**THE INTERNATIONAL ADR MOOTING COMPETITION**

**HONG KONG – JULY 2012**

# MEMORANDUM FOR RESPONDENT

## Team Number: 008

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# INDEX OF TERMS AND ABBREVIATIONS

| | |
|---|---|
| ¶ | Paragraph of Problem |
| AC | Law Reports, Appeal Cases (Third Series) |
| App Cas | Appeal Case in the United States |
| Ass. Ltd. | Association Limited |
| CIETAC | China International Economic and Trade Arbitration Commission |
| Claimant | Longo Imports |
| Co. | Corporation |
| Chan | Chan Manufacturing |
| CP | Law Reports, Common Pleas |
| EWHC | England and Wales High Court |
| ICC | International Court of Arbitration |
| Longo | Longo Imports |
| MLJ | Malaysian Law Journal |
| Mr. | Mister |
| NY Convention | New York Convention |
| Pg. | Page |
| QLR | Quinnipiac Law Review |
| Respondent | Chan Manufacturing |
| SIAC | Singapore International Arbitration Commission |
| UNCITRAL Model Law | United Nations Convention on International Trade Law |
| UNIDROIT | Institut International Pour L'Unification du Droit Prive 2010 |

# INDEX OF ARBITRAL AWARDS AND JUDICIAL DECISIONS

**ICC International Court of Arbitration**

Court: ICC International Court of Arbitration

Number:

Date: 09. 10.2006

Available at: http://www.unilex.info/case.cfm?id=1177

Cited as: European Company (2006)

**Russia**

Court: 13th Arbitrazh Appellate Court

Number: ?56-56366/2008

Date: 05.06.2009

Available at: http://www.unilex.info/case.cfm?id=1600

Cited as: Sanesta-Metall v TFZ (2009)

**Serbia**

Court: Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce

Number: T-9/07

Date: 23.01.2008

Available at: http://www.unilex.info/case.cfm?id=1442

Cited as: Claimant of Italy vs. Respondent of Serbia (2008)

# STATEMENT OF FACTS

Longo Imports **(CLAIMANT)** is a company headquartered in the Minuet. Chan Manufacturing **(RESPONDENT**) is a company incorporated by Mr. Chan and headquartered in Cadenza which manufactures electric cars.

On 5 February 2011 Claimant and Respondent executed a sales and purchase agreement **(AGREEMENT)** under which Claimant agreed to purchase 1000 electric cars from the Respondent. However, the terms stipulated that the Claimant wanted a sample car before proceeding to the rest 999 cars.

In August 2011, the Claimants noted the Respondent that SS Herminia is nearing Cadenza and expecting the 999 cars. The Respondent contended that as the Claimant did not notify them of their intention to continue with the rest 999 cars, it is assumed that the Claimant do not wish to proceed. However, the Respondent pointed out that they have 100 cars available, and the Claimant agreed to accept it as a form of mitigation. The Claimant alleged that they wish to take action against the Respondent for breach of contract.

The Respondent on the other hand pointed out that the Claimant had failed to appoint a vessel that can dock at Cadenza, Piccolo and Cantata; as the 100 cars was in Piccolo but SS Herminia was unable to dock there.

On 1 July 2012, the Claimant filed a notice of the dispute to the China International Economic and Trade Commission.

# PLEADINGS ON JURISDICTION

## I. THE TRIBUNAL HAS NO JURISDICTION OVER THE PRESENT DISPUTE

### A. THE AGREEMENT TO REFER TO ARBITRATION IN BEIJING MUST BE VALID UNDER CADENZAN LAW.

The jurisdiction of an arbitral tribunal is dependent on the validity of the arbitration clause stipulating its effect.[1] This being said, in order to determine the validity (or invalidity) of said arbitration clause, the first matter that must be addressed is that of the law governing the dispute.

Following the principle cited by Lord Diplock the case of *Amin Rasheed Shipping Corporation v Kuwait Insurance Co.*[2], the proper law of a contract may be understood as, "...the substantive law of the country which the parties have chosen as that by which their mutually legally enforceable rights are to be ascertained..."

In the case at hand, however, though both Claimant and Respondent in Exhibits 1 and 2 respectively have acknowledged arbitration in reference to Cadenza[3], a dispute nevertheless arises whereby the Respondent has offered, in his excerpt, the alternative reference to Hong Kong arbitration. In other words, though minute, there still exists an issue of conflict of laws.[4]

Having said this, the remedy to conflict of such nature is determined by satisfaction of the principle of *Lex Loci Solutionis* – the application of the law of the place where most relevant performance occurs.[5]

Relevant performance here is illustrated by the case of *Bonython v Commonwealth of Australia*[6] as the place where, "the contract has its closest and most real connection."

[1] Bonomi, A., & Volken, P. (2008). *Yearbook of Private International Law 2008.* Sellier European Law Pub 2009.
[2] [1984] AC 50 per Lord Diplock;
[3] Moot Problem, pg. 3 and 5.
[4] Lipstein, K. (1956). *The Cambridge Law Journal.* Cambridge University Press.
[5] Garner, B. A. (2001). *A Dictionary of Modern Legal Usage 2 ed.* Oxford University Press.
[6] [1951] AC 201.

In application, Cadenza is deemed to be the place of closest connection due to the fact that: (1) the port of loading is in Cadenza, (2) the subject matter resides in Cadenza and, reiterating the first issue on choice of law elected by the parties, both parties have expressed their intention to apply Cadenzan law anyway.[7]

This being said, Cadenzan law, having adopted the UNIDROIT 2010 Principles, the New York Convention and the UNCITRAL Model Law shall therefore apply.

## B. THERE WAS NO ACCEPTANCE BY *CHAN MANUFACTURING* TO THE PROPOSAL MADE BY *LONGO IMPORTS* TO ARBITRATE IN BEIJING.

According to the Malaysian case of *Usahasama SPNB-LTAT Sdn Bhd v Borneo Synergy (M) Sdn Bhd*[8], there must exist a consensus between contracting parties to be bound by the agreement to arbitrate. This consensus is not limited by outright expression alone as it may be inferred from the conduct of the parties.[9]

Failure to reach an agreement between parties, according to Article 36(1)(a)(iv)[10] of the UNCITRAL Model Law may work as a ground for refusal of recognition or enforcement of the arbitral award.

Having said this, however, by virtue of Article 16(1) of the same Model Law[11], it is necessary that the arbitration clause be treated as distinct and independent from the other terms of the main contract. This being the case, the conduct of the parties may be recognized as assenting to one agreement and not the other; thus, the doctrine of severability.[12]

In the present case, the Claimant, Longo Imports, had made an invitation to treat on the 5th of January, 2011.[13] The fact that this post was initiated as a mere invitation to treat rather than an actual; binding contract is proven based on the construction of the words themselves.[14] Invitation to treat is different from an actual offer in that it only indicates a party's

[7] Moot Problem, pg. 3 and 5
[8] [2009] 2 MLJ 308.
[9] Mustill, M. J., & Boyd, S. C. (1989). *The Law and Practice of Commercial Arbitration in England.* Butterworths.
[10] Article 36(1)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration.
[11] Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration.
[12] Tao, J. (2005). *Resolving Business Disputes in China.* The Hague: Kluwer Law International.
[13] Moot Problem, pg. 2.
[14] Article 4.1(2) of the UNIDROIT Principles.

willingness to *negotiate* a contract, instead of their willingness to *enter* into one on the immediate instance that the other party expresses his acceptance.[15]

The usage of the phrase, "we expect to be offered a very good price," alongside the rest of the letter being worded in such a way that the Claimant is merely explaining his position as an importer of small cars, *"interested"* in placing an order from Chan Manufacturing, gives rise to the implication that, indeed, the whole purpose of Exhibit 1 in the first place is to declare their intention to buy *only should* they be offered a good price.

In support of this contention is the principle laid down by the case of *Harvey v Facey*[16] whereby a mere indication of interest to enter into contract *should* the sale price be a good one may be regarded as an invitation to treat.

This being said, despite having attached an excerpt of a web page containing terms and conditions (their arbitration clause being one of these terms), this entire document delivered by Longo Imports to Chan Manufacturing does not amount to a legally binding contract.

To expand on this matter further, as no recurring mention of the Claimant's arbitral clause is seen to be brought up, it is implied via their conduct that Longo Imports accept all other agreed terms (discussed later in Pleadings of Terms of Contract) except that of the arbitration clause (as no agreement had been reached).[17]

Whatever the case, there arises an issue of invalidity of Longo's arbitration clause. On this point, therefore, as the jurisdiction of an arbitral tribunal is to rely on the validity of said arbitration clause, the tribunal, too, ought to be denied its competence in enforcing any awards between the parties.

## II. EVEN IF THERE EXISTED ACCEPTANCE TO ARBITRATE ON THE RESPONDENTS BEHALF, THE CLAIMANTS THEMSELVES ARE IN BREACH OF THEIR OWN ARBITRAL CLAUSE.

[15] *Canadian Dryers Ass. Ltd. v Burton* (1920) 47 OLR 259.
[16] [1893] AC 552.
[17] *Wettern Electric Ltd. v Welsh Development Agency* [1983] QB 796.

On the chance that the tribunal is to decide in favor of an acceptance being nevertheless made in the creation of a valid arbitration agreement, the respondent submits that the Claimant's themselves are in breach of their own arbitration clause.

As per Clause 12 of their terms and conditions, "All disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination shall be conciliated. If no agreement can be reached it must be referred to arbitration in Cadenza using the relevant rules. The seat shall be Beijing and the language English."[18]

Making reference to this clause, if the tribunal were to look at the first sentence in particular, the Claimant had mentioned a reference to conciliation as a means to solving the dispute first.

This being the case, the Claimant is in breach of their own clause when they immediately went to the China Trade Commission, tendering their application for arbitration.[19]

The implication of this breach of condition, therefore, is that the Claimants themselves have no intention of being bound by their own arbitration clause. As a result, this non-intention shall enable the innocent party to repudiate the contract.

Such a situation is better exemplified in the case of *Rose & Frank Co v Crompton Bros*[20] in which Vaisey J had introduced the concept of a "Gentlemen's Agreement." According to him, "a gentlemen's agreement is an agreement which is an agreement not entered into between two parties, neither of whom is a gentlemen, with each expecting the other to be strictly bound, while he himself has no intention of being bound at all."

This being said, the fact that a gentlemen's agreement is not enforceable by nature would result in the arbitration clause being deemed invalid and not-enforceable, as well.

[18] Moot Problem, pg. 3.
[19] Moot Problem, pg. 20.
[20] [1925] AC 445 per Vaisey J;

# PLEADINGS ON CONTRACTUAL TERMS

## I. THERE IS NO CONTRACT OF SALE FOR THE 999 CARS.

### A. EXHIBIT 10 CONSTITUTES A COUNTER-OFFER

Requests made by the respondent constitute a counter-offer which invalidates the original offer made by the claimant.[21] One of the requests made is to have two separate contracts for the sample car and the remaining 999 cars. Acceptance to the new terms is shown when the claimant only paid for the sample car and not the remaining 999 cars. The contract of sale for the sample car is concluded when there is an offer by the respondent and an acceptance by the claimant where he has paid for the sample car.[22] However, there is no contract of sale for the remaining 999 cars as there is no order form forwarded to the respondent.

Therefore, the respondent has not breached the contract as there is no existence of a contract of sale between him and the claimant in the first place.

### B. SILENCE DOES NOT AMOUNT TO ACCEPTANCE

Even if there is a contract of sale for the 999 cars, silence cannot amount to an acceptance.[23] There must be some kind of positive act on Claimant's part to constitute an acceptance to the contract[24]. There is no legal basis on which to assume that the Claimant had accepted the contract when he remained silent within one week of receipt of the sample car. The Claimant has not made any kind of positive act with regards to ordering the remaining 999 cars as he has not paid for them where it is stated by the Respondent that the cars will only be loaded when they have received payment before sailing time.

Absence of positive acts constitutes no acceptance to the contract therefore there is no contract between the Respondent and the Claimant.

[21] Article 2.1.11 UNIDROIT Principles
[22] Article 2.1.6 UNIDROIT Principles
[23] *Felthouse v Bindley* (1862) EWHC CP J35
[24] Article 2.1.6 UNIDROIT Principles

## II. THE TERMS APPLICABLE IN THE CONTRACT ARE FREE ALONGSIDE SHIP (FAS)

### A. THERE IS AN ACCEPTANCE OF THE TERMS OF THE CONTRACT BY CONDUCT OF BOTH PARTIES.

The terms in the contract is applicable by mutual consent of both parties. Regardless of whether the contract indicates otherwise, the agreed terms in the contract shall prevail over the actual terms. Conduct by both parties to the contract shall be seen as an acceptance to the terms of the contract as stated under Article 2.1.6 of the UNIDROIT Principles. Therefore, as seen in this case, there is an acceptance when both parties carried out obligations based on the terms of FAS and not CIF terms[25].

Under the contract of FAS, the seller has to deliver the goods only 'alongside the vessel' so that the buyer could load them. On the other hand, the buyer must give the seller good and sufficient notice of the vessel's name and berth. Once both parties have agreed on the vessel, the goods shall be delivered alongside the vessel and the responsibility to load passes to the buyer and so does the risk of the goods. However, there is a slight modification made to the terms of the contract where the vessel is to be nominated by the Claimant and the port of loading is to be nominated by the Respondent which is in contrary with the actual terms of FAS where both obligations are to be carried out by the buyer. This does not affect the validity of the contract as this is a mere modification to the terms which is not against any law.[26]

### B. THE CLAIMANT HAS BREACHED THE CONTRACT WHEN HE FAILED TO NOMINATE A PROPER AND EFFECTIVE VESSEL THAT CAN DOCK AT PICCOLO.

The Claimant has failed to nominate an effective vessel which can dock at all three ports which are at Cantata, Candenza and Piccolo which has been clearly stated in Exhibit 11 by the Respondent. The Claimant has an obligation to nominate an effective and a proper vessel

[25] *Brogden v Metropolitan Railway Co* [1877] App Cas 686
[26] *Comptoir D'Achat v Luis De Ridder (The Julia)* (1949) AC 293 HL

to be able to take delivery of the 100 cars when they have been delivered alongside the vessel by the Respondent. Unfortunately, the Claimant has failed to ensure that the vessel nominated by them, named SS Herminia, to be able to dock at all three ports.

Even if the seller has the duty to arrange for lighters or carriers to carry the goods to the side of the vessel at sea if she is unable to dock at the port of loading, the Claimant has failed to give good and sufficient notice to the seller of the berth of SS Herminia at sea so that the Respondent has a chance to arrange for lighters or carriers to take the goods to the vessel.

### C. THE CLAIMANT HAS FAILED TO NOMINATE A SUBSTITUTE VESSEL

It is by implication that whenever a vessel is unable to dock at a nominated port, the buyer would have to nominate a substitute vessel.[27] The Claimant should have the knowledge that SS Herminia is unable to dock at the port of Piccolo before the nomination is made. Therefore, they should have nominated a substitute vessel which can dock at Piccolo. Due to the fact that there is still time for delivery to take place which is anticipated to be on December 1, 2011, the Claimant can nominate a substitute vessel which is effective[28] but failed to do so.

## III. THE RESPONDENT IS NOT LIABLE FOR DAMAGES FOR THE BREACH OF CONTRACT PURSUANT TO ARTICLE 7.4.1

### A. THERE IS NO CONTRACT BETWEEN THE RESPONDENT AND THE CLAIMANT.

Non-performance occurs when there is a failure by a party to perform any of its obligations under the contract, including defective performance or late performance.[29] The Claimant claimed that the Respondent has breached the contract of sale for 999 cars. However,

[27] *Agricultores Federados Argentinos Soc Co-op Ltd v Ampro Commerciale Industrielle et Financiere SA* [1965] 2 Lloyds Rep 157
[28] *ibid*
[29] Article 7.1.1 UNIDROIT Principles.

Respondent contends that such contract is not in existence as stated in the first ground that silence does not amount to acceptance.[30] Therefore, the seller is not bound by any contract thus Article 7.4.1 is not applicable because there was no non-performance as claimed by the Claimant.

## B. EVEN IF THERE IS A CONTRACT BETWEEN THE PARTIES THE RESPONDENT DID NOT BREACH THE CONTRACT.

Even if there is a contract between the two parties, the Claimant's claim of non-performance cannot stand as Article 7.1.2 states that non-performance which caused by the first party's act or omission. Here, failure to forward order form for 999 cars by the Claimant made it impossible for the Respondent to fulfil his obligations under the contract.[31] Furthermore, the Respondent contends that he has not breached his obligations due to *force majeure* under Article 7.1.7[32] where it is beyond his control when the Claimant failed to forward the order form. The Respondent has no obligation to ensure that the Claimant serve the order form for the 999 cars after he was satisfied test conducted on the sample car.

[30] Article 2.1.6(1) UNIDROIT Principles
[31] European Company (2006)
[32] Sanesta-Metall v TFZ (2009)

# REQUEST FOR RELIEF

Respondent respectfully requests the tribunal to find that:

1. The claimant arbitral clause is not applicable.
2. There is no valid arbitration clause.
3. The terms applicable to the contract of sale are FAS.
4. There is no valid contract between the parties.
5. The RESPONDENT is not liable for damages pursuant to Article 7.4.1.