Chamber of National and International Arbitration of Milan

FINAL AWARD

IN THE ARBITRATION
BETWEEN

XXX Ltd (Cyprus), *Claimant* [Seller]

and

YYY S.r.l. (Italy), *Respondent* [Buyer]

BEFORE
Sole Arbitrator

Rendered in Milan, Italy

SUMMARY

I. THE PARTIES

1. Claimant, XXX Ltd, is a limited liability company under the laws of Cyprus with its registered offices at, -----, Cyprus and Moscow, Russia ... represented in these arbitration proceedings by: Avv. ..., Via ..., Milan (Italy).

2. Respondent (and counterclaimant), YYY S.r.l., is a limited liability company under the

laws of Italy with its registered office at --------, Milan, Italy ... represented in these arbitration proceedings by: Avv. ..., Via ..., Genoa, Italy.

3. Claimant and Respondent may be collectively referred to in this Award as the "**Parties**" or, individually, as "**Party**".

[*Hereafter, in this presentation of the Award, references to "Claimant" or "XXX" are generally presented as* "**[Seller]**" *and references to "Respondent" or "YYY" are generally presented as* "**[Buyer]**".]

II. THE ARBITRAL TRIBUNAL

Based on agreement of the Parties, the Arbitral Tribunal (hereinafter also referred to as the "**Tribunal**") was composed of a sole arbitrator, prof. ..., with offices in Milan, Italy, appointed by the Chamber of National and International Arbitration of Milan (hereinafter referred to as the "**Chamber**").

III. THE ARBITRATION AGREEMENT AND THE PROCEEDINGS

A. Arbitration Agreement

1. The present case is based on a contract, numbered ... (hereinafter referred to as the "**Contract**"), executed in English on February 5, 1999 between [Seller] and [Buyer].

2. With regard to the settlement of disputes between the Parties arising out of the Contract, Article 10 of the Contract relevantly provides as follows:

> "*All disputes and differences which may arise out of the present Contract or in connections with it are to be settled by the parties in an amicable way.*
>
> *If the parties do not come to an agreement, the matter is to be submitted to the International Commercial Arbitration Court of the Chamber of Commerce and Industry of MILANO ITALY in compliance with the rules of procedures of said Court award of which is final and binding upon both parties.*
>
> *Appliance to the State Court is not allowed."*

3. The jurisdiction of the Chamber and of the Arbitral Tribunal, appointed according to the International Rules of the Chamber (hereinafter referred to as the "**Rules**"), has never been questioned by the Parties.

4. The place of arbitration was Milan, Italy, according to Art. 11 of the Rules, as confirmed by letter of the Chamber.

B. Arbitration proceedings

1. The present arbitration proceedings were governed, in particular, by the Rules and two Procedural Orders enacted by the Tribunal.

2. The [Seller]'s Request for Arbitration was received by the Chamber in 2000, and the Answer to the Request ("Explanations") was filed by the [Buyer]

3. During the proceedings, the Parties submitted to the Tribunal and exchanged with each other various statements, briefs, memorials and other documents, in full compliance with the Rules, the Orders and the instructions of the Tribunal, namely: [Seller]'s Request of arbitration; [Buyer]'s Statement of defence; [Seller]'s Memorial; [Buyer]'s Additional memorandum in defence; [Buyer]'s Pleading; [Seller]'s Memorial; [Buyer]'s Counterpleading; [Seller]'s Reply; [Seller]'s Closing brief; [Buyer]'s Final pleading.

4. In the course of the proceedings, two hearings were held: a preliminary hearing in Milan with the Counsel of the Parties and, for [Buyer], Mr. ---, and a hearing on the merits in Milan, 2000, with the Counsel of the Parties and, for [Seller], Mr. ---.

5. During the hearings, attempts to have the Parties reach a conciliation proved unsuccessful.

6. As for the witnesses, [Seller] filed the written statements of Mr. ---, Mr. ---, Mr. --- and Ms. ---, and introduced only Mr --- as a witness, heard and cross-examined during the second Milan hearing; [Buyer] filed the written statement of Mr. ---.

7. In 2001 the Tribunal informed the Parties that the fact finding phase of the proceedings had been completed.

C. Language of the proceedings

1. The Parties agreed with the Tribunal that English should be the language of the arbitration proceedings, according to Article 12 of the Rules and to the Chamber's letter.

D. Sureties for the arbitration costs

1. [Seller] has complied with the Arbitral Council's directions with respect to the payment of sureties by remitting to the Chamber:

   - 23.000 United States Dollars (hereinafter "*US$*") plus VAT; and
   - 757.000 Italian Lire (hereinafter "*Lit*") plus VAT;

1.1. Moreover [Seller] has paid to the Chamber US$ 1.000 as registration fee.

2. [Buyer] has equally complied with the Arbitral Council's directions with respect to the payment of sureties by remitting to the Chamber:

   - 24.000 US$ plus VAT; and
   - 757.000 Lit. plus VAT;

2.2. Moreover [Buyer] has paid to the Chamber US$ 1.200 as registration fee.

E. Deliberation of the award

1. Following prior extentions, in 2001 the Chamber extended until September 2001 the time limit for rendering the award.

IV. DOCUMENTARY AND FACTUAL BACKGROUND

1. On February 5, 1999 [Buyer] and [Seller] entered into Contract No. 01-1999, a sale and purchase agreement, under which the [Seller], as the Seller, engaged to sell and the [Buyer], as the Buyer, undertook to buy, at certain terms and conditions, the goods specified in ″enclosed Appendices″ (hereinafter referred to as the "**Specifications**").

2. More precisely, Article 1 of the Contract reads as follows:

   "The Seller has sold and the buyer has bought the goods specified in the enclosed Appendices, showing specifications, quantities, prices and delivery time and constituting an integral part of the present Contract."

3. The goods consist in steel wire, nails and wire rod, as it results from fifteen Specifications signed under the Contract.

4. According to Article 2 of the Contract, prices are in US$ and include ″export Packing and Marketing″.

5. Under Article 6, complete payment must be effected within 45 days from the date of delivery of the goods, which coincides (Article 3) with the date of the relevant bill of lading. In case of the Buyer's failure to observe the contractual terms of payment, Article 11, third paragraph, entitles the Seller not to fulfil its obligations under the Contract and to claim damages. The Contract is silent on the consequences of non-performance or inadequate performance on the part of the Seller.

6. With regards to the quantity of the goods actually delivered, Article 3 of the Contract permits a tolerance of +/- 5% vis à vis the quantity agreed in the Specifications.

7. The quality of the goods must fully conform to Russian standards and the technical conditions in force at the manufacturing works - namely ZZZ (hereinafter referred to as "**ZZZ**") - and must be confirmed by a "Manufacturer's Quality Certificate" (Article 4).

8. Quantity and quality claims must be submitted within 30 days from the date of arrival of the goods at the place of destination, but, in any case, no later than 60 days after the delivery date. Claims must be confirmed by a Seller's representative and by a representative of a neutral organisation (Article 8).

9. Furthermore, the Contract contains a force majeure clause, Article 9, which refers, inter alia, to the "prohibitions of exports or imports beyond the control of the parties". Article 9 also relevantly provides:

   "If any of the above circumstances last longer than 6 months, each party shall have the right to refuse any further fulfilment of the obligations under the Contract and in this case neither of the parties shall have the right to make a claim upon the other party for compensation of any possible damages.

   The party, for whom it becomes impossible to meet their obligations under the Contract, shall immediately advise the other party as regards the beginning and the cessation of the circumstances preventing the fulfilment of their obligations. [...]"

10. Finally, alterations and additions to the Contract are valid only if made in writing and signed by both Parties (Article 11, second paragraph).

11. On February 5, 1999 (the same date of the Contract), the Parties signed Specifications NN. 1 and 2. Together they referred to 3.030 tons of goods, for a total price of US$ 636.000. Specifications NN. 1 and 2 were the only ones attached to the original Contract and their implementation (the so called "First Shipment") gave rise to no disputes.

12. On March 6, 1999 the Parties signed in (Russia) another agreement (hereinafter referred to as the "**Agreement**"). [Buyer] engaged to buy from [Seller] a further amount of 12.000 tons of wire and nails and 4.500 tons of wire rod, to be delivered according to a time schedule between April and July 2001. With regards to "sorts of production, prices, conditions of delivery and payments" the Agreement referred to the Contract and to Specifications NN. 3, 4, 5, 6, 7, 8.

13. The latter Specifications were signed on March 6, 1999 - the same date of the Agreement - and contemplated, on the whole, the delivery of 3.000 tons of goods, by April 30, 1999, against US$ 678.600.

14. On the same day, March 6, 1999, [Seller] (the trader) signed an agreement (in Russian "Soglashenie") with ZZZ (the wire and wire rod Manufacturer) strikingly similar in form and content to the Agreement. Under this agreement ZZZ engaged to deliver to [Seller] 12.000 tons of wire and nails and 4.500 tons of wire rod between March and June 1999 (see [Seller]'s Exhibit 1). However, whereas the single lots (or shipments) were identical with the lots listed in the Agreement, the time forecast for the delivery of each lot (shipment) was anticipated by one month (e.g. the April 3.000 tons of the Agreement became the March 3.000 tons of the Soglashenie). As for concrete types of goods, prices, conditions of delivery and payments, the Soglashenie, like the Agreement, sent back to an original contract with ZZZ (contract N. .... of February 8, 1999) and to Specifications NN. 3, 4, 5, 6, 7, and 8 of March 6, 1999 (presumably parallel to, but not identical with the ones relating to the Contract under dispute), but neither the former nor the latter have been submitted to the Tribunal.

15. During the first days of April, Specifications NN. 4, 5 and 7 were modified (quantity and price were reduced in Specifications NN. 4 and 5 and increased in Specification N. 7) and Specification N. 9 was added. Also the delivery date for all the Specifications was posponed from April 30 to May 30, 1999. Specifications NN. 3, 4, 5, 6, 7, 8, as modified, and Specification N. 9 together provided for 2.970 tons of goods to be delivered against a total price of US$ 684.750. All these changes were introduced to satisfy [Buyer]' requests.

16. All the goods provided for under Specifications NN. 3 to 9 (the so called "Second Shipment") occurred within the agreed new time limit, namely May 30, 1999, as evidenced by the relevant bill of lading.

17. However, a part of the goods delivered with the second shipment did not meet the agreed package and quality standards and gave rise to a Buyer's claim under Article 8 of the Contract. A meeting took place at a warehouse, in the first week of July 1999, during

which representatives of the Parties (Mr. --- for [Seller] and Mr. --- for [Buyer]) and ZZZ (Ms. ---), as well as --, an independent survejor jointly appointed by the Parties, assessed the nature and extent of the defects and discussed a reduction of the price.

18. As a result of that meeting an amicable settlement (hereinafter referred to as the "Settlement Agrement") was reached. According to the Settlement Agreement - undated, but admittedly and most likely concluded between July 15 and 19, 1999 - the total price for the goods comprised in the Second Shipment was reduced to US$ 579.415,63, which were to be paid in two instalments: US$ 339.291 on July 15, 1999 and US$ 240.124,63 on October 30, 1999. The first instalment was paid on July 20 and received by the Seller on July 23, 1999, whereas the second has not been paid so far.

19. The Settlement Agreement expressely stated that "[a]ll other terms and conditions of the contract N 1/99 and following addendum dated March 6th 1999, still under performance, remain unchanged".

20. [Seller] initially hesitated (see faxes N. 17 of July 14 and N. 18 of July 16, 1999), but eventually agreed to sign the Settlement Agreement, apparently on July 19, 2001. However, before (faxes of July 14 and July 16) and after (faxes of July 26 and 29, August 8 and 27, 1999) the date of the Settlement Agreement, the Seller requested urgently from the Buyer a proper claim (in accordance with Article 8 of the Contract) and a series of documents allegedly necessary to explain to Russian export and exchange control authorites the reasons for the lower price and the worsened terms of payment of the goods delivered (under Specifications NN. 1 to 9) and to avoid major sanctions.

21. The requested documents were sent by the Buyer gradually, but somehow slowly and not fully satisfactorily, between August and September (see, in particular, [Buyer]'s fax of September 2, 1999: "*our cooperation* [in sending the documents] *is subject to your fulfilling of the sale contract*"). Most of the original documents were admittedly sent by mail only on September 22, 1999.

22. In the meantime, namely on May 18, 1999, the Parties had agreed on Specifications NN. 10, 11, 12, 13, 14 and 15, altogether allegedly covering approximately 3.000 tons of goods, to be delivered within July 30, 1999. However, Specifications NN. 10, 11 and 12 have not been submitted to the Tribunal while Specifications NN. 13, 14 and 15 ([Buyer]'s Exhibits 41, 42, 43) only provide for the delivery of 2.250 tons of steel wire for a total price of US$ 520.250.

23. On June 7, 1999, [Buyer] asked [Seller] to urgently instruct ZZZ to "temporarily suspend the production" covered by Specifications NN. 14 and 15, owing to the "need to change the diameter of the wire, leaving the total quantity unmodified"; nonetheless the Buyer asserted its readiness to accept goods already manufactured. In a subsequent letter of June 16, 2001 [Buyer] proposed to modify Specifications NN. 14 and 15 by slightly reducing the quantity (from 1.450 to 1.420 tons) and the price (from 312.250 to 302.000 US$).

24. 1.432,252 tons of goods were shipped on July 23, 1999, aboard the vessel "...", within the agreed deadline ([Buyer]'s Exhibit 45). The weight roughly coincides with that contemplated by Specifications NN. 14 and 15 (as modified), although from subsequent

correspondence from the Seller ([Seller]'s fax of July 14, 1999, [Buyer]'s Exhibit 9) it appears that the so called "Third Shipment" referred to the goods under Specifications NN. 12, 13 and 14. In this regard the Seller relevantly stated, on July 14, 1999 that the shipment of the goods under Specifications NN. 10, 11 and 15 - for 1.630,547 tons - was planned for September.

25. The Buyer never specifically objected to this postponement and, referring to the Agreement schedule in general, on August 9, 1999 wrote that it was ready "*to accept though delayed the quantity not yet delivered*".

26. The payment of the goods delivered through the Third Shipment (US$ 319.153,44), due on September 6, was ordered by the Buyer on September 9, but reached the Seller only on September 15, 1999 ([Seller]'s Exhibits 26 and 35).

27. The second half of July 1999 witnesses the birth of divergences between the Parties concerning the payment by [Buyer] of the second (Settlement) instalment, the dispatch by [Seller] of the missing part of the Third Shipment, the allegedly delayed forwarding of the documents requested by the Seller in connection with the Settlement Agreement and, above all, the price of the goods to be delivered in the further shipments. As it emerges from the correspondence between the Parties, divergences and disputes widened in August and September and eventually led [Buyer] not to pay the second instalment on October 30, 1999 and [Seller] to start the present arbitration in Milan in February 2000.

28. It is clear from [Seller]'s correspondence that the new terms of payment (expecially the delayed second instalment) adopted in the Settlement Agreement have put the Seller in an awkward position vis à vis Russian authorites and the Manufacturer, both ZZZ and [Seller] being chargeable with infringement of stern Russian Export and Foreign currency regulations. [Seller] tried to have the second (Settlement) instalment paid earlier, offering in exchange a price discount (or, more precisely, unchanged prices) on the future shipments.

29. Towards the end of July 1999 ([Seller]'s Exhibit 24) the Seller informed the Buyer that the non-payment of the second instalment - certainly not due until October 30, 1999 - and the lack of appropriate documents might prevent [Seller] from further deliveries.

30. As for [Seller]'s prayer for an earlier payment of the second (Settlement) instalment, [Buyer] made its agreement subject to conditions ([Seller]'s Exhibit 28) unacceptable for the Seller:

    a) immediate delivery of all the goods (quantities) provided for in the March Agreement;

    b) granting of a discount on the (allegedly) agreed prices of all future shipments, [Buyer]'s position being that the prices agreed in Specifications NN. 3 to 8 were fixed and applicable to all further deliveries under the Contract and the Agreement;

    c) rate of discount apparently to be proportionally equal to the reduction fixed in the Settlement Agreement.

31. In its fax of August 12, 2001, the Seller, in case of a prompt and full payment by the Buyer of the goods delivered with the Second Shipment, offered a price discount proportionally equal to the reduction agreed in the Settlement Agreement, to be calculated on prices increased by 25-30 US$ per ton, in line with a general price increase for the contractual goods on the Russian market ([Seller]'s Exhibit 29, 30).

32. [Buyer] implicitely rejected that offer, insisting on obtaing the discount on the allegedly already agreed prices (fixed in the Agreement and the Specifications NN. 3 to 8 attached thereto). In its correspondence ([Buyer]'s Exhibits 12 and 16) [Buyer] accused [Seller] of breach of Contract, asserted that it was suffering (August 5 and September 9, 1999) or was about to suffer (September 2, 1999) heavy damages caused by non-delivery of approximately 12.000 tons of goods, and, in its letter of September 9, 1999, for the first time threatened not to pay the second (Settlement) instalments, when due, to cover those damage ([Buyer]'s Exhibit 28).

33. [Buyer] also asserted, on August 5, 1999 ([Buyer]'s Exhibit 12), that "we were consequently compelled to buy from other sources the material which we needed, with relevant increase of our costs", although in a later fax of September 9 it stated that "we are compelled to buy the products on the market at a higher price in order to satisfy the orders we have accepted relying on your supply".

34. Apparently to solve its difficulty with ZZZ and to avoid the Manufacturer's and its own responsibility for violation of Russian Export and Currency regulation, on August 30, 1999 [Seller] entered into a year long Loan Agreement (the "Loan Agreement") with ZZZ. The amount of the loan was the same amount due but not paid by [Buyer] to [Seller] on October 30, 1999 and on September 25, 2000 [Seller] paid to the ZZZ US$ 39.029,25, being the 15% yearly interest on the principal of 240.124,63 US$.

V. RELIEF SOUGHT BY EACH PARTY

In the course of this arbitration the Parties have slightly changed the formulation or amount of their respective claims; their final requests are set out herebelow.

A. On the [Seller]'s side

The [Seller] shortly asks that the Tribunal:

1. order [Buyer] to pay to [Seller] US$ 240.124,63 (being the Settlement second instalment), with legal interest on said amount from October 30, 1999 until the date of actual payment, to be calculated according to Article 395 of the Civil Code of the Russian Federation (hereinafter referred to as the "RF Civil Code");

2. order [Buyer] to pay to [Seller] US$ 39.020,25 (being the amount paid by [Seller] to ZZZ as interest on the Loan Agreement) and all costs consequent thereto;

3. order [Buyer] to pay all arbitration and legal costs.

B. On the [Buyer]'s side

The [Buyer] shortly asks that the Tribunal:

1. order [Seller] to compensate to [Buyer] all the damages it suffered as a consequence of [Seller]'s breach of its contractual obligation to deliver the goods listed in paragraph 2 of the Agreement at the terms and conditions defined in paragraph 3 of the same;

2. assess and quantify such damages at an amount not lower than US$ 301.248,400 and not higher than US$ 361.498,08;

3. terminate by set-off [Seller]'s credit of US$ 240.124,63 (the second instalment under the Settlement Agreement) against [Buyer]'s higher credit under paragraph 3 above ("as assessed by the Arbitrator") and consequently order [Seller] to pay the balance to [Buyer];

4. order [Buyer] to pay all arbitration and legal costs.

Moreover, each Party has in its briefs and/or at various stages of the proceedings requested the Tribunal to reject all the claims submitted by the other Party.

Neither Party has validly terminated the Contract or asked the Tribunal to declare its termination, although each of them has threatened to terminate it or stated that it would consider the Contract terminated failing fulfillment of the other Party's obligations within a given deadline (see [Buyer]'s faxes of September 9 and October 27, and [Seller]'s fax of October 29, 1999).

VI. OPINION AND REASONS

A. Applicable law

1. The Contract is silent on the norms applicable to the merits of the present dispute and no agreement has been reached between the Parties on this issue. Such being the case, the arbitrator is authorized and invited by the Rules to apply the law with which the Contract has its closest connection.

2. The [Buyer] identifies this law with Italian law, whereas, according to the [Seller], Russian law is the law applicable. Incidentally, but perhaps significantly, neither Party maintains that the arbitrator should have recourse to the law of Cyprus, being the law of the "formal" Seller.

3. The Tribunal finds [Seller]'s arguments more convincing for the following reasons.

3.1. First of all, although the arbitrator is not compelled (neither by the Rules nor by the *lex fori*) to move from a given system of rules on conflicts of laws, let us remember that in a sale-purchase relationship - which we are undoubtedly dealing with in the present dispute - the widely prevailing rule, failing a choice of law by the Parties, is that the law applicable should be that of the seller.

3.2. In Russia, this rule is expressly set forth in Article 166.1(1) of the 1999 "Basis of legislation of the Union of the SSR and the Republics".

3.3. In Italy, the same result is achieved through Article 4.2 of the 1980 Rome EC Convention on the Law Applicable to Contractual Obligations (now an integral part of Italian law, ex Article 57 of the Law [= "Legge"] May 31, 1995, N. 218), because, with few exceptions, the so called "characteristic performance" is, in a sale contract, the performance of the seller.

3.4. Following this "conflict of laws" approach, the law applicable to the Contract should be the law where [Seller], a company incorporated under the laws of Cyprus, has, at the time of conclusion of the Contract, its "central administration" or "principal place of business".

3.5. However, as the Contract was certainly entered into "in the course of the party's trade", Article 4.2 of the Convention clearly prescribes that, where the performance is to be effected through a place of business other than the principal place of business, the country to be considered is the country in which that other place of business is situated.

3.6. From the documents, the facts of the case and the written and oral testimonies it appears that [Seller] has its principal place of business in Moscow (Russia); even if it were not so, Russia would still be the most closely connected country to the Seller, as the place (ZZZ) through which the Contract had to be performed.

4. Russian law appears to be the law applicable to the Contract, as the one having the closest connection therewith, also on a "substantive law" line of reasoning, i.e. without recourse to private international law.

4.1. A sufficient number of connecting factors lead to the substantive law of the Russian Federation: (a) [Seller] is incorporated in Cyprus, but it has two legal adresses and corresponding places of business, Nicosia and Moscow (Article 6 and 11 of the Contract), the first looking like an accounting and payment centre, the second like the effective operational unit; (b) the Manufacturer of the goods sold under the Contract is a Russian firm, ZZZ; (c) all the goods originated from ZZZ are shipped from Russia and loaded aboard Russian ships; (d) the Agreement was signed in Russia when Mr. ---- visited ZZZ; (e) most if not all correspondence between the Parties comes from or is addressed (by [Buyer]) to [Seller]'s Moskow office.

4.2. On the contrary, very few factors connect the Contract with the substantive law of Italy, more so as two of the criteria mentioned by the [Buyer] - namely the choice of Milan as a procedural venue (but *lex fori* and *lex causae* do not necessarily coincide) or the conclusion in Italy of the Settlement Agreement (a merely accidental event in the life of the Contract) - must obviously be dismissed.

5. Neither Party has argued that the 1980 Vienna UN Convention on Contracts of International Sale of Goods (hereinafter referred to as the "Vienna Convention") applies to the present dispute, although the [Seller] has indirectly done so by quoting Article 74 of the Vienna Convention in its submissions.

5.1. However, the Tribunal believes that the Vienna Convention is the main body of law applicable in this arbitration, for the following reasons.

5.2. The Vienna Convention has been ratified by the two States more directly involved in the present arbitration and has therefore become a part (speciel rules for international sales) of their national legal systems. Whether Russian (in this Tribunal's opinion) or Italian law (in [Buyer]'s view) is the national law applicable, therefore, the Vienna Convention applies to the present dispute as *lex specialis* within the domestic general law of sales.

5.3. Moreover, the Tribunal finds that the Vienna Convention must autonomously and automatically apply in the present arbitration also by virtue of Article 1 (a) and 10 (a) of the same Convention, as the law applicable to a contract of sale between parties belonging to two different contracting States (Italy and Russia).

5.4. As stated above, [Seller] has more than one place of business, Moskow and Nicosia, but Article 10 (a) of the Vienna Convention offers a clear criterium to risolve this conflict: the closest relationship of one place of business with the contract or its performance "having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract".

5.5. The Tribunal has already shown (at paragraph 3.6. above) that Russia has a closer connection with the Contract than Cyprus, a seat mainly (if not only) chosen for payment (Contract, Article 6) and possibly tax reasons.

5.6. In addition, also the parameters set out in the second part of Article 10 (a) are fully met, since the circumstances that the goods were to be produced in Russia, according to Russian standards, and sent from Russia to Italy aboard Russian ships were perfectly known to and considered by [Buyer] when concluding the Contract and during its performance.

6. The Tribunal's final conclusion is that the law applicable to the Contract and the present dispute is the Vienna Convention and, for matters not covered by the Convention, the substantive law of the Russian Federation (*in primis* the RF Civil Code).

B. Nature of the Contract, the Agreement and the Specifications

1. The Parties extensively disagree on the function, extent and effects of the Contract, the Agreement and the Specifications, so that it is absolutely necessary to ascertain, as a first step, their true nature -irrespective of their given names and notwithstading the poor quality (to put it mildly) of the language used in these documents and in part of the correspondence- and to define their mutual relationship.

2. First of all the Tribunal notes that the Contract at issue is, from the viewpoint of the Vienna Convention and the Russian applicable law, a general contract of sale, which, however, does not independently and completely determines all the necessary elements of the agreement.

3. As usual in the export trade practice (not only Soviet and Russian), the general or framework contract is accompanied, or to be followed, by an often unspelled number of annexes or appendices, where the essential, indispensable aspects of the contract (technical characteristics, quantities, prices, packing ways and times of delivery of the goods sold and bought) are specified. Without such concrete specifications, frequently variable in number (especially when the contract does not have a time limit), the general

contract remains an abstract and possibly empty document, dictating broad rules capable of being implemented only if and when a concrete "specification" will be adopted, whereby the key or chore elements of the contract will actually be agreed between the Parties. Without at least one specification, the contract cannot operate and its only or mainly effect is the obligation of each Party to negotiate in good faith in order to reach a reasonable agreement on the (many and essential) unspecified elements of the general sale contract.

3.1. Only the Specifications, therefore, by showing sorts (types) of production (steel wire, nail, wire rods), technical characteristics of the gods (diameter, etc.), quantity, port of destination, packing instructions, time of delivery and, above all, price (see Article 1 and 2, first sentence, of the Contract, all the Specifications submitted by the Parties and parargaph 3 of the Agreement) make the Contract, so to say, concretly usable, or "enforceable", and create a reciprocal duty to deliver and to pay the specified goods at the specified terms and conditions.

3.2. Notwithstanding the wording of the Contract (Article 1 and 2 of which speak of "enclosed Appendices"), it is not controversial that only Specifications NN. 1 and 2 were originally appended thereto. The following (N. 3 to N. 15) were all prepared, agreed and occasionally changed (by the Buyer) at later times and provided for successive deliveries. It appears that the largest number of Specifications (NN. 3 to 8) was made on March 6, 1999 in ..., when the so called Agreement was signed by the Parties (a contemporary symmetric agreement, the Soglashenie, having been entered into between ZZZ and [Seller]).

4. The nature and effects of the Agreement have been the subject of extensive debate between the Parties and by the witness testimony, the [Buyer] asserting its bilateral character, the [Seller] arguing for its merely unilateral nature (the Buyer's exclusive commitment to buy).

5. Irrespective of the inadeguate text wording, the Tribunal accepts that the Agreement is a source of bilateral (and not merely unilateral) obligations.

5.1. A comparison of the English and the Russian text, respectively of the Agreement and of ZZZ-[Seller] (in the former [Buyer] engages to buy from [Seller], whereas in the latter ZZZ engages to supply to [Seller], but in both cases the verbal tense is the perspective future: respectively, "will buy" and "postavit"), [Seller]'s parallel and contemporary signature of both these documents, the structure of the Agreement itself (in which the first two paragraphs refer respectively to an obligation to buy and to an obligation to deliver), and Mr. ----'s witness testimony (admittedly, "both parties have to be guided by an agreement", even if [Buyer] was the Party which requested it) have led the Tribunal to such conclusion.

6. But of course the bilateral nature of the Agreement - identical to the bilateral nature of the numbered Specifications - does not affect the higher rank of the Contract and its controlling functions and does not suppress the need that a potential or abstract obligation contemplated in the Contract or in the subordinate Agreement (such as a delivery to be carried out within certain periods of time) become actual and concrete through Specifications adopted at the same time (like Specifications NN. 3 to 8, appended to the Agreement) or to be agreed in the future.

6.1. In this perspective it is clear that the Agreement is not the Contract - as [Buyer] mistakenly tries to depict it (see, *inter alia*, [Buyer]'s exhibit 14) -, it does not replace, alter or add to the Contract - notwithstanding its wrong definition as "addendum" in the Settlement Agreement - unless we use the latter term in the sense of completing the Contract with some missing items (namely the quantity and the time of delivery, but not the technical description and the price), with a function similar to but less extensive than each numbered Specification. On the contrary, the Agreement (paragraph 3) refers to the Contract (as a higher ranking document), as well as to Specifications NN. 3 to 8, attached thereto, and, significantly, is never referred to in the Specifications. Moreover, each and all numbered Specifications are said to be appended to the Contract and not to the Agreement. By its content, the Agreement rather resembles a grouped or super specification (from March 6, 1999 onwards), a program, agenda or instruction (when coupled with the ZZZ-[Seller] agreement) for production and delivery purposes, a calendar or forecast of supplies, which, like the Contract, had unavoidably to be completed with numbered Specifications.

6.2. Like the Contract, but even more than the Contract, the Agreement is not self-sufficient, it does not have a life of its own, but it becomes usable and enforceable only through individual Specifications.

7. Incidentally, from a structural point of view, a careful analysis of the combined provisions of the Contract, the Agreement and the Specifications fully authorize a definition of the overall agreement as a *contract for delivery of goods by instalments* in the sense of Art. 7.3 of the Vienna Convention [sic. Art. 73 appears to have been intended], as acknowledged also by [Buyer] in its first submission.

8. We know from the facts of the case and the concordant statements of the Parties that Specifications NN.3 to 8 were adopted at the date of the Agreement (March 6, 1999), Specifications NN. 9 to 15 were adopted on May 18, 1999 (with subsequent adjustments), while further Specifications (necessary to cover the total amount of goods (16.500 tons) contemplated by the Agreement were never agreed by the Parties.

9. If what stated above is true, a breach of contract, whether fundamental (in the sense of article 25 of the Vienna Convention) or not, relevant for these proceedings, must forcibly be also a breach of one or more numbered Specifications, because only these Specifications determine some indispensable elements of the Contract, such as the technical and mechanical properties of the goods, the concrete delivery terms, the packing conditions, the shipment documents and, above all, the price (this of course does not apply to the obligations autonomously and exceptionally born from the Settlement Agreement; see section D below).

C. The prices of the goods and [Buyer]'s claim of damage compensation for non-delivery of 10.430 tons of goods included in the Agreement

1. Whereas it is not controversial that the prices of the goods delivered under the Contract could only be fixed in the Specifications, the positions of the Parties widely differ on the price issue.

1.1. According to [Seller], the price had to be agreed for each delivery and it could therefore fluctuate, at least after the Third Shipment (although this limitation emerges only from

the unclear testimony of Mr. -- and seems only to regard the relationship between ZZZ and [Seller]).

1.2 In [Buyer]'s opinions the price was fixed once and forever through the Agreement, or more precisely, through the Specifcations NN. 3 to 8, mentioned in paragraph 3 of the Agreement.

2. The Tribunal finds that neither the Contract nor the Agreement provides for a fixed price, that a fixed price agreement was never concluded, that the price was firmly set only in the Specifications and that only fifteen such Specifications were finally agreed upon (however Specifications NN. 10 to 12 have not been submitted to the arbitrator and their content can only be indirectly and approximately inferred from [Seller]'s fax of July 14, 1999).

3. In terms of quantities, 10.430 tons of undelivered goods (approximately 12.050 tons less approximately 1.620 tons, as suggested by [Buyer] in its second submission) were never concretely defined or specified, especially price-wise, in properly agreed Specifications - the ones enclosed in [Buyer]'s fax No. 388 of September 3, 1999, certainly not qualifying for this purpose - and precisely owing to the failure of relevant Sepcifications they could not and did not have to be delivered by [Seller].

4. Paragraph 3 of the Agreement is the crucial argument in [Buyer]'s contention. In the [Buyer]'s view that paragraph was to govern all the deliveries foreseen in the Agreement (and not only those covered by Specifications NN. 3 to 8) in as much as sorts of production, prices, conditions of delivery and payments were concerned; the price of the different types of goods was allegedly frozen for all the April-July deliveries and [Buyer] has also listed those prices in its Exhibit 29 for the Tribunal's convenience.

5. The Tribunal, however, is not persuaded by these arguments.

5.1. First of all the wording of paragraph 3, as usually not univocal, seems simply (and redundantly) to indicate that the price, etc., of the items listed in Specifications NN. 3 to 8 were to be found in the respective Specifications.

5.2. Moreover, Specifications NN. 3 to 8 could not apply as such - that is to say without further specifications, adjustments or changes - to future deliveries, out of a very simple reasoning. How can the goods be precisely described? How are their technical conditions or properties to be determined? Which is the port of destination? Furthermore, with regard to the price, where is the fixed price for wire rod (4.500 tons) to be found, since none of the Specifications in question refers to this product? In its Exhibit 29 [Buyer] does include wire rod and shows a price of 200 US$/MT, but sintomatically it draws this price from Specification N. 2, viz. from an earlier Specification, not embraced by the Agreement.

5.3. In addition, even if the prices had been fixed or stabilized (as per Mr. ---'s words), they could not have been fixed forever, but only until July 1999, in accordance with the tentative time schedule of the Agreement; the frozen prices could certainly not apply to goods delivered after the end of July 1999, owing to a delay which, in the Tribunal's opinion, had been silently accepted by both Parties or, in any case, could not be

exclusively ascribed to [Seller]. On the contrary, the [Seller], as late as September 9, 1999 (see [Buyer]'s fax 405 on this date) was justified in relying on the (additional) period of time fixed by the Buyer for performance (within the current year). Any different interpretation of the Agreement would be unreasonable.

6. But les ut assume, only for the sake of truth and arguments' completeness, that [Seller], during the period under investigation (August - October 1999) did not comply with some of the broader obligations of good faith and fair dealing in international trade, namely by making its agreement to further deliveries conditional upon the arrival of the requested post-Settlement documents and/or an earlier payment of the second instalment.

6.1. Was the bad faith actually proved and so serious as to constitute a fundamental breach? Was the procedure established in Section III of the Vienna Convention adhered to by the Buyer? Did [Buyer] observe the general duty (UNIDROIT Principles of International Commercial Contracts, Art. 5.3) of cooperation with [Seller], in a situation in which such cooperation could be reasonably expected for the performance of the latter's obligations? The Tribunal can only answer negatively to these questions.

6.2. Furthermore, even if [Seller]'s bad faith were proved and constituted a fundamental breach on the part of the Seller, the causal nexus between the breach and the alleged damages is far from being proved, the Contract was not duly terminated by the Buyer, there are serious doubts and contradictions as to the connection and timing of the six replacement purchases - two of which took place before [Seller]'s alleged breach (on August 11 and 12, 1999) and three of which were performed only on November 12 and 15, that is to say after the expiration of the time limit for the payment of the second (Settlement) instalment, whereas the last invoice, of September 30, 1999, only concerns wire rod, i. e. a good whose price was certainly not fixed in the Agreement - and most of the goods listed in the invoices submitted to the Tribunal are not identical to, and are hard to compare with, the ones (still unspecified) mentioned in paragraph 2 of the Agreement.

7. Finally, one cannot ignore a deciding argument: even though [Seller] had been guilty to a wantonly delay in reaching an agreement on the missing necessary Specifications (that is to say those concerning the 10.430 undelivered tons) and forced [Buyer] into the substitute transactions, there would be no actual harm caused to the buyer, because no difference would exist or could be proved between the Contract price (never agreed between the Parties) and the price of the replacement transaction: as it emerges very clearly from the correspondence between the Parties (see above all [Seller]'s fax N. 28 of August 12, 1999) and the oral testimony, on the one hand the Seller would have never agreed to a price not including the notified market increase - unless it could benefit of some concessions with regard to the second instalment - and, on the other hand, the Buyer - which between August and November 1999 bought from third parties at higher prices - did not agree to buy at the increased price from the Seller.

8. For all the reasons explained so far the Tribunal finds that [Buyer]'s request to compensate the damage allegedly caused by [Seller]'s non-delivery of 10.430 tons of goods under the Agreement must be rejected.

D. The Second Shipment and the Settlement Agreement

1. [Seller], beyond any doubt, signed the Settlement Agreement consciously and voluntarily, after inspecting *in loco* the defective goods together with a representative of the Manufacturer.

2. Afterwords [Seller] probably repented having done so, owing to the well known mandatory norms of the applicable law concerning timely documentation and payment of Russian exports and to the slow and inadequate incoming of the documents requested from [Buyer].

3. However, even if [Buyer] did not comply promptly with [Seller]'s justified requests, until October 30, 1999 the possible infringement of Russian mandatory norms and the related sanctions, if any, could certainly not be attributed to the former, nor could the Russian regulations and sanctions be used as an argument by the latter in order not to complete its Third Shipment or to obtain an earlier payment of the second (Settlement) instalment.

4. [Seller], assisted at the wharehouse by Ms. ----of ZZZ, knew or ought to have known that the content of the Settlement Agreement was or might have been in contradiction with Russian export and foreign exchange control regulations. Even if Mr. ---- had been acquainted with those regulations at the time of the meeting in Bari and perhaps earlier - according to the written and oral testimony from the [Seller]'s witnesses - he later rightly relied on the Settlement Agreement.

5. *Nemo potest venire contra factum propium* and [Seller], having agreed to the Settlement without any clear written reservation, was undoubtely estopped from subsequently invoking the existence of mandatory norms of Russian law prohibiting a postponed payment without prompt and adequate documentation.

6. Is it unquestioned that the first instalment was regularly paid, although with a negligible and untimely contested delay (5 days).

7. On the other hand, we already know that on September 9, 1999 [Buyer] announced its intent "to link the payment of the second instalment - never disputed by [Buyer] - to the weight of the goods actually delivered" by [Seller]; moreover, on October 27, 1999, contrary to its previous statement (Augut 8, 1999), the Buyer wrote to the Seller that because of [Seller]'s fundamental breach, it would not pay the second instalment on October 30, 1999.

8. We also know that this deadline was not respected, with the consequence that from November 1999 onwards, as a result of the Buyer's failure to observe a contractual term of payment, the Seller became entitled to refuse the fulfillment of its obligations under the Contract (Art. 11, 3rd paragraph).

9. As the second (Settlement) instalment was never paid, without well founded reasons, [Seller] is certainly entitled to recover the corresponding amount.

E. The Loan Agreement and the interest payable on the principal owed to the [Seller]

1. The [Seller] classifies as damages the amount of US$ 39.020,25 that it paid to ZZZ on September 25 (or 30), 2000 as 15% yearly interest (on the sum of US$ 240.124,63)

under the Loan Agreement. [Seller] primarily justifies its request for compensation of these damages with the alleged "coercion" (so to say) to enter that Loan Agreement, when it became apparent that the [Buyer] would not pay the second (Settlement) instalment by the October 30 deadline, lest it be subjected to major sanctions, export bans and judicial proceedings on the part of the Manufacturer.

2. The Tribunal, familiar with the peculiarities of Russian export-trade legislation, does not question the truth, reality and risks of these consequences (easily foreseeable by the [Buyer] which, at the date of its non-performance, had been acquainted with them long since), but must remark the following.

3. First of all the Tribunal observes that when a Party fails to pay the price or any other sum that is in arrears, the other Party is entitled to interest on it (Vienna Convention, Art. 78), irrespective of the legal characterization thereof, and therefore agrees that interest is surely owed to the [Seller] on the amount of US$ 240.124,63 as of October 30, 1999.

4. However, neither the Contract nor the Vienna Convention fix any interest rate or mention any method to establish it, so that the [Seller] correctly demands that interest be calculated in conformity with the applicable law, i.e. according to Article 395 of the RF Civil Code.

5. Obviously, to avoid a double payment of interest (although at possibly different rates) for the same cause and period of time (October 30, 1999 - September 25 or 30, 2000), the [Seller]'s request can only be construed as a prayer to grant interest quantified at US$ 39.020,25, until September 25 or 30, 2000, plus interest to be calculated in conformity with Art. 395 of the RF Civil Code, from September 25 or 30 onwards.

6. Nevertheless it must be also noted that [Seller] entered the Loan Agreement autonomously, without any previous or contemporary notice to [Buyer] and, above all, two months before the deadline for payment of the second (Settlement) instalment; with the consequence that the 15% yearly rate, privately agreed upon by the [Seller] with ZZZ, could only run from the initial date of October 30, 1999 and would only be acceptable if it were not higher than the rate of interest applicable under Russian law (Art. 395, RF Civil Code).

7. Hence, the claimed amount (liquidated interest) of US$ 39.020,25 should be proportionally reduced to US$ 33.017,14; but, unfortunately, the second condition mentioned in the preceding paragraph is not fulfilled, irrespective of the methods of calculation allowd by Art. 395.

8. The Tribunal has autonomously sought and obtained information on average bank short-term US$ lending rates to prime commercial borrowers in Russia in the years 1990 and 2000 - as per data of the Central Bank of the Russian Federation - and has ascertained that these rates were 11.85% per annum in October/November 1999 and 13% per annum in February 2000 (when the request of arbitration was submitted).

9. The Tribunal, faced with the alternative choices allowed by Article 395 of the RF Civl Code, decides to take as a basis and parameter for its decision the average bank interest

rate prevailing in the [Seller]'s country (Russia) on the date of presentation of the claim, such rate being the closest one to the rate applied to the Loan Agreement.

10. The Tribunal, therefore, hereby fixes a rate of interest of 13% on the principal amount granted to the [Seller].

11. The [Seller] is entitled to interest at the above rate on US$ 240.124,63 from October 30, 1999 until the date of actual collection.

F. The incomplete third shipment

1. It is admitted by both Parties that the Third Shipment [Seller] had delivered to [Buyer] less than one half (in terms of weight) of the goods covered by the Specifications NN. 10 to 15 (approximately 3000 tons).

2. The initial cause of this partial non-performance seemingly consisted in [Buyer]'s requests and Specifications' adjustments, and in any case the Tribunal is convinced that a delivery postponement was at least silently agreed by the Parties, but it is indisputable that the Seller had an obligation to deliver the remaining quantity (slightly over 1600 tons) within a reasonable time.

3. In this connection the Tribunal must reject the [Seller]'s argument that the [Buyer] did not comply with the claim procedure prescribed in Art. 8 of the Contract, when the first and partial delivery arrived at the place of destination. As a matter of fact, whether or not that procedure was compulsory in this case, its infringement was never invoked by [Seller] before the beginning of the present arbitration; besides, [Buyer] was fully entitled to rely on [Seller]'s announcement (notified by fax NN. 16 of July 14, 1999) that it was planning to perform the missing deliveries (under Specifications NN. 10, 11 and 15), albeit only in September.

4. But was there a time limit for these deliveries?

4.1. Certainly not before September 1999, after the July 14 notification to the Buyer which, by failing to raise any precise objection, acquiesced in this postponement and, more generally, reiterated its readiness to accept belated deliveries.

4.2. Furthermore, [Seller] was perhaps justified (Contract, Art. 11, 3rd paragraph) in not completing its deliveries from September 6, when the payment for the performed part of the Third Shipment was due (see [Seller]'s fax No. 31 of the same date, referring to INV 99035) to September 15, when the payment was actually received.

4.3. However, as from September 16 and until October 30, [Seller]'s refusal to complete its deliveries under Specifications NN. 10 to 15 was undoubtedly groundless and [Buyer] is therefore entitled to have its damages for delayed performance compensated (Vienna Convention, Artt. 45.2 and 47.2, last sentence).

5. [Buyer] has asked to have these damages calculated as the difference between the Contract (that is to say the Specifications NN. 10 to 15) price and the price paid by the Buyer for the goods bought in replacement of those not delivered by the Seller.

6. The Tribunal agrees to this method of calculation, although the Buyer did not strictly abide by the directions of the Vienna Convention (Art. 51), the Contract (or the transaction under Specifications NN. 10 to 15) was not previously terminated by [Buyer] (Vienna Convention, Art. 75) and the Specifications NN. 10 to 12 could not be examined by the arbitrator, and even though the connection, timing and sequence of the substitute purchases (two of which were made before [Seller]' breach) -as already explained in Section C, par. 6.2. above -, as well as the causal connection between [Seller]'s delayed performance and [Buyer]'s substitute transactions ([Buyer]'s exhibits 30 to 35), are largely unsubstantiated and uncertain.

6.1. The reason of this decision is that both Parties have proved or admitted that an increase in the world market price of the goods to be delivered with the Third Shipment took place in the relevant period of time, so that, in the Tribunal's opinion, it has been established with a sufficient degree of certainty that [Buyer] suffered harm as a consequence of the delay.

6.2. However, the circumstances recalled in par. 6 above induce the Tribunal to select the lowest amount of average price increase proposed by the Buyer and admitted by the Seller, namely US$ 25 per metric ton of goods.

6.3. As for the quantity of undelivered goods, the figure of 1.620 tons, pointed out in [Buyer]'s submission of September 28, 2000 (page 6) is accepted, but this figure must be reduced by 5%, i.e. to 1.539 tons, on the basis of the Contract provision on tolerances (Art. 3, 2nd paragraph).

7. As a conclusion, [Buyer] is entitled to a compensation of damages worth US$ 38.475 (1.539 tons x 25 US$).

G. The set-off and the *exceptio inadimpleti contractus* (hereinafter the *"Exceptio"*)

1. In its fax of September 9, 1999 the Buyer notified the Seller that, if [Seller] did not deliver 12.000 tons of allegedly missing goods within the next month of October, [Buyer] would deduct from the second (Settlement) instalment, due on October 30, 1999, US$ 20 for each undelivered ton. In other words, [Buyer] was apparently or implicitly declaring or announcing a forthcoming termination of its obligations by set-off.

2. But was the set-off an admissible way of terminating [Buyer]'s obligations uder the Settlement Agreement? Russian law gives a negative answer to this question. According to the RF Civil Code (Art. 410) and the relevant judge-made law and legal writings (see for istance *Nauchno-prakticheskij kommentarij k chasti pervoj GK Rossijskoj Federacij*, 2nd ed., Moscow, 1999, at page 540), an obligation can be terminated by set-off (*zachet*) only if the counterclaim is identical or homogeneous, quantified and indisputed: unlike [Seller]'s claim, [Buyer]'s claim met none of these conditions.

3. Consequently, in the circumstances of the case, a valid set-off could not be unilaterally declared by the Buyer, who, not insignificantly, in its briefs has asked the Tribunal to declare an (arbitral) partial set-off of the Parties' claims.

* * * *

4. A seemengly different approach was taken by the Buyer toward the end of October 1999. In fact, after numerous earlier warnings [Buyer] decided not to pay the second (Settlement) instalment at the due time on the basis of the well known principle *inadimplenti non est adimplendum* and because, in [Buyer]'s contention, the value of the damage previously caused by [Seller]'s contractual breaches (non-delivery of over 12.000 tons of goods) abundantly exceeded ([Buyer]'s letter of October 27, 1999) the amount of the second (Settlement) instalment: 301.248,400/361.498,080 US$ versus 240.124,63 US$.

5. The Tribunal disagrees with this argument, and consequently finds that [Buyer] was not entitled to hold back its payment on October 30, 1999, for the following reasons.

5.1. First of all the Vienna Convention does not include the *Exceptio* among the remedies available to the Buyer for breach of contract by the Seller (Art. 51.1), nor did the Buyer, at least before the deadline for the payment of the second (Settlement) instalment expired, validly terminate the Contract in its entirety or with respect to the Third Shipment (Art. 73 of the Vienna Convention).

5.2. Additionally, taking into account the facts and circumstances of the case and the findings of this Tribunal, even assuming that the Vienna Convention allowed a recourse to the *Exceptio*, it could only be used by one Party, in a *Contract for delivery of goods by instalments* as the Contract undoubtedly is, to withold its performance until the other Party had performed its obligations "in respect of the same instalment": this means, in the present dispute, that [Buyer] might have opposed the *Exceptio* only with respect to the Third Shipment (= instalment), since the delivery of the second load of this Shipment was the only proved breach of [Seller], whereas the obligation to pay US$ 240.124,63 had a different origin and cause, had already been completed and accepted (although through a settlement) and, above all, pertained to an earlier and not interdependent delivery (the Second Shipment).

5.3. Moreover, wherever this remedy is permitted, it is doubtful that it can apply when one Party performs in part but not completely (as in the case of the Third Shipment). Even when permitted, performance may be withheld but only where in normal circumstances this is consonant with good faith. In any case, and in the vast majority of the legal systems, the *Exceptio* is paralized when the non-performance of one Party ([Seller]) is minor or significantly lower than the performance expected from the other Party ([Buyer]), as in the present dispute.

H. Arbitration and related costs

1. Both Parties request reimbursement of (a) all arbitration costs and (b) all legal costs and other arbitration related expenses (duly specified by [Seller] and [Buyer] in their respective submissions).

3. The Parties have always paid their respective shares of the arbitration costs, as shown in detail in the Chamber Secretariat's letter.

2.1. It seems to the Tribunal that the circumstances of the case do not give any ground for ignoring or distancing itself from the principle that the arbitration costs follow the event, i.e. that the losing party has a duty to reimburse the winning party for its costs of the

proceedings; consequently these costs must be apportioned accordingly.

2.2. This award grants more monies to [Seller] than to [Buyer], also in proportion to the Parties' respective claims, so that, in the Tribunal's opinion, the [Buyer] must compensate to the [Seller] 2/3 (two third) of its arbitration costs (US$ 24.000 and Lit 757.000), namely US$ 18.000 (+ VAT) and Italian Lire 504.667 (+ VAT).

4. However, each Party shall bear its own expenses, autonomously decided and incurred in connection with the present arbitration, including the costs and fees of its respective attorneys.

VII. AWARD

For the foregoing reasons this Tribunal hereby renders the following:

FINAL AWARD

1. [Buyer] is ordered to pay to [Seller] US$ 240.124,63 being the unpaid second instalment provided for in the Settlement Agreement.

2. [Seller] is ordered to pay to [Buyer] US$ 38.475 as damage compensation for the Third Shipment.

3. [Buyer] is ordered to pay to [Seller] interest, at an annual interest rate of 13%, on the sum due under paragraph 1 above, from October 30, 1999, until the date when payment is effected.

4. [Buyer] is ordered to pay to [Seller] US$ 18.000 (plus VAT) and Lit 504.667 (plus VAT) as partial reimbursement of the [Seller]'s arbitration costs.

5. Each Party shall bear its own legal costs and arbitration related expenses.

6. Every other claim or counterclaim of the Parties is rejected.

* * * *

This award is made and signed in three identical originals, one for each of the Parties and one for the Chamber.

* * * *

The Sole Arbitrator