



**МІЖНАРОДНИЙ КОМЕРЦІЙНИЙ АРБИТРАЖНИЙ СУД
при ТОРГОВО-ПРОМИСЛОВІЙ ПАЛАТІ УКРАЇНИ**

**INTERNATIONAL COMMERCIAL ARBITRATION COURT
AT THE UKRAINIAN CHAMBER OF COMMERCE AND INDUSTRY
COUR INTERNATIONALE COMMERCIALE D'ARBITRAGE AUPRES DE LA CHAMBRE DE
COMMERCE ET D'INDUSTRIE DE L'UKRAINE
INTERNATIONALES KOMMERZIELLES SCHIEDSGERICHT BEI DER HANDELS- UND
INDUSTRIEKAMMER DER UKRAINE
CORTE INTERNACIONAL COMERCIAL DE ARBITRAJE ANEXA A LA CAMARA DE COMERCIO
E INDUSTRIA DE UKRANIA**

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ARBITRAL AWARD

rendered in Kiev on 3 April 2009

in case AC No. 229В/2008

Claimant: EVERFIELD CAPITAL LLP (United Kingdom)

Respondent: MIRATECH UK LIMITED (United Kingdom)

Arbitral Tribunal: composed as a sole arbitrator Mr. Vasyl Y. Marmazov

Rapporteur Ms. Nataliya A. Dutsnyk

On 3 April 2009 the Arbitral Tribunal, composed as above, held the oral hearing of the case AC No. 229В/2008 concerning *EVERFIELD CAPITAL LLP* (United Kingdom)'s claim for avoidance of the *Software Development Agreement* No. M10/07 dated 13 September 2007 and recovery of the amount of 176,326.55 US dollars (USD) from *MIRATECH UK LIMITED* (United Kingdom).

At the hearing the Parties were represented by the following persons:

the Claimant ,

Mr. Sergii A. Korotkov, acting by virtue of the Power of Attorney (certified by a notary and apostilled) dated 4 November 2008, signed by Mr. Ivan Kovpak as Beneficial Owner of *EVERFIELD CAPITAL LLP*;

the Respondent,

Mr. Valerii P. Kutsyi as Director of *MIRATECH UK LIMITED*; and Mr. Andriy Y. Kubko, acting by virtue of the Power of Attorney (certified by a notary) dated 2 April 2009, signed by Mr. Mykola Royenko as Director of *MIRATECH UK LIMITED*.

1. Jurisdiction of the Arbitral Tribunal

The International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (hereinafter referred to as "the ICAC") has accepted jurisdiction over this case by virtue of section 10.1 of the *Software Development Agreement* No. M10/07, concluded between the Parties on 13 September 2007, providing for that:

"[...] any and all disputes rising under this Agreement and/or in its concern not resolved amicably by the Parties shall be settled in accordance with Ukrainian laws under jurisdiction of International Commercial Arbitrage, under Chamber, of Commerce of Ukraine by one arbitrator appointed in accordance with its Rules. The place of arbitration shall be Kiev (Ukraine). The language of arbitration shall be English".

2. Arbitration Proceedings

On 3 November 2008 *EVERFIELD CAPITAL LLP* (United Kingdom) filed with the ICAC the *Statement of Claim* with a set of documents annexed thereto, seeking an award requiring:

- 1) "to dissolve the Software Development Agreement No. M10/07 of 13th of September, 2007";
- 2) "to levy from *MIRATECH UK LIMITED* ... the damage, caused by the breach of the obligations under the Software Development Agreement No. M10/07 of 13th of September, 2007, at the rate of USD 125000,00";
- 3) "to levy from *MIRATECH UK LIMITED* ... the penalty at the rate of USD 51326,55", and also
- 4) "to levy from *MIRATECH UK LIMITED* ... the cost – the arbitration tax paid".

This very day, on 3 November 2008, upon filing the statement of claim, the present arbitral proceedings were commenced by order of the President of the ICAC as a case AC No. 229B/2008.

By a payment order dated 31 October 2008 the Claimant paid a registration fee in the amount of USD 600.00.

By a letter No. 2483/14-7 dated 5 November 2008 the ICAC in accordance with article 20 of the *ICAC Rules* requested the Claimant, within 30 days following the receipt of that letter, to pay pursuant to sections III and VII (4) of the *Schedule of Arbitration Fees and Costs* USD 7,631.84 by way of arbitration fee and also USD 300.00 by way of deposit to cover the cost of translation to be provided in the course of the arbitral proceedings. The Claimant had also been requested to take measures, with the Respondent, in order to agree on appointment of a sole arbitrator. The letter No. 2483/14-7 of 5 November 2008, sent by registered mail, had been delivered to the Claimant's representative on 20 November 2008.

By a payment order dated 12 November 2008 the Claimant paid an arbitration fee in the amount of USD 7,631.84.

On 19 December 2008 the Claimant submitted to the ICAC a copy of its letter No. 2/17/12 dated 17 December 2008, which had been sent to the Respondent, including proposals to agree on a candidacy of Ms. Tetyana G. Zakharchenko as a sole arbitrator in the case and to change the language of the arbitral proceedings from English to Russian.

On 25 December 2008 the ICAC, by registered mail (post-office receipt No. RD010941238UA), sent to the Respondent a copy of the *Statement of Claim* with documents annexed thereto and also the *Rules and Recommendatory List of Arbitrators* of the ICAC. By a letter No. 2986/14-6 dated 24 December 2008 the Respondent had been requested to submit, within 30 days following the receipt of the letter, a statement of defence and communicate to the ICAC a full name of a sole arbitrator as it would be agreed with the Claimant. The letter referred to article 11 of the *Ukrainian Law on International Commercial Arbitration*

and article 27 of the *ICAC Rules*, which provide that if the parties are unable to agree on a sole arbitrator, within the time limit given by the ICAC, this arbitrator shall be appointed, upon request of a party, by the President of the Ukrainian Chamber of Commerce and Industry.

Having received no information as to delivery of the registered letter No. RD010941238UA to the Respondent, on 27 January 2009, by a letter No.229/199/14-7, the ICAC requested the Ukrainian State Postal Services Enterprise "Ukrposhta" to submit information as to the delivery of the above mentioned registered letter.

By a letter No. 542 dated 30 January 2009, which the ICAC received on 2 February 2009, the Respondent acknowledged the receipt of the registered letter No. RD010941238UA on 13 January 2009.

On 13 February 2009 the Respondent communicated to the ICAC the *Statement of Defence* dated 12 February 2009 by fax. On 16 February 2009 the ICAC received the *Statement of Defence* with documents annexed thereto, sent by the Respondent by registered mail.

By a letter No. 21, dated 12 February 2009 the Respondent informed the ICAC that it disagreed with the Claimant's proposals to change the language of the arbitral proceedings from English to Russian as well as with appointment of Ms. Tetyana G. Zakharchenko as a sole arbitrator in the case. By the same letter the Respondent proposed to appoint Mr. Dominique Hasher (France) as a sole arbitrator in the case. However, it failed to submit any evidence to the ICAC of taking measures to agree with the Claimant on appointment of the proposed sole arbitrator. Besides, by a letter No. 21 dated 12 February 2009 the Respondent requested the ICAC to send all correspondence addressed to it at the following address: P.O. Box 10, Kiev, 03028, Ukraine.

On 18 February 2009 the ICAC, by registered mail (post-office receipt No. 8632743), sent to the Claimant a copy of the *Statement of Defence* with documents annexed thereto and also the Respondent's letter No. 21 dated

12 February 2009. By a letter No. 420/14-6 dated 17 February 2009 the Claimant had been requested to submit, within 20 days following the receipt of the letter, its comment on the *Statement of Defence*. The ICAC proposed that the Claimant pays USD 300.00 by way of deposit to cover the cost of translation in the course of the arbitral proceedings. That registered letter (No. 8632743) had been delivered to the Claimant's representative on 23 February 2009.

Since the Parties failed to agree on appointment of a sole arbitrator within the prescribed time limit, on 23 February 2009 the President of the Ukrainian Chamber of Commerce and Industry, acting under articles 6.1 and 11.3 of the *Ukrainian Law on International Commercial Arbitration*, appointed Mr. Vasyl Y. Marmazov to act as a sole arbitrator in the case.

The oral hearing of the case AC No. 229B/2008 was scheduled to take place on 3 April 2009 at 2 p.m., at the following address: 33, Velyka Zhytomirska Street, Kiev, Ukraine. The notice of the oral hearing specifying the date, time and place of the hearing as well as the Decision of the President of the Ukrainian Chamber of Commerce and Industry of 23 February 2009 appointing a sole arbitrator were sent to the Parties by registered mail on 24 February 2009 (to the Claimant's representative under the post-office receipt No. 8633529 and to the Respondent under the post-office receipt No. 8633561).

On 10 March 2009 the ICAC received the acknowledgement of receipt of the registered letter No. 8633529, sent to the Claimant's representative, on 2 March 2009, confirmed by the signatures of the addressee and the postal services employee, and a stamp of the Ukrainian postal services on the return slip of the acknowledgement of receipt.

On 2 March 2009 the ICAC received the acknowledgement of receipt of the registered letter No. 8633561, sent to the Respondent, on 25 February 2009, confirmed by the signatures of the addressee and the postal services employee, and a stamp of the Ukrainian postal services on the return slip of the acknowledgement of receipt.

By a payment order dated 27 February 2009 the Claimant made the payment in the amount of USD 300.00 to cover the cost of translation in the course of the arbitral proceedings.

The Arbitral Tribunal held the oral hearing on the scheduled date. The Claimant's representative submitted to the Arbitral Tribunal the *Application for specification of the amount of claim* and *Comments on the Statement of Defence*, which had been handed over to the Respondent's representatives.

In the *Application for specification of the amount of claim* the Claimant has defined more exactly the amount of penalty to be paid by the Respondent under section 4.1.2 of the *Agreement*. In particular, the Claimant requested the Arbitral Tribunal to recover from the Respondent USD 50,289.65 of the penalty instead of USD 51,326.55 that were initially claimed. In the *Comments on the Statement of Defence* the Claimant "strongly objects to the statement of [the Respondent] that the absence of [the Claimant]'s claim concerning the delay in the time of fulfilling the works in accordance with [section] 4.1.2 of the agreement deprives [the Claimant] of the legal rights to bring an action". The Claimant asserted that: "until the present day [the Respondent] did not finished the works, established in the [Agreement], and did not present any evidences of right fulfillment and hand over of these works to the customer..." and also "did not present any evidences that the violation of the agreement happened not by his fault".

In the course of the oral hearing the Parties' representatives reconfirmed their written submissions made to the Arbitral Tribunal.

3. Factual Background of the Parties' Dispute

The course of events that ultimately led to the dispute between the Parties dates back to 13 September 2007 when the Parties entered into the *Software Development Agreement* No. M10/07 (hereinafter referred to as "the *Agreement*"), where it was agreed that the Respondent would provide to the Claimant software development services for Senturia information system consisting of booking services and including website, various programming modules and components and its integration to external reservation systems.

Pursuant to section 4.1.1 of the *Agreement* the works under the *Agreement* should be performed according to the *Project Schedule of Milestones*, provided in *Annex 2* to the *Agreement*. According to that *Schedule* Milestone M0 was performed on the day of the *Agreement* had been signed, on 13 September 2007; Milestone M1 (Project Started) should be performed in 3 weeks following the day of signature of the *Agreement* by the Parties, i.e. till 4 October 2007; Milestone M2 – M1 + 3 weeks – i.e. till 25 October 2007; Milestone M3 – M1 + 8 weeks – i.e. till 29 November 2007; Milestone M4.1 – M1 + 12 weeks – i.e. till 27 December 2007; Milestone M4.2 – M1 + 16 weeks – i.e. till 24 January 2008; Milestone M4.3 – M1 + 21 weeks – i.e. till 28 February 2008; Milestone M4.4 – M1 + 24 weeks – i.e. till 20 March 2008; Milestone M4.5 – M1 + 28 weeks – i.e. till 17 April 2008; Milestone M4.6 – M1 + 31 weeks – i.e. till 8 May 2008; Milestone M4.7 – M1 + 34 weeks – i.e. till 29 May 2008; Milestone M5 (Project Acceptance) – M1 + 42 weeks – i.e. till 24 July 2008.

In accordance with section 5.1 of the *Agreement* and section 2.4.1 of *Annex 1* to the *Agreement* (*Miratech Standard Terms and Conditions for Services Provision*) the Respondent should periodically (at the end of each reporting period) provide the Claimant with reports of accomplished works. According to section 2.3.1 of *Annex 1* to the *Agreement* the Respondent should “deliver all Deliverable, upon completion, to Client [the Claimant] Technical Coordinator for its quality control (testing) and/or acceptance. Miratech [the Respondent] shall fix such delivery by certain document execution (Delivery Confirmation)”.

In accordance with section 3.1 of the *Agreement* a total value of services to be provided by the Respondent under the *Agreement* (Contract Price) makes USD 207,380.25. Pursuant to section 6.1 of the *Agreement* the Claimant should pay the services provided (works performed) according to the *Payment Schedule*, provided in *Annex 3* to the *Agreement*, as follows:

Milestone M1 – 30% of Contract Price - USD 62,214.08;
 Milestone M4.1 – 30% of Contract Price - USD 62,214.08;
 Milestone M4.7 – 25% of Contract Price - USD 51,845.06;

Milestone M5 - 15% of Contract Price - USD 31,107.03.

Pursuant to section 5.2 of *Annex 1* to the *Agreement* "any payments under the Agreement shall be based on invoices that refer to reports of accomplished work or other documents specified by the Agreement". Section 5.1 of *Annex 1* to the *Agreement* provides for that: "Miratech [the Respondent] shall submit invoices to Client [the Claimant] for payment for works performed (services provided) ... only when appropriate obligation to make a payment on certain milestone, defined in the project plan, becomes due".

The Claimant, in the *Statement of Claim*, asserts that the Respondent has systematically violated the *Project Schedule of Milestones*, provided in *Annex 2* to the *Agreement*, and failed to perform Milestone M5 (a final stage) at all ("MIRATECH UK did not notify the Client of M5 stage works execution and produced any results").

As it is indicated in the *Statement of Claim*, the Respondent sent to the Claimant, by e-mail, the *Report of Accomplished Works* dated 4 October 2007, confirming the performance of Milestone M1, and the Invoice No. 09M/0907/1 dated 7 November 2007 to the amount of USD 62,214.08 on 7 November 2007, i.e. with the 34-day delay. In spite of the delay the Claimant accepted and signed the *Report of Accomplished Works*. On 20 November 2007 the Respondent issued the Invoice No. M10/07/1 (corrected) to the amount of USD 62,214.08, which the Claimant paid by two instalments: USD 25,000.00 on 26 November 2007 and USD 25,000.00 on 4 December 2007.

Milestone M2 was performed by the Respondent in time. The Respondent notified the Claimant of performance of that Milestone and sent, by e-mail, working results on 12 October 2007, and the Claimant notified the Respondent of acceptance of performance also by e-mail on 16 October 2007.

Milestone M3 was performed by the Respondent with the 4-day delay. The Claimant accepted a performance of that Milestone on 5 December 2007.

On 28 December 2007 the Respondent sent to the Claimant, by e-mail, the *Report of Accomplished Works* dated 27 December 2007, confirming the performance of Milestone M4.1, and the Invoice dated 28 December 2007 to the amount of USD 62,214.08. The Claimant accepted performance of Milestone M4.1 and paid the Invoice dated 28 December 2007 by two instalments: USD 25,000.00 on 25 January 2008 and USD 50,000.00 on 7 February 2008.

A total of the Claimant's payments under the Agreement amounted to USD 125,000.00. Therefore, the Claimant paid in full all invoices, issued by the Respondent on 20 November 2007 and on 28 December 2007. No other payments under the Agreement were made by the Claimant.

The Claimant, in the *Statement of Claim*, mentioned that its failure to pay the Contract Price in full resulted from its refusal to accept improperly performed works effectuated by the Respondent for the remainder of Milestones.

So, as it is indicated in the *Statement of Claim*, the Respondent notified the Claimant of performance of Milestone 4.2 and sent, by e-mail, working results only on 7 February 2008, i.e. with the 41-day delay. The Claimant sent to the Respondent its reasoned refusal to accept the works performed. On 25 March 2008 the Respondent sent to the Claimant corrected working results of Milestone M4.2; however, the Claimant also refused to accept them.

On 6 March 2008 (with the 7-day delay) the Respondent notified the Claimant of performance of Milestone M4.3 and sent working results. The Claimant refused to accept a performance of that Milestone, too.

On 24 April 2008 (with the 35-day delay) the Respondent notified the Claimant of performance of Milestone M4.4 and sent working results. On 6 May 2008 the Claimant sent to the Respondent its refusal to accept working results "in view of absence of specified functionality and great number of revealed defects". On 16 May 2008 and on 19 May 2008 the Respondent sent to the Claimant corrected working result but the Claimant also did not accept them in view of the aforesaid reasons.

On 9 June 2008 the Parties conducted negotiations concerning the existing situation. However, the negotiations between them had no effect. In particular, the Respondent failed to take measure to remedy detected defects. Moreover, as the Claimant asserts in the *Statement of Claim*, the Respondent failed to notify the Claimant of performance of Milestone M5 and failed to deliver any working results completed at that Milestone neither within the time period specified in *Annex 2 to the Agreement* (i.e. till 24 July 2008), nor later.

On 14 September 2008 the Claimant, by e-mail, sent to the Respondent the Invoice No. 14/09/2008 dated 14 September 2008 to the amount of USD 27,477.88 as a penalty for the Milestone M5 delay, which is to be paid by the Respondent under section 4.1.2 of the *Agreement*. By the same e-mail the Claimant proposed to the Respondent the following solutions of the disputed situation:

- 1) to terminate the *Agreement*. In that case the Respondent should have paid a penalty and returned a prepayment made by the Claimant under the *Agreement*; or
- 2) to complete the project by means of prolongation of the performance of Milestone M5 till 1 December 2008. In that case the Respondent should have paid to the Claimant a penalty at the rate of 25% of the Contract Price for the schedule delay.

By a letter No. 365 dated 26 September 2008 the Respondent replied to the Claimant that:

"The current delay in Project Schedule is caused by your non-performance ... During the Project period we haven't received from you any required information and documentation as defined in the Annex 2 to the *Agreement* ... Furthermore, ... the Milestone 4.4 acceptance is delayed for more than 4 months from your side that influence the whole project schedule and budget ...".

By the same letter the Respondent proposed the following way forward:

- 1) "You proceed with our request to accept Milestone 4.4 ... In this case Miratech agrees to provide Deliverables under Milestone 4.5 till February 1, 2009 but in any case no sooner than 2 month after you complete all your obligations under Milestone 2 ..."; or

2) "we can proceed with contract termination according to section 7 of the Agreement. Miratech has already spent 95% or USD 197 110,24 of the budget. You have already paid USD 125 000,00. In case of project termination we request you to execute the remaining payment of USD 72 110,24 ... as specified in Agreement".

By a letter No. 2008-10-03/01 dated 3 October 2008 the Claimant replied to the Respondent that:

"Current schedule delay is caused by Miratech non-performance ... None of [your propositions] looks acceptable ... Our position is the same: 1. Complete current project according to agreed scope and new schedule [till 1 February 2009] ... 2. Cancel current project with payback of project advance and remedy till the date of cancellation decision".

As the Claimant asserts in the *Statement of Claim*, the Respondent did not reply to the above letter.

Despite numerous attempts of the Claimant to settle the dispute without resort to courts, the Respondent failed to comply with its contractual obligations. Thus, the Claimant initiated recourse to the ICAC.

In the *Statement of Defence* dated 12 February 2009, submitted to the ICAC, the Respondent asserts that:

"The Respondent has committed no unlawful actions or omissions which might potentially result in loss for the Claimant in the amount as indicated in the statement of claim; timely and proper completion of certain stages of the Works and Works in general has been precluded as a result of unlawful acts by the Claimant in the form of failure to observe the procedure and time limits set forth for completing a set of actions relevant in law while performing the SDA [Software Development Agreement] and required to be observed by the SDA, annexes thereto and applicable laws of Ukraine".

In particular, the Respondent notes that the Claimant has not sent to the Respondent a notice of acceptance or non-acceptance of performance of Milestone M4.2 within a time period prescribed by section 5.2.2 of the *Agreement*. Thus, pursuant to the aforesaid section of the *Agreement* Milestone M4.2 should be deemed as accepted by the Claimant and considered as properly

performed. Moreover, the Claimant "served no confirmation on material defects in the works performed within M4.2 stage". In view of the above the Respondent considers that "the Claimant's refusal to accept the works completed at M4.2 stage is groundless and constitutes a violation of the SDA requirements and the Standard Conditions".

The Respondent also asserts that:

"The Claimant's refusal to accept the M4.4 stage ... in a gross excess of the timelines stipulated by clause 5.3.1 of the SDA should be deemed as unlawful and as a one resulting in unjustified delay in completion of the M4.4 specifically and the Works in general". Moreover, "in breach of [section 5.3.1 of the Agreement] the Claimant notice of its refusal to accept the M4.4 stage contained no specific instructions to describing the actions to be taken to improve the results of this stage".

So, in the Respondent's opinion, "the Claimant unlawfully precluded completing certain stages and Works in general". That's why "the Claimant's statement of alleged failure by the Respondent to observe the time limits for completing works at the M5 stage is groundless".

Based on the foregoing, the Respondent asserts that it "has committed no unlawful actions or omissions in the form of breach in the contractual obligations to the Claimant in terms of provisions in the SDA and attachments thereto" and requests the Arbitral Tribunal "to dismiss in full the claims made by the Claimant".

In the *Comments on the Statement of Defence* dated 3 April 2009 the Claimant "strongly objects to the statement of [the Respondent] that the absence of [the Claimant]'s claim concerning the delay in the time of fulfilling the works in accordance with [section] 4.1.2 of the agreement deprives [the Claimant] of the legal rights to bring an action". The Claimant asserts that: "until the present day [the Respondent] did not finished the works, established in the [Agreement], and did not present any evidences of right fulfillment and hand over of these works to the customer..." and also "did not present any evidences that the violation of the agreement happened not by his fault".

4. Applicable Law

Pursuant to article 14 of the *ICAC Rules* "the Arbitral Tribunal shall settle disputes in accordance with the rules of law, which the parties have chosen to apply to the subject matter of the dispute".

By section 10.1 of the *Software Development Agreement* No. M10/07 dated 13 September 2007 the Parties have provided that:

"this Agreement shall be governed by and construed in accordance with the laws of Ukraine. Any and all disputes arising under this Agreement and/or in its concern not resolved amicably by the Parties shall be settled in accordance with Ukrainian laws ...".

Thus, the Arbitral Tribunal concludes that the rules of law envisaged in the legislation and normative acts of Ukraine shall apply to the settlement of the present dispute between the Parties.

5. Reasons for the Award

(I) So, the Claimant requests the Arbitral Tribunal to declare the *Software Development Agreement* No. M10/07, entered into between the Parties on 13 September 2007, avoided in view of a fundamental breach of contract committed by the Respondent.

To substantiate its claims the Claimant asserts that the Respondent has systematically violated the *Project Schedule of Milestones*, provided in *Annex 2* to the *Agreement*, improperly performed most of Milestones, and failed to perform any works related to Milestone M5 (a final stage) ("MIRATECH UK did not notify the Client of M5 stage works execution and produced any results").

The Arbitral Tribunal having regard to:

1. Paragraph 2 of article 651 of the *Civil Code of Ukraine* (in force at the material time), which stipulates that a contract shall be declared avoided by virtue of the court decision at the request of either party, in case of a fundamental breach of

that contract by the other party and in other cases provided for by the contract or law. A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as to deprive it, substantially, of what it is entitled to expect under the contract;

2. Paragraph 1 of article 892 of the *Civil Code of Ukraine*, which determines that under the contract for the performance of research, development or technological work the contractor is obligated to conduct scientific researches, to develop a sample of a new product and construction documentation relating to it, know-how or others like that, and the customer is obligated to accept performed work and pay the price for it; [#]

3. Paragraph 1 of article 894 of the *Civil Cod of Ukraine*, which prescribes the contractor must hand over to, and the customer must pay the price for completely performed research, development or technological work;

4. Paragraph 1 (1) of article 897 of the *Civil Code of Ukraine*, which provides for that the contractor under the contract for the performance of research, development or technological work must perform the work in accordance with the program agreed with the customer and hand over the working results to the customer within a period of time fixed by the contract;

and also paragraph 1 (5) of the aforesaid article of the *Civil Code of Ukraine* which obliges the contractor under the contract for the performance of research, development or technological work to correct, using its own resources and at its own expense, any defects in technical documents, which were due to its fault and may result in deviations from technical-and-economic indexes, provided in technical specifications of the customer or in an agreement;

5. The *Software Development Agreement* No. M10/07 dated 13 September 2007 (hereinafter referred to as the "*Agreement*"), and in particular, its section 1, according to which the Respondent should provide to the Claimant "professional services ... for information system development consisting of booking services Senturia" and

section 2.1.1, which provides for that: "Information system includes website, different programming modules and components and integration with external reservation systems";

section 5.1 of the *Agreement*, which prescribes that: "Miratech provides Client with a Milestone competition report at each of Milestones", and section 2.4.2 of *Annex 1* to the *Agreement*, which determines that: "... actual volume of provided services shall be ... fixed by Miratech ... in report of accomplished work (signing of which by Client explicitly confirms its acceptance of given services) and shall be reflected in invoices concerned";

section 4.1.5 of the *Agreement*, which stipulates that: "The schedule failure (caused by Miratech non-performance) which exceed 3 month ... might be qualified as Miratech's unsatisfactory Project performance and the client is entitled to enforce remedies defined in section 7.5.1"; and section 7.5.1, which entitles the Claimant to cancel the Project "by 1 (one) month prior notice in case of Miratech's unsatisfactory Project performance";

section 2.1.3. of *Annex 1* to the *Agreement* ("*Miratech Standard Terms and Conditions for Services Provision*"), in which the Parties have preconditioned that: "Since there is no possibility to completely exclude the risk of Parties' misunderstanding of mutual cooperation expectations, Parties agree that if unattainability of Client expectation as to satisfaction arises during services provision, then Client may initiate early termination of the *Agreement* according to the terms thereof";

and finally section 2.4.2 of *Annex 1* to the *Agreement*, which determines that: "In case of any Client's claims concerning quality of services provided by Miratech Client may terminate *Agreement* according to the terms set forth therein",

and also taking into account the following:

According to *Annex 2* to the *Agreement* (*Senturia Project Schedule*) the works under the *Agreement* should be completed before 24 July 2008 (M1 + 42 weeks). However, as the records of this case demonstrate, the Respondent failed to perform its contractual obligations within a time limit established by *Annex 2* to the *Agreement* and until now (as of the date of the oral hearing) has not handed over to the Claimant neither the Report of Accomplished Works at a final stage (Milestone 5) nor the completely performed work. As the Claimant asserts in its *Comments on the Statement of Defence* dated 3 April 2009, "until the present day [the Respondent] did not finish the works, established in the [Agreement], and did not present any evidences of right fulfillment and hand over of these works to the customer ... The only

stages, which were rightly fulfilled with signing of report of fulfillment of works in these stages by customer, were the stages M1 and M4.1. The other stages were not rightly handed over to the customer [the Claimant]”.

The Arbitral Tribunal received extensive evidence, including documentation and records produced by both the Claimant and the Respondent, particularly: the copies of Reports of Accomplished Works, invoices issued by the Respondent, bank statements, which support the Claimant’s allegation that the Respondent performed in a proper manner only Milestones M1-M4.1, which in accordance with Annex 2 to the Agreement (*Senturia Project Schedule*) constitute only 35% of project volume. Milestones M4.2-4.4 were not accepted by the Claimant “in view of absence of specified functionality and great number of revealed defects”. Despite of assertions of the Respondent that these claims, as mentioned in the *Statement of Claim* by the Claimant, were groundless, the Arbitral Tribunal finds it established that the works under the Agreement were and are not performed in full, and a result for the sake of which the Agreement had been concluded, was not attained. The Respondent has not contested that fact neither in its Statement of Defence nor during the oral hearing of the case and has not produced to the Arbitral Tribunal any evidence of its full performance of the works provided for by section 2.1.1 of the Agreement;

the Arbitral Tribunal, based on foregoing findings of fact, finds that the Respondent breached the Agreement, as alleged in the *Statement of Claim* and subsequent written submissions of the Claimant.

Thus, the Arbitral Tribunal concludes that the claim stated by the Claimant in the *Statement of Claim* for avoidance of the *Software Development Agreement* No. M10/07 dated 13 September 2007 is justified and confirmed by the records of this case. Therefore, taking into account submissions of the Parties submitted in writing and given in the course of the oral hearing of the case, all the documents and information in its possession and the legal regulations applicable to the dispute, the Arbitral Tribunal allows claims brought by the Claimant and declares the agreement at issue avoided.

The Claimant requests the Arbitral Tribunal to recover from the Respondent damages in the amount of USD 125,000.00 from non-performance of the Agreement.

To substantiate its claims the Claimant refers to articles 612, 623, 900 of the *Civil Code of Ukraine* and articles 220, 224 of the *Commercial Code of Ukraine*, providing for that the party, which has failed to comply with its contractual obligation, shall be obligated to compensate the other party for damages caused by such failure.

The Claimant determines an amount of damages, caused as a result of breach by the Respondent of its contractual obligations (namely non-performance of the Agreement), to the extent of the price of services provided by the Respondent (as it was fixed in Annex 3 to the Agreement (*Payment Schedule*)) at Milestones M1 – M4.1. The payment of the amount of USD 125,000.00 by the Claimant is proved by the copies of bank documents, submitted to the Arbitral Tribunal by both the Claimant and the Respondent.

The Arbitral Tribunal having regard to:

1. Paragraph 5 of article 653 of the *Civil Code of Ukraine*, which prescribes that where the contract is rescinded because of a fundamental breach of contract committed by one of the parties, the other party is entitled to claim damages, caused by avoidance of the contract;
2. Article 900 of the *Civil Code of Ukraine*, which stipulates that the contractor is liable before the customer for any breach of contract for the performance of research, development or technological work unless it proves that a breach of contract was not due to its fault. The contractor must compensate the customer for actual damages to the extent of the price for work, in which the defects were discovered, if a contract provides for that such damages are to be compensated to the extent of a total price for work to be performed under the contract;

3 Paragraphs 1, 2 of article 623 of the *Civil Code of Ukraine*, which provide for that: "The debtor who failed to perform his obligation must compensate the creditor for damages caused", and "the amount of damages shall be proved by the creditor";

4. Section 9.3 of *Annex 1 to the Agreement*, which provides for that: "in any case, the total portion of Miratech liabilities arising under the conditions of damage or loss indemnification ... shall not exceed total amount, paid by Client [the Claimant] for that part of program solution of Miratech that is not available to be used by Client because of causing such violations";

and also taking into account that:

As it was mentioned above, the Respondent failed to perform the work provided by the *Agreement* in full and has not handed over to the Claimant a result of this work. That part of the works, which was performed by the Respondent at Milestones M1-M4.1 and was accepted by the Claimant, *de facto* is not available for use by the Claimant. In particular, taking into account the peculiarity of the agreement at issue, the Claimant could use only a final product – the integral information system, including website, various programming modules and components, which could be integrated with external reservation systems, but not its separate parts;

the *Arbitral Tribunal*, based on the above, finds that the Claimant is entitled to compensation for damages, caused by non-performance of the *Agreement* by the Respondent, in the claimed amount of USD 125,000.00 and *concludes* that the Claimant's claim for damages' compensation is justified and shall be allowed in full.

(III) In the *Statement of Claim* the Claimant seeks USD 51,326.55 of the penalty for delay in performance of the obligations under the *Agreement*, which shall be paid by the Respondent under section 4.1.2 of the *Agreement*.

Meanwhile, in the *Application for specification of the amount of claim* (dated 3 April 2009) the Claimant has defined more exactly the amount of the penalty to

be paid by the Respondent under section 4.1.2 of the *Agreement*, requesting the Arbitral Tribunal to recover from the Respondent USD 50,289.65 of the penalty instead of the initially claimed amount of USD 51,326.55.

So, the arbitral proceedings in the remainder of USD (51,326.55 - 50,289.65 =) 1,036.90 are terminated in view of corresponding decrease by the Claimant in the amount of the claim, namely in the amount of the penalty.

According to the calculation, submitted by the Claimant to the ICAC on 3 April 2009, the Claimant requests the Arbitral Tribunal to recover from the Respondent the penalty for the period from 24 July 2008 (the expected date of completion of M5 (Project Acceptance)) to 29 October 2008 (the date of the *Statement of Claim*) for 90 calendar days of delay.

The Arbitral Tribunal having regard to:

Section 4.1.2 (a) of the *Agreement*, which provides that:

"In the event of major milestone delay more than 1 (one) week (hereinafter – "Schedule Buffer") the Client Technical Coordinator might request a remedy at level of up to 0.25% per each work day of milestone delay following the next work day after Schedule Buffer. Client Contract Coordinator shall send a schedule remedy request in written (email or fax) form to Miratech Contract Coordinator within 5 calendar days after schedule change is identified. Miratech is entitled not to accept any remedy request, which have been submitted later than 5 calendar days after an actual schedule change is identified. Client is not entitled for remedies for the delays of minor milestones";

and also taking into account the following:

As the records of this case demonstrate, the Claimant sent, by e-mail, its remedy request for delay in performance of Milestone 5 (Invoice No. 14/09/2008 to the amount of USD 27,477.88) to the Respondent only on 14 September 2008. Hence, the Claimant violated the term fixed by section 4.1.2 of the *Agreement* for submitting such remedy request and could not communicate to the Arbitral Tribunal a justifiable reason of such violation. Moreover, the calculation of the

amount of the penalty, made by the Claimant, does not correspond to provisions of section 4.1.2 of the *Agreement*. The Claimant has wrongfully calculated the penalty for 90 calendar days of delay instead of working days and has not excluded Schedule Buffer.

Under such conditions, the Arbitral Tribunal finds that the Claimant's claim for recovery of the penalty from the Respondent for delay in performance of the obligations under the *Agreement* is unreasonable and shall be dismissed.

6. Final Conclusion of the Arbitral Tribunal

The Arbitral Tribunal, based on foregoing findings of fact and been governed by the provisions of articles 623, 651, 653, 892, 894, 897, 900 of the Civil Code of Ukraine; and also the provisions of articles 40, 48, 49 of the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, finally concludes that:

(1) The claims lodged by the Claimant in the *Statement of Claim* for avoidance of the *Software Development Agreement* No. M10/07 dated 13 September 2007 and those for damages in the amount of USD 125,000.00, caused by avoidance of the *Agreement*, are justified and, therefore, shall be allowed;

(2) The Claimant's claim for recovery of penalty in the amount of USD 50,289.65 from the Respondent is unreasonable, not substantiated and shall be dismissed;

(3) The arbitral proceedings in the remainder of USD 1,036.90 are terminated in view of corresponding decrease by the Claimant in the amount of the penalty.

7. Apportionment of the Arbitration Costs between the Parties

1. In determining the apportionment of the arbitration costs between the Parties the Arbitral Tribunal is guided by section VI of the *Schedule of Arbitration Fees and Costs*, which provides that:

- "1. Unless the parties have agreed otherwise, the arbitration fee shall be charged to the party against which the award is made.
2. If the claim is granted in part, the arbitration fee shall be charged to the Respondent in proportion to the amount of the granted claims, and the Claimant shall bear the arbitration fee relating to the amount of the claim that have been dismissed".

The Claimant pursuant to section III of the *Schedule of Arbitration Fees and Costs* paid the arbitration fee in the amount of USD 8,231.84 (USD 6,791.84 of the arbitration fee were paid for property claims and USD 1,440.00 of the arbitration fee were paid for non-property claim).

As a non-property claim for avoidance of the *Agreement* is allowed, the Respondent is required to reimburse to the Claimant the payment of the arbitration fee in the amount of USD 1,440.00.

The property claims are allowed to the extent of the amount of USD 125,000.00 that makes 70.89 % from the amount of claim. Hence, the Respondent is required to reimburse to the Claimant the payment of the arbitration fee in the amount of USD $(6,791.84 \times 70.89 \% =) 4,814.74$.

Thus, the Respondent is required to reimburse to the Claimant the payment of the arbitration fee in the total amount of USD $(1,440.00 + 4,814.74 =) 6,254.74$.

The remainder of the arbitration fee paid in the amount of USD $(8,231.84 - 6,254.74 =) 1,977.10$ is referred at the expenses of the Claimant.

2. The costs of translation pursuant to section VII (4) of the *Schedule of Arbitration Fees and Costs* shall be borne by both parties in equal amounts. Since the Claimant deposited on the Ukrainian Chamber of Commerce and Industry's account the moneys in the amount of USD 300.00 to cover the costs of the translation provided in the course of the arbitral proceedings, the Respondent is also required to reimburse to the Claimant a half of this sum in the amount of USD 150.00.

8. THE ARBITRAL TRIBUNAL'S AWARD

The Arbitral Tribunal:

(1) Declares the *Software Development Agreement* No. M10/07, entered into between *EVERFIELD CAPITAL LLP* (United Kingdom) and *MIRATECH UK LIMITED* (United Kingdom) on 13 September 2007, avoided;

(2) Finds that the Claimant, *EVERFIELD CAPITAL LLP* (United Kingdom), shall be entitled to compensation for damages in the amount of USD 125,000.00 caused by avoidance of the *Agreement*;

(3) Finds further that the Claimant shall be entitled to reimbursement of the arbitration fee in the amount of USD 6,254.74 and a half of the sum of USD 150.00 that the Claimant paid by way of deposit to cover the costs of the translation provided in the course of the arbitral proceedings;

(4) Refers the remainder of the arbitration fee paid in the amount of USD 1,977.10 as well as the other half of the above advance payment in the amount of USD 150.00 to the expenses of the Claimant;

(5) Rejects the Claimant's claim for recovery of the penalty in the amount of USD 50,289.65 from the Respondent;

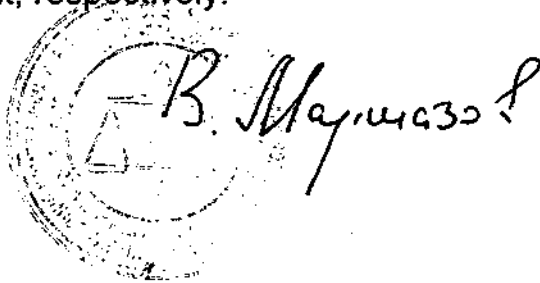
(6) Terminates the arbitral proceedings in the remainder of the claims in the amount of USD 1,036.90, in view of corresponding decrease by the Claimant in the amounts claimed;

(7) Orders the Respondent, *MIRATECH UK LIMITED* (Suite 404 Albany House, 324-326 Regent Street, London W1B 3HH, United Kingdom), immediately after the receipt of this arbitral award, to pay to the Claimant, *EVERFIELD CAPITAL LLP* (38 Crewys Road, London NW2 2AA, United Kingdom), the total amount of USD 131,404.74 (one hundred and thirty one thousand four hundred four US dollars 74 cents).

The award is final.

Done in English in three copies, one of which will be placed in the archives of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry and the others will be forwarded to Claimant and Respondent, respectively.

Arbitrator



V. Marmazov

Vasyl Y. Marmazov