CASE NO. 96

(*Arbitral Award of 14 May 2014*)

1. According to part 5 of Article 15 of the Rules of the ICAC at the UCCI the correspondence and in particular the Procedural order on adjournment of the arbitral procedure is deemed to be delivered to the Respondent since it was sent to the last known address of the Respondent and the mere fact that the Respondent refused to accept it should not be a valid ground precluding the hearing in the case.

In light of the foregoing and according to Article 38 of the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, the Arbitral Tribunal may continue the proceedings and make the award on the evidence before it.

2. The parties to the Contract has made a minor imprecision in the name of the arbitration institution when they agreed to «International Commercial Arbitration Court under the Chamber of Commerce of Ukraine» instead of «International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry», – the official name of the permanent arbitral institution at the Ukrainian Chamber of Commerce and Industry in English. Nevertheless, the Arbitral Tribunal has reached the conclusion that the Contract is beyond any doubt indicative of the parties' intention to refer the dispute to the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry.

3. Taking into account that the Contract signed by the parties is an international sales of goods contract, and the parties thereto are Ukrainian LLC – the Buyer (Claimant) and Chinese company – the Seller (Respondent), the Arbitral Tribunal has reached a conclusion that the dispute falls within the subjective and objective scope of the competence of ICAC at the UCCI defined in Article 1 of the Law of Ukraine "On International Commercial Arbitration" and Article 1 of the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry.

4. The Claimant has duly exercised its contractual right under clause 10.3 to avoid the Contract following the failure of the Respondent to deliver the equipment in accordance with the Contract by due date upon receipt of the prepayment from the Claimant.

Such conclusion is also supported by applicable Vienna Convention which provides in Article 49 (1) that the buyer may declare the contract avoided if the failure by the seller to perform any of his obligations under the contract amounts to fundamental breach of contract. Similarly, according to Article

651 of the Civil Code of Ukraine a contract can be avoided in unilateral manner if such a right is stipulated by the contract itself.

* * *

The ICAC at the UCCI composed of three arbitrators (hereinafter referred to as the "Arbitral Tribunal") considered the case initiated by the Ukrainian LLC against the Chinese company for recovery of the amount of USD 83,250.

The legal basis for the determination of the dispute by ICAC at the UCCI is the arbitration agreement contained in clause 11 of Contract dated 12 April 2013 (hereinafter – the Contract), which provides as follows:

"11. Juridical claim settlement

11.1 In case no settlement of the differences can be reached though the negotiations, any disputes that may arise out of the present Contract or the execution thereof shall be submitted to the International Commercial Arbitration Court under the Chamber of Commerce of Ukraine.

11.2 The Parties under the present Contract shall agree that the consideration and settlement of disputes are subject to the Rules and Procedures of the International Commercial Arbitration Court under the Chamber of Commerce of Ukraine.

11.3 The relations of the parties under the present Contract are to be governed by the Law of Ukraine.

11.4 Arbitration court includes three arbitrators.

11.5 The session of the International Commercial Arbitration Court shall take place in Ukraine (Kyiv).

11.6 The language of the Arbitration sessions is English.

11.7 The decisions of the International Commercial Arbitration Court are final and binding upon both Parties."

The parties to the Contract has made a minor imprecision in the name of the arbitration institution when they agreed to «*International Commercial Arbitration Court under the Chamber of Commerce of Ukraine*» instead of «*International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry*», – the official name of the permanent arbitral institution at the Ukrainian Chamber of Commerce and Industry in English. Nevertheless, the Arbitral Tribunal has reached the conclusion that the Contract is beyond any doubt indicative of the parties' intention to refer the

dispute to the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry.

Taking into account that the Contract signed by the parties is an international sales of goods contract, and the parties thereto are Ukrainian LLC – the Buyer (Claimant) and Chinese company – the Seller (Respondent), the Arbitral Tribunal has reached a conclusion that the dispute falls within the subjective and objective scope of the competence of ICAC at the UCCI defined in Article 1 of the Law of Ukraine "On International Commercial Arbitration" and Article 1 of the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry.

The Arbitral Tribunal notes that the parties have agreed that the languages of the arbitral proceedings should be English. Accordingly, all procedural documents shall be made in English languages.

As regards the number of arbitrators, the parties agreed that three arbitrators should hear the case. The place of the hearings should be Kyiv (Ukraine).

Given the parties' agreement, the Arbitral Tribunal shall apply substantive law of Ukraine in the settlement of the present dispute. The Arbitral Tribunal notes that the Convention on International Sales of Goods 1980 (hereinafter – the Vienna Convention) shall be applied on the basis Article 1 (1) (b) of the Vienna Convention as part of the law of the Contracting state, i.e. part of Ukrainian law. Other provisions of Ukrainian law will be applicable to the issues not directly regulated by the Vienna Convention on subsidiary basis (for instance, as to penalties).

FACTUAL BACKGROUND OF THE CASE

On 15 July 2013 the Ukrainian LLC, the Claimant, filed the Statement of Claim with the ICAC at the UCCI concerning the recovery from the Chinese company the amount of USD 83,250 under Contract (being prepayment and penalties) as well as arbitration costs.

The claim is based on the Contract according to which the seller (the Respondent) agrees to manufacture, deliver to the buyer (the Claimant) equipment, specified in the Specification (Exhibit No.1 to the Contract), as well as to establish, build and run the equipment on the premises of the Buyer.

Under the clause 3.1 of the Contract the delivery of the equipment is carried out by sea under the FOB terms, port of Shanghai, Incoterms 2010; the delivery date is the date of the clean on board bill of lading. In accordance with clause 3.2 of the Contract the Respondent was obliged to deliver the

equipment within 45 calendar days after receipt of prepayment, 35 days of which is given to produce and pack the equipment and 10 days is the time given to deliver the equipment from the factory to port. The total amount of the Contract is USD 225,000 according to its clause 4.1.

On 16 April 2013 the Claimant transferred the prepayment of the equipment to the Respondent's account in the amount of USD 67,500 in compliance with the clause 5.1 of the Contract. The Respondent was obliged to deliver the equipment under the Contract not later than 31 May 2013 for further transportation to Odessa.

On 24 May 2013 the Claimant received a letter from the Respondent dated 21 May 2013 in which he informed that the terms of the production and delivery of the equipment were remitted and according to clauses 6.1 and 6.2 of the Contract a test run of the equipment was required at the suppliers factory before the transportation to the port could be conducted.

On 13 June 2013 the representative of the Claimant went for a business trip to China to conduct a test drive of the equipment at the Respondent's premises. After the procedure conducted together with the representative of the Respondent it was found out that the equipment did not correspond to the technical characteristics specified in the contract. This was confirmed by the Pre-delivery test acceptance protocol dated 14 June 2013 were it was concluded that the equipment does not meet the requirements according to the Contract dated 12 April 2013 and was signed by both parties.

Following the Respondent's failure to deliver the equipment in accordance with the contractual terms by due date, the Claimant invoke its right under clause 10.3 of the Contract to avoid the Contract. On 5 July 2013 the Claimant sent a Claim to the Respondent in which requested to return the prepayment in the amount of USD 67,500 and to pay penalties in the amount of USD 15,750 under clauses 3.1, 3.2 and 10.3 of the Contract. The request of the Claimant was ignored by the Respondent. In that connection the Claimant initiated recourse to the ICAC at the UCCI.

On 15 July 2013 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 22 January 2014.

Three hearings on 22 January 2014, 24 March 2014 and 14 May 2014 were scheduled in the present proceedings.

The first hearing scheduled for 22 January 2014 was adjourned to 24 March 2014 following the application of the Claimant representative and the letter of DHL confirming that notice on hearing was not delivered to the Respondent. The procedural order on such adjournment was duly received by the Claimant on 3 February 2014 which is confirmed by advice of delivery, whereas the Respondent failed to receive the order on adjournment.

The hearing on 24 March 2014 was attended by representative of the Claimant. Since the Respondent failed to attend the hearing and no information was available on whether the Respondent was duly served on summons as well as taking into account the application of the Claimant on adjournment of the proceedings in order to clarify the address of the Respondent, the procedure was again adjourned to 14 April 2014. The Claimant was notified on adjournment on 24 March 2014 in the course of the hearing and via post which is confirmed by advice of delivery. The Respondent failed to receive the order on adjournment.

The hearing on 14 April 2014 was attended by the Claimant's representative. The Respondent failed to attend the hearing despite of all proper steps being taking to notify it. In particular, (1) the ICAC at the UCCI has received a confirmation from the State Administration for Industry&Commerce of the People's Republic of China on registered address of the Respondent, which is the address where all correspondence in the present case has been duly sent and (2) confirmation of DHL that the correspondence (Procedural order of 24 March 2014 on adjournment of the arbitral procedure until 14 April 2014) has been properly delivered, however, the Respondent refused to accept it stating that it does not expect anything.

According to part 5 of Article 15 of the Rules of the ICAC at the UCCI the correspondence and in particular the Procedural order dated 24 March 2014 on adjournment of the arbitral procedure until 14 May 2014 is deemed to be delivered to the Respondent since it was sent to the last known address of the Respondent and the mere fact that the Respondent refused to accept it should not be a valid ground precluding the hearing in the case. Furthermore, a number of correspondence was duly received until certain period of time by the Respondent as evidenced below.

In light of the foregoing and according to Article 38 of the Rules of the ICAC at the UCCI, the Arbitral Tribunal may continue the proceedings and make the award on the evidence before it.

At the hearing conducted on 14 May 2014 the Claimant's representative confirmed the prayers for relief and asked to grant the claim in full.

REASONS FOR AWARD

1. The Claimant has duly exercised its contractual right under clause 10.3 to avoid the Contract following the failure of the Respondent to deliver the equipment in accordance with the Contract by due date upon receipt of the prepayment from the Claimant in the amount of USD 67,500. The failure to deliver the equipment by due date until 31 May 2013 is confirmed by the Pre-delivery test acceptance protocol dated 14 June 2013 signed by both parties where it was concluded that the equipment did not meet the requirements of the Contract. The payment of the advance payment amounting to USD 67,500 under the Contract is confirmed by the payment order with the confirmation of the performing bank dated 16 April 2013. Accordingly, the amount of USD 67,500 shall be recovered in favour of the Claimant as a matter of contractual arrangements between the parties.

Such conclusion is also supported by applicable Vienna Convention which provides in Article 49 (1) that the buyer may declare the contract avoided if the failure by the seller to perform any of his obligations under the contract amounts to fundamental breach of contract. Similarly, according to Article 651 of the Civil Code of Ukraine a contract can be avoided in unilateral manner if such a right is stipulated by the contract itself.

2. Considering the penalties in the amount of USD 15,750 the Arbitral Tribunal notes the following: (1) the right to penalties for the delay in delivery is established in clause 10.1 of the Contract in the amount of 0,2% of the total contractual price for each day of delay but not more than 10% of the total contractual price, (2) such right for penalties is supported by Ukrainian law, in particular Article 549 of the Civil Code of Ukraine and Article 230 of the Commercial Code of Ukraine (3) calculation made by the Claimant for 35 day of delay prior to avoidance of the Contract is correct and well-grounded. Accordingly, the request for recovery of USD 15,750 of penalties shall be granted.

3. Pursuant to Section VI (1) of the Schedule of Arbitration Fees and Costs the arbitration fee shall be charged to the party against which the award is made. Hence, the Respondent must reimburse to the Claimant the payment of the arbitration fee in full. Besides, the Respondent must reimburse to the Claimant the payment for translation of documents into English by the ICAC at the UCCI.

Based on the above, the Arbitral Tribunal recovered from the Chinese company in favor of the Ukrainian LLC the amount of advance payment of USD 67,500 and penalties in the amount of USD 15,750 USD, together with arbitration costs in the amount of USD 5,530 and USD 400 of translation costs.