COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIFTH SECTION

CASE OF REGENT COMPANY v. UKRAINE

(Application no. 773/03)

JUDGMENT

STRASBOURG

3 April 2008

FINAL

29/09/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Regent Company v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Peer Lorenzen, *President,*
Snejana Botoucharova,
Volodymyr Butkevych,
Rait Maruste,
Renate Jaeger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, *judges,*
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 11 March 2008 and,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 773/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a company with its registered office in the Seychelles, Regent Company ("the applicant company"), on 12 October 2002.

2. The applicant company was represented by Mr Yuriy Portnik, a director of the company residing in London. The Ukrainian Government ("the Government") were represented by their Agent, Mr Yuriy Zaytsev.

3. The applicant company complained, in particular, under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 about the non-enforcement of an arbitration award made on 23 December 1998 by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry. In particular, it alleged that the judgment remained unenforced on account of an omission by the State Bailiffs' Service and the enactment of Law no. 2864-III of 29 November 2001 on the introduction of a moratorium on the forced sale of property.

4. By a decision of 10 April 2007 the Court declared the application partly admissible.

5. The applicant company and the Government each filed further written observations (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant is a privately owned commercial company, Regent Engineering International Limited, registered in Victoria (the Seychelles). The company's actual address is in London (United Kingdom). It was represented before the Court by its director, Mr Yuriy Portnik, who resides in London.

A. Proceedings before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine

7. In December 1998 COM s.r.o. ("COM"), a limited liability company registered in Prague (Czech Republic) instituted proceedings in the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine (*Міжнародний комерційний арбітражний суд при Торгівельно-Промисловій палаті України* – "the Arbitration Tribunal") against an open joint-stock company, Oriana, seeking an award for breach of contract. In particular, COM claimed that Oriana, a company registered in the city of Kalush (Ivano-Frankivsk Region), with 99.9% of its shares owned by the State, had failed to comply with its contractual obligations concerning the processing of raw materials.

8. On 23 December 1998 the Arbitration Tribunal made an arbitration award (case AC no. 142y/98) ordering the Oriana company to pay COM the amount of 2,466,906.47 United States dollars (USD) in compensation.

B. Enforcement proceedings instituted by COM

9. On 19 July 1999 COM lodged an application with the Ivano-Frankivsk Regional Arbitration Court ("the Regional Arbitration Court") seeking a ruling that COM was a creditor in relation to the Oriana company, on the basis of the 23 December 1998 award.

10. On 2 August 1999 the Kalush State Bailiffs' Service of the Ministry of Justice ("the Bailiffs' Service") instituted enforcement proceedings against Oriana in order to collect the debt from it as ordered by the Arbitration Tribunal. These enforcement proceedings were joined to the other enforcement proceedings that were pending against Oriana.

11. On 16 October 1999 the Regional Arbitration Court rejected the applicant company's request to initiate bankruptcy proceedings against Oriana.

12. On 18 and 21 October 1999 the Bailiffs' Service initiated the attachment of the property owned by Oriana. On 13 December 1999 the Bailiffs' Service quashed the decision on the attachment of Oriana's assets.

13. On 14 December 1999 the property owned by Oriana was attached again. On 16 December 1999 the Bailiffs' Service decided to sell some of the property that had been attached (the Oriana company's polymerisation workshop).

14. On 20 September 2000 COM again requested the Regional Arbitration Court to institute bankruptcy proceedings against Oriana. It also sought a ruling including it on the list of Oriana's creditors.

15. Between 1999 and 2003 the Bailiffs' Service took a number of measures to obtain payment of the debts accumulated by Oriana. In particular, it sent payment orders to the debtor's bank, seized its assets, prohibited the unauthorised sale of property belonging to Oriana and attempted to sell some of the company's property in order to pay its debts. It also attached the Oriana company's bank accounts and its shares (including the shares which Oriana owned in the Lukor company).

16. At the same time, the enforcement proceedings were suspended several times because Oriana contested the bailiffs' actions before the courts and because its numerous creditors filed applications with the court seeking an insolvency order in respect of the company.

17. On 18 September 2002 the Ivano-Frankivsk Regional Commercial Court (formerly the Ivano-Frankivsk Regional Arbitration Court) instituted bankruptcy proceedings against Oriana. These proceedings are still pending.

18. On 22 January 2003 COM requested the Ivano-Frankivsk Regional Commercial Court to include it on the list of creditors of the Oriana company.

C. Enforcement proceedings instituted by the applicant company

19. On 10 February 2003 the applicant company concluded a contract with COM concerning the transfer of the latter's right to claim the debt awarded by the Arbitration Tribunal on 23 December 1998.

20. On 8 June 2004 the applicant company and COM requested that the Arbitration Tribunal recognise the applicant company as the creditor in the arbitration proceedings against Oriana on the basis of the above-mentioned contract. On 21 June 2004 the President of the Arbitration Tribunal dismissed their request, stating that the Arbitration Tribunal had been dissolved after having made the award of 23 December 1998.

21. On 9 July 2004 the applicant company and COM requested that the Ivano-Frankivsk Regional Court of Appeal ("the Court of Appeal") declare the applicant company to be legally entitled to the debt awarded to COM by the Arbitration Tribunal on 23 December 1998.

22. On 16 July 2004 the applicant company and COM requested the Bailiffs' Service to change the creditor in the enforcement proceedings on the basis of the contract.

23. On 9 September 2004 the applicant company and COM requested the Court of Appeal to declare that the applicant company was the Oriana company's creditor and to substitute the applicant company for COM as a party to the enforcement proceedings on the same grounds as mentioned above.

24. On 10 September 2004 the Court of Appeal allowed the applicant company's request. It declared the applicant company to be Oriana's creditor in respect of the debt of USD 2,466,906.47 resulting from the arbitration award of 23 December 1998.

25. On 18 November 2004 the applicant company and COM requested the Bailiffs' Service to substitute the applicant company for COM in the enforcement proceedings against Oriana.

26. On 9 December 2004 the Bailiffs' Service substituted the applicant company for the original creditor in the enforcement proceedings on the basis of the ruling of 10 September 2004.

27. On 29 December 2005 the Ivano-Frankivsk Regional Commercial Court ("the Regional Commercial Court") ruled that the Bailiffs' Service had to discontinue the enforcement proceedings.

28. On 30 December 2005 the Bailiffs' Service discontinued the enforcement proceedings and transferred the writs of enforcement to Oriana's property administrator (*розпорядник майна*).

29. On 23 January 2006 the applicant company requested the Regional Commercial Court to amend the list of Oriana's creditors and to include it on this list on the basis of the contract of 10 February 2003 and the ruling of the Court of Appeal of 10 September 2004.

30. On 6 February 2006 the Regional Commercial Court allowed the applicant company's request and ordered that the administrator of the Oriana company's property make the relevant amendments to the list of creditors.

31. On 27 February 2006 the applicant company requested to be informed whether the Bailiffs' Service had substituted it for COM in the list of creditors in the enforcement proceedings against Oriana.

32. The enforcement proceedings are still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Law of 14 May 1992 on the restoration of a debtor's solvency or the declaration of bankruptcy

33. Under section 12 of the Law (*Закон України "Про відновлення платоспроможності боржника або визнання його банкрутом"*), a commercial court is entitled to order a moratorium on debt recovery from a company which is the subject of insolvency proceedings. The moratorium entails a prohibition on execution by the Bailiffs' Service of judgments against the company concerned. The same section provides that a company protected by the moratorium is immune from any fines and other sanctions for non-fulfilment or improper fulfilment of its financial obligations during the moratorium.

B. Law of 29 November 2001 on the introduction of a moratorium on the forced sale of assets

34. The Law (*Закон України "Про введення мораторію на примусову реалізацію майна"*) aims at protecting State interests with regard to the sale of assets belonging to undertakings in which the State holds at least 25% of the share capital. A moratorium on the enforcement of judgment debts has been introduced until the mechanism for the forced sale of the property of such undertakings is improved. No time-limit has been set.

35. Section 2 of the Law provides that the prohibition on the forced sale of assets includes the execution of writs by the State Bailiffs' Service on the assets belonging to such companies. The Law therefore stays the execution of all writs by the State Bailiffs' Service in respect of the assets of undertakings in which the State holds at least 25% of the share capital.

C. Relevant provisions of the Civil Code and the Ownership Act

36. Under Article 214 of the Civil Code, in the event of delay in the fulfilment of its financial obligations, a debtor must, upon a claim by the creditor, pay the amount of the debt, plus any interest payable at the officially established inflation rate during the default period.

37. Chapter 40 ("Compensation for damage") of the Civil Code provides for compensation for damage and establishes the grounds for such compensation. Chapter VII ("Protection of property") of the Ownership Act guarantees protection of property and allows for court action in such matters. Also, Articles 197-202 of Chapter 17 ("Reassignment of debts") of

the Civil Code provide for the conclusion of transfer contracts and the reassignment of rights to claim debt recovery.

D. The Enforcement Proceedings Act of 21 April 1999

38. Under section 2 of the Act (*Закон України "Про виконавче провадження"*), the enforcement of judgments is entrusted to the State Bailiffs' Service. Under section 85 of the Act, the creditor may file a complaint against actions or omissions of the State Bailiffs' Service with the head of the competent department of that service or with a local court. Section 86 of the Act entitles the creditor to institute court proceedings against a legal person entrusted with the enforcement of a judgment on account of the inadequate enforcement or non-enforcement of that judgment, and to receive compensation.

39. Under the Enforcement Proceedings Act, awards made by arbitration tribunals (*третейські суди*) are subject to enforcement by the State Bailiffs' Service (section 3(1) of the Act) and are therefore treated as equivalent to judgments delivered by domestic courts.

E. The State Bailiffs' Service Act of 24 March 1998

40. Section 11 of the Act (*Закон України "Про державну виконавчу службу"*) provides for the liability of bailiffs for any inadequate performance of their duties, and for compensation for damage caused by a bailiff when enforcing a judgment. Under section 13 of the Act, acts and omissions of the bailiff can be challenged before a superior official or the courts.

F. Relevant resolutions of the Cabinet of Ministers and the State Property Fund report

41. There have been several resolutions of the Cabinet of Ministers in relation to the financial situation of the Oriana company:

(a) no. 1650 of 19 October 1998 (on measures aimed at preventing Oriana's bankruptcy and on the transfer of the company's management to the Shelton enterprise);

(b) no. 1280 of 16 July 1999, which quashed the previous resolution on Oriana (it also related to measures aimed at ensuring Oriana's financial and economic well-being and the restructuring of its debts);

(c) resolution no. 800 of 10 May 1998 (on the approval of the list of enterprises exempt from land tax payment in 1999);

(d) no. 92-p of 19 February 2000 (on privatisation of the Oriana company);

(e) no. 314-p of 10 August 2000 (on payment of Oriana's debts for the loans it received);

(f) no. 810-p of 28 October 2004 (suspending privatisation of Oriana, following the sale of 47.93% of shares in the Oriana company to CJSC Lukor, a closed joint-stock company founded by Oriana and Lukoil, a Russian company).

42. On 3 August 2000 the Cabinet of Ministers adopted a procedure for payment of Oriana's debts from the State budget, amounting to USD 34,115,000.

43. On a number of occasions the Government included Oriana on the list of State-owned companies which had strategic importance for Ukraine's economic well-being and security and were thus to be excluded from privatisation (see, for instance, resolutions nos. 1346 and 1734 of the Cabinet of Ministers of 29 August 2000 and 23 December 2004).

44. The Government also undertook to fund compensation for environmental damage caused by the Oriana company's operations (resolution no. 593 of the Cabinet of Ministers of 18 July 2005).

45. In its resolution of 19 August 2002 the Cabinet of Ministers adopted an action plan providing for the elimination of environmental damage caused by the operation of Kaliyny Zavod, an enterprise belonging to the Oriana company. The action plan provided for the allocation of 33,800,000 Ukrainian hryvnas (UAH) from the State budget for necessary environmental work during the period from 2003 to 2012.

46. In decision no. 308-p of 3 August 2005 the Prime Minister ordered the Cabinet to examine Oriana's financial problems and to take the necessary steps for its economic development.

47. Also, it ensues from the report of 15 December 2004 by the State Property Fund that the State, and in particular the State Property Fund, managed Oriana's "corporate rights" (its corporate investments). In particular, on 26 May 2006 the State Property Fund appointed the State's representative to Oriana's supervisory board and ordered that the relevant structural department of the State Property Fund should issue a letter of authority for the representative enabling him to manage the State's shares in the company.

G. Judgment of 10 June 2003 of the Constitutional Court in a case concerning the moratorium on the forced sale of property

48. In its judgment the Constitutional Court found that the Law of 29 November 2001 on the introduction of a moratorium on the forced sale of property complied with the Constitution of Ukraine. It also held that the Law at issue did not violate the constitutional principle of the binding nature of court judgments. Court judgments requiring the forced sale of the property of enterprises, given both prior to and after the Law was adopted,

had not been set aside; they remained in force, and their enforcement was merely suspended until the mechanism for the forced sale of property was improved. That meant that the Law extended the term for enforcement of judgments during that period ("period of legislative improvement").

H. The International Commercial Arbitration Act of 24 February 1994

49. The relevant provisions of Chapter VIII of the Act, concerning the recognition and enforcement of awards, read as follows:

Section 5

Extent of court intervention

"In matters governed by the present Act, no court shall intervene except where so provided in the present Act."

Section 6

Authority for certain functions of arbitration assistance and supervision

"1. The functions referred to in sections 11(3), 11(4), 13(3) and 14 shall be performed by the President of the Ukrainian Chamber of Commerce and Industry.

2. The functions referred to in sections 16(3) and 34(2) shall be performed by the Appeal Court of the Autonomous Republic of Crimea, regional appeal courts or appeal courts of the cities of Kyiv and Sevastopol, depending on where the arbitration takes place." (On 6 September 2005 the Verkhovna Rada amended this provision and allowed the local district courts of first instance to perform these functions.)

Section 35

Recognition and enforcement

"1. An arbitration award, irrespective of the country in which it was made, shall be recognised as binding and, upon a written application to the competent court, shall be enforced subject to the provisions of this section and of section 36.

2. The party claiming an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in section 7 or a duly certified copy thereof. If the award or agreement is made in a foreign language, the party shall supply a duly certified translation thereof into the Ukrainian or Russian language."

Annex I to the International Commercial Arbitration Act of 24 February 1994 "Statute on the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry:

"... 4. An award of the International Commercial Arbitration Court shall be carried out by the parties voluntarily within the time limit indicated by the Court. If the award does not indicate any time limit, it shall be carried out immediately. Awards not carried out within the applicable time limit shall be enforced in accordance with law and international treaties."

I. Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry

50. The relevant extracts from the Rules of the International Commercial Arbitration Court (as approved by the decision of the Presidium of the Ukrainian Chamber of Commerce and Industry of 25 August 1994, Protocol no. 107(3), with amendments resulting from the decision of 26 September 2001 of the Presidium of the Ukrainian Chamber of Commerce and Industry) provide as follows:

V. Remedies against an arbitration award

"... 9.1. An arbitration award may be challenged in court only by means of an application for setting aside in accordance with paragraphs 2 and 3 of Rule 9 of the present Rules.

9.2. An arbitration award may be set aside in accordance with section 6(2) of the International Commercial Arbitration Act by the Shevchenkivsky District Court of Kyiv only if:

(1) the party making the application for setting aside furnishes proof that:

a party to the arbitration agreement referred to in Rule 1.2 above was subject to an incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication thereof, under the law of Ukraine; or

a party was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present its case; or

the award was made regarding a dispute not contemplated by or not falling within the terms of the submission to arbitration, or, where it contains decisions on matters beyond the scope of the submission to arbitration, provided that the decisions on the matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

the composition of the Arbitration Tribunal or the arbitration proceedings were not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the International Commercial Arbitration Act from which the parties cannot derogate, or, in the absence of such agreement, were not in accordance with this Act; or

(2) the court finds that:

the subject matter of the dispute is not capable of settlement by arbitration under the law of Ukraine; or

the award is in conflict with the public policy of Ukraine.

9.3. An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if the request had been made under Rules 8.16-8.18 above, from the date on which that request had been disposed of by the Arbitration Tribunal."

VI. Recognition and enforcement of an arbitration award

"10.1. An award by the Arbitration Tribunal shall be final. It shall be executed by the parties voluntarily within the time-limit indicated by the Arbitration Tribunal.

If the award does not indicate any time-limit, it shall be executed immediately.

10.2. An arbitration award shall be recognised as binding and, in the event of refusal to execute it voluntarily, it shall be enforced depending on the respondent's location.

If the debtor is in Ukraine, the award by the International Commercial Arbitration Court at the UCCI shall be enforced upon an application in writing to the competent court at the place of the debtor's location in accordance with the International Commercial Arbitration Act and the rules of civil procedure in Ukraine.

If the debtor is abroad, the claimant's application in writing shall be communicated to the competent court of the country where the debtor is located and in accordance with Article III of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) or an inter-State agreement, the relevant court of the Contracting State shall recognise and enforce awards of the International Commercial Arbitration Tribunal in accordance with the rules of procedure of the territory where the award is being relied upon.

10.3. To obtain the recognition and enforcement of the award, the party applying for recognition and enforcement shall, at the time of the application, supply to the competent State court the duly authenticated original award or a duly certified copy thereof, and also the original arbitration agreement referred to in Rule 1.2 above or a duly certified copy thereof. If the said application, award or agreement is not made in an official language of the country in which the award is being relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language in two copies. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agency."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1

51. The applicant company complained under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 about the non-enforcement of the arbitration award of 23 December 1998. These provisions read as follows:

Article 6 § 1

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. The Government's preliminary objection

1. The parties' submissions

52. The Government maintained that Article 6 § 1 of the Convention was not applicable to arbitration proceedings. The Government firstly noted that the Arbitration Tribunal was established on the basis of the parties' agreement to arbitrate as contained in the arbitration clause concluded between them. They stated that the parties to the arbitration proceedings in the instant case had waived the full application of Article 6 § 1 of the Convention, which consequently was not applicable to the enforcement of the final arbitration award of 23 December 1998 made by that tribunal. Secondly, they maintained that there was no relationship between the arbitration proceedings in the case and the ensuing enforcement proceedings, since the applicant company had allegedly acquired the debt pursuant to the contract of 10 February 2003 and not in accordance with the arbitration award. They concluded that the application was incompatible *ratione materiae* with the provisions of the Convention.

53. The applicant company disagreed. It stated that Article 6 § 1 of the Convention was applicable to the proceedings at issue.

2. The Court's assessment

54. In so far as the Government raised an objection to the applicability of Article 6 § 1 of the Convention to arbitration proceedings, the Court reiterates that Article 6 does not preclude the setting up of arbitration tribunals in order to settle disputes between private entities. Indeed, the word "tribunal" in Article 6 § 1 is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country (see, *inter alia*, *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, pp. 72-73, § 201). It further considers that the Arbitration Tribunal was a "tribunal established by law", acting in accordance with the 1994 International Commercial Arbitration Act and internal procedural rules. The proceedings before the Arbitration Tribunal were similar to those before an ordinary State civil or commercial court and due provision was made for appeals to the Kyiv City Court of Appeal (as applicable at the material time), which could review the award on the grounds specified in the 1994 Arbitration Act. The Arbitration Tribunal remains the only arbitration body in Ukraine that may, in accordance with the 1994 Arbitration Act, decide on "commercial disputes with a foreign element". Under the 1994 Arbitration Act and section 3(1) of the Enforcement Proceedings Act, the Arbitration Tribunal's award is treated as equivalent to an enforceable court judgment.

55. As to the right to demand payment of a debt or to comply with a civil-law obligation to provide compensation for pecuniary and non-pecuniary damage is a "civil" right, belonging to the domain of Ukrainian private law, which is provided for in Chapter 40 of the Civil Code ("Compensation for damage") and the Ownership Act ("Protection of possessions"). In particular, Articles 197-202 of Chapter 17 of the Civil Code allow the reassignment of debts and the conclusion of written agreements for their transfer. Furthermore, the applicant company's right to recover the debt owed to it by the Oriana company on the basis of the arbitration award and the agreement was upheld by the Ivano-Frankivsk Regional Court of Appeal on 10 September 2004. The Court concludes therefore that the arbitration proceedings related to the determination of the original claimant's civil right. Following the transfer of the debt to the applicant company on the basis of the agreement of February 2003 and the recognition of the applicant company as a new debtor in September 2004, the ongoing enforcement proceedings involved the applicant company's rights and its civil rights in succession of those of the initial creditors.

56. The Court observes that these reasons are sufficient to conclude that Article 6 § 1 of the Convention was applicable to the proceedings in this case. It therefore dismisses the Government's preliminary objection.

B. Merits of the applicant company's complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1

1. *The parties' observations*

57. The Government submitted that there had been no breach of Article 6 § 1 of the Convention in respect of the applicant company. In particular, the Government contended that the arbitration award at issue was final only in respect of the parties to the dispute and was enforceable only in relation to the original creditor of the Oriana company, but not the applicant company, which had indirectly acquired the right to payment of the debt resulting from the arbitration award. The Government further argued that there had been no breach of Article 1 of Protocol No. 1. In particular, the State was not accountable for the debts of the Oriana company, which was a separate legal entity. They also submitted that the transfer contract of 10 February 2003 was not a valid ground on which to demand the enforcement of the arbitration award made in favour of another entity.

58. The applicant company submitted that Article 6 § 1 of the Convention had been breached by the State authorities in that the arbitration award of 23 December 1998 had not been enforced within a reasonable time and in full. It stated that the State had failed to comply with its obligations under Article 1 of Protocol No. 1 in that it had not ensured that the award was enforced in good time and had not taken necessary and adequate measures to ensure that the applicant company effectively enjoyed its property rights.

2. *The Court's assessment*

59. The Court notes that one of the main reasons for the failure of the authorities to enforce the final arbitration award was the insolvency of the Oriana State-owned and managed company. However, it is to be noted that while appropriations for the payment of State debts may cause some delay in the enforcement of judgments from the Government's budget, they cannot be considered an excuse for failure to comply with the obligations under Article 6 § 1 of the Convention.

60. Moreover, it appears from the case file that no recent steps have been taken by the State authorities to remedy the situation in the present case. The Court is therefore of the view that the continued non-enforcement of the judgment debt at issue constituted a violation of Article 6 § 1 of the Convention.

61. The Court also notes that it has consistently held that a "claim" can only constitute a "possession" within the meaning of Article 1 of Protocol No. 1 if it is sufficiently established to be enforceable (see *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III, and *Poltorachenko v. Ukraine*, no. 77317/01, § 45, 18 January 2005). It also considers that an assignment

of a debt is capable in principle of amounting to such a "possession". Moreover, from the Court's point of view domestic court's judicial decisions acknowledging that the applicant company was the creditor in the proceedings as to enforcement of the arbitration award of 23 December 1998 mean that it had an enforceable claim which constituted a "possession" within the meaning of Article 1 of Protocol No. 1 (see paragraph 24 above).

62. There has therefore been a violation of Article 1 of Protocol No. 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage and costs and expenses

64. The applicant company claimed USD 10,000,000 for non-pecuniary damage and lost income. They made no claim as to costs and expenses.

65. The Government stated that the claim was exorbitant and not substantiated by any relevant evidence.

66. The Court observes that it is not disputed that the State still has an outstanding obligation to enforce the judgment at issue. Accordingly, the applicant company remains entitled to recover the amount of the award debt and, if the Government were to pay this debt, this would constitute full and final settlement of the claim for pecuniary damage.

67. As to the claim in respect of non-pecuniary damage, the Court is of the opinion that in the particular circumstances of the case, the finding of a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 constitutes sufficient just satisfaction. In particular, the Court notes that the applicant company purchased the debt in question, as a part of its normal business activity, being aware of problems existing in enforcement of the award at issue, thus taking a commercial risk by that transaction. It considers, therefore, that the applicant company is not entitled for non-pecuniary damage.

68. The applicant company made no claim for costs and expenses and therefore the Court makes no award under this head.

B. Default interest

69. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Finds* that Article 6 § 1 of the Convention is applicable and *dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 1 of Protocol No. 1;

4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

5. *Holds*
   (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the outstanding amount of the arbitration award of 23 December 1998 still owed to it;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on that sum at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 3 April 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President