

China International Economic and Trade Arbitration Commission

Arbitration Award

Applicant: Suzhou Kunyuan Optoelectronics Co., Ltd.

Address: No. 558, Fenhu Avenue, Lili Town, Wujiang District, Suzhou City, Jiangsu Province, China

Representatives: Teng Zongqi, Xu Qiuyang Jiangsu Zhize Law Firm

Respondent: Capital Asset Exchange and Trading, LLC

Address 1: 5201 Great America Pkwy, Ste 272, Santa Clara, CA 95054, USA

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Shanghai

November 1, 2024

Arbitration Award

[2024] CIETAC Jing Arbitration Case No. 2929

The China International Economic and Trade Arbitration Commission (hereinafter referred to as the "Arbitration Commission") accepted the arbitration case under the contract (Contract No. ACKEN-CAE-2022021101) signed on February 10, 2022, between the Applicant Suzhou Kunyuan Optoelectronics Co., Ltd. (hereinafter referred to as the "Applicant") and the Respondent Capital Asset Exchange and Trading, LLC (hereinafter referred to as the "Respondent"), based on the arbitration clause stipulated in the said contract and the written arbitration application submitted by the Applicant on May 30, 2023. The case number is M20231624.

The arbitration proceedings in this case are governed by the Arbitration Rules of the China International Economic and Trade Arbitration Commission (hereinafter referred to as the "Arbitration Rules"), effective as of January 1, 2015.

On June 30, 2023, the Arbitration Commission (hereinafter referred to as the "Arbitration Secretariat") served the Notice of Arbitration, Arbitration Rules, and the CIETAC Arbitrator List to both the Applicant and the Respondent by express mail. It also forwarded the Applicant's arbitration application and the attached evidence to the Respondent. According to the mail tracking record, the documents sent to Respondent's Address 1 (as provided in the contract, hereinafter referred to as "Address 1") were successfully delivered on July 5, 2023.

In accordance with Article 25 of the Arbitration Rules, this case shall be heard by a tribunal composed of three arbitrators. The Applicant appointed Mr. Deng Sicong as one arbitrator. Since the Respondent failed to appoint an arbitrator within the stipulated time or request the Chairman of CIETAC to appoint one on its behalf, the Chairman of the Arbitration Commission, as per the Arbitration Rules, appointed Ms. Tong Liping as an arbitrator. Since neither the Applicant nor the Respondent jointly appointed or authorized the Chairman of CIETAC to appoint a presiding arbitrator within the stipulated time, the Chairman of the Arbitration Commission appointed Mr. Sheng Leiming as the presiding arbitrator in accordance with the Arbitration Rules. After signing the designated [Declaration], the three arbitrators formed the arbitral tribunal on November 1, 2023, and decided to hold a hearing in Shanghai on December 5, 2023.

On November 1, 2023, the Arbitration Secretariat served the Tribunal Formation Notice, along with the attached [Declaration] and the Hearing Notice, to both parties via express mail. According to the mail tracking record, the documents sent to Respondent's Address 1 were successfully delivered on November 6, 2023.

On December 5, 2023, the arbitral tribunal held the hearing as scheduled in Shanghai. The Applicant was represented by its appointed representatives, while the Respondent, despite being duly notified, failed to attend the hearing or provide any explanation for its absence. Pursuant to Article 39(2) of the Arbitration Rules, the tribunal conducted the hearing in the Respondent's absence. During the hearing, the Applicant presented

statements on the facts of the case, presented the evidence, produced original documents as evidence, answered the tribunal's inquiries, and made a final statement. Before concluding the hearing, the tribunal made arrangements for post-hearing arbitration procedures.

After the hearing, the Applicant submitted a Clarification of Arbitration Claims with attachments, supplementary evidence, and a statement of opinions from its legal representatives.

On February 5, 2024, the arbitral tribunal, through written notification by the Arbitration Secretariat, notified both parties that the tribunal would adjudicate the case based on the Applicant's post-hearing confirmed claims. The tribunal also forwarded the materials submitted by the Applicant to the Respondent and informed the Respondent that any objections or requests for further hearings and/or verification of evidence, as well as any supplementary evidence or opinions, should be submitted within the prescribed time-frame. According to the mail tracking record, the documents sent to Respondent's Address 1 were successfully delivered on February 12, 2024.

On April 30, 2024, the Arbitration Secretariat notified both parties of an extension of the arbitration decision deadline. However, the documents sent to Respondent's Address 1 were returned by the courier service with the notice: "Recipient not found at the address, and phone contact was unsuccessful."

On July 11, 2024, based on two additional addresses provided by the Applicant—namely, Respondent's Address 2 (the address signed by Respondent's representative Austin Gill) and Address 3 (the address published on Respondent's official website and municipal service websites)—the Arbitration Secretariat re-sent the returned arbitration documents to the Respondent. According to the mail tracking record, the documents sent to Address 2 could not be delivered due to "Recipient moved from the address on the waybill," while the documents sent to Address 3 were successfully delivered on July 15, 2024.

To meet the needs of the arbitration process, upon the tribunal's request, the Director of the Arbitration Secretariat approved and extended the deadline for rendering the arbitration award to November 1, 2024.

All arbitration documents in this case have been effectively served to both parties as per Article 8 of the Arbitration Rules. Throughout the arbitration process, the Respondent neither submitted any evidence or defense nor participated in the proceedings.

This case has now been concluded. Based on the Applicant's submitted written materials and the facts ascertained during the hearing, the tribunal has rendered a default award according to the contractual agreement and applicable legal provisions.

One. Case Details

The Applicant submitted the following claims in the arbitration:

On February 10, 2022, the Applicant and the Respondent signed the contract involved in this case, agreeing that the Applicant would purchase one unit of VARIAN/VEECO GEN2000 MBE System from the Respondent for a price of USD 800,000. Article 3 of the contract stipulates the following: "Within one week after the final payment, equipment removal may begin. The Seller must cooperate with the Buyer's schedule for removal, packaging, and related work on-site." Article 10 stipulates: "The Seller guarantees to assist within its capacity in obtaining all necessary permits and approvals for the import and export of the goods and all associated inspections. If the goods fail to obtain export approval within one year of the contract date, the Seller agrees to assist in reselling the equipment and refund all payments made by the Buyer within one week after the resale. If the equipment cannot be resold within three months, the Seller shall refund all payments made within one week. If the failure to obtain export approval is due to the Seller, the Seller shall also compensate the Buyer for interest losses calculated at four times the LPR (Loan Prime Rate) from the date of payment." The Applicant paid USD 400,000 on February 11, 2022, and another USD 400,000 on February 24, 2022, to the bank account provided by the Respondent, fulfilling its payment obligations under the contract. However, the Respondent has not delivered the equipment to date. According to the contract, if the goods fail to obtain export approval within one year, they must be resold. If the resale cannot be completed within three months, all payments must be refunded with interest. At the time of filing this arbitration, over a year had elapsed since the contract date, and while the three-month resale period had not yet ended, the Respondent's unresponsiveness and inability to communicate effectively indicated a high likelihood of default after the resale period. Thus, the Respondent's failure to deliver or resell the equipment constitutes anticipatory breach, and the Applicant is entitled to a refund of payments and interest.

Based on the above, the applicant has submitted the final and clear claims as follows:

1. Terminate the contract in this case (Contract No. ACKEN-CAE-2022021101) that was entered into by the applicant and the respondent on February 10, 2022.
2. Require the respondent to return the payment of USD 800,000 made by the applicant and compensate the applicant for the interest loss, provisionally calculated at RMB 1,317,777.67 (based on USD 800,000, converted at the exchange rate of 1 USD = RMB 6.33 on February 24, 2022, totaling RMB 5,064,000). The interest shall be calculated from February 24, 2022, at four times the Loan Prime Rate (LPR) published by the National Interbank Funding Center, until the respondent makes full payment.
3. Require the respondent to compensate the applicant for reasonable attorney fees of RMB 40,000.
4. Require the respondent to bear the arbitration fees for this case.

The applicant has submitted the following key evidence materials:

Evidence 1. The contract in this case to prove the following: The contract stipulates that the applicant shall purchase one set of VARIAN/VEECO GEN2000 MBE System device from the respondent. Article 3 of the contract stipulates: "Within one week after the payment of the balance, the equipment may be dismantled. The seller shall cooperate with the buyer in the dismantling, packing, and other related work and scheduling at the equipment site." Article 10 stipulates: "The seller guarantees to assist in completing all work related to import and export license approvals and cargo inspections within its capacity. If the contract goods fail to obtain the approvals from the import and export countries within one year of contract signing, the seller agrees to assist the buyer in reselling the equipment and refund all payments made by the buyer within one week after the equipment is resold. If the resale of the equipment cannot be completed within three months, the seller shall refund all advance payments to the buyer within one week. If the failure to obtain export approval is due to the seller's reasons, the seller shall also bear the buyer's interest loss, calculated from the payment date at four times the LPR."

Evidence 2. Two bank receipts to prove the following: The applicant paid USD 400,000 each to the respondent's bank account on February 11, 2022, and February 24, 2022, respectively, fulfilling the payment obligations under the contract in this case.

Evidence 3. Three email screenshots to prove the following: The applicant made multiple attempts to contact the respondent through emails and phone calls but failed to receive a valid response. The respondent's repeated failures to be communicated indicates its inability to perform the contract.

Evidence 4. "Individual Entrustment Agency Agreement," attorney fee invoice, and transfer receipt to prove the following: The applicant incurred reasonable attorney fees of RMB 40,000 to protect its rights and interests.

Two. The Opinions of Arbitration Tribunal

(I) Applicable Law in this Case

Since the Respondent is a company registered in the United States, this case involves foreign-related elements and is classified as an international sale of goods contract dispute. Article 1(1)(a) of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the "CISG") states: "(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." The Applicant and the Respondent are based in China and the United States, respectively, both of which are Contracting States to the CISG. Although Article 9 of the contract states, "Any dispute arising from the execution of the contract shall be resolved through friendly consultation. If consultation fails, the dispute shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration, applying the laws of the People's Republic of China and the arbitration procedures of the Commission," the contract does not explicitly exclude the application of the CISG. Therefore, the CISG shall take precedence in this case.

Additionally, Article 41(1) of the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations provides: "Parties may agree on the applicable law for the contract through negotiation." Thus, for matters not governed by the CISG, the laws of the People's Republic of China, as stipulated in the contract, shall be applicable.

(II) Legal Validity of the Contract

Article 4 of the CISG provides the following: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any customary practices; (b) the effect which the contract may have on the ownership of the goods sold." Accordingly, the validity of the contract shall be determined under the laws of the People's Republic of China as agreed upon by the Applicant and the Respondent in the contract.

The Civil Code of the People's Republic of China (hereinafter referred to as the "Civil Code") came into effect on January 1, 2021. Since the contract was concluded after the Civil Code came into effect, the validity of the contract shall be determined based on its provisions. Upon review, the contract was signed by both the Applicant and the Respondent. Both parties are legally competent, and the content of the contract reflects the genuine intentions of both parties. Furthermore, the contract does not violate the mandatory provisions of the Civil Code or other laws and regulations of the People's Republic of China and does not contravene public order or good morals. Therefore, the arbitral tribunal confirms that the contract is valid and legally binding on both parties.

(III) Facts ascertained by the Tribunal

On February 10, 2022, the Applicant (Buyer) and the Respondent (Seller) signed the contract, agreeing to the purchase of one unit of VARIAN/VEECO GEN2000 MBE System for a total price of USD 800,000. Article 4.1 of the contract stipulates the following: "Upon signing the contract and receiving the original contract and invoice, the Buyer shall prepay 50% of the total contract price via wire transfer. After on-site inspection and written confirmation of the equipment, the Buyer shall pay the remaining 50% of the total contract price upon receiving the original full invoice via wire transfer." Article 10 stipulates the following: "The Seller guarantees to assist within its capacity in obtaining all necessary permits and approvals for the import and export of the goods and any associated inspections. If the goods fail to obtain export approval within one year of the contract date, the Seller agrees to assist in reselling the equipment and refund all payments made by the Buyer within one week of resale. If the equipment cannot be resold within three months, the Seller shall refund all payments made within one week. If the failure to obtain export approval is due to the Seller's reasons, the Seller should also compensate the Buyer for interest losses calculated at four times the LPR (Loan Prime Rate) from the date of payment."

On February 11 and February 24, 2022, the Applicant made payments of USD 400,000 each to the Respondent via bank transfers, fulfilling its payment obligations under the contract.

After the contract had been in effect for one year, the Applicant repeatedly contacted the Respondent via email to inquire about the status of the export permits and proposed arrangements for resale of the equipment. Despite receiving an initial response from the Respondent stating that they would check the status, the Respondent subsequently failed to provide any updates or respond to further communications.

On February 21, 2023, Shi Lingyan sent another email to Austin Gill and Sylvia Li, stating: "I haven't received your reply for a long time. Is there any progress on the equipment license recently? According to the contract, we need to implement Article 10. Of course, if you have any better suggestions, you can let me know. Or what do you think about transporting the equipment to a third country outside of China where a license is not required? I look forward to your reply. Thank you!" On February 22, 2023, Austin Gill replied to Shi Lingyan's email, stating: "I will review the status and then review your application." On March 22, 2023, Shi Lingyan sent another email to Austin Gill, Sylvia Li, and others, stating: "According to the contract, the deadline for CAE to apply for the export license for this equipment was February 10, 2023. However, since the contract was signed, our company has contacted your company multiple times via email but has not received any valid replies regarding the equipment license or delivery. The phone calls have not been answered either. Our company needs to confirm the following matters with your company: 1. Please inform us of the current location of the equipment so that our personnel can be arranged to visit the site for confirmation. 2. Regarding the export license, our company has found an effective solution to transport the equipment to a third country where an export license is not required. Please provide a direct response on the feasibility of this plan. If you have any other plans to immediately execute the contract, you may also communicate with us. 3. Given your negative attitude toward prior communications, our company has serious doubts about your willingness to cooperate and the current status of the performance of the contract. Please contact us as soon as possible to dispel our concerns. Thank you."

The above facts are supported by evidence provided by the applicant. Despite being duly notified, the respondent failed to attend the hearing to present its case or provide any evidence, thereby waiving its rights. Consequently, the arbitration tribunal recognizes the relevant facts of this case based on the evidence provided by the applicant.

(IV) Opinions on the Applicant's Arbitration Claims

1. On the Applicant's Request to Terminate the Contract

The arbitral tribunal holds that under Article 47(1) of the CISG: "The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations." Article 49(1) further provides: "The buyer may declare the contract voided under the following circumstances: (a) if the failure by the seller to perform any of his obligations under the contract amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47, or if he declares that he will not do so within the period so fixed." According to Article 10 of the contract, if the approval of export and import countries

for the goods fail to be obtained within one year of the contract date and the goods cannot be resold within three months after the one-year period, the Respondent shall refund all payments made by the Applicant. On February 10, 2023, one year after the contract was signed, the Applicant contacted the Respondent to request performance of the contract according to the stipulated terms. Although the Respondent initially replied that they would check the status of the export permits, they failed to provide further updates or respond to subsequent emails. The Respondent neither disclosed the status of the equipment nor addressed the Applicant's proposal to transport the equipment to a third country that does not require export permits. This failure to perform the agreed obligations, even within the additional time granted by the Applicant, constitutes a fundamental breach of contract. The Applicant's request to terminate the contract aligns with the conditions for contract termination under the CISG. Although the Applicant used the term "terminate" in accordance with Chinese law, it is substantively equivalent to the CISG's "declaration of avoidance." The tribunal supports the Applicant's request but adjusts the terminology to confirm that the Applicant has the right to declare the contract voided.

Article 26 of the CISG stipulates: "A declaration of avoidance of the contract is effective only if made by notice to the other party."

Although the Applicant did not directly notify the Respondent of the contract termination, the Applicant's arbitration application, submitted on June 30, 2023, was forwarded to the Respondent by the Arbitration Secretariat. Therefore, under the CISG, the tribunal confirms that the contract was declared avoided on June 30, 2023.

2. On the Applicant's Request for a Refund of Payments and Compensation for Interest Losses

Article 81(1) of the CISG provides: "Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance of the contract does not affect any provision in the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract." Article 81(2) further states: "A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently." Article 84(1) of the CISG provides: "If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid." Under Article 10 of the contract, if the equipment fails to obtain export approval within the agreed time-frame and cannot be resold, the Respondent is obligated to refund the Applicant's payments and compensate for interest losses calculated at four times the Loan Prime Rate (LPR) from the date of payment.

The Respondent failed to disclose the status of the export approval or perform the resale obligations. The Applicant has provided sufficient evidence to demonstrate that it fulfilled its payment obligations, while the Respondent provided no evidence to prove compliance with its contractual duties. It is therefore not inappropriate for the Applicant to request the refund of the payments for the goods and interest at the rate and from the dates of the payments on the payments in compliance with CISG and the contract in the case. As the contract does not specify the currency for interest

compensation, the Applicant's calculation, which converts the payment amount from USD to RMB using the exchange rate at the time of payment, is reasonable.

In summary, the Applicant's requests for refund of payments for the goods and interest payment are based on facts and legal grounds. They are upheld by the tribunal.

3. On the Applicant's Claim for Attorney Fees and Arbitration Fees

The Respondent's failure to fulfill its contractual obligations caused the arbitration. Since the Applicant's claims were upheld, the tribunal determines, in accordance with Article 52 of the Arbitration Rules, that the Applicant's reasonable attorney fees of RMB 40,000 and the arbitration fees for this case should be borne by the Respondent.

Three. Arbitration Award

Based on the foregoing, the arbitral tribunal renders the following award:

1. The contract (Contract No. ACKEN-CAE-2022021101) signed between the Applicant and the Respondent on February 10, 2022, is declared voided as of June 30, 2023.
2. The Respondent shall refund the Applicant USD 800,000 and compensate for interest losses (calculated using the RMB equivalent of 800,000 USD, converted at the exchange rate of 1 USD = 6.33 RMB as of February 24, 2022, totaling RMB 5,064,000, with interest at four times the Loan Prime Rate (LPR) from February 24, 2022, to the date of actual payment).
3. The Respondent shall pay the Applicant RMB 40,000 as attorney fees.
4. The arbitration fee for this case in the amount of RMB 189,790 will be fully borne by the Respondent. Since the Applicant has prepaid the arbitration fees, the Respondent shall reimburse the Applicant RMB 189,790.

All payments under this award shall be made by the Respondent to the Applicant within 15 days of the issuance of this award.

This award is final and binding, effective immediately upon issuance.

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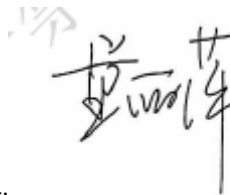
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Presiding Arbitrator:



Arbitrator:



Arbitrator:



November 1, 2024 in Shanghai