4. Pursuant to p.4 of Section VII of the Schedule of Arbitration Fees and Costs, if the arbitral proceedings in the case are conducted neither in Ukrainian nor in Russian languages, all possible costs of translation shall be charged to both parties in equal amounts.*

*Since the Claimant deposited in the Ukrainian CCI's account the money to cover the costs of the translation provided in the course of these arbitral proceedings, the Respondent is required to reimburse to the Claimant a half of this sum.*

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The ICAC at the UCCI composed of three arbitrators (hereinafter referred to as the “Arbitral Tribunal”) held a hearing in the case under the claim of the Ukrainian enterprise against the Brazilian company for the recovery of the amount of USD 176,177.27 that includes the principal debt amounting to USD 100,510.00, penalties amounting to USD 68,973.77, 3% of annual interest rate amounting to USD 1,196.64 and inflation rate amounting to USD 5,496.86 as well as the arbitration charges and expenses incurred by the Claimant.

The legal basis for the resolution of the dispute at the ICAC at the UCCI is the arbitration clause contained in clause 10 of the Contract dated 26 February 2015, which provides as follows:

*“If not achieve an agreement during 30 (thirty) days from the date of the first negotiation measure (correspondence starting) any dispute, divergence or claim in accordance with this Contract or his violation, dissolution or unreality, will be finally decided by an arbitration in the International commercial arbitration court at Commercial and industrial a chamber Ukraine in accordance with his regulation”.*

Despite the inaccuracy in the name of the Ukrainian Chamber of Commerce and Industry in the arbitration clause of the Contract, the Arbitral Tribunal comes to the conclusion that the Parties agreed on the jurisdiction of the ICAC at the UCCI, and accordingly acknowledges its jurisdiction to hear the present dispute.

#### **FACTUAL BACKGROUND OF THE CASE**

The Ukrainian enterprise, the Claimant, filed the Statement of Claim with the ICAC at the UCCI for recovery of the amount of USD 176,177.27 from the Brazilian company, the Respondent.

The claims of the Claimant are based on the Contract dated 26 February 2015 (hereinafter referred to as “the Contract”), according to which the Respondent (the Customer) is to transfer, and the Claimant (the Warehouseman) is to perform the temporary storage of equipment (hereinafter referred to as “the Property”) and to return it to the Respondent on its first demand or upon the expiration of the Contract. The Respondent is to pay for these services.

According to clause 6.3 of the Contract, the first advance payment for the first three-month storage period shall be made within 20 calendar days after signing the acceptance and transfer act in relation to the Property and the Certificate of delivery and acceptance of services. Subsequent payments shall be made at the beginning of the following three-month period upon the Warehouseman’s invoice within 20 days after receiving such invoice.

According to clause 7.1 of the Contract, the warehouseman shall provide insurance cover of the Property, the beneficiary of insurance cover being the Customer. According to clause 6.2.IV of the Contract, the cost of the insurance premium which is to be paid by the Customer amounts to USD 21,000.00 annually.

According to clause 6.5 of the Contract, payment for insurance premium is to be done as a separate advance payment within 20 days after receipt of the invoice of the Claimant. The Claimant duly paid the amount of USD 17,062.00 of insurance premium for the Property.

As appears from the Statement of Claim, the Claimant has provided the following invoices for storage services to the Respondent:

- 1) invoice of 27 May 2015 for the three-month period from 1 June 2015 until 31 August 2015, for the amount of USD 20,976.00;
- 2) invoice of 11 September 2015 for the three-month period from 1 September 2015 until 30 November 2015, for the amount of USD 20,748.00;
- 3) invoice of 17 December 2015 for the three-month period from 1 December 2015 until 20 February 2016, for the amount of USD 20,748.00;
- 4) invoice of 11 March 2016 for the three-month period from 1 March 2016 until 1 May 2016, for the amount of USD 20,976.00;
- 5) invoice of 8 June 2016 for the payment of the insurance premium in the amount of USD 17,062.00.

By the letters of 19 June 2015, of 13 July 2015, of 7 August 2015 and of 12 November 2015, the Claimant notified the Respondent about the necessity to comply with the terms of the Contract and to pay the costs pursuant to the invoices provided.

However, as of 24 May 2016, the services for the storage of the equipment remained unpaid.

In light of the breach of contractual obligations under the Contract by the Respondent with regard to payment for storage services, the Claimant requests to recover from the Respondent the debt in the amount of USD 176,177.27 that includes the principal debt amounting to USD 100,510.00, penalties amounting to USD 68,973.77, 3% of annual interest rate amounting to USD 1,196.64 and inflation rate amounting to USD 5,496.86 as well as the arbitration charges and expenses incurred by the Claimant.

On 2 June 2016 the present arbitral proceedings were commenced by the Decision of the President of the ICAC at the UCCI.

On 28 July 2016 the ICAC at the UCCI received the Respondent's letter dated 27 July 2016. In that letter, the Respondent argued that he was being liquidated, and therefore the Claimant had to wait for the appointment and the commencement of the work of the Liquidation Commission, which would then regulate all issues connected with agreements entered into by the Respondent. Moreover, in its letter the Respondent stressed that it had at all times acknowledged its debts before the Claimant. At the same time the Respondent disagrees on the rate of penalty established in the Contract being in the Respondent's view 0.05.

Upon the constitution of the Arbitral Tribunal and the preparation of the case for consideration, the oral hearing of the case was scheduled for 6 October 2016.

However, due to the lack of necessary evidence and materials, the Arbitral Tribunal decided to adjourn the hearing to 14 November 2016 and to request the parties to submit additional evidence, namely: the statutory documents of the Respondent and an extract from the relevant state register on the registration of the Respondent.

On 31 October 2016 the ICAC at the UCCI received the Respondent's letter, in which it was stated that the Respondent was waiting for creation of the Liquidation Commission which would have the responsibility to resolve all issues connected with liquidation. The Respondent stressed that the Liquidation Commission will perform its work in order to provide payment of debt to the creditors of the Respondent.

Together with the abovementioned letter, the ICAC at the UCCI received from the Respondent the requested documents, namely: the extract from the state register on the registration of the Respondent (in Portuguese) and the statute of the Respondent (in Portuguese).

On 7 November 2016 the ICAC at the UCCI received the Claimant's letter of 3 November 2016 in which it was explained the calculation of the amount of debt. The Claimant has stated that the Ukrainian text of the Contract has priority over its English version because the dispute is being considered by ICAC at the UCCI.

At the hearing which took place on 14 November 2016, the Claimant's representative affirmed the claim concerning the recovery from the Respondent of the principal debt, fine, inflation rate, annual interest rate and arbitration charges and expenses incurred by the Claimant.

The Respondent, being duly notified on the date, time and place of the hearing, failed to participate.

### **REASONS FOR AWARD**

#### **As to the Claimant's claim regarding the recovery of principal debt in the amount of USD 100,510.00:**

According to article 526 of the Civil Code of Ukraine, an obligation shall be properly fulfilled according to the conditions of the contract, the requirements of this Code, other acts of civil legislation, and in the absence of such conditions and requirements – according to market practice or requirements which normally apply. Article 525 of the Civil Code of Ukraine provides that unilateral refusal to fulfill an obligation or unilateral change of its conditions is not allowed unless provided otherwise by the contract or by law. Article 629 of the Civil Code of Ukraine stipulates that an agreement is obligatory for the parties to fulfill.

In performance of its obligations under the Contract, the Claimant stored equipment transferred to it by the Respondent.

The obligation to pay in time for these services has arisen on the basis of clause 6.3 of the Contract. In turn, clause 6.3.2 of the Contract provides that the customer shall proceed with the payment at the beginning of the following three-month period upon the Warehouseman's invoice within 20 days after receiving such invoice. Moreover, according to clause 7.1 of the Contract, the Warehouseman shall provide insurance coverage for the property received for storing, beneficiary of insurance cover is the Customer.

The Claimant sent to the Respondent invoices for storage services provided in accordance with the Contract for the total amount of USD 83,448.00 and for the insurance premium in the amount of USD 17,062.00, altogether amounting to USD 100,510.00. However, as of date of the hearing, the abovementioned services remained unpaid.

Moreover, in the Respondent's letter dated 27 July 2016 to the ICAC at the UCCI, the Respondent acknowledged its debt before the Claimant.

Pursuant to the case materials, the Respondent in contravention of the Contract failed to fulfill its contractual obligations and to pay the fees for the services provided in the amount of USD 100,510.00.

Therefore, the principal debt in the amount of USD 100,510.00 is to be recovered from the Respondent on the basis of Articles 525, 526, 629 of the Civil Code of Ukraine.

**As to the Claimant's claim regarding the recovery of fine in the amount of USD 68,973.77:**

Due to the Respondent's failure to fulfill its contractual obligations, the Claimant's right to forfeit has arisen, as set out in part 1 of article 549 of the Civil Code of Ukraine which provides for the following: *"Forfeit (penalty, fine) shall be the amount of money or another property, which the debtor is obliged to deliver to the creditor in case the debtor does not meet its obligation"*.

In turn, clause 9.2 of the Contract specifies the following: *"For violation of payment terms of the Warehouseman services under clause 6.3 of this Contract, as well as not receipt of Property back on storage expiration the Customer pays a fine of 0,05% for each day, after payment expiration date"*.

However, the rate of the fine differs between the English and the Ukrainian versions of the Contract, being 0.05% in the former and 0.5% in the latter version.

In the Respondent's letter of 27 July 2016 the Respondent has also stressed this discrepancy, arguing that the rate established by the Contract is 0.05%, and the rate of 0.5% referred to in the Statement of Claim was erroneous.

In turn, in the Claimant's letter of 3 November 2016 the Claimant stated that the Ukrainian text of the Contract has priority over its English version because the case was being considered at the ICAC at the UCCI.

Having carefully considered the provisions of the Contract as well as the arguments of both parties, the Arbitral Tribunal finds the Respondent's argument more convincing as reflecting the intention of the parties and the true course of their agreement while concluding the Contract.

The Arbitral Tribunal also finds that the Contract's text has been authenticated in English and Ukrainian languages and it is plain from the Contract that none of them prevails in case of doubt. In the opinion of the Arbitral Tribunal, the Claimant is apparently unable to demonstrate the

contrary. Besides, the Arbitral Tribunal notes that the above point taken by the Claimant is not a matter of interpretation of the Contract but a matter of a mistake which shall be operative against the Claimant.

Therefore, in calculation of the amount of fine the rate of 0.05% shall be applied.

On this basis the amount of the fine shall be re-calculated. According to the calculation of the Arbitral Tribunal the total amount of fine is USD 6,897.27.

Therefore, the Arbitral Tribunal grants the claim concerning the recovery of the fine in part, namely – in the amount of USD 6,897.27 on the basis of part 1 of articles 549 of the Civil Code of Ukraine. The remainder in the amount of USD 62,076.50 is denied.

**As to the Claimant's claim regarding the recovery of the inflation rate in the amount of USD 5,496.86:**

While claiming the recovery of inflation rate, the Claimant refers to part 2 of article 625 of the Civil Code of Ukraine which stipulates that a debtor that delayed the fulfillment of a monetary obligation is obliged to pay the amount of the debt taking into account the established rate of inflation for the entire period of delay as well as three per cent annual interest rate on the delayed sum, unless another interest rate is established by the agreement or by law.

Although, according to the paragraph 8 of Resolution of the Plenum of the High Commercial Court of Ukraine No.14 of 17 December 2013, the accrual of the rate of inflation on the principal amount of debt in a foreign currency is not possible, since the inflation rate is established only for the national currency of Ukraine – hryvnia.

Since the amount of principal debt is expressed in USD, the Arbitral Tribunal holds that the Claimant's reliance on article 625 of the Civil Code of Ukraine cannot be given as support. The Claimant's claim regarding the recovery of inflation rate in the amount of USD 5,496.86 accordingly fails.

**As to the Claimant's claim regarding the recovery of annual interest rate in the amount of USD 1,196.64:**

Part 2 of article 625 of the Civil Code of Ukraine stipulates that a debtor that delayed the fulfillment of a monetary obligation is obliged to pay the amount of the debt taking into account the established rate of inflation for the entire period of delay as well as three per cent annual interest rate on the delayed sum, unless another interest rate is established by the agreement or by law.

Therefore, the Arbitral Tribunal finds that annual interest rate in the amount of USD 1,133.79 is to be recovered from the Respondent on the basis of part 2 of articles 625 of the Code.

**As to recovery of arbitration charges and expenses**

According to p.2 of Section VI of the Schedule of Arbitration Fees and Costs, if a claim is granted in part, the arbitration fee shall be charged to the Respondent in proportion to the amount of the claims granted, and the Claimant shall bear the arbitration fee relating to the amount of the claims that have been dismissed.

The Claimant has paid an arbitration fee in the amount equal to USD 8,485.31. The total amount of claims granted is USD 108,541.06, which amounts to 61.61% of the amount initially claimed.

On this basis, the Respondent is to bear arbitration charges and expenses in the amount of USD 5,227.80 and, respectively, the Claimant is to bear arbitration charges and expenses in the amount of USD 3,257.51.

**As to payment for translation provided in the course of these arbitral proceedings**

Pursuant to p.4 of Section VII of the Schedule of Arbitration Fees and Costs, if the arbitral proceedings in the case are conducted neither in Ukrainian nor in Russian languages, all possible costs of translation shall be charged to both parties in equal amounts.

Since the Claimant deposited in the Ukrainian CCI's account the money in the amount equal to USD 400.00 to cover the costs of the translation provided in the course of these arbitral proceedings, the Respondent is required to reimburse to the Claimant a half of this sum as much of USD 200.00.

Based on the above, the Arbitral Tribunal recovered from the Brazilian company in favour of the Ukrainian enterprise USD 108,541.06 in discharge of claims of the recovery of principle debt, fine and annual interests stated by the Claimant; and USD 5,227.80 of arbitration fee; as well as USD 200.00 to cover the costs of the translation provided in the course of these arbitral proceedings. The remainder of the claim was denied.