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 RESPONDENT

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ARGUMENTS AS TO JURISDICTION

1. **Clause 12 of the Claimant's standard terms and conditions is not applicable to the dispute**

The Claimant's Clause 12 at Exhibit 13 (**Clause 12**) is not applicable to the dispute because it is inherently unworkable, inoperable and inconsistent (1.1). Furthermore, Clause 12 does not apply to the dispute as it has not been made a part of the contract (1.2). If the tribunal is with us under either or both 1.1 and 1.2 then CIETAC does not have jurisdiction to administer the arbitration under this clause (1.3).

1.1 Clause 12 of the Claimant's standard terms and conditions is inherently unworkable, inoperable and inconsistent

Clause 12 cannot form the basis of any arbitration agreement between the parties because it is inherently inoperable, unworkable and inconsistent.[1] Clause 12 refers to a non-existent arbitral institution, provides an uncertain reference to conciliation and does not specify which arbitration rules are to apply. The clause is not capable of being construed with sufficient certainty to form an arbitration agreement.[2] Such interpretation of Clause 12 is consistent with the UNIDROIT *Principles of*

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[1] *Lucky Goldstar International (HK) Ltd v Nag Moo Kee Engineering Ltd* [1993] HKCFI 14; *X v. Y*, case no: 4A_246/2011, Swiss Federal Supreme Court, Switzerland, Judgment of 7 November 2011; *Sulamerica CIA Nacional De Seguros S.A and Others v Ensea Engenharia S.A and Others* [2012] EWCA Civ 638 (***Sulamerica***).

[2] *X v. Y*, case no: 4A_246/2011, Swiss Federal Supreme Court, Switzerland, Judgment of 7 November. 2011; *Sulamerica* [2012] EWCA Civ 638.

International Commercial Contracts 2010 (**PICC**), which the parties have expressly chosen as the governing law of the contract (Exhibits 10 and 13).

Additionally, as Clause 12 does not provide a valid arbitration agreement under the law to which the parties have subjected it, any arbitral award premised on an arbitration agreement evidenced solely in Clause 12 will not be enforceable.[3]

1.2 Clause 12 does not apply to the dispute because it has not been made a part of the contract

The UNCITRAL Model Law 1985 as adopted in 2006 (**Model Law**)[4] provides that a reference in a contract to any document containing an arbitration clause will constitute an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.[5] However, clause 12 does not meet this requirement. It forms part of the Claimant's standard terms and conditions which, as argued below, were not incorporated into the contract (4.1). Furthermore, there was no express, implied or imputed acceptance of Clause 12 that can be drawn from the circumstances.[6]

1.3 CIETAC does not have jurisdiction to conduct this arbitration under Clause 12

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[3] *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Art. V (1)(a), *Arbitration Law of the People's Republic of China,* Art 18

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

[5] Model Law, Art. 7(6) [option 1].

[6] CISG, Art. 18.

CIETAC does not have jurisdiction to conduct arbitration under the claimant's Clause 12. CIETAC's jurisdiction is only enlivened where the arbitration agreement refers specifically to CIETAC (including by its former names).[7]

CIETAC has not previously gone by the name "China Trade Commission" and the term could reasonably have referred to a number of arbitral institutions. In the absence of the parties' agreement, CIETAC does not have jurisdiction under Clause 12. Even where "China Trade Commission" is construed as referring to CIETAC, Clause 12 was not a part of the contract and therefore did not form the basis of any arbitration agreement.

2. **The Respondent's Clause 9 is a valid arbitration clause and is the basis of the arbitration agreement between the parties.**

Clause 9 of the respondent's terms and conditions at Exhibit 4 (**Clause 9**) is a valid arbitration clause. The clause outlines what disputes that will be arbitrated and the parties to the agreement within the defined legal relationship of contract. As argued below (4.2), Clause 9 is validly incorporated into the contract.

Clause 9 provides for arbitration in accordance with the SIAC rules at one of two venues that is to be determined by the claimant in the event of a dispute. The absence of a specified seat or arbitral institution does not invalidate the clause as the intention

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[7] *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 (**CIETAC Rules**).

of the parties can be ascertained by contractual interpretation in accordance with the PICC.

SIAC rules provide that the seat of the arbitration is to be Singapore failing agreement between the parties.[8] Arbitration in Cadenza or Hong Kong is not inconsistent with the SIAC rules.[9]

The requirement that arbitration is conducted in accordance with the SIAC rules creates a strong presumption that SIAC is to be the arbitral institution responsible for the administration of the arbitration. In the alternative, the clause permits arbitration through any arbitral institution or ad hoc arbitration providing such institution or tribunal is capable of conducting the arbitration in accordance with the SIAC rules.

Clause 9 requires that the arbitration be administered in accordance with the SIAC rules and as this tribunal has not been constituted in accordance with those rules this tribunal does not have jurisdiction.[10]

3. **In the alternative, if Clause 9 is not exclusively applicable, a separate and valid arbitration agreement was concluded between the parties.**

Both Clause 9 and Clause 12 were contained within standard terms and conditions that each party presumably uses as part of their standard business practice. Where the parties have reached agreement except on standard terms, the terms that are common

[8] SIAC Rule 18.1

[9] SIAC Rule 18.2

[10] CIETAC Rules, Art. 3(3)

in substance will form part of the contract and the contentious or not agreed terms do not form a part of the contract.[11]

Both Clause 9 and Clause 12 are common in substance to the extent that they provide for arbitration in Cadenza for any dispute arising out of or in connection of the contract. In this respect the parties have evidenced a valid arbitration agreement in writing.[12] As the parties have agreed on the venue of arbitration as being Cadenza the tribunal ought to be conducted in Cadenza.[13]

The aspects of the clauses that are not common in substance are the arbitration institution named to administer the arbitration, the seat of the arbitration and the rules of the arbitration. The tribunal may determine the rules of procedure and the seat of arbitration.[14] Failing agreement between the parties, the tribunal ought to find that the seat of the arbitration is Cadenza as both parties have selected Cadenza as the venue of arbitration, the law of Cadenza has a close and real connection with the dispute and it is supported by award enforcement considerations.

ARGUMENTS AS TO THE MERITS

4. The Respondent's standard terms and conditions apply to the dispute

While both parties used 'standard terms' in negotiations, only the Respondent's were wholly incorporated into the contract (4.1, 4.2). Application of the PICC to the 'battle

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[11] PICC, Art. 2.1.22

[12] UNCITRAL Art 7

[13] UNCITRAL Art 20

[14] UNCITRAL Art 19 and 20(1)

of forms' between the remaining standard terms favours those of the Respondent (4.3, 4.4).

4.1 The Claimant's standard terms, other than those in its order form, were not incorporated into the contract

The first reference (Exhibit 1) to the standard terms is insufficient because it does not expressly reference their existence, but merely provides a URL beneath the signature line.[15]

The second reference is insufficient because it occurs after the contract had already been concluded. The Claimant's letter of 5 February 2011 (Exhibits 8 and 9) constituted an offer because it was sufficiently definite and indicated an intention to be bound.[16] The Respondent's letter of 20 March 2011 (Exhibit 10) constitutes a counter-offer under the PICC because it materially alters the terms of the Claimant's offer.[17] The counter-offer was accepted by the Claimant when they gave instructions for the sample car to be loaded on the SS Herminia and made payment for it.[18] This occurs during the phone call of 21 March 2011 (Exhibit 11). The Respondent only mentions its standard terms in the letter of June 10 2011 (Exhibit 13).

4.2 The Respondent's standard terms were incorporated into the contract

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[15] PICC, Off. Cmt. 3 to Art 2.1.19.

[16] PICC, Art. 2.1.3; CISG, Art. 14(1).

[17] PICC, Art. 2.1.11.

[18] PICC, Arts. 2.1.1, 2.1.6. Cf, CISG, Art. 18(3).

The first reference instructs the Claimant to find the Respondent's conditions on its webpage by 'Googling' the company name (Exhibit 3). This is sufficient to incorporate the Respondent's standard terms because, first, it directly references the existence of the standard terms.[19] Second, while the Respondent does not directly provide a copy of, or link to, the standard terms, a public website provides sufficient availability of the terms to the Claimant. The second reference (Exhibit 10) again explicitly mentions the existence of standard terms.

4.3 Not all of the remaining standard terms are 'knocked out'

The Claimant's order form includes standard terms as to 'Discount', 'Shipment', and 'Return of goods' (Exhibit 9). The remainder are not standard, because they reflect the negotiation of the parties.[20] Under the PICC, where both parties have used standard terms only those which are common in substance will form part of the contract,[21] with the rest excluded through the 'knock-out' rule.[22] There are two relevant exceptions.

First, a non-standard term will prevail over a standard term where there is conflict.[23] In Exhibit 10, the Respondent referred to the Claimant's order form and advised that its terms were FAS and that the governing law was the PICC (Exhibit 10).

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[19] PICC, Off. Cmt. 3 to Art 2.1.19.

[20] PICC, Art. 2.1.19(2).

[21] PICC, Art. 2.1.22.

[22] PICC, Off. Cmt. 3 to Art 2.1.22.

[23] PICC, Art. 2.1.21.

Second, the knock-out rule does not apply where a party without undue delay informs the other party that it does not intend to be bound by the standard terms.[24] Exhibit 12 states, contrary to the Claimant's order form, that the Claimant must bear the cost of returning the sample car or selling it at a loss.

The cumulative result is that the Respondent's Clauses 4 applies, and neither the Claimant's 'Shipment' nor its 'Return of goods' terms apply.

4.4 The application of the knock out doctrine to the remaining terms favours the Respondent

The remaining standard terms are subject to the knock out rule. The resultant gaps are filled by reference to the usage and practices of the parties[25] and, failing that, the terms of the PICC itself.[26]

Clause 6 will, in substance, apply rather than the Claimant's 'Discount' term because there is no established usage between the parties that a discount would apply to the purchase of the cars. In fact, the Respondent offered a 2% discount as a 'good will gesture' (Exhibit 17), leading to the inference that it is exceptional rather than normal to offer a discount.

Clause 7 will, in substance, apply because the treatment of the sample car demonstrates that the Respondent is unwilling to accept consequential liability for the

[24] PICC, Art. 2.1.22.

[25] PICC, Art. 1.9.

[26] PICC, Art. 1.6(2).

goods it provides. Any loss on resale of the sample car is to be borne by the Claimant (Exhibit 12), establishing a practice also relevant to the balance of 999 cars.

Clause 11 will, in substance, apply because it is a core obligation for purchasers under an FAS contract to arrange for carriage of the goods, including nominating the ship.[27]

5. **The contract between the Claimant and the Respondent is not valid**

The Respondent was under a mistaken assumption of fact (5.1), which entitled it to avoid performance of the contract (5.2) and made the contract invalid in its entirety (5.3).

5.1 The Respondent's assumption that notification of confirmation of the order was required amounts to a mistake of fact

Under the PICC, the Respondent was under the mistaken assumption that the Claimant would send confirmation of its decision to proceed with the order of the balance of the 999 cars (Exhibit 15).[28]

This constitutes a relevant mistake because, first, the Respondent would not have concluded the contract on these terms.[29] Given that time was of the essence to complete the transaction by 1 December 2011 (Exhibit 5), the Respondent would have had to accept the risk of immediately preparing the cars for shipment by this date, without any certainty that the Claimant would in fact proceed with the transaction.

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[27] FAS INCOTERMS 2010, B3.

[28] PICC, Art. 3.2.1.

[29] PICC, Art. 3.2.2(1).

Second, the Claimant caused or knew, or ought to have known, about the mistake. This is because they never explicitly established that silence could enliven the purchase of the 999 cars, only that satisfactory performance assessment of the cars was an event upon which performance of the contract was conditional.[30] Given the size of the transaction, the Applicant knew or ought to have known that it was essential to either communicate the outcome of its testing of the sample or to establish unambiguously that silence was sufficient.

Third, for the reasons outlined above, it would be contrary to reasonable commercial standards of fair dealing to leave the Respondent in error as to whether actual communication was necessary.[31]

5.2 The Respondent was entitled to avoid performance of the contract

Exhibit 15 gave notice to the Claimant that the Responded had avoided performance of the contract on grounds that it did not know that the order had been enlivened.[32] This occurred as soon as the Respondent became aware that the Claimant assumed that it had been enlivened.[33] Because avoidance takes effect retroactively,[34] the contract is invalid from formation.

5.3 The contract is invalid in its entirety

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[30] PICC, Art. 5.3.1.

[31] PICC, Art. 3.2.2(1)(a).

[32] PICC, Art. 3.2.11; PICC, Off. Cmt. 2 to Art. 3.2.11.

[33] PICC, Art. 3.2.12.

[34] PICC, Art. 3.2.14.

While the ground of avoidance only concerns the date at which the order was enlivened, the mistake as to this term means that it is unreasonable to uphold the original bargain.[35] This is because, according to the Claimant, the order was enlivened 7 days after receipt of the sample car - 17 June 2011 (Exhibit 13). The Respondent only became aware that the order was enlivened upon receipt of the Claimant's letter of 10 August 2011 (Exhibit 14). Given the time sensitive nature of the transaction and the fact that the Respondent has only finite manufacturing capacity, the delivery of 999 cars by 1 December 2011 was simply impossible at the later date.

6. **In the alternative, the Respondent is not liable to pay damages under Article 7.4.1**

The Claimant has not suffered any direct loss and may only claim consequential loss for loss of profits (6.1). Such losses have been excluded by contract between the parties (6.2). In any event, the Claimant's harm is not recoverable because it is not reasonably certain (6.3). Alternatively, the Respondent is not liable to pay damages because the Claimant made performance of the contract impossible (6.4) and did not permit the Respondent to cure the non-performance (6.5).

6.1 The nature of the harm suffered by the Claimant

As the Claimant's harm is in the nature of 'consequential losses' or 'loss of profits',[36] for losing the chance to bring the Respondent's 'Gardener's Model' electric car to the Minuet market before its rivals.

6.2 'Consequential damages' such as loss of profits have been excluded by contract

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[35] PICC, Art. 3.2.13.

[36] PICC, Off. Cmt. 3 to Art. 7.4.2

Under the PICC, a party is entitled to full compensation for harm sustained by the other parties non-performance.[37] However, as argued above, the Respondent's Clause 7 is incorporated in substance into the contract and excludes the liability of the Respondent for "consequential damages including loss of profits". Such agreements are routinely upheld in common law jurisdictions as representing the parties' agreement as to the allocation of risk of economic loss if the contemplated transaction is not completed.[38] It is not 'grossly unfair' to hold the parties to this bargain.[39]

6.3 The Claimant's harm is not reasonably certain

The Claimant has never dealt with electric cars, having previously been involved with solar panels and wind turbines (Background Information). As such, it is not reasonably certain how much harm it has suffered, or even whether it has suffered harm at all, from the loss of chance to be first to market with the 'Gardener's Model'.[40]

6.4 Alternatively, the Claimant cannot recover damages because it made performance of the contract impossible

As argued above, it was a term of the contract that the Claimant had to nominate a ship which could load out of Cadenza, Cantata and Piccolo. The Claimant failed to do this, nominating an inappropriate ship which could not load from all of these ports (Exhibits

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[37] PICC, Arts. 7.4.1 & 7.4.2.

[38] See, e.g., *Metropolitan Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 84 N.Y.2d 430, 436.

[39] PICC, Art. 7.1.6.

[40] PICC, Art. 7.4.3.

13 and 17). This made performance of the contract impossible,[41] because the Respondent used at least two of the ports to ship cars.

6.5 Furthermore, the Claimant did not allow the Respondent to cure the non-performance

The Respondent offered to supply the Claimant with 400 cars in substitution for the original agreement for 999 cars (Exhibit 17), which was rejected by the Claimant on grounds that the market would be flooded by the time the contract was entered in to (Exhibit 18). In the circumstances, this is an appropriate cure for non-performance of the original agreement.[42] Given that the contract for the 400 cars would be entered in to within the period originally contemplated for delivery of the cars, the Claimant has no legitimate interest in refusing cure.[43]

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[41] PICC, Art. 7.1.2.

[42] PICC, Art. 7.1.4.

[43] PICC, Art. 7.1.4(1)(c).