THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE
P.O. Box 16050, SE-103 21 Stockholm, Sweden, phone: +46-8-555 100 50, fax: +46-8-566 316 50

FINAL AWARD

given in Stockholm (seat of the arbitration) on 21 April 2010

in an arbitration (No. F 192/2009)
pursuant to the Rules for Expedited Arbitrations of
the Arbitration Institute of the Stockholm Chamber of Commerce

between

Rual Trade Limited
Claimant

and

1. Viva Trade LLC
Respondent No. 1
2. Ūkio Banko Investicinė Grupė
Respondent No. 2
3. Vladimir Romanov
Respondent No. 3
4. Roman Romanov
Respondent No. 4

before

Prof. Dr. Siegfried H. Elsing, LL.M., Sole Arbitrator

FINAL AWARD

Made on 21 April 2010
The seat of arbitration is Stockholm, Sweden
arbitration no. F 192/2009

Claimant:	Rual Trade Limited, 2 Floor, #333 Waterfront Drive, P.O. Box 3339, Road Town, Tortola, British Virgin Islands.
Claimant's Counsel:	Mr. Victor Dumler, Egorow, Puginsky, Afanasiev & Partners, Nevsky Pr. 22–24, suite 132, 191186, St. Petersburg, Russia.
Respondent No. 1:	VIVA Trade LLC, Yamray Bldg., 1st Floor, Market Square, Tortola, British Virgin Islands, represented by Mr. Eduard Mitelman, c/o Paul C. Klumb (registered agent), 6688 N. Shawmoors Dr., Chenequa, WI 53029, USA.
Respondent No. 2:	Ūkio Banko Investicinė Grupė UAB, K. Donelaičio g. 60, 44248 Kaunas, Lithuania.
Respondent No. 3:	Vladimir Romanov, Vaižganto g. 12, 44230 Kaunas, Lithuania.
Respondent No. 4:	Roman Romanov, Traku g. 5-11, 44236 Kaunas, Lithuania.
Respondents Nos. 2–4's Counsel:	Mr. Kęstutis Švirinas and Mr. Albertas Šekštelo, Nordia Baublys & Partners, Konstitucijos ave. 7, 27th Floor, 09308 Vilnius, Lithuania.
Arbitral Tribunal:	Prof. Dr. Siegfried H. Elsing, LL.M. (Sole Arbitrator), Orrick Hölters & Elsing, Immermannstr. 40, 40210 Düsseldorf, Germany.

Table of Abbreviations

Arbitral Tribunal	As defined in para. (8).
Arbitration Costs	As defined in para (103).
Counterclaim	As defined in para. (17).
New Arbitration	As defined in para. (24).
Party/Parties	The Claimant and/or the Respondents individually / jointly
PO No. 1	As defined in para. (9).
PO No. 2	As defined in para. (16).
PO No. 3	As defined in para. (18).
PO No. 4	As defined in para. (23).
PO No. 5	As defined in para. (25).
PO No. 6	As defined in para. (27).
Procedural Timetable	As defined in para. (9).
Request for Arbitration	As defined in para. (2).
Respondent No. 1's Statement of Defence	As defined in para. (12).
Respondent No. 1's Statement of Rejoinder	As defined in para. (22).
Respondents Nos. 2–4's Answer	As defined in para. (6).
Respondents Nos. 2–4's Statement of Defence	As defined in para. (13).
Respondents Nos. 2–4's Statements of Rejoinder	As defined in para. (20).
Rules	As defined in para. (30).
SA	As defined in para. (1).
SCC	As defined in para. (2).
SCC Award	As defined in para. (33).
Settlement Agreement	As defined in para. (1).
Statement of Claim	As defined in para. (11).
Statement of Reply	As defined in para. (19).
Wisconsin Action	As defined in para. (34).

Table of Contents

A. Introduction

(1) The dispute which forms the subject-matter of these arbitral proceedings essentially concerns an alleged payment obligation under Paragraph 2.1 of an agreement designated as *„Settlement Agreement and Mutual Release"* which the Parties executed in April 2009 (hereunder the "Settlement Agreement" or "SA"). The Parties argue, in particular, about whether or not this payment obligation also extends to Respondents Nos. 2–4.

B. Chronology of Proceedings

I. Request for Arbitration

(2) On 10 November 2009, the Claimant filed a *"Request for Expedited Arbitration"* against the Respondents (hereunder: "Request for Arbitration") with the Arbitration Institute of the Stockholm Chamber of Commerce (hereunder: "SCC") along with Exhibits Nos. C-1 and C-2.

(3) By letter dated 12 November 2009 the SCC served the Request for Arbitration on the Respondents[1] and requested them to submit to the SCC an Answer in accordance with Art. 5 of the Rules, by 26 November 2009 at the latest.

II. Respondents' Answers

(4) In a submission dated 26 November 2009 (which included the powers of attorney signed by Respondents Nos. 2–4 as Exhibits Rs1 to Rs3) Respondents 2–4 requested an extension of time to file the Answer until 28 December 2009, mainly because they had retained and instructed a counsel only a few days before. Also by letter dated 26 November 2009, Respondent No. 1 applied for an extension of the time-limit until 20 December 2009, *inter alia*, because Respondent No. 1 was served only a short time before and was thus not yet able to find a counsel.

(5) On 30 November 2009, the SCC reminded Respondent No. 1 to submit an Answer until 7 December 2009 at the latest. By email dated 7 December 2009, 17:30 o' clock, Respondent No. 1 made a submission which despite it being headed *"Request to grant an extension of time period for submission of the answer"* merely informed the SCC that since Respondent No. 1 was unable to retain a counsel it reserved its right to submit any position regarding the Claimant's request later in the arbitration proceedings.

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[1] According to the courier's delivery confirmation, the letter was served on Respondent No. 1 at the address of 6688 N. Shawmoors Drive, Chenequa, WI53029, USA, c/o Mr. Paul C. Klump, on 17 December 2009. Delivery to Respondent No. 1's alternative address at Yamray Buliding, 1st Floor, Market Square, Tortola BVI, British Virgin Islands failed.

(6) Respondents Nos. 2–4 filed their Answer on 7 December 2009 (hereunder: "Respondents Nos. 2–4's Answer") in which they, *inter alia*, suggested to the Claimant to agree on a different procedure as provided under Art. 13 of the Rules for the appointment of the arbitrator. Since the Claimant objected to this proposal on the same day, the SCC granted, in its letter dated 8 December 2009, ten days to jointly appoint an arbitrator, failing which, the arbitrator would be appointed by the SCC. On 18 December 2009, Respondents Nos. 2–4 rejected the proposals made by the Claimant on 10 December 2009.

(7) On 18 December 2009 the SCC Board decided that the advance on costs be fixed at 41,500.00 € of which the Claimant was to pay 19,750.00 € and the Respondents 20,750.00 € until 8 January 2010 at the latest.

III. Appointment of the Arbitral Tribunal and Procedural Order No. 1

(8) The SCC appointed Prof. Dr. Siegfried H. Elsing as sole arbitrator (hereunder the "Arbitral Tribunal") on 28 December 2009. By letter dated 14 January 2010 the SCC informed the Arbitral Tribunal that the advance on costs had been paid and referred the case to the Arbitral Tribunal with the instruction that the final award was to be rendered by 14 April 2010. The Arbitral Tribunal accepted the appointment to serve as an arbitrator and declared its independence on 15 January 2010.

(9) The Arbitral Tribunal issued its first Procedural Order on January 2010 (hereunder "PO No. 1") ordering , *inter alia*, that the arbitral proceedings be conducted expeditiously in accordance with the Rules and that the Parties were to make their various submissions pursuant to Art. 19 para. 3 of the Rules in accordance with the procedural timetable set out in Exhibit A to PO No. 1 (hereunder: "Procedural Timetable"). The Procedural Timetable provided:

Date	Submission Due
3 February 2010	Claimant's Statement of Claim according to Article 24 para. 1 SCC-Rules (with all relevant documents, legal authorities, witness statements and expert reports)
17 February 2010	Respondents' Statements of Defence Article 24 para. 2 SCC-Rules (with all relevant documents, legal authorities, witness statements and expert reports)
1 March 2010	Claimant's Statement of Reply (with all relevant documents, legal authorities, witness statements and expert reports)
12 March 2010	Respondents' Statements of Rejoinder (with all relevant documents, legal authorities, witness statements and expert reports)
	Hearing: optional (tbd)

(10) PO Nr. 1 also stipulated that all notifications and communications by the Arbitral Tribunal shall be sent to the address of the Parties' counsel or, where no counsel is appointed, to the address of the Party itself and that procedural orders and other notifications by the Arbitral Tribunal may be sent by facsimile or e-mail only (item 8). It also urged Respondent No. 1 to retain a legal counsel as soon as possible and pointed to the potential consequences under Art. 30 paras. 2 and 3 of the Rules (item 9). PO Nr. 1 was served on the Parties by courier.[2]

IV. Claimant's Statement of Claim and Respondents' Statements of Defence

(11) The Claimant submitted its statement of claim on 1 February 2010 (hereunder "Statement of Claim"), including Exhibits Nos. C-3 and C-4.

(12) Respondent No. 1 submitted its statement of reply on 17 February 2010 (hereunder "Respondent No. 1's Statement of Defence"), in which it confirmed that it made due payment of the first instalment in 2009 and *"admit[ted] its obligation to cover all outstanding amounts"*. Respondent No. 1 also invited the Claimant to renegotiate the schedule of instalments and *"reserved"* its right to ask the Arbitral Tribunal to amend Paragraphs 2.2 to 2.3 of the Settlement Agreement, should the Parties fail to agree on a schedule. Such request, however, was never made at any later stage of the present arbitration.

(13) Respondents Nos. 2–4 filed their statement of defence on 17 February 2010 (hereunder "Respondents Nos. 2–4's Statement of Defence") along with three witness statements of Ms. Rita Matūzienė, Mr. Vladimir Romanov and Mr. Roman Romanov (as Exhibits Rs4 to Rs6) denying the relief sought by the Claimant.[3] In their respective statement the witnesses assert, in essence,

> *"that [Respondents Nos. 2–4] did not sign the Settlement Agreement as a direct respondent, but rather as a party to the court proceedings, and that [the Claimant] is entitled to file a claim against [Respondents Nos. 2–4] only in the event of [Respondent No. 1's] bankruptcy".*

(14) Respondents Nos. 2–4 requested in their Statement of Defence, *inter alia*,

(i) to grant the Parties an additional time period of one month to settle the dispute amicably and amend accordingly the procedural timetable of PO No. 1 (*ibid.*, paras. 8, 16.1); and

(ii) to grant a time period of two weeks to file a counterclaim (*ibid.*, paras. 8, 16.2).

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[2] Again, according to the courier's receipt, delivery to Respondent No. 1's address at Yamray Buliding, 1st Floor, Market Square, Tortola BVI, British Virgin Islands failed, but was successful at the address of 6688 N. Shawmoors Drive, Chenequa, WI53029, USA, c/o Mr. Paul C. Klump.

[3] See paras. 9 *et seq.* of Respondents Nos. 2–4's Statement of Defence.

(15) The Claimant objected to Respondent No. 1's proposal to renegotiate and Respondents Nos. 2–4's requests for an extension of time in their letter dated 19 Februar 2010. In particular, the Claimant refused to engage in any further settlement negotiations and applied for the requests as stated in para. (14) *supra* to be denied.

(16) On 23 February 2010, Procedural Order No. 2 was issued (hereunder: "PO No. 2") dismissing both requests for time extension as stated in para. (14) *supra* for the reasons described in more detail in PO No. 2. It also ordered the Parties according to Art. 19 para. 4 of the Rules to finally state their claims for relief, the facts relied on as grounds thereof and the evidence on which the Parties rely.

(17) By email dated 24 February 2010 Respondents Nos. 2–4 submitted their letter of 23 February 2010 along with a counterclaim against the Claimant and Respondent No. 1 (hereunder the "Counterclaim") and applied for the admission of the Counterclaim. The preliminary relief sought by Respondents Nos. 2–4 as Counterclaimants in the Counterclaim was:

(i) to declare that Paragraph 2.1 of the Settlement Agreement is null and void (*ibid.*, para. 14.1);

(ii) to declare that Repondent No. 1 is responsible for the breach of the Settlement Agreement (*ibid.*, para. 14.2)

(iii) to dismiss Claimant's claim against the Counterclaimants in its entirety (*ibid.*, para. 14.3);

(iv) to award the arbitration costs incurred by the Counterclaimants (*ibid.*, para. 14.4).

(18) The Arbitral Tribunal disallowed Respondents Nos. 2–4's request to admit the Counterclaim in its Procedural Order No. 3 of 26 February 2010 (hereunder: "PO No. 3") for the reasons more specifically explained in PO No. 3, particularly because the Counterclaim had been filed after the applicable time-limit set forth in Exhibit A of PO No. 1 and because Respondents Nos. 2–4 had failed to adduce sufficient reasons to exuse such delay. The Arbitral Tribunal, however, clarified that, to the extent to which defenses and objections in the Counterclaim relate to the Claimant's claim as stated in the Statement of Claim, such submissions will be taken into consideration by the Arbitral Tribunal in evaluating Respondents Nos. 2–4's defense.

V. Claimant's Statement of Reply and Respondents' Statements of Rejoinder

(19) The Claimant's statement of reply and Exhibits Nos. C-5 to C-12 were submitted on 1 March 2010 (hereunder "Statement of Reply"). With regard to the Counterclaim the Claimant expressed that it did not object to the Counterclaim being admitted, but without prejudice to the Claimant's rights and remedies (*ibid*, para.2), and moved for the Counterclaim to be dismissed in its entirety (*ibid*, page 6).

(20) On 15 March 2010 Respondents Nos. 2–4 filed their statements of rejoinder (hereunder "Respondents Nos. 2–4's Statements of Rejoinder") together with Exhibits Nos. Rs7 and Rs8. Particularly pointing to the Claimant's note that it did not object to the admission of the Counterclaim, Respondents Nos. 2–4 requested, *inter alia*,

(i) to set in motion the Counterclaim (*ibid*, para. 22.1);

(ii) to grant a new timetable for the submissions regarding the Counterclaim (*ibid*, para. 22.2);

(iii) to determine the date, time and location of the hearing (on both Statement of Claim and Counterclaim) (*ibid*, para. 22.3); and

(iv) to summon the witnesses Ms. Rita Matūzienė, Mr. Roman Romanov and Mr. Vladimir Romanov (*ibid*, para. 22.4).

(21) By letter of 16 March 2010 the Claimant replied to Respondents Nos. 2–4's Statements of Rejoinder. Whereas it accepted considering Respondents Nos. 2–4's defenses and objections as stated in the Counterclaim to the extent to which they relate to the Claimant's claim (particularly the witness statements), it objected to a new timetable and further time extensions and to arrange for any oral hearing to take place. On the same day Respondents Nos. 2–4 commented on the Claimant's letter und upheld the requests stated in their Statement of Rejoinder.

(22) Respondent No. 1's statement of rejoinder dated 16 March 2010[4] (hereunder "Respondent No. 1's Statement of Rejoinder") with Respondent No. 1's only exhibit was received by the Arbitral Tribunal via e-mail on 17 March 2010, *i. e.*, five days after the respective time-limit as set forth in the Procedural Timetable (cf. para. (9) *supra*) had expired. In essence, Respondent No. 1 applied for its Statement of Rejoinder to be admitted, for a hearing to be held, for the Counterclaim to be admitted and for an amendment of the timetable to accommodate the necessary submissions on the Counterclaim.

(23) In its Procedural Order No. 4 of 22 March 2010 (hereunder: "PO No. 4") the Arbitral Tribunal granted Respondent No. 1's request to admit its Statement of Rejoinder, but denied Respondents Nos. 2–4's requests as stated in para. (20) above for the reasons more specifically explained in PO No. 4.

VI. Respondents Nos. 2–4's Request to Stay the Present Proceedings

(24) On 31 March 2010 Respondents Nos. 2–4, *inter alia*, informed the Arbitral Tribunal and the

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[4] Respondent No. 1's Statement of Rejoinder reads *"16 March 2009"*. For the purposes of this arbitration the Arbitral Tribunal assumes that this is a mere clerical mistake.

other Parties about the commencement of new arbitral proceedings against the Claimant and Respondent No. 1 as new Respondents (the "New Arbitration"), in which they intend to apply for, *inter alia*, a declaration that Paragraph 2.1 of the Settlement Agreement is null and void and that Respondent No. 1 is responsible for the breach of the Settlement Agreement (*ibid*, para. 11). They also object to a consolidation of the two arbitral proceedings (*ibid*, para. 8) and are of the opinion that the Arbitral Tribunal should not be authorized to consider any of the arguments mentioned in the Counterclaim because otherwise the present arbitral proceedings would deal with a difference not falling within the terms of the submission to arbitration (*ibid*, para. 10). Against this background Respondents Nos. 2–4 requested to stay the present arbitral proceedings until an award is rendered in the New Arbitration before another tribunal (*ibid*, para. 15.3).

(25) On 31 March 2010 the Arbitral Tribunal issued Procedural Order No. 5 (hereunder "PO No. 5") requesting the Parties in accordance with Art. 42 and 43 of the Rules to finally state the costs incurred by each of them until 9 April 2010 at the latest and giving the Claimant and Respondent No. 1 the opportunity to reply to Respondents Nos. 2–4's submission of 31 March 2010 within the same period of time.

(26) However, only the Claimant, on 6 April 2010, replied and objected to Respondents Nos. 2–4's request for a stay of the present arbitral proceedings and, on 8 April 2010, made a submission on costs (see paras. (95) *et seq.* below). Respondents Nos. 2–4 made their submission on costs on 9 April 2010 (see paras. (100) *et seq.* below). Respondent No. 1 did not reply to PO No. 5 at all.

(27) In Procedural Order No. 6 of 12 April 2010 (hereunder: "PO No. 6") the Arbitral Tribunal dismissed the request to stay the present proceedings on grounds which are elaborated in more detail in PO No. 6. The Arbitral Tribunal also declared the arbitral proceedings closed according to Art. 34 of the Rules.

C. Jurisdiction, Governing Law, Seat and Procedural Rules

(28) The Claimant relies on the arbitration clause set out in Paragraph 4 of the Settlement Agreement which reads as follows:

> ***"4.0 Arbitration and Governing Law***
>
> *4.1 Any dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce. The seat of the arbitration shall be Stockholm, Sweden. The language to be used in the arbitral proceedings shall be English. This Settlement Agreement shall be governed by the substantive law of the State of New York, without reference to choice of law rules."*

(29) The Respondents have not raised any objections in respect to this arbitration clause.[5] The composition of the Arbitral Tribunal and its jurisdiction for the claims asserted by the Claimant remained likewise uncontested.

(30) In accordance with Parapraph 4.1, Clause 1 of the Settlement Agreement, the present arbitration is to be conducted in accordance with the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce as of 1 January 2010 (hereunder: the "Rules"), it being presumed that the Parties in this arbitration clause agreed to apply the most recent rules in force. This presumption was already expressed in item 1 of Procedural Order No. 1 dated 20 January 2010 and remained uncontested by the Parties.

(31) Pursuant to Paragraph 4.1, Clauses 2 and 3 of the Settlement Agreement the place of arbitration is Stockholm, Sweden, and the language of the proceedings is English.

(32) Since the Parties have agreed in Paragraph 4.1, Clause 4 of the Settlement Agreement that such agreement

> *"shall be governed by the substantive law of the State of New York, without reference to choice of law rules"*

the Arbitral Tribunal applies the substantive laws of the State of New York, USA, to the merits of this dispute.

D. Undisputed Facts

(33) By a final award given in Stockholm on 10 February 2006 in an arbitration (No. 111/2004) between the Claimant and Respondent No. 1 pursuant to the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Award") Respondent No. 1 was ordered to pay a certain amount of money to the Claimant.

(34) On or about 25 June 2007, the Claimant (as "plaintiff") asserted claims against the Respondents (as "defendants") seeking to recover monies due on the confirmed SCC Award and as the alleged result of Defendants' alleged fraud and alleged breach of a loan agreement (the "Wisconsin Action"). The Respondents applied to dismiss the Wisconsin Action on multiple grounds, *inter alia*, for lack of personal jurisdiction as regards Respondents Nos. 2–4. Throughout the Wisconsin litigation Respondents Nos. 2–4 were representetd by John Fellas and Hagit Elul of the U.S. law firm Hughes Hubbard & Reed LLP as well as by Mark A.

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[5] In their Answer Respondents No. 2–4 "*reserved*" their right to raise any jurisdictional objections, particularly any objections concerning the existence, validity, or applicability of the arbitration clause later, but they have not availed themselves of such reservation in the course of these proceedings and have not raised any such objections.

Cameli and Sahar A. Huck of the U.S. law firm Reinhart Boerner Van Deuren s.c. as local counsel.[6]

(35) In April 2009 the Parties executed the Settlement Agreement. Throughout the negotiation, finalization and execution of the Settlement Agreement Respondents Nos. 2–4 were again represented by Hughes Hubbard & Reed (John Fellas).[7] According to the Settlement Agreement's recitals, the Parties wished, by concluding the Settlement Agreement, to resolve the dispute between themselves and any and all other claims in any way arising out of or relating to any of the facts alleged in the Wisconsin Action.

(36) Paragraph 2.1 of the Settlement Agreement provides as follows:

> *"Defendants are jointly and severally liable to pay, and agree to pay, or cause to be paid to the Plaintiff, the total sum of Three Million U.S. Dollars ($3,000,000.00), to be made in two installments of Five Hundred Thousand U.S. Dollars ($500,000.00) and two installments of One Million U.S. Dollars ($1,000,000.00) to Rual."*

(37) During the negotiations of the Settlement Agreement Respondents Nos. 2–4 suggested several amendments to the Settlement Agreement, but not to its Paragraph 2.1 which, thus, remained unchanged in the form in which it was finally executed.[8]

(38) According to Paragraphs 2.2 and 2.3 SA, the first installment (USD 500,000.00) was due on 1 April 2009, the second installment (USD 500,000.00) on 1 August 2009, the third installment (USD 1,000,000.00) on 15 October 2009 and the last installment (USD 1,000,000.00) on 15 October 2010. It is undisputed that only the first installment of USD 500,000.00 was paid.

(39) Failure by Defendants to make any of the installements listed in Parapraph 2.3 in strict conformity with the Settlement Agreement shall constitute, according to Paragraph 2.4 SA, a material breach of the Settlement Agreement, whereupon the total amount of the remaining balance owed under the Settlement Agreement will become due immediately.

(40) Paragraph 5 (Representation of Comprehension of Document), subparagraph 1 provides:

> *"This Agreement is the entire agreement between the parties and there are no other agreements, understandings, promises, warranties or representations of any kind made in connection with this settlement. This Agreement embodies the entire understanding of the parties and can be changed only by an instrument in writing and signed by the party, against whom enforcement of any waiver, change or modification is sought. In entering into this Agreement, the parties are relying only on the terms expressly set forth therein".*

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[6] Statement of Reply, para. 7, first bullet point and Exhibit C-6. This allegation remained undisputed.

[7] Statement of Reply, para. 7, 2nd and 3rd bullet point and Exhibits C-7 to C-9. This allegation unremained disputed.

[8] Statement of Reply, para. 7, third bullet point and Exhibit C-9. This allegation remained undisputed.

E. Position of the Parties

I. Claimant

(41) The Claimant submits that the Respondents are jointly and severally liable for the payment of USD 2,500,000.00 and interest accrued thereon as of 2 August 2009 under Paragraphs 2.1, 2.3, 2.4 and 2.5 of the Settlement Agreement.[9] Essentially, this view is based on the following considerations.

(42) In the Claimant's view the non-payment of this amount is already the fourth failure of Respondent No. 1 to honor its obligations which occurred for the first time when Respondent No. 1 breached a supply contract dated 19 November 2003 and a Memorandum of Unterstanding dated January 2004.[10] To the Claimant, the Respondents' course of actions, *i. e.*, Respondents Nos. 2–4's denial of their liability on the basis of a linguistical misunderstanding on the one hand and Respondent No. 1's full admission of liability on the other hand, is no more than a ruse to render only Respondent No. 1 liable which is, as the Claimant alleges, a mere shell company and the one Respondent that cannot pay.[11]

(43) Moreover, the Claimant is of the opinion that Respondents Nos. 2–4's argument relating to their language difficulties has no merit and refers to several authorities on New York law on this point.[12] Rather, Paragraph 2.1 SA is to be enforced according to its wording.[13]

II. Respondent No. 1

(44) Respondent No. 1 confirms its capability to pay the balances due under the Settlement Agreement[14] and contests that it is a mere shell company with no funds to pay.[15]

(45) Respondent No. 1 has further *"reserved"* its right to ask the Arbitral Tribunal to amend Paragraphs 2.2 and 2.3 of the Settlement Agreement.[16] However, despite the Arbitral Tribunal's order to finally state the reliefs sought in PO No. 2, para. 9, Respondent No. 1 never elaborated on this point any further, nor did they actually request the Arbitral Tribunal to amend

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[9] Request for Arbitration, paras. 5 *et seq.*; Statement of Claim, paras. 13 *et seq.*

[10] Statement of Claim paras. 9 *et seq.*

[11] Statement of Reply, para. 3.

[12] Statement of Reply, para. 6.

[13] Statement of Reply, paras. 8 *et seq.*

[14] Respondent No. 1's Statement of Defence, para. 4.

[15] Respondent No. 1's Statement of Rejoinder, para. 3.

[16] Respondent No. 1's Statement of Defence, para. 5.

the Settlement Agreement in any way. Hence, the Arbitral Tribunal is not called to decide upon an amendment of said provisions of the Settlement Agreement.

III. Respondents Nos. 2–4

(46) According to Respondents Nos. 2–4, they cannot be held jointly and severally liable under the Settlement Agreement.[17] In essence, this view is based on the following assertions:

- Respondents Nos. 2–4 signed the Settlement Agreement not as direct respondents, but rather as *"part[ies] of the court proceedings"*.[18] Therefore, the proper respondent for the breach of the Settlement Agreement is the Respondent No. 1.[19]

- Respondents Nos. 2–4, due to an insufficient knowledge of the English language[20], did not properly understand that they are jointly or severally liable under the Settlement Agreement, but rather that they would not be liable except in case of bankruptcy of Respondent No. 1.[21] It was also understood from the private meetings with the Claimant's authorities that the Settlement Agreement should cover the Claimant and Respondent No. 1 only.[22]

(47) Respondents Nos. 2–4 also expressed their opinion that Paragraph 2.1 of the Settlement Agreement is invalid. In their Counterclaim and in relation to the New Arbitration they have submitted that, due to Respondents Nos. 2–4 misconception of their own liability under Paragraph 2.1 as described in para. (46) above, this provision does not reflect Respondents Nos. 2–4's understanding of the agreement which they have signed.[23] On the basis that *"each agreement must correspond to true wills of parties, otherwise the provisions in question are invalid as breaching good faith and fair dealing"* [24] Respondents Nos. 2–4 thus consider Paragraph 2.1 of the Settlement Agreement null and void. However, they are of the opinion that the Arbitral Tribunal should not be authorized to address any of the arguments mentioned in the Counterclaim for otherwise the final award rendered in this arbitration would deal with a difference not falling within the terms of the submission to arbitration.[25]

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[17] Respondents Nos. 2–4's Statements of Rejoinder, para. 13.

[18] Respondents Nos. 2–4's Statements of Rejoinder, para. 15.

[19] Respondents Nos. 2–4's Statement of Defence, para. 15.

[20] Respondents Nos. 2–4's Statement of Defence, para. 13.

[21] Respondents Nos. 2–4's Statements of Rejoinder, para. 15; Respondents Nos. 2–4's Statement of Defence, para. 14.

[22] Respondents Nos. 2–4's Statements of Rejoinder, para. 16.

[23] Respondents Nos. 2–4's Counterclaim, para. 11; Respondents Nos. 2–4's Request for Arbitration, para. 8.

[24] Respondents Nos. 2–4's Counterclaim, para. 11.

[25] Respondents Nos. 2–4's Submission dated 31 March 2010, para. 10.

F. Relief Sought

I. Claimant

(48) The Claimant seeks an award against the Respondents ordering that the Respondents jointly and severally pay to the Claimant US$ 2,500,00.00 plus 5% interest on that amount accruing as from 2 August 2009, until payment in full is made to the Claimant.[26]

(49) The further request made by the Claimant to order the Respondents to pay as joint and several debtors to the Claimant post-award interest at a rate of 8 percentage point about the reference rate of the Central Bank of Sweden on all *"amounts awarded"*[27] is precluded according to Art. 19 para. 4 clause 2 of the Rules. See para. (98) below.

II. Respondent No. 1

(50) Respondent No. 1 admits its obligation to pay all outstanding amounts.[28]

III. Respondents Nos. 2–4

(51) Respondents Nos. 2–4 deny

(i) the relief sought by the Claimant[29] and

(ii) their direct liability for the alleged breach of the Settlement Agreement.[30]

G. Decision by the Arbitral Tribunal

I. Jurisdiction

(52) The dispute before the Arbitral Tribunal arises out of and in connection with the Settlement Agreement, in particular with regard to Art. 2.1 of the Settlement Agreement. Thus, the Arbitral Tribunal has jurisdiction under the arbitration clause contained in Paragraph 4 of the Settlement Agreement (see para. (28) *supra*). No jurisdictional objections were raised with respect to the Arbitral Tribunal's competence to decide upon the claims as asserted by the Claimant.

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[26] Cf. Statement of Claim dated 1 February 2010, para. 17; Statement of Reply dated 1 March 2010, p. 5.

[27] Claimant's submission on costs dated 8 April 2010, p. 4.

[28] Respondent No. 1's Statement of Defence dated 17 February 2010.

[29] Respondents Nos. 2–4's Statement of Defence, para. 9; Respondents Nos. 2–4's Statements of Rejoinder, para. 13; cf. also Rspondents Nos. 2–4's Answer dated 7 December 2009, paras. 9 and 16.1.

[30] Respondents Nos. 2–4's Statement of Defence, para. 10.

II. Decision on the Merits

(53) The claims asserted by the Claimant are fully justified. *Vis-à-vis* the Respondents Nos. 2–4, this finding is based upon the reasons stated below. In relation to Respondent No. 1 this finding also follows from the fact that Respondent No. 1 expressly admitted its obligation to cover all outstanding debts (see para. (50) *supra*).

1. Claim for Payment of USD 2,500,000.00

(54) The Respondents are liable as joint and several debtors to pay to the Claimant an amount of USD 2,500,000.00 pursuant to Paragraph 2.1 SA in connection with Paragraph 2.4 SA.

(55) It is undisputed that the second installment of USD 500,000.00 which was due by 1 August 2009 under Paragraph 2.3 SA was not paid in time. According to Paragraph 2.4 SA this failure resulted in the total amount of the remaining balance, *i. e.* USD 2,500,000.00, becoming due immediately.

(56) Pursuant to the wording of Paragraph 2.1 SA the Respondents, *i. e.*, Respondent No. 1 *and* Respondents Nos. 2–4, owe this sum as joint and several debtors. Since all Respondents failed to pay the second installment when due, they have all jointly and severally commited a material breach of the Settlement Agreement pursuant to Paragraph 2.4 SA.

(57) Respondents Nos. 2–4's objections concerning their liability as joint and several debtors under Paragraph 2.1 SA as described in para. (46) *et seq.* have no merit.

a) Exclusion of Extrinsic Evidence under the *Parol Evidence Rule*

(58) Respondents Nos. 2–4 are prevented under the *parol evidence rule* from relying on extrinsic evidence, such as the witness statements that they have adduced (para. (13)*supra*), to prove they attributed to Paragraph 2.1 SA a meaning different to its wording. Rather, Paragraph 2.1 SA is to be enforced according to its language.

aa) The Two Prongs of the *Parol Evidence Rule*

(59) The *parol evidence rule* is a very significant principle of contract interpretation under New York State law. It excludes admission of extrinsic evidence concerning the meaning and effect of contract provisions and written instruments.[31] Controlling New York authority[32] is the case

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[31] *Robert L. Haig*, 3 N.Y.Prac., Commerical Litigation in New York States Courts (2nd ed.), § 41:9.

W.W.W. Associates, Inc. v Giancontieri in which the New York Court of Appeals through Kaye, J. found:

> *"A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing [citation omitted]."*[33]

(60) The *parol evidence rule* has two prongs: The first excludes admission and consideration of extrinsic evidence concerning the meaning of provisions of a written agreement or instrument if the meaning is complete, clear, and unambiguous on the face of the writing within its four corners. The second prong of the rules excludes admission and consideration of extrinsic evidence to *create* an ambiguity in a writing which is otherwise clear, complete, and unambiguous on the face of the writing within its four corners.[34] Both dimensions of the *parol evidence rule* have also been confirmed in *W.W.W. Associates, Inc. v Giancontieri.*[35]

(61) The premise of the *parol evidence rule* is that when parties have expressed their mutual intention in a writing which is clear, complete (with or without a merger clause), and unambiguous, only that intention as written should be given operative effect. The policy reasons underlying this rule are powerful ones. It imports certainty and stability to commercial transactions that are based on clearly expressed written agreements between business people who are often sophisticated and well counseled. It thus avoids the unsettling and detrimental effect that would occur in business, commerce, and finance if otherwise clearly expressed written agreements were open to challenge based on oral testimony and other extrinsic evidence.[36] As was also confirmed in *W.W.W. Associates, Inc. v Giancontieri*, the rule imparts *"stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses ... infirmity of memory ... [and] the fear that the jury will improperly evaluate the extrinsic evidence"*[37].

(62) Hence, where a court finds that the provisions at issue have a *"definite and precise meaning"* irrespective of opposing interpretation, then *"there is no reasonable basis for a difference of opinion"* and

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[32] *Robert L. Haig*, 3 N.Y.Prac., Commerical Litigation in New York States Courts (2nd ed.), § 41:9.

[33] *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 442, 566 N.E.2d 639, 641 (1990); followed in *e. g. Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Company*, 1 N.Y.3d at 475, 775 NY.S.2d 767–768 (2004); *Reiss v. Financial Performance Corp.*, 97 N.Y.2d at 199, 764 N.E.2d at 966, 738 N.Y.S.2d at 661 (2001).

[34] *Robert L. Haig*, 3 N.Y.Prac., Commerical Litigation in New York States Courts (2nd ed.), § 41:9.

[35] Cf. *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d at 162 and 163, 565 N.Y.S.2d at 443, 566 N.E.2d at 642 (1990).

[36] *Robert L. Haig*, 3 N.Y.Prac., Commerical Litigation in New York States Courts (2nd ed.), § 41:10 with further references; cf. *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d at 162, 566 N.E.2d at 976–977, 495 N.Y.S.2d at 311–312 (1990).

[37] *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d at 162, 565 N.Y.S.2d at 442, 566 N.E.2d at 641 (1990).

extrinsic evidence will be barred as a matter of law.[38] In such circumstances, there is no room for the court to search for the real but *"unstated"* intent of the parties by resorting to extrinsic evidence, or *"by ignoring the plain language of the contract"* to permit any attempt to rewrite the *"bargain that was struck"*.[39]

bb) Applicability of the *Parol Evidence Rule*

(63) The *parol evidence rule* applies in the case at hand, for it is a rule of substantive law, not merely a rule of evidence,[40] and the Settlement Agreement is subject to the substantive laws of the State of New York, according to Paraphraph 4.1 Clause 4 SA.

(64) Admittedly, it has been held that the rule is binding only upon state courts and *may* be disregarded in arbitration proceedings, so that an arbitrator may consider parol evidence even where the agreement is unambiguous. The underlying authority of *Lentine v. Fundaro*, however, must be distinguished from the case at hand. *Lentine v. Fundaro* concerned arbitral proceedings in which the arbitrators were not bound by principles of substantive law or rules of evidence because the arbitration agreement did not contain any provisions to the contrary.[41] In contrast to this situation, Paragraph 4.1 Clause 4 SA explicitely stipulates that the SA shall be governed by the substantive law of the State of New York. The Arbitral Tribunal holds that the Parties have thereby agreed that the substantive law of the State of New York be applied by the Arbitral Tribunal, leaving no discretion as to the application of the *parol evidence rule*.

cc) Paragraph 2.1 of the Settlement Agreement is clear, complete and unambiguous

(65) The Arbitral Tribunal finds that Paragraph 2.1 of the Settlement Agreement is clear, complete and unambiguous within the meaning of the *parol evidence rule* in stipulating that *all* Respondents are liable as joint and several debtors.

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[38] Cf. *Greenfield v. Phillies Records, Inc.*, 98 N.Y.2d 562, 570, 780 N.E.2d 166, 171, 750 N.Y.S.2d 565, 570 (2002); *Breed v. Insurance Co. of North America*, 46 N.Y.2d 351, 355, 413 N.Y.S.2d 352, 355, 385 N.E.2d 1280, 1282, 4 A.L.R.4th 1246 (1978); *Rentways Inc. v. O'Neill Milk & Cream Co.*, 308 N.Y. at 347, 349, 126 N.E.2d at 273–274.

[39] Cf. *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d at 162–163, 566 N.E.2d at 642–643, 565 N.Y.S.2d at 442–443 (1990); *Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Company*, 1 N.Y.3d at 475, 775 N.Y.S.2d at 767 (holding that *"courts may not … make a new contract under the guise of interpreting"* the writing, quoting *Reiss v. Financial Performance Corp.*, 97 N.Y.2d at 199); *Greenfield v. Phillies Records, Inc.*, 98 N.Y.2d at 570, 780 N.E.2d at 570, 780 N.E.2d at 170, 750 N.Y.S.2d at 570 (holding that *"a court is not free to alter the contract to reflect its personal notions of fairness and equity"*). See *Robert L. Haig*, 3 N.Y.Prac., Commerical Litigation in New York States Courts (2nd ed.), § 41:10 for further reference.

[40] *Robert L. Haig*, 3 N.Y.Prac., Commerical Litigation in New York States Courts (2nd ed.), § 41:9; *Bersani v. General Acc Fire & Life Assur. Corp.*, Ltd., 36 N.Y.2d at 460, 330 N.E.2d at 70, 369 N.Y.S.2d at 111; *Yoo v. Piano Post Inc.*, 6 Misc. 3d 59, 791 N.Y.S.2d 271 (App. Term 2004).

[41] *Lentine v Fundaro*, 29 N.Y.2d at 382 and 385, 278 N.E.2d at 633 and 635 (1972); followed in *Aeneas Mc Donald Police Benevolent Assn. Inc. v. City of Geneva*, 92 N.Y.2d at 332.

(66) The provision of a written instrument is ambiguous when on the face of the writing and within its four corners – without resort to extrinsic evidence – it is "*reasonably susceptible to more than one interpretation*"[42]. Whether or not a writing is ambiguous in that sense is a question of law which is to be determined by the Arbitral Tribunal.[43] Ambiguity does *"not arise from silence, but from what was written so blindly and imperfectly that its meaning is doubtful"*[44].

(67) Yet Paragraph 2.1 of the Settlement Agreement is not reasonably susceptible to more than one interpretation. That follows from the following considerations.

(1) Language of Paragraph 2.1 of the Settlement Agreement

(68) The language of Paragraph 2.1 of the Settlement Agreement is plain, outright and clear in providing that *"Defendants"* – which is defined in the very first paragraph of the Settlement Agreement as including Respondent No. 1 and Respondents Nos. 2–4 – *"are jointly and severally liable to pay [...] the total sum of Three Million U.S. Dollars [...]"*. The insertion *"and agree to pay or cause to be paid"* emphasizes this obligation on the part of the Respondents by stating the obvious, namely that the Respondents are liable to either pay themselves or to cause somebody else to pay.

(69) Moreover, the phrase *"jointly and severally liable"* is a standard English legal term which is internationally acknowledged and commonly used to depict a form of joint liability where each of the several debtors is liable for the entire obligation, but the creditor may only claim it once.

(70) The Arbitral Tribunal can thus find no ambiguity in the words used in Paragraph 2.1 of the Settlement Agreement that would render it susceptible to more than one interpretation. In particular, there is no room for Respondents Nos. 2–4's alleged understanding that their liability would be subordinate to Respondent No. 1's liability in the sense that they could only be held liable should Respondent No. 1 fall into bankruptcy.

(2) Reading the Settlement Agreement in its Entirety

(71) This finding is corroborated when the entire Settlement Agreement is taken into considera-

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[42] For instance: *Chimart Assocs. v. Paul*, 66 N.Y.2d at 573, 498 N.Y.S.2d at 344 and 345, 489 N.E.2d at 231 and 233 (1986); see *Robert L. Haig*, 3 N.Y.Prac., Commerical Litigation in New York States Courts (2nd ed.), § 41:14 for further references.

[43] Cf. *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d at 162, 566 N.E.2d at 642, 565 N.Y.S.2d at 443; *Robert L. Haig*, 3 N.Y.Prac., Commerical Litigation in New York States Courts (2nd ed.), § 41:10 with futher references.

[44] *Nissho Iwai Europe PLC v. Korea First Bank*, 99 N.Y.2d at 121–122, 782 N.E.2d at 60, 752 N.Y.S.2d at 264 (2002) with further authorities.

tion. In determining the threshold legal question as to whether there is any ambiguity in the provision at issue, the inquiry must not be limited to the text of that provision, but the contract must be examined *"as a whole to determine its purpose and intent"* [45]. Therefore, all of the provisions within its four corners must be considered, reading the contract as a whole and interpreting every part with reference to the whole.[46]

(72) Here, even when the Settlement Agreement is read as a whole, no ambiguity arises as to Respondents Nos. 2–4' liability. On the contrary, there is explicit language in the Settlement Agreement that clearly supports the finding that the Respondents are joint and several debtors. In particular:

(73) Firstly, Paragraph 2.4 of the Settlement Agreement provides that *"failure by Defendants to make any of the installments shall constitute a material breach of the Agreement"* and that *"the Defendants' breach shall constitute an arbitrable dispute"* (emphasis added). According to this wording, the payment obligation is uniformly directed at all Respondents (as *"Defendants"*), and non-fulfillment of that obligation shall amount to a breach of contract by all Respondents at the same time. In particular, the provision makes no distinction between Respondent No. 1 on the one hand and Respondents Nos. 2–4 on the other hand. Rather, the Respondents' liability is treated as being one and the same.

(74) The same follows from the language of Paragraph 2.6 SA (*"Defendants' payment of each installment"*, *"provided by Defendants' bank"*), Paragraph 2.2 SA (*"Defendants shall make the first installment"*) and Paragraph 2.3 SA (*"Thereafter, the Defendants shall make the second [...] installment"*), all of which are evidently formulated on the assumption that all four Respondents owe the performance of the payment obligation.

(75) Secondly, the purpose of the Settlement Agreement is, according to its recitals, to resolve the dispute between the Parties arising out of or relating to any of the facts alleged in the Wisconsin Action which was filed by the Claimant against all four Respondents. Furthermore, by payment of the first installment, the Claimant irrevocably and unconditionally released and discharged any and all claims etc. against all four Respondents (Paragraph 3.3 SA) whereas all four Respondents irrevocably and unconditionally released and discharged any and all claims etc. against the Claimant (Paragraphs 3.4, 3.5, 3.6 and 3.7 SA). It is hence to be assumend that the payment to be made under Paragraph 2.1 SA on the one hand and the various releases on the other hand constitute *mutual* obligations in the sense that the Respondents were released by the Claimant *in return* for the payment to be made under Paragraph 2.1 SA to the Claimant.

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[45] *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d at 162, 566 N.E.2d at 642, 565 N.Y.S.2d at 443 (1990) with further references.

[46] *Robert L. Haig*, 3 N.Y.Prac., Commerical Litigation in New York States Courts (2nd ed.), § 41:10.

This relationship argues for the assumption that the Respondents are joint and several debtors because the releases declared by the Claimant extend to all of them.

(76) Thirdly, Paragraph 5.1 SA must be taken into account. This provision contains a so-called general merger clause. Such provisions state that the agreement is the entire agreement of the parties. As a result of such explicit representations, the contract by its own terms is a complete and integrated agreement which under New York State law bars any claim of *incompleteness* and the use of parol evidence to interpret it.[47] Therefore, if one construes Respondents Nos. 2–4's submissions as suggesting that the Settlement Agreement is *incomplete* (not merely ambigious), such allegation and the evidence adduced to prove it would just as well be excluded under the *parol evidence rule.*

(77) In view of the language and the provisions of the entire Settlement Agreement Respondents Nos. 2–4's argument as to the capacity in which they signed the Settlement Agreement (*i. e.*, merely as parties to the court proceedings and not as *"direct respondents"*) is also unavailing. The Settlement Agreement explicitly treats Respondents Nos. 2–4 as parties to this agreement and makes no distinctions between Respondent No. 1 on the one hand and Respondents Nos. 2–4 on the other hand. In fact, all the Respondents have assumed essentially identical duties and obligations (payment; release of the Claimant) and they all benefit in essentially the same way from the releases declared by the Claimant. Besides, the Wisconsin Action was in fact also brought against Respondents Nos. 2–4 as *"direct"* defendents.[48]

(3) Negotiation Between Counseled Business People

(78) Finally, it is acknowledged in New York case law that in circumstances *"where the contract was negotiated between sophisticated, counseled business people negotiating at arms length"*, courts should be reluctant to imply any additional terms, or interpret an agreement in a way, which the parties have neglected to specifically include since courts may not *"make a new contract under the guise of interpreting the writing"*[49].

(79) Against this background, regard must be paid here to the fact that Respondents Nos. 2–4 are persons who are evidently versed and experienced in business transactions, Respondent No. 2

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[47] *Robert L. Haig*, 3 N.Y.Prac., Commerical Litigation in New York States Courts (2nd ed.), § 41:15.

[48] Cf. the Recitals of the Settlement Agreement.

[49] *Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Company*, 1 N.Y.3d at 475, 775 NY.S.2d 767–768 (2004) (refusing to imply notice provisions) with further references; *Reiss v. Financial Performance Corp.*, 97 N.Y.2d at 199, 764 N.E.2d at 966, 738 N.Y.S.2d at 661 (2001) (refusing to imply a provision with respect to a reverse stock split). See also *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d at 162, 566 N.E.2d at 642, 565 N.Y.S.2d at 443 (1990); *George Backer Management Corp. v. Acme Quilting Co.*, 46 N.Y.2d at 217, 385 N.E.2d at 1065, 413 N.E.2d at 138 (1978); *Robert L. Haig*, 3 N.Y.Prac., Commerical Litigation in New York States Courts (2nd ed.), § 41:10.

being a Lithuanian investment enterprise[50], Respondent No. 3 being a prominent Lithuanian businessman with holdings and interest in various enterprises[51] and chairman of the supervisory board of Respondent No. 2[52], and Respondent No. 4 being a member of the supervisory board of Respondent No. 2[53].

(80) Even more importantly, Respondents Nos. 2–4 were advised by renowned U.S. law firms throughout the negotiation, finalization and execution of the Settlement Agreement (see paras. (34) and (35) *supra*). This is evidenced by Exhibits C-7 through C-9 and was not disputed by the Respondents. The Arbitral Tribunal has no doubts, and Respondents Nos. 2–4's did not deny, that these respectable U.S. lawyers – obviously native English speakers – did very well apprehend the exact meaning of the provisions they negotiated on behalf of Respondents Nos. 2–4 and that they were very well able to illustrate the content and effect of such provisions to their clients.

(81) The Arbitral Tribunal finds that on the basis of the cited case law and the facts described above it is even more called to enforce the Settlement Agreement according to its wording. If Respondents Nos. 2–4's command of the English language was in fact insufficient to completely understand the meaning of Paragraph 2.1 SA or any explanations given by the Claimant's representatives, they should have, as experienced businessmen, known better and consulted their U.S.-American counsel to explain the exact meaning of said clause before signing the Settlement Agreement.

(82) Beyond that, there are authorities in New York case law supporting the view that a person who voluntarily signs an agreement in a language which he does not understand, enters into this agreement at his own risk and may, therefore, not contest the validity of such agreement solely on the grounds that he did not properly understand it.[54]

dd) No Exceptions to the *Parol Evidence Rule* Applies

(83) Finally, none of the exceptions acknowledged in the New York case law to the *parol evidence rule* applies.

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[50] Statement of Claim, para. 5; Respondents Nos. 3 and 4's witness statements (Exhibits Rs5 and Rs6), para. 1.

[51] Statement of Claim, para. 6.

[52] Respondent No. 3's witness statement (Exhibit Rs-5), para. 1.

[53] Respondent No. 4's witness statement (Exhibit Rs-6), para. 1.

[54] Cf. *Stein-Sapir v. Stein-Sapir*, 52 A.D.2d 115, 382 N.Y.S.2d 799 (1976); followed in *Stawski v. Stawski*, 43 A.D.3d 776, 843 N.Y.S.2d 544 (2007).

(84) Firstly, following the decision in *Sabo v. Delman* the *parol evidence rule* has no application under New York law in an action for fraud to rescind the contract. [55] Here, however, the Respondents do not allege false or fraudulent misrepresentations by the Claimant. In particular, their references to *"private meetings with Rual's authorities" "from which it was understood that the Settlement Agreement should cover the Claimant and VIVA only"* [56] – despite being utterly unsubstantiated – do not contain such charges. Moreover, Respondents Nos. 2–4 obviously do not strive to *rescind* the (entire) agreement, including, *e. g.*, the declaration by the Claimant to release Respondents Nos. 2–4 from their potential liability under the Complaint (Paragraph 3.3 SA). They rather aim at amending (and invalidating) the contents and effect of Paragraph 2.1 SA only.

(85) Secondly, another exemption from the *parol evidence rule* is accepted where it is adduced as a basis for reformation of a contract due to mutual mistake or unilateral mistake and fraud. In its 1978 decision in *George Backer Management Corp. v. Acme Quilting Co.*[57] the New York Court of Appeals, however, imposed a *"high order of proof"* of parol evidence as the basis for reforming a contract in such circumstances. Consequently, it required the proponent of reformation to show *"in no uncertain terms, that not only mistake or fraud exist, but exactly what was really agreed upon between the parties"* [58].

(86) However, Respondents Nos. 2–4 have neither asserted a case of mutual mistake or fraud nor have they adduced such unequivocal evidence as necessary under the requirements set out in *Backer*. In a case of mutual mistake, the parties have reached an oral agreement and, unknown to either of them, the signed instrument does not express that agreement.[59] Here, the written submissions of Respondents Nos. 2–4 as well as the witness statements (Exhibits Rs-4 through Rs-6) do not allege that the Claimant also erred about the meaning of Paragraph 2.1 SA. Likewise, there is no contention that the Claimant fraudulently misrepresented the contents and effects of said provision.

b) Validity of Paragraph 2.1 of the Settlement Agreement

(87) Respondents Nos. 2–4's claim that Paragraph 2.1 of the Settlement Agreement is invalid due to their alleged misunderstanding fails for much the same reasons.

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[55] *Sabo v Delman*, 3 N.Y.2d at 155, 143 N.E. 2d at 906 (1957). See *Robert L. Haig*, 3 N.Y.Prac., Commerical Litigation in New York States Courts (2nd ed.), § 41:18 with further references.

[56] Respondents Nos. 2–4's Statements of Rejoinder, para. 16.

[57] *George Backer Management Corp. v. Acme Quilting Co.* (46 N.Y.2d 211, 413)

[58] *George Backer Management Corp. v. Acme Quilting Co.*, 46 N.Y.2d at 219, 385 N.E.2d at 1066 (1978); followed in *e.g. Chimart Assocs. v. Paul*, 66 N.Y.2d at 574, 498 N.Y.S.2d at 344 and 345, 489 N.E.2d at 231 and 233 (1986).

[59] *Chimart Assocs. v. Paul*, 66 N.Y.2d at 574, 498 N.Y.S.2d at 344 and 345, 489 N.E.2d at 231 and 233 (1986) with further references.

(88) Firstly, contrary to Respondents Nos. 2–4's view (see para. (47) *supra*), the Arbitral Tribunal is not barred from examining the invalidity of that provision for the purposes of this arbitration only because Respondents Nos. 2–4 have made, or are intending to make, the same or a similar submission in the New Arbitration. Whether Paragraph 2.1 SA is null and void or rather fully enforceable between the Claimant and Respondents in this arbitration is a mere question of law, not a matter of fact. It is also a preliminary question to which all claims asserted by the Claimant are intrinsically connected and on which they depend. Consequently, the question of the validity of Paragraph 2.1 SA must be determined in this arbitration. Allowing a party to *"reserve"* particular questions of law to different arbitral proceedings and thus to exclude such questions from being determined in a particular arbitration, even though the dispute in that arbitration is contingent upon them, would not only be detrimental to the efficiency of arbitral proceedings, it would also amount to an abuse of process.

(89) Moreover, Respondents Nos. 2–4's view that the Arbitral Tribunal would deal with a difference not falling *"within the terms of the submission to arbitration"* if it would address any of the arguments mentioned in the Counterclaim is groundless. The extent to which an arbital tribunal may determine questions of law is not defined by what the parties submit, but rather by whether or not such questions of law are covered by the agreement to arbitrate. Here, the arbitration clause in Paragraph 4.1 SA extends to all disputes arising out of or relating to the Settlement Agreement and thus also to the question of the validity of Paragraph 2.1 SA.

(90) The Arbitral Tribunal has pointed to this conclusion in PO No. 3 when it clarified that, to the extent to which defenses and objections in the Counterclaim relate to the Claimant's claim as stated in the Statement of Claim, such defenses and objections will be taken into consideration by the Arbitral Tribunal (cf. para. (18) *supra*). However, Respondents Nos. 2–4 have refrained from making further submissions to the substance of this argument.

(91) Respondents Nos. 2–4's contention – for which they adduce no authority – that *"each agreement must correspond to true wills of parties, otherwise the provisions in question are invalid as breaching good faith and fair dealing"*[60] is meritless, at least within the scope of application of the *parol evidence rule*. It follows from the considerations in paras. (57) *et seq.* that a clear and unambiguous agreement in writing (such as the Settlement Agreement) will be enforced according to its wording unless a party to such agreement can show that one of the recognized exceptions to the rule applies. Yet Respondents Nos. 2–4 have not only failed to argue any of these exceptions, they have also not adduced sufficient evidence in support thereof (cf. para. (83) *supra*).

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[60] Respondents Nos. 2–4's Counterclaim, para. 11.

(92) Since Respondents Nos. 2–4 have not submitted any other grounds which could render Paragraph 2.1 SA invalid and since such grounds are not evident elsewise, the Arbitral Tribunal concludes that the provision is valid as between the Claimant and the Respondents.

2. Claim for Payment of Interest in an Amount of 5% per annum as from 2 August 2009

(93) The Respondents are also liable as joint and several debtors to pay to the Claimant interest on the amount of USD 2,500,000.00 at the rate of 5% per annum accruing as of, and including, 2 August 2009 until full payment is made to the Claimant. This obligation derives from Paragraphs 2.4, 2.5 SA.

(94) Since the Respondents failed, as joint and several debtors, to make the second installment of USD 500,000.00 on its due date, *i. e.* by 1 August 2009 (Paragraph 2.3 SA), the entire amount of the remaining balance owed under the Settlement Agreement, *i. e.* USD 2,500,000.00, became due and payable immediately pursuant to Paragraph 2.4 SA. The Arbitral Tribunal construes the term *"immediately"* as meaning that the remaining balance became due and payable on the expiry of 1 August 2009, *i. e.* at 24:00 o'clock of that day. Hence, the entire balance accrues interest at the rate of 5% per annum starting on 2 August 2009, being the *"date following the due date"* within the meaning of Paragraph 2.5 SA.

III. Decision on the Costs of the Arbitral Proceedings

1. The Parties' Submissions on Costs

a) The Claimant

(95) In its submission dated 8 April 2010 the Claimant specified its costs as being:

1. Arbitration Costs	
1.1 Registration Fee paid to SCC	1,000.00 €
1.2 Advance on costs paid to SCC	19,750.00 €
2. Claimant's Costs	
2.1 Counsels' fees	63,335.25 €
2.2 Lawyer travel and on-site expenses	320.24 €
2.3 Delivery/Messenger/Postage and Courier Charges	611.76 €
2.4 Computerized legal research/other information services	1,295.30 €
2.5 Miscellaneous expenses (photocopies, faxes, telephone etc.)	377.63 €
3. Total	**86,690.18 €**

(96) The Claimant considers the costs of EUR 86,690.18 (as specified in para. (95) *supra*) which Claimant incurred during this arbitration to be reasonable within the meaning of Art. 43 of the Rules.[61]

(97) The Claimant's relief as to costs is as follows: Ordering that the Respondents jointly and severally pay to the Claimant:

(i) its legal fees and expenses (to be assessed at the conclusion of this matter);

(ii) the Arbitral Tribunal's fees and expenses; and

(iii) the SCC's expenses.[62]

(98) The further requests with regard to, *inter alia*, costs that the Claimant made in its submission on costs of 8 April 2010[63], particularly its request to award *"post-award interest on all costs incurred by the Claimant as well as on all other amounts awarded"*, are precluded according to Art. 19 para. 4 clause 2 of the Rules. For in PO No. 2, the Arbitral Tribunal ordered the Parties to finally state their claims in their respective last submission as set forth in Procedural Timetable, *i. e.* for Claimant in his Statement of Reply and for Respondents in their respective Statements of Rejoinder at the latest. PO No. 5 only invited the Parties to state the costs incurred by them and to comment on their reasonability, but did not allow the Parties to amend their claims for relief.

b) Respondent No. 1

(99) Respondent No. 1 has not specified its costs and has made no other submissions or requests as to costs.

c) Respondents Nos. 2–4

(100) Respondents Nos. 2–4 have specified their costs incurred in this arbitration as being:[64]

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[61] Claimant's submission on costs dated 8 April 2010, page 3.

[62] Claimant's Statement of Reply, page 6.

[63] Claimant's submission on costs dated 8 April 2010, page 4.

[64] Respondents Nos. 2–4's submission on costs dated 9 April 2010, para. 3 along with Exhibits Rs10 through Rs12.

1.	**Arbitration Costs**	
	1.1 Advance on costs paid to SCC	20,750.00 €
2.	**Respondents Nos. 2–4's Costs**	
	2.1 Counsel fees	9,244.78 €
	2.2 Other expenses	330.86 €
3.	**Total**	**30,325.64 €**

(101) They are of the opinion that the Claimant's request on costs should be dismissed because the Claimant failed to procure any documentation prooving the accrual of such costs.

(102) The relief on costs sought by Respondents Nos. 2–4's is to award to Respondents Nos. 2–4's the arbitration costs incurred by them.[65] Their further requests on costs as stated in their submission on costs of 9 April 2010 are precluded according to Art. 19 para. 4 clause 2 of the Rules (see para. (98) *supra* , which applies *mutatis mutandis*).

2. Decision of the Arbitral Tribunal

a) Costs of the Arbitration (Art. 42 of the Rules)

(103) The costs of this arbitration have been determined by the SCC on 15 April 2010 in accordance with Art. 42 of the Rules as follows (hereunder the "Arbitration Costs"):

(i) The fee of the Arbitral Tribunal (sole arbitrator) amounts to EUR 22,959.00 and compensation for expenses of EUR 364.50, in total EUR 23,323.50 plus VAT of EUR 4431.47, totaling EUR 27,754.97.

(ii) The administrative fee of the SCC amounts to EUR 9,344.00 plus VAT of EUR 2,336.00, totaling EUR 11,680.00.

(104) The Parties are jointly and severally liable to the Arbitral Tribunal and to the SCC for the Arbitration Costs (Art. 42 para. 6 of the Rules).

(105) As between the Claimant and the Respondents, the Arbitral Tribunal considers it appropriate in view of the outcome of the case that all Arbitration Costs are born by the Respondents as joint and several debtors (Art. 42 para. 5 of the Rules). See also para. (107) below. Hence, the

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[65] Respondents Nos. 2–4's Statements of Rejoinder, para. 22.5; Respondents Nos. 2–4's Statement of Defence, para. 16.3.

Respondents are jointly and severally liable to pay EUR 39.434,97 (being the sum of the amounts stated in para. (103) lit. (i) and (ii) *supra*) to the Claimant. Accordingly, Respondents 2–4's request as to the Arbitration Costs (see para. (102) *supra*) is dismissed.

b) Costs Incurred by the Parties (Art. 43 of the Rules)

(106) According to Art. 43 of the Rules, upon the request of a party, the Arbitral Tribunal may order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances.

(107) Given the fact that the Claimant succeeded with all of its claims, the Arbitral Tribunal considers it appropriate that Respondents, as joint and several debtors, reimburse the Claimant for the costs that the Claimant has incurred. It is general practice in international arbitration[66] and also acknowledged in the Swedish Code of Judicial Procedure[67] that the losing party is liable for its own expenses as well as those of the winning party. Accordingly, Respondents 2–4's request as to the costs they have incurred in the course of this arbitration (see para. (102) *supra*) is dismissed.

(108) The Arbitral Tribunal regards the Claimant's costs as specified in para. (95) *supra*, items 2.1 through 2.5, totaling EUR 65,940.18, to be reasonable. Firstly, because this sum is only a mere 3.5% of the value of this dispute (USD 2.5 Mio.), and secondly because of the fact that the Claimant had to incur costs to reply to Respondents Nos. 2–4's various procedural requests which were, in the end, meritless and unsuccessful.

(109) The Respondents are, therefore, jointly and severally liable to pay EUR 65,940.18 to the Claimant. All other reliefs as to costs are dismissed.

H. Arbitral Award

(110) The Respondents are ordered to pay as joint and several debtors to the Claimant

(i) USD 2,500,000.00 (United States Dollars twomillionfivehundredthousand) and interest thereon at a rate of 5% *per annum* from, and including, 2 August 2009 until full payment has been made; and

(ii) EUR 65,940.18 (Euros sixtyfivethousandninehundredfourty 18/100).

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[66] *Gary B. Born*, International Commercial Arbitration, 2009, Volume II, page 2495, 2499 *et seq.*

[67] Cf. *Weigand*, Practitioner's Handbook on International Commercial Arbitration, 2nd ed. 2009, margin note 11.226.

(111) The Parties are jointly and severally liable to pay the Arbitration Costs. The Arbitration Costs have been determined as follows:

(i) The fee of the Arbitral Tribunal (sole arbitrator) amounts to EUR 22,959.00 and compensation for expenses of EUR 364.50, in total EUR 23,323.50 plus VAT of EUR 4431.47, totaling EUR 27,754.97.

(ii) The administrative fee of the SCC amounts to EUR 9,344.00 plus VAT of EUR 2,336.00, totaling EUR 11,680.00.

(112) As between the Parties, the Respondents are ordered to pay the entire Arbitration Costs. The Respondents shall, therefore, pay as joint and several debtors to the Claimant EUR 39.434,97 (Euros thirtyninethousandfourhundredthirtyfour 97/100).

(113) All other reliefs sought by the Parties are dismissed.

(114) A Party who is dissatisfied with this award regarding the payment of compensation to the Arbitral Tribunal may, pursuant to Section 41 of the Swedish Arbitration Act (SFS 1999:116), bring an action to the Stockholm District Court (Stockholms tingsrätt) within three months from receipt of this award.

Place of arbitration: Stockholm

Date: 21 April 2010

The Arbitral Tribunal

Prof. Dr. Elsing, LL.M.
(Sole Arbitrator)