SVEA HOVRÄTT
Avdelning 02
Rotel 020101

**BESLUT**
2012-04-19
Stockholm

Mål nr
Ö 4963-11

**SÖKANDE**
Förlagsgrupp Superdruk, sällskap med begränsat ansvar
Volodymyra Velykogogatan 5a
7026 Lviv
Ukraina

**MOTPART**
Solna Offset AB, 556012-6848
Box 582
175 26 Järfälla

Ombud: Advokaten Kristoffer Sparring
Advokatfirman Fylgia KB
Box 55555
102 04 Stockholm

**SAKEN**
Verkställighet av utländsk skiljedom

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**HOVRÄTTENS AVGÖRANDE**

1. Hovrätten avslår Solna Offset AB:s yrkande om avvisning av den av Förlagsgrupp Superdruk, sällskap med begränsat ansvar, gjorda ansökan.
2. Hovrätten förklarar att skiljedomen meddelad i Paris, Frankrike, den 16 januari 2009 i tvist mellan Publishing Group "Expres" Ltd. och Solna Offset AB, *bilaga A*, får verkställas i Sverige som en svensk domstols lagakraftägande dom såvitt avser AB Solna Offset AB:s betalningsförpliktelser.
3. Solna Offset AB ska ersätta Förlagsgrupp Superdruk, sällskap med begränsat ansvar, för rättegångskostnader i hovrätten med 24 475 kr, jämte ränta enligt 6 § räntelagen (1975:635) från denna dag till dess betalning sker.

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| Postadress | Besöksadress | Telefon | Telefax | Expeditionstid |
|---|---|---|---|---|
| Box 2290<br>103 17 Stockholm | Birger Jarls Torg 16 | 08-561 670 00<br>08-561 675 00<br>**E-post**: svea.avd2@dom.se<br>www.svea.se | 08-561 675 09 | måndag – fredag<br>09:00-15:00 |

## YRKANDEN M.M. I HOVRÄTTEN

Förlagsgrupp Superdruk, sällskap med begränsat ansvar (Superdruk) har yrkat att hovrätten ska förklara skiljedomen den 16 januari 2009, *bilaga A*, verkställbar i Sverige vad avser Solna Offset AB:s betalningsförpliktelser. Superdruk har anfört att Publishing Group "Expres" Ltd. efter skiljedomens meddelande har ändrat namn till Förlagsgrupp Superdruk, sällskap med begränsat ansvar.

Solna Offset AB (Solna Offset) har yrkat att hovrätten ska avvisa Superdruks ansökan alternativt, som det får förstås, avslå den helt eller delvis.

Parterna har yrkat ersättning för rättegångskostnader i hovrätten.

## HOVRÄTTENS SKÄL

Solna Offsets invändningar är av två slag. För det första hävdar Solna Offset att det saknas stöd i svensk lag för att verkställa endast viss del av en utländsk skiljedom; ansökan ska därför avvisas. För det andra gör Solna Offset gällande att bolaget enligt skiljedomen har närmare angivna motkrav på Superdruk som ska beaktas.

Superdruk har anfört att sällskapet har ansökt om verkställighet av skiljedomen endast vad avser Solna Offset AB:s betalningsförpliktelser eftersom Superdruk ansett sig kunna begära verkställighet endast till den del Superdruk är berättigad part enligt skiljedomen.

Hovrätten finner att det saknas hinder mot att förklara skiljedomen verkställbar endast såvitt avser Solna Offsets betalningsförpliktelser. Solna Offsets yrkande om avvisning av ansökan ska därför avslås. De motkrav som Solna Offset gör gällande utgör inte något hinder mot verkställbarhetsförklaring. De får i stället i förekommande fall beaktas vid verkställighet av skiljedomen.

Solna Offset har inte invänt att det föreligger någon sådan omständighet som anges i 54 § lagen om skiljeförfarande. Det finns inte heller något sådant hinder mot verkställighet som avses i 55 § samma lag. Superdruks ansökan ska därför bifallas.

En part är berättigad till ersättning för rättegångskostnader i mål om verkställighet av utländsk skiljedom (NJA 2001 s. 738 II). Hovrätten finner att det belopp som Superdruk yrkat är skäligt.

**HUR MAN ÖVERKLAGAR**, se bilaga B
Överklagande senast 2012-05-18
Prövningstillstånd krävs inte.

I avgörandet har deltagit hovrättsråden Kazimir Åberg, Anne Kuttenkeuler och Patrik Schöldström, referent. Enhälligt.

Bilaga A

# ICC INTERNATIONAL COURT OF ARBITRATION

**CASE No. 15313/JEM/GZ**

PUBLISHING GROUP "EXPRES" LTD.

(Ukraine)

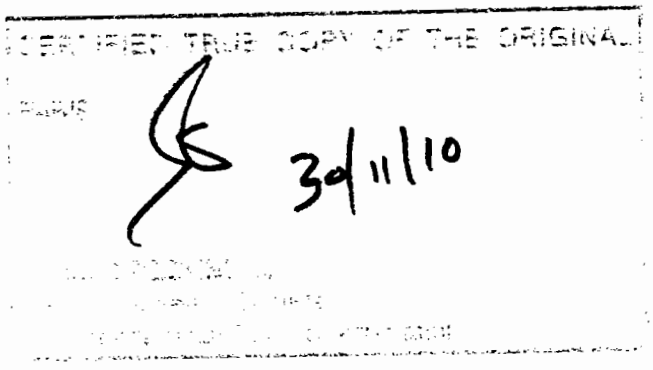
**vs/**

SOLNA OFFSET AB

(Sweden)

This document is a certified true copy of the original of the Final Award rendered in conformity with the Rules of Arbitration of the ICC International Court of Arbitration.

**ICC International Court of Arbitration**
**Arbitration 15313/JEM/GZ**




PUBLISHING GROUP "EXPRES" LTD. (Ukraine)
(hereinafter "**Expres**" or "**the Claimant**")

vs/

SOLNA OFFSET AB (Sweden)
(hereinafter "**Solna**" or "**the Respondent**")

(Both collectively referred to as the "**Parties**" or individually as a "**Party**").

# FINAL AWARD

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## (A) INTRODUCTION

### The Parties

1. The following descriptions are taken from the Terms of Reference.

2. The Claimant, Publishing Group "Expres" Ltd., is a limited liability company, incorporated under the laws of Ukraine under organization number 22393603, with its address at 5, Svoboda Str., Township Ryasne-Ruske, Yavorivsky District, Lviv Region, 81085, Ukraine.

3. Expres has been working successfully in the Ukrainian market of periodicals and the printing industry since 1996. Over this period it has evolved into a major holding of companies that enjoy a commanding lead in their respective sectors. The Publishing Group presently unites three printing complexes, four newspapers, a youth magazine, along with several servicing companies that provide comprehensive support for the group's projects. The company's most successful media project is the newspaper "Expres", which is Ukraine's largest Ukrainian-language periodical. Its other highly successful project is the modern book and magazine complex "Mandaryn". The company has a commanding lead in the market of periodicals and printing services in Right-bank Ukraine, showing confident growth of its segments in the respective markets.

4. The Respondent, Solna Offset AB, is a limited liability company, incorporated under the laws of Sweden (organization number 556012-6848), with its registered address at Box 582, 175 26 Järfälla, Sweden.

5. Solna is one of the world's leading manufacturers of web offset printing presses, with more than 60 years of experience in offset technology made in Sweden. Solna supplies complete press configurations to printers mainly engaged in short to medium runs of newspaper, commercial and book production. Solna's customers are

located all over the world and more than 90 % of the production is exported. The main markets are China, Hong Kong, Indonesia, Eastern Europe, USA and South America.

**The Parties' Counsel**

6. Expres's Counsel in this arbitration are:

(a) Maître Stéphane Dunikowski
Avocat au Barreau des Hauts de Seine - PN 320
Résidence Central Parc
116 rue Salvador Allende
92000 Nanterre
France

(b) Advocate Valentine Kavun
Law agency "Law Consultant"
Galytska Str, 21
79008 Lviv
Ukraine

Although Mr. Dunikowski was Expres's sole Counsel at the start of the arbitration, it soon became clear as the arbitration proceeded that Expres's lead Counsel was, in fact, Mr. Kavun.

7. Solna's Counsel in this arbitration are:

Advokat Kristoffer Sparring, and
Jur. kand. Karin Börjesson

Advokatfirman Fylgia KB
Nybrogatan 11
Box 55555
102 04 Stockholm
Sweden.

## (B) THE PROCEDURE IN THIS ARBITRATION

### The arbitration agreement

8. The arbitration agreement between the Parties is to be found at Article 10 of Supply and Erection Contract No. 01-11/06, which was concluded between the Parties on 23 November 2006 (the "**Contract**"). This Article provides:

> "Any disputes in connection with The Contract shall be settled by the International Arbitration Court in Paris, France. The laws of respondent shall be applicable to The Contract and to its interpretation.
>
> The ruling language shall be English. The adjudication shall be final and shall be binding on both parties."

9. It is relevant to note that a further arbitration clause – in similar but not exactly the same terms – is provided in Appendix #7 to the Contract (General Conditions of Sale and Delivery), paragraphs 61 and 62:

> "61. All disputes arising in connection with the Contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules, supplemented as necessary by the procedural rules of the law of the Contractor's country.
>
> 62. The Contract shall be governed by the substantive law of the Contractor's country."

10. However, Article 10 of the main part of the Contract takes precedence over paragraphs 61 and 62 of Appendix #7 – see Article 7 of the Contract, which states:

> "The Press is supplied, installed and commissioned According to the "General Conditions of Sale and Delivery", if something other is not conditioned in the main part of the Contract and Appendices 1, 2, 3, 4, 5, 6." (Emphasis added)

11. "Something other" than Clauses 61 and 62 of Appendix #7 is indeed provided for in the main part of the Contract, *i.e.* as set out in Article

10 of the main part of the Contract. Accordingly, pursuant to Article 7, that "something other" takes precedence.

12. It should also be mentioned in this context that, while the Contract is written in both Ukrainian and English, Article 11 of the Contract provides that:

> "In case of conflict of interpretation of the Ukrainian version, the English version will prevail."[1]

Accordingly, except as expressly stated below, I shall refer to the English version only when quoting from the Contract.

**The parties' initial pleadings**

13. Expres filed its Request for Arbitration, entitled "Bill of Complaint", on 13 December 2007.

14. Solna filed an Answer on 18 February 2008.

15. There was a certain amount of correspondence between the parties and the ICC Secretariat between late December 2007 and March 2008. The Parties agreed that there should be a Sole Arbitrator. However, they failed to agree upon a choice of arbitrator, and they also advanced different views regarding the place of arbitration, Expres proposing Paris and Solna proposing Stockholm.

16. At its session of 7 March 2008, the ICC International Court of Arbitration fixed Paris, France as the place of arbitration, took the necessary steps for the appointment of the Sole Arbitrator, and fixed the initial advance on costs. The place of arbitration is, accordingly, Paris, France.

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1 I understand that the corresponding sentence in the Ukrainian version is to the same effect.

## Constitution of the Arbitral Tribunal

17. I was appointed as Sole Arbitrator by the ICC International Court of Arbitration on 21 March 2008 upon the proposal of the United Kingdom National Committee of the ICC, in accordance with Article 9(3) of the ICC Rules.

18. I received the file from the ICC Secretariat by letter dated 21 March 2008. I proceeded to set about establishing Terms of Reference and a provisional timetable in accordance with Article 18 of the ICC Rules.

## A procedural point raised by Solna's Counsel

19. At the beginning of April 2008, several days after my appointment as Sole Arbitrator, I received a telephone call from Solna's Counsel, Mr. Sparring, in which I was informed that Solna was considering calling as a witness Mr. Andreas Eriksson, previously legal counsel at the Swedish Export Credits Guarantee Board (*Sw. Exportkreditnämnden*) ("**EKN**"), and now a colleague of mine at Advokatfirman Vinge KB in Stockholm.

20. I had previously had no idea that Mr. Eriksson had any involvement with this matter. I immediately informed Solna's Counsel that it would not be appropriate for me to speak with him without Expres's Counsel also being present on the call, and I asked Solna's Counsel to write to me with a copy to Expres's Counsel.

21. Solna's Counsel duly wrote to me by email dated 3 April 2008, with a copy to Expres's Counsel. Solna stated in this email, *inter alia*:

> "We are likely to call as a witness a person named Andreas Eriksson.
>
> Andreas Eriksson was earlier working at the Swedish Export Credits Guarantee Board (EKN) that has played a major role during the negotiations of the disputed agreement. This week, it has come to our knowledge that Andreas Eriksson since January 2008 is working as an associate at Advokatfirman Vinge, the same lawfirm as the Arbitrator James Hope is working for.

> From our point of view we find the situation acceptable, but want to address it to ICC and the arbitrator."

22. Thereafter, having discussed the matter with the ICC Secretariat, I wrote to both Parties by email dated 4 April 2008, stating *inter alia*:

> "I note that the Respondent states that it is likely to call Mr. Eriksson as a witness, and I can confirm that Mr. Eriksson is now an associate at Vinge. The Respondent states that it finds the situation to be acceptable. I invite the Claimant to provide any comments that it may have in light of the Respondent's email, and I ask that any such comments be provided by Wednesday 9 April."

23. Expres did not submit any comments in response to this email. By email to the Parties dated 11 April 2008, I noted that I had not received any such comments. Expres also did not submit any comments in response to this further email.

**The Terms of Reference**

24. By email dated 11 April 2008, I invited the Parties to submit their own descriptions of themselves (for the purposes of Article 18(1)(a) of the ICC Rules), and their own summaries of their respective claims and relief sought (for the purposes of Article 18(1)(c) of the ICC Rules).

25. There was then some delay, but a procedural conference was eventually arranged to take place by telephone on 13 May 2008. Shortly before the call, by email dated 11 May 2008, I circulated a near-final version of the Terms of Reference.

26. The procedural conference duly took place by telephone on 13 May 2008. The Terms of Reference and a provisional timetable were essentially agreed during the procedural conference, subject to certain further matters to be confirmed by correspondence thereafter.

27. The Terms of Reference and the provisional timetable were finally agreed on 20 May 2008, and I circulated a faxed version of the final

text on that date, as signed by myself and on behalf of each Party. (At the request of the ICC Secretariat, five original versions of the Terms of Reference, in exactly the same terms, were later prepared and were signed by myself and by representatives of both Parties. I circulated the originals to the Parties and to the ICC Secretariat by letter 11 July 2008.)

**The Provisional Timetable**

28. The provisional timetable, as agreed during the conference call on 13 May 2008, was set out in Procedural Order No. 1, dated 14 May 2008. This set out a timetable for the exchange of pleadings, and a hearing window of 27-29 August 2008. It was agreed that there would be a further procedural conference call on 9 July 2008.

**Further pleadings**

29. Pursuant to paragraphs 2-3 of the provisional timetable, Solna proceeded to answer a question that had been posed by Expres.

30. Pursuant to paragraph 5 of the provisional timetable, each Party submitted a first round of written submissions on 11 June 2008.

31. Pursuant to paragraph 6 of the provisional timetable, each Party submitted a second round of written submissions on 1 July 2008. Solna's second written submission included a short list of witnesses and a statement of evidence in relation to each witnesses, as contemplated by paragraph 6 of the provisional timetable. No such witness list or statement of evidence was included with Expres's second written submission.

32. Pursuant to paragraph 7 of the provisional timetable, each Party submitted a third round of written submissions on 9 July 2008.

**The second procedural conference on 9 July 2008**

33. A second procedural conference took place by telephone on 9 July 2008, during which the further procedure in the arbitration was discussed and largely agreed upon.

34. In summary:

- It was agreed that there should be a physical hearing, but the parties disagreed on whether the hearing should be held in Paris (as requested by Expres) or Stockholm (as requested by Solna).

- After discussing the potential witnesses, Expres concluded that it wanted to call Mr. Ihor Pochynok as a witness. It was agreed that Expres would be allowed to file a statement of Mr. Pochynok's proposed evidence by 11 July 2008. Expres also indicated that it might wish to submit further factual documents, and it was agreed that these could be filed by the same date.

- It was agreed that Solna would have the chance to file any response to Expres's filings by 15 August 2008.

- It was agreed that each party would file copies of any legal authorities that it intended to rely upon by 22 August 2008.

- It was agreed that the parties would continue to reserve the dates 27-29 August 2008 for the hearing.

35. I confirmed these agreements in Procedural Order No. 2, dated 11 July 2008. I also ruled in this Procedural Order that the hearing would take place in Paris.

36. As agreed, and pursuant to paragraph 1 of Procedural Order No. 2, Expres submitted a document entitled "*Main thesis of the witness*

*testimony of Mr. Pochynok*" on 11 July 2008. (I subsequently allowed Expres to re-submit this document on 12 July 2008, since Expres discovered that it submitted the wrong version on 11 July.)

37. On 14 July 2008, Solna submitted an English translation of Exhibit 1 to its written submission dated 1 July 2008, Expres having complained that the version submitted previously was in Swedish.

38. I had various discussions with the parties during July regarding the detailed arrangements for the hearing. On 4 August 2008, I circulated Procedural Order No. 3, confirming these detailed arrangements. In particular, I directed that the hearing would start on Wednesday 27 August 2008 at 14:00, and would continue until approximately 17:00 on Thursday 28 August 2008.

**Additional claims made by Expres**

39. By email dated 6 August 2008, and without prior warning, Expres submitted a further written pleading entitled "*Supplement to the statement of claim of 11.06.2008*" (Expres's "**Supplement**").

40. I invited Expres to comment on whether or not this further written pleading contained new claims under Article 19 of the ICC Rules, and I further invited Solna to provide its comments. Such comments were received.

41. On 14 August 2008, I issued Procedural Order No. 4, in which I ruled, after considering the matter in some detail, that Expres's Supplement contained one new claim for the purpose of Article 19 of the ICC Rules – a claim for reimbursement pursuant to paragraph 29 of Appendix #7 – together with some increases in the amounts of its

existing claims. I further ruled that all these claims would be included in the arbitration.[2]

42. Solna had asserted that the current timetable could not be maintained if these claims were included. Accordingly, before taking a decision regarding the timetable, I invited Solna to clarify its position on this point, and further comments were submitted by email by Solna, and later by Expres, on 18 August 2008.

43. Later on 18 August 2008, I issued Procedural Order No. 5, in which I ruled that, in light of Solna's comments, the hearing that was set to take place on 27 and 28 August 2008 would be postponed. I invited the Parties to attend an urgent procedural conference by telephone in order to agree upon an amended procedural timetable.

**Further procedure in light of the postponement of the hearing**

44. During a telephone conference held on 22 August 2008, it was agreed that the hearing would be re-fixed for 6-8 October 2008.

45. I subsequently confirmed in Procedural Order No. 6, dated 28 August 2008, that the hearing would take place in Paris on 6 and 7 October 2008. Procedural Order No. 6 also provided a timetable for some further submissions to be made as a result of and in response to Expres's Supplement. It was also stated that the provisions of Procedural Order No. 3 would continue to apply, *mutatis mutandis*, in relation to the postponed hearing.

46. Pursuant to paragraph 2 of Procedural Order No. 6, and on 27 August 2008, Expres answered a question that had been posed by Solna.

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2 As a result of Expres's Supplement, the principal amount of Expres's claims was increased from USD 273,297.55 to USD 550,948.07.

47. Pursuant to paragraph 3 of Procedural Order No. 6, Solna filed a response to Expres's Supplement on 5 September 2008, together with two legal authorities.

48. Pursuant to paragraph 4 of Procedural Order No. 6, Expres filed a response on 10 September 2008.

49. Pursuant to paragraph 5 of Procedural Order No. 6, Solna filed a further reply on 19 September 2008, together with two further exhibits.

**Request for a witness to be heard by telephone**

50. By email dated 5 September 2008, Solna asked if one of its witnesses, Mr. Gunnar Johansson, could be heard by telephone from Stockholm. I duly invited Expres to comment on this request, and I also asked whether video conference might alternatively be acceptable. By email dated 9 September 2008, Expres confirmed that it was content for Mr. Johansson to be heard by video conference.

51. By email dated 15 September 2008, I accordingly directed that Mr. Johansson's evidence would be heard by video conference.

**Procedural issues which arose shortly before the hearing**

52. In an attempt to avoid last-minute procedural difficulties, I wrote to the Parties by email dated 18 September 2008, asking them to confirm a number of practical issues and to raise in good time any other issues that might arise.

53. Since I did not receive a response, I repeated this request by email dated 26 September 2008. Both Parties then raised a number of last-minute procedural issues.

54. I summarised the various procedural issues in an email dated 1 October 2008, and I directed the Parties to attend a procedural

conference by telephone on 3 October 2007, *i.e.* on the last working day before the start of the hearing.

55. The procedural conference took place as arranged on 3 October 2007, during which certain matters were agreed upon, as subsequently confirmed in Procedural Order No. 7 of the same date.

56. However, there remained three last-minute applications by Expres, each of which was objected to by Solna:

- an application that Mr. Eriksson should not be permitted to give evidence;
- an application for Mr. Oleksiy Malyarchuk to be introduced as a new witness, to be heard by video conference; and
- an application for one or two additional witnesses to be introduced by Expres in addition to Mr. Malyarchuk, also to be heard by video conference.

57. By Procedural Order No. 7, which was drafted in considerable detail, I rejected all three of Expres's applications, in each case for reasons of due process. Regarding Mr. Eriksson, I ruled that, by failing to object to Mr. Eriksson's involvement until 1 October 2008, despite having been originally told about Mr. Eriksson's potential involvement as a witness on 3 April 2008, *i.e.* almost six months earlier, the Claimant had accordingly lost its right to object pursuant to Article 33 of the ICC Rules. Regarding Mr. Malyarchuk and the other possible additional witnesses, I ruled that it was far too late to introduce new witnesses into the proceedings at this late stage.

## The hearing

58. The hearing finally took place in Paris at the premises of the ICC, 38 Cours Albert 1er, on 6-7 October 2008.

59. The procedure at the hearing was made very considerably more difficult as a result of the fact that:

- Expres's lead Counsel, Mr. Kavun, announced late on Saturday 4 October 2008 that his visa to enter France would only be valid from 8 October 2008, *i.e.* from the day after the last day of the hearing;

- Mr. Kavun nevertheless insisted on taking part in the entire hearing by video conference, even though he did not have proper facilities for doing so;[3]

- Furthermore, I was only made aware once the hearing had actually begun that Mr. Kavun did not speak English – the agreed language of the arbitration – and that he accordingly required every word of the hearing to be translated to and from Ukrainian.[4]

60. I should like to pay tribute to the interpreter, Mrs. Maria Malanchuk, who provided an extraordinary service to all involved during the

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3 Unlike the professional video conference facilities that had been arranged (through my firm's office in Stockholm) for the video evidence of Mr. Johansson, Mr. Kavun proposed that he should be linked up to the hearing via a "Skype" video link to his personal computer. However, it soon became apparent that this link could not be relied upon. Accordingly, it was agreed that Mr. Kavun would be linked up to the hearing via telephone, and this arrangement continued for the remainder of the hearing.

4 Expres had previously informed me that an interpreter would be required for the evidence of its witness, Mr. Pochynok, but no indication was given that the interpreter would also be required (for Mr. Kavun's purposes) for all the rest of the hearing. Had I known of this in advance, I would have scheduled a considerable amount of additional time for the hearing, including at least an additional half day, in order to take account of the delays that are inevitably caused by translation.

hearing in the most difficult of circumstances. I regret that her job was rendered almost impossible at times, as a result of the technical difficulties of running simultaneous translation over an international telephone line.

61. The procedure during the hearing largely followed the procedure as set out in Procedural Order No. 6, except that (a) Mr. Pochynok's evidence was heard at the start of the second day, (b) by agreement Mr. Johansson was heard before Mrs. Forsberg, and (c) the Parties agreed to provide closing statements in writing.

62. In summary:

- Both Parties gave oral opening statements, Expres for about 1½ hours and Solna for about 1¼ hours;
- Expres's witness, Mr. Ihor Pochynok, was heard in person, and examined, cross-examined and re-examined;
- Solna's witness, Mr. Gunnar Johansson, was heard by video conference, and examined and cross-examined – Solna chose not to conduct any re-examination;
- Solna's witness, Mrs. Eva Forsberg, was heard in person, and examined and cross-examined – Solna chose not to conduct any re-examination;
- Solna's witness, Mr. Andreas Eriksson, was heard in person, and examined and cross-examined – Solna chose not to conduct any re-examination.

63. Expres complained during the hearing that insufficient time was allowed for the examination and re-examination of Mr. Pochynok. However, I noted during the hearing that his examination took 2 hours, and his re-examination took 20 minutes. In total, I noted that

Expres spent a total of 4 hours and 10 minutes in asking questions to witnesses, while Solna spent a total of 3 hours and 5 minutes.

64. I should add that, in my discretion, I considered it to be fair that Expres be given some time more than the time given to Solna, since Expres was translating its questions to and from Ukrainian, which inevitably takes extra time. However, I did not think it would be fair to give Expres any further time than it was in fact given.

65. A number of procedural issues remained to be discussed at the end of the hearing. In particular, Mr. Kavun – who, unlike everyone else involved in the hearing, was sitting at his computer – had submitted a considerable number of further late documents, including three documents headed "petitions" and one document headed "statement", while the hearing was in progress.

66. The various outstanding procedural matters were discussed and ruled upon by me orally at the end of the hearing.

**The procedure following the hearing**

67. I later confirmed these various procedural issues and my rulings in a detailed procedural order, Procedural Order No. 8, dated 11 October 2008.

68. As agreed, and pursuant to paragraph 28 of Procedural Order No. 8, Expres filed its Closing Statement and a statement of costs on 22 October 2008, and Solna filed its Closing Statement and a statement of costs on 5 November 2008.

69. By email dated 6 November 2008, I asked the Parties whether there were any additional matters that they wished to raise prior to the closing of the proceedings. Neither Party raised any additional matters.

70. On the other hand, by email dated 12 November 2008, I raised two procedural issues that required clarification:

- Expres unilaterally filed several additional employment contracts, in addition to those employment contracts which had been presented to me and to Solna during the hearing. I therefore asked Solna whether or not it agreed that these additional employment contracts could be included in the proceedings.

- I had asked a legal question of both Parties at the end of the hearing[5], but whereas Solna gave a reply in its Closing Statement, Expres did not answer the question at all. I therefore invited Expres to state whether it agreed with Solna, or whether it had a different view.

In addition, I gave notice to the Parties that I would refer to some additional legal authorities for the purposes of deciding the case, and I confirmed that I would give the Parties an opportunity to comment on those authorities before the Award was finalised.

71. Solna replied by email the same day, stating that it did not agree to the additional employment contracts being included in the proceedings. Expres later confirmed by email dated 19 November 2008 that it still wanted the additional employment contracts included, and answered the legal question that I had posed.

72. On 28 November 2008, I issued Procedural Order No. 9, in which I ruled that the additional employment contracts would not be included in these proceedings. By my email with which I sent this procedural order to the Parties, I declared the proceedings closed for the purposes

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5 See paragraph 32 of Procedural Order No. 8: "*Does the Vienna / UN Convention on Contracts for the International Sale of Goods (CISG) apply, or does the Swedish Sale of Goods Act apply, or it is [sic] suggested that in some manner both are applicable?*".

of Article 22(1) of the ICC Rules. However, I reminded the Parties that I would revert to them with copies of additional legal authorities that I was proposing to refer to.

73. By email dated 10 December 2008, I circulated to the Parties five extracts from additional legal authorities, and I invited the Parties to provide comments on those legal authorities, should they wish to do so. I also invited the Parties to supplement their submissions on costs, if so desired.

74. By emails dated 10 December 2008, both Parties confirmed that they had received by email and the five attachments. Further, and upon my request, each Party confirmed by emails dated 15 December 2008 that it had no comments to make on the additional legal authorities that had been circulated, and that it did not propose to supplement its submissions on costs.

**The deadline for rendering the Final Award**

75. At its session of 7 November 2008, the ICC International Court of Arbitration extended the deadline for rendering the Final Award until 28 February 2009.

## (C) AN OUTLINE OF THE BACKGROUND FACTS

**Introduction**

76. The dispute between the Parties concerns the sale and delivery by Solna to Expres of a Solna Web Offset Printing Press, type SOLNA C800, model year 2007 (the "**Press**").

77. The Parties' respective rights and obligations are regulated by the Contract – Supply and Erection Contract No. 01-11/06, which was concluded between the Parties on 23 November 2006.

## The Contract

78. The Contract is a "turnkey" contract, pursuant to which the Supplier (Solna) is obligated to produce, supply, erect and commission the Press at the premises of the Purchaser (Expres) in Ukraine.[6]

79. The Contract is comprised of a Main Part (Clauses 1-11), and nine Appendices, which pursuant to Clause 1 are "incorporated into and made part of this Contract":

- Appendix #1: Specification of the Plant
- Appendix #2: Definition of Responsibilities, regarding installation of SOLNA Web offset presses
- Appendix #3: Acceptance Test / Taking-Over Test
- Appendix #4: Standard Terms of Warranty
- Appendix #5: Checklist
- Appendix #6: Press layout
- Appendix #7: General Conditions of Sale and Delivery
- Appendix #8: The Solna Technical Description (General Description and Performance Standards of the Press)
- Appendix #9: Parties' banking requsits [sic]

## The Main Part of the Contract

80. Clause 2.1 provides that Solna shall supply the Press CIP at Expres's premises. The Press is to be supplied CIP according to Incoterms 2000, except that the conditions on the passing of risk are as defined in the main part of the Contract.

81. Clause 2.1 goes on to provide that Solna is to "undertake and fulfil the following Works":

> (i) The engineering, procurement, manufacturing, standard packing and delivery of the Press, together with components and accessories required for the formation of the Press.
>
> (ii) The on-site erection and commissioning of the Press, as well as training of the Purchaser's [Expres's] press crew, required to complete the Works.

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6 Preamble, page 2; Clause 2.1, pages 2-4.

> The Supplier [Solna] will go through maintenance and troubleshooting routines with the Purchaser's [Expres's] personnel during the start-up processes. The main part of the trainings will take place in connection with the erecting and starting-up processes. The Purchaserrs [sic] [Expres's] personnel shall take an active part in the installation works, both mechanically and electrically. The Purchaser [Expres] shall arrange that there is always one printing crew present especially during the final part of the installations and starting-up procedures.

82. Clause 2.1 further provides that Solna is to supply a preliminary erection plan, a Press Installation Manual, "all other information, necessary for the peparation [sic] of project works", and "lists of complete sets of Spare Parts to be supplied with the Press and Operator's Manuals". Clause 2.1 further provides that:

> All Manuals provides for by Article 2 of the Contract, will be prepared in Ukrainian.

83. Clause 3.1 specifies a "Turn Key Price" for the complete Press of EUR 2,825,000. Clauses 3.2 and 3.4 set out provisions regarding the currency of payment and a payment schedule, which terms were later varied in Amendment No. 1 – see paragraph 93 below. Clause 3.3 sets out the following provision regarding price adjustments:

> All prices are fixed and firm. Import duties, clearance charges, taxes or any fiscal fees or any other contributions whatsoever which may be perceived by the Ukrainian authorities are excluded and to be borne by the Purchaser [Expres].

84. Clause 4 sets out "Special Terms" regarding shipment of the Press, including the following:

> At the Purchaser's [Expres's] request the Supplier [Solna] shall file all the necessary documents, required by the Ukrainian legislation, necessary for settling of different formalities (currency regulation, import clearance) for the fulfillment of this Contract's conditions. These may be the documents indicated in the Contract and also those which are not, but required by the Ukrainian legislation.

85. Clause 5 ("Responsibility") states:

In case of violation of terms of payments (item 3.4 of this Contract) for The Press, The Supplier [Solna] has the right to impose a fine in the amount of 0,3% of the outstanding payment on the top of the conditions of payment.

If the delivery or commissioning date of the Press stipulated by this Contract has not been observed, through Supplier's [Solna's] fault, the Supplier [Solna] is to pay a penalty at the rate of 0,3% from total contract price. The penalty amount is to be deducted from the third invoice of the Press, when payments are effected in accordance with Article 4 of this Contract. Should for any reason the Purchaser [Expres] fail to deduct the penalty amount from the invoice, the Supplier [Solna] is to pay to the Purchaser [Expres] separately.

86. Clause 6 ("Delivery and Commissioning Schedule") provides, *inter alia*:

> The Press is to be delivered from Supplier's [Solna's] works in Sweden 9 (nine) months, calculated after due settlement of the first installment of the down payment according to the item 3.4 of the Contract. Any delay of payment will suspend the delivery dates.

87. Clause 7 ("Conditions of Sale and Delivery") provides:

> The Press is supplied, installed and commissioned According to the "General Conditions of Sale and Delivery", if something other is not conditioned in the main part of the Contract and Appendices 1, 2, 3, 4, 5, 6.
>
> Not covered by the Scope of Works and excluded from the Supplier's obligations and responsibilities are certain provisions related to the Works, which are to be carried out as specified in Appendix # 2.

88. Clause 8 ("Language") provides:

> All project documents to be supplied under The Contract shall be in Ukrainian. All operation and maintenance manuals with drawings shall be in Ukrainian. The menu of the central control system and control shall be in Ukrainian. All labelling on the Press has to be in Ukrainian language or international signs.

89. Clause 9 provides various provisions on Service and Warranties.

90. Clause 10 is the arbitration and choice of law clause (see paragraph 8 above).

91. Clause 11 ("Other Clauses"), includes, *inter alia*, the following:

> The Contract must be signed by the authorized representatives of both parties. It shall come into force immediate after signed Contract on Financing of the Press Purchase between the Purchaser [Expres] and the Bank Swenska Handelsbanken AB ("SHB").
>
> ...
>
> The terms of the following items and issues of "The General Conditions of Sale and Delivery" shall not be observed in connection with the fulfillment of the conditionsas [sic] fo [sic] the present Contract: paragraph 4 issue 2 (definition of term "Value of the Contract"; issue 7; items e), f) issue 10; issue 15; issue 16; issue 17; issue 32; issue 33; the first sentence of issue 34; issue 36; issue 37.
>
> In the first sentence of the issue 41 of "The General Conditions of Sale and Delivery" the 24 monthes [sic] term shall be apllied [sic] instead of the one year term. The second and the third sentences of the issue 41 of "The General Conditions of Sale and Delivery" shall not ne [sic] applied. In the first sentence of the issue 42 of "The General Conditions of Sale and Delivery" the 24 monthes [sic] term shall be apllied [sic] instead of the one year term.

92. Appendices #1-#9 are attached to the Main Part of the Contract. For the purposes of this arbitration, the Appendices that are particularly relevant are:

- Appendix #2, which sets out detailed specifications of the Parties' different responsibilities during the installation of the Press at Expres's premises;
- Appendix #5, which also sets out some additional information regarding the Parties' responsibilities; and
- Appendix #7, which contains the General Conditions of Sale and Delivery.

**The Amendment to the Contract**

93. The Contract was later amended by an "Agreement on amendments", dated 12 March 2007, which amended Clauses 3.2 and 3.4 of the

Contract. Clause 3.2 is not relevant for the purposes of this arbitration. Clause 3.4, as amended, provides as follows:

> 3.4 PAYMENT SCHEDULE
> Payments are to be effected in the following manner:
>
> (I) The first installment of the downpayment in the amount of EUR 84 750 (eighty four thousand seven hundred and fifty), i.e. 3 % (three percent) of the total value of the Contract, shall be transferred to the account, not later 15th March 2007, by bank transfer
>
> The date of the first installment of the downpayment transfer is the date the bank processes the payment, defined in the payment order and confirmed appropriately by the bank.
>
> (II) The second installment of the downpayment in the amount of EUR 339 000 (three hundred thirty [sic] nine thousand), i.e., 12 % (twelve percent) of the total value of the Contract, shall be transferred to the account, not later 6 April 2007, by bank transfer
>
> (III) The Third payment in the amount of EUR 2 118 750 (two million one hundred eighteen thousand seven hundred and fifty) i.e. 75 % (seventyfive percent) of the total value of the Contract, payable upon the written notice of the Supplier [Solna] on the readiness of the Supplier [Solna] to make the delivery of the Press during the following 10 days.
>
> (IV) The fourth payment in the amount of EUR 282 500 (two hundred eighty two thousand and five hundred) 10 % (ten percent) of the total value of the Contract, after "Act of Commissioning" being signed by both Parties according to paragraph 5 of clause 6 of this Contract.
>
> The third and the fourth payments as for the Contract are effected by means of the funds attracted by the Purchaser [Expres] according to the Contract with Swenska Handelsbanken AB ("SHB").

**The Credit Facility provided to Expres**

94. Expres partially financed its purchase of the Machine by entering into a Credit Facility Agreement with Svenska Handelsbanken AB ("**SHB**"), dated 16 January 2007 (the "**Credit Facility Agreement**"), pursuant to which SHB granted a maximum loan in USD corresponding to EUR 2,401,250, up to 85% of the contract amount under the Contract.

95. There are only two parties to the Credit Facility Agreement – the Borrower (Expres) and the Lender (SHB). Solna is not a party to the Credit Facility Agreement.

96. It is stated in the preamble to the Credit Facility Agreement that:

> The decision by Svenska Handelsbanken AB (publ) to grant the loan mentioned above is, *inter alia*, subject to [sic] that the loan amount is guaranteed to 95 per cent against political risks and to 95 per cent against commercial risks by the Swedish Expert Credits Guarantee Board ("EKN").

97. For the purposes of this arbitration, it is relevant to note that Drawings under the Credit Facility Agreement are subject to various conditions precedent, as set out in Clause 3 of the Credit Facility Agreement.

98. Also relevant is Clause 29 ("Registration of Agreement"), which provides:

> This Agreement shall enter into full force and effect immediately upon its registration by the Borrower [Expres] with the National Bank of Ukraine.

**The guarantee provided by the Swedish Expert Credits Guarantee Board (EKN) to SHB and to Solna**

99. As a background to the transaction, EKN provided two separate guarantees – a guarantee to SHB against both political and commercial risks (see paragraph 96 above) (the "**SHB Guarantee**"), and a guarantee to Solna in respect of production costs (the "**Solna Guarantee**").

100. Solna called Mr. Eriksson, a former employee of EKN, as a witness, and Mr. Eriksson gave a brief description of the two EKN guarantees. Mr. Eriksson even quoted from the Solna Guarantee during the course of his evidence.

101. However, although I invited Solna to provide me with a copy of the Solna Guarantee, I was not provided with a copy of either guarantee.

## (D) THE CLAIMS MADE BY EXPRES

### Introduction

102. Expres has submitted several lengthy written submissions. It would appear that, at least in part, these are English translations of original documents that were written in Ukrainian.

103. It should be noted that the following is only intended to be a brief summary of Expres's claims. I shall consider the detailed arguments made by Expres in the course of determining the various claims – see section (F) below.

### Allegations of breach of the Contract

104. Expres claims that Solna has failed to perform various specific obligations under the Contract, as follows:[7]

(a) Most significantly,[8] failure to deliver the Press within 9 months from the date of the first payment[9] – *i.e.* by 15 December 2007[10] – contrary to Clause 6 of the Contract;

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7 Request for Arbitration, page 2. In providing this summary, I have followed the English terms as stated in the relevant provisions of the Contract, rather than the (rather different) terms used in the English translation of Expres's Request for Arbitration.

8 Expres describes this as the "main violation of the contractual provisions" (Statement of Claim, dated 11 June 2008, page 5).

9 Request for Arbitration, page 2; Statement of Claim, page 5.

10 Statement of Claim, page 5.

(b) failure to provide a written preliminary erection plan within four weeks from the date of the first payment – *i.e.* by 16 April 2007[11] – contrary to Clause 2.1 of the Contract;[12]

(c) failure to provide a Press Installation Manual in the Ukrainian language within seven weeks from the date of the first payment – *i.e.* by 4 May 2007[13] – contrary to Clause 2.1 of the Contract;[14]

(d) failure to provide "other information necessary for preparation of project works" within four weeks from the date of the first payment – *i.e.* by 16 April 2007[15] – contrary to Clause 2.1 of the Contract;[16]

(e) failure to provide a list of spare parts within twelve weeks from the date of the first payment – *i.e.* by 8 June 2007[17] – contrary to Clause 2.1 of the Contract;[18]

(f) failure to provide necessary documents for the fulfillment of formalities, contrary to Clause 4 of the Contract;[19]

(g) failure to provide confirmation of insurance, contrary to Clause 2.1 of the Contract and CIP Incoterms 2000;[20]

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11 Statement of Claim, page 5.

12 Request for Arbitration, page 2; Statement of Claim, page 5.

13 Statement of Claim, page 5.

14 Request for Arbitration, page 2; Statement of Claim, page 5.

15 Statement of Claim, page 5.

16 Request for Arbitration, page 2; Statement of Claim, page 5.

17 Statement of Claim, page 6.

18 Request for Arbitration, page 2; Statement of Claim, page 6.

19 Statement of Claim, page 6.

(h) failure to provide proper notification of delivery and necessary documents, contrary to Clause 2.1 of the Contract and CIP Incoterms 2000;[21]

105. As regards delivery of the Press, Expres claims that 15% of the Press was, in fact, delivered on 4 February 2008 (as certified by the customs declaration of that date), but that the final part of the Press was not in fact delivered until 19 September 2008.[22]

106. Concerning installation works, Expres claims that these have been considerably delayed. They should have started within 2 weeks of customs clearance of the Machine, i.e. not later than 29 December 2007, and finished within 12 weeks of customs clearance, i.e. not later than 8 March 2008. In fact, Expres claims that the installation works started on 4 February 2008 and had not finished by 11 June 2008.[23]

**Claims made by Expres**

107. Expres seeks the following relief (Statement of Claim, page 37; Supplement dated 6 August 2008):[24]

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20 Statement of Claim, page 6.

21 Statement of Claim, page 6.

22 Closing Statement, page 7.

23 Statement of Claim, page 5.

24 The Claimant's monetary claim as set out in the Terms of Reference was for USD 120,542.83. However, as the Claimant had made clear from the start, and as stated in paragraph 16 of the Terms of Reference, the quantum of the Claimant's claim increased during the course of the arbitral proceedings, as a result of increases in the amount of the Claimant's losses. I expressly confirmed in Procedural Order No. 4, dated 14 August 2008, that the increases in and additions to the Claimant's claim as set out in its Supplement were to be included in this arbitration.

| | *Claim* |
|---|---|
| (1) | To render an award, with which to hold [Solna] responsible for untimely supply of equipment to Ukraine according to the terms of [the Contract]; responsible for the non-fulfillment of the time schedule of supply of equipment to Ukraine and therefore in causing direct losses to [Expres]; |
| (2) | To render an award, with which due to gross negligence and the non-fulfillment of its obligations under the [Contract] to withdraw from [Solna] direct losses in the amount of [USD 273,297.55] (later increased to USD 550,948.07); |
| (3) | To render the decision to rely on [Solna] all the arbitration expenses in the amount of [USD 25,000]; |

108. This relief was then "defined more accurately" by Expres in pages 23-24 of Expres's written submission dated 1 July 2008, in which Expres added certain supplementary claims, as follows:

| | *Claim* |
|---|---|
| (4) | 4.1 To recognize Solna's guilt in gross negligence, as provided by Art.1 of the Annex #7 to the Contract, performed in relation to the execution of the terms of the Contract;<br><br>4.2 To recognize Solna's guilt in infringements, stipulated in the part "Arguments proving violation of the contractual provision" of the statement of claim, and to establish that those infringements, performed by Solna, have caused direct damages to Express. |
| (5) | 5.1 To recognize Solna's guilt in non-delivery of the Machine to Ukraine to the Buyer-Express in the established by the Contract period of 9 month, starting from 15.03.2007 until 15.12.2007 and its non-delivery as of 01.07.2008, as partial delivery of the Machine is a partial execution of Solna of the terms of the Contract with the performed infringements, established in the statement of claim.<br><br>5.2 To withdraw from Solna in favor of Express caused damages according to the Statement of claim. |

| | |
|---|---|
| (6) | To recognize Solna's guilt in the failure of the periods of installation and setting into operation of the Machine as this is provided for under the contract and withdraw from Solna the losses in favor of Express as provided under the Contract. |
| (7) | To recognize Solna's guilt in non-transmission of the full complete documentation for the Machine to the Buyer in the manner and the terms, provided for under the Contract, which has caused direct losses, and withdraw from Solna mentioned in the statement of claim losses in favor of Express. |
| (8) | To recognize Solna's guilt in causing direct losses to the Buyer – Express – by non-delivering the Machine, which has caused the payment to the workers for the compelled stoppage, with which in accordance to the Contract training and execution of works on setting the Machine into operation labor contracts are concluded, starting from the periods established by the Contract (i.e. non-provision of work and non-conduct of trainings after signing the labor contracts), as is supported by the agreements with them and is proved by evidence, and to withdraw from Solna such losses in favor of Express. |
| (9) | To recognize Solna's guilt in causing delay and untimely use of the credit resources, as provided by the Agreement with the Bank, which are provided by the Bank until 15.12.2007 (further payment of the interest and fines to the Bank are proven with documental evidence) and to withdraw such direct losses from Solna in favor of Express. |
| (10) | To recognize Solna's guilt in infringement of Art.5 of the Contract, in failure of delivering the Machine to the buyer and failure to installation and setting into operation of the Machine, and withdraw the provided under this article financial sanctions from Solna in favor of Express. |
| (11) | To recognize Solna's guilt in caused to Express arbitration expenses, as well as expenses for legal assistance, supported with documents, which shall be withdrawn from the Respondent in favor of the Claimant. |

109. Accordingly, Expres claims payment of the following amounts as a result of the breaches of the Contract as outlined above:[25]

| | *Claim* |
|---|---|
| (1) | reimbursement of a fine imposed on Expres by the State of Ukraine for overdue execution of the import operation, in the sum of USD 88,071.88; |
| (2) | payment of personnel costs incurred as a result of the delay in delivery and installation of the Press, in the sum of USD 171,255.57; |
| (3) | payment of a penalty for delay in delivery pursuant to Clause 5 of the Contract, in the sum of USD 22,543.50; |
| (4) | reimbursement for commission for non-used credit as a result of the delay in delivery of the Press, paid by Expres to SHB, in the sum of USD 2,190.58; |
| (5) | reimbursement for payment of additional interest paid by Expres to SHB as a result of the delay in delivery of the Press, in the sum of USD 44,323.00; |
| (6) | reimbursement for additional costs incurred as a result of the late provision of the installation plan, in the sum of USD 2,452.60; |
| (7) | payment of sanctions for delay in delivery of the Press pursuant to Appendix #7 of the Contract, paragraph 29, in the sum of USD 220,110.94. |

110. In addition to the above, Expres claims legal costs, as follows:

25 I note that, in its Request for Arbitration, Expres also originally referred to a claim for the cost of preparatory works in the amount of USD 30,000, and to a claim for the cost of training personnel, estimated at USD 4,800. However, these claims did not feature in Expres's later pleadings – see Statement of Claim, pages 19-20, and the Supplement to the Statement of Claim, dated 6 August 2008.

| | *Claim* |
|---|---|
| (1) | arbitration expenses for the provision and hearing of the case in the International commercial arbitration proceedings, in Paris in the amount of 18 000, 00 USD or higher amount in case of the decision on increasing the advance payment; |
| (2) | 38 011.26 EUR in respect of legal and other expenses. |

## (E) THE CLAIMS MADE BY SOLNA

111. Solna contests each of the claims made by Expres.

112. I shall consider in detail each of Solna's defences in the course of considering each of Expres's claims – see Section (F) below.

113. In addition, Solna has made three counterclaims during the course of this arbitration:

(a) A counterclaim for payment of interest, in respect of the later payment by Expres of the third installment under the Contract. Solna announced by letter dated 4 January 2008 that partial delivery would take place, first on 18 January 2008, and second on 4 February 2008. Solna, therefore, claims that the third installment – EUR 2,118,750, being 75% of the Contract Price – was payable by Expres as follows:

- EUR 1,017,187.50 on 8 January 2008 (*i.e.* 10 days prior to 18 January 2008), and
- EUR 599,062.50 on 25 January 2008 (*i.e.* 10 days prior to 4 February 2008)

In fact, however, Expres paid EUR 1,017,187.50 on 15 January 2008, and EUR 599,062.50 on 13 February 2008.

Accordingly, Solna originally claimed interest for late payment, pursuant to Appendix #7, paragraph 36, of the Contract, in the amount of EUR 4,055.

However, this claim was abandoned by Solna's counsel, Mr. Sparring, in the course of his opening statement at the hearing.

(b) Solna claims a contractual penalty in respect of the same late payment pursuant to Clause 5, paragraph 1, of the Contract, in the amount of EUR 4,849.

(c) Solna claims direct damages from Expres, being damages for reimbursement of additional costs caused by delay by Expres in issuing the PP-number, pursuant to Appendix #7, paragraph 34, of the Contract, in the amount of EUR 13,530.

However, Mr. Sparring revised this figure during his opening statement at the hearing. The revised figure is EUR 11,034.

114. Solna's counterclaims may, therefore, be summarised as follows:

| | *Counterclaims* |
|---|---|
| (1) | Penalty, EUR 4,849 |
| (2) | Direct damages, EUR 11,034 |

115. In addition, Solna claims legal costs, as follows:

| | |
|---|---|
| (1) | Legal fees, in the sum of EUR 87,500 |
| (2) | Translation costs, in the sum of EUR 150 |
| (3) | Travel costs, in the sum of EUR 1,315.00 |
| (4) | Witness disbursements, in the sum of EUR 150 |

## (F) DECISION AND DETAILED REASONING

### Summary – the principal issues to be considered

116. In determining this matter, I propose to consider the following issues in turn:

(1) The governing law of the Contract;

(2) Whether Solna has breached the Contract;

(3) Expres's Claims;

(4) Solna's Counterclaims.

### (1) The governing law of the Contract

Introduction

117. Before considering the Parties' respective arguments and counter-arguments, there is an important preliminary issue that needs to be determined – namely, under what law are the Parties' respective claims to be decided?

118. It is relevant to note in this connection that much of the argument can be determined by applying the detailed provisions of the Contract. Nevertheless, the underlying law is relevant in certain important respects. It is, therefore, appropriate to start with this issue.

The question that was asked at the end of the hearing

119. I asked the Parties the following question at the end of the hearing:[26]

> Does the Vienna / UN Convention on Contracts for the International Sale of Goods (CISG) apply, or does the Swedish Sale of Goods Act apply, or is it suggested that in some manner both are applicable?

120. Solna answered this question in its Closing Statement as follows:[27]

> 106. It is Solna's view that CISG, according to Article 1, 1(b), is applicable on the Contract. Further, Solna claims that according to Article 7 (1) and (2), when interpreting the Convention, regard is to be given to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. Questions concerning matters governed by the Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law, that is the Swedish Sale of Goods Act.
>
> 107. In accordance with the foregoing, Solna claims that CISG and Köplagen [*i.e.* the Swedish Sale of Goods Act] are applicable simultaneously and complement each other.

121. Expres did not deal with this question in its Closing Statement, but it stated the following in its email dated 19 November 2008:

> About appliance of International convention on sale goods: as it was repeatedly mentioned in written pleadings of Expres that the Convention should be applied during examination on this case, since in Contract parties has not excluded its action. In question of appliance of Sweden Trade law in examination on the case, Expres relies on Court opinion (decision).

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26 See also paragraph 32 of Procedural Order No. 8.

27 Solna's Closing Statement, paras. 106 and 107.

Analysis

122. Neither Party's answer to my question is satisfactory. A careful analysis is needed in order to determine the proper answer to the question.

123. The following matters need to be taken into account:

(a) The Parties provided at Clause 10 of the Contract that:

> The laws of respondent shall be applicable to The Contract and to its interpretation.[28]

(b) Both Parties agree that the "laws of respondent" is a reference to Swedish substantive law (Request for Arbitration, page 4; Answer, page 1).

(c) The relevant Swedish law is the Swedish Sale of Goods Act (*Sw. Köplagen*) (1990:931). However, section 5 of the Swedish Sale of Goods Act expressly provides:

> *Internationella köp*
>
> *5 § Lagen gäller inte i fall då lagen (1987:822) om internationella köp är tillämplig.*
>
> International sales
>
> Section 5 This Act does not apply in cases where the International Sales Act (1987:822) is applicable.
>
> (My translation)

(d) The Swedish International Sales Act (1987:822) incorporates into Swedish law Articles 1-13 and 25-88 of the UN (Vienna) Convention on Contracts for the International Sale of Goods (1980) ("CISG"). Section 1 of the Swedish International Sales Act provides that CISG shall apply in Sweden in the wording

---

28 Paragraph 62 of Appendix #7 also sets out a clause which is to very similar effect. However, in my opinion, this paragraph is not applicable – see paragraphs 9-11 above.

of its original texts, and the original texts of CISG in both English and French versions are attached as an appendix to the Swedish International Sales Act, together with a Swedish translation. The Swedish International Sales Act entered into force on 1 January 1989.

(e) I note in passing that Section 2 of the Swedish International Sales Act sets out an exception to the application of CISG in the event that both seller and buyer have their place of business in Denmark, Finland, Iceland, Norway or Sweden. However, since only the seller in the present case has its place of business in one of those countries, with the buyer having its place of business in Ukraine, this exception does not apply in the present case.

(f) It follows that it is necessary to consider the provisions of Chapter I of CISG, in order to determine whether or not CISG (and therefore the Swedish International Sales Act) is applicable. Article 1 of CISG provides:

> (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
>
> (a) when the States are Contracting States; or
>
> (b) when the rules of private international law lead to the application of the law of a Contracting State.
>
> (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.
>
> (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

(g) In the present case, the Parties' places of business are in different States – namely, Ukraine and Sweden – both of which are Contracting States of CISG.[29] Accordingly, CISG is applicable pursuant to Article 1(1)(a).

(h) Furthermore, CISG is also applicable pursuant to Article 1(1)(b). All relevant rules of private international law[30] uphold the parties' choice of Swedish substantive law – see paragraph 123 (a) & (b) above. Accordingly, such rules of private international law lead to the application of the law of a Contracting State (Sweden) within the meaning of Article 1(1)(b).[31]

(i) A further important consideration is whether the parties intended to derogate from CISG by stating that the "laws of respondent" shall be applicable (Clause 10 of the Contract). However, there is nothing in the wording of Clause 19 (nor indeed in the wording of paragraph 62 of Appendix #7) to indicate any such intention. I also note the following passage in Schlechtriem & Schwenzer, "*Commentary on the UN Convention on the International Sale of Goods (CISG)*", Second (English) Edition, 2005 ("**Schlechtriem & Schwenzer**"), pp. 90-91:

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29 See http://www.cisg.law.pace.edu/cisg/countries/cntries.html. CISG became effective in Ukrainian SSR, of which Ukraine is the successor, on 1 February 1991. CISG became effective in Sweden on 1 January 1989. Thus CISG was effective in both States at the time when the Contract was signed on 23 November 2006.

30 It is a standard feature of most systems of private international law – including in particular, for the purposes of this case, the Rome Convention on Law Applicable to Contractual Obligations – to give effect to the parties' express choice of law.

31 Neither Ukraine or Sweden has declared a reservation that it will not be bound by Article 1(1)(b).

> Since the CISG is part of the law to which the choice of law clause refers, such a reference also includes the CISG. The prevailing opinion, therefore, holds that a reference to the law of a Contracting State *in itself* does not amount to an exclusion of the CISG. If the CISG would have been applicable on the basis of Article 1(1)(a), this choice of law clause then merely determines the domestic law applicable to issues outside the sphere of application of the CISG.

(j) I note that the parties agree that CISG is applicable. I also note Expres's statement that the parties have not "excluded its action" (by which I take Expres to mean that the parties have not excluded its application).[32]

124. I conclude, therefore, that:

- CISG is applicable in the determination of the parties' respective rights and obligations under the Contract; and
- Pursuant to section 5 of the Swedish Sale of Goods Act – see paragraph 123(c) above – the Swedish Sale of Goods Act is accordingly not applicable.

Interpretation of Article 7(1) and (2) of CISG

125. Solna argues, nevertheless, that CISG and the Swedish Sale of Goods Act "are applicable simultaneously and complement each other". Solna relies expressly upon Articles 7(1) and 7(2) of CISG, which provide:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

---

32 See the Parties' respective answers to my specific question on this point – paragraphs 120 and 121 above.

126. Expres agrees that CISG applies, but it states that it "relies on the Court opinion (decision)" on whether Swedish law is applicable. I take this to mean that Expres is content to leave it to me to determine this question.

127. I, therefore, need to consider whether Articles 7(1) and 7(2) provide support for Solna's conclusion.

128. Article 7(1) is reasonably straightforward, providing three basic principles concerning the interpretation of CISG:

(a) regard is to be had to the international character of the Convention;

(b) regard is to be had to the need to promote uniformity in its application; and

(c) regard is to be had to the observance of good faith in international trade.

129. I note that Schlechtriem & Schwenzer suggest that Article 7(1):

> ... seeks to secure an autonomous interpretation of the provisions of the CISG and its general principles, i.e. an interpretation free from preconceptions of domestic laws.[33]

130. Article 7(2) is less straightforward in its application, but here too the underlying theory is clear. There is a two-step process:[34]

- Where a matter is governed by CISG but not expressly settled in it, that matter is to be settled in conformity with the general principles on which CISG is based.

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33 Schlechtriem & Schwenzer, page 94.

34 Schlechtriem & Schwenzer, page 102.

- If no such general principles can be determined, the matter is to be settled in conformity with the law applicable by virtue of the rules of private international law.

131. For present purposes, it is of particular relevance to note that domestic law is only to be applied in the absence of relevant general principles on which CISG is based. Schlechtriem & Schwenzer state:

> "If gap filling by uniform rules fails, domestic law is applicable as ultima ratio, i.e. as a last resort".[35] (Emphasis added)

132. I, therefore, find myself unable to accept Solna's contention, apparently based upon an application of Article 7, that CISG and the Swedish Sale of Goods Act "are applicable simultaneously and complement each other". On the contrary, Article 7(1) requires CISG to be interpreted internationally and *without* regard to domestic law preconceptions, and Article 7(2) provides that the express provisions of CISG, and failing those the legal principles on which CISG is based, take precedence over any application of domestic law.

133. For completeness, in the event that (following the application of the two-step process outlined in paragraph 130 above) domestic law is to be applied, the question arises as to what relevant rule of private international law is to be applied for the purposes of Article 7(2). Schlechtriem & Schwenzer state that the applicable domestic law is to be determined by the conflict rules of the forum.[36] Accordingly, since the seat of arbitration is Paris, the relevant rule is to be found in Article 1496 of the French Code of Civil Procedure, which provides:

> *L'arbitre tranche le litige conformément aux règles de droit que les parties ont choisies ; à défaut d'un tel choix, conformément à celles qu'il estime appropriées.*

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35 Schlechtriem & Schwenzer, page 109.

36 Schlechtriem & Schwenzer, page 109.

> The arbitrator shall decide the dispute in accordance with the rules of the law chosen by the parties or, in the absence of such choice, in accordance with the rules of the law he considers appropriate.

134. In the present case, the law chosen by the parties ("respondent's law") is Swedish law. Accordingly, Swedish law is applicable in the event that recourse is to be had to domestic law under Article 7(2).

135. In summary, therefore, Solna is correct that the Swedish Sale of Goods Act could be applicable, but only to the extent that (i) a matter arises that is governed by and not expressly settled in CISG, and (ii) that matter cannot be settled in conformity with the general principles on which CISG is based.

Application of any other laws?

136. A further issue arises as to whether any other laws or rules of law are to be applied pursuant to the Contract. Expres claims that the law of Ukraine and Incoterms are also applicable in certain respects.[37]

137. I have already found that CISG and (to a limited extent under Article 7) Swedish law, are applicable. Nevertheless, the Contract itself also refers to the following additional laws and rules of law:

- Ukrainian law and legislation (Clause 4; paragraph 14 of Appendix #7); and
- CIP, Incoterms 2000 (Clause 2.1).

138. These laws and rules of law are accordingly also potentially applicable, but only to the limited extent and in the specific manner specified in the Contract.

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37 Expres's written submission dated 1 July 2008, pages 13-14, and the references therein.

## (2) Whether Solna has breached the Contract

139. I now turn to consider Expres's various arguments regarding liability, and Solna's various counter-arguments.

140. As noted in paragraph 104 above, Expres makes the following separate allegations of breach of contract by Solna, each of which I shall consider in detail below:

(i) Delay in delivery of the Press;

(ii) Failure to provide a written preliminary erection plan;

(iii) Failure to provide a Press Installation Manual in the Ukrainian language;

(iv) Failure to provide "other information necessary for preparation of project works";

(v) Failure to provide a list of spare parts;

(vi) Failure to provide necessary documents for the fulfillment of formalities;

(vii) Failure to provide confirmation of insurance; and

(viii) Failure to provide proper notification of delivery and necessary documents.

### (i) Delay in delivery of the Press

141. Expres's principal claim is that Solna was late in delivering the printing press, and that Expres has accordingly suffered loss as a result of such late delivery.

142. Solna's defence to this claim is essentially two-fold: (a) that the delivery did not in fact become contractually due until January 2008, and thus that the delivery was not, in fact, delayed, and (b) that, further, Solna was entitled to suspend delivery.

Solna's first argument – when did delivery became contractually due?

*When did the Contract enter into force?*

143. Solna's first argument turns on the question of when the Contract entered into force. In short, Solna claims that the Contract did not come into force until 25 April 2007 (when Solna first knew about the registration of the Financial Agreement with the National Bank of Ukraine) and that delivery was therefore due 9 months after that date, *i.e.* at the latest on 25 January 2008.[38]

144. The relevant provisions of the Contract are as follows:

- Clause 3.4, as amended by the Amendment Agreement dated 12 March 2007 – "Payments are to be effected in the following manner: (I) The first installment of the downpayment in the amount of EUR 84 750 (eighty four thousand seven hundred and fifty), i.e., 3 % (three percent) of the total value of the Contract, shall be transferred to the account, not later 15th March 2007, by bank transfer

  The date of the first installment of the downpayment transfer is the date the bank processes the payment, defined in the payment order and confirmed appropriately by the Purchaser's bank. ..."

- Clause 6 – "The Press is to be delivered from Supplier's works in Sweden 9 (nine) months, calculated after due settlement of the first installment of the down payment according to the item 3.4 of the Contract. Any delay of payment will suspend the delivery dates correspondingly."

- Clause 11 – "The Contract must be signed by the authorized representatives of both parties. It shall come into force immediate after signed Contract on Financing of the Press Purchase between the Purchaser and the Bank Swenska Handelsbanken AB ("SHB")."

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38 Solna's Closing Statement, paras. 1-5.

145. The "Contract on Financing of the Press Purchase" – *i.e.* the Credit Facility Agreement – was signed by the parties to it, Expres and Svenska Handelsbanken AB, on 16 January 2007.[39] Thus, the wording of Clause 11 suggests that the Contract came into force immediately thereafter, *i.e.* on 16 January 2007.[40]

146. Nevertheless, Solna argues:

(a) that the Credit Facility Agreement did not itself come into force until it was registered with the National Bank of Ukraine;

(b) that Solna did not know of such registration until 25 April 2007, and

(c) that the effective date of the Contract should, therefore, be taken to be 25 April 2007.

147. I have already mentioned that the literal wording of Clause 11 suggests that the Contract enters into force immediately after the *signing* of Credit Facility Agreement. Nevertheless, there is some support for Solna's argument that this date should be postponed to the date of registration with the National Bank of Ukraine. Such support is not to be found in the Contract, but rather in Clause 29 of the Credit Facility Agreement, which provides:

> This Agreement shall enter into full force and effect immediately upon its registration by the Borrower with the National Bank of Ukraine.

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39 Exhibit 2 to Solna's First Written Submission, pages 1, 5 and 40.

40 The relevant words – "immediate after signed Contract" – are written in somewhat broken English, but the meaning would appear to be that the Contract will come into force immediately after the Credit Facility Agreement has been signed.

148. Accordingly, if Clause 11 of the Contract is intended to mean that the Contract enters into force immediately after the Credit Facility Agreement *enters into force*, then such date will be immediately after the registration of the Credit Facility Agreement with the National Bank of Ukraine.

149. The evidence shows that the Credit Facility Agreement was registered with the National Bank of Ukraine on 9 February 2007 – see Registration Certificate #507 (Exhibit C29). Solna has not challenged this evidence.

150. However, I have found no support – in the Contract, in the Credit Facility Agreement, or in any other documentation – for Solna's argument that the date on which the Contract entered into force should be postponed until the date on which Solna itself *knew about* the registration of the Credit Financial Agreement. It is notable, and revealing, that Solna does not attempt to provide any support for this proposition.[41]

151. I should add that, not only is Solna's argument entirely unsupported by the contractual documentation, but it also makes little commercial sense. The argument would appear to be that the entry into force of the Contract should be postponed for some indefinite amount of time until such date as Solna happens to find out about the registration. Even Solna appears to be unsure about when exactly it did find this out.[42] In my view, commercial parties would be very unlikely to

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41 Solna merely asserts that "... the deciding factor should be the time Solna received information about such registration" (written submission dated 11 June 2008, para. 3.2, page 4).

42 "As far as Solna remembers, Solna did not receive a notification of the registration of the Financing Agreement until April 2007, probably on the 25th of April 2007" (Answer, para. 3.2, page 4; written submission dated 11 June 2008, para. 3.2, page 4) (Emphasis added).

agree upon such an uncertain provision, and it is even more implausible that such a provision should be implied.[43]

152. In light of the above, I find that the Credit Facility Agreement was signed on 16 January 2007 and entered into force on 9 February 2007. It follows that, pursuant to Clause 11 of the Contract, the Contract entered into force on 16 January 2007, or at the latest, on 9 February 2007.

153. I should also add that, although it is not necessary for me to determine this further point, I agree with Expres that Solna's own actions during March 2007 suggest that Solna considered that the Contract was in force at that stage.

*When was the Press due to be delivered?*

154. In light of my conclusion above, the date of delivery of the Press needs to be determined pursuant to the relevant provisions of the Contract.

155. Clause 6 is clear in this regard: the Press is to be delivered from Solna's works in Sweden, 9 months after due settlement of the first instalment of the down payment.

156. Clause 3.4 (as amended) provides that the first instalment is to be transferred not later than 15 March 2007, and that the date of transfer "is the date the bank processes the payment, defined in the payment order and confirmed appropriately by the Purchaser's bank".

157. Payment Order # 25 (Exhibit C1) confirms that this payment was duly made on 15 March 2007.[44] Moreover, Solna admits that the first payment was made on 15 March 2007.[45]

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43 I also note Expres's argument that Solna would appear to have made little effort to ascertain the date of registration – see, in particular, the certificate from the National

158. It follows, pursuant to Clause 6 of the Contact, that the Press was due to be "delivered from [Solna's] works in Sweden", 9 months after 15 March 2007, *i.e.* on 15 December 2007.

159. Leaving aside Solna's arguments regarding "frustration", "right of stoppage" and "retention of delivery", which will be addressed below, I therefore find in favour of Expres, that Solna was contractually required to "deliver" the Press from its works in Sweden no later than 15 December 2007.

Solna's second argument – was Solna entitled to withhold delivery?

160. In addition to its argument that there was a delay in the Contract coming into force, Solna argues that it is entitled to exercise a further delay in delivery of the Press by reason of a contractual or legal right to retain or delay delivery. By this means, Solna seeks to extend its period of lawful delay even further, from January until August 2008.

161. Various legal grounds have been put forward by Solna in support of this argument, including:

(a) "a frustration of the Contract", which extended the time limit for Solna's delivery;

(b) anticipated non-performance by Expres, giving Solna a right to delay delivery pursuant to Appendix #7, paragraph 59 of the Contract;

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Bank of Ukraine suggesting that Solna has not made any written enquiries about this matter (Exhibit C51).

44 Exhibit C1.

45 Answer, para. 3.3.3, page 6; Solna's written submission dated 11 June 2008, para. 3.4.1, page 6: "According to amendment 1 of the Contract, Ekspres has paid 3 % of the Contract price on the 15th of March 2007 ...".

(c) a right of retention of delivery pursuant to the Swedish Sale of Goods Act, sections 10 and 61; and

(d) a right of retention of delivery purusuant to CISG, Article 71.

162. Put shortly, Solna claims that such right of retention arose as a result of discrepancies between the Credit Facility Agreement and the Contract, and as a result of the negotiations between the parties that took place between June and December 2007 regarding those discrepancies.

163. Solna's argument, as finally summarised in its Closing Statement, is that it had a right of retention of delivery:

(a) for six months and one week (*i.e.* from 14 June until 21 December 2007), thus – on Solna's argument – postponing the delivery time from 25 January 2008 until 2 August 2008; or alternatively

(b) for one month and twelve days (*i.e.* from 9 November until 21 December 2007), thus – on Solna's argument – postponing the delivery time from 25 January 2008 until 6 March 2008.

*The law*

164. Before considering the factual matters in support of Solna's argument, it is important to put the argument in its proper legal context.

165. First of all, as Solna mentions, the Contract gives each party the right to suspend performance on grounds of anticipated non-performance, pursuant to Appendix #7, paragraph 59, which provides:

> "ANTICIPATED NON-PERFORMANCE
>
> 59. Notwithstanding other provisions in these conditions regarding suspension, each party shall be entitled to suspend the performance of his obligations under the Contract, where it is clear from the

circumstances that the other party will not perform his obligations. A party suspending his performance of the Contract shall forthwith notify the other party thereof In Writing."

(Emphasis added)

166. Secondly, and to similar effect, Article 71 of CISG provides:

> "(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:
>
> (a) a serious deficiency in his ability to perform or in his creditworthiness; or
>
> (b) his conduct in preparing to perform or in performing the contract.
>
> (2) [*Not relevant in this situation*]
>
> (3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance."
>
> (Emphasis added)

167. Solna also refers to a right of retention of delivery pursuant to the Swedish Sale of Goods Act, sections 10 and 61, and to a general doctrine of "frustration". However, for the reasons set out above (paragraphs 117-138), I have found that Swedish law is not directly applicable. I see no basis for applying either general principles or domestic law under Article 7 in this particular situation.

*The discrepancy*

168. Solna's case turns on a discrepancy between the Contract and the Credit Finance Agreement. What exactly is the discrepancy? Put shortly:

(a) The Contract (as amended on 12 March 2007) provides that the third payment in the amount of EUR 2,118,750, *i.e.* 75% of the total value of the Contract, is "*payable upon the written*

*notice of the Supplier on the readiness of the Supplier to make delivery of the Press during the following 10 days*", and that this payment is "*effected by means of the funds attracted by the Purchaser according to the Contract with Swenska Handelsbanken AB ("SHB")*".

(b) However, the Credit Facility Agreement dated 16 January 2007 provides that SHB's obligation to grant any Drawing (as defined) is subject to various conditions precedent, including in relation to the payment of EUR 2,118,750, "*original copies of the relevant shipping documents for the Equipment evidencing that delivery of the Equipment has been completed*" (Clause 3.2(j), and Schedule 5).

169. Thus, so Solna argues, the Contract provides for the payment to be made *before* delivery, whereas the terms of the Credit Facility Agreement reveal that payment will not actually be made by SHB until *after* delivery.

*The negotiations between the parties*

170. The evidence shows that the Parties were involved in lengthy, and at times heated, negotiations regarding this discrepancy from June until December 2007.

171. I have not been provided with a complete set of correspondence between the Parties in relation to these negotiations. Nevertheless, from the documents that I have been given, it is possible to obtain a reasonably good overview of what happened during this period.

172. It would appear that Solna's principal proposal was for the Parties to amend the Contract, and in particular the provisions regarding the third and fourth payments, by entering into an Amendment No. 2. Various drafts of this Amendment appear to have been circulated – drafts dated 14 June 2007, 13 September 2007, 27 November 2007,

28 November 2007, and 19 December 2007, all appear in the file (Exhibits C38-42).

173. It would also appear that the Parties were, at one time, close to agreement regarding this issue – see, for example, page 2 of Solna's letter to Expres dated 19 November 2007, and page 2 of SHB's letter to Expres dated 21 November 2007 (Solna's Exhibits 6 & 8 to its First Written Submission).

174. There seems to have been a particular flurry of activity during the period 19-21 November 2007, when Solna, EKN and SHB all sent letters to Expres on consecutive days, each letter urging Expres to agree to make the amendment (Solna's Exhibits 6, 7 & 8 to its First Written Submission). I note that EKN's letter is written in a somewhat threatening tone.

175. A conference call between Solna, Expres, EKN and SHB then followed on 26 November 2007 (as mentioned in Expres's letter to Solna dated 6 December 2007 – Exhibit C19).

176. In the end, however, the Parties did not reach agreement regarding Amendment No. 2, which was never formally executed. I note that Expres was particularly concerned about what it saw as an attempt by Solna to insert a provision that would have formally allowed delivery of the Press in parts – see Expres's letter to Solna dated 6 December 2007 (Exhibit C19).

177. Nevertheless – and I consider this to be of crucial significance – Solna agreed after all to make delivery of the press at the beginning of January 2008, despite the absence of Amendment No. 2. The relevant letters are Solna's letters to Expres dated 4 January 2008 and 16 January 2008 (Exhibits C22 and C21). To quote from Solna's own words:

(4 January 2008)

With reference to earlier proposal and discussions with EKN as well as Solna Offset AB, we are prepared to continue discussions and to find a solution concerning the delay in delivery which has arisen. This does not, however, reflect any change in our understanding of the question of responsibility, which Solna Offset AB can not be held responsible for.

Of course, it would be a great advantage if we can agree concerning Amendment # 2. However, until then the contract between Solna and Expres (Supply and Erection Contract No. 01-11/06, signed 23 November 2006 with Amendment #1, signed 12 March 2007) is valid in its present wording.

According to our contract, Solna Offset AB hereby notifies readiness to make deliveries as follows ...

(16 January 2008)

Yesterday, January 15, 2008, Svenska Handelsbanken confirmed to us that all conditions for the payment for the first delivery have been fulfilled by you. Despite there is no Amendment 2 signed, we will make an exception from our contract and regard this confirmation from the bank as equivalent to a payment to us, as stated in the contract (10 days before delivery).

Considering the above, we hereby confirm the readiness to make the delivery of Solna equipment, defined as Delivery number 1, in our letter January 4, 2008, from factory on January 25, 2008.

(Emphasis added)

178. Thus, after around six months of complaints that it was unable to make delivery until Amendment No. 2 was signed, in the end Solna decided to "make an exception" and to make delivery without the amendment.

*Did Solna have a right to suspend performance?*

179. According to the wording both of Appendix #7, paragraph 59 of the Contract and of Article 71 of CISG, Solna needs to show that it became clear, or apparent, that Expres would not perform its obligations or a substantial part of them. It is not enough that Solna was fearful that there might be a breach of contract by Expres, or that

Solna wanted to secure itself against the possibility of a breach of contract.

180. Solna has described its concerns in various different ways in the course of its submissions:

(a) Solna's Counsel, Mr. Sparring, stated in his opening statement at the hearing that the discrepancy "made it uncertain for Solna to receive payment";

(b) Solna argues that it "had reasons to expect that Ekspres would fail in their obligations according to the Contract" (Answer, para. 3.3.3, page 6), or "had reasons to anticipate late payment or non-payment" (Written Submission dated 5 September 2008, para. 25, page 6), or "anticipated non-performance" (Closing Statement, paragraph 6);

(c) Solna argues in several places that, due to the discrepancy, it "was not guaranteed to get paid" (Answer, para. 3.3.3, page 6; Written Submission dated 11 June 2008, para. 3.3, pages 4-5);

(d) Solna argues that EKN did not allow Solna to deliver "if the payment [was] not safe" (Answer, para. 3.3.3, page 6).

181. Did the circumstances make it clear, or apparent, that Expres would not perform its obligations or a substantial part of them? Solna does not actually go so far as to say that, and after careful consideration I have come to the conclusion that the evidence does not support that conclusion.

182. Expres's witness, Mr. Pochynok, stated forcefully that it would have been a "mad idea" for anyone to think that Expres, which had already paid almost half a million Euro and "had done so much to make the Contract work" would then not perform the Contract.

183. EKN, nevertheless, suggested in its letter to Expres dated 20 November 2007 that:

> The only possible interpretation of your position is that you do not intend to fulfil your payment obligations under the Contract.

184. With respect, I do not agree. EKN may not have known the full background. However, the correspondence between Expres and Solna reveals that there had developed a considerable element of distrust between them during the autumn of 2007. Solna could not understand why Expres would not sign the proposed amendment. On the other hand, Expres considered that Solna was already in breach of contract by failing to supply various items of information (see paragraphs 196-202 below), Expres was concerned that Solna might delay delivery of the Press, and Expres suspected that Solna was seeking to force Expres to sign an amendment against its commercial interests. As to this last point, the fact that Solna apparently sought to introduce an agreement to allow delivery in parts was a particular deal-breaker.

185. In short, it was quite unrealistic to think that Expres would agree to sign an amendment to the Contract in such antagonistic circumstances. It is relevant to note that Expres threatened and then started these arbitration proceedings during this period, in November/December 2007. Parties who are about to enter into legal proceedings rarely reach agreements on anything. In the circumstances, EKN's "only possible interpretation" is misplaced.

186. The most that can be said in favour of Solna's argument, is that it was clear that the actual payment would take place later than was envisaged under Clause 3.4(III) of the Contract, as amended by Amendment No. 1. However, as Mr. Pochynok argued strongly, once Expres signed the drawing request, then the payment was irrevocable. The discrepancy with the Credit Facility Agreement would give rise

to a delay in actual payment[46], but in my view that mere timing issue does not give any grounds for a suspension of performance in these circumstances.

187. During the hearing, Solna's case developed into an argument that EKN effectively refused to allow Solna to deliver without Amendment No. 2. However, the evidence does not support that conclusion:

(a) Solna's witness, Mrs. Forsberg, stated during her evidence:

- "EKN then got involved. The reason was to secure payment. Without secured payment, we're almost not allowed to deliver. The reason is that we would then be risking the EKN guarantee." (Emphasis added)

- "EKN recommended that we should have amendment 2 signed."

- "Payment has to be secured according to EKN's conditions. ... There were certain conditions that needed to be fulfilled."

- "SHB was guaranteed by EKN. EKN is state owned. EKN has its own conditions, and we need to follow their conditions. ... The key is that we needed EKN. We tried altogether. We tried to convince Ekspres to sign amendment number 2, but Ekspres didn't do that. They didn't do that. So the thing is ... it is not a trust thing, but there are conditions for all the parties involved."

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46 This might in turn give rise to a liability upon Expres to pay a contractual penalty to Solna for late payment under Clause 5 of the Contract – see Solna's first counterclaim below.

(b) Mr. Eriksson stated during his testimony:

- "Eventually there was a risk that EKN would have to make payment under the guarantee. Obviously that was not the preferred solution."

- "[Was EKN authorized to interrupt delivery?] Yes, in certain circumstances, EKN was authorized to require Solna to take actions, including to terminate the contract. The obvious effect, if Solna didn't follow, was that the guarantee would be null and void. It would be Solna's choice if it could live without the guarantee."

- "Item 3 of the general terms and conditions: "EKN and the beneficiary shall cooperate and consult with each other on measures to avoid and limit loss, concerning payments etc." ... "If EKN and the beneficiary cannot agree on what measures to be taken, EKN decides."

188. Mrs. Forsberg stated that "the key" was that Solna needed EKN. Solna wishes to present its case as though it had no choice but to stop production, because of the conditions posed by EKN. However, the evidence shows a rather different picture. Mrs. Forsberg stated: "we're <u>almost</u> not allowed to deliver" (my emphasis). Mr. Eriksson stopped short of suggesting that EKN actually required Solna to suspend delivery.

189. Moreover, and crucially for Solna's case, EKN and Solna did eventually agree to accept that payment would take place after delivery, once it became clear that Expres would not sign amendment no. 2. In my view, Solna's letter of 16 January 2008 (quoted above) reveals the truth: Solna eventually agreed to "make an exception from

our contract". I asked Mr. Eriksson at the end of this evidence whether EKN changed its position, and his answer was that this happened after he left the company. Changes of position often occur in connection with changes in personnel.

190. Furthermore, and as Expres strongly submitted, it appears that the real reason for the change in Solna's position is that the Press, or at least the first part of it, was ready for delivery in January 2008. Mrs. Forsberg virtually admitted this in her evidence, when she said:

- "[Why did you change your mind?] We had a discussion with EKN. ... We decided that the best thing was to deliver. All was ready. Therefore, we decided to go ahead, and EKN also recognised that it was the best thing for all concerned." (Emphasis added)

191. I should add, for completeness, that the Hungarian case cited by Solna (Case VB/94124) is very different from the present case. In that case, the buyer promised to secure payment by procuring a bank guarantee in favour of the seller, but then he did not do so. In the present case, Expres has not promised to secure payment in favour of Solna. Solna's security comes from its contract with EKN, but that is an entirely separate contract to which Expres is not a party.

192. Finally, there is no evidence to support Solna's argument that Expres "has direct [sic] or by implied action accepted the extended time limit of delivery that occurred due to the extended negotiations" (Answer, page 6). The correspondence shows clearly that Expres was insisting throughout that delivery had to take place in full by 15 December 2007.

193. Had I been deciding this matter under Swedish law, I would also have reached the same conclusion. Section 61 of the Swedish Sale of Goods Act is in similar terms to Article 71 of CISG. Section 10 of

the Swedish Sale of Goods Act is not relevant: Solna was suspending production for several months, not exercising a right of retention of delivery.

194. Solna's original case on this issue was based on an unspecified ground of "frustration". The legal basis for this was never fully explained, and this argument appears to have been abandoned. Nevertheless, I take "frustration" to be a reference to *förutsättningsläran* under Swedish law, which is a doctrine that frees a contracting party from its obligations in extreme cases where performance is prevented as a result of a material change of circumstances. For completeness, I see no grounds for the application of this doctrine in the present case. In any event, for the reasons given above, I find that Swedish law does not apply to this issue.

195. In conclusion, I find that Solna breached Clause 6 of the Contract by failing to deliver the Press on 15 December 2007.

**(ii) Failure to provide a written preliminary erection plan**

**(iii) Failure to provide a Press Installation Manual in the Ukrainian language**

**(iv) Failure to provide "other information necessary for preparation of project works"**

**(v) Failure to provide a list of spare parts**

196. Expres makes several additional claims regarding breach of the Contract by Solna in relation to supplying the necessary documentation and information during 2007, as required under Clause 2.1 of the Contract. In summary:

(a) the written preliminary erection plan and "other information necessary for preparation of project works" were due by 16 April 2007;

(b) the Press Installation Manual in the Ukrainian language was due by 4 May 2007; and

(c) a list of spare parts was due by 8 June 2007.

197. Expres complained about these matters in its letter to Solna dated 1 November 2007. By June 2008, when Expres submitted its Statement of Claim, Expres was still complaining that the Press Installation Manual and the list of spare parts had not yet been provided.

198. Solna does not appear to deny Expres's claim that the Press Installation Manual and the list of spare parts were not delivered on time. Solna's response is that Expres has not suffered any damage as a result (see Solna's written submission dated 1 July 2008, paras. 6 and 7). Solna also points out that there has been no error or misinformation on its part on how the foundations should be constructed (see Solna's written submission dated 1 July 2008, para. 13(q)).

199. For its part, Expres agrees that it has not yet suffered any loss arising from the non-delivery of the list of spare parts (see Expres's reply dated 9 July 2008, page 2 ("On para. 7")), and there is no claim in this arbitration in respect of that particular breach.

200. However, the result of the lack of relevant information is clearly spelt out by Expres in its letter to Solna dated 5 March 2008 (Exhibit C17). The particular problem that arose was that the "Megtech splicer DLP 2-50" did not correspond to its installation measurements as presented in the preliminary drawings that Solna did provide. Accordingly, Expres informs Solna in this letter that it will be necessary "to destroy

a certain part of the foundation in full and to make a new concrete one on the same place".

201. Thus, the allegation is not that Solna made any errors or provided any misinformation in the documentation that it did provide. The allegation is that the insufficient documentation was provided, contrary to the specific requirements of the Contract.

202. In the circumstances, I conclude that Solna breached Clause 2.1 by failing to provide the written preliminary erection plan, "other information necessary for preparation of project works", the Press Installation Manual, and a list of spare parts within the particular time periods specified in that Clause.

**(vi) Failure to provide necessary documents for the fulfillment of formalities**

203. Expres also claims that Solna failed to provide necessary documents for the fulfillment of formalities, contrary to Clause 4 of the Contract.

204. In particular, Expres claims that the technical documentation for one of the component parts – the printing press cooling system AZTO – was not provided in time, and was provided only after the customs office had refused to grant permission for the importation of this part of the equipment into Ukraine. Furthermore, Expres claims that when the documents were provided, they were provided in English and in electronic form, whereas the Contract stipulated written documents in the Ukrainian language (Statement of Claim, page 10).

205. Solna contests this claim (written submission dated 1 July 2008, page 2, paragraphs 8&9). In short, Solna disagrees that the Contract requires written documents to be provided in Ukrainian, Solna states that it was unaware of what "appropriate documentation" the customs authority required, and Solna adds that it managed "on its own

behalf" to provide the customs authorities with the relevant documentation in order to get the import clearance for the press.

206. I agree with Solna that Clause 4 of the Contract does not state that documents may not be provided electronically, nor does it state that they have to be in the Ukrainian language. In fact, Clause 4 merely states:

> At the Purchaser's [Expres's] request the Supplier [Solna] shall file all the necessary documents, required by the Ukrainian legislation, necessary for settling of different formalities (currency regulation, import clearance) for the fulfillment of this Contract's conditions. These may be the documents indicated in the Contract and also those which are not, but required by the Ukrainian legislation.

207. However, Clause 8 of the Contract states that all "project documents" and all "operation and maintenance manuals with drawings" are to be in Ukrainian. Thus, Solna may have breached this provision, but I do not see a separate claim by Expres for breach of Clause 8 of the Contract.

208. If Expres's claim is that the necessary documents were part of the Press Installation Manual, which should have been provided in May 2007 pursuant to Clause 2.1, then I have already found that Solna was in breach of that Clause.

209. However, I find that Expres has not proved that there was a separate failure to comply with Clause 4. I note that, in its letter to Solna regarding this issue dated 13 February 2008 (Exhibit C11), Expres complains about the lack of documents under Clause 2.1, not about further additional documents.

210. I note that Solna did then take steps to resolve the issue, following receipt of Expres's letter of 13 February 2008.

211. Accordingly, I find for Solna on this particular point.

**(vii) Failure to provide confirmation of insurance**

212. Expres claims that Clause 2.1 of the Contract requires Solna to insure the shipment, and that no confirmation of such insurance was provided.

213. Solna's response (written submission dated 1 July 2008, paragraph 10) is as follows:

> The allegation that Solna has failed to provide insurance policy for the machine is not a circumstances that has caused any damage to Ekpres and therefore is not ground for any claim. Solna has taken out insurance cover in accordance with the Contract, see Exhibit 1.
> ...

214. In fact, the insurance certificate provided by Solna (Exhibit 1 to its written submission dated 1 July 2008) shows that it took out insurance as from 4 February 2008, which was the date of the first actual delivery. Clause 2.1 expressly states that the Supplier's obligation is to provide an insurance policy covering risks "from date of shipment".

215. Accordingly, I find for Solna on this point. It had no obligation to provide an insurance policy before the date of shipment.

**(viii) Failure to provide proper notification of delivery and necessary documents**

216. Finally, Expres appears to make a further claim for failure to provide proper notification of delivery and failure to provide necessary documents, as required under CIP Incoterms 2000.

217. However, to the extent that Expres alleges a breach of the Contract, this claim has already been covered in paragraphs 196-211 above. To the extent that Expres raises these issues as a defence to Solna's

counterclaim regarding the PP-number, I shall deal with that matter below.

## (3) Expres's Claims

### Summary

218. For the reasons stated above, I have found that Solna breached Clause 6 and Clause 2.1 of the Contract. It is, therefore, necessary to proceed to consider the question of what remedies flow from such breaches of the Contract.

219. As already noted, Expres claims reimbursement of the following losses and expenses:

| | *Claim* |
|---|---|
| (1) | reimbursement of a fine imposed on Expres by the State of Ukraine for overdue execution of the import operation, in the sum of USD 88,071.88; |
| (2) | payment of personnel costs incurred as a result of the delay in delivery and installation of the Press, in the sum of USD 171,255.57; |
| (3) | payment of a penalty for delay in delivery pursuant to Clause 5 of the Contract, in the sum of USD 22,543.50; |
| (4) | reimbursement for commission for non-used credit as a result of the delay in delivery of the Press, paid by Expres to SHB, in the sum of USD 2,190.58; |
| (5) | reimbursement for payment of additional interest paid by Expres to SHB as a result of the delay in delivery of the Press, |

| | |
|---|---|
| | in the sum of USD 44,323.00; |
| (6) | reimbursement for additional costs incurred as a result of the late provision of the installation plan, in the sum of USD 2,452.60; |
| (8) | payment of sanctions for delay in delivery of the Press pursuant to Appendix #7 of the Contract, paragraph 29, in the sum of USD 220,110.94 |

220. All of these claims are, in essence, claims arising out of the delayed delivery of the Press. I shall deal with each of these claims in turn below. However, before I do so, I think it is important to describe how the Contract deals with potential remedies for delayed delivery.

**The remedies for delayed delivery as provided under the Contract**

Summary

221. Neither Party presented me with a systematic analysis of the relevant provisions of the Contract. However, in order to reach a correct decision, I consider that I am required to consider the various provisions of the Contract together, in their proper context. This I have endeavoured to do below.

222. The Main Part of the Contract includes the following provision under Clause 5 ("Responsibility"):

> If the delivery or commisioning [sic] date of the Press stipulated by this Contract has not been observed, through Supplier's [Solna's] fault, the Supplier [Solna] is to pay a penalty at the rate of 0,3% from total contract price. The penalty amount is to be deducted from the third invoice of the Press, when payments are effected in accordance with Article 4 of this Contract. Should for any reason the Purchaser [Expres] fail to deduct the penalty amount from the invoice, the Supplier [Solna] is to pay to the Purchaser [Expres] separately.

(Expres raised, during the hearing, an argument that the English version of this clause does not correspond with the Ukrainian version. As to this, see paragraphs 305-307 below.)

223. I note that Clause 5 does not state that the penalty is intended to be the *sole* remedy for late delivery under the Contract.

224. Appendix #7 ("General Conditions of Sale and Delivery") then adds several detailed provisions, under the heading "Completion – Contractor's Delay". In particular:

> 25. The Works shall be considered as completed when they are ready for production start up.
>
> ...
>
> 29. The Contractor [Solna] is in delay when the Works are not completed at the time for completion as defined in Clauses 25, 26 and 28. The Contractor's [Solna's] delay entitles the Purchaser [Expres] to liquidated damages from the date on which the Works should have been completed. The liquidated damages shall be payable at a rate of 1 per cent of the Contract Price for each completed month of delay. The liquidated damages shall not exceed 5 per cent of the Contract Price. If only part of the Works is delayed, the liquidated damages shall be calculated on that part of the Contract Price which is attributable to such part of the Works as cannot in consequence of the delay be used as intended by the parties. The liquidated damages become due at the Purchaser's [Expres's] request In Writing but not before taking-over or termination of the Contract under Clause 30. The Purchaser's [Expres's] right to liquidated damages shall be forfeited if such request has not been submitted within six months after the due time for completion.
>
> 30. If 6 months after the contractual delivery date the Works are still not completed, the Purchaser [Expres] may demand In Writing completion within a final reasonable period. If the Contractor [Solna] does not complete the Works within such final period and this is not due to any circumstance for which the Purchaser [Expres] is responsible, then the Purchaser [Expres] may be notice In Writing to the Contractor [Solna] terminate the Contract in respect of such part of the Works which, due to the Contractor's [Solna's] failure, cannot be used as intended by the parties. If the Purchaser [Expres] terminates the Contract he shall be entitled to compensation for the loss he has suffered as a result of the Contractor's [Solna's] delay. The total compensation, including the liquidated damages which are payable under Clause 29, shall not exceed 10 per cent of that part of

the Contract Price which is attributable to the part of the Works in respect of which the Contract is terminated.

31. Liquidated damages under Clause 29 and termination of the Contract with limited compensation under Clause 30 are the only remedies available to the Purchaser [Expres] in case of delay on the part of the Contractor [Solna]. All other claims against the Contractor [Solna] based on such delay shall be excluded, except where the Contractor [Solna] has been guilty of Gross Negligence.

225. "Gross Negligence" is defined in Appendix #7, paragraph 1 as follows:

> „Gross Negligence" shall mean an act or omission implying either a failure to pay due regard to serious consequences, which a conscientious contracting party would normally foresee as likely to ensue, or a deliberate disregard of the consequences of such act or omission.

226. Appendix #7, paragraph 60 then provides:

> CONSEQUENTIAL LOSSES
> 60. Save as elsewhere stated in these conditions there shall be no liability for either party towards the other party for loss of production, loss of profit, loss of use, loss of contracts or for any consequential, economic or indirect loss whatsoever.

<u>What remedies are available under the Contract?</u>

227. While Clause 5 is applicable to delays in delivery or delays of commissioning, Appendix #7, paragraphs 25-31 refers only to delays of completion.

228. The fact that the Main Part of the Contract and Appendix #7 use different terminology is not helpful. Nevertheless, it would appear to be the intention that "commissioning" in the Main Part of the Contract corresponds to "completion" in Appendix #7. I note that Clause 6 of the Main Part of the Contract uses both words.

229. In my view there are essentially two questions here:

(i) what remedies are available for delays in *delivery*?

(ii) what remedies are available for delays in *commissioning*?

230. Having considered the contractual provisions carefully, my conclusions in relation to these questions are as follows:

*General considerations*

(a) As noted above, there is a contractual penalty for delay under Clause 5 of the Main Part of the Contract. This clause provides contractual penalties for delay in delivery and for delay in commissioning.

(b) Also as noted above, there is nothing in the Main Part of the Contract to indicate that these contractual penalties are intended to be the *sole* remedies in such circumstances.

(c) The question then arises whether paragraphs 25-31 of Appendix #7 are applicable. Pursuant to Clause 7 of the Main Part of the Contract, Appendix #7 is applicable "if something other is not conditioned in the main part of the Contract and Appendices 1, 2, 3, 4, 5, 6". I also note that, although Clause 11 of the Main Part of the Contract varies certain paragraphs under Appendix #7, there is no variation of paragraphs 25-31.

(d) Is "something other ... conditioned" in Clause 5 of the Main Part of the Contract than is set out at paragraphs 25-31 of Appendix #7?

*Delay in delivery*

(e) Paragraphs 25-31 of Appendix #7 do not deal with remedies for delay in delivery, but only with remedies for delay of completion.

(f) Moreover, Clause 5 of the Main Part of the Contract clearly provides "something other" in relation to remedies for delay in delivery.

(g) I, therefore, find that Clause 5 of the Main Part of the Contract is applicable in case of delay in delivery.

(h) Does paragraph 31 of Appendix #7 nevertheless still exclude any *other* remedies for delay in delivery? Paragraph 31 states that the remedies set out in paragraphs 29 and 30 "are the only remedies available to the Purchaser in case of delay on the part of the Contractor". Read literally, this would suggest that no remedies are available for delay in delivery, but that Expres can only claim for delay in the event of a delay in completion. It seems to me that this would be an unnatural reading of this section in Appendix #7, which refers to completion, not delivery. The section is headed "Completion", paragraph 25 starts off with a definition of when the Works are considered completed, and the remedies in paragraphs 29 and 30 only apply to completion. It is also relevant that the last sentence of paragraph 31 refers to "such delay", which suggests that claims for other types of delay are not excluded.[47]

(i) Accordingly, I find that other remedies for delay in delivery can be brought, despite paragraph 31 of Appendix #7.

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47 Thus, I would add the following words (see underlining) to paragraph 31, so that it reads: "Liquidated damages under Clause 29 and termination of the Contract with limited compensation under Clause 30 are the only remedies available to the Purchaser [Expres] in case of delay in completion on the part of the Contractor [Solna]."

*Delay in commissioning*

(j) *Both* Clause 5 of the Main Part of the Contract *and* paragraphs 25-31 of Appendix #7 deal with remedies for delay in completion.

(k) Clause 5 of the Main Part of the Contract provides a contractual remedy of 0.3% of the total Contract price, both for delay in delivery and for delay in commissioning. Paragraph 29 of Appendix #7 provides a different contractual remedy of 1% of the total Contract price for each completed month of delay, in respect of delay in completion/commissioning[48] only. However, pursuant to Clause 7 of the Main Part of the Contract, the provisions of Appendix #7 apply only "if something other is not conditioned in the main part of the Contract" and the other Appendices.

(l) Thus, Clause 5 of the Main Part of the Contract does provide "something other" in relation to remedies for delay in completion than is provided in paragraphs 25-31 of Appendix #7.

(m) I, therefore, find that Clause 5 of the Main Part of the Contract is applicable in case of delay in commissioning, thus superseding and taking precedence over the remedies for delay in completion paragraphs 25-31 of Appendix #7.

(n) Does paragraph 31 of Appendix #7 nevertheless still exclude any *other* remedies for delay in commissioning? It also seems to me that paragraphs 25-31 of Appendix #7 need to be superseded in their entirety in relation to delays in

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48 As noted above, I consider that "completion" and "commissioning" mean the same thing in this context.

commissioning. These paragraphs are intended to be applied together, given the various cross-references between them. In my view, it does not make sense to have part of these paragraphs superseded by Clause 5 – for example, paragraph 29 – while leaving the other paragraphs intact. I note that Clause 5 does not allow for an extension of time as contemplated by paragraph 28. The references to "total compensation" and "only remedies" in paragraphs 30 and 31 would also need to be modified to fit in with Clause 5.

(o) Accordingly, I find that paragraph 31 of Appendix #7 is superseded, and therefore other remedies for delay in commissioning can also be brought, notwithstanding paragraph 31.

Gross Negligence

231. It follows that, for the purposes of paragraph 31, I do not need to decide whether Solna is guilty of "Gross Negligence" within the specific meaning set out in Appendix #7. Nevertheless, I think it is appropriate to record that I do consider that Solna did, in part, act in this manner.

232. "Gross Negligence" is given a particular meaning in paragraph 1 of Appendix #7. The definition of gross negligence under Swedish law is not applicable here.

233. Solna states that "Gross Negligence" should be given a restrictive interpretation, and points out that "no act or failure to act on Solna's behalf has been intentional to inflict damages to Expres" (first written submission dated 11 June 2008, page 10). Solna also refers to various "prevailing factors" and to "intended risk-taking" (written submission dated 5 September 2008, paragraphs 28 and 33). Such considerations might be correct when applying Swedish law, but when interpreting

paragraph 1 of Appendix #7, I consider that I simply need to determine whether or not Solna's actions fall within the meaning of that paragraph.

234. Expres argues that it gave Solna very clear notice of the fact that a delay in delivery would have serious consequences for it, including by triggering the fine under Ukrainian legislation, and that Solna effectively chose to ignore these consequences.

235. In my opinion, the facts show that Solna did fail "to pay due regard to serious consequences" which Expres specifically pointed out would ensue during the autumn of 2007. Solna did so, since it was acting in accordance with what it perceived to be a contractual right to suspend performance. However, as I have found, it was not entitled to exercise this right. Thus, Solna acted in breach of contract.

236. Solna argues strongly that it did everything in its power to ensure that the Press was delivered as soon as possible to Expres. In particular, it points out that the delay was caused by breaches by its sub-contractors, in particular SPEFA.

237. I agree with Solna that delay caused by the fault of its sub-contractors would not constitute "Gross Negligence" by Solna. However, to the extent that delay was caused by Solna's deliberate act of putting production on hold (see Exhibit C18), I find that that act constituted "Gross Negligence" within the meaning of paragraph 1 of Appendix #7.

Indirect loss – paragraph 60 of Appendix #7

238. The next question is whether such claims must be limited to claims for direct loss.

239. Paragraph 60 is stated in clear terms. Liability for the following types of loss is excluded as between the Parties:

- loss of production
- loss of profit
- loss of use
- loss of contracts
- "any consequential, economic or indirect loss whatsoever".

240. Paragraph 60 begins: "Save as elsewhere stated in these conditions", but there does not appear to be any other paragraph in Appendix #7 which provides for liability in respect of such losses.

*No carve-out for Gross Negligence*

241. It is important to note in this regard that there is no exception to paragraph 60. As Expres points out, section 27 of the Swedish Sale of Goods Act gives a buyer the right to claim full compensation for the seller's delay in the event that the delay is caused by the seller's negligence, whereas in the absence of negligence indirect loss is not recoverable. However, there is no similar provision in Appendix #7. By contrast with paragraphs 54 and 55 (which limit liability for defects and damage, except in the event of Gross Negligence), there is no Gross Negligence exception in paragraph 60. In other words, the limitation of liability in paragraph 60 applies, even if there is Gross Negligence.

242. I, therefore, reject Expres's argument that Appendix #7 provides for unlimited liability in the event of Gross Negligence. As Expres itself points out, Gross Negligence is referred to in three specific provisions of Appendix #7 – paragraphs 31, 54 and 55. However, Gross Negligence is not referred to in paragraph 60, and Expres has provided no grounds for suggesting that the paragraph should be interpreted as if it included such a reference.

*The meaning of "any consequential, economic or indirect loss whatsoever"*

243. How should this provision be interpreted? I have found that the Contract is governed by CISG, and accordingly interpretation of the

Contract should be carried out pursuant to Article 8 of CISG, which provides:

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
>
> (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

244. I have not been provided with evidence regarding either Party's specific intent in relation to this section. In any event, this is a negotiated contract, and paragraph 60 of Appendix #7 therefore needs to be seen as a statement made jointly by both Parties. I, therefore, need to interpret paragraph 60 pursuant to Article 8(2)&(3) of CISG:

> ... according to the understanding that a reasonable person of the same kind as each Party would have had, giving due consideration to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

245. In particular, given that this is a bilingual contract between parties of different nationalities, I consider that it is necessary to strive to give paragraph 60 an international meaning, not merely a meaning that corresponds to the meaning that the provision would have under one of the Parties' domestic law.

246. Solna refers to section 67 of the Swedish Sale of Goods Act (written submission dated 11 June 2008, page 9). However, Swedish law is not directly applicable, nor do I consider that it should be applied by analogy, for the reasons stated above.

247. I conclude that, in determining the meaning of "any consequential, economic or indirect loss whatsoever", I should in fact have regard to Article 74 of CISG, which sets out which losses are recoverable under the CISG regime. The specific wording of paragraph 60 of Appendix #7 does, of course, take precedence over Article 74. However, in determining the meaning of paragraph 60, I consider that I am nevertheless entitled to have regard to Article 74.

248. Article 74 provides:

> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

249. The basic distinction here is between losses that were foreseeable by the party in breach – *i.e.* which the party in breach foresaw or ought to have foreseen – at the time the contract was entered into (which are recoverable), and losses that were not foreseeable by that party (which are not recoverable).

250. In this case, paragraph 60 of Appendix #7 adds certain additional categories of loss that are not recoverable under the Contract – loss of production, loss of profit, loss of use and loss of contracts. Thereafter, the general "catch-all" category that follows – "any consequential, economic or indirect loss whatsoever" – should, in my view, be interpreted as applying to those losses that were not foreseeable by the party in breach at the time the Contract was entered into.

Summary

251. In summary, therefore, I find that Clause 5 of the Main Part of the Contract supersedes paragraphs 25-31 of Appendix #7. I therefore find that Expres is entitled to bring other remedies for delay in delivery or delay in commissioning, including claims for damages. However, Solna's liability for such damages is limited under paragraph 60 of Appendix #7. In particular, Solna is only liable for losses that Solna foresaw or ought to have foreseen at the time the Contract was entered into.

252. Against that background, I now turn to consider each of Expres's claims.

(1) The Ukrainian tax fine

*Summary*

253. Expres states that it was required to obtain licences from the National Bank of Ukraine in respect of the import transaction, pursuant to the Law of Ukraine "On the Procedure for Settlements in Foreign Currency" of 23 September 1994, No. 185/94-BP.

254. Expres obtained two such licences:

- No. 220, in the amount of USD 111,725.92, valid from 14 June 2007 until 15 December 2007;[49] and
- No. 357, in the amount of USD 452,836.20, valid from 15 July 2007 until 15 December 2007.[50]

(Statement of Claim, page 4)

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49 Exhibit C-5.

50 Exhibit C-6.

255. However, in fact, the "import transaction" was overdue by 52 days. The customs declaration shows that the 15% of the Machine that was delivered was not received until 4 February 2008.[51]

256. Accordingly, Expres claims that, as a direct result of Solna's delay, Expres is required to pay a fine of USD 88,071.88 to the Ukrainian State Tax Inspection of Yavoriv district of the Lviv region of Ukraine No. 2327 (10) 22-022 as of 2 June 2008.[52]

257. Solna makes two arguments for why this fine should not be payable:

(a) it is an indirect loss, which is excluded under the Contract; and

(b) in any event, the fine has not been paid by Expres, and "will never have to be paid if the arbitrator should come to the conclusion that Solna has breached the delivery terms".

*Does this fine constitute an indirect loss, and is it therefore excluded under the Contract?*

258. In support of its argument, Solna refers to section 6 of the Swedish Sale of Goods Act, Article 74 of CISG and Appendix #8, paragraph 60, of the Contract (which I take to be a reference to Appendix #7, paragraph 60).

259. However, the starting point has to be the Contract itself. To the extent that it is also necessary to consider the underlying law, the relevant provision is Article 74 of CISG. The Swedish Sale of Goods Act is not applicable, for the reasons discussed above. Specifically, there is no basis for applying domestic law under Article 7 of CISG in relation to this issue. Article 74 of CISG is in clear terms, and it is

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51 Exhibit C-7, C-8; Statement of Claim, page 4.

52 Exhibit C-9.

therefore not necessary to consider general principles on which CISG is based, let alone domestic law.

260. I have already concluded that paragraph 60 of Appendix #7 is applicable. The question is, therefore, whether this fine falls within one of the types of losses that are excluded by that paragraph.

261. This fine is not a "loss of production", nor is it a "loss of profit", a "loss of use", or a "loss of contracts". Is it a consequential, economic or indirect loss?

262. Expres argues that the fine under Ukrainian law is a direct loss which was foreseeable. Solna, on the other hand, argues that it is an indirect loss which was not foreseeable.

263. Expres makes much of the fact that it warned Solna of the likely incurrence of the fine throughout the autumn of 2007. This is not disputed, and the correspondence shows that Expres made its position clear at that time. However, Solna's argument is that the fine was not foreseeable at the time when the Contract was entered into. That is the relevant test under Article 74, and I have already found that it is the relevant test for determining whether the fine is a "consequential, economic or indirect loss".

264. There is no evidence that Expres specifically warned Solna of the potential of this fine *before* the Contract was entered into. Expres argues that Solna ought to have foreseen this possibility, and it points to the fact that Solna had done business in Ukraine before and must therefore have been familiar with Ukrainian legislation. Mrs. Forsberg admitted in cross-examination that this was not the first time Solna had done business in Ukraine. However, she added that this was the first time that Solna had had problems with its business in Ukraine.

265. In the final analysis I am bound to conclude that Expres has failed to prove its case on this particular point. I have been provided with no evidence to show that Solna did foresee the fine at the time when the Contract was entered into. I am being asked to assume that Solna ought to have foreseen it, but again there is very little evidence on which I can base that assumption. In particular, I have no evidence of Solna's previous business dealings in Ukraine, nor do I have any evidence as to whether fines of this type are a common feature of business in Ukraine.

266. For these reasons, I find that Expres's claim for damages in respect of the fine is a claim for indirect loss which must fail.

*Whether the fine is actually due*

267. Although it is not necessary to decide this issue, in my view Expres has also failed to prove that the amount of the fine is actually due. It is clear that the fine has not yet been paid, since the claim by the tax authority was suspended pending this arbitration. The relevant legislation also suggests that, should Solna be found liable, then the fine is not paid. Expres also appears to confirm this point in its Closing Statement (page 13, para. 13(1)), where it states: "... the payment of which [*i.e.* of the fine by the state of Ukraine] should be made in case the Court finds Solna not guilty in the untimely delivery of the Machine ...".

268. Thus, *prima facie*, Solna's argument in this point would appear to be well-founded, although had it been necessary to decide this issue I would have wanted to have considerably more evidence regarding the meaning and effect of the relevant Ukrainian legislation.

*Conclusion*

269. Expres's claim in respect of reimbursement of the Ukrainian tax fine is thereby rejected.

(2) The personnel costs

*Expres's arguments*

270. Expres claims that, as a result of Solna's delay in delivery, it was required to keep a team of personnel ready and waiting.

271. Expres's argument was ably summarised by Mr. Pochynok in his testimony. He pointed out that the Press was to be the start of "a new form of production for our company" and "all the staff were hired only and specifically for this type of production". However, there was a "catastrophic shortage of such technical staff in Ukraine", and this Press needed a team of "highly qualified engineers", requiring "three teams on a 3/8 system over a 24-hour cycle".

272. Mr. Pochynok agreed that, when it became clear that the Press would not be delivered on time, Expres "could theoretically have laid off part of the staff", but only "after paying very considerable compensation". Mr. Pochynok also pointed out that Solna was not clear about when the Press would actually be able to be delivered, the suggestion being that six different new delivery dates were promised during the period between February and September 2008.

273. In all, Expres claims the cost of hiring 22 personnel during the period between December 2007 and May 2008, and this period was later extended in Expres's Supplement until August 2008. Such personnel – whose details and remuneration during this period are set out Exhibit C-32 – include:

- a "Chief of Polygraph Complex"
- a "Deputy Chief of Polygraph Complex – Magazine Printing"
- a chief power engineer
- a chief engineer
- an electronic engineer
- 2 maintenance engineers
- a chief mechanic

- 2 shift supervisors
- a foreman, and
- 11 operators.

274. Expres's claim, pursuant to Exhibit C-32, amounts to USD 114,170.37 for the period from December 2007 until May 2008, plus USD 57,085.20 for the period from June until August 2008, giving a total of USD 171,255.57.

*Solna's arguments*

275. Solna, for its part, argues that "there has been no need for Ekspres to hire any person explicitly for performance of Ekspres' obligations under the Contract and that there is no contractual liability put on Solna to compensate Ekspres for Ekspres' own costs for personnel, staff, subcontractors and/or other third parties" (Closing Statement, para. 22).

276. Mr. Sparring stated in his opening statement that it is "completely and utterly unclear why Expres should hire personnel to this extent, and why they could not perform other work for Expres during the relevant time".

277. Solna argues that no clause in the Contract or its appendices puts a responsibility on Expres to hire any personnel specifically for this project (Closing Statement, para. 23).

278. Solna also argues that paragraphs 7, 8 and 10 of Appendix #7 require Expres to carry out certain preparatory works in any event, and that paragraph 10(d) provides that Expres should provide the required number of workers free of charge (Closing Statement, para. 24).

279. Solna refers to Article 75 of CISG (by which, I presume is meant Article 74 of CISG), on the basis of which it argues that indirect damages are not recoverable. Solna classifies costs for personnel as

"losses relating to diminishing or reduction of production" in this context (Closing Statement, para. 25).

280. Finally, Solna argues that there is "a total lack of evidence" to show that Expres has tried to mitigate its loss (Closing Statement, para. 26).

*Decision*

281. I find that these are largely losses which Expres has suffered directly as a result of Solna's delay in delivery.

282. Clause 2.1 of the Contract expressly provides that Solna is to undertake and fulfil the training of Expres's press crew as part of the on-site erection and commissioning of the Press. It is further specifically stated that:

> The Supplier [Solna] will go through maintenance and troubleshooting routines with the Purchaser's [Expres's] personnel during the start-up processes. The main part of the trainings will take place in connection with the erecting and starting-up processes. The Purchaserrs [sic] [Expres's] personnel shall take an active part in the installation works, both mechanically and electrically. The Purchaser [Expres] shall arrange that there is always one printing crew present especially during the final part of the installations and starting-up procedures.

283. I also note Article 13 of Appendix #2, which states:

> The specific hands-on training takes place during the installation and commissioning on site. The Supplier [Solna] recommends the uninterrupted participation of the mechanical and electrical maintenance staff.

284. Given these provisions, it can come as no surprise to Solna that Expres arranged for its personnel to be ready for training to commence as from the date when the Press was due to be delivered.

285. Mr. Pochynok stated in his evidence that this was to be the start of a new form of production, and I have no reason not to accept this

evidence. I am not surprised that Expres hired new personnel specifically to work on this Press.

286. It is correct, as Solna argues, that Expres is contractually required to carry out certain preparatory works "at his [its] cost" – see Articles 1-3 of Appendix #2. However, Expres is not here claiming for the cost of preparatory works. Nor is Expres claiming for the cost, *per se*, of providing workers as envisaged in paragraph 10(d) of Appendix #7. Expres is only claiming for the additional costs caused by Solna's delay in delivering the Press.

287. For the reasons stated above, I consider that these losses were foreseeable, and specifically, that Solna ought to have foreseen these losses at the time of the conclusion of the Contract as a possible consequence of delay in the delivery of the Press, pursuant to Article 74 of CISG. I do not accept Solna's argument that these personnel costs are "losses relating to diminishing or reduction of production". Expres is claiming reimbursement for amounts paid to personnel; this has nothing to do with a loss or diminution of production.

288. As regards mitigation of loss, I accept Mr. Pochynok's evidence that Expres could not have made the staff redundant without paying a considerable amount of compensation, and I note that the two copies of employment contracts that I have seen (for Baydalka V.M. and Vakshynskyy V.Yu) show that Expres is required to pay "double monthly remuneration" under those contracts if its fails to fulfil its obligations to the individual employed (clause 4.3). Moreover, I accept Mr. Pochynok's evidence that there was a "catastrophic shortage of such technical staff in Ukraine"; Expres might reasonably not want to take the risk of making staff redundant in such circumstances. Moreover, I accept Expres's point that it was difficult for it to plan, given that Solna changed the expected date of delivery on a number of different occasions.

289. However, it does seem to me that Expres might have been able to do more to mitigate its losses. Solna asks why these personnel could not have been employed on other jobs, or why Expres could not have negotiated better terms. Moreover, Expres asks why Solna entered into all these 22 employment contracts starting in December 2007, when Expres knew by 9 November 2007 that Solna had stopped production and would not deliver on time (see Exhibit C18). I consider these to be valid questions in the circumstances, and Expres has not sufficiently proved its case on this point.

290. In all the circumstances, I find that Expres is entitled to recover its personnel costs, but that a certain amount should be deducted to take account of other measures that Expres might reasonably have been able to take to mitigate its losses. I find that a 25% deduction is reasonable in all the circumstances.

291. For the above, reasons, I find that Solna is liable to pay reimbursement of personnel costs to Expres in the sum of USD 171,255.57 – 25% (42,813.89), which equals USD 128,441.68.

(3) Penalty for delay in delivery pursuant to Clause 5 of the Contract

*Expres's arguments*

292. Expres claims a penalty for delay in delivery pursuant to Clause 5 of the Contract, in the sum of USD 22,543.50 (*i.e.* a US dollar equivalent of EUR 16,950 – Statement of Claim, pages 20-21).

293. In fact, Expres claims two penalties under Clause 5: a penalty for late delivery and a penalty for late commissioning (see Statement of Claim, pages 20 and 21; written submission dated 9 July 2008, page 7, the sentence beginning: "On para. 13 r)").

294. As stated above, the penalty under Clause 5 of the Main Part of the Contract would appear to be the Purchaser's primary remedy for delay under the Contract.

*Solna's arguments*

295. Solna does not appear to dispute that this penalty is payable in the event of delay. On the contrary, Solna argues that this is the sole remedy under the Contract in such circumstances (written submission dated 5 September 2008, para. 10; Closing Statement, para. 33).

296. However, Solna points out that, pursuant to the express wording of Clause 5, this penalty is to be deducted by Expres from the last invoice for the Press. Solna adds that: "Solna does not have to give its consent to Ekpres to deduct the fine from the last payment for the press" (Closing Statement, para. 35), and that "Solna has up to this date not denied that Ekpres shall have the right to 0,3% of the Contract value as a fine for late performance of the Works and Commissioning" (Closing Statement, para. 36).

297. Thus, Solna argues that this penalty "may never be due for payment (through set-off) before the last invoice of the press is due for payment" (Closing Statement, para. 36).

*Decision*

298. The relevant part of Clause 5 of the Contract states:

> If the delivery or commissioning date of the Press stipulated by this Contract has not been observed, through Supplier's [Solna's] fault, the Supplier [Solna] is to pay a penalty at the rate of 0,3% from total contract price. The penalty amount is to be deducted from the third invoice of the Press, when payments are effected in accordance with Article 4 of this Contract. Should for any reason the Purchaser [Expres] fail to deduct the penalty amount from the invoice, the Supplier [Solna] is to pay to the Purchaser [Expres] separately.

299. For completeness, 0.3% of the total contract price = 0.3% of EUR 2,825,000 (which is expressly stated to be the "total Contract Price" in Clause 3.1 of the Contract). 0.3% of EUR 2,825,000 = EUR 8,475.

300. Expres appears to assume that two cumulative penalties can be levied, one for a delay in delivery, and the other for a delay in commissioning. Solna does not address this point. I accept Expres's position on this point. The clause suggests that the penalty is payable if "the delivery or commisioning [sic] date ... has not been observed" (my emphasis). EUR 8,475 x 2 = EUR 16,950.

301. I also accept Expres's argument that both the delivery date and commissioning date have not been observed. Expres argues that delivery was due on 15 December 2007, and that commissioning should have taken place 12 weeks after that, *i.e.* on 8 March 2008 (Statement of Claim, page 5).

302. However, I agree with Solna that the reference to "the third invoice of the Press" in this clause is, following Amendment #1, to be read as a reference to the payment of EUR 282,500 pursuant to Clause 3.4(IV), as amended. This is to take place only after the "Act of Commissioning" has been signed.

*Conclusion*

303. I, therefore, find that Solna is liable to Expres in respect of the sum of EUR 16,950, being 2 x 0.3% of the total contract price, pursuant to and in accordance with the provisions of Clause 5 of the Contract.

304. However, Clause 5 provides that this penalty is to be deducted by Expres from the final invoice. For this reason, Expres's claim for me to order payment of this penalty is hereby rejected.

*A further issue – the question of a discrepancy between the English and Ukrainian versions*

305. There were some suggestions by Expres during the witness evidence that the English version of the second paragraph of Clause 5 is incorrect. Expres pointed out that the Ukrainian version refers to a penalty of 0.3% of the total Contract price for each day of delay, whereas the English version refers merely to a one-off penalty of 0.3% of the total Contract price. I understand that the Ukrainian version does indeed include the additional words "for each day" ("за кожен день").

306. However, no claim has in fact been made by Expres for a penalty of 0.3% of the total Contract price for each day of delay. Expres's claim is made on the basis of two penalties each amounting to 0.3% of the total Contract price – *i.e.* in accordance with the English version of the text (Statement of Claim, page 20; written submission dated 9 July 2008, page 7)). In any event, it is of course the English version of the Contract that prevails – see paragraph 12 above.

307. For the record, I was provided with no credible evidence to support Mr. Pochynok's assertion that Solna deliberately altered the English version of Clause 5 of the Contract.[53]

(4, 5) <u>The claims for non-used credit and additional credit interest</u>

*Expres's arguments*

308. Expres claims "commission on unused part of credit on the basis of the Credit Agreement, concluded between [Expres] and [SHB] 16.01.2007 in the amount of 1736,20 USD as of 11.06.2008"

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53 If Expres had wanted to pursue this point, then it would at the very least have had to provide me with written evidence of a prior English version of the Contract, with the "for each day" wording included in the English version.

(Statement of Claim, pages 13 and 21; Exhibit C31). In its Supplement dated 6 August 2008, Expres raised this amount to USD 2,190.58.

309. Further, Expres claims payment of additional interest payable under the Credit Facility Agreement in the amount of USD 44,323.00 (Statement of Claim, page 21; Exhibit C30).

*Solna's arguments*

310. Solna argues that this commission is a matter between Expres and SHB that "has no bearing on the issue at hand". Further, Solna argues that this is an indirect damage or a consequential damage or an economic damage that is not recoverable under the Contract. (See the written submission dated 1 July 2008, page 4, para. c.) Mr. Sparring also argued during his opening statement that these credit costs were not discussed between the Parties during the negotiations prior to signing the Contract, and that the losses in question were accordingly not foreseeable.

*Decision*

311. I have already set out in some detail my conclusions regarding the issue of indirect losses, and the question of foreseeability.

312. I have no evidence regarding the extent to which Expres's credit terms may have been known to, or foreseeable by, Solna prior to the signing of the Contract. I also have no basis on which to judge whether or not Solna ought to have foreseen these types of potential losses. The Credit Facility Agreement is, of course, an agreement between Expres and SHB only, to which Solna is not a party.

313. I note that Expres has not actually argued that these losses were or ought to have been foreseeable by Solna at the time when the Contract was entered into.

314. For these reasons, I find that these claims must be rejected.

(6) The claim for additional costs incurred as a result of the late provision of the installation plan

*Expres's arguments*

315. Expres claims the amount of UAH 11,900.00, "equalling to USD 2,452.60", being the cost of designing repairs to the foundation, plus the cost of construction work on those repairs – see the certificate at Exhibit C33.

*Solna's arguments*

316. As noted above, Solna argues that it is not liable in respect of repairs to the foundation. In addition, as regards quantum, Solna argues that it cannot verify that the alleged costs have been incurred by Expres, and in any event, that these costs are indirect, consequential or economic.

*Decision*

317. These are direct costs incurred as a result of the need to repair the foundations following the late provision of technical information – see my conclusions at paragraphs 196-202 above.

318. The Contract makes specific provision for particular information to be provided, and imposes various obligations upon Expres to ensure that the site is ready to receive the Press upon delivery. In my opinion, Solna ought clearly to have foreseen that the late provision of such information would be quite likely to give rise to this type of loss.

319. I find that Expres has adequately proved how these costs came about, and their amount, by means of Exhibits C17 and C33. However, I note from Exhibit C33 that the losses in question were incurred in

Ukrainian currency. The conversion into US dollars as stated in that exhibit is as at 10 June 2008, and has not been updated. Accordingly, I propose to order Solna to pay this amount in Ukrainian currency

320. For these reasons, I find that Solna is liable to pay reimbursement to Expres of the costs in respect of repairing the foundation in the sum of UAH 11,900.00.

(7) The claim for liquidated damages under paragraph 29 of Appendix #7

*Expres's arguments*

321. This claim was first made by Expres in its Supplement, dated 6 August 2008.

322. Expres argues that the installation works should have been completed by 8 March 2008.

323. Pursuant to paragraph 29 of Appendix #7, Expres then claims 1% of the total Contract price for five months of delay, *i.e.* 5 x EUR 28,250 = EUR 141,250.00. Expres has claimed this amount in US dollars, the equivalent US dollar figure being USD 220,110.94 (Supplement, pages 2 and 3).

*Solna's arguments*

324. Solna argues that the Main Part of the Contract supersedes Appendix #7, and in particular, that Clause 5 of the Main Part of the Contract supersedes paragraph 29 of Appendix #7. Solna argues that these two provisions regulate "the same factual circumstances and events and cannot be put into practice at the same time" (see written submission dated 5 September 2008, paras. 1-16, and written submission dated 19 September 2008, paras. 1-3).

325. Solna relies specifically on Swedish law principles whereby individually-formulated provisions prevail over standard-form provisions, specific provisions prevail over general provisions, and later negotiated provisions prevail over earlier negotiated provisions.

*Decision*

326. In my opinion, this issue is clear from the face of the Contract. It is also clear from the manner in which Expres has pleaded its case.

327. As to the contractual provisions, I have already found from analyzing the Contract that Clause 5 of the Main Part of the Contract takes precedence over paragraphs 25-31 of Appendix #7 – see paragraphs 227-230 above.

328. It follows that, pursuant to Clause 7 of the Main Part of the Contract, Clause 5 takes precedence over paragraph 29 of Appendix #7 in providing a contractual remedy for delay in commissioning.

329. In my opinion, it is also relevant to note that Expres has already claimed a penalty under Clause 5 of the Main Part of the Contract in respect of delay in commissioning. The fact that Expres is trying to claim two alternative penalties for the same delay illustrates quite clearly the inconsistency of its position on this point.

330. For these reasons, on the basis of specific wording of the Contract, I find that paragraph 29 of Appendix #7 is not applicable. Accordingly, Expres's claim under paragraph 29 of Appendix #7 fails.

331. In the circumstances, since the wording of the Contract is clear on this point, it is not necessary for me to consider any underlying principles of contractual interpretation. I would add, however, that since I have already found that the Contract is to be interpreted according to CISG, Solna's references to Swedish law principles are not relevant.

## (4) Solna's Counterclaims

Summary

332. I now turn to Solna's two remaining counterclaims.

333. These are:

(a) a claim for a contractual penalty pursuant to Clause 5, paragraph 1, of the Contract, in the amount of EUR 4,849.

(c) a claim for damages for reimbursement of additional costs caused by delay by Expres in issuing the PP-number, pursuant to Appendix #7, paragraph 34, of the Contract, in the (revised) amount of EUR 11,034.

The counterclaim for a contractual penalty under Clause 5, paragraph 1

*Solna's arguments*

334. Solna argues that Expres was obliged to pay the amount of EUR 1,017,187.50 on 8 January 2008 (for delivery number 1) and the amount of EUR 599,062.50 on 25 January 2008 (for delivery number 2). These sums were each paid, but they were paid late. The sum of EUR 1,017,187.50 was paid on 15 January 2008, and the sum of EUR 599,062.50 was paid on 13 February 2008. Thus, the total sum paid late, in two separate instalments, was EUR 1,616,250.

335. Solna's argument turns on the meaning of Clause 3.4(III), as amended, which provides that the "Third payment" is:

> ... payable upon the written notice of the Supplier on the readiness of the Supplier to make the delivery of the Press during the following 10 days.

336. According to Solna, this means that Expres "has to make payment the same day as receiving Solna's written notice" (my emphasis), in cases where only 10 days' notice is given, or where more than 10 days' notice is given, payment is due 10 days before delivery. Solna points out that to only present the drawing request does not make the payment completed. (See Solna's written submission dated 9 July 2008, para. 3.)

337. Accordingly, Solna seeks a penalty under Clause 5 of the Main Part of the Contract. The relevant part of Clause 5 is, for these purposes, the first paragraph, which states:

> In case of violation of terms of payments (item 3.4 of this Contract) for The Press, The Supplier [Solna] has the right to impose a fine in the amount of 0,3 % of the outstanding payment on the top of the conditions of payments.

338. Solna seeks 0.3% of EUR 1,616,250, which equals EUR 4,849.

*Expres's arguments*

339. Expres argues that it performed these payments pursuant to the Contract. Expres also argues that the first payment was lawfully delayed by reason of the fact that the original notification was given during Ukrainian official vacation time (Exhibit C43), and that some of the bank's delay was caused by Solna's own fault. (See Expres's written submission dated 1 July 2008, pages 10-11.)

*Decision*

340. I find that, according to the strict wording of Clause 3.4(III) of the Contract, as amended, the payments in question were indeed made late.

341. The words "payable upon the written notice" mean that the payment becomes due once the written notice is given, provided the notice is in accordance with the relevant provisions of the Contract.

342. I agree with Solna that providing the drawing request is not sufficient for these purposes. The amounts are "payable" in accordance with the clause, which means that actual payment is due.

343. I accept that the first notice was delayed due to the Ukrainian national holiday, but this does not assist Expres since on Expres's own case the notification was received on 8 January 2008 (written submission dated 1 July 2008, page 11). I agree with Solna that, in these circumstances, payment was due the same day.

344. Whether or not the bank's delay was caused by Solna is irrelevant for these purposes. Paragraph 1 of Clause 5 provides strict liability for late payment.

345. For these reasons, I find that Expres is liable to pay to Solna the sum of EUR 4,849 pursuant to the first paragraph of Clause 5 of the Contract.

The counterclaim for damages under Appendix #7, paragraph 34

*Solna's arguments*

346. Solna claims that the first part of the delivery, which left Solna's factory on 25 January 2008, was delayed for a month at the Polish/Ukrainian border, due to delays by Expres in obtaining the so-called PP number.

347. Solna refers to the fact that, pursuant to items 2.4 and 2.5 of Appendix #5 of the Contract, "customs clearance and forwarding" and "customs duties" are to be performed by Expres. Solna's case further relies on the testimony of Mr. Johansson.

348. Solna, accordingly, seeks damages under the second sentence of paragraph 34 of Appendix #7, which provides:

> If the erection is delayed due to a cause for which the responsibility rests with the Purchaser [Expres] or any of his contractors other than the Contractor [Solna], the Purchaser [Expres] shall compensate the Contractor [Solna] for:
>
> a) waiting time and time spent on extra journeys;
>
> b) costs and extra work resulting from the delay, including removing, securing and setting up erection equipment;
>
> c) additional costs, including costs as a result of the Contractor [Solna] having to keep his equipment at the Site for a longer time than expected;
>
> d) additional costs for journeys and board and lodging for the Contractor's [Solna's] personnel;
>
> [e) is missing]
>
> f) additional financing costs and costs of insurance;
>
> g) other documented costs incurred by the Contractor [Solna] as a result of changes in the erection programme.

349. The costs claimed were originally summarised by Solna in Exhibit 4 to its Answer. A revised summary, with a revised total of EUR 11,034, was submitted by Solna at the hearing.

*Expres's arguments*

350. Expres argues that the delay was caused by Solna's failure to provide the necessary technical information.

351. Expres refers to its letter to Solna dated 8 January 2008 (Exhibit C24), in which Expres set out in detail what information was required, and to the customs authority's certificate dated 23 January 2008 (Exhibit C27), in which the customs authority stated that "a complete data package" was required "on 'AZTO CWC300-2 machine cooling system". Expres also refers to a further letter by the State Customs Service of Ukraine, dated 11 February 2008 (Exhibit C10), and to the "card of refusal" at the border (Exhibit C57).

352. Expres relies on Article 80 of CISG, which provides that:

> A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

*Decision*

353. It is difficult on the evidence to determine whether the delay in question is "due to a cause for which the responsibility rests with the Purchaser", as required under paragraph 34 of Appendix #7.

354. The claim made by Solna is that Expres delayed in providing it with the PP-number, but I have been provided with insufficient evidence regarding what exactly a "PP-number" is, what the preconditions are for obtaining it, why there was a delay in obtaining the PP-number in this case, and generally, what the cause was for the delay.

355. I note that Expres provided detailed instructions to Solna in its letter dated 8 January 2008 (Exhibit C24). However, I do not know to what extent these instructions were followed by Solna, nor is it clear to me how exactly these instructions relate to the issue of the PP-number.

356. There is considerable argument between the Parties as to whether shipment in three parts were permissible. However, again, I do know to what extent this relates to the issue of the PP-number.

357. In my view, Solna has not demonstrated that the delay was caused by Expres. It seems to me from the evidence that both Solna and indeed to some extent the customs authority may bear some responsibility for the delay.

358. In the circumstances, I cannot determine that the delay "was due to a cause for which the responsibility rests with [Expres]", pursuant to paragraph 34 of Appendix #7. This counterclaim, therefore, fails.

## (G) COSTS

359. Finally, I am required to determine costs pursuant to the ICC Rules. Article 31(3) of the ICC Rules provides that:

> The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

The costs of the arbitration

360. Regarding the costs of the arbitration:

(a) on 12 January 2009, the ICC International Court of Arbitration fixed the costs of the arbitration as follows:

(i) ICC administrative expenses at USD 7,786;
(ii) fees and expenses of the Sole Arbitrator at USD 28,214;

(b) the advance on costs fixed by the Court has been paid in equal shares by the Parties (*i.e.* USD 18,000 each).

361. I have set out above the costs that are claimed by each of the Parties – see paragraphs 110 and 115 above.

Decision on the allocation of costs

362. Arbitral tribunals acting under the ICC Rules have wide discretion when it comes to determining the allocation of costs as between the parties. In particular, under Article 31(3) of the ICC Rules, tribunals have wide discretion to decide which of the parties shall bear the costs of the arbitration or in what proportion they shall be borne by the parties.

363. I note from Derains & Schwartz, "*A Guide to the ICC Rules of Arbitration*", second edition ("**Derains & Schwartz**") that the approaches of ICC arbitrators are "diverse" (page 370). Derains & Schwartz state that the arbitrators "have complete discretion to

allocate the costs as they see fit", and that unlike some other rules, the ICC Rules do not provide for the bearing of the costs "in principle" by the unsuccessful party (page 371). I also note that ICC arbitrators can take account of the behaviour of the parties (pages 373-4).

364. In the present case, I have found for Expres on liability, but in terms of quantum it has recovered very considerably less than half the sum sued for. I have also found for Solna on one of its counterclaims, although they were in any event of low value.

365. In the circumstances, this is not a case in which Expres can clearly be said to be the winning party. On the contrary, Solna has won a major part of its arguments.

*Allocation of tribunal and ICC costs*

366. In all the circumstances, and in the exercise of my discretion, I have concluded that the tribunal's fees and expenses and the ICC administrative costs should be borne 50:50 between the Parties, and thus neither Party is required to make any reimbursement to the other of those costs.

*Allocation of the Parties' respective legal costs*

367. Had there been no issues regarding the Parties' conduct, I would also be inclined to say that each Party should bear its own legal costs. However, I made it clear in the very first procedural conference in this case that I would take into account the Parties' conduct in assessing costs. In my view the conduct of Expres and its counsel needs to be remarked upon.

368. I regret that Expres' conduct in these proceedings has added very considerably to the complication, cost and delay of this arbitration. What ought to have been a comparatively simple case has been made unnecessarily complicated as a result of the manner in which Expres

has chosen to conduct its case. The following matters in particular need to be mentioned in this regard:

(a) Without warning or explanation, Expres filed its Supplement to the Statement of Claim only a few weeks before the dates which were originally set for the hearing in this arbitration. Specifically, this Supplement included a new claim, which was the claim for liquidated damages under paragraph 29 of Appendix #7. No good reason was given for why this claim was not made earlier. As a direct result of Expres's late filing, the original hearing had to be postponed, thus increasing costs and delay.

(b) Later, shortly before the hearing that finally did take place, Expres filed three last-minute applications (see paragraph 56 above), the purpose of which appears to have been to ambush Solna at the very last minute. Again, no good explanation was given for why these matters could not have been raised earlier. Again, this caused additional costs, which could easily have been avoided.

(c) Mr. Kavun later proceeded during the hearing to file three "petitions" and a "statement" (see paragraph 65 above). Two of these concerned Mr. Maliarchuk and Mr. Eriksson, and raised matters that I had already expressly ruled upon in Procedural Order No. 7. Thus, Mr. Kavun sought to re-run arguments that had already been decided, thus further wasting time and costs. Moreover, although I granted Expres's request for Mr. Maliarchuk to act as counsel, nevertheless Mr. Maliarchuk then played no part whatever in the hearing. All this again caused additional costs which could otherwise have been avoided.

(d) Expres's decision to choose a lead counsel (Mr. Kavun) who did not speak the agreed language of the arbitration – see paragraph 59 above – added immensely to the difficulty of the hearing, and further increased costs and delays.

(e) I am unable to form a view as to why Mr. Kavun did not manage to obtain the necessary visa in order to appear in person at the hearing. Nevertheless, even if he may not personally have been responsible, Expres could and should have done more to ensure that the hearing would be able to proceed smoothly in Paris. If indeed it is common for Ukrainian citizens to be refused visas for such important events, then Expres should have taken steps to ensure that Mr. Kavun's co-counsel, Mr. Dunikowski, was ready and able to conduct the hearing in Mr. Kavun's absence. (In fact, it was clear that Mr. Dunikowski had virtually no instructions. I make no criticisms of Mr. Dunikowski, who acted professionally in what were obviously very difficult circumstances.)

(f) Mr. Kavun appeared to ignore my specific instructions on a number of occasions. In particular, on numerous occasions, he sent emails and documents to me without copying in Solna, and my reminders for him to do so seem to have been deliberately ignored.

(g) Finally, Expres's pleadings, and its presentation of its case, made this case far more complicated and difficult than it needed to be. Specifically, Expres's Statement of Claim is a particularly impenetrable document, which seems to have been designed to make it difficult for Solna, and for the tribunal, to understand Expres's case. All this added greatly to my work in deciding this case, and it must also have

added greatly to the work that needed to be done by Solna's counsel.

369. In all the circumstances, and in the exercise of my discretion, I have decided that Expres should bear 50% of Solna's legal costs in relation to this arbitration. I find that the amount of Solna's legal costs and expenses is reasonable in all the circumstances.

370. Expres's claim for costs is hereby rejected. Solna's claim for costs is granted to the extent set out immediately above.

371. For these reasons, I find that:

- the fees and expenses of the tribunal and the ICC's administrative expenses shall be borne equally between the Parties; and
- Expres is ordered to pay Solna's legal costs and expenses in the total sum of EUR 44,557.50 (*i.e.* 50% of EUR 89,115).

## (H) CONCLUSION AND AWARD

372. For the reasons set out in sections (F) and (G) above, I hereby accordingly make the following Final Award:

*Expres's claims for declarations*

I hereby declare that:

(1) Solna is found to have breached Clause 6 of the Contract by failing to deliver the Press by 15 December 2007.

(2) Solna is found to have breached Clause 2.1 of the Contract by failing to provide the written preliminary erection plan, "other information necessary for preparation of project works", the Press Installation Manual, and a list of spare parts within the particular time periods specified in that Clause of the Contract.

(3) Solna is found to have acted with "Gross Negligence" within the specific meaning set out in paragraph 1 of Appendix #7 to the Contract by delaying the delivery of the Press, but only to the extent that the delay was caused by Solna's deliberate act of putting production on hold.

(4) Solna is found to be liable to Expres in respect of the sum of EUR 16,950, as a penalty for late delivery of the Press and for late commissioning of the Press, pursuant to and in accordance with the provisions of Clause 5 of the Contract, but pursuant to that Clause such sum is to be deducted from the final invoice for the Press, to be issued pursuant to Clause 3.4(IV) of the Contract (as amended).

(5) All other claims by Expres for declarations in respect of breach of the Contract by Solna or in respect of gross negligence (howsoever defined) are hereby rejected.

*Expres's claims for payment*

I hereby make the following orders for payment by Solna to Expres:

(6) Expres's claim for payment in respect of the Ukrainian tax fine is hereby rejected.

(7) Solna is ordered to pay to Expres the sum of **USD 128,441.68**, being the amount claimed in respect of reimbursement of personnel costs, less 25% for mitigation of losses.

(8) Expres's claim for payment of penalties pursuant to Clause 5 of the Contract is hereby rejected.

(9) Expres's claims for payment in respect of reimbursement of commission for non-used credit and in respect of reimbursement of additional interest are hereby rejected.

(10) Solna is ordered to pay to Expres the sum of **UAH 11,900.00**, being reimbursement for additional costs as a result of the late provision of the installation plan.

(11) Expres's claim for payment of liquidated damages pursuant to paragraph 29 of Appendix #7 to the Contract is hereby rejected.

*Solna's counterclaims*

I hereby make the following orders for payment by Expres to Solna:

(12) Expres is ordered to pay to Solna the sum of **EUR 4,849.00**, being a penalty pursuant to Clause 5, first paragraph, of the Contract.

(13) Solna's counterclaim for direct damages in respect of costs caused by delay in issuing a PP-number, pursuant to paragraph 34 of Appendix #7 to the Contract, is hereby rejected.

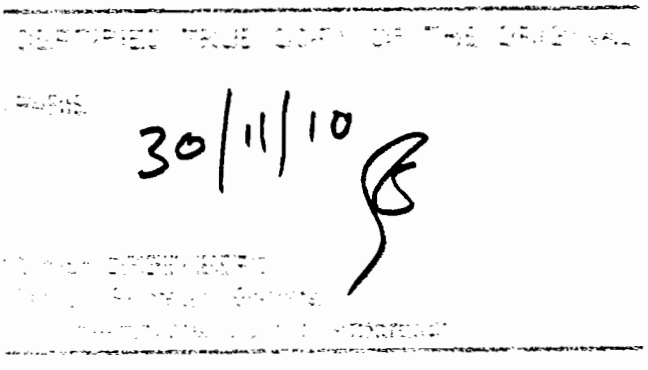
*Costs*

I hereby make the following orders in respect of costs:

(14) The costs and expenses of the arbitral tribunal and the ICC administrative expenses are hereby fixed in the total sum of **USD 36,000**, and are to be borne equally by each Party.

(15) Expres's claim for costs is hereby rejected.

(16) Solna's claim for costs is granted to the extent that Expres is ordered to pay 50% of Solna's legal costs and expenses, in the total sum of **EUR 44,557.50**.




Place of arbitration: Paris, France.

16 January 2009

James Hope

Sole Arbitrator