CASE NO. 69

(*Arbitral Award of 2 March 2012*)

1. Having considered the Respondent's plea as to the jurisdiction of the ICAC and analyzed the documents submitted by the Claimant, the Arbitral Tribunal in accordance with Article 16 of the Law of Ukraine "On International Commercial Arbitration" and Article 3 of the Rules of the ICAC acquired its jurisdiction over this case.

2. In accordance with Article 241 (1) of the Civil Code of Ukraine a transaction concluded by a representative with exceeding of authority shall establish, change, terminate civil rights and obligations of a person whom he/she represents only in case of subsequent approval of a transaction by that person. A transaction shall be considered approved, in particular, in case if the person that is represented has committed actions witnessing to the transaction's acceptance for execution.

Based on Article 241 (1) of the Civil Code of Ukraine and taking into account factual circumstances of this case, the Arbitral Tribunal considers that carrying out graphologic examination upon request of the Respondent is inadvisable, as even if supposing that the Contract was signed not by the General Director of the Respondent, but other person, the subsequent actions of the Respondent, aimed at real contract execution, testify to unreserved approval by the Respondent of transaction, and consequently, permit to consider the Contract dated 8 May 2008 concluded.

Taking into account the foregoing, the Arbitral Tribunal considers that a plea of the Respondent as to the ICAC jurisdiction is groundless, as the jurisdiction of the ICAC is expressly provided in the arbitration clause, contained in Section 9 of the Contract dated 8 May 2008, which was partially executed by the Respondent.

3. Taking into account that by a letter of claim dated 6 September 2011 the Claimant refused the delivery of the goods under the Specifications No. 12 and No. 13 to the Contract and demanded from the Respondent to return the prepayment amount in the sum of USD 84,067.50, the Arbitral Tribunal considers that the charge from the Respondent of the default interests for violation of the delivery period for the period from 6 September till 13 October 2011 is unfounded as in this period the Respondent already had no obligation as to the delivery of goods.

4. Pursuant to Article 226 (1) of the Economic Code of Ukraine the participant of economic relations must take necessary measures to prevent

or mitigate the damages of other participants of economic relations in the economic sphere.

In accordance with Article 4 of the Law of Ukraine "On Payments In Foreign Currency" in case of acceptance by the ICAC of the statement of claim of the resident for recovery from the nonresident of currency debt into consideration, the charge of penalty interest by tax authorities of Ukraine for untimely receipt of currency revenue (goods) stops, and the penalty interest during this period isn't paid.

Therefore, if the Claimant filed the statement of claim with the ICAC in due time, it could avoid the claimed damages but failed to do it. In this connection the Arbitral Tribunal considers that there are no sufficient bases for satisfaction of the claim of the Claimant for damages.

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The ICAC at the UCCI composed of three arbitrators (hereinafter referred to as the «Arbitral Tribunal») considered in the oral hearing the case on a claim lodged by the Ukrainian Company against the Sri Lankan Company for recovery of the amount of USD 103,720.00, including USD 84,067.50 as a prepayment for the undelivered goods, USD 14,882.50 as the default interests for violation of the delivery period, and USD 4,770.00 as damages.

Representatives of both Parties took part in the oral hearing.

FACTUAL BACKGROUND OF THE CASE

On 14 October 2011 the Ukrainian Company, the Claimant, filed the Statement of Claim with the ICAC for recovery of the amount of USD 103,720.00 from the Sri Lankan Company, the Respondent.

The claims of the Claimant are based on the Contract dated 8 May 2008 (hereinafter – the "Contract"), according to which the Respondent (the Seller) was to sell and the Claimant (the Buyer) was to pay the price for the goods in accordance with the specifications and invoices, which form an integral part of the Contract and specify quantity, price and total value of the goods, and also the terms of delivery (according to INCOTERMS 2000) and payment of the goods. In accordance with clause 10.1 of the Contract it is valid till 31 December 2013.

In Annex No. 2 to the Contract the parties have agreed that the delivery of the goods shall be made by the Seller within 35 days from the date of

prepayment. In case of delay in delivery the Seller shall pay the default interests in the amount of 0.1% of the sum of prepayment per each day of delay. The Buyer shall make a prepayment in the amount of 40% of the value of a lot of goods and pay a full price for the goods within 5 days before the receipt of them at the point of destination.

As appears from the Statement of Claim, the Claimant (the Buyer) in accordance with Specification No. 12 to the Contract and Commercial Invoice dated 18 February 2011 has ordered the goods for a total amount of USD 54,067.50 which has been paid by it in full. In accordance with Specification No. 13 to the Contract and Commercial Invoice dated 20 June 2011 the Claimant has ordered the goods for a total amount of USD 53,553.00. The ordered goods have been paid by the Claimant in part – in the amount of USD 30,000.00. Therefore, a total amount, which the Claimant has transferred to the Respondent's bank account as the payment for the goods that should have been delivered under Specifications No. 12 and No. 13, came to USD 84,067.50. In accordance with Annex No. 2 to the Contract the Respondent should have delivered the goods to the Claimant within 35 days from the date of prepayment; however, failed to do it neither within the established period nor later. In that connection the Claimant held a demand against the Respondent to return the paid amount. The letter of claim, sent to the Respondent by courier mail, was received by the Respondent on 14 September 2011. In its reply of 7 October 2011 the Respondent informed that it failed to fulfill its contract obligations to the Claimant because its Russian partner had failed to fulfill contract obligations to it. As, in the Claimant's opinion, such reason of failure of the Respondent of its contract obligations is unreasonable excuse and is not in compliance with good business practices, the Claimant initiated recourse to the ICAC.

In the Statement of Claim the Claimant invoked as a basis of the Arbitral Tribunal's jurisdiction subsections 9.1-9.2 of the Contract dated 8 May 2008, which provide for that: «All disputes that may arise between the sides in connection with the present Contract including interpretation and/or fulfilment of it, and cannot be decided by means of negotiations, shall be finally settled in the International Commercial Arbitration Court with Chamber of Commerce of Ukraine in the city of Kiev. Arbitration procedure is to be in accordance with regulations of the International Commercial Arbitration Court with Chamber of Commerce of Ukraine. A law, regulative this Contract, is a law of Ukraine. Decision of such arbitration court shall be final

and binding for both sides. Arbitration procedure is to be carried by one arbitrator. Languages of arbitration consideration: Ukrainian, English».

On 14 October 2011 the present arbitral proceedings were commenced by the Decision of the President of the ICAC at the UCCI.

Upon the constitution of the Arbitral Tribunal and the preparation of the case for consideration, the oral hearing of the case was scheduled for 2 March 2012.

On 28 February 2012 the ICAC received the Respondent's Application ("Application to dismiss for lack of jurisdiction of the ICAC") in which the Respondent declared that the ICAC did not have jurisdiction in the case because the Contract dated 8 May 2008, on which the Claimant based its claims and substantiated the ICAC jurisdiction, was faked and, accordingly, invalid. As the Respondent asserted, the Contract given by the Claimant had never been signed by the General Director of the Respondent or an authorized person on behalf of the Respondent, and the signature and seal of the Respondent, contained in that Contract, were counterfeit. The aforesaid Respondent's Application was accompanied by the Application for a forensic expertise.

At the oral hearing, which the Arbitral Tribunal held on 2 March 2012, the representative of the Respondent confirmed the Respondent's plea that the ICAC does not have jurisdiction in this case in view of absence of the contract between the parties, which would contain the corresponding arbitration agreement. Upon being acquainted with the Respondent's Application dated 28 February 2012 ("Application to dismiss for lack of jurisdiction of the ICAC"), the representatives of the Claimant have declared that the assertion of the Respondent that there is no contract between the parties is groundless, in witness of what submitted to the Arbitral Tribunal the originals of the Contract dated 8 May 2008 and Annexes No. 1 and No. 2 to it with signatures and seals of both parties, and also originals of all documents (copies of which have been attached to the Statement of Claim) supporting the fact of performance of the Contract by both parties during four years since 2008, namely: commercial invoices, payment orders, bank statements, bills of lading, and also cargo customs declarations with the Ukrainian customs' marks. The Claimant's representatives explained to the Arbitral Tribunal that the Contract was signed by the parties not simultaneously but sequentially: a draft contract previously agreed by the parties was signed at first by the Claimant and then was sent to the Respondent by mail and received from the Respondent with its signature and seal by mail,

too, whereupon the Contract began to be performed by both parties. Upon the Claimant representatives' statement, the contractual relationship between the parties existed since 2008 and was based exactly on the Contract No. LDP-99 dated 8 May 2008, to what the references to this contract in the commercial invoices of the Respondent and in the payment orders of the Claimant testify. The representative of the Respondent, insisting on absence of the Contract dated 8 May 2008 between the Claimant and Respondent, at the same time did not deny the fact of receipt of payments from the Claimant and shipping of goods to the address of the Claimant as well as did not submit any other contract on the basis of which the said deliveries and payments would make. The representatives of the Claimant also explained to the Arbitral Tribunal that the performance of the Contract dated 8 May 2008 carried out directly by the parties to the Contract, and the Claimant had no relationships with the Russian company, which was mentioned in the Respondent's reply to the letter of claim, and it knew about that company only from the aforesaid reply of the Respondent. Insisting on existence of the contract between the Claimant and Respondent, on the basis of which the Claimant brought action, the representatives of the Claimant confirmed the claims, stated in the Statement of Claim, and requested the Arbitral Tribunal to satisfy them in full.

REASONS FOR AWARD

1. In accordance with Article 16 of the Law of Ukraine «On International Commercial Arbitration» and Article 3 of the ICAC Rules the issue of ICAC jurisdiction in a particular case shall be decided by the Arbitral Tribunal examining the case. The Arbitral Tribunal may rule on a plea as to the ICAC jurisdiction either as a preliminary question or in an award on the merits. Based on Article 16 (3) of the Law of Ukraine «On International Commercial Arbitration» and Article 3 (3) of the ICAC Rules the Arbitral Tribunal has considered appropriate to decide the issue of the ICAC jurisdiction in the award on the merits.

2. The Arbitral Tribunal considers that the objections of the Respondent, stated in its Application dated 28 February 2012 («Application to dismiss for lack of jurisdiction of the ICAC»), are unreasonable on the following bases:

– at the oral hearing the Claimant provided the Arbitral Tribunal with the originals of the Contract dated 8 May 2008 and Annexes No. 1 and No. 2 to it with signatures and seals of both parties;

– the original of the Contract, given by the Claimant, contains section 9 «Arbitration», which provides for that: «All disputes that may arise between the sides in connection with the present Contract including interpretation and/or fulfilment of it, and cannot be decided by means of negotiations, shall be finally settled in the International Commercial Arbitration Court with Chamber of Commerce of Ukraine in the city of Kiev. Arbitration procedure is to be in accordance with regulations of the International Commercial Arbitration Court with Chamber of Commerce of Ukraine. A law, regulative this Contract, is a law of Ukraine. Decision of such arbitration court shall be final and binding for both sides. Arbitration procedure is to be carried by one arbitrator. Languages of arbitration consideration: Ukrainian, English»;

– the Claimant invoked the foregoing arbitration clause in its Statement of Claim as a basis of the Arbitral Tribunal's jurisdiction to consider the action brought, having confirmed availability of the arbitration agreement between it and the Respondent to refer the dispute to the ICAC;

– the documents available in the case file, the originals of which have been submitted by the Claimant's representatives at the oral hearing (namely: invoices, payment orders, bank statements, bills of lading, cargo customs declarations, etc.), testify to the contractual relationship between the parties during four years – from 2008 till 2011 included. Payment for the goods and shipping of them have been made directly by the Claimant and Respondent, the parties to the Contract dated 8 May 2008, with references to the Contract. Fact of receipt from the Claimant of payments with references exactly to the Contract dated 8 May 2008 as well as the fact of shipping of the prepaid goods to the Claimant's address and a partial return of the amount of prepayment to the bank account of the Claimant to the extent of USD 18,615.66 are not denied by the Respondent;

– asserting that the signature of the General Director of the Respondent in the Contract dated 8 May 2008 is counterfeit, the Respondent's representative at the oral hearing has not explained at the same time why that question was not raised earlier in receiving by the Respondent of payments from the Claimant under that contract and why, if such «falsification» took place, the Respondent did not return the received funds to the Claimant as groundlessly paid and during four years shipped to the Claimant's address the goods, which is a subject of the Contract dated 8 May 2008? Available in the case file copies of SWIFT notifications testify that a partial return

of the amount of prepayment to the extent of USD 18,615.66 was made by the Respondent under the Contract dated 8 May 2008;

– in accordance with Article 241 (1) of the Civil Code of Ukraine a transaction concluded by a representative with exceeding of authority shall establish, change, terminate civil rights and obligations of a person whom he/she represents only in case of subsequent approval of a transaction by that person. A transaction shall be considered approved, in particular, in case if the person that is represented has committed actions witnessing to the transaction's acceptance for execution.

3. Based on Article 241 (1) of the Civil Code of Ukraine and taking into account factual circumstances of this case, the Arbitral Tribunal considers that carrying out graphologic examination upon request of the Respondent is inadvisable, as even if supposing that the Contract was signed not by the General Director of the Respondent, but other person, the subsequent actions of the Respondent, aimed at real contract execution, testify to unreserved approval by the Respondent of transaction, and consequently, permit to consider the Contract dated 8 May 2008 concluded;

4. Taking into account the foregoing, the Arbitral Tribunal considers that a plea of the Respondent as to the ICAC jurisdiction is groundless, as the jurisdiction of the ICAC is expressly provided in the arbitration clause, contained in Section 9 of the Contract dated 8 May 2008, which was partially executed by the Respondent.

Consequently, by virtue of Section 9 of the Contract dated 8 May 2008, Article 7 of the Law of Ukraine on International Commercial Arbitration and Article 2 (1) of the ICAC Rules and based on Article 16 (3) of the Law of Ukraine On International Commercial Arbitration and Article 3 (3) of the ICAC Rules, the Arbitral Tribunal acquires its jurisdiction over this case.

5. According to Article 14 (1) of the ICAC Rules the Arbitral Tribunal shall settle disputes in accordance with the rules of law, which the parties have chosen to apply to the subject matter of the dispute. Any reference to the law or the legal system of a country shall be interpreted as direct reference to the substantive law of country, rather than to the conflict of laws rules thereof.

In subsection 9.2 of the Contract dated 8 May 2008 the parties have determined the Ukrainian law as the proper law of the Contract. That's why the Arbitral Tribunal holds that the rules of law envisaged in the legislation and normative acts of Ukraine shall apply to the settlement of the present dispute between the parties.

6. Examining the claims, lodged by the Claimant, on merits, the Arbitral Tribunal established that within the frame of the Contract dated 8 May 2008 (hereinafter referred to as the "Contract") the Claimant in the period from 20 June 2008 till 22 June 2011 transferred to the bank account of the Respondent USD 561,091.22 in total, that is confirmed by available in the case file copies of payment orders and bank statements (the originals of which were presented to the Arbitral Tribunal by the Claimant's representatives at the oral hearing) and is not contested by the Respondent.

7. The Respondent in the period from 23 October 2008 till 21 March 2011 shipped to the Claimant's address the goods for a total amount of USD 458,408.06, to what the available in the case file copies of commercial invoices of the Respondent and bills of lading with the Ukrainian customs' marks confirming the importation of goods into the territory of Ukraine (the originals of which were presented to the Arbitral Tribunal by the Claimant's representatives at the oral hearing) testify.

On 16 March 2009 and on 30 March 2010 the Respondent returned to the bank account of the Claimant USD 3,615.66 and USD 15,000.00, respectively, as a prepayment for the undelivered goods, to what the copies of SWIFT and bank statements (available in the case file) testify.

8. Therefore, the difference between the preliminary paid by the Claimant and delivered in fact by the Respondent goods (taking into account a partial return by the Respondent of the prepayment amount) has made USD 84,067.50. The specified sum has been transferred by the Claimant into the bank account of the Respondent by the payment orders No. 153 dated 22 February 2011 and No. 162 dated 22 June 2011 on the basis of the commercial invoices, issued by the Respondent, dated 18 February 2011 and dated 20 June 2011 for the goods which should have been delivered under the Specifications No. 12 and No. 13 to the Contract.

9. Pursuant to article 663 of the Civil Code of Ukraine the seller must deliver the goods to the buyer within the term established in the sale and purchase contract.

In accordance with Annex No. 2 to the Contract the Respondent should deliver the goods to the Claimant within 35 days from the date of prepayment, i.e. under the Specifications No. 12 – till 29 March 2012, and under the Specification No. 13 – till 27 July 2011; however, in violation of its contract obligations and requirements of Article 663 of the Civil Code of Ukraine, failed to do it neither within the established period nor later.

10. In accordance with Article 693 (2) of the Civil Code of Ukraine in case the seller who received a prepayment for the goods failed to deliver the goods within the established term, the buyer shall be entitled to claim delivery of paid goods or return of the prepayment amount.

In subsection 8.1 of the Contract the parties have provided for that: «Should the delay [in delivery] exceed 60 days the Customer has the right to cancel the Contract on the goods not put in time and demand refund from Seller overall cost of goods, including fine sanctions».

With reference to the aforesaid subsection of the Contract the Claimant sent to the Respondent the letter of claim dated 6 September 2011, in which it refused the goods not delivered in time and demanded from the Respondent to return the prepayment amount in the sum of USD 84,067.50 and also to pay the default interests for violation of the delivery period. As the demand of the Claimant was not fulfilled by the Respondent, the Claimant initiated recourse to the ICAC.

11. As of the day of the oral hearing of the case the Respondent neither delivered to the Claimant the goods under the Specifications No. 12 and No. 13 to the Contract nor returned to the Claimant's bank account the prepayment for them in the amount of USD 84,067.50.

12. Under such conditions, the claim of the Claimant for recovery from the Respondent of USD 84,067.50 as a prepayment for the undelivered goods is justified and, being confirmed by the case files, shall be granted in full according to Article 693 (2) of the Civil Code of Ukraine.

13. The Claimant also claims for recovery from the Respondent of USD 14,882.50 as the default interests for violation of the delivery period, which are allegedly to be paid by the Respondent under subsection 8.1 of the Contract, providing for that: «In case the delivery of the goods is not effected during period stipulated by the Contract, the Seller will pay to the Customer penalty calculated from the value of the goods not delivered in time basing on 0,1% of the value of such goods per each day of delay».

The amount of the default interests has been calculated by the Claimant as follows:

– under the Specification No. 12 to the Contract:

USD 54,067.50 (the value of the undelivered goods) x 0.1% x 198 days of delay in delivery (for the period from 30 March 2011 till 13 October 2011) = USD 10,705.37;

– under the Specification No. 13 to the Contract:

USD 53,553.00 (the value of the undelivered goods) x 0.1% x 78 days of delay in delivery (for the period from 28 July 2011 till 13 October 2011) = USD 4,177.13.

The Arbitral Tribunal, recognizing that the Claimant is entitled in accordance with contract provisions to demand from the Respondent the payment of the default interests for violation of the delivery period, at the same time considers that the calculation of the amount of the default interests is made by the Claimant incorrectly as in Annex No. 2 to the Contract the parties changed the contract provisions as to the charge of the default interests, having agreed that in case of delay in delivery the Seller shall pay the default interests in the amount of 0.1% of the sum of prepayment per each day of delay. Besides, taking into account that by a letter of claim dated 6 September 2011 the Claimant refused the delivery of the goods under the Specifications No. 12 and No. 13 to the Contract and demanded from the Respondent to return the prepayment amount in the sum of USD 84,067.50, the Arbitral Tribunal considers that the charge from the Respondent of the default interests for violation of the delivery period for the period from 6 September till 13 October 2011 is unfounded as in this period the Respondent already had no obligation as to the delivery of goods. In this connection the Arbitral Tribunal finds that the default interests payable by the Respondent to the Claimant for the violation of the delivery period shall be re-calculated in the following way:

1) USD 30,000.00 (sum of the prepayment) x 0.1% x 160 days of delay in delivery (for the period from 30 March till 5 September 2011 included) = USD 4,800.00;

2) USD 54,067.50 (sum of the prepayment) x 0.1% x 40 days of delay in delivery (for the period from 28 July till 5 September 2011 included) = USD 2,162.70;

3) Total amount is: USD 4,800.00 + USD 2,162.70 = USD 6,962.70.

So, according to the Arbitral Tribunal's calculation the default interests for the violation of the delivery period, which the Claimant is entitled to, shall be set at the amount of USD 6,962.70.

Under such conditions, the Claimant's claim for recovery from the Respondent of the default interests for violation of the delivery period shall be granted in part to the extent of the amount of USD 6,962.70. The remainder of USD 7,919.80 (14,882.50 – 6,962.70) is unreasonable and shall be dismissed.

14. The claim of the Claimant for recovery from the Respondent of USD 4,770.00 as damages suffered by it in connection with payment of the penalty interest to the state budget for violation of the Law of Ukraine «On Payments In Foreign Currency», shall be dismissed on the following bases.

Pursuant to Article 226 (1) of the Economic Code of Ukraine the participant of economic relations must take necessary measures to prevent or mitigate the damages of other participants of economic relations in the economic sphere.

In accordance with Article 4 of the Law of Ukraine «On Payments In Foreign Currency» in case of acceptance by the ICAC of the statement of claim of the resident for recovery from the nonresident of currency debt into consideration, the charge of penalty interest by tax authorities of Ukraine for untimely receipt of currency revenue (goods) stops, and the penalty interest during this period isn't paid.

Therefore, if the Claimant filed the statement of claim with the ICAC in due time, it could avoid the claimed damages but failed to do it. In this connection the Arbitral Tribunal considers that there are no sufficient bases for satisfaction of the claim of the Claimant for damages.

15. Apportionment of the arbitration fee in the amount of USD 5,049.28 between the parties shall be made in accordance with Section VI (2) of the Schedule of Arbitration Fees and Costs, providing for that: «If a claim is granted in part, the arbitration fee shall be charged to the Respondent in proportion to the amount of the granted claims, and the Claimant shall bear the arbitration fee relating to the amount of the claims that have been dismissed».

The Claimant's claims are granted to the extent of the amount of USD (84,067.50 + 6,962.70 =) 91,030.20 that makes 87.76% from the amount of claim. Hence, the Respondent must reimburse to the Claimant the payment of the arbitration fee in the amount of USD (5,049.28 x 87.76% =) 4,431.25. The remainder of the arbitration fee paid in the amount of USD (5,049.28 – 4,431.25 =) 618.03 shall be referred at the expenses of the Claimant.

16. Pursuant to Section VII (4) 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.

According to the arbitration clause (subsection 9.2 of the Contract dated 8 May 2008) the arbitral proceedings in the present case conducted in Ukrainian and English languages. Since the Claimant deposited in the

Ukrainian Chamber of Commerce and Industry's account the money in the amount equal to USD 400.00 to cover the costs of translation services for the procedural documents issued in the case into the English language, the Respondent must reimburse to the Claimant a half of this sum as much of USD 200.00.

Based on the above, the Arbitral Tribunal decided:

– to recover from the Sri Lankan Company in favour of the Ukrainian Company the following sums: USD 84,067.50 as a prepayment for the undelivered goods, USD 6,962.70 as the default interests for violation of the delivery period, USD 4,431.25 in reimbursement of paid arbitration fee as well as USD 200.00 in reimbursement of payment of the translation services for the procedural documents in the case into the English language;

– to dismiss the remainder of the claim;

– to refer at the expenses of the Claimant the remainder of the arbitration fee in the amount of USD 618.03 and a half of the advance paid by the Claimant in order to cover the cost of translation services for the procedural documents in the case into the English language in the amount of USD 200.00.