

**INTERNATIONAL COMMERCIAL ARBITRATION COURT
under the Ukrainian Chamber of Commerce and Industry**

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Case AC № 208u/2016

AWARD

In this city of Kyiv, this 2nd day of September 2016

The International Commercial Arbitration Court under the Ukrainian the Chamber of Commerce and Industry, being composed by: Anatoliy Ivanovich Dmitriev, the Umpire, Yulia Sergeyevna Chernykh, an Arbitrator, and Ksenia Olegovna Datsenko, an Arbitrator, has heard, in judicial sitting, a lawsuit initiated by virtue of a claim of JUTIX LLC, of Ukraine, vs. the Messrs. BRIJLALL SHIVNATH, of India, for collection of an indebtedness in the amount of USD 7,370 and the attorney's fee in the amount of USD 500 as well as the expenses related to payment of the arbitration fee.

At the judicial sitting that has been held this 2nd of September 2016, JUTIX LLC (*hereinafter referred to as the Plaintiff*) has been represented by Mr. Y.P. Ponomarenko, an Attorney-in-Fact, acting by virtue of a Power of Attorney dated September 1, 2016 and valid till September 1, 2017.

An attorney of the Respondent, the Messrs. BRIJLALL SHIVNATH (*hereinafter referred to as the Respondent*), has not appeared at the judicial sitting of the Arbitration Court. The Respondent was properly served with a summons specifying the date, hour and place of hearing; the Respondent did not inform the Arbitration Court about the reasons of its default.

The Plaintiff's Attorney-in-Fact insisted on hearing by default, with reference to the fact that the Respondent had been duly summonsed in advance; however, the latter did not exercise its right to attend the hearing and failed to inform the Arbitration Court whether it had any reasonable excuse for such default or not.

The warrant of law for hearing the case at the International Commercial Arbitration Court under the Ukrainian Chamber of Commerce and Industry (*hereinafter referred to as the ICAC under the UCCI*) lies in an arbitration clause contained in Cl. 10 of Supply Contract № BSJ/2312/2015 dated December 23, 2015 (*hereinafter referred to as the Contract*), which says:

"All disputes and controversies arising out of and in connection with this Contract shall be solved via negotiations between the Parties.

Any dispute that cannot be so solved shall be referred to the International Commercial Arbitration Court for settlement in accordance with the Regulations of this Arbitration Court.

This Contract shall be regulated by the international law.

It has been noted by the Arbitration Court that the Parties have not mentioned the full name of the arbitration institution in the said arbitration clause stating that all disputes shall be solved by "*the International Commercial Arbitration Court*". The official full name of the arbitration institution is the International Commercial Arbitration Court under the Ukrainian Chamber of Commerce and Industry.

In view of the wording actually used by the parties and the existence of the only arbitration institution under the Ukrainian Chamber of Commerce and Industry, that is named "the International Commercial Arbitration Court", as well as given the fact that

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the Ukrainian party, JUTIX LLC, lodged its claim to the International Commercial Arbitration Court under the Ukrainian Chamber of Commerce and Industry and the Respondent did not object to the competence of the International Commercial Arbitration Court under the Ukrainian Chamber of Commerce and Industry, the Arbitration Court has concluded that upon conclusion of the said Contract, when coming to an agreement as to the arbitration clause, the Parties meant the International Commercial Arbitration Court under the Ukrainian Chamber of Commerce and Industry of Ukraine as an arbitration institution competent to settle disputes.

The Arbitration Court states that the imprecise name of the arbitration institution mentioned in the arbitration clause of the Contract shall not be deemed as a hindrance to establishing the Parties' free will when the same chose the International Commercial Arbitration Court under the Ukrainian Chamber of Commerce and Industry.

The Arbitration Court has noted that JUTIX LLC (the Plaintiff) has provided proper evidence that the due endeavours were made to settle the dispute via negotiations. Thus, the Plaintiff has furnished a copy of its correspondence by e-mail with the Respondent.

Taking into account the fact that the Contract concluded by the Parties is an international Sale Contract (which means that a Seller undertakes to supply some goods and a Buyer undertakes to accept and pay for the same), the Parties to such Contract being a Ukrainian company, JUTIX LLC (the Plaintiff), as a Buyer and an Indian company, BRIJLALL SHIVNATH (the Respondent) as a Seller, the Arbitration Court has concluded that this dispute falls within the subject-matter and personal jurisdiction of the ICAC under the UCCI as is defined in Art. 1 of the International Commercial Arbitration Act of Ukraine and in Cl. 2 of the Regulation of the International Commercial Arbitration Court under the Ukrainian Chamber of Commerce and Industry of Ukraine.

Being guided by the provisions of Art. 1, 7, 16 of the International Commercial Arbitration Act of Ukraine and Art. 3 of the Regulation of the International Commercial Arbitration Court under the Ukrainian Chamber of Commerce and Industry (*hereinafter referred to as the Regulation of the ICAC under the UCCI*), the Arbitration Court deems that it has due competence to hear and settle the dispute arisen out of the said Contract.

As regards the question of applicable law of substance, the Arbitration Court reasons from the fact that the Parties to the Contract have not agreed upon any national law whatsoever to be applied. As regards application of the international law as was agreed upon by the Parties, the Arbitration Court has noted that the United Nations Convention on Contracts for the International Sale of Goods 1980 may not be applicable to the Contract because India is not a country-party to this Convention and, therefore, the provisions of the private international law allow applying neither this Convention nor any other international treaties.

Given the circumstances, the wording "the international law" used by the Parties, the Arbitration Court interpret as agreement upon some common generally accepted principles of law, which makes possible to apply the Principles of International Commercial Contracts UNIDROIT (*hereinafter referred to as the UNIDROIT Principles*). In conformity with the Preamble of the UNIDROIT Principles, they may be used when the parties have not chosen any law to regulate a contract between them as well as when the parties have agreed that a contract between them shall be regulated by the general principles of law, *lex mercatoria* or any similar provisions.

The Parties have not agreed upon the number of arbitrators in the arbitration clause. In such case, by virtue of Art. 10, par. 1 of the International Commercial Arbitration Act of Ukraine and Art. 26, par. 1 of the Regulation of the ICAC under the UCCI, the arbitration panel shall be composed by three arbitrators, each Party appointing its own arbitrator. Arbitrators so appointed shall elect a third one to perform the duties of an umpire.

The Contract contains no data mentioning an agreement of the Parties as regards the language of arbitration proceedings. In accordance with Art. 22, par. 1 of the

International Commercial Arbitration Act of Ukraine, if no such agreement exists, the Arbitration Court shall define a language or languages to be used in the arbitration proceedings. Choosing the language, the Arbitration Court reasons from the fact that both the Contract signed by the Parties and the Statement of Claim have been made in Russian. In view of the foregoing, the Arbitration Court has chosen the Russian language as the language of these arbitration proceedings.

During the arbitration proceedings none of the Parties has made any statements alleging the incompetence of the ICAC under the UCCI for hearing of this case or any excess of the limits of its competence by the Arbitration Court, in accordance with the procedure established by Art. 16 of the International Commercial Arbitration Act of Ukraine.

Besides, the Arbitration Court takes note that during the arbitration hearing none of the Parties has made any objections as regards any failure to comply with the requirements contained in the arbitration clause in the Contract, the Regulation of the ICAC under the UCCI and the International Commercial Arbitration Act of Ukraine. Therefore, by virtue of Art. 4 of the International Commercial Arbitration Act of Ukraine the Parties shall be deemed to waive their right to state any counterclaims or defence.

Taking into consideration the fact of the due service of summons to the Respondent, and by virtue of Art. 38 of the Regulation of the ICAC under the UCCI, the Arbitration Court deems it possible to continue the proceedings and to approve an award on the basis of the existing documents furnished, not considering the failure to file a counterclaim or defence as admission of the Plaintiff's assertions per se.

Upon a thorough consideration of the records, and having heard the explanations of the Plaintiff's Attorney-in-fact, the Arbitration Court has been satisfied that:

A Statement of Claim was filed by JUTIX LLC, of Ukraine, to the Regulation of the ICAC under the UCCI on April 26, 2016 for rescission of Supply Contract № BSJ/2312/2015 dated December 23, 2015 and collection of an amount of 7,370 US dollars and all expenses related to payment of the arbitration fee, as well as USD 500 as all costs related to defence of their interests at the ICAC under the UCCI, from the Messrs. BRIJLALL SHIVNATH. The Statement of Claim is grounded on Supply Contract № BSJ/2312/2015 dated December 23, 2015.

In its Statement of Claim, the Plaintiff refers to the Supply Contract that was concluded for the purpose of delivery of jute scrim and provides that the Respondent (the Seller under the said Contract) undertook to supply the Goods in question and the Plaintiff (the Buyer under the said Contract) undertook to accept and pay for the same.

The Plaintiff asserts that in accordance with the terms and conditions of the Contract the Plaintiff made an advance payment in the amount of USD 7,370, which is confirmed by Payment Order №1109 dated January 18, 2016. The Plaintiff asserts also that upon receipt of the advance payment the Respondent furnished one document only of the four documents required to the Plaintiff in contravention of Art. 8 of the Contract.

The Plaintiff states that the Respondent has not fulfilled its obligation to supply the Goods prepaid and has not supplied the Goods. Therefore, the amount of the Respondent's indebtedness to the Plaintiff shall be USD 7,370.

Besides, the Plaintiff says that it has incurred additional expenses related to the fees for the services of a Attorney at law, in the amount of UAH 12,600, which was equivalent to USD 500 as of April 25, 2016 - the date of filing of the Statement of Claim.

In view of the foregoing, the Plaintiff requests the ICAC under the UCCI to rescind the Supply Contract and to collect the amount of the principal debt of USD 7,370, and reimbursement of the expenses for the Attorney's services in defending the Plaintiff's interests at the ICAC under the UCCI in the amount of USD 500, as well as reimbursement of the arbitration fee from the Respondent.

On April 25, 2016 the Plaintiff paid the registration fee in the amount of UAH 15,206.19, which was equivalent to USD 600 at the rate of the National Bank of Ukraine as of the

of payment. Payment of the registration fee is confirmed by Payment Order No. 1204 dated April 25, 2016.

An Order dated April 26, 2016 of the President of the ICAC under the UCCI the proceedings were initiated under № 208и/2016.

The Order stated that it was required to pay the arbitration fee in an amount in UAH equivalent to USD 3,000 at the rate of the National Bank of Ukraine as of a date of payment within 30 days from a date of receipt of the said Order, and to provide evidence to the ICAC under the UCCI that negotiations have been held with the Respondent for settlement of the dispute pursuant to Cl. 10 of the Contract, as well as to appoint an arbitrator for the case and to notify an arbitrator's name and surname to the ICAC under the UCCI. The Regulation, a Recommended List of Arbitrators, and the Order of commencement of the proceedings were received by the Plaintiff's Attorney-in-fact on April 30, 2016 together with Accompanying Letter № 3276/14-7 dated April 27, 2016 from the ICAC under the UCCI.

On May 23, 2016 the Plaintiff partly paid the arbitration fee in the amount of UAH 1,69.27, which was equivalent to USD 840 at the rate of the National Bank of Ukraine of the day of payment. Payment of the arbitration fee is confirmed by Payment Order № 222 dated May 23, 2016.

An Amended Statement of Claim was filed to the ICAC under the UCCI on May 25, 2016 whereby the Plaintiff refused his claim to rescind the Contract in view of expiry thereof on April 30, 2016. The Amended Statement of Claim contain the claim to collect from the Respondent the prepayment under the Contract in the amount of USD 7,370.00 and USD 500.00 as payment of the expenses related to the Attorney's services in defending the Plaintiff's interests at the ICAC under the UCCI, as well as expenses related to payment of the arbitration fee that, given the Amended Statement of Claim, amounts to USD 1,800.00.

An Order dated May 25, 2016 of the President of the ICAC under the UCCI the Order of April 26, 2016 about commencement of proceedings under case № 208и/2016 was amended. The Order stated that it was required to pay an additional sum to the arbitration fee in an amount in UAH equivalent to USD 360.00 at the rate of the National Bank of Ukraine as of a date of payment within 10 days from a date of receipt of the said Order. The Order of Amendment dated May 25, 2016 was received by the Plaintiff's Attorney-in-fact on June 9, 2016 together with Accompanying Letter №3954/14-7 dated May 27, 2016 from the ICAC under the UCCI.

On May 31, 2016 the Plaintiff made the additional payment of UAH 9,059.76, which was equivalent to USD 360.00 at the rate of the National Bank of Ukraine as of the day of payment, as required on account of the arbitration fee. Payment of the arbitration fee in USD is confirmed by Payment Order No. 1222 dated May 31, 2016.

On June 2, 2016 the ICAC under the UCCI sent copies of the Statement of Claim with all documents enclosed to the Respondent, the Regulation and the Recommended List of Arbitrators of the ICAC under the UCCI, by courier, viz.: DHL International Ukraine Private Company (with Air Waybill №2355604602). The ICAC under the UCCI suggested, in accompanying letter №4080/14-6 dated June 1, 2016, that the Respondent should provide, within 30 days from a date of receipt of that letter, the name and surname of an appointed arbitrator from the enclosed Recommended List to the ICAC under the UCCI and as furnish, in three copies, a statement of defence (explanations) on the merits.

In conformity with the accompanying letter dated June 3, 2016 of the courier service, DHL International Ukraine Private Company, the package of documents sent under Air Waybill №2355604602 was delivered to the addressee (the Respondent) by personal delivery on June 4, 2016.

In conformity with the accompanying letter №4080/14-6 dated June 1, 2016 that contained the request for the Respondent to notify the name and surname of an arbitrator appointed by the former to the ICAC under the UCCI was sent to the Respondent by

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registered mail No. 0405329491617 and was delivered to the addressee by personal service on June 9, 2016, which is evidenced by the signatures of the addressee and an employee of the postal service as well as by a postage mark impression of the Postal Service of Ukraine affixed unto an acknowledgement of receipt.

The Plaintiff filed a petition to the ICAC under the UCCI on July 4, 2016 for appointment of Yulia Sergejevna Chernykh as an Arbitrator in this case.

In accordance with Art. 6.1 and 11.3 of the International Commercial Arbitration Act of Ukraine, the President of the UCCI approved an Order on July 21, 2016 appointing Ksenia Olegovna Datsenko as an Arbitrator for the Respondent. The said Order was adopted because 48 days had passed since the date of receipt by the Respondent of the letter from the ICAC under the UCCI proposing an appointment of an arbitrator and the Respondent had failed to furnish any information about an arbitrator so appointed to the ICAC under the UCCI within the 30-day period as required.

In accordance with Art. 6, par. 1 and Art. 11, par. 3 of the International Commercial Arbitration Act of Ukraine and Art. 26, 27 of the Regulation of the ICAC under the UCCI, the arbitrators Y.S. Chernykh and K.O. Datsenko adopted a decision to appoint Anatoliy Ivanovich Dmitriev as an Umpire on June 21, 2016.

The hearing of the case of was appointed for September 2, 2016 at 12:00 at the address: 33 Bolshaya Zhitomirskaya Str., Kyiv, Ukraine.

Summons №5223/14-6 dated July 21, 2016 specifying the date, hour and place of hearing, as well as the members of the arbitration panel, together with the accompanying letter and the Order about the appointment of an arbitrator for the Respondent was sent to the Plaintiff on July 25, 2016 by registered mail 045331598615 that was delivered to the addressee by personal service on August 6, 2016, which is evidenced by the signatures of the addressee and an employee of the postal service as well as by a postage mark impression of the Postal Service of Ukraine affixed unto an acknowledgement of receipt.

Summons №5223/14-6 dated July 21, 2016 specifying the date, hour and place of hearing, as well as the members of the arbitration panel, together with the accompanying letter and the Order about the appointment of an arbitrator for the Respondent was sent to the Respondent by courier, DHL International Ukraine Private Company, under Air Waybill №2813615486. The said correspondence was delivered to the Respondent on July 25, 2016, which is confirmed by a letter dated July 25, 2016 of DHL International Ukraine Private Company, the courier service.

Whereas:

1. A Contract was concluded by and between the Plaintiff and the Respondent on December 23, 2015 under which the Seller (the Respondent) undertook to transfer jute scrim and the Buyer undertook to accept and pay for the same (as per Cl. 1 of the Contract).

The Parties agreed, in Cl. 3 of the Contract, that the Goods should be supplied on the terms of FOB Kolkata, India, in a 20-foot container. Port of destination: Odessa, Ukraine (as per Cl. 3 of the Contract).

The total volume of supply of the Goods under the Contract shall be 70,000 m (as per Cl. 2 of the Contract).

In conformity with Cl. 6 of the Contract, the jute scrim to be supplied shall be 100% jute and be 39.5 inches (100 cm) wide and have density of 250 g/m².

Clause 7 of the Contract stipulates that the price of the Goods shall be fixed in US dollars per 250 g/m² of jute scrim. The total amount of the Contract has been fixed by the Parties in USD 24,500.00.

The payments for the Goods supplied by the Seller to the Buyer shall be made by prepayment in the amount of USD 7,370. The remaining sum of USD 17,130.00 shall

be paid after the Buyer receives scanned copies of documents such as: three copies of signed commercial invoices, a copy of the signed Contract, a full package of clean onboard master bills of lading, a packing list and a certificate of origin.

The Contract was agreed to be valid till April 30, 2016 (as per Cl. 11 of the Contract).

2. In accordance with the terms and conditions agreed, the Plaintiff made an advance payment in the amount of USD 7,370 on January 18, 2016, which is confirmed by Payment Order №1109 dated January 18, 2016.

As of the date of this hearing, the Respondent has failed to perform its obligations to supply the Goods and has not furnished the documents required to the Plaintiff. Given the prepayment of the Goods in the total amount of USD 7,370 made by the Plaintiff in favour of the Respondent, and given the Respondent's failure to furnish the documents stipulated by the terms and conditions of the Contract and to supply the Goods, the Respondent's debt under the Contract amounts to USD 7,370.

In conformity with Art. 7.1.1 of the UNIDROIT Principles, a failure by either of the Parties to fulfil any of its respective obligations under a Contract, including an improper fulfilment and a delay in fulfilment, shall be deemed a non-fulfilment.

In conformity with Art. 7.4.1 of the UNIDROIT Principles, any non-fulfilment entitles an aggrieved Party to get indemnification of its losses, either exclusively or in combination with any other remedies, save cases when in accordance with the UNIDROIT Principles responsibility for non-fulfilment shall not arise.

Pursuant to Cl. 7.4.2 of the UNIDROIT Principles, an aggrieved Party shall be entitled to a compensation in full or damage arisen as a result of such non-fulfilment. Such damage shall include any losses as may be incurred by a Party and all loss of profit, taking into account all profit of an aggrieved Party gained by such aggrieved Party as a result of avoidance of any expenses or damage.

Thus, the Arbitration Court concludes that the Plaintiff's claim for collection from the Respondent of the principal debt in the amount of USD 7,370 shall be satisfied in full.

3. In respect of the Plaintiff's claim to collect all the expenses incurred in relation to defence of the Plaintiff's interests at the ICAC under the UCCI from the Respondent, the Arbitration Court takes note that:

A Contract for Legal Assistance was concluded by and between the Plaintiff and Mr. Y.P. Ponomarenko on April 22, 2016 under No. 19. In conformity with Cl. 3.1 of the Contract aforementioned, the cost of the services to be rendered to the Plaintiff pleading its case shall be UAH 12,600.00, which was equivalent not to USD 500, but to USD 497.17 as of April 25, 2016 - the date of execution of the Statement of Claim at the official rate of the National Bank of Ukraine. The Arbitration Court takes note that the said cost of the legal services has been paid up by the Plaintiff, which is confirmed by an electronic statement of account related to card account No. 0141008095.980 dated April 25, 2016 and a Completion Report dated September 2, 2016.

In accordance with Cl. 2 of Section VIII of the Regulation of Arbitration Fees and Expenses, which is an Annex to the Regulation of the ICAC under the UCCI, all expenses incurred by a prevailing Party in relation to defence of its interests at the ICAC under the UCCI (Parties' travelling allowance, attorneys' fees, etc.) may be imposed on an adverse Party to an extent as it may be found reasonable and substantiated by the Arbitration Court.

In view of the foregoing in this Clause, the Arbitration Court finds the Plaintiff's expenses reasonable and substantiated in relation to the attorney's fee in the amount of USD 497.17 or pleading the Plaintiff's case at the ICAC under the UCCI and deems it possible to impose them upon the Respondent.

4. In conformity with Cl. 2 of Section VI of the Regulation of Arbitration Fees and Expenses, if a claim is satisfied in part, an arbitration fee shall be imposed upon a

respondent pro rata an amount of such claim so satisfied, and upon a plaintiff pro rata a part rejected of its claim.

The Plaintiff has paid the arbitration fee in the amount of UAH 45,435.22, which is equivalent to USD 1,800.00. The claim has been satisfied in full. Therefore, all the expenses related to the arbitration fee in the Amount of USD 1,800.00 shall also be imposed upon the Respondent.

In view of the foregoing, and being guided by the provisions of Supply Contract № BSJ/2312/2015 dated December 23, 2015, the Principles of International Commercial Contracts UNIDROIT, Art. 31 of the International Commercial Arbitration Act of Ukraine, Art. 38, 48-49 of the Regulation of the ICAC under the UCCI, the Regulation of Arbitration Fees and Expenses,

THE ARBITRATION COURT HAS HELD:

to collect the indebtedness in the amount of USD 7,370.00, the arbitration fee in the amount of USD 1,800.00 and the expenses in the amount of and USD 497.17 for the Attorney's services in defending the Plaintiff's interests at the ICAC under the UCCI, the total amount being USD 9,667.17 (Nine thousand six hundred sixty-seven US dollars seventeen cents), from BRIJLALL SHIVNATH, of 23A, NETAJI SUBHAS ROAD, 6th floor, room No. 4, Kolkata - 700 001, India, in favour of JUTIX LLC, of 14 Topolevaya Str., Apt 37, Odessa 65114, Odessa region, Taxpayer Registration Card number: 37420475).

This Award has come into force this 2nd day of September 2016 shall be final and definitive and shall have immediate effect.

The Award has been made and signed in three counterparts, one for the records in the case, one for the Plaintiff, and one for the Respondent.

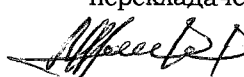
/Signed/ A.I. Dmitriev, Umpire

/Signed/ Y.S. Chernykh, Arbitrator

/Signed/ K.O. Datsenko, Arbitrator

Seal: *International Commercial Arbitration Court
under the Ukrainian Chamber of Commerce and Industry*

Текст документа перекладений з української та російської мов на англійську мову
перекладачем Могилевською Марією Олександрівною.

 Могилевська М.О.

Місто Оде-

са, Україна. Двадцять четвертого листопада дві тисячі шістнадцятого року.

Я, Шклярук З.М., приватний нотаріус Одеського міського нотаріального округу, засвідчую справжність підпису перекладача Могилевської Марії Олександрівни, який зроблено у моїй присутності.

Особу перекладача встановлено, його дієздатність та кваліфікацію перевірено.



Зареєстровано в реєстрі за № 19576
Стягнуто плати за домовленістю
Приватний нотаріус

Всього прошито, пронумеровано
та скріплено печаткою п'ятнадцять аркушів.
Приватний нотаріус

