TEAM 003

2012 International ADR (Alternative Dispute Resolution) Mooting Competition

Hong Kong - July/August 2012

IN THE CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

Longo Imports

(CLAIMANT)

v

Chan Manufacturing

(RESPONDENT)

MEMORANDUM FOR THE CLAIMANT

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ARGUMENTS AS TO JURISDICTION

1. CLAUSE 12 OF CLAIMANT'S STANDARD TERMS AND CONDITIONS IS APPLICABLE TO THE DISPUTE BETWEEN CLAIMANT AND RESPONDENT

CLAIMANT's arbitration clause is applicable in the dispute between CLAIMANT and RESPONDENT because it is a valid arbitration clause (submission 1.1) and it is a part of the contract between CLAIMANT and RESPONDENT (submission 1.3).

1.1. CLAUSE 12 OF CLAIMANT'S STANDARD TERMS AND CONDITIONS IS A VALID ARBITRATION CLAUSE

CLAIMANT's arbitration clause complies with the definition of an arbitration clause under the law of this seat (China),[1] the UNCITRAL Model Law[2] to which both parties are signatory. Constituting a written agreement[3] in electronic form usable for subsequent reference.[4]

The China Trade Commission could only reasonably be held to be a reference to the China International Economic and Trade Arbitration Commission (CIETAC).

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[1] *Arbitration Law of the People's Republic of China 1994*, Art 16.

[2] *UNCITRAL Model law on International Commercial Arbitration 1985* (with amendments adopted in 2006), United Nations, Vienna, Art 7.

[3] *Model Law* Art 7(2).

[4] *Model Law* Art 7(4).

CIETAC is the only arbitral centre in China that could possibly be referred to as the China Trade Commission.[5]

CIETAC has had various previous names and under Rule 2 of the CIETAC Rules specific prevision is made to give CIETAC jurisdiction where an ambiguity has arisen owing to the different previous nomenclature for CIETAC.[6]

Claimant can rely on the doctrine of *effect utile* to give reasonable sense to the meaning of 'China Trade Commission.'[7]

1.2. THE REQUIREMENT FOR CONCILIATION DOES NOT INVALIDATE THE AGREEMENT TO ARBITRATE

The requirement for conciliation contained neither a clearly defined conciliation process nor provisions for the appointment of relevant bodies or persons to conduct the conciliation and thus ought to be severed from the agreement.[8]

1.3. CLAUSE 12 OF CLAIMANT'S STANDARD TERMS AND CONDITIONS FORMS A PART OF THE CONTRACT EXISTING BETWEEN CLAIMANT AND RESPONDENT.

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[5] See *Arbitration Law of the People's Republic of China 1994*, Arts 65, 66, 73.

[6] *China International Economic and Trade Arbitration Commission Arbitration Rules* (Revised and adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce on February 3, 2012, effective of 1 May 2012), Art 1(2) (*CIETAC Rules*).

[7] See *Société Asland* c/ *Société European Energy Corporation*, TGI de Paris, reprinted in Revue de l'Arbitrage, 1990 No 2.

[8] See *Sulamerica CIA Nacional de Seguros SA v Enesa Engenharia* [2012] EWCA Civ 638, [37].

Under Article 7(6) of the Model Law, reference in a contract to another document containing an arbitration clause will constitute an arbitration agreement in writing provided that the reference is such as to make it form part of the contract.

Whether such a clause forms part of the contract is determined by the ordinary rules of contractual construction in accordance with the UNIDROIT *Principles of International Commercial Contracts 2010* (**PICC**).

In Exhibits 3, 10 and 13, each party expresses a manifest intention that the UNIDROIT Principles be the governing law of the contract.

The jurisdiction of the Arbitral seat does not restrict the parties in their choice of governing law.[9]

RESPONDENT was put on notice of the inclusion of CLAIMANT's arbitration clause in any contract between them through the first letter of inquiry (Exhibit 1) containing CLAIMANT's standard terms and conditions.

CLAIMANT arbitration clause met PICC criteria for definiteness.[10]

RESPONDENT and CLAIMANT had an agreement for a conveyance of cars.[11] As it was manifestly not the parties' intention to contract without an arbitration agreement CLAIMANT's arbitration clause must be the agreed arbitration clause.[12]

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[9] *Leibinger v Stryker Trauma GmbH* [2005] EWHC 690 (Comm).

[10] PICC art 2.1.2

[11] See submission 3.3

[12] PICC art 5.1.2(a) "the nature and purpose of the contract".

CLAIMANT's clause was delivered to RESPONDENT, whereas RESPONDENT's standard terms and conditions were only referred to as existing and referable through Google.[13]

RESPONDENT's letter of January 15 did not materially alter the basis upon which CLAIMANT had invited RESPONDENT to treat.[14]

It is common to the commercial legal practice of both parties that knowing a document contains terms a party will be bound by them.[15]

1.4. ALTERNATELY THE CLAIMANT AND RESPONDENT'S CONDUCT IS REFERABLE TO THE EXISTENCE OF AN ARBITRATION AGREEMENT NOTWITHSTANDING THE ABSENCE OF A PRECISE MOMENT OF OFFER AND ACCEPTANCE

The conduct of RESPONDENT and CLAIMANT is clearly referable to the existence of an arbitration agreement, as agreement to CLAIMANT's arbitration clause can be implied on the part of RESPONDENT from RESPONDENT conduct (Submission 1.5), further, such an agreement has to be admitted as arising when examining "all the circumstances" of the case (Submission 1.6).

1.5. RESPONDENT'S AGREEMENT TO CLAIMANT'S ARBITRATION CLAUSE CAN BE IMPLIED FROM RESPONDENT CONDUCT

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[13] Ibid.

[14] PICC art 2.1.11 (2).

[15] *Parker v South Eastern Railway Co* (1877) 2 CPD 416, 423.

Exhibit's 10 and 11 clearly evidence a contractual conveyance and Exhibits 12 and 13 reference that conveyance to an ongoing and larger contract for which some details are still in the process of being negotiated.

The Terms and Conditions attached to Longo's "inquiry" can only sensibly be referenced to an offer agreed in the phone call of February 4 and which incorporated terms contained in the preceding exchange of letters and reiterated in CLAIMANT's order form (Exhibit 9).[16]

Irrespective of whether RESPONDENT's letter of March 20 contained a counter-offer[17] or modified acceptance it did not seek to modify the arbitration agreement.[18]

1.6. RESPONDENT AGREEMENT TO CLAIMANT ARBITRATION CLAUSE CAN BE INTERPRETED FROM AN AGREEMENT ARISING OUT OF "ALL THE CIRCUMSTANCES" SURROUNDING THE CLAIMANT AND RESPONDENT'S DEALINGS

A mutual intention to arbitrate was evidenced in both parties' standard terms and conditions.

Subsequently acts done in accordance with the contract were done in reliance upon the existence of an arbitration agreement.[19]

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[16] PICC art 2.1.11(2).

[17] PICC art 2.1.11(1).

[18] PICC art 2.1.11(1).

[19] See L Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 433, 435.

The substantive terms of RESPONDENT's arbitration clause are not incompatible with those of CLAIMANT (that the venue be Cadenza and that arbitration be binding as to "all disputes arising out of or in connection with")[20]

An imputation that RESPONDENT agreed to CLAIMANT's arbitration agreement can be inferred from RESPONDENT's compliance with essential terms of the contract.[21]

2. CLAIMANT AND RESPONDENT EXHIBITED A MUTUAL INTENTION TO ARBITRATE NOTWITHSTANDING THE ABSENCE OF A VALID ARBITRATION CLAUSE

If the tribunal is not with us on submission 1 that the Arbitral Clause incorporated into the contract constitutes a valid and presently applicable arbitration clause. It is our submission that CLAIMANT and respondent both exhibited a mutual intention to arbitrate notwithstanding the absence of a valid arbitration clause.

An arbitration agreement can be separated from the contract of which it forms a part and "[a] decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."[22]

Where both parties use standard terms a contract will be concluded on the basis of those terms agreed and those terms common in substance.[23]

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[20] *Laboratories Grossman v Forest Laboratories* 295 New York Supp 2nd series 756; see also *Lucky Goldstar International v Ng Moo Kee Engineering* [1993] HKCFI 14, [24].

[21] See Hawkins v Clayton (1988) 164 CLR 539, 570 (Deane J); *The Bell Group v Westpac* (Owen J); *Branair v Owston Nominees* (Allsop J).

[22] Uncitral Model Law, Art 16(1).

The substantial provisions of CLAIMANT's arbitration clause are that it be referred to arbitration in Cadenza and that it be enforceable under Chinese law ("the seat shall be Beijing"). RESPONDENT's arbitration clause is not incompatible with these demands.

The provision in RESPONDENT's arbitration clause that the arbitration follow the SIAC rules is not incompatible with arbitration in Beijing by CIETAC.[24]

2.1. RESPONDENT AGREEMENT TO SUBSTANTIVE PROVISIONS OF CLAIMANT ARBITRATION CLAUSE CAN BE INTERPRETED FROM AN AGREEMENT ARISING OUT OF "ALL THE CIRCUMSTANCES" SURROUNDING THE CLAIMANT AND RESPONDENT'S DEALINGS

If the tribunal is not with us on submission 1.6 that RESPONDENT agreement to clause 12 of the CLAIMANT's standard terms and conditions can be interpreted from "all the circumstances" of their dealings. It is our submission that agreement upon the substantive provisions of the CLAIMANT's arbitration clause can be so inferred.

ARGUMENTS AS TO THE MERITS

3. THE AGREED TERMS INDIVIDUAL TO THE CONTRACT AND THE CLAIMANT'S STANDARD TERMS ARE THE APPLICABLE TERMS

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[23] PICC art 2.1.22 (*Battle of forms*)

3.1. THE PICC APPLIES TO THE CONTRACT BETWEEN THE CLAIMANT AND THE RESPONDENT, IN WHICH THE CISG WILL PROVIDE GUIDANCE WHEN THE PICC CANNOT.

Both CLAIMANT and RESPONDENT are based in countries subject to the CISG and are negotiating a contract for the international sale of electric cars. [25] Absent a choice-of-law clause explicitly stating that the Convention is excluded[26] the contract will be subject to the CISG.

Additionally, both parties have agreed that the governing law is to be PICC.[27] Pursuant to Article 6 of the CISG, the parties are free to choose the applicable law and thus the PICC will apply. The CISG will help to provide guidance in interpreting the contract when the PICC cannot. Further, the PICC will prevail over the CISG in the event of conflicting provisions.[28]

3.2. THE APPLICABLE TERMS ARE THE TERMS THAT BOTH PARTIES HAVE AGREED TO

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[24] CIETAC Rules Art 4(3).

[25] CISG Art 1.

[26] *Arbitration 19 April 1994 Ad Hoc Arbitral Tribunal - Florence (Società X v. Società Y*) Convention); *Travelers Property Casualty Co. of America v. Saint-Gobain Technical Fabrics Canada Ltd.*

[27] Exhibits 10 and 13.

[28] CISG Art 6.

Terms that are individual to the contract and common standard terms are: the application of UNIDROIT at the governing law,[29] an agreement for the purchase of 1000 Gardener model cars,[30] the delivery and payment of the sample car[31] in which the sale of the remaining 1000 cars depends on.[32] The applicable standard terms are outlined below.

3.3. THE CLAIMANT'S STANDARD TERMS APPLY BECAUSE THEY WERE INCORPORATED WHEREAS THE RESPONDENT'S STANDARD TERMS HAVE NOT BEEN INCORPORATED INTO THE CONTRACT

The CLAIMANT's standard terms were incorporated into the contract as they formed part of an offer that was accepted. When the counter-offer was made,[33] the CLAIMANT incorporated their terms by making an express reference to their terms and conditions through a web link on 10 June 2011.[34] Otherwise, the CLAIMANT incorporated their standard terms through negotiation on 5 January 2011.[35]

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[29] Exhibit 10 and Exhibit 13.

[30] Exhibit 9 and Exhibit 10.

[31] Exhibit 10 and Exhibit 11.

[32] Exhibit 8.

[33] Exhibit 13.

[34] Exhibit 13.

[35] Exhibit 1.

However, the RESPONDENT's standard terms were not incorporated into the contract because the RESPONDENT's terms were not accepted in any offer or counter-offer nor were the terms made sufficiently available.[36]

The RESPONDENT only made reference to their terms twice during the negotiations, in the first reference requesting the CLAIMANT Google search their "technical descriptions as well as our conditions"[37] and on the second occasion referring to their terms and conditions without providing a means of access to them.[38] A good faith attempt to incorporate their standard terms would require the RESPONDENT to properly convey their standard terms to the CLAIMANT.[39]

3.4. IN THE ALTERNATIVE, SHOULD BOTH STANDARD TERMS HAVE BEEN INCORPORATED AND NOT EXCLUDED, THE RESPONDENT'S STANDARD TERMS DO NOT APPLY BECAUSE THEY HAVE BEEN EXCLUDED BY THE CLAIMANT.

Under the PICC, where both parties have used standard terms only those which are common in substance will form part of the contract,[40] with the rest excluded through the 'knock-out' rule.[41] However, an exception arises when one party clearly indicates

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[36] PICC, *Official Commentary*, p 321.

[37] Exhibit 3.

[38] Exhibit 10.

[39] PICC, *Off. Cmt*. p 324.

[40] PICC, Art 2.1.22.

[41] PICC, *Off. Cmt*. 3 to Art 2.1.22.

that they do not wish to be bound by a contract not on their standard terms.[42] The CLAIMANT had clearly indicated such intent.

The CLAIMANT opened negotiations by including a link to their terms and conditions[43] and further urged that the RESPONDENT should see their terms and conditions.[44] Moreover, the CLAIMANT had adopted terms from its standard terms in the order form[45] which reinforces that the CLAIMANT will only agree to the contract if their standard terms are met.

3.5. IN THE ALTERNATIVE, A 'LAST SHOT' ANALYSIS WOULD BE PREFERABLE IN DETERMINING THE APPLICABLE TERMS TO A 'KNOCK OUT APPROACH.

The 'knock out rule' encapsulated in Article 2.1.22 of the PICC deals with conflicting standard terms and its use is justified by the idea that parties do not generally look at each other's standard terms, thus making it fair to eliminate conflicting ones.[46] However, it is clear in these circumstances that both parties have noted the other party's standard terms.

The 'last shot' approach is appropriate when there have been a series of offers and counter-offers in which the contract concludes when one party has commenced

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[42] PICC, Art 2.1.22.

[43] Exhibit 1.

[44] Exhibit 13.

[45] Exhibit 9.

[46] K C Stemp, "A Comparative Analysis of the 'Battle of the Forms'", *Transnational Law and Contemporary Problems* 2005, 243-286.

performance.[47] The CLAIMANT made an offer on February 5 through the attached order form in which the RESPONDENT sent a counter-offer on 20 March 2011 referring to their own terms and conditions[48] that materially affected the terms, namely the price. The CLAIMANT sent another counter-offer noting their terms and conditions. Pursuant to their proviso that the remaining 1000 cars are to be delivered upon silence from the CLAIMANT a week after the receipt of the sample car,[49] the contract was enlivened on 17 June 2011. The party to last send their standard terms was the CLAIMANT.

Such an analysis of the parties' intentions can also be borne out by the parties' conduct. The phone call referred to on 25 March 2011 between the RESPONDENT and the CLAIMANT suggests that the CLAIMANT had agreed to the RESPONDENT's terms as they have complied with CIF-like conditions by loading the car onto the ship[50] indicating the RESPONDENT had accepted the CLAIMANT's terms.

3.6. ALTERNATIVELY, IF THE 'KNOCK-OUT' DOCTRINE IS APPLIED, TERMS WILL BE DECIDED BY (I) LOOKING AT THE INTENTIONS OF THE PARTY AND (II) REFERRING TO THE PICC.

A 'knock-out' approach will bind the parties to terms they have negotiated with and common standard terms and eliminate the conflicting terms. As such, it will exclude the standard terms found in the CLAIMANT and RESPONDENT's terms and

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[47] PICC, Art 2.1.11

[48] Exhibit 10.

[49] Exhibit 9.

[50] Exhibit 11.

conditions pertaining to the following: applicable INCOTERMS, price agreement, responsibility for consequential loss.

The proviso 'Once we receive the sample we will test it and unless we find it unsatisfactory will expect the remaining cars to be sent by December 1, 2011'[51] is a non-standard term as it was negotiated by the CLAIMANT and thus cannot be 'knocked out'.

The intention of the parties indicated that the CLAIMANT's standard terms were to apply. The transaction for the sample car was executed in a method according to the standard terms of the CLAIMANT. The shipping of the sale car was completed in a CIF fashion, in which the RESPONDENT confirms that they have loaded the car onto the SS Herminia as agreed orally.[52] Under FAS conditions, the RESPONDENT would have left the sample car at the loading dock.

In regards to the price of the cars, the discount term was part of the order form that the RESPONDENT accepted.[53] Thus the discount of 2% for orders of more than $10 million applies.

According to Art 7.4.2 of the PICC, the aggrieved party will be entitled to full compensation, including loss of profits. It follows that the RESPONDENT would be responsible for consequential loss.

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[51] Exhibit 8

[52] Exhibit 11.

[53] Exhibit 9.

4. THEIR ARE NO GROUNDS FOR THE RESPONDENT TO RELY ON MISTAKE TO JUSTIFY NON-PERFORMANCE OF THE CONTRACT

4.1. THE RESPONDENT CANNOT RELY ON MISTAKE TO JUSTIFY THEIR NON-PERFORMANCE OF THE CONTRACT AS THERE WAS NO MISTAKE BY THE CLAIMANT

It was clearly stated in the order form sent by the CLAIMANT that the order for the remaining 1000 cars would be enlivened should there be no notification of dissatisfaction with the sample car within one week of the receipt of the car.[54] The RESPONDENT subsequently acknowledged the order form.[55] After the CLAIMANT informed the RESPONDENT they had received the car,[56] there was no other correspondence until 2 months later.

Further, silence by the CLAIMANT does not invalidate the contract as, although silence is generally not regarded as acceptance in the PICC, any express terms agreed by both parties will prevail.[57] Both parties agreed to enliven the contract for the 1000 cars if the CLAIMANT was not dissatisfied. From the phone conversation where the CLAIMANT had expressed their satisfaction with the specification of the sample car, it is clear that the CLAIMANT was of the intention to enliven the contract upon receipt of the sample car.

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[54] Exhibit 9.

[55] Exhibit 10.

[56] Exhibit 13.

[57] CISG, Art 6.

4.2. IN THE ALTERNATIVE, THE RESPONDENT CANNOT RELY ON MISTAKE TO AVOID THE CONTRACT AS THE CLAIMANT DID NOT MAKE, CAUSE OR KNOW OF THE MISTAKE.[58]

The CLAIMANT did not at any point believe anything other than that the contract would be enlivened if there was no communication of dissatisfaction nor did they know the RESPONDENT was under this mistake. The CLAIMANT did not make this mistake either as their intentions were clear from their order form. Further, they reiterated this proviso in their further correspondence.[59]

5. THE RESPONDENT IS LIABLE TO PAY DAMAGES UNDER ARTICLE 7.4.1 FOR FAILURE TO PERFORM THE CONTRACT.

5.1. THE RESPONDENT FAILED TO PERFORM ITS CONTRACTUAL OBLIGATIONS BY BEING UNABLE TO PROVIDE 1000 CARS.

It is adequate that the CLAIMANT prove non-performance. In particular, it is not necessary to prove in addition that the non-performance was due to the fault of the non-performing party.[60]

The RESPONDENT failed to perform the contract when they stated they were unable to provide the agreed remaining 999 cars.[61] They were only able to provide 100 cars which were not accessible by the nominated ship SS Herminia.

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[58] PICC, Art 3.2.2(1)(b).

[59] Exhibits 7 and 8.

[60] PICC, *Off. Cmt.* to Art 2.1.19.

[61] Exhibit 15.

5.2. THE CLAIMANT IS ENTITLED TO FULL COMPENSATION FOR THE HARM SUSTAINED FROM NOT RECEIVING 1000 CARS, INCLUDING THE FUTURE LOSS OF THE PROFIT FROM SELLING THE CARS, AS IT ESTABLISHED WITH A REASONABLE DEGREE OF CERTAINTY AND WAS FORESEEABLE TO OCCUR HAD THE RESPONDENT FAILED TO PERFORM

The CLAIMANT has sustained economic harm from the lost profits that would have been obtained from selling 1000 electric cars. There was a reasonable degree of certainty that the CLAIMANT would make profits from the sale of electric cars as this was a new market in a "very environmentally conscious country with a good road network". In fact, it was noted on 20 August 2011 that the cars had "become very popular".[62]

Foreseeability is considered in conjunction with degree of certainty at the time of the conclusion of the contract and by the non-performing party.[63] It was clearly foreseeable that the CLAIMANT would not be able to gain any profits if the RESPONDENT failed to deliver the cars, especially when the CLAIMANT advised the RESPONDENT that they anticipated yearly sales reaching 10 000 cars.[64]

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[62] Exhibit 16.

[63] PICC, *Off. Cmt.* to Art 7.4.4.

[64] Exhibit 1.