LCIA Arbitration No 91502 2011

EVROSTROY GRUPP LLC

(RUSSIAN FEDERATION)

Claimant

v

VENDORT TRADERS INC

(BRITISH VIRGIN ISLANDS)

Respondent

FINAL AWARD

Prof Dr Loukas Mistelis, Sole Arbitrator

TABLE OF CONTENTS

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I. THE PARTIES AND THEIR REPRESENTATIVES

1. The Claimant

EvrostroyGrupp LLC

A limited liability company, incorporated under the laws of Russian Federation, registration no 1057749219670 with registered address at 22 Putevoy proezd, Moscow 127410, Russian Federation; address for correspondence: Vitebskaya Street 9, building 1, Moscow 121254, Russian Federation.

1.1 Claimant's Representative

Vegas Lex and Keystone Law
Led by Kirill Trukhanov and Nicole Smith

Vegas Lex Advocate Bureau
52, Kosmodamianskaya Embankment, Bldg. 5
Moscow 115044
Russian Federation
Tel. +7 495 933 08 00 (# 201)
Fax +7 495 933 08 02
Mbl +7 903 183 58 97

Kirill Trukhanov <trukhanov@vegaslex.ru>
Yuriy Bortnikov <bortnikov@vegaslex.ru>
Nicole Smith <nicole.smith@keystonelaw.co.uk >

2. The Respondent

Vendort Traders Inc

A company registered under No 641745, at Palm Chambers, 197 Main Street, P.O. Box 3174, Road Town, Tortola, British Virgin Islands

2.1 *Respondent's Representative*

Nadmitov & Partners Law Firm LLC
Znamenka Street 9/1
Moscow 119019
Russian Federation
Tel. +7 495 649 87 12,
Fax +7 495 649 87 21

Alexander Nadmitov <alexander.nadmitov@nplaw.ru>
Vladimir Gorbov <vladimir.gorbov@nplaw.ru>

II. THE ARBITRAL TRIBUNAL

Professor Dr. Loukas Mistelis
Centre for Commercial Law Studies
Queen Mary University of London
67-69 Lincoln's Inn Fields
London WC2A 3JB, UK
Tel. +44 20 7882 8075
Fax +44 20 8181 6616 (private)
Email: l.mistelis@qmul.ac.uk

Appointed by the LCIA Court on 29 January 2010.

III. THE MAIN FACTS

1. The Parties, i.e. the Claimant Evrostroy and the Respondent Vendort, entered into a Share Sale and Purchase Agreement (both in English and Russian, with the English

version prevailing) dated 15 May 2006 (hereinafter the "SPA" or the "Agreement"). The Claimant seeks payment for sums remaining to be paid: these sums are calculated as 29,489,066.36 Russian Rubles (hereinafter "RUR") plus interest. The Claimant, Evrostroy relies on the SPA clause 9.3 to calculate interest accrued at 0.02% for failure to pay on due date. At the date of the post-hearing brief such interest amounts to RUR 9,890,627.37.

2. The Claimant also claims its costs in the arbitration, i.e. both its legal costs and the costs of the arbitration.

3. According to the SPA, Evrostroy agreed to transfer shares (hereinafter "Shares") to Vendort and Vendort agreed to pay the purchase price for the Shares (hereinafter "Total Payment) on the Share Transfer Date (clause 2 of the SPA).

4. The Shares are described in Annex 1 of the SPA as:
   - Issuer: ISKOG JSC
   - Type of Shares: Ordinary Registered Shares
   - Issuance registration no: 73-1П-2690
   - Par value: RUR 0.04
   - Number of Shares: 834,693
   - Price for shares: RUR 53.62
   - TOTAL NET PRICE OF THE LINE

5. As specified in the Annex 1, the "Total Payment" for the shares amounts to RUR 44,672,769.36 (forty four million, six hundred seventy two thousand, seven hundred and sixty nine rubles and thirty six kopeks).

6. The Share Transfer Date was defined (in clause 1 of the SPA) as

   "a date within three (3) Business Days of the Payment Day, on which the title to all of the Shares shall be transferred from the Seller to the Buyer in accordance with the terms and conditions hereof."

7. The Payment Date was defined (in clause 1 of the SPA) as

"a date within forty-five (45) Business Days from the date of the execution hereof, on which the Total Payment shall be transferred to the Seller's bank account in accordance with the terms and conditions hereof."

8. Clause 9.3 of the SPA provides for a contractual interest rate for failure to pay on the due date (i.e. 0.02%) as well as a cap for such interest payment to 10% of the Total Payment. Any interest according to this clause shall be payable promptly upon demand.

9. The Parties entered into the Agreement on 15 May 2006. On 17 July 2006, Vendort wire-transferred RUR 15,183,713 (fifteen million, one hundred and eighty three thousand, seven hundred and thirteen rubles) to the account of Evrostroy in partial payment for the Shares. (Exhibit C3).

10. On 24 July 2006, Evrostroy transferred all 834,693 shares (as per Annex 1 of the SPA) to the custody account of Vendort in the Custodian Closed Joint Stock Company "Russian Funds". (Exhibit C4). This allegedly happened because Evrostroy felt confident after receipt of the partial payment that the subsequent amount would be paid shortly thereafter (Request for Arbitration para 20).

11. Vendort accepted the transfer of the Shares and became legal owner of the Shares. By transferring the Shares Evrostroy fully discharged its obligations under the Agreement.

12. Vendort never paid the remaining balance of RUR 29,489,056.36 (twenty nine million, four hundred eighty nine thousand and fifty-six rubles, and thirty-six kopeks). No such payment was effected prior to 24 August 2006 when the only bank account of Evrostroy was liquidated following the termination of the license of the banking institution (closed Joint Stock Company "Federal Promishlenniy Bank", hereinafter referred to as the "the Bank").

13. Evrostroy did not undertake any business activity between 24 July 2006 and 22 July 2009 and did not receive any funds from Vendort. On 22 June 2009 100% of the shares in Evrostroy were purchased by Ms Elena Smirnova (Exhibit C5). The new management of Evrostroy reviewed the company's files and confirmed the sum owed by Vendort to the company for the sale of the Shares under the SPA.

14. Ms Smirnova acquired the shares in Evrostroy from Mr Mamporia for the sum of RUR 10,000. (Exhibit C5). Mr Mamporia also informed Ms Smirnova about the Agreement with Vendort and the outstanding sum of money and provided relevant documents (Exhibits C3, C11 and witness statement of Ms Smirnova attached to the Statement of Claim dated 26 February 2010. See also Witness Statement of Mr Mamporia dated 24 February 2010).

15. On 28 October 2009 Evrostroy sent notice to Vendort requesting payment of the sums of money outstanding. (Exhibits C6 and C7). The sum is stipulated as RUR 29,489,056.36 plus interest to be calculated pursuant to clause 9.3 of the SPA.

16. Evrostroy seeks (a) declaration that Vendort has breached its obligation to pay the Total Payment for the Shares; (b) that Vendort is required to pay the outstanding amount of RUR 29,489,056.36; (c) that Vendort is required to pay interest pursuant to clause 9.3. of the SPA; (d) an Award ordering Vendort to pay full legal and arbitration costs and (e) any other relief that may be appropriate in the Circumstances.

17. Vendort alleges that there was an amendment to the Agreement by mutual consent. According to this alleged amendment Evrostroy decided to waive the remainder of the purchase price for the Shares. No explanation is offered as to why this may have happened nor any documentary evidence is provided to support this allegation. As evidence Vendort offers (a) the fact that the Shares have been transferred (allegedly waiving the need for Total Payment) and (b) statements made by Mr Mamporia during criminal proceedings against Mr Alexey Kozlov in the Presnenskiy District Court. These factual allegations and intended defences to non-payment will be discussed infra.

IV. JURISDICTION OF THE ARBITRAL TRIBUNAL AND APPLICABLE LAW

18. Clause 12 of the Agreement provides for arbitration under LCIA Rules as follows (in English):

> *"This Agreement shall be governed by, and construed, in accordance with English Law. Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be one. The seat, or legal place, of arbitration shall be London, United Kingdom. The language to be used in the arbitral proceedings shall be English."*

19. The jurisdiction of this Tribunal, the seat of the arbitration and the language are clearly stipulated and are not contested by the Parties.

V. PROCEDURAL HISTORY

20. Evrostroy filed a Request for Arbitration to the London Court of International Arbitration ("LCIA") dated 14 December 2009 that was received on 17 December 2009. The essence of this Request is summarized supra under paras 1 et seq with the particular requests for relief summarized supra under paras 15-17.

21. The Arbitrator was appointed on 29 January 2010 and the Request was transmitted to the Tribunal on 1 February 2010.

22. A Procedural Management Hearing was held on 29 April 2010 following which the Tribunal issued Procedural Order no 1 setting out the specific procedures to be followed for this Arbitration. To this Procedural Order a Procedural Timetable was attached, recording all procedural history to that point of time and introducing the next steps.

23. The Full Statement of Defence with Exhibits R1-R11 (hereinafter "SOD") was scheduled for 31 May 2010 but at the request of the Respondent the Tribunal agreed on 28 May 2010 to a submission on 5 June 2010.

24. The Tribunal with Procedural Order no 2 dated 30 May 2010 appointed Dr Stavros Brekoulakis as Secretary to the Tribunal.

25. On 5 June 2010 Vendort submitted a motion (Procedural Motion of Vedort Traders Inc, dated 5 June 2010) requesting the Tribunal to (a) postpone the Arbitration until the resolution of court proceedings no. A40-78780/09-48-644 before Moscow Commercial (Arbitrazh) Court initiated by OJSC Finvest Group against Karnavon Limited, CJSC Russian Funds and Vendort Traders, third party and JSC ISKOG, third party (hereinafter referred to as "Finvest Proceedings"); (b) request Evrostroy to produce the share purchase and acquisition agreement between Evrostroy and OJSC Finvest Group on or about 3 March 2006 in relation to the sale and purchase of 1,103,639 shares of JSC ISKOG; and (c) order Evrostroy to provide security for the legal and other expenses incurred by the Respondent in the amount of not less than US$ 80,000 by way of deposit.

26. Evrostroy applied on 18 June 2010 for security for costs which prompted a Supplement to the Procedural Motion of Vendort Traders Inc dated 21 June 2010. Evrostroy commented on this Supplement on 25 June 2010 and in turn Vendort Traders filed an Addendum to the Supplement to the Procedural Motion of Vendort Traders Inc. on 28 June 2010. A further Addendum 2 to the Supplement to the Procedural Motion of Vendort Traders Inc. was filed on 21 July 2010, following email exchange with the Tribunal.

(a) Security for Costs

27. In relation to the Motion with supplements and amendment Tribunal issued on 9 July 2010 Procedural Order no 3. This Procedural Order only dealt with the Security for

Costs application while the two further motions (document production and stay of proceedings) were reserved for a later stage. The Tribunal afforded both Parties the opportunity to be heard and several exchanges took place. In the end the Tribunal issued the order as follows:

27.1. *"The Arbitral Tribunal notes that the LCIA Rules in Article 25 give the Tribunal powers to order, at the request of a party, appropriate security for costs. The primary motivation of Article 25.1(a) and 25.2 is to ensure the effectiveness of the arbitral process and to discourage the maintenance of unmeritorious defences or claims. While it is desirable for the Tribunal to have power to make orders to ensure the effectiveness of the arbitral process, in doing so, the Tribunal must be careful not to pre-judge the merits.*

27.2. *The party seeking security for costs should satisfy the tribunal that:*

(a) *The measure sought is necessary to ensure a fair and efficient resolution of the dispute avoiding unnecessary delay or expense;*

(b) *Each party has a reasonable opportunity to put its case and deal with that of its opponent;*

(c) *Harm which cannot adequately be compensated by an award of damages is likely to result if the measure is not ordered and that such harm substantially outweighs the harm likely to result to the party against whom the measure is sought;*

(d) *The costs for which security is requested are adequate and an appropriate calculation is submitted with the application or subsequently;*

(e) *On the statements of case and essential documents before the tribunal, there is a reasonable possibility that the party seeking the order will succeed on the merits;*

(f) *That the order will not amount to a pre-judgment of the case on the merits.*

27.3. Any order made by this Tribunal should go no further than what is absolutely necessary to achieve the aims of Article 25. Thus, under Article 25.1(a), a bank guarantee is usually more appropriate than a deposit and a cross-indemnity could be considered. Under Article 25.2, the interests of fairness mean that a cross-indemnity should generally be required.

27.4. The power of the Tribunal to order security for costs is also provided for in Section 38(3) of the English Arbitration Act. In exercising its discretion, the tribunal should have regard to its general duty under Section 33. In practice, attention is likely to focus upon financial information regarding the Claimant and upon the location of its assets, i.e. whether it has sufficient assets, and whether those assets are readily available, to meet any award for costs.

27.5. The Arbitral Tribunal takes note of the Claimant's responses to the Respondent's allegations concerning the financial position of the Claimant.

27.6. The Arbitral Tribunal notes that at this stage of the arbitration both parties may be seen as having a "reasonable possibility" to succeed on the merits of its claim. Respondent seems to rely on proceedings outside this Arbitration and facts involving third parties to establish the strength of its application.

27.7. The Arbitral Tribunal further notes that the Respondent does not provide any calculation for its expenses, largely legal fees, as so far the Respondent has not provided its share of the advance for the Arbitration, as requested by LCIA.

27.8. The Arbitral Tribunal finds that the Claimant provides sufficient evidence that it will be able to meet the costs of arbitration and the legal fees of the Respondent, should the Respondent prevail in this Arbitration. At the same time the Respondent fails to provide appropriate calculation of its likely costs and to prove its allegations about the financial situation of the Claimant.

27.9. *The Arbitral Tribunal rejects Respondent's application of 5 June 2010 for security for costs in the amount of US$ 80,000."*

28. Evrostroy Replied to the Statement of Defence on 15 July 2010 (hereinafter "RSOD").

29. The Tribunal then issued on 29 July 2010 Procedural Order no 4, a Revised Timetable.

30. On 30 July 2010 the Tribunal issued Procedural Order no 5 regarding Request for Stay of Proceedings and Production of Document. The Tribunal recorded and considered all submission of the Parties in this regard namely:

- Respondent's application of 5 June 2010
- Respondent's supplement of 21 June 2010
- Respondent's addendum of 28 June 2010
- Claimant's comments of 30 June 2010
- Claimant's reply of 15 July 2010 (RSOD)
- Respondent's addendum 2 of 21 July 2010
- Claimant's comments of 26 July 2010
- Respondent's email of 29 July 2010

31. The Tribunal issued Order no 5 as follows:

31.1. *"The Arbitral Tribunal notes that the LCIA Rules in Article 14 and 22 (c) and (d) give the Tribunal powers to order production of documents and stay of proceedings.*

(b) Stay of Proceedings

31.2. The doctrine of stay of proceedings in favour of court proceedings (lis pendens) is not well defined; different jurisdictions adopting different approaches and most standards used in national legal systems lack precision. The International Law Association (ILA) in its related report of 2006 noted that, in principle, the doctrine

provides for a tribunal to suspend its own proceedings or otherwise defer to a legal proceeding in another forum, typically involving the same or very similar parties, issues and claims for relief. In some jurisdictions, the question of priority, (e.g., which proceeding was commenced first?) plays a decisive role in application of the doctrine, while in others it does not.

31.3. *Authority (e.g., Born, International Commercial Arbitration, 2009, pp. 2394 et seq) emphasize that the lis pendens doctrine is not readily applicable to international arbitration. That is because the doctrine rests on the premise that there are two presumptively competent forums in which a dispute may be decided and that, in appropriate circumstances, one of these forums should defer to the other, for reasons of fairness, efficiency, judicial integrity and comity. Further, the basis for such deference is the likely or certain subsequent preclusive effect of one forum's decision in the other proceeding. These premises do not generally apply in the context of international arbitration, where (assuming a valid, applicable arbitration agreement) there is only one competent forum – the arbitration – in which the parties have agreed to resolve their disputes, and where a national court judgment obtained in breach of an arbitration agreement should have no preclusive effect in the arbitration. As a consequence, a number of authorities have held that the lis pendens doctrine does not apply in international arbitral proceedings.*

31.4. *Irrespective of the applicability of the lis pendens doctrine, it appears that certain conditions are relevant per analogiam for the issue of stay of proceedings (see Born, op. cit., with further references and also references to the ILA report, op. cit.). The party seeking stay of proceedings should satisfy the tribunal that the court proceedings relate to:*

(i) same parties;

(ii) same dispute cause of action; and

(iii) directly impact on this Arbitration;

31.5. In addition the Tribunal will also consider:

(a) Whether the courts have exclusive primary jurisdiction on this matter;

(b) Likely length of court proceedings;

(c) Likely detriment on parties to Arbitration

31.6. Finally the Tribunal shall ensure that ach (sic) party has a reasonable opportunity to put its case and deal with that of its opponent.

31.7. The Arbitral Tribunal takes note of the Respondent's submissions and the Claimant's responses to the Respondent's applications and submissions.

31.8. The Arbitral Tribunal also notes that there have been several postponements in the Finvest proceedings and it is unclear how long it would take for local remedies to be exhausted. In any event it is the Tribunal's finding that the court proceedings do not have a direct impact on this Arbitration and any application to the contrary is merely based on speculation and could simply derail this Arbitration.

31.9. The Arbitral Tribunal finds that the Respondent fails to meet its burden of proof pursuant to para 13 above. It is clear that Respondent only participates as third party in the Finvest proceedings and it is unclear whether Claimant also participates as third party. Tribunal notes discrepancy in the Respondent's request on 5 June and 28 June 2010, the latter including Claimant as third party in Finvest proceedings.

31.10. Further the Arbitral Tribunal finds that the Finvest proceedings not only are not between the same Parties as in this Arbitration but also have a different cause of action, a different Agreement as their basis. In this respect Respondent fails to prove that the Finvest proceedings will directly impact on this Arbitration.

(c) Production of Finvest-Claimant Agreement of 2006

31.11. Pursuant to LCIA practice and the IBA Rules on Taking of Evidence 1999, as revised in 2010, the party seeking production of a document should satisfy the tribunal that:

(a) The request for production must establish the relevance of each document or of each specific category of documents sought in such a way that the other party and the Arbitral Tribunal are able to refer to factual allegations in the submissions filed by the parties. In other words, the requesting party must make it clear with reasonable particularity what facts/allegations each document (or category of documents) sought is intended to establish; and

(b) The Arbitral Tribunal will only order the production of documents or category of documents if they exist and are within the possession, power, custody or control of the other party. If contested, the requesting party will have to make this likely;

(c) If necessary, upon proper application, the Arbitral Tribunal shall also balance the request for production against the legitimate interests of the other party, including any applicable privileges, unreasonable burden and the need to safeguard confidentiality, taking into account all the surrounding circumstances.

(d) For the sake of clarity, the Tribunal wishes to emphasize that in ruling on the requests for document production, it will rule on the prima facie relevance of the requested documents, having regard to the factual allegations made by the parties in the submissions filed to date. At the present stage of the proceedings, the Tribunal will not be in a position to make any ruling on the ultimate relevance of the requested documents to the final determination of the parties' claims and defences in this arbitration.

31.12. The Arbitral Tribunal takes note of Parties' submissions.

31.13. The Arbitral Tribunal finds, that the request for the production of the Finvest-Claimant Agreement is a specific one. However, Respondent failed to establish the relevance of this Agreement to this. The Tribunal notes that it may well be the case that the Finvest-Claimant Agreement be produced in the Finvest Proceedings at the next hearing date on 3 August 2010. The finding is that the requested document is at this stage not directly relevant to this Arbitration.

31.14. The Tribunal having considered all submissions and exchanges of the Parties:

- *Rejects the application for stay of proceedings*
- *Rejects at this stage the application for the production of the Finvest-Claimant Agreement, noting that Respondent may repeat this request de novo at the stage of requests for production of documents as per procedural timetable (Procedural Order no 4)."*

32. The Respondent's Further Submission in Reply to the Claimant's Reply of Vendort Traders Inc was filed on 24 September 2010.

33. Finally, following consultation with the Parties' representatives, the Tribunal issued Procedural Order no 6 on 21 January 2011 regarding Organisation of the Hearing.

34. A one-day hearing was held on 27 January 2011. Following the hearing the transcript produced on the same day by the court reporters, both Parties produced closing submissions (post-hearing briefs), namely the Claimant's Post Hearing Brief of 25 February 2011 and the Respondent's Closing Submission of 25 February 2011.

35. A final further exchange took place on 11 March 2011, i.e. the Claimant's Reply to the New Points and Cases in the Respondent's Post Hearing Brief and the Respondent's

Response to the Claimant's Reply on Respondents' PHB. At the same time, the Parties filed submissions setting out their costs.

VI. THE PARTIES' POSITION

1. Evrostroy's position

36. The Claimant's position in this Arbitration is that the Respondent has breached the Agreement between the Parties by failing to make a Total Payment. Hence it claims the outstanding amount of RUR 29,489,056.36 plus interest; interest accrues from the day after the Shares were transferred to Vendort's custody, i.e. from 25 July 2006. Interest is capped at 10% of the Total Payment price, i.e. RUR 4,467,726,94. The Claimant also claims its costs in the Arbitration.

37. The Claimant argues that the key elements of the Claim are accepted by Vendort and identifies Evrostroy's burden to prove that:
    - The Agreement was entered into between the Seller and the Buyer;
    - The Seller performed its obligations under the Agreement by transferring the Shares; and
    - The Buyer did not pay the sums due under the Agreement.

38. The Agreement was entered into by the Parties on 15 May 2006 (Exhibit C2 and paragraph 12 of the Amended Statement of Defence).

39. Under the Agreement Evrostroy had an obligation to transfer 834,693 ISKOG shares (Annex 1 of the SPA). On 24 July 2006, Evrostroy transferred all 834,693 ISKOG shares (Exhibit C4 and paragraph 13 of the SOD).

40. Vendort pursuant to the Agreement had to pay the sum of RUR 44,672,769.36. Vendort only paid the sum of RUR 15,183,713 on 17 July 2006 with no further payment made since that date. (Annex 1 of the SPA and paragraph 13 of the SOD).

2. Vendort's position

41. Vendort accepts the main facts presented by Evrostroy. However, it argues that it should not be liable under the SPA to make any further payment and that the SPA does not tell the "whole story" (Transcript page 32, line 24).

42. Vendort maintains that after the signing of the SPA:
    a. The Claimant and the Respondent agreed or reached an accord that the purchase price for the Shares would be RUR 15,183,713 and not RUR 44,672,769.36 and/or
    b. The Claimant represented to the Respondent that it was prepared to accept RUR 15,183,713 for the Shares and the Respondent relied on that same.

43. In other words, Respondent argues that the SPA has been modified or replaced or, alternatively, the Claimant has waived its rights under the SPA to seek payment from the Respondent and/or is estopped from doing so.

44. Vendort further raises defences based on public policy, set-off and frustration and contends that the evidence before this Tribunal, including that provided by the Claimant's witnesses, support its position. It further submits that these proceedings have been initiated as part of a sustained assault carried out in concert with others on the Respondent's ISKOG shares. (Respondent's Closing Submissions paragraphs 4-6).

45. The main argument which Vendort puts forward about its position is that Evrostroy was under no obligation to transfer the Shares until Total Payment and that there was no reference or characterization of the payment of RUR 15,183,713 as being only a part payment. No documentary evidence is provided.

46. Vendort further relies on the witness statement of Mr Mamporia, also his witness testimony in the context of the Russian Criminal Court Proceedings (Exhibit R2). Mr Mamporia was a manager of the Claimant at the time of the SPA. Particular reference is made to the statement of Mr Mamporia that *"there were no more claims because the company [Claimant] was satisfied with the transaction"* (Exhibits R2 and C22). This

is in the context of instruction and/or information which Mr Mamporia received from Mr Kozlov (who is associated with Vendort) as to discussions and/or an agreement with Mr Koltsov (who was associated with Evrostroy) (see Respondent's Closing Submission paragraphs 18-20).

47. Vendort submits that the discussions reported by Mr Mamporia confirm that (a) a prior agreement had been reached between Claimant and Respondent that the Shares would be transferred for RUR 15,183,713 rather than the contractual total price of RUR 44,672,769.36; (b) even without such agreement, the Claimant has represented to the Respondent that it would accept RUR 15,183,713 for the Shares; and (c) this was confirmed and represented again by Mr Mamporia, on behalf of Evrostroy to Venddort via Mr Kolzov. It is also submitted that such conversation must have taken place before the transfer of the Shares.

48. Absent any documentary evidence of the modification of the Agreement, Mr Mamporia provides evidence at this Arbitration that he has asked on occasions when the outstanding payment would be paid; the only assurance he provided to the Respondent is that the Respondent was not be pursued (legally) at that stage.

49. It falls to the Tribunal to determine, to the extent possible and on the basis of the evidence submitted to it, what was the content and timing of the conversation between Mr Mamporia and Mr Kolzlov and most importantly, what are its legal consequences, if any.

50. Respondent also refers in its submissions about the transfer from the Claimant of a further 268,964 ISKOG shares to a third entity (Tsem Servis Ltd) which in turn were transferred to the Respondent (Exhibit R25 and FSIR/7).

51. Respondent also notes that following the termination of the license of the Bank, Claimant had no back account between 24 October 2006 and 31 August 2009.

52. Respondent also submits that in early 2007 the relationship between the Claimant and Respondent started to break down. There are also references to the effect that Mr Kozlov started to experience problems with ISKOG shareholders and he threatened to take control of the shares through "his directors", arguably Mr Samoilov of the Respondent and Mr Koltsov of the Claimant (Exhibit R27 and the Respondent's Closing Submission paragraph 31). The Claimant denies these arguments and/or theories.

53. It is unrelated to this Arbitration that the Russian Courts found evidence of fraud as far as various transactions of Mr Kozlov are concerned. It is also unrelated to this Arbitration the report that Mr Kozlov was shot and killed by gunmen (Exhibit R11).

54. On 12 April 2007 Mr Koltsov sold 100% of his shares in Evrostroy to Mr Mamporia for RUR 10,000. Mr Mamporia allegedly carried out no business through the Claimant and made no demand for payment of the outstanding sum under the SPA. On 22 June 2009 Mr Mamporia appears to have sold 100% of the shares in the Claimant's company to Ms Smirnova and following a due diligence Ms Smirnova is seeking payment of the outstanding sum of money under the SPA.

55. Respondent also refers in its submissions to the Finvest proceedings before Russian Courts, these proceedings being, however, unrelated to this Arbitration.

56. It is the Respondent's case that the Claimant is a company existing and operating as a middle legal person for the transfer of ISKOG shares from Finvest to the Respondent. It is also the Respondent's case that the SPA was either modified or replaced and is no longer binding.

57. Alternatively, it is the Respondent's case that the Claimant waived its rights under the SPA. Even if the SPA is still valid, it is the Respondent's position that it is tainted by illegality and hence unenforceable as a matter of public policy.

58. The Respondent also submits that the Claimant may not claim interest for the period during which its bank account was inoperative and payment could not have been made.

59. Respondent seeks from the Tribunal that the Claimant's claims are dismissed in their entirety and it maintains that Respondent only has to prove that (a) an agreement or some form of accord was reached between the Claimant and the Respondent and (b) the SPA was either modified or replaced and is no longer binding or the Claimant waived its rights under the SPA to seek payment or is otherwise estopped from doing so; or (c) these proceedings are part of an assault on ISKOG shares or the SPA is tainted by illegality and hence unenforceable.

60. The Respondent further submits that the Tribunal need not make a specific finding as between the various suggested options, simply confirm the *status quo* and make no order for payment. Reference is also made to Phipson on Evidence (paragraph 6-07), which supports this proposition. However, Phipson on Evidence (paragraph 6-08) provides specific examples clearly establishing the burden of proving on the claiming party.

3. Legal Aspects

61. The Parties propose a number of legal bases on which the Tribunal can establish its findings and render its decision. All these bases have been duly considered and below the most pertinent are considered.

3.2 The applicable rules

62. The Agreement is governed by English law and all questions of the validity and enforceability of the SPA are to be assessed against English law rules. In this respect English contract law is the governing law. The Tribunal does not have to decide any proprietary issues in relation to the Shares (this may have been subject to Russian law, provided that the Shares are situated in Russia) nor has to make any company law determinations. The legal issues are solely of contractual nature.

3.3 Was there a valid oral modification of the SPA which renders the SPA no longer valid?

63. The Claimant relies on the SPA to establish its claim for payment of the outstanding sum of money under the Agreement and related interest.

64. The Respondent argues that there was a contract modification or some other accord replacing the SPA and essential establishing that no further payment will be required for the transfer of Shares.

65. The Respondent argues that such modification may be evidenced through statement of Mr Mamporia made in the context of court proceedings, that there is an assault against ISKOG shares and an overall hostile environment (Transcript page 58, line 10 set seq.). In that respect Mr Kozlov is referred to as well as Finvest and Crompton.

66. The Parties to the Arbitration and to the Agreement are Vendort and Evrostroy. Evrostroy is owned by Ms Smirnova who acquired Evrostroy in order to engage into business (Transcript page 58, page 84 lines 5-7, page 111, lines 2-9). Evrostroy appears to be a good business opportunity for her (and indeed very inexpensive) and acquired the business from Mr Mamporia with all the rights and obligations of the company (Transcript page 85, lines 8-10, page 89, lines 15-16, page 149, lines 1-4).

67. Ms Smirnova clearly states that Mr Mamporia mentioned the debt owed by Vendort and that he could not pursue it as he lacked resources (Transcript page 92, lines 14-17). Mr Mamporia expressed his view that the likelihood of collecting the Vendort debt is very slim (Transcript page 166, line 11, Mamporia Second Witness Statement, paragraph 16).

68. In support of its suggestion of modification, the Respondent argues that Evrostroy, Finvest and ISKOG form a single group (paragraph 45 of SOD). No sufficient evidence is

provided and in any event Ms Smirnova seems to have no knowledge of or relation to Finvest or ISKOG.

69. There is simply no evidence of the Parties having entered into an alternative agreement before or after the SPA or before or after the transfer of Shares. The burden of proof for this matter falls on the Respondent. In fact any suggestion of modification of the Agreement is made on the basis of discussions or suggestions of third parties.

70. At the hearing the Respondent's Counsel clarified that if an alternative agreement was entered into this would have happened after the SPA was signed (15 May 2006) but prior to payment of RUR 15,183,713 by the Respondent to the Claimant (17 July 2006) (Transcript, page 37, lines 16-23). However, no documentary or witness evidence is provided in support of this proposition.

71. The main question here is why Evrostroy transferred the Shares while there was no Total Payment. Counsel for the Claimant suggests that this may be explained by business practices in Russia with reference to Russian law and Russian Court proceedings, notwithstanding the fact that English Law governed the Agreement (The Claimant's Post Hearing Brief, paragraph 48 et seq.). The Claimant having achieved a good deal and received partial payment was prepared to transfer the Shares. This is in accordance with Russian Court decision (Exhibit C32 – Determination of 7 May 2010 of the Russian Supreme Arbitrazh Court; Exhibit C33 – Determination of the Federal Arbitrazh Court of Moscow region of 30 September 2009, No KG-A40/9644-09 and Determination of the Federal Arbitrazh Court of Volga region of 27 October 2009, case no A65-2408/2009). As a matter of Russian Law a demand for collection of payment where the goods have not been delivered to the defendant is supported neither by law nor by contract (id.).

72. The fact that the Claimant has not opened another bank account between 24 October 2006 and 31 August 2009 cannot be seen as an evidence of a modification of the Agreement. Mr Mamporia indicated that if a payment were forthcoming the issue of

the account could easily be resolved (Transcript, page 127, lines 15-16; page 126, line 4 and page 127 line 5). Ms Smirnova also expressed the same view and indeed opened an account in August 2009 (Third Witness Statement, paragraph 22).

73. There is no evidence either that Evrostroy agreed to accept only a fraction (about one third) of the Total Payment as full payment under the Agreement (the Claimant's Post Hearing Brief paragraphs 67-80).

74. Clause 16.1 of the SPA requires any amendments to the Agreement to be made in writing. Despite this the Respondent argues an oral modification of the SPA (paragraph 95 of the Respondent's Closing Submission (RCS)). The Respondent fails to indicate who were the persons acting on behalf of the Parties and entering into the modification of the SPA. As a matter of fact Vendort acknowledges that an oral modification would not be effective in light of Article 16.1 (paragraph 98 of RCS) but an oral modification may also cover Article 16.1 about no oral modification so that an oral modification would be allowed. Vendort suggests that the Tribunal should disregard Article 16.1. as English Courts tend to overlook standard boilerplate provisions where circumstances dictate (paragraph 100 of the RCS).

75. Vendort relied on *World Online* case (*World Online Telecom Limited v I-Way Limited*, [2002] EWCA Civ 413, Tab 43 of the Trial Bundle) to support its legal argument for oral modification of a contract also covers the no oral modification provision of the original contract. However, *World Online* is no authority for this proposition. It seems to the Tribunal that Chitty on Contracts provides the legal basis and as such one has to look at the intention of the parties guided by the written evidence, i.e. the SPA.

76. Three more cases are being submitted to support the oral modification position of the Respondent. With its Closing Submission Vendort offers an 1865 case, *Hill v South Staffordshire Railway*. *Hill* introduces a modification by estoppel for additional services provided and hence is materially different from the case before this Tribunal.

77. The second case is a New Zealand case, and hence merely persuasive, *Meyer v Gilmer*. The case held that it is necessary to distinguish between cases where a failure to follow a statutory formality and cases where there is no statutory formality where a party can validly waive such formality. This case is no good authority for the Respondent's position on the law.

78. Finally, Respondent refers to *Boots the Chemists Ltd v Amdahl*. In this case a contract modification was confirmed in writing and in accordance with this case such confirmation ought to be coming from Evrostroy. However, such confirmation in writing of an amendment of the Total Payment does not exist.

79. It is the Tribunal's view that no evidence of modification or variation of the Agreement exists. Even if it did exist then the Respondent would have the burden of persuading this Tribunal why such an oral modification would be valid despite clause 16.1 of the SPA (no oral modification).

3.4 Is there a waiver by the Claimant or some form of estoppel as regards any further payment under the SPA?

80. The Claimant submits that the fact that Vendort was not pursued for the remaining sum under SPA cannot be interpreted as waiver. It may well be interpreted as attempt to force an alternative written agreement, such as the Assignment Agreement of 15 January 2007 between Evrostroy and Crompton (a company set and controlled by Mr Kozlov) (Exhibit R1 and Exhibit C18). According to that agreement Evrostroy assigned the right to claim the outstanding sums under the SPA to Crompton and this was to be paid on 15 January 2008 (the Claimant Post Hearing Brief, paragraphs 57-61)

81. Counsel for the Respondent relied on the *Pinnel's case* (1602 5 Co. Rep 117 a, Amended SOD paragraph 44): "where there is a claim for a liquidated sum, the liability for which is not in dispute, the acceptance of a smaller sum in satisfaction does not relieve the debtor for there is no consideration for the creditor's abandonment of the

balance." If such an agreement exists then the doctrine of promissory estoppel will be triggered.

82. Counsel for the Respondent makes extensive submissions in relation to estoppel and/or waiver (paragraphs 34-41 of the Amended SOD). Counsel also acknowledged that it must be inequitable for the promisor to go back on the alleged promise (Chitty on Contracts, paragraphs 3-094, 3-095). There is no indication in this case that Evrostroy indicated or promised that it would not pursue its rights under the SPA nor there is reliance of Vendort of such a promise.

83. There is hence evidence that attempts were made to collect the outstanding sum so that the theory of waiver or estoppel is not substantiated.

84. If there is evidence of waiver this may be in relation to interest payable during the period when the Claimant had no operative bank account but this does not affect the right of the Claimant to claim interest as per clause 9.3. of the SPA.

85. The interest is payable for all periods, except for 24 October 2006 and 31 August 2009 during which period the Claimant had no bank account, i.e. the total interest payable is 90 days at RUR 5,897.81 per day = RUR 530,802.91 (from Transfer date of 25 July 2006 to the close of the bank account on 24 October 2006) and then for 543 days at RUR 5,897.81 per day = RUR 3,202,510.83 (period from 1 September 2009 to 25 February 2011 (as per Claim). Accordingly and pursuant to clause 9.3. the interest payable to 25 February 2011 is RUR 3,733,313.74 (i.e. RUR 742,963.2 short of the Claim). Of course interest is due for the time since 25 February 2011 and capped as per SPA at RUR 4,467,276.94.

3.5 Is the SPA tainted by illegality and hence unenforceable as a matter of public policy?

86. Finally the Respondent argues that the Agreement is tainted by illegality and hence is unenforceable as a matter of public policy (the Respondent's Closing Submission paragraphs 129-131).

87. The illegality argument is based on the conviction of Mr Kozlov (for fraud). The argument is that the Claimant has been involved in the fraudulent schemes for which Mr Kozlov has been convicted. If they are any such involvement, that would be the signing of the assignment agreement by Mr Koltsov. If this is the case then Vendort would have to show that Mr Koltsov had knowledge of the fraudulent schemes of Mr Kozlov, indeed such knowledge should ideally be shown to be attributable to Vendort. Such evidence does not exist.

88. According to English Law (Chitty on Contracts paragraph 16-165) a contract can be vitiated by the illegality of another contract to which it is merely collateral. Vendort does not refer to a specific contract but more likely to whole business practices of Mr Kozlov in relation to ISKOG shares.

89. The Tribunal is of the view that the business practices of Mr Kozlov are not closely linked to the Vendort and Evrostroy Agreement before this Tribunal so that the destiny of the SPA is not affected by what happened to Mr Kozlov and his conviction.

VII. COSTS

90. The total amount of the costs of the arbitration (other than the legal or other costs incurred by the parties themselves) have been determined by the LCIA Court, pursuant to Article 28.1 of the LCIA Rules, to be as follows:

Registration fee:	£1,500.00
LCIA's administrative charges:	£7,494.46
Sole arbitrator's fees and expenses:	£20,000.00
Hearing room costs:	£1,646.16
Translation costs:	£650.00
Court reporting costs:	£930.00
Total costs of arbitration:	£32,220.62

91. The Claimant incurred legal costs as follows:

- RUR 4,575,014.93 for Vegas Lex, RUR 53,548.51 for disbursements
- GBP 37,500 for Keystone Law and GBP 316.77 and USD 3,657.00 for disbursements

92. The Respondent incurred legal costs as follows:

- USD 101,900 for Nadmitov & Partners, RUR 190,574 for disbursements
- GBP 15,500 for Mr Harris Bor

93. The Claimant has lodged the registration fee and deposits while the Respondent has not lodged any deposits or advances. The Parties also submitted their Statements on Costs with the post-hearing submissions; these cost statements are not disputed. Both Parties made submissions in relation to costs, requesting the Tribunal to order the other Party to bear all costs.

94. Pursuant to Article 28.4 of the LCIA Rules, and absent any specific agreement of the parties in writing, it is for the Tribunal to allocate costs reflecting on the relative success and failure in the Award and the Arbitration. The Respondent has been unsuccessful in its applications, procedural or substantive, while the Claimant comprehensively prevails in this Arbitration, save for the question of interest. In accordance with Articles 28.2 and 28.3 of the LCIA Rules it is decided that the Respondent will carry 95% of the arbitration costs and will also reimburse the Claimant 95% of its legal costs.

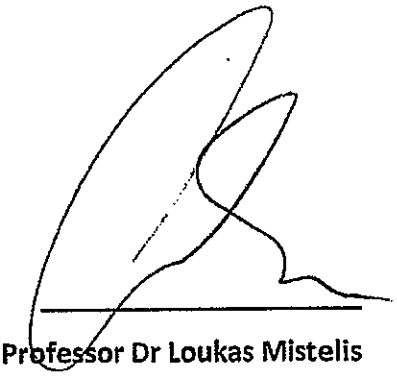
VIII. DECISION

95. In view of the above considerations, **the Arbitral Tribunal decides, awards and orders as follows:**

- **Vendort has breached its obligation under the Share Purchase Agreement of 15 May 2006 to pay the Total Payment for the Shares;**
- **Vendort is ordered to pay the outstanding amount of RUR 29,489,056.36;**
- **Vendort is ordered to pay interest pursuant to clause 9.3. of the SPA at RUR 5,897.81 per day accruding from 25 July 2006, but not for the period during which Evrostroy had no operative bank account; this amounts to RUR 3,733,313.74 to 25 February 2011 but to the day of the Award interest accrues to the contractually capped to RUR 4,467,276.94;**
- **Vendort is ordered to pay 95% of the arbitration costs amounting to GBP 30,973.24 and 95% of the Claimant's legal costs amounting to RUR 4,397.135.27, GBP 35,925.93 and USD 3,474.15.**

Place of arbitration: London, United Kingdom

Made on 1 November 2011



Professor Dr Loukas Mistelis

Sole Arbitrator