ARBITRATION INSTITUTE
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FINAL AWARD

given in Stockholm on 20 September 2010

in an arbitration (No. 102/2010) pursuant to the Rules of

The Arbitration Institute of
The Stockholm Chamber of Commerce

between

Mincom Services Pty Ltd
Claimant

and

TOO Aktubinskaya Mednaya Companiya (TOO Aktubinskaya Copper Company)
Respondent

before

J William Rowley QC, *Arbitrator*

Professor Alexander S Komarov, *Arbitrator*

Mr Bo G H Nilsson, *Chairperson*

CLAIMANT

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RESPONDENT

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ARBITRAL TRIBUNAL

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BACKGROUND

1. Claimant and Respondent have concluded a General Agreement for Software and Support Services ("GASS").To GASS are appended (i) Schedule A, Software Products, (ii) Schedule B, Licence Agreement, (iii) Schedule C, Software Licence Requisition (iv) a document somewhat cumbersomely entitled "Software Licence Requisition made in the form of SCHEDULE C for General Agreement for Software and Support Services No_____made as of _____2008 by and between Mincom Services Pty Ltd (UK Registered No 02931602) and TOO 'Aktubinskaya Mednaya Companiya' ('the General Agreement'), in the following called the "Licence Requisition", (v) Schedule D, Support Services Agreement, with Appendices A and B thereto, (vi) Schedule E, Support Services Requisition and finally (vii) a further cumbersomely entitled document "Support Services Requisition made in the form of Schedule E for General Agreement of Software and Support Services No_____made as of _____2008 by and between Mincom Services Pty Ltd (UK Registered No 02931602) and TOO 'Aktubinskaya Mednaya Companiya' ('the General Agreement')", in the following called the "Support Services Requisition".

2. These documents are all signed by both parties and the corporate stamp of Respondent is applied to all eight. Claimant's signature on all documents is dated 19 August 2009. Respondent's signature on GASS, Schedule A, Schedule B and Schedule D (and its Appendices) is dated 15 August 2009, while the signatures on Schedule C, the Licence Requisition, Schedule E and the Support Services Requisition are undated.

3. There is also a General Agreement for Consulting Services ("GAC") signed by Respondent on 15 August 2008 and by Mincom Pty Ltd (a company affiliated with Claimant) on 19 August 2008. The GAC also has appendices.

4. The various contractual documents concern delivery by Claimant to Respondent of certain software, and delivery by Claimant and by Mincom Pty Ltd of various services ancillary thereto.

5. In addition to procedural and jurisdictional issues the dispute in the case is over Respondent's possible liability in damages for repudiation of its relationship with Claimant.

THE PROCEEDINGS

6. By a Request for Arbitration ("Request") addressed to the Arbitration Institute of the Stockholm Chamber of Commerce ("Institute") dated 23 September 2009 Claimant and its affiliate Mincom Pty Ltd, which were in the Request jointly referred to as the "Mincom companies", requested arbitration against Respondent. The contractual background to the dispute was described as follows: *"On 19 August 2008 the Mincom companies and /Respondent/ executed a general software and technical support agreement and a general consulting services agreement (hereinafter collectively referred to as the 'Agreements') together with software, support services and consulting*

services requisitions (the 'Requisitions') which incorporate the terms of and constitute integral parts of the Agreements." The preliminary relief sought was stated to be *"an award ordering /Respondent/ to pay to Mincom Pty Ltd an amount of 326,857 USD, and compensation for lost profits in an amount to be specified, and ordering /Respondent/ to pay to Mincom Services Pty Ltd amounts of 729,450 USD and 152,400 USD, together with interest on all amounts...."*. In the Request Mr Rowley was appointed as arbitrator.

7. By a facsimile letter to the Institute dated 19 October 2009 Respondent confirmed that *"On 19 August 2008 the Mincom Companies and AMK executed a general agreement for software and support services and general agreement for consulting services (hereinafter-Agreements)"*. In the letter Respondent requested postponement and dismissal, stating as regards postponement *"Under clause 7.2 of the Agreements...[i]f the dispute is not resolved in .....30 day period from the date of receipt by a party of a written notice of a dispute, any of the parties shall be entitled to submit such dispute to international arbitration.....As far as /Respondent/ is aware of, the procedure set forth in 7.2 of the Agreements has not been followed..."* and as regards dismissal *"Under clause 7.1. of the Agreements....[a]ny action or proceedings arising from or relating to this Agreement must be brought in the courts of Ontario, Canada"*.

8. Respondent further stated that it denied *"each of Mincom Companies' requests and the relief sought"* and reserved the right to further expand on the above and other issues. Finally Respondent stated as follows: *"Due to the late receipt of the letters from the SCC Institute about the arbitration /Respondent/ did not have an opportunity to retain a counsel and appoint an arbitrator. If the SCC Institute refuses /Respondent's/ request for dismissal, /Respondent/ will, subject to its objection on jurisdiction, be ready to appoint an arbitrator till 4 November 2009....."*

9. By letter to the Institute of 26 October 2009 "Mincom companies" commented on Respondent's letter of 19 October, enclosing excerpts of GASS and GAC including clauses 7.1, 7.2 and 7.3 which are identical to the two documents and which are quoted in the following section of this Award.

10. By letter of 2 November 2009 the Institute communicated its decision that it did not manifestly lack jurisdiction over the dispute and granted Respondent until 4 November 2009 to appoint an arbitrator.

11. By letter of 2 November 2009 Respondent appointed Professor Komarov as arbitrator, reiterating its view that the requirements of "Article 7.2 of the Agreements" had not been met.

12. By letter of 5 November 2009 the Institute communicated its decision to appoint Mr Nilsson as chairperson of the Arbitral Tribunal and to determine the advance on costs at EUR 82 700.

13. By letter of 12 January 2010 the Institute informed that Claimant had paid the entire advance on costs and referred the matter to the Tribunal reminding that the Final Award should be made by 12 July 2010.

14. By its Procedural Order No 1 of 9 February 2010 the Tribunal set the following schedule for the proceedings: Statement of Claim by Claimants latest 1 March 2010, Statement of Defence by Respondent latest 1 April 2010, Reply and Final Statement of Evidence by Claimants latest 21 April 2010 and Rejoinder and Final Statement of Evidence by Respondent 14 May 2010, oral hearing of the case commencing 0930 on 6 July 2010 and continuing as necessary on the following day. The Order further stated that upon *"receipt of Statement of Claim and Statement of Defence as aforesaid"* the Tribunal would decide whether to proceed as per the schedule or whether to revise the schedule to bifurcate the proceedings in order to deal with Respondent's procedural objections before going further into the merits of the case.

15. The Statement of Claim (by Claimant and Mincom Services Pty Ltd jointly) having been timely filed, Respondent failed to submit a Statement of Defence as ordered. The Tribunal on 8 April 2010 issued Procedural Order No 2 containing inter alia the following: *"There will be no bifurcation of proceedings and all issues will be dealt with at the hearing commencing on 6 July as previously advised. –The Respondent is given one final opportunity to file its Statement of Defence not later than 30 April 2010. After said day no documents from Respondent will be admitted except if good cause is shown why they have not been submitted before. – Respondent is reminded that failure to submit documents or to appear at the hearing will not prevent the Arbitral Tribunal from proceeding with the arbitration and rendering an Award."*

16. By letter of 27 April 2010 Mr Hårdeman introduced himself and Ms Permyakova as counsel for Respondent. The letter stated that following receipt of Procedural Order No 1 Respondent had *"relied upon that a decision on bifurcation of the proceedings would be taken by the Tribunal only after due consideration of the additional arguments in respect of the jurisdictional issues which were to be raised by the Respondent in the Statement of Defense"* and also *"that the parties would be allowed reasonable time to submit its arguments on the substantive matters in further briefs, should the Tribunal not decide on bifurcation."* Respondent through Mr Hårdeman argued that the time available to it was unreasonably short and requested until 15 June to submit a Statement of Defence. Respondent further requested that the Tribunal only thereafter consider whether bifurcation was appropriate and finally that restrictions imposed in respect of presentation of documentation should not apply.

17. Having heard Claimant, the Tribunal on 29 April 2010 gave Procedural Order No 3 containing the following decision:

    "Respondent has offered no explanation why it did not comply with Procedural Order No 1, or why Respondent proceeded to appoint outside counsel only in late April 2010 - in an arbitration in which Respondent first corresponded in October 2009. It should furthermore have been clear to Respondent that if Respondent did not comply with Procedural Order No 1, the Tribunal would take a decision on the issue of bifurcation following the expiry of the deadline for filing a Statement of Defence. Respondent has not been entitled to assume that the Tribunal would await Respondent's possible later filing.

On this background the Tribunal sees no reason to revisit the issue of bifurcation and the Parties should accordingly assume that the hearing will take place as ordered and deal with all issues in the case.

Respondent is granted one final possibility to file a Statement of Defence, on jurisdiction and in substance, not later than 24 May 2010.

After that day the Tribunal will not permit Respondent to invoke new circumstances or new evidence except if good cause is shown why such have not been invoked before.

Claimant may file a Statement of Reply not later than 11 June 2010.

To the extent that such Statement of Reply gives Respondent good cause to further filing, Respondent may file a Statement of Rejoinder not later than 23 June 2010.

After 29 June 2010 the Tribunal will not accept further documents from either side."

18. On 12 May 2010 Respondent filed a letter again protesting that the time available to it was unreasonably short as "*Respondent has been ordered, within three weeks only, to prepare its defence and present full Statement of Evidence…..*".

19. On 24 May 2010 Respondent filed its Statement of Defence, reiterating its view that the Tribunal has no jurisdiction and that the proceedings should be bifurcated. As regards jurisdiction Respondent raised the arguments (i) the arbitration clauses do not allow for the joinder of disputes, (ii) the arbitration clauses are invalid or inoperative, (iii) the conditions precedent to arbitration have not been fulfilled and (iv) the Claimants' claims are not covered by the arbitration clauses.

20. On 31 May 2010 the Chairperson on behalf of the Tribunal sent an e-mail to the parties as follows.

"The Tribunal is in receipt of R1. The Tribunal will give its final decision on the future conduct of the proceedings upon receipt of Claimant's comments which are expected on or before 11 June 2010."

21. On 11June 2010 Claimant filed its Statement of Reply.

22. On 16 June 2010 the Chairperson on behalf of the Tribunal sent an e-mail to the Institute as follows, with copies to the parties:

'Please find enclosed copy of the Reply in the matter. The arbitrators would like to invite the Institute to (i) consider whether to split the matter into one case with Mincom Ptd as Claimant and one case with Mincom Services Pty as Claimant (the arbitrators would in such event hear the two cases together but render two formally separate awards) and (ii) reconsider the advance on costs in light of (i) and also considering the damages claim which has been added by the Statement of Claim and modified in the Reply.

The oral hearing in the matter is scheduled to take place in Stockholm, commencing on 6 July 2010. In view of the intervening holidays the Tribunal may require until 23 September to render a final award and an extension of time until then is hereby requested."

23. On 17 June 2010 the Chairperson on behalf of the Tribunal sent an e-mail to the parties as follows:

"As follows from Procedural Order No 3 Respondent may latest on 23 June 2010 file a Statement of Rejoinder. By such date Respondent should in any event finally specify the evidence on which Respondent relies and furnish translations of documents hitherto filed only in the Russian language. By the same date Claimant should file English translations of C 9 and C 11 and the Russian originals which correspond to the translations filed as C 8, C 10 and C 12.

Further, it appears both sides are relying to some extent on oral testimony by witnesses requiring interpreter assistance. As you know, the number of interpreters available in Stockholm is limited. I have taken the liberty of provisionally booking Ms Helena Isaksson. I understand that at least one of you may have been in contact with her as well. If either party wishes to engage someone else I would like to be informed by return e-mail, otherwise I will confirm her engagement tomorrow.

The oral hearing will as previously advised take place on 6-7 July 2010 in the Chairperson's offices, commencing 0930 a m on 6 July. The parties are requested to indicate by return if they would be available also on 8 July if need be."

24. By e-mail of 23 June 2010 the Institute responded to the Chairperson's e-mail of 16 June 2010 as follows:

"Please be advised that as this case has been referred to the Arbitral Tribunal any decision on the issue of splitting the case at this point rests with the Tribunal.

The SCC will await the decision from the Tribunal in this respect before taking any further action regarding the advance on costs as foreseen in the communication from the Tribunal referred to above."

25. On 24 June 2010 the Tribunal through the Chairperson responded as follows:

"The Tribunal has indeed decided to split the case into one with Mincom Pty as claimant (claiming 326,857 USD as per point 1 of the SoC under Relief sought plus 773,564 USD as per point 4 of the SoC under Relief sought as modified by point 2 of the Reply under Claimants' request for relief) and one with Mincom Services Pty as claimant (claiming 729,450 USD plus 152,400 USD as per point 2 of the SoC under Relief sought) The Tribunal requests the Institute to fix the advances accordingly."

26. By e-mail received by the Chairperson at 02:17 a.m. on 24 June 2010 Respondent filed its Statement of Rejoinder, advising that accompanying Exhibits would be filed later that day. They were subsequently transmitted between 10:38 and 13:32.

27. By e-mail of 24 June 2010 Claimant jointly with Mincom Pty Ltd stated as follows:
"Claimants, whose counsel waited until 2400 hours yesterday for Respondent to submit a Rejoinder in accordance with Procedural Order no. 3, note that Respondent, without any adequate explanation or even a request for an extension of time, has elected not to comply with the 23 June deadline that Respondent was given in Procedural Order No. 3 for submitting a Rejoinder. Further, Respondent has elected to withhold a number of documents to which Respondent has referred as evidence in its late submission. This is entirely unacceptable.

Claimants respectfully request that the Tribunal rejects or disregards Respondent's Rejoinder, due to the fact that it has been submitted too late."

28. In a submission of 29 June 2010 Respondent maintained that the Tribunal *"cannot by an administrative decision remedy errors which have been made in connection with the commencement of the arbitration"* and cannot *"dispose of Respondent's right to appoint its arbitrator for each case which opportunity Respondent has not been given".*

29. The Institute by letter of 30 June 2010 communicated that the arbitration had been split into two cases, to be handled by the same Tribunal. By a further letter of even date the Institute fixed the Advance on Costs for the present case at EUR 59 000, noted that Claimant had paid its share through money previously deposited and ordered Respondent to pay EUR 29 500 by 7 July 2010.

30. On 30 June 2010 the Tribunal gave Procedural Order No 4 containing the following decision:

"Since the claims brought by Mincom Pty Ltd and the claims brought by Mincom Services Pty Ltd cannot against Respondent's protest be formally joined and since Respondent has in the Tribunal's view not been prevented by Article 31 of the SCC Rules from making such protest as regards their future conduct, they will be handled as individual arbitration cases and thus be decided by separate awards. Whether the Tribunal has jurisdiction over the respective cases, considering also their handling until now, will be decided in such awards which will also deal with the merits of each case if the Tribunal finds that it has jurisdiction.

This notwithstanding the present Order is for practical reasons given in one document covering both arbitration cases; the parties may if desired duplicate this and other documents on file to date to maintain separate records in each case.

The two cases will be heard together, commencing on 6 July 2010 at 0930 in the Chairperson's office.

Counsel are requested to present to the Tribunal not later than 2 July 2010 a jointly prepared time-table for the hearing. Counsel for Claimants is requested at the same time to inform the interpreter, Ms Isaksson, of the timing of expected need for her assistance. I have transmitted to her copies of C1 and R1 in order for her to prepare.

The Rejoinder with Exhibits is admitted in view of the modest delay in submission."

31. By a submission of 2 July Claimant requested leave to submit two additional documents evidencing the development of copper prices, denominated Claimant's Exhibits 19 and 20.

32. By letter of 5 July the Institute communicated its decision to extend the time for rendering the Final Award until 23 September 2010.

33. The case was heard on 6-7 July 2010 in Stockholm, together with the case between Mincom Pty Ltd and Respondent. As witnesses called by Respondent appeared Mr Andrei Yorsh, Mr Andrey Nadein, Mr Nikolay Godunov and Mr Peter Hanlon.

34. At the commencement of the hearing the Chairperson communicated the Tribunal's decision not to admit Claimants Exhibits 19 and 20 in view of their late submission.

35. At the end of the first day of the hearing Claimant stated that it wished to invoke as a legal basis for all its claims entitlement to damages due to the relationship having been improperly repudiated by Respondent. Respondent objected thereto on the basis that the argument had been made too late. The Tribunal decided to admit it, on the basis that it concerned legal reasoning and did not introduce any new facts.

36. Respondent was granted until 19 July 2010 to supplement in writing its oral closing submissions as regards the damages issue insofar as Claimant had in the course of the hearing relied on damages as a new legal ground for all claims. Both parties were given until 26 July 2010 to file their submissions on costs.

37. On 19 July 2010 Respondent filed its supplementing closing submission, with Exhibits in the form of legal materials.

38. On 22 July 2010 Claimant requested leave to comment on Respondent's written closing submission, which the Tribunal by decision of 23 July 2010 decided not to grant.

39. On 23 July 2010 the Tribunal declared the proceedings closed save for the issue of costs.

40. Claimant by its submission of 26 July 2010 claimed reimbursement of costs with USD 68 272 plus SEK 400 782 and Respondent by its corresponding submission claimed CAD 11 706.38 and EUR 66 161.

41. Respondent subsequently objected to Claimant's claim as regards USD 28 395 for fees of counsel during negotiation and arbitration and as regards USD 33 815 for internal management time. The claim for expenses of USD 2 337 plus USD 3 725 was not objected to by Respondent.

42. The Institute by letter of 27 July 2010 informed that Claimant has paid the entire amount of the Advance on Costs, Respondent having failed to pay its share thereof.

THE ARBITRATION CLAUSES

43. GASS contains the following clauses:

> *"**7.1 Governing law.** This Agreement and any claims related to it will be governed by and construed in accordance with the laws of Ontario, Canada. Any action or proceeding arising from or relating to this Agreement must be brought in the courts of Ontario, Canada. The United Nations Convention on Contracts for the International Sale of Goods does not apply to this Agreement.*
> ***7.2 Dispute Resolution.** Upon any dispute, controversy or claim between the parties, relating in any way to this Agreement (except as it relates to a confidentiality violation or an intellectual property right), each of the parties will designate a representative from the senior management who (to the extent practicable) does not devote substantially all of his or her time to performance under this Agreement to attempt to resolve such matter. The designated representatives will negotiate in good faith in an effort to resolve the dispute over a period of thirty (30) days. If the dispute is not resolved in this 30 day period from the date of receipt by a party of a written notice of a dispute, any of the parties shall be entitled to submit such dispute to international arbitration in accordance with clause 7.3.*
> ***7.3 Arbitration.** Any dispute, controversy or claim arising out of or in connection with this Agreement or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitral tribunal shall be composed of 3 (three) arbitrators. The place of arbitration shall be Stockholm, Sweden. The language to be used in arbitral proceedings shall be English. This arbitration clause shall survive in the event that this Agreement shall be adjudged null and void or shall be cancelled, annulled or terminated for any reason whatsoever. Initiation of arbitration proceedings by either party shall not suspend that party's contractual obligations hereunder. Judgment upon the award may be entered in any court having jurisdiction or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be."*

44. Schedule B contains the following clauses:

> *"**11.7 Governing law and venue.** This LA and any claims related to it will be governed by and construed in accordance with the laws of Ontario, Canada. Any action or proceeding arising from or relating to this Agreement must be brought in the courts of Ontario, Canada. The United Nations Convention on Contracts for the International Sale of Goods does not apply to this LA.*
> ***11.8 Dispute Resolution.** Upon any dispute, controversy or claim between the parties, relating in any way to this LA (except as it relates to a confidentiality violation or an intellectual property right), each of the parties will designate a representative from the senior management who (to the extent practicable) does not devote substantially all of his or her time to performance under this Agreement to attempt to resolve such matter. The designated representatives will negotiate in good faith in an effort to resolve the dispute over a period of thirty (30) days. If the dispute is not resolved in this 30 day period from the date of receipt by a*

party of a written notice of a dispute, any of the parties shall be entitled to submit such dispute to international arbitration in accordance with clause 11.9.

11.9 Arbitration. *Any dispute, controversy or claim arising out of or in connection with this Agreement or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitral tribunal shall be composed of 3 (three) arbitrators. The place of arbitration shall be Stockholm, Sweden. The language to be used in arbitral proceedings shall be English. This arbitration clause shall survive in the event that this LA shall be adjudged null and void or shall be cancelled, annulled or terminated for any reason whatsoever. Initiation of arbitration proceedings by either party shall not suspend that party's contractual obligations hereunder. Judgment upon the award may be entered in any court having jurisdiction or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be."*

45. Schedule D contains the following clauses:

*"**9.7 Governing law and venue.** This SSA and any claims related to it will be governed by and construed in accordance with the laws of Ontario, Canada. Any action or proceeding arising from or relating to this Agreement must be brought in the courts of Ontario, Canada. The United Nations Convention on Contracts for the International Sale of Goods does not apply to this SSA.*

9.8 Dispute Resolution. *Upon any dispute, controversy or claim between the parties, relating in any way to this SSA (except as it relates to a confidentiality violation or an intellectual property right), each of the parties will designate a representative from the senior management who (to the extent practicable) does not devote substantially all of his or her time to performance under this Agreement to attempt to resolve such matter. The designated representatives will negotiate in good faith in an effort to resolve the dispute over a period of thirty (30) days. If the dispute is not resolved in this 30 day period from the date of receipt by a party of a written notice of a dispute, any of the parties shall be entitled to submit such dispute to international arbitration in accordance with clause 9.9.*

9.9 Arbitration. *Any dispute, controversy or claim arising out of or in connection with this SSA or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitral tribunal shall be composed of 3 (three) arbitrators. The place of arbitration shall be Stockholm, Sweden. The language to be used in arbitral proceedings shall be English. This arbitration clause shall survive in the event that this SSA shall be adjudged null and void or shall be cancelled, annulled or terminated for any reason whatsoever. Initiation of arbitration proceedings by either party shall not suspend that party's contractual obligations hereunder. Judgment upon the award may be entered in any court having jurisdiction or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be."*

46. Schedule A, Schedule C, Schedule E, the Licence Requisition and the Support Services Requisition in themselves contain no dispute resolution or governing law clauses.

THE JURISDICTIONAL AND PROCEDURAL ISSUES

Respondent's position

47. Respondent argues that (i) the arbitration clauses do not allow for the joinder of disputes, (ii) the arbitration clauses are invalid or inoperative, (iii) the preconditions to arbitration have not been fulfilled and (iv) the Claimants' claims are not covered by the arbitration clauses.

48. Respondent further objects to the conduct of the proceedings on the basis that Respondent has not had sufficient time to prepare its case.

49. Respondent develops its jurisdictional arguments as follows.

    (i) The fact that the cases between Claimant and Respondent and between Mincom Pty Ltd and Respondent could not lawfully be joined means that the arbitration has never been properly commenced and this cannot be rectified at a later stage. The Request for Arbitration was misleading since it was not clear that the claims contained therein were advanced under more than one contract and since the relevant arbitration clauses were not appended. Respondent was deprived of its right to appoint one arbitrator for each case.

    (ii) Article 7.1 of GASS provides that any action or proceeding must be before the courts of Ontario. The arbitration clause in 7.3 of GASS is accordingly invalid or inoperative. The clauses are incompatible and it is unclear what disputes shall be resolved by arbitration. The drafting seems deliberate, if misplaced. Mr Yorsh, then outside counsel to Claimant, referred to "court procedure" in his letter to Respondent of 26 June 2009 (Claimant's Exhibit 3). Mr Zhegalin acting for Respondent in signing minutes of a meeting on 23 July 2009 (Claimant's Exhibit 12) did not refer to arbitration but to "arbitrazh" which is a reference to commercial courts.

    (iii) Claimant has not complied with the notice mechanism provided for in Article 7.2 of GASS. The discussions which took place in July 2009 were not over any dispute but over Respondent's request to terminate the relationship. It was not clear that Claimant requested pre-arbitral negotiations and in fact Mr Yorsh used that very expression in the heading of his letter of 2 September 2009 (Claimant's Exhibit 4), which was not followed by any negotiations. In any event Claimant was not properly represented in the negotiations which took place.

    (iv) Claimant has requested arbitration with reference to the arbitration clause in Article 7.3 of GASS. The claim is, however, based on provisions contained in the Licence Requisition and the Support Services Requisition which by reference incorporate Schedules B and D which contain separate arbitration clauses.

50. As regards the conduct of the case, Respondent maintains that it has been given insufficient time to prepare its case. Respondent in particular points to the fact that it is a Kazakh entity which *"until 16 April 2010 was represented by an in-house lawyer which cannot be expected to be familiar with international arbitration proceedings in general and Swedish arbitration proceedings in particular and, as evident from earlier*

communication in this matter, obviously does not have any command of the English language". Respondent in this context complains that it was unclear until 17 June 2010 whether proceedings would be bifurcated and whether the hearing would take place as scheduled, and that accordingly Respondent had only four working days to prepare its Statement of Rejoinder. Respondent also maintains it had insufficient time to interview and bring witnesses to the final hearing. Finally, Respondent objects to the fact that Claimant was allowed to introduce a new legal argument in the course of the oral hearing.

Claimant's position

51. Claimant denies that the Request for Arbitration was in any way improper. In any event, Respondent failed to object without delay to the fact that a single arbitration was initiated.

52. Contrary to Respondent's assertions the arbitration clauses are not irreconcilable with the reference to court proceedings. It is not uncommon that parties to an arbitration agreement agree also some means to achieve a mechanism for situations in which only a court is able to assist efficiently, for example in situations where injunctive relief is required. The language about Ontario courts could well be a mere mishap as a result of a cut-and-paste exercise.

53. The provision in section 7.2 of GASS is no condition precedent to the right to arbitrate. There is no trace in that section or anywhere else in the contractual documents of any requirement for a "pre-arbitration notice". In any event, there can be no dispute about the fact that Respondent had received the notice of 26 June 2009 (Claimant's Exhibit 3) prior to the negotiations reflected in the minutes of 8 July and 23 July 2009 (Claimant's Exhibits 9 and 12). The 23 July meeting ended in a failure of negotiations. Mr Zhegalin remarked that if Claimant was not prepared to accept Respondent's proposal it could go to arbitration.

54. Claimant disagrees with Respondent's view that the agreements entered into between Claimant and Respondent are strictly separate contractual relationships. Instead, in Claimant's view, the Licence Requisition and the Support Sercvices Requisition are integral elements of a contractual package laying down the final details of the various transactions contemplated in GASS and its Schedules.

THE PARTIES' POSITIONS IN SUBSTANCE

Claimant's claims

55. Claimant requests - as it has finally defined its requests for relief - that Respondent be ordered to pay the following:
(i) An amount of USD 729 450;
(ii) An amount of USD 152 400;
(iii) Interest on the amounts claimed in (i) and (ii) above at a rate of 1.5 per cent per month until payment is made, or alternatively at a rate which the Tribunal finds appropriate, the interest to be calculated in the first place from 23 October 2008, or secondly from 12 November 2008 or thirdly from 1 April 2010.
Claimant asks the Tribunal to calculate the amount of interest accrued until the date of the award, and to specify that amount in the award.

56. Claimant further seeks an award ordering Respondent to assume liability as between the parties for all costs for the arbitration, including all fees and costs for Claimants counsel, all fees and costs of the arbitrators and the SCC Institute. Interest is claimed on all amounts under this paragraph at the rate provided for in section 6 of the Swedish Interest Act, calculated from the date of the award.

Respondent's position in regard to the claims

57. Respondent submits that all Claimant's claims – unless dismissed - should be denied.

58. As regards interest, it is Respondent's position that the pre-award interest rate is capped at 5 per cent per annum or – in the event that the Ontario Court of Justice Act applies – should be awarded at 0.5 per cent per annum. At common law no interest should accrue unless provided for by agreement. In the event that the Tribunal would in its discretion award interest it should not exceed the time value of money. Interest in Respondent's submission could run only from 1 April 2010, the date of Respondent's receipt of the Statement of Claim.

59. Respondent requests that the Tribunal order Claimant to pay all of the Respondent's costs of the arbitration, including all compensation to the Tribunal, to the SCC Institute, the attorney's fees and other costs and expenses incurred by the Respondent in connection with or otherwise related to this arbitration, including interest thereon from the date of the arbitral award until payment in full has been made.

Claimant's grounds for the claims

60. Claimant bases its claim for 729 450 USD plus interest on Sections 7 and 8 of the Licence Requisition, pursuant to which such licence fee as a firm price was to be paid in three equal installments on 15 September 2008, 15 February 2009 and 15 May 2009 ; it is implicit in Claimant's case that it believes to have been deprived of such payments through Respondent's unjustified repudiation.

61. Claimant bases its claim for USD 152 400 on Sections 5 and 6 of the Support Services Requisition pursuant to which such amount was to be paid on 6 October 2008 for 365 calendar days of support services; it is implicit in Claimant's case that it believes to have been deprived of such payment through Respondent's unjustified repudiation.

62. Claimant bases its interest claim on a provision in the contract between Mincom Pty Ltd and Respondent (section 3.1 of Schedule B to GAC) according to which interest is to be calculated at a rate of 1.5 per cent per month on "any sum not paid by customer when due". Claimant maintains that this provision should be implied into all aspects of the Respondent's relationship with Mincom Pty Ltd and Claimant.

Respondent's grounds for denial of the claims

63. Respondent maintains that the claims are based not on GASS but on the Licence Requisition and the Support Services Requistion which in turn reference Schedules B and D, which contain a dispute resolution regime distinct from that of GASS. Consequently, if the Tribunal were to take jurisdiction based on GASS the claims would have to be denied.

64. Claimant is claiming the full contract price for the Licence Requisition and the Support Services Requisition. It has not even attempted to state or prove its profit margin or wasted expenses in relation thereto. There is accordingly no basis on which the Tribunal can quantify Claimant's claim for damages. It follows that if the Tribunal awards damages in the amount of the licence fee or the support fee without any deduction Claimant would effectively be receiving compensation equal to a 100 per cent profit margin.

65. The Respondent notes that it is quite obvious that the provision of support services requires manpower and facilities for which Claimant would have incurred costs which are not negligible and which costs Claimant has saved or should have saved.

66. As regards the licence fee, the software was to be provided in the language version which is not the claimant's standard version and certain software components were to be translated to Russian language as the project proceeded. In any case Claimant according to Mr Nadein later provided a corresponding version of the software to another client in Russia and was thus covered for any costs connected to the licensing to the Respondent.

67. Furthermore, as regards the claim for the support fee:

(i) The advance payment was a payment on account of services to be performed. These necessarily presupposed a delivery of software which never occurred.
(ii) Respondent has had no obligation to pay in the absence of appropriate invoice.
(iii) In the alternative, the claim is excessive.

68. As regards the claim for the licence fee:

(i) This presupposed delivery of the software, which never occurred.
(ii) Respondent has had no obligation to pay in the absence of appropriate invoices.
(iii) In the alternative, the claim is excessive.

THE PARTIES' DEVELOPMENT OF THEIR RESPECTIVE CASES

Claimant

69. Respondent and its Russian owners form a major player in the copper industry globally.

70. Claimant and Mincom Pty Ltd are IT companies with high standing. The Mincom Ellipse around which the parties' relationship revolves is sophisticated software aimed at and adapted to the needs of the raw materials industry.

71. In 2008 Respondent contracted Claimant to licence that software and to provide support services for its use.

72. Shortly after delivery of the software to Respondent, a project team was sent to Respondent's premises for the purpose of configuring the software on Respondent's system and assisting with the implementation of it. The team spent several weeks at Respondent's premises starting on 6 October 2008. It provided a considerable amount of consulting services, including training of Respondent's staff, during October and the first half of November 2008.

73. During this training phase Respondent suddenly explained that it wished to back out of its deal with Claimant. At first that was not made as an outright repudiation. On 12 November 2009, however, Mr Zhegalin told the project team to leave Respondent's premises immediately and informed them that they were no longer welcome there.

74. By its letter of 23 October 2008 (Respondent's Exhibit 1), to the effect that all works were to be stopped or in any event by sending away Claimant's project team on 12 November 2008, Respondent de facto terminated the parties' relationship, albeit wrongfully.

75. The purported reason was first described in more vague terms referring to the world financial situation. Only later did Respondent advance the theory that fluctuation in copper prices constituted *force majeure*. The alleged decline in the raw materials market does not, even if it would be shown to have caused shortage of funds with Respondent, amount to *force majeure*. In any event Claimant denies that Respondent has been entirely unable to pay. Respondent seems to meet its obligations in other respects.

76. Claimant has been unable to mitigate the damage caused to it by Respondent's unjustified termination. The project cycle for the relevant type of undertaking is 18 months. There was a general slowdown in the industry and therefore it was even more difficult to find alternative projects at short notice. Much work had been invested in the project which in fact started prior to the issuing of the contractual documentation.

77. Interest on damages awarded should be computed at 1.5 per cent per month since that is the contractually stipulated rate which should be implied into all relations between the parties. In Kazakhstan that rate is quite normal. There is no reason to apply a 5 per cent ceiling to an undertaking in an international contract to be performed far away from Ontario.

Respondent

78. In the first half of 2008 Claimant's and Mincom Pty Ltd's local sales representatives in Russia, Messrs Godunov and Nadein, approached Respondent's owner ZAO "Russkaya Mednaya Komapniya" (RMK) to offer the Mincom Ellipse software system and connected services. Subsequently contracts were made with Respondent instead.

79. In connection with the execution of the contracts Respondent pro forma acknowledged delivery of the software but this never took place. Consequently Claimant has never been in a position to perform the support services. No invoices have been issued, at least not until January 2009.

80. Proper delivery of the software never took place. Under Kazakh law it would not have been sufficient to download the software over the Internet.

81. During the autumn of 2008 the RMK group was severely affected by the world financial crisis and the rapid deterioration of the raw materials market. It was therefore decided at the group level to cut down on all contemplated investment projects within the group. As a result, on 23 October 2008, letters were sent from Respondent and from RMK requesting the termination of the agreements. The request was denied by Claimant and no solution was found in subsequent discussions.

82. GASS establishes a special contracting mechanism in connection with the customer's orders. As follows from sections 3.1 and 3.2 the execution of the Licencing Requisition and the Support Services Requisition lead to the formation of a separate agreement incorporating the terms of the Requisitions and the Schedules B and D. Thus a fundamental function of GASS is to provide for a contracting mechanism which leads to the formation of separate agreements through the execution of individual requisitions. It follows that the Claimant's assertion that the Requisitions incorporate the terms of and constitute integral part of GASS is erroneous.

83. The fact that amounts were to be paid in advance – when invoiced – does not mean that such amounts should in effect be treated as non-refundable, as that would require an express provision. Claimant should be placed in the position that it would have been in had the contract been performed, in other words its profits plus any wasted expenditure. This should be assessed for the whole contract.

REASONS FOR THE AWARD

Respondent's possibilities to present its case

84. Respondent has since the appointment of its Swedish counsel in April 2010 repeatedly complained that the proceedings have not been organized so as to afford Respondent adequate opportunity to prepare and present its case.

85. The Tribunal must point out in this context that the issue is not whether Respondent's counsel has been under more or less severe time pressure but whether Respondent itself has been given adequate time. In such regard it is initially to be noted that the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("Rules") provide for an Award to be rendered within 6 months from referral of the case to the Arbitral Tribunal. A party who has contracted to arbitrate under the Rules – an issue to which the Tribunal will revert hereafter – must, accordingly, principally be prepared to conduct the arbitration correspondingly. In addition, while referral occurred on 23 January 2010, Respondent first corresponded in the matter already by its Answer dated 19 October 2009. This means that Respondent was aware of the arbitration more than three months before the referral to the Tribunal.

86. Furthermore, in said Answer Respondent stated that it needed further time until 4 November 2009 since it had not had time to *"retain a counsel and appoint an arbitrator"*. Respondent has not even sought to explain why although aware of the need to retain counsel it took Respondent more than 5 months to do so. Whatever the reason, this delay and the resulting time pressure on counsel has obviously been of Respondent's own doing. A party cannot be permitted to obstruct or prolong the arbitral process by simply deferring appointment of counsel; to permit that would compromise the efficiency of the arbitral process.

87. Respondent has also suggested that it was only at a very late stage aware whether the hearing would deal with the whole case or whether there would be a bifurcation of proceedings. The Tribunal disagrees. Procedural Order No 1 set out a schedule until the final hearing, already then scheduled to take place 6-7 July 2010 (although leaving open the possibility that there could be a change in schedule to include bifurcation). Procedural Order 2 clearly stated: *"There will be no bifurcation of proceedings and all issues will be dealt with at the hearing commencing on 6 July 2010 as previously advised"*. Procedural Order 3 stated: *"The Tribunal sees no reason to revisit the issue of bifurcation and the parties should accordingly assume that the hearing will take place as ordered and deal with all issues in the case"*. Finally, following correspondence on the issue whether the claims pending should be dealt with as one arbitration case or as two arbitration cases, Procedural Order 4 stated: *"The two cases will be heard together, commencing on 6 July 2010 at 0930 in the Chairperson's office"*. It should be clear from this sequence of orders that the Respondent has from the beginning been ordered to proceed with a view to having all issues resolved at one hearing commencing on 6 July 2010 and that Respondent's possible hopes of having the substance of the matter postponed until a later date have not been the result of any ambiguity on the part of the Tribunal as regards the conduct of the proceedings.

88. As for Respondent's objection to Claimant's reliance on damages as a legal basis for its claims, advanced only in the course of the final hearing, the Tribunal notes that Respondent had the opportunity to reflect on this legal argument and file a written submission thereon after the hearing. Further, the issue of mitigation of damages was addressed already in Respondent's Statement of Defence where it was stated: *"The knowledge of any steps taken in mitigation is entirely within Mincom's knowledge, and not the Respondent's, and as Mincom has not provided any evidence of any steps taken in mitigation, it must be presumed either that they could have, but did not, mitigate their losses, or that they did reduce or eliminate their losses through mitigation"*. Respondent has thus addressed the mitigation issue and chosen to deal with it on the basis of Claimant's burden of proof.

89. In summary, the Respondent has had sufficient opportunity to prepare and present its case and, in the Tribunal's opinion, its allegations to the contrary have no foundation.

Objections to the Tribunal's jurisdiction etc

The issue of allegedly improper joinder

90. As follows from Procedural Order No 4 the Tribunal accepts that Respondent is correct in its allegation that joinder of cases is not possible against Respondent's objection. The question then is whether the fact that Claimant and Mincom Pty filed a single Request for Arbitration containing claims by each of them and the Tribunal was constituted on the basis of this Request and Respondent's Answer is an obstacle to the Tribunal's jurisdiction or competence.

91. The Institute did not enquire with Claimant and Mincom Pty whether there were in fact two arbitration cases commenced by the Request for Arbitration or invite Respondent to comment on whether all claims contained in the Request could be dealt with in the framework of a single arbitration, as the Request seemed to imply. The Institute simply sent the Request to Respondent soliciting an Answer thereto.

92. The relevant question in the opinion of the Tribunal is whether this caused any prejudice to Respondent. In such regard the Tribunal notes that the Request for Arbitration made it clear to Respondent that claims were advanced not only by Claimant but also by Mincom Pty Ltd and that the claims were advanced under different, if related contracts. Respondent suggests that the Request for Arbitration was misleading in this respect, in particular since it did not append the relevant contracts or even the arbitration clauses. But while the Request could possibly have been misunderstood by the Institute, it cannot have misled Respondent itself, which of course had full knowledge of the contractual arrangements it had entered into.

93. This means that Respondent appointed Professor Komarov as arbitrator well knowing that the claims to be tried comprised claims by both Claimant and

Mincom Pty Ltd, under different contracts, and that the arbitrator appointed by the Request for Arbitration, Mr Rowley, had been appointed to try all of them. Had Respondent intended that the mandate of its own appointee should be more limited, it was incumbent upon Respondent to say so.

94. Thereafter the Institute appointed Mr Nilsson as Chairperson based on the Request for Arbitration and the Answer, so that there is in place one Tribunal entrusted by all parties and by the Institute with the adjudication of all claims in the Request and such amended or further claims as may be advanced by any party in accordance with the Rules.

95. The Arbitral Tribunal appointed thus has jurisdiction and this is not changed by the fact that administratively the Tribunal, once Respondent objected to the claims being joined, has decided that the claims should formally be treated as two separate arbitration cases, to be heard together.

The issue of whether the arbitration clause(s) are valid and operative

96. Respondent's argument in this respect is that the reference in 7.1 of GASS and in 11.7 of Schedule B and 9.7 of Schedule D to the courts of Ontario, Canada, means that the arbitration clauses are "pathological" and hence invalid or inoperative. Respondent emphasizes that Claimant was responsible for drafting the language of the documentation so that any ambiguities should be interpreted to Claimant's disadvantage.

97. The Tribunal is well aware that equivocation may render dispute resolution clauses inoperative because of difficulty in ascertaining the parties' intentions and that equivocation has accordingly been named "the cardinal sin" by the authors who possibly first coined the pathology term (Craig, Park, Paulsson). In the present case, however, there can be no doubt that the parties intended any disputes between them to be settled by arbitration, in Stockholm under the Rules. The extensive and elaborate language to this effect in 7.2 and 7.3 of GASS (and the corresponding language of 11.8 and 11.9 of Schedule B and 9.8 and 9.9 of Schedule D) is evidence enough. This was further corroborated by the testimony of Mr Godunov, who explained that Respondent had originally wanted disputes to be resolved by arbitration in Kazakhstan under Kazakh law while Claimant favoured UK law, but that the parties after negotiation agreed on arbitration in Stockholm under Canadian law. The minutes of meeting of 23 July 2009 signed by Mr Zhegalin (Claimant's Exhibit 12), where in English translation he is quoted as saying *"if Mincom is not ready to accept the new AMK's proposals, it may refer to arbitration"* point in the same direction. The Tribunal certainly does not accept Respondent's suggestion that "arbitration" is an incorrect translation of the Russian original's "arbitrazh" which, it says, refers to court proceedings. That would not be a credible suggestion even if the events had been connected only to Russia and is even less so in regard to Ontario where no "arbitrazh" courts exist.

98. What – if anything – the parties may have intended by the reference to the courts of Ontario is unclear, although one possibility which gives a workable meaning to both is that the different dispute resolution routes provided in 7.1 and 7.2/7.3 are alternatives. What seems wholly clear to the Tribunal is that in any event they cannot have intended to infringe upon the regulation contained in the provisions headed Dispute Resolution and Arbitration (7.2 and 7.3 of GASS and 11.8 and 11.9 of Schedule B and 9.8 and 9.9 of Schedule D). The reference by Mr Yorsh in his letter of 26 June 2009 (Claimant's Exhibit 3) to "court procedure" does not change this conclusion. Mr Yorsh had no previous involvement in the matter when requested by Claimant to assist in negotiations with Respondent and Mr Yorsh's explanation during his testimony to the effect that he regarded the reference as boilerplate language in a demand letter is plausible.

99. Respondent's reference to the *contra proferentem* rule is not well founded as it is not inherently to the advantage of one party or the other how dispute resolution clauses are understood or not understood, since at the time of contracting it is not known who might be the claimant in a future dispute.

100. This objection by Respondent is thus in the Tribunal's view without merit.

The issue whether the requirements of negotiation preceding arbitration have been complied with

101. The Tribunal does not share Claimant's view that 7.2 of GASS (and of 11.8 of Schedule B and 9.8 of Schedule D) create no pre-condition at all to the initiation of arbitration. The requirement that the parties must negotiate in good faith for a period of 30 days before initiation of any arbitration is in the Tribunal's view valid.

102. Contrary to Respondent's allegations there is, however, no requirement that such negotiations be initiated by some formal "pre-arbitration notice". The fact that Mr Yorsh's letter of 2 September 2009 (Claimant's exhibit 4) bears such heading reflects, in the Tribunal's understanding, an intention on his part to communicate a last warning to Respondent that arbitration was imminent, rather than any belief that this letter, written long after oral discussions had been conducted, should mark the initiation of negotiation.

103. For the pre-condition to be met it is sufficient that 30 days have elapsed since negotiations have in fact commenced with both sides being aware that there is a genuine disagreement between them capable of being resolved by arbitration. As argued by Claimant that must have been apparent at the latest upon Respondent's receipt of the letter of 26 June 2009. Furthermore, the Minutes of 8 July 2009 (Claimant's Exhibit 8) evidence that "/b/oth parties went into the meeting acknowledging the need for an amicable settlement..". Both parties were thus aware of the dispute that had arisen and that they were negotiating for an amicable settlement. The further record shows that the meeting on 23 July 2010 left the parties still unable to agree and that the letters exchanged in September,

Mr Yorsh's letter of 2 September 2009 (Claimant's exhibit 4) and Mr Zhegalin's letter of 15 September 2009 (Claimant's Exhibit 13) brought them no closer together. When the Request for Arbitration was filed on 23 September 2009 well over 30 days of negotiation had passed, to no avail.

104. The reference in the clause to "senior management" with "if possible" no previous involvement in the dispute is by the Tribunal not understood as making negotiations of no legal consequence unless conducted personally by individuals of such standing. In any event Respondent participated in negotiations without protest as to how Claimant was represented. In these circumstances Respondent cannot now claim that negotiations were not properly conducted in order to escape the arbitration which inevitably followed upon unsuccessful negotiations.

105. This objection therefore also fails.

The issue whether the claims advanced fall under the relevant arbitration agreement

106. Respondent correctly points out that even identically worded arbitration clauses in separate contracts between two parties do not necessarily mean that there is only one arbitration agreement or that a party could advance claims under one contract with reference to the arbitration clause in the other.

107. On the other hand, the mere fact that various aspects of two parties' relationship are enshrined in two or more documents, each with the status of a contract, does not of itself mean that these contracts should be viewed as constituting discrete and separate relationships or that substantially identical arbitration clauses should be viewed as giving rise to separate arbitration agreements.

108. The issue rather is whether the contractual documents are to be taken as part and parcel of the same whole, in which case there would in effect be only one arbitration agreement even if reflected in two or more formally separate clauses. This issue must be determined in the light of all circumstances, but of particular importance is whether the documents have been executed simultaneously, whether they contain cross-references to one another and whether they are otherwise interconnected.

109. In this case GASS, Schedule A, Schedule B and Schedule D are dated 15 August 2008 by Mr Bogotin, signing for Respondent, while Schedule C, Schedule E and the Requisitions have not been dated by him. All eight documents are dated 19 August 2008 by Ms Whidborne, signing for Claimant. Although not expressly admitted by Respondent it has not been seriously contested that all documents were issued simultaneously.

110. As emphasized by Claimant they are also cross-referenced. GASS itself contains in Sections 3.1and 3.2 the provision that the separate agreement to be formed

upon the execution of the Requisitions will be *"incorporating the terms of the Software License Requisition and License Agreement attached as Schedule B to this Agreement"* respectively *"incorporating the terms of the Support Services Requisition and Support Services Agreement attached as Schedule D to this Agreement"*. Schedule C provides in Section 1 that licence is granted *"on the terms and conditions of the General Agreement and the License Agreement which shall form an integral part hereof"*. Schedule E provides in Section 1 that Support Services are to be provided *"in accordance with the General Agreement and the Support Services Agreement (including Appendices A and B), which shall form an integral part hereof"*.

111. Finally, the interconnection between the contracts appears from the fact that Schedules A, B, C, D and E are precisely that – schedules to GASS – and that the Licence Requisition is in its preamble expressly stated to be made *"in the form of Schedule C for General Agreement for Software and Support Services..."* while the Support Services Requisition is similarly stated to be made *"in the form of Schedule E for General Agreement for Software and Support Services...."*.

112. The Tribunal concludes that the Requisitions, although stated in the preambles to form "separate" agreements are in reality only part of one overall contractual arrangement between the parties. In any event, the Requisitions expressly provide that the terms of GASS and Schedules B and D, respectively, shall form an integral part of each Requisition. Two or more separate and distinct arbitration clauses cannot possibly form an integral part of the same contract. That is possible only if the clauses are viewed as reflecting one and the same underlying agreement to arbitrate.

113. So it is the conclusion of the Tribunal that Sections (7.2 and) 7.3 of GASS and Sections (11.8 and) 11.9 of Schedule B and Sections (9.8 and) 9.9 of Schedule D reflect one and the same (dispute resolution and) arbitration agreement. It is thus immaterial whether arbitration was initiated with reference to one or the other of these clauses. The claims advanced in any event fall under the arbitration agreement.

114. The Tribunal accordingly has jurisdiction over the present dispute.

The dispute in substance; liability

115. Respondent maintains that if the Tribunal were to take jurisdiction based on Section 7.3 of GASS, then claims would have to be denied because they are based not on GASS but on the Licence Requisition and the Support Services Requisition. It follows from the Tribunal's reasoning as regards the nature of the arbitration agreement in the preceding section of this Award that this objection must fail.

116. Respondent has generally referred to the world financial crisis in 2008 and 2009 and the related deterioration of the macro economic situation in the raw materials market, but has explicitly stated that – contrary to the position taken by Mincom Pty Ltd on the basis of contractual language different from that applying

to Claimant's relationship with Respondent – it does not maintain that is has been excused from performance by *force majeure*. Nor has Respondent advanced any other basis on which it had a right to repudiate the relationship with Claimant.

117. It is thus the conclusion of the Tribunal that Respondent unlawfully terminated the parties' relationship, effective 12 November 2009, without valid cause and is therefore liable in damages.

The dispute in substance; quantum

118. There then remains to be considered the issue of *quantum*.

119. The parties devoted considerable interest to the question whether and to what extent Claimant had performed its obligations at the time when the relationship came to an end, i.e. on 12 November 2008, and in particular to the question whether the software had been delivered or not. This discussion was, however, largely made moot when Claimant amended the legal basis for its claim to qualify it as being entirely a claim for damages. But Respondent had already at an earlier stage argued that Claimant should have mitigated its losses and that line of argument by Respondent was thus unaffected by the amendment.

120. Respondent correctly points out that payments were not at the time of termination technically payable, as no invoices in accordance with Section 8 of the Licence Requisition or Section 6 of the Support Services Requisition had been issued and hence the provisions in section 10.3 of Schedule B and section 8.3 of Schedule D on "amount owed to Mincom before such termination" were not triggered although the due dates stated in the Requisitions had then passed.

121. The income of which Claimant has been deprived is the full contractual price. The amount of damages required to place Claimant in the same position as if no breach of contract had occurred is thus USD 729 450 plus USD 152 400, or a total of USD 881 850, less whatever savings or alternative income Claimant achieved or could have achieved by not having to perform under the Licence Requisition and the Support Services Requisition after termination.

122. Neither party has done much to explain what further costs Claimant would have incurred if having to fully perform under the respective Requisitions or how resources freed upon termination could have been used to generate alternative income. It was debated during the hearing to what extent the software to be licenced was actually downloaded or otherwise accessed by Respondent, but it seemed to the Tribunal to be clear that Claimant had prior to termination done essentially all that was necessary to perform under the Licence Requisiton. The performance of the licence itself, as opposed to the ancillary services, would thus in the Tribunal's understanding not have entailed further costs of any significance while the support services if utilized presumably would have; if not the annual fee

of USD 152 400 would seem grossly inflated. It would have been incumbent upon Claimant to explain its costs structure for the support services. As Claimant did not, the resulting uncertainty must to some extent be to its detriment.

123. It was Mr Nadein's testimony that the calculated profit margin on the project with Respondent was 50 per cent. The Tribunal assesses, conservatively, that the costs saved on the support services were 50 per cent of USD 152 400, i.e. USD 76 200 and that Claimant's total loss due to Respondents wrongful termination is USD 729 450 plus USD 76 200, i.e. USD 805 650.

Interest

124. As regards interest the Tribunal notes that prior to termination on 12 November 2008 no payment was due, as no invoice had been issued, and Respondent is consequently not entitled to any interest until thereafter; in fact Claimant does not purport to be entitled to interest before termination.

125. Upon termination the resulting damages claim fell due. There is nothing in evidence that indicates that interest should not run on the claim from the due date. Interest shall accordingly be awarded from 12 November 2008.

126. Regarding interest rate the Tribunal does not accept that the provision in 3.1 of Schedule B to GAC should be extended outside to Claimant's relationship with Respondent. There is thus no agreement between the parties to guide the Tribunal as to what is the proper rate for interest.

127. *Bank of America* (Respondent's Exhibit 34) makes it clear that the Supreme Court of Canada has found that at common law the courts have the power to order even compound interest when such corresponds to the time value of money of which a plaintiff has been deprived by the opponent's breach of contract. There is nothing in the evidence which would suggest that an arbitral tribunal should not have a corresponding power. In any event if Canadian courts order interest at common law that is a substantive law rule, while any possible distinction between courts and arbitrators would seem to be of a procedural nature and thus irrelevant to an international arbitration not as such governed by Canadian law.

128. Claimant's loss in this regard is equal to its bank borrowing – or possibly deposit – rate. Absent any evidence on the point the Tribunal must make a conservative assessment and therefore awards interest at a rate of 3 per cent per annum. Claimant has not demonstrated circumstance which in this case would justify an award of compound interest. Interest shall therefore be simple. There is no basis on which to distinguish pre-award and post-award interest and simple interest shall therefore run until payment.

129. Claimant has requested that interest accrued until the date of this Award be computed and specified herein. The Tribunal sees no reason not to accede to this request. Interest accrued from 1 April 2010 until today amounts to USD

44 847.85 (668/360 x 805 650 x 0.03) and should be awarded, as should interest from today until payment at a rate of 3 per cent per annum.

Costs

130. The Institute has determined the fees and costs of the arbitrators and the Institute at the amounts stated below. As between the parties these costs should be borne by Respondent as the losing party.

131. Respondent should further reimburse Claimant its fair costs of the arbitration. The Tribunal is satisfied that the amounts claimed for counsel are fair costs, having noted the involvement of counsel at the negotiation stage and in the arbitration and with regard to the fact that Respondent's counsel's fees are of the same magnitude. The internal costs claimed by Claimant were supported by an excel sheet outlining their computation. They correspond to a total of 484 hours spent by a number of individuals, of which presumably one half pertains to this arbitration and the other half to the arbitration brought by Mincom Pty Ltd. The Tribunal is not convinced that such massive work in-house in addition to that performed by counsel has been necessary for the proper conduct of the case. Of the claimed amount of internal costs of USD 33 815 the Tribunal accepts USD 10 000 as fair. Claimant should accordingly be awarded USD 44 457 and SEK 400 782.

AWARD

1. TOO Aktubinskaya Mednaya Companiya shall pay to Mincom Services Pty Ltd eighthundredfivethousandsixhundredandfifty United States Dollars (USD 805 650) plus interest thereon at a rate of three (3) per cent per annum from the date of this Award until payment.

2. TOO Aktubinskaya Mednaya Companiya shall further pay to Mincom Services Pty Ltd interest accrued on the amount as per 1. above until the date of this Award in the amount of fortyfourthousandeighthundredandfortyseven 85/100 United States Dollars (USD 44 847.85).

3. TOO Aktubinskaya Mednaya Companiya shall further pay to Mincom Services Pty Ltd fortyfourthousandfourhundredandfiftyseven United States Dollars (USD 44 457) plus fourhundredthousandsevenhundredandeightytwo Swedish Crowns (SEK 400 782) in reimbursement of costs on the arbitration plus interest on such amounts from the date of this Award until payment at a rate which by 8 percentage units exceeds the official Swedish reference rate as determined by the Bank of Sweden from time to time.

4. The costs of the arbitration are fixed as follows

   a) for Mr Nilsson EUR 18 936 as fee and EUR 1 000 for disbursements;

   b) for Mr Rowley EUR 11 362 as fee and EUR 750, CAD 3 519.74 and SEK 495 for disbursements;

c) for Professor Komarov EUR 11 362 as fee and EUR 500 and RUB 23 313.73 for disbursements

d) for the Institute as administrative fee EUR 9 603.

5. As between the parties TOO Aktubinskaya Mednaya Companiya shall be responsible for all costs as per 4. above and shall reimburse Mincom Pty Ltd for what Mincom Pty Ltd demonstrates has been taken out of the deposit made by Mincom Pty Ltd in reimbursement of such costs, plus interest on such amount from the date of this Award until payment at a rate which by 8 percentage units exceeds the official Swedish reference rate as determined by the Bank of Sweden from time to time.

If a party is dissatisfied with this Award insofar as it concerns the compensation to the arbitrators, the matter may be brought before the District Court of Stockholm by initiating action latest 3 months from receipt of this Award.

Bo G.H. Nilsson J. William Rowley Alexander S. Komarov

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Correction as of 15 October 2010 to the FINAL AWARD

given in Stockholm on 20 September 2010

in an arbitration (No. 102/2010) pursuant to the Rules of

The Arbitration Institute of
The Stockholm Chamber of Commerce

between

Mincom Services Pty Ltd
Claimant

and

TOO Aktubinskaya Mednaya Companiya (TOO Aktubinskaya Copper Company)
Respondent

before

J William Rowley QC, *Arbitrator*

Professor Alexander S Komarov, *Arbitrator*

Mr Bo G H Nilsson, *Chairperson*

Having received Claimant's notification that paragraph 124 of the Final Award in arbitration 102/2010 contained a clerical error and having given Respondent an opportunity to comment, the arbitrators on the date first above written resolved the make a correction to paragraph 124 as follows.

"124. As regards interest the Tribunal notes that prior to termination on 12 November 2008 no payment was due, as no invoice had been issued, and Claimant is consequently not entitled to any interest until thereafter; in fact Claimant does not purport to be entitled to interest before termination."

Bo G.H. Nilsson J. William Rowley Alexander S. Komarov