Arbitral Award

China International Economic and Trade Arbitration Commission

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Plaintiff: Wuhan Heavy Duty Machine Tool Group Corporation

Address: 108, Zhongbei Road, Wuchang District, Wuhan City, China

Attorney: Dewell & Partners

Attorney Leng Chunyan, Attorney Lu Yinke

Defendant: S&S Machinery Corp.

Address: 140 53rd Street, Brooklyn, NY 11232, USA

Attorney: Beijing Yingke Law Firm

Attorney Wang Xuanjun

Beijing

Dec. 24, 2009

Arbitral Award

[2009]Z.G.M.Z.J.C.Z.No.:0595

Subject to the arbitration clauses in the "Appendix (Contract No. 5967) signed by Wuhan Heavy Duty Machine Tool Group Corporation (hereinafter referred to as the "Plaintiff") and S&S Machinery Corp. (hereinafter referred to as the "Defendant") on May, 31, 2000, upon the arbitration application submitted by the Plaintiff on Feb. 24, 2009, China International Economic and Trade Arbitration Commission (hereinafter referred to as "CIETAC") accepted the dispute between both parties arising out of the said Appendix. The case number is M20090101.

The arbitration procedures applicable to the case are *Rules of Arbitration of China International Economic and Trade Arbitration Commission* (hereinafter referred to as the "Rules of Arbitration") which began to be implemented as of May 1, 2005.

March 17, 2009, the secretariat of CIETAC sent the arbitration notice, the Rules of Arbitration and the Roster of Arbitrators to the Plaintiff and the Defendant respectively by express delivery and at the same time sent to the Defendant the arbitration application and the attached evidences submitted by the Plaintiff in the same way.

The Plaintiff chose Ms Guo Yujun to be one of the arbitrators in the case. Because the Defendant neither chose an arbitrator nor entrusted the director of CIETAC to appoint an arbitrator within the prescribed period, the director of CIETAC appointed Mr Liu Quanfu to be another arbitrator in the case in accordance with the Rules of Arbitration. Because both parties neither chose the chief arbitrator in the case together nor commonly entrusted the director of CIETAC to appoint the chief arbitrator in the case within the prescribed period, the director of CIETAC appointed Mr Li Yong to be the chief arbitrator in the case in accordance with the Rules of Arbitration. The three arbitrators mentioned above constituted the arbitration tribunal to hear the case on

April 20, 2009. On the same day, the secretariat of CIETAC sent the notice of constituting the tribunal to both parties by express delivery.

After negotiation with the secretariat of CIETAC, the arbitration tribunal decided to begin to hear the case on June 19, 2009. On May 14, 2009, the secretariat of CIETAC sent the notice of appearance to both parties by express delivery.

On June 10, 2009, CIETAC received a facsimile from the Defendant who applied to postpone the court session. The Defendant mentioned in the facsimile that it was reconciling with the Plaintiff and if reconciliation fails, it took time for it to employ an attorney and make preparations, so it requested to postpone sixty days. However, the Plaintiff disagreed to postpone and denied the existence of reconciliation. After considering the overall situation, the arbitration tribunal decided to postpone the court session and asked the Defendant to submit its statement of defense and evidences.

On July 9, 2009, CIETAC received the statement of defense and evidences from the Defendant. The Defendant claimed in the statement of defense that the dispute was not subject to arbitration. On August 17, 2009, the Defendant challenged the jurisdiction of the arbitration tribunal and claimed that the dispute between both parties arose out of an "Agency Agreement" between them and such "Agency Agreement" contains no arbitration clauses. The Defendant also claimed that the dispute was far beyond the prescription for arbitration.

Only after trial could CIETAC make a decision on the issue of jurisdiction, so CIETAC authorized the arbitration tribunal to hear the case and make a decision on the issue of jurisdiction in accordance with Paragraph 1 of Article 6 of the Rules of Arbitration. CIETAC informed both parties of the said authorization on August 20, 2009.

After negotiation with the secretariat of CIETAC, the arbitration tribunal decided to begin to hear the case on August 24, 2009 in Beijing. On July 29, 2009, the secretariat of CIETAC sent the notice of appearance to both parties by express delivery.

Afterwards, the Defendant applied to postpone the court session again with the excuse that Mr Simon Srybnik was ill and could not come to Beijing to appear. The arbitration tribunal believed that the Defendant could entrust his Chinese agent to attend the court session and made a decision not to postpone.

On August 24, 2009, the arbitration tribunal began to hear the case on schedule. The Plaintiff, the Plaintiff's attorneys and the Defendant's attorney attended the court session. During the court session, both parties made statements on the details of the case and the Plaintiff's witness stated the facts. Furthermore, both parties presented the originals of evidences, made cross-examination on relevant evidences, debated about relevant legal issues and answered the questions of the arbitrators. The Defendant withdrew its counterclaims made on August 17, 2009 in the court session and confirmed such withdrawal in writing on Sept. 3, 2009.

Upon the request of the arbitration tribunal, the Defendant summarized his statements after the court session and submitted "statements of the procurator" and evidences of Chinese version. The Plaintiff also submitted "statements of the procurator" and evidences. The secretariat of CIETAC forwarded the said documents to both parties. Then both parties submitted their comments to the arbitration tribunal.

Limited by relevant procedures, the arbitration tribunal could not make an arbitral award within the period prescribed in the Rules of Arbitration. Upon the request of the arbitration award, the director of CIETAC approved the arbitration tribunal to make an arbitral award before Jan. 20, 2010.

All arbitration documents concerning this case, including the procedural decisions of CIETAC and the arbitration tribunal, have been served to both parties in accordance with Article 68 of the Rules of Arbitration.

The case has been concluded now. The arbitration tribunal, subject to the existing written materials as well as the situations of the court session, hereby makes the arbitral award in accordance with laws.

The details of the case, opinions of the arbitration tribunal and the arbitral award are as follows:

I. Details of the Case

The Plaintiff claimed:

The Plaintiff and the Defendant signed the AGENCY AGREEMENT on October 23, 1999. In accordance with this Agreement, the Plaintiff shall appoint the Defendant as the sales agent of its products in North and South America, and the Defendant shall purchase a machine tool from the Plaintiff to exhibit in the Chicago machine tools fair in the next year. On January 26, 2000, the Defendant placed an order to the Plaintiff for a CH5116B Vertical Lathe (hereinafter referred as to the "Vertical Lathe"). On May 31, 2000, the Plaintiff and the Defendant signed a contract on the sale of this Vertical Lathe, namely, Contract No. 5967. According to the Contract, the price of the Vertical Lathe was CIF Chicago USD198, 000.00. The Defendant shall pay to the Plaintiff 20% of the aforesaid total price upon the receipt of B/L, pay 20% at the end of 2000, and pay 20% at the end of 2001. The remaining 40% shall be paid to the Plaintiff at the end of 2002.

The Plaintiff effected delivery adequately and punctually according to the said contract, and the Defendant received the Vertical Lathe. Moreover, there were no problems about the quality. However, the Defendant only paid USD39,590.00 to the Plaintiff in 2000. And the amount USD 119,284.05 in total was still unpaid to the Plaintiff after the Plaintiff agreed to bear the exhibition fee of USD39,125.95. Therefore, by the end of February 10, 2009, the Plaintiff suffered from a loss of RMB635,279.91 due to overdue payment of the Defendant. The Defendant shall compensate the loss. Besides, the Plaintiff spent attorney fee of RMB200,000.00 in recovering the debt and on the arbitration, which the Defendant shall also compensate.

Although the Plaintiff dunned for the debt against the Defendant for many times by facsimile and letter, and even entrusted China Export & Credit Insurance Corporation to dun, the Defendant refused to fulfill its payment obligation.

The Plaintiff claimed that the Defendant's refusal of paying the balance had seriously breached of the contract, and had caused substantial damage to the Plaintiff's lawful rights and interests. In view of Defendant's refusal of solving through negotiation with the Plaintiff, the Plaintiff submitted arbitration to CIETAC to protect its lawful rights and interests.

The Plaintiff claims as follows:

1. The Defendant pays to the Plaintiff the balance of USD 119, 284.05;

2. The Defendant pays to the Plaintiff the loss of RMB635,279.91 (provisionally calculated to February 10, 2009) incurred due to overdue payment;

3. The Defendant pays to the Plaintiff the attorney fee of RMB200,000.00 spent in recovering the debt and on the case;

4. The Defendant bears the arbitration fee for the case and pays to the Plaintiff the traveling expenses of RMB 6, 042.9 spent for the case.

The bases for the Plaintiff's claims are as follows:

(I) On the subject qualification of the Plaintiff as creditor

1. *Change Notification on Restructuring of Enterprises* submitted by the Plaintiff has confirmed that the Plaintiff was not newly set up but formed by the registration of change of Wuhan Heavy Duty Machine Tool Plant. The change was attributable to the transformation of the enterprise owned by the whole people. The Plaintiff is the successor of rights and obligations Wuhan

Heavy Duty Machine Tool Plant after its transformation and both of them belong to the same legal subject. Article 2 of the *Reply of Wuhan Municipality National Assets Management Office on the Application of Wuhan Heavy Duty Machine Tool Plant for Authorized Operation of State-owned Assets* explicitly provides, "After Wuhan Heavy Duty Machine Tool Plant is transformed into a state-owned group corporation, the state-owned group corporation shall accept all assets, debts and personnel of Wuhan Heavy Duty Machine Tool Plant, take the responsibility of maintaining and increasing the value of state-owned assets, and be responsible for the settlement and stability of the staffs of the original Plant". It can be confirmed in accordance with the Reply that the Plaintiff has received all assets of Wuhan Heavy Duty Machine Tool Plant, including the creditor's right in this case, and has the subject qualification of this case.

2. Although the consignor stated in the *forwarding order* is "Import and Export Company of Wuhan Heavy Duty Machine Tool Plant", it is not a registered independent legal entity in fact but just an internal department especially in charge of import and export business of Wuhan Heavy Duty Machine Tool Plant. The seal that the Plaintiff stamped on the Forwarding Order is "Import and Export Department of Wuhan Heavy Duty Machine Tool Plant" rather than "Import and Export Company". In accordance with the return receipt of bank bill issued by Nanyang International Shipping Agent when Wuhan Heavy Duty Machine Tool Plant paid transportation charges to it on August 14, 2000, the payer is "Wuhan Heavy Duty Machine Tool Plant" rather than "Import and Export Company of Wuhan Heavy Duty Machine Tool Plant" or "Import and Export Department of Wuhan Heavy Duty Machine Tool Plant". Therefore, it can be confirmed further that the consignor in *Forwarding Order* is "Wuhan Heavy Duty Machine Tool Plant" rather than any other legal entity.

3. It is an act authorized by the Plaintiff in writing that Wuhan Heavy Duty Machine Tool Co., Ltd. signed *Recovery Entrustment Agreement*, which demonstrates that Wuhan Heavy Duty Machine Tool Group Corporation is the creditor in the case.

It is contradictory to the suit the Defendant filed against the Plaintiff to United States District Court in East New York that the Defendant challenged the creditor status of the Plaintiff. In accordance with Annex 5 concerning defense evidences dated July 2, 2009 submitted by the Defendant, the accused against whom that the Defendant filed a suit to United States District Court in East New York is the Plaintiff of this case, and the suit is also on the same dispute about Vertical Lathe Sale Contract. If the Defendant denied the creditor status of the Plaintiff in this case, the suit submitted to United States District Court in East New York should have not deemed the Plaintiff as the accused. The Plaintiff considered that the Defendant concealed arbitration clauses and filed a suit to United States Court and denied the creditor status of the Plaintiff groundlessly in the arbitration of the case just in order to evade the debt deliberately.

(II) On the Plaintiff's claim for creditor's right against the Defendant

1. Claim the creditor's right against the Defendant on its own and entrust the American professional channel HOUSE OF ADJUSTMENTS INC to claim the creditor's right against the Defendant through China Export & Credit Insurance Corporation.

The Plaintiff claimed the creditor's right against the Defendant for many times by facsimile, letter, etc. during the period from 2002 to 2006, but the Defendant refused to fulfill the payment obligations.

In addition to claiming the creditor's right against the Defendant on its own, the

Plaintiff also entrusted China Export & Credit Insurance Corporation to claim the creditor's right, but the Defendant still refused to fulfill the payment obligations.

(1) The written *Explanations* and testimony of China Export & Credit Insurance Corporation are authentic and credible and shall be adopted. The reasons are as follow:

a. China Export & Credit Insurance Corporation has appeared in court as a witness and been questioned by the arbitration tribunal and the parties involved in the dispute, which adequately guarantees the authenticity of its written *Explanations* and stated facts procedurally.

b. China Export & Credit Insurance Corporation is the only financial institution to undertake policy credit insurance business in China. Its capital comes from the risk fund of export credit insurance and is subject to the national budget. International accounts collection is one of its key businesses. China Export & Credit Insurance Corporation, a national policy financial entity, differs from the general legal persons of companies or enterprises in nature. Therefore, its written *Explanations* and testimony are much credible.

c. The facts stated in writing by China Export & Credit Insurance Corporation and its testimony coincides with the facts confirmed in the court hearing of this case.

d. The facts that China Export & Credit Insurance Corporation called in the arrears are explicit and specific, and can be supported with relevant correspondences. China Export & Credit Insurance Corporation described the detailed information of the entrusted American professional channel: HOUSE OF ADJUSTMENTS, INC. HOUSE OF ADJUSTMENTS, INC

is an independent American collecting company professionally engaged in account recovery business, and collects through its cooperative attorneys. At the same time China Export & Credit Insurance Corporation provided the development correspondence of its American professional channel on collecting the arrears in the case, and described specifically the contacts of China Export & Credit Insurance Corporation in the correspondence: Gloria Tsai (Cai Xiaohu) and Emma (Li Liangxuan). Both of them were responsible to contact for the purpose of collecting. Mel Chaiken is the business personnel of American professional channel HOUSE OF ADJUSTENTS, INC. The correspondence mentioned above coincides with the fact that the operator in the case progress report of China Export & Credit Insurance Corporation is Li Liangxuan.

(2) The inevitable prerequisite that the American professional channel contacted and negotiated with the Defendant and its representative was the collection of the debt, namely, whether the American professional channel has contacted and negotiated other contents with the Defendant and its representative or not, they are sure to talk about the debt collection. Otherwise, the contact and negotiation based on nothing.

The Plaintiff furnished additional evidence on September 24, 2009 proving that American Joseph & Terracciano Law Firm accepted the entrustment of China Export & Credit Insurance Corporation about collecting the debt of this case from the Defendant. Article 4 of *AFFIDAVIT* testified: "On December 6, 2004, I received a facsimile communication from Frank L.Shernoff, Esq. who indicated that he was the attorney for the Debtor". In accordance with Exhibit D of *AFFIDAVIT*, namely the content of the facsimile that Frank L.Shernoff

sent to James M. Joseph of American Joseph & Terracciano Law Firm on December 6, 2004: "This office represents S&S Machinery Corp." Therefore, it can be confirmed that Frank L.Shernoff was the duly authorized representative of the Defendant.

2. Entrust American Joseph & Terraccociano Law Firm to claim against the Defendant for creditor's right through China Export & Credit Insurance Corporation.

In order to further testify the Plaintiff was not idle in claiming against the Defendant for creditor's right, the Plaintiff further provided the evidence proving that it entrusted American Joseph & Terraccociano Law Firm to claim against the Defendant. The evidences offered by the Plaintiff show that the Law Firm claimed against the Defendant respectively on November 30, 2004, December 28, 2004, April 22, 2005, August 9, 2005 and September 14, 2005. Thereinto, the first collection correspondence was replied by Frank L.Shernoff who handled these debt issues on behalf of the Defendant.

AFFIDAVIT and annexes issued by Joseph & Terraccociano are authentic, legitimate and effective upon notarization and coincides with other evidences in this case, so they shall be deemed as the bases for determining the facts of the case.

The evidences mentioned above shows that the Plaintiff had claimed against the Defendant for creditor's right from 2004 to September 14, 2005, and was not idle in exercising its rights.

(III) On the quality of the Vertical Lathe in dispute

1. The Vertical Lathe involved in the case belongs to the goods subject to national mandatory inspection, and has passed inspection by Entry-Exit Inspection and Quarantine Bureau of Hubei Province.

2. So far, the Defendant has not provided any inspection certificate or inspection report showing that the Vertical Lathe is defective or inconsistent with the contract. the Defendant just submitted the testimony of its staffs and legal adviser about the Vertical Lathe's inability to operate properly 9 years after receipt of the Vertical Lathe in the case, as well as the so-called certification of maintenance 4 years after receipt of it. Obviously, these evidences can not be taken as the bases to determine the facts of the case due to their weight of proof and relativity to the case.

3. The defendant failed to provide sufficient evidence to testify the Vertical Lathe's inability to operate properly.

In order to evade its payment obligations, the Defendant once mentioned that the machine was unable to operate properly in 2006. Although the Plaintiff has discussed relevant solutions with the Defendant during the course of negotiation in 2006, all relevant solutions are based on the Defendant's unilateral introduction, and cannot be deemed that the Plaintiff has accepted the Defendant's descriptions about machine issues. The certification of maintenance issued by Siemens that the Defendant submitted after the hearing had never been presented to the Plaintiff. Further, the Defendant has never descried the factual status of the Vertical Lathe.

4. The Defendant has never purchased installation service from the Plaintiff, and the contract obligations of the Plaintiff do not include installation and debugging of the Vertical Lathe.

The sales contract of Vertical Lathe signed by both parties neither contains installation clauses nor stipulates the installation obligations of the Plaintiff. The price of the Vertical Lathe excludes the charges of installation and debugging. The Plaintiff appointed personnel to attend the Chicago vertical lathe exhibition only for exploring the development status of international machine tool rather than for performing

installment obligation. The Vertical Lathe in the case failed to operate on the exhibition completely because the Defendant failed to provide external conditions necessary for the operation of the Vertical Lathe. It was attributable to neither the responsibilities of the Plaintiff nor the quality issues of the Vertical Lathe. The Defendant did not require the personnel appointed by the Plaintiff to assist it in installing and debugging when it shipped the Vertical Lathe back to its company from the exhibition. The Defendant was just sales agent not end-user, so there is no need of installing Vertical Lathe for production.

5. The Vertical Lathe's inability to operate did not equal to quality issues

The installation of the Vertical Lathe requires external operating environment and conditions such as complex procedures (laying the foundation, filling, etc.), professional skills and large electric capacity. If the Vertical Lathe is not installed or debugged professionally and correctly, its normal operation will be affected undoubtedly. Moreover, the Defendant has approved that the Vertical Lathe has not been sold all the time. If the Vertical Lathe fails to operate for a long time, the Vertical Lathe may lose data due to use-up of battery. Therefore, correct installation and debugging as well as necessary operational maintenance are the necessary precondition of the successful operation of the Vertical Lathe. Under the circumstance that the Defendant did not purchase installation and debugging service from the Plaintiff but installed by itself, it has no sufficient proof obviously that the Vertical Lathe's inability to operate is a quality problem.

6. The Defendant has forfeited the right to claim that the Vertical Lathe fails to conform to the contract

The Defendant received the Vertical Lathe in the case in June 2000. In accordance with the stipulations of Article 39 of *United Nations Convention on Contracts for the*

International Sale of Goods, the Defendant shall notify the Plaintiff of the inconformity of the Vertical Lathe to Contract within 2 years after receipt of it (before June 2002).

(Ⅳ) On the prescription of the arbitration in the case

In accordance with Article 140 of *General Principles of the Civil Law*, "the prescription of actions shall suspend due to lodging a complaint, or when either party makes a request or agrees to fulfill obligations. The prescription of actions will be recalculated from the time of suspension." Paragraph 2 of Article 173 of *Comments of Supreme People's Court on Issues of Implementation of General Principles of the Civil Law of PRC* stipulates, "Where the creditor claims against the debt guarantor, agent of debtor or custodian of property, the suspension of the prescription of actions can be determined". Article 5 of *Several Provisions* of *Supreme People's Court on Issues of Applying Prescription of Actions System in Civil Matters* stipulates,"the prescription of actions shall be calculated upon the expiration of the last installment, where the concerned parties agree to perform the same debt by installments", and Article 129 of *Contract Law of CPR* stipulates,"the prescription for lodging a lawsuit or submitting for arbitration for disputes arising out of contract of international goods sales and import & export contract of technology shall be four years and shall be calculated from the date when the concerned party gets to know or shall know that its rights are infringed. The prescription for lodging a compliant or submitting for arbitration for disputes arising out of other contracts shall observe the stipulations of relevant laws."

This case is a dispute arising out of contract of international goods sales, so prescription of submitting for arbitration is 4 years. However, performance by installment is agreed on for the payment in the Contract of this case, so the expiry date of the last installation is the end of 2002, namely, December 31, 2002. Therefore,

the prescription of action in this case shall be calculated from December 31, 2002.

In accordance with the evidences submitted by the Plaintiff, the Plaintiff has claimed for creditor's right against the Defendant respectively in 2004, 2005, 2006, and 2007 since the above-mentioned starting-point of prescription. Because the prescription of arbitration is suspended for many times, the Plaintiff is entitled to institute the arbitration on February 24, 2009, which is within the prescription of arbitration of four years.

(V) On the calculation of the loss of RMB 635,279.91 due to overdue payment

The amount of RMB 635,279.91 covers the loss of overdue payment calculated up to February 10, 2009, including exchange loss and interest loss due to overdue payment.

Exchange loss of overdue payment is: RMB 172,281.95.

The calculation basis is: the Defendant shall have been paid the arrear of USD119,284.05 at the end of 2002. On December 30, 2002, the exchange rate was RMB 827.73 against USD 100, but on February 10, 2009, it was RMB 683.3 against USD 100. By the end of February 10, 2009, the exchange loss of overdue payment is: 119, 284.05× (8.2775-6.833) =RMB172, 281.95.

Interest loss of overdue payment is RMB 462,997.96.

The calculation basis is: in accordance with the stipulations of *Reply on Which Standard Will Be Applied to the Calculation of Penalty Due to Overdue Payment* and *Reply on Modification to <Reply on Which Standard Will Be Applied to the Calculation of Penalty Due to Overdue Payment* of the Supreme Court, if the contract parties do not agree on a standard to calculate penalty of overdue payment, the Supreme Court can calculate it in accordance with the standard that the People's Bank of China stipulates to charge the interest of overdue payment for financial institutions.

In accordance with the standard that the People's Bank of China stipulates to charge the interest of overdue payment for financial institutions, the interest rate is 0.21‰. The number of overdue days is 2,233 from January 1, 2003 to February 10, 2009, and the Defendant's arrear is USD 119,284.05. Therefore, the interest loss of overdue payment is 119,284.05 ×8.2773×0.21‰/day×2233=RMB462,997.96.

Above-mentioned two items are RMB635, 279.91 in total.

(VI) On attorney fee and traveling expenses

In the case, the Defendant evades debt as the debtor and does not fulfill obligations intentionally, so the Plaintiff suffers great loss and has to entrust attorney to handle. The attorney fee and traveling expenses the Plaintiff completely arise out of the malicious acts of the debtor. So these losses shall be borne by the Defendant.

The Plaintiff once entrusted Lovells Law Firm to negotiate with the attorney of the Defendant on the debt for many times. In accordance with the pay orders of the Plaintiff, it has paid USD10, 000.00 to Lovells Law Firm, equivalent in RMB 68,618.00, which can be testified by the *Overseas Remittance Application* of Huaxia Bank.

Consultation Proposal about the dispute in the case provided by Lovells Law Firm to the Plaintiff offered us advisory opinions on which way is used to collect the debt in the case: through lodging a complaint in United States or submitting to CIETAC for arbitration. It suggested solving the dispute through submitting to CIETAC for arbitration. Therefore, the *Consultation Proposal* is directly connected with the case.The defendant shall bear the attorney fee that the Plaintiff paid for it.

In addition, in accordance with the legal services entrustment contract signed between the Plaintiff and Hubei Dewell & Partners Law Firm, the Plaintiff need pay 10% of adjudicating amount in the case to the firm as attorney fee. In accordance with the

exchange rate of RMB 683.30 to USD 100, the Plaintiff's first two arbitration requests (payment and losses due to overdue payment) have reached RMB 1,450,347.82. Therefore, if the Plaintiff wins the suit, the attorney fee that it shall pay to the Hubei Dewell & Partners Law Firm will exceed RMB 140,000.00.

The attorney fee of aforesaid two items will exceed RMB200，000.00 obviously, so the Plaintiff requires herein the Defendant to pay the attorney fee RMB200，000.00.

The traveling expenses in the case are RMB 6,042.90 in total, and shall be borne by the Defendant.

(VII) On the Defendant's withdrawal of all defense evidences that have been submitted before the hearing.

In accordance with the stipulations of Article 74 of *Some Regulations of the Supreme People's Court Concerning the Evidence of civil actions*, "during the course of action, the People's Court shall confirm the adverse facts and approved evidences admitted in the party's indictment, pleading, statement and statement of attorney, unless the party cops out on it and has enough evidences to override.

Although the attorney of the Defendant coped out in the court hearing, and required to withdraw all defense materials and relevant evidences, it has confirmed the basic facts in the case and failed to provide any adverse evidences to override above-admitted facts and approved evidences. Therefore, the Plaintiff claims that the facts in the case are undoubted no matter whether the Defendant withdraws the defense materials and evidences or not.

The Plaintiff objects to the Defendant's withdrawal of defense evidences that are adverse to it, for this act of the Defendant violates the principle of good faith and estoppels. The parties shall be responsible for the various words made out by them, and shall not make any conclusion or act to deny their former words at will. The acts

that the Defendant made during the course of arbitration must be consistent, and the Defendant shall not be allowed to make inconsistent acts unless under legal circumstances. If the Defendant makes out inconsistent words and deeds deliberately for the sake of seeking advantage and avoiding disadvantage, and its later words is more subjective than its former ones, it is more unbelievable.

The main contents of the Defendant's defense opinions are as follows:

(I)The evidences submitted by the Plaintiff can not testify that it is the legal successor of the creditor's right of Wuhan Heavy Duty Machine Tool Plant against the Defendant.

On November 6, 2001, Wuhan Heavy Duty Machine Tool Plant was transformed (i.e. restructuring), and the name of the enterprise was changed into Wuhan Heavy Duty Machine Tool Group Corporation after restructuring. There were alterations to the enterprise type in addition to the name. In accordance with the stipulations of relevant Chinese laws and regulations, they are two different enterprises. The enterprise after restructuring is not sure to be the legal successor of creditor's right of the enterprise before restructuring.

（II）The time when the Plaintiff requested of paying the remaining money of the machine and other amounts has exceeded the Chinese statutory four-year prescription of arbitration.

The time when the Defendant effected its last payment was at the end of 2002. It has been as long as 6 years from the end of 2002 to February 24, 2009 when the Plaintiff applied your commission for arbitration. It is even longer while being calculated from the end of 2001 or 2000. Therefore, the time when the Plaintiff applied for arbitration has exceeded the four-year prescription. Although the Plaintiff submitted its evidence of claiming for creditor's right, the Defendant challenged the credibility of these

evidences and the subject of claiming for creditor's right.

(III) Wuhan Heavy Duty Machine Tool Plant sold the machine that was unable to function normally. Although the Defendant requested Wuhan Heavy Duty Machine Tool Plant of maintenance duly for many times, it refused to repair. Wuhan Heavy Duty Machine Tool Plant violated the stipulations of implied quality warranties of goods (machine), and the Defendant has the right to cease the payment.

The Defendant's evidences testify that Wuhan Heavy Duty Machine Tool Plant declined, although the Defendant requested it of maintenance duly for many times. After its assembly engineer refused to repair the machine in Chicago exhibition, it has been in the state of inability to function normally all the time. Wuhan Heavy Duty Machine Tool Plant or the Plaintiff did not appoint any personnel, technician, or engineer to inspect the machine. Therefore, Wuhan Heavy Duty Machine Tool Plant violates the stipulations of implied quality warranties of goods (machine), and the Defendant has the right to cease the payment. The business place of Wuhan Heavy Duty Machine Tool Plant is in China, and that of the Defendant is in America. The two countries are both the contracting states of CISG, and the international treaties that China takes part in or contracts are superior to Chinese domestic laws in accordance with relevant stipulations of the General Rules of the Civil Law of China. Therefore, the stipulations of implied quality warranties of goods (machine) and economic means that violate the stipulations in the case shall be governed by the *United Nations Convention on Contracts for the International Sale of Goods* (CIEG).

The Defendant purchased the machine involved in the case for the specific purpose of exhibition and sales in United States. The goods is not suitable to the specific purpose of exhibition and sales in United States which Defendant notified expressly or impliedly Wuhan Heavy Duty Machine Tool Plant when the Contract was signed. The Defendant in the case depended on Wuhan Heavy Duty Machine Tool Plant

technically, and this dependence was reasonable. Therefore, in accordance with Paragraph 2 of Article 35 of CISG, the machine that Wuhan Heavy Duty Machine Tool Plant sold to the Defendant does not conform to the Contract, and Wuhan Heavy Duty Machine Tool Plant has breached of the Contract.

The machine departed from Shanghai, China in July, 2000, and was displayed in Chicago in September. On the Chicago exhibition, after the Defendant discovered that the machine was unable to function, it told the personnel of Wuhan Heavy Duty Machine Tool Plant. Afterwards, although the Defendant required Wuhan Heavy Duty Machine Tool Plant to repair the machine for many times, Wuhan Heavy Duty Machine Tool Plant declined due to unwillingness or incapability to undertake the responsibility of implied quality warranties of machine. Therefore, in accordance with Article 71 of CISG, the Defendant has the right to pay remaining amount to Wuhan Heavy Duty Machine Tool Plant.

(Ⅳ) it is malicious and vindictive of the Plaintiff to apply for arbitration in China.

Wuhan Heavy Duty Machine Tool Plant or the Plaintiff did not apply for any arbitral procedure within 8 years from the end of 2000 to February 2009. Should the Defendant do not lodge a suit in New York in accordance with AGENCY AGREEMENT, the Plaintiff would have not applied for this arbitration subject to the PURCHASE ORDER.

(Ⅴ) The attorney fee of RMB200,000.00 has no basis, and shall not be borne by the Defendant.

The consultation provided by Lovells Law Firm is connected with the suit that the Defendant lodged against the Plaintiff in New York, but not directly relevant to this case. Moreover, the consultation fee is two high. The Plaintiff can not testify that it has paid any attorney fee.

II. Opinions of the arbitration tribunal

The arbitration tribunal has examined all the materials submitted by the Plaintiff and the Defendant. Through the court session, the opinions of the arbitration tribunal about the dispute are as follows:

(I)On the issue of the Plaintiff's subject qualifications

The Plaintiff in this case is Wuhan Heavy Duty Machine Tool Group Corporation, but the Defendant claims that the seller which signed relevant contract with the Defendant is Wuhan Heavy Duty Machine Tool Plant and the Plaintiff cannot testify that it is the legal successor of the creditor's right of Wuhan Heavy Duty Machine Tool Plant. In view of this issue, the arbitration tribunal checked the evidences submitted by the Plaintiff *Change Notification on Restructuring of Enterprises* and *Reply of Wuhan Municipality National Assets Management Office on the Application of Wuhan Heavy Duty Machine Tool Plant for Authorized Operation of State-owned Assets*. The arbitration tribunal found out that Wuhan Heavy Duty Machine Tool Plant went through transformation alteration registration in Wuhan Administrative Bureau for Industry and Commerce on November 6, 2001. Its name was changed to the current name of the Plaintiff, and its state-owned character, name of legal representative and the address of the enterprise were unchanged. Besides, the reply of Wuhan Municipality National Assets Management Office states clearly that after Wuhan Heavy Duty Machine Tool Plant was restructured to group corporation, it accepts all assets, debts and personnel of original unit, and takes the responsibility of maintaining and increasing the value of state-owned assets. In accordance with above-mentioned evidences, the arbitration tribunal can confirm that Wuhan Heavy Duty Machine Tool Plant is the legal successor of the creditor's right of Wuhan Heavy Duty Machine Tool Plant. The Plaintiff has the right to apply for arbitration to solve the dispute in accordance with the relevant contract signed between Wuhan Heavy Duty Machine

Tool Plant and the Defendant.

(Ⅱ) On the contract involved in this case and the jurisdiction of this arbitration

This arbitration case involves "AGENT AGREEMENT", "PURCHASE ORDER" and "APPENDIX (Contract No. 5967)". Both parties in this case never challenge the credibility of the aforesaid AGREEMENT, PURCHASE ORDER and APPENDIX. The arbitration tribunal confirms the credibility and effectiveness of above AGREEMENT, PURCHASE ORDER and APPENDIX through the trial. The attorney of the Defendant claimed at the court session that it was S&S Machinery Company rather then S&S Machinery Corp that was written on the signing place of "APPENDIX", which the arbitration tribunal conducted inspections. The arbitration tribunal found out that the Defendant cross-used Company and Corp in the above three documents. For example, the Defendant used Company in "AGENCY AGREEMENT", but used Corp in "PURCHASE ORDER". And "PURCHASE ORDER" quoted "AGENCY AGREEMENT" ("terms: According to agreement signed October 1999…") ; the Defendant used Corp in the name in the "APPENDIX", but used Company in the signing place. The Defendant's signatory in above-mentioned documents is all Mr. Simon Srybnik. The address of the company in above documents is 140 53rd Street, Brooklyn, NY 11232, USA. After comprehensively analyzing above facts, the arbitration tribunal considers that the meanings of Company and Corp are similar in English, and they are confused from time to time in some occasions. The actual matters in the case indicated that the Defendant confused Company and Corp in different occasions or the same occasion, however, this circumstance can affect the identity of the Defendant's subject, and the effectiveness of above agreement and purchase order as well as appendix.

In the written defense opinions dated July 2, 2009 and August 13, 2009, the Defendant claimed that the Plaintiff applied for arbitration in accordance with the

arbitration clauses under "APPENDIX of PURCHASE CONTRACT ", and "PURCHASE CONTRACT" did not apply to the relations between the two parties. the Defendant also claimed that Although "AGENCY AGREEMENT" was applicable to the relations between the two parties, there were no arbitration clauses in it. Therefore, the dispute between the Plaintiff and the Defendant should not be solved through arbitration.

In accordance with the notice issued by CIETAC through its secretariat on August 20, 2009, CIETAC deems that can the jurisdiction of this case be decided only when the arbitration tribunal conducts trial about relevant issues. Therefore, in accordance with Paragraph 1 of Article 6 of *Arbitration Rules*, the jurisdiction should be decided after CIETAC authorizes the arbitration tribunal to conduct trial.

The arbitration tribunal found out through trial that on October 23, 1999, the Plaintiff and the Defendant signed "AGHENCY AGREEMENT" to agree that the Defendant was the Plaintiff's sales agent in North and South American market within the next 3 years and the two parties wished to cooperate in the sales of vertical lathes, machining center of vertical lathes and straight flexible process equipments as soon as possible. On February 26, 2000, the Defendant placed on the Plaintiff the"PURCHASE ORDER"where the Defendant confirmed the will to purchase a CH5116B vertical lathe, and quoted the conditions ("terms") under "AGENCY AGREEMENT". Then on May 31, 2000, the two parties signed "AAPENDIX" which made out specific stipulations about the technical specifications, packaging, loading place & destination, insurances, price, mode of payment and time limit of CH5116B vertical lathe. At the same time, the two parties agreed in "APPENDIX" that all disputes arising out of this Contract ("this contract') should be solved through arbitration by CIETAC in accordance with its arbitration rules.

Judging from the history from the two parties establishing cooperation relationship to

conducting actual trades, the three documents are derived from the same origin, and closely related with each other. As for "APPENDIX", the arbitration tribunal deems that the document signed between the two parties is factually a purchase contract of equipment, although it is marked with "Appendix". In accordance with existing evidences and the statement of the two parties, the Plaintiff and the Defendant only made the transaction of the CH5116B Vertical Lathe after they signed the "AGENCY AGREEMENT". And this transaction was made in accordance with the "Appendix" signed between the two parties. The dispute arose out of the payment and quality of this CH5116B Vertical Lathe between the two parties. In accordance with the arbitration clauses under transaction contract ("Appendix'), CIETAC certainly has jurisdiction on payment dispute, quality dispute and other relevant disputes arising out of this transaction. And CIETAC has the right to judge and solve above disputes between the two parties in accordance with the contents of "Appendix", and "PURCHASE ORDER", as well as "AGENCY AGREEMENT" (collectively referred to as "Contract in the case") related to it.

（III）On the laws that the case is governed by

The Contract in the case does not agree on the applicable laws for the solution of the dispute. During the court session of the case, the arbitration tribunal has asked the two parties about the issue of applicable laws. The Plaintiff indicated that Chinese laws should be applied to with reference to international practices at the same time. The Defendant indicated that Chinese laws should be applied to. The Defendant also claimed in the materials submitted after the court session that because the business place of the Plaintiff was in China and that of the Defendant was in America, and moreover, the two countries are the contracting states of CISG, CISG shall be applied to as a priority. The Plaintiff also quoted the stipulations of CISG in relevant paragraphs of the written opinions submitted after the court session. Taking into

account the clear expression that the two parties agree to apply Chinese law and the fact that both China and America are the contracting states of CISG, the arbitration tribunal decides that the dispute in this case is applicable to the law of PRC and relevant stipulations of CISG.

(IV) On prescription

The Defendant claimed the time when the Plaintiff requested of paying the remaining money had exceeded the four-year prescription stipulated in China's Contract Law. The Plaintiff refuted it with corresponding evidences and reasons. Based on the overall consideration of examinations the two parties made in the court session and the written examinations announced after the court session, the arbitration tribunal, through the trial, decides to admit the following evidences provided by the Plaintiff: *Debt Collection Authorization*, *Collection Entrustment Agreement*, *Explanations* of China Export & Credit Insurance Corporation, *Case Progress Report* dated December 22, 2006 and October 8, 2007, the appearance testimony made by the witnesses of China Export & Credit Insurance Corporation, and the AFFIDAVIT and appendix that are provided by American Joseph & Terracciano Law Firm and have been notarized by local public notary office.

In accordance with above-mentioned evidences, the arbitration tribunal finds out the Plaintiff entrusted Wuhan Heavy Duty Machine Tool Limited Corporation to collect the arrear against the Defendant on January 3, 2004. Wuhan Heavy Duty Machine Tool Limited Corporation entrusted China Export & Credit Insurance Corporation to collect the arrear against the Defendant on November 25, 2004. In accordance with the *Explanations* of China Export & Credit Insurance Corporation and testimony made by the witnesses appointed by the corporation during the court session, based on the credibility of China Export & Credit Insurance Corporation and the conclusion of the witnesses' credibility, the arbitration tribunal believes that the American

professional collection institute entrusted by China Export & Credit Insurance Corporation collect the arrear against the Defendant for twice no later than December 22, 2006 and October 8, 2007, and China Export & Credit Insurance Corporation reported the collection progress to the Defendant for twice no later than December 22, 2006 and October 8, 2007.

In addition, in accordance with the AFFIDAVIT and appendix that are provided by American Joseph & Terracciano Law Firm and have been notarized by local public notary office, the arbitration tribunal also finds out that China Export & Credit Insurance Corporation entrusted American Joseph & Terracciano Law Firm to undertake the collection against the Defendant in November 2004. Mr. James N. Joseph of this law firm phoned the Defendant's legal counsel Mr. Frank L. Shernoff. Because the Defendant's legal counsel was out and missed the ring, the legal counsel Mr. Frank L. Shernoff replied Mr. James N. Joseph by facsimile afterwards and promised to contact later. Besides, Mr. James N. Joseph faxed to Mr. Frank L. Shernoff no later than August 9, 2005, and explicitly required the Defendant to pay arrear. As to the status of Mr. Frank L. Shernoff, the arbitration tribunal can confirm that Mr. Frank L. Shernoff is the legal counsel on behalf of the Defendant during the course of the collection, in accordance with the name of the Defendant's attorney, as well as the name, address, telephone number and fax number of the law firm indicated in the written materials (the complaint that the Defendant lodged to the American Court against the Plaintiff) submitted by the Defendant.

Based on above-mentioned facts, the arbitration tribunal deems, in accordance with the stipulations about the suspension of prescription of action and recalculation of prescription in Article 140 of *General Principles of the Civil Law of the People's Republic of China*, and the stipulation in *Contract Law of the People's Republic of China* that the prescription of arbitration for the contract for the international sale of is

four years, because the Plaintiff claimed for creditor's right against the Defendant at least in 2005, 2006, 2007 after the payment deadline December 31, 2002 stipulated in the Contract of the case, the time when the Plaintiff lodged this arbitration does not exceed the statutory four-year prescription of arbitration, although the prescription of arbitration was suspended for several times.

(V) On the first claim in the arbitration

The Plaintiff requires the Defendant to pay the arrear USD 119, 284.05 in the first claim. The Defendant does not challenges the facts that the Defendant has received the goods (Vertical Lathe) and failed to effect the payment USD 119,284.05 subject to the Plaintiff's claim, and the related evidences. The arbitration tribunal confirms above-mentioned facts are tenable. The arbitration tribunal deems that there is explicit agreement in the Contract of this case about the price of goods, payment obligations of the Defendant and payment period, and the Defendant shall fulfill its payment obligations in accordance with the agreement under the Contract in this case. In accordance with the stipulations of Article 8, and Article 60 of *Contract Law of the People's Republic of China*, the arbitration tribunal supports the Plaintiff's arbitration claim that requires the Defendant to pay the arrear USD 119, 284.05.

"The Defendant claims that because the Plaintiff sold the machine with inability to function normally, and refused to maintain, and violated the stipulation of implied quality warranties of goods, the Defendant has the right to cease payment in accordance with the relevant stipulations of Article 35, Article 36 and Article 71 of CISG", which the arbitration tribunal is aware of.

The arbitration tribunal considers that firstly, because the Defendant withdrew the counterclaim during the trial of this case, the arbitration tribunal did not hear the claim that the Defendant lodged about the quality of the goods and relevant evidences.

Therefore, the arbitration tribunal can not confirm whether it is true that the Plaintiff sold the machine with inability to function normally, and refused to maintain. The Defendant has the right to require the Plaintiff to compensate the loss the Defendant suffered from due to the quality of the goods in the form of counterclaim or lodging arbitration, or remedy in other ways, but can not refuse to effect the payment for this reason after receipt of the goods. Secondly, Article 34 and Article 36 of CISG the Defendant quoted as the basis for the refusal of payment are the stipulations concerning the obligations of the seller rather than the issue whether the purchaser has the right to cease payment. And Article 71 of CISG provides that if either party does not fulfill its majority of substantial obligations under the circumstance of anticipatory breach of contract, the other party has the right to terminate the implementation of obligations, which does not coincide with the case. The arbitration tribunal does not support above-mentioned causes put forward by the Defendant.

(VI) On the second claim in arbitration

The Plaintiff requires ruling the Defendant to pay exchange loss of overdue payment: on December 31, 2002 (the deadline when the payment shall be effected), the exchange rate was RMB 827.73 against USD 100, but on February 10, 2009, it was RMB 683.3 against USD 100. Therefore, the exchange loss of overdue payment is: 119, 284.05× (8.2775-6.833) =RMB172, 281.95. As for this exchange loss, the arbitration tribunal considers the currency of the Contract in the case is USD, and there is no specific agreement about responsibility of exchange loss in the Contract. Moreover, the Plaintiff failed to prove that this loss can be foreseen by the Defendant; therefore, the arbitration tribunal does not support this claim.

The interest rate of 0.21‰ per day put forward by the Plaintiff can not be applied to the interest loss of overdue payment which the arbitration tribunal deems to be supported. In accordance with the current USD loan interest rate, the arbitration

tribunal deems it is suitable to calculate at annual interest rate of 4%. The period is calculated from January 1, 2003, up to February 10, 2009 provisionally.

(Ⅶ) On the third claim in arbitration

The Plaintiff requires ruling the Defendant to pay the attorney fee of RMB 200,000.00 spent on the collection of the arrear and the case. The Plaintiff has provided the evidence that it has paid USD10, 000.00 to American Lovells Law Firm and the evidence (contract) that it needs to pay 10% of adjudicating amount in this case to Hubei Dewell & Partners Law Firm. However, the Defendant claimed that the fee paid to Hubei Dewell & Partners Law Firm is not related to this case directly, and the amount is too high. Besides, the contract can not prove the Plaintiff has paid attorney fee to Hubei Dewell & Partners Law Firm.

After checking the legal advice that American Lovells Law Firm issued to the Plaintiff, the arbitration tribunal deems that the contents of the legal advice is closely connected with the matter in this case that the Plaintiff collected the arrears of Vertical Lathe. After checking the contract signed between the Plaintiff and Hubei Dewell & Partners Law Firm, the arbitration tribunal deems that the Plaintiff is obliged to pay 10% of adjudicating amount in this case to Hubei Dewell & Partners Law Firm if the Plaintiff wins this suit after the conclusion of the hearing. The total amount of these two items exceeds RMB 200,000.00. It is reasonable for the Plaintiff to require the Defendant to pay above-mentioned fees, and the arbitration tribunal supports the Plaintiff's this claim.

(Ⅷ) On the fourth claim in arbitration

The Plaintiff requires the arbitration tribunal to rule the Defendant to bear the arbitration fee of this case and pay to the Plaintiff the traveling expenses spent due to this case. The Plaintiff provides relevant evidences for the traveling expenses.

The arbitration tribunal supports the Plaintiff's claim that requires the arbitration tribunal to rule the Defendant to bear the arbitration fee of this case, as well as the claim that requires the Defendant to bear the traveling expenses spent due to this case. Through the calculation of corresponding evidences, the Defendant shall bear the total traveling expenses of RMB 6,042.90 spent due to this case.

3. Award

(I) The Defendant pays to the Plaintiff overdue payment USD 119, 284.05

(II) The Defendant pays to the Plaintiff the interest of aforesaid arrear USD 119, 284.05 according to the annual interest rate of 4% from January 1, 2003, up to February 10, 2009 provisionally.

(III) The Defendant pays to the Plaintiff attorney fee of RMB 200,000.00 spent on the collection of the arrear and the case.

(IV) The Defendant bears the arbitration fee of this case and pays to the Plaintiff the traveling expenses of RMB 6,042.90 that the Plaintiff spent on this case. The arbitration fee of this case is RMB 61,908.00, and has been prepaid in full by the Plaintiff. The Defendant shall compensate the arbitration fee of RMB 61,908.00 that has been paid by the Plaintiff.

The actual charge of arbitrator Guo Yujun appointed by the Plaintiff in the case is RMB2, 204.00 and is borne by the Plaintiff itself. The Plaintiff prepaid RMB 8,000.00 for appointing Guo Yujun. The remaining RMB 5, 796.00 shall be returned to the Plaintiff by CIETAC.

The Defendant shall pay up the sums that the Defendant shall pay to the Plaintiff within 20 days after this Award comes into forces.

This Award is final, and will come into force upon the date of conclusion.