THE THIRD INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG JULY - AUGUST 2012

MEMORANDUM FOR CLAIMANT

TEAM NUMBER: 011

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LIST OF ABBREVIATIONS

&	And
AC	Appeal Cases (L.R)
ADR	Alternative Dispute Resolution
All E.R	All England Reporter
ALR	Australian Law Reports
ARB	Arbitration
Art.	Article
BCA	Bermuda Court of Appeal
CB	Common Bench
CD	Comny's Digest
CIETAC	China International Economic and Trade Arbitration Commission
CISG	Convention on International Sale of Goods
Cl.	Clause
CLOUT	Case Law on UNCITRAL Texts
Co.	Company
Corp.	Corporation
Edn.	Edition
Ex.	Exhibit

Inc.	Incorporated
K.B.	King's Bench
Ll.L Rep.	Lloyd's Reports
Lloyd's Rep.	Lloyd's Reports
Ltd.	Limited
L.R.	Law Reports
NE	North Eastern Reporter (USA)
N.Y.	New York
N.Y.S.Ct	New York State Court
OJLS	Oxford Journal of Legal Studies
p.	Page
PICC	UNIDROIT Principles of International Commercial Contracts of 2004
QB	Law Reports: Queen's Bench Division
Rep.	Reports
Rev.	Reviewed
SC	Supreme Court
S.D.N.Y	Southern District of New York
SIAC	Singapore International Arbitration Commission
Supp.	Supplement

UML	UNCITRAL Model Law on International Commercial Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v.	versus
YBCA	Yearbook of Commercial Arbitration

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ARGUMENTS

1: CLAIMANT'S ARBITRATION CLAUSE IS APPLICABLE

This issue seeks to prove that of the two arbitration clauses in the dispute, it is Claimant's arbitration clause that will be applicable.

A. THERE IS AN EXISTENCE OF AN AGREEMENT TO ARBITRATE

The essential core of an arbitration agreement consists of nothing more than an obligation to resolve certain disputes with another party by arbitration and these rights and duties can be contained in nothing more than the word 'arbitration' included in a contract or letter. A valid agreement to arbitrate exists even in the absence of provisions regarding the arbitral seat, arbitral procedure, constitution of the arbitral tribunal and other similar matters.[1] The phrase arbitration clause in a contract is sufficient to establish a parties' agreement to arbitrate.[2] Furthermore, the intention to arbitrate is the dominant intention and frustration of that dominant intention is not permitted merely because the precise method of accomplishing that intent has become impossible.[3] It is clear from the correspondence between the parties that arbitration of disputes arising from the contract was a pertinent intention of both the parties.[4] Hence, there exists a valid agreement to arbitrate.

B. AMBIGUITY IN THE ARBITRATION AGREEMENT DOES NOT RENDER IT INVALID

There seems to be an ambiguity in the arbitration agreement, however, it does not lead to invalidation as long as the common intention to arbitrate the dispute is present[5]. In fact,

[1] Gary Born, *International Commercial Arbitration*, Volume 1, Kluwer Law International, 2009, p.486
[2] *C. N. A Reins Co. Ltd. v. Trustmark Insurance Co* 2001 WL 648948 at *6 (N.D. III 2001)
[3] *Ballas v. Mann*82 N.Y.S 2d 426, 446 (N.Y.S.Ct 1948)
[4] Ex.2Cl.12, Ex4.Cl.9
[5] *Bahuinia Corporation* v. China *National Machinery & Equipment Import & Export Corp*. 819 F. 2d 247

questions of arbitrability must be addressed with a healthy regard for the policies favouring arbitration[6]. Keeping this in mind, the arbitration agreement is to be considered valid because of the common intention of the parties to arbitrate.

C. THE CIETAC HAS JURISDICTION TO ADJUDICATE THE MATTER

In this dispute, there exists ambiguity as to the arbitral institution to govern the dispute. Claimant has approached the CIETAC as per their arbitration clause while Respondent has mentioned Cadenza or Hong Kong as the place of arbitration with the SIAC rules. If the ambiguity of the arbitration clause renders it impossible to identify the institution envisaged by the parties, the institution first seized may consider itself competent, unless of course a party claims that another institution was intended despite the imprecise wording of the clause.[7] As Claimant has filed an application first in the CIETAC for arbitration, it has jurisdiction applying the above principle. Thus, it can be concluded that Claimant's arbitration clause is applicable.

[6] *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth Inc*., 473 U.S. 614 (U.S.S.Ct 1985)
[7] Paris Court of Appeal, 1st civ. Ch., 28.10.1999, *Middle East Agricultural and Trading Cy Ltd.* v. *Avicola Bucuresti*, Rev. arb. 2002.175 (note T. Clay)

2: THE CLAIMANT'S ARBITRATION CLAUSE IS VALID

It is submitted that despite the Respondent's allegations, the arbitration Clause of the Claimant is valid, as it complies with all the essentials of a valid arbitration clause.

A. THE CONCEPT OF SEPERABILITY VALIDATES THE ARBITRATION CLAUSE EVEN IF THE CONTRACT IS DECLARED INVALID

The concept of seperability separates the arbitration clause from the main contract of which it forms the part and, as such, survives the termination of the contract. An arbitration agreement was a separate contract which is generally valid irrespective of the invalidity of the main contract.[8] The purpose of the contract may have failed, but the arbitration clause is not one of the purposes of the contract.[9] Hence, even if this Tribunal does not accept the validity of the terms of the Contract, considering the principle of separability, the arbitration clause will still remain valid.

B. ALL THE FORMAL REQUIREMENTS OF A VALID ARBITRATION CLAUSE ARE FULFILLED

It is submitted that all the requisites of an arbitration agreement have been fulfilled, thereby establishing its validity. There are certain prerequisites to establish the validity of an arbitration agreement.[10]

The Arbitration Clause, stands valid as there has been an exchange of letters by post between the parties which has envisaged the Arbitration Agreement. Such exchange of letters contemplating an arbitration agreement leads to an enforceable agreement.[11] Additionally the

[8] *Sojuznefteexport v. Joc Oil* (1990) XV YBCA 384, 407 *et seq* (BCA, 7.071989)
[9] *Heyman* v. *Darwins Ltd.* [1942] AC 356, p.374
[10] Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, 2009, 5 Edn., p.89
[11] *Sen Mar, Inc. v. Tiger Petroleum Corp.*774 F. Supp.879,882 (S.D.N.Y1991); Art. 7(1) & (2), UNCITRAL Model Law 2010; Art. II (2), NY Convention, 1958; XII Y.B. Comm. Arb. 511 (Swiss Federal Tribunal) (1987)

Arbitration Clause was contained in the general terms and conditions of the party, which was referred to in the exchange of letters between them. Hence, the prerequisite of the agreement being in writing is fulfilled.[12]

Furthermore, the essential of the clause relating to future or existing disputes is also fulfilled as the parties had agreed to resolve any prospective disputes arising out of or in connection with this contract by arbitration. In this case, the arbitration clause of the claimant was with reference to a prospective dispute [Ex.2 Cl.12].

The final essential that of the dispute relating to a defined legal relationship is concerned, is also fulfilled as the existing dispute arose out of a contract of sale between the parties, which was the result of a defined legal relationship.

Thus all the essentials of a valid arbitration clause being fulfilled, one cannot deny the validity of Claimant's arbitration clause.

C. THE TERMS OF THE CLAIMANT ARE NOT AMBIGUOUS

The Claimant's arbitration clause is free of any ambiguity because it specifies all the essentials imperative to an arbitration process.[13] Whereas, the Respondent's Arbitration Clause is ambiguous since it does not establish anything except the governing rules of the arbitration. If the ambiguity of the arbitration clause renders it impossible to identify the institution envisaged by the parties, the institution first seized may consider itself competent, unless of course a party claims that another institution was intended despite the imprecise

[12] *Commentary on UNCITRAL Model law* 2010, p.28
[13] *Supra* 12

wording of the clause.[14] As long as the parties have consensus to arbitration, the Arbitration agreement, is valid.[15]

Thus, the Arbitration Clause of the Claimant is not ambiguous and must be considered valid in light of the prevailing circumstances.

[14] *Supra* 7
[15] ***Supra*** 15

3: THE TERMS OF CLAIMANT ARE APPLICABLE

In the contract between the parties, it can be established that Claimant's terms are applicable.

A. EXEMPTION CLAUSE IS AGAINST THE DOCTRINE OF *PACTA SUNT SERVANDA*

The exemption clause of the seller[Ex.4 Cl.7] provided that the seller would not be responsible for the consequential losses. Art.7.1.6 UNIDROIT restricts a party's liability on the event of non performance if it is grossly unfair and causes injustice to the other party.[16] An exemption clause included in a standard term which was pre-drafted unilaterally is more likely to be unfair than a term that was negotiated individually.[17] If a breach by one party evinees "a deliberate disregard of his bounden obligations",[18] it will not be covered by an exemption clause.[19] The terms of Respondent restricts his liability on the event of non-performance. Such an exemption clause defeats the purpose of the contract since the party deprives itself from some major liabilities.

An exemption clause cannot be relied upon if the non-performance was the result of intentional conduct.[20] Respondent intentionally sold the cars without clarifying with the claimant and hence was unable to fulfil its obligations. Such non-performance was an intentional conduct, and thus Respondent cannot rely upon its exemption clause.

If Respondent is not liable to Claimant on the basis of that clause, it would cause grave injustice and would be unfair to the other party, leaving the Claimant remediless and

[16] See (1986) Study L- Doc 36, p 14 (draft Art 17) and (1992) CD (72) 6, p.6
[17] Stefan Vogenauer & Jan Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, p.765, para.19
[18] *Hai Tong Bank Co. Ltd.* v. *Rambler Cycle Co. Ltd.* [1959] AC 576,588
[19] *Alexander* v. *Ry Executive* [1951] 2 KB 882
[20] *Supra* 2 at p.763, para.14

incapable to recover damages for non-delivery. Hence, this clause of Respondent is against the general rule of *Pacta sunt Servanda*[21].

B. FIRST SHOT DOCTRINE SHALL BE APPLICABLE

The 'first shot doctrine' is a well recognized concept under many jurisdictions[22] and is based on a similar concept of Article 4 of CISG[23]. It states that whoever "fires" the "first shot" (i.e., the buyer) can dictate the terms of the contract more than the seller. The terms and conditions were first put-forth by Claimant relying on the 'first shot rule', Claimant has fired the 'first shot', hence, Claimant's terms shall be applicable.

Furthermore, accepting the purchase order, acting accordingly, issuing the letter of credit, not disputing or questioning anything, is a step taken towards the execution of the contract. This clearly reflects the intention of the offeree to be bound by the terms and conditions of the offeror. Claimant's terms are therefore applicable.

[21] Art.1.7, UNIDROIT Principles 2010
[22] Art.40, Chinese Contract Law.; Article 6:223(3) Dutch Civil Code
[23] André Janssen & Olaf Meyer, *CISG Methodology*

4: A VALID CONTRACT EXISTS BETWEEN THE PARTIES

An agreement produces legal consequences, which can either be induced by the manifestation of will structured as action and reaction 'by the acceptance of an offer' or deduced from 'conduct of the parties that is sufficient to show agreement'.[24]

A. THE OFFER PUT-FORTH BY CLAIMANT WAS VALID

To be deemed an offer, a proposal to conclude a contract not only must indicate intent to be bound by an acceptance but, must also be sufficiently definite.[25] Claimant intended to buy cars from Respondent, the intention was conveyed to them. The fact that, the parties, time and again referred to their standard terms in the correspondences, show their 'intention to be bound' which is the key ingredient that justifies the attribute of a binding legal force to the mutual agreement forming a contract.

For an offer to be sufficiently definite, parties need to specify what is required as performance.[26] Here, Claimant had sent an Order Form[Ex.9] where the quantity, price, delivery date, mode of payment, car model and such other specifications were provided, showing that the offer was sufficiently definite. The conditions of a valid offer are fulfilled.

B. PART-PERFORMANCE BY RESPONDENT AMOUNTED TO ACCEPTANCE

A statement made by or the conduct of the offeree indicating assent to an offer is an acceptance.[27] Art.2.1.6 allows implicit acceptance by conduct unless the offer indicates otherwise.[28] Conduct will amount to acceptance only if it is clear that the offeree did the act

[24] *Supra*17, p.217, para.2
[25]Art.14(1) CISG, Art.2.1.1, *Supra* 21; CLOUT Case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999]
[26] *Supra* 17, p.234, para.20
[27] Art.18, CISG
[28]Art.2.1.6(1), *Supra* 21

of alleged acceptance with the intention of accepting the offer. Once the conduct of the offeree has gone beyond mere preparation to perform, and amounts to actual part performance, it amounts to acceptance.[29] An offer to buy goods can be accepted by supplying them.[30] The agreement between the parties to enter into a buyer-seller relationship was determined once the sample car was delivered and the payment was made. Such conduct showed implied acceptance of the contract. This amounted to part performance of the contract. The moment the parties agreed for such a sale, the contract came into existence.

Preliminary negotiations are amongst the circumstances to be taken into account in interpreting a contract[31], and shall also include correspondences between the parties, internal documents and communications, webpages, etc.[32]

A contract can be concluded if one of the two parties starts performance despite the lack of congruent statements.[33] The counter-offers of the parties, with the common intention to enter into a contract, led to a concluded contract between the two. This was reflected by the conduct of the parties where they had partially performed the terms negotiated in their correspondences.

C. THE PARTIES HAD THE INTENTION TO BE BOUND BY THE CONTRACT

Factors that relate to the particular relationship between parties like preliminary negotiations, practices established between them, and their subsequent conduct are of particular weight in

[29] *Morrisson SS. Co*. v. *The Crown* (1924) 20 Ll.L.Rep. 283
[30] *Harvey* v. *Johnson* (1848) 6 CB 305
[31] Art.4.3, *Supra* 21
[32] *Supra* 17
[33] *Supra* 17 at p.279, para.4

establishing the intention of the first party and the knowledge of the other party.[34] This is normally the case if they act on the contract, perform and do not reject performance of the other party.[35] Request for firm sales contract, supply of the sample car, acceptance of the same, nomination of the ship[36]- all such conduct establish that the parties intended to conclude a contract.

Claimant promised to pay for 1000 cars on its delivery. Respondent had impliedly promised to supply the cars, after which the contract became a binding bilateral contract. None of the parties could withdraw from their liabilities thereafter.[37] It appears that whenever there is evidence that the parties have acted upon faith of a written document, the courts will prefer to assume that the document embodies a definite intention to be bound, and will strive to implement its terms.[38]

Thus, it is well established that not only the conduct of the parties reflected that there exists a contract, but also the parties had the intention to do so ever since Claimant inquired about the cars. Hence, there exists a valid concluded contract.

[34] Off Cmt 2 to Art. 4.3, p 121
[35] *Supra 17*, p.513, para.9
[36] [Ex.6,11,13]
[37] *The Unique Mariner* [1979] 2 Lloyd's Rep.37,51-2
[38] *Sweet & Maxwell Ltd.* v. *Universal News Services Ltd.* [1964] 2 QB 699

5: RESPONDENT IS LIABLE FOR DAMAGES FOR THE BREACH OF CONTRACT PURSUANT TO ARTICLE 7.4.1

Respondent has failed to perform his contractual obligations towards Claimant, hence, Claimant shall be entitled to damages for the following reasons:

A. TIMELY DELIVERY WAS OF ESSENCE OF THE CONTRACT

The parties have specifically mentioned in their correspondences that 'time is of essence' [Ex.5, 8, 10, 13], indicating that the contract had to be performed within a stipulated time period. Where specific performance order requires the non-performing party to perform but performance takes place at a later time than the stipulated date, the aggrieved party is entitled to recover damages in respect of the delay in rendering the promised performance '*…in commercial contracts for the sale of goods prima facie a stipulated time of delivery is of utmost essence...*' [39] Where a contractor for the manufacture and sale of goods provides for delivery of time fixed in the contract for the full completion thereof, and the seller fails to perform by the day so fixed, the buyer may insist on his strict legal right.[40]

Despite the understanding between the parties, Respondent failed to perform his obligations, which led to the breach of the contract, hence, Claimant is entitled to damages.

B. RESPONDENT AND NOT CLAIMANT IS LIABLE FOR DAMAGES

SS Herminia, the nominated ship turned out to be incapable of docking at Piccolo. However, such an error did not frustrate the matrix or the commercial purpose of the contract, as seaworthiness of a vessel is not a 'condition', but an 'intermediate/innominate' term. Breach

[39] *Supra 17*, p.869 para.4
[40] *Trainor Co*. v. *Amsinck & Co., Inc.* 236 NY 392, 395, 140 NE 931,932

of such a term would not give rise to a right to treat the charter-party as repudiated unless the conduct of the ship-owners, and the actual or anticipated consequences of the breach, was so serious as to frustrate the commercial purpose of the venture.[41] Therefore, such an error cannot lead to a 'breach of the contract' as it was merely an intermediate term in the contract.

A contract cannot expire unless the plaintiff has given proper notice of it.[42] Hence, without a proper notice Respondent cannot simply assume that Claimant did not want to proceed with the contract.

Respondent has committed a breach by non-performance of his obligations On the basis of such non-performance Claimant is entitled to damages.

C. CLAIMANT IS ENTITLED TO DAMAGE FOR THE LOSS OF PROFITS

Respondent committed a breach because of which Claimant failed to perform third party obligations resulting in a loss of profits. For awarding loss of profits, there must be a link between the harm and the non-performance.[43] 'Loss of profit is the benefit which would normally have accrued to the aggrieved party if the contract had been properly performed.'[44]

Respondent had the knowledge that Claimant had third party obligations of supplying the same cars. Failure on part of Respondent would make him liable to pay damages for loss of profits.[45] Furthermore, expenses for nominating a ship, fuel and port charges and similar miscellaneous expenses also reduce the profit-margin. Where the breach of contract causes loss of reputation, which in turn causes foreseeable financial loss to Claimant, he may recover

[41] *Hongkong Fir Shipping Co. Ltd v. Kawaski Kisen Kaisha Ltd.* [1962] 2 QB 26, p.62
[42] *Pearl Mill Company v. Ivy Tannery Co* (1919) L.R.1 K.B
[43] *Supra 17,* p.884 para.9
[44] Off Cmt 2 to Art 7.4.2, p.234
[45] *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd*.

damages for the financial loss[46]. Here, Claimant had to comply with the third party orders, but due to the non-performance by Respondent, Claimant failed to fulfil such obligations, which caused significant harm to Claimant's Goodwill. This further reduces the profit margin of Claimant, making Respondent liable for the same. Hence, Respondent is liable for all such damages.

[46] *Malik* v *Bank of Credit and Commerce International SA* [1998] AC 20 ;See the article *Enonchong* , which proceeded this decision (1996) 16 OJLS 617

RELIEF REQUESTED

Claimant respectfully requests that the Tribunal to find that:

- There is a valid Arbitration clause;
- There was a valid contract between the parties;
- Respondent has breached the contract; and
- Respondent is liable to pay damages for the non-performance.

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