THE THIRD INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG JULY- AUGUST 2012

MEMORANDUM FOR RESPONDENT

TEAM NUMBER: 011

LIST OF ABBREVIATIONS

AC	Appeal Cases (L.R)
ADR	Alternative Dispute Resolution
All E.R	All England Reporter
Art	Article
Beav	Beavan's Chancery Reports
CIETAC	China International Economic and Trade Arbitration Commission.
CB	Common Bench
Ch.	Law Reports: Chancery Division
CISG	Convention on International Sale of Goods
CLOUT	Case Law on UNCITRAL Text
CP	Common Pleas
Edn.	Edition
ICC	International Chamber of Commerce
KB	King's Bench
Ltd	Limited
p.	Page
PICC	UNIDROIT Principles of International Commercial Contracts of 2004

QB	Queens Bench
Rep.	Reports
SIAC	Singapore International Arbitration Centre
SDNY	Southern District of New York
Term Rep	Term Reports, English Bench
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v.	Versus

LIST OF AUTHORITIES

Redfern & Hunter	Law and Practice of International Commercial Sweet & Maxwell, London 2003.
H.G Beale	Chitty on Contracts 28th Edn, Sweet & Maxwell Limited, London, 1999.
Henri Motulsky	Volume 2- Etudes Et Notes Sur L'Arbitrage , 1974, 239
Zhao Xiuwen & Lisa A.	Reforming Chinese Arbitration law and Practices in the Global Economy, Higher Education press and Global Verlag, 2006
Charles Sukurs	Harmonizing the Battle of Forms, A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods, 34 VAND J TRANSNAT'L L.1481, 1512-13 (2001)
S Vogenauer	Commentary on the UNIDROIT Principles
Gary Born	International Commercial Arbitration, Volume 1, Kluwer Law International, 2009
Andrew Tweeddale	*Arbitration of Commercial Disputes, International and English Law and Practice*, Oxford University Press, New York, 2007
Julian D M Lew QC,	*Comparative International Commercial Arbitration*

Loukas A Mistelis, Stefan M Kroll	Kluwer Law International, 2004
Fouchard Gaillard Goldman	International Commercial Arbitration
Mustill and Boyd	Commercial Arbitration 2nd Edn.
Larry A. DiMatteo	International Sales Law: A Critical Analysis Of CISG Jurisprudence
Phillip Morgan	Battle of Forms, *Restating the Orthodox*, The Cambridge Law Journal, Volume 69, Issue 2, pg. 230
Chitty	Chitty on Contracts, Vol. I, 13th Edn., Sweet & Maxwell.
Michael Furmston	Cheshire, Fifoot & Furmston's Law of Contract, 15th Edn. Oxford University Press, 2007.
J Martin Hunter, Benjamin Pilling	Halsbury's Laws of England, Vol.2(3), Arbitration, 4th Edn.,

	Butterwoths, Lexis Nexis, 2003.
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	Vol. 41,
	Sale of Goods and supply of Services,
	4th Edn., Butterwoths, Lexis Nexis, 2005.
GH Treitel	The Law of Contract,
	11th Edn.
	Sweet & Maxwell, 2003.
Jill Poole	Case Book on Contract Law,
	8th Edn,
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Hugh Beale, Stefan Vogenauer	Cases, Materials and Text on Contract Law,
	2nd Edn.,
	Hart Publication, 2010

LIST OF CASES

Watkins-Johnson v. Bank Saderat Iran, Award no 429-370-1,(28 July, 1989)

ARGUMENTS

1: CLAIMANT'S ARBITRATION CLAUSE WILL NOT BE APPLICABLE

It is submitted by the Respondent that application of Claimant's Arbitration Clause will be erroneous.

A. THERE HAS BEEN NO VALID AGREEMENT TO ARBITRATE SINCE BOTH THE PARTIES HAVE CONFLICTING ARBITRATION CLAUSES

It is very clear from the dispute that both the parties are attempting to put forth arbitration clauses that are in complete conflict with each other. The only common factor here is their intention to arbitrate and nothing else. Conflicting clauses are considered as a notification of objection[1] and because of the hopeless conflict, no contract to arbitrate was made. Arbitration is a consensual process and depends upon the existence of a valid agreement to arbitrate.[2]Applying this principle to the present dispute, it cannot be said that there is a valid arbitration agreement between the parties because there has been no consensus as to the arbitration clause which is an imperative of an enforceable arbitration agreement.

B. JURISDICTIONAL POWERS HAVE NOT BEEN GRANTED TO THE TRIBUNAL BY THE PARTIES

The granting of jurisdictional powers to a tribunal is by the actual contractors who simultaneously confer upon the arbitral tribunal both its existence and jurisdiction.[3] Arbitrations derive their mandate from the consent and agreement of the parties; hence, it is

[1] *Lea Tai Textile Co. v. Manning Fabrics Inc.,* 411 F. Supp.140 (S.D.N.Y. 1975)
[2] *ICC Case No.7929*, XXV Y.B.Comm. Arb. 312,316 (2000)
[3] Henri Motulsky, Ecrits- Volume 2- Etudes Et Notes Sur L'Arbitrage , 1974, 239

the parties' consent that determines the scope, limit and areas of certitude of an arbitrator's authority and jurisdiction.[4]

However participating in the appointment of arbitrators doesn't preclude Respondent from raising the plea that the tribunal has no jurisdiction[5]. If there is no valid arbitration agreement, arbitration institutions have no jurisdiction over the dispute and the courts cannot enforce any award rendered by the arbitrators[6]. Arbitration rests on the will and consent of the parties' litigant.[7]According to the CAL, if the parties fail to reach an agreement on a designated arbitration commission, the arbitration agreement shall be void, even though parties clearly intended to settle their disputes by arbitration.[8] There has been no consent or approval on the part of the respondents for the appointment of the CIETAC. When simultaneous consent is absent in the appointment of a tribunal, it cannot have jurisdiction over the matter.

C. RESPONDENT'S ARBITRATION CLAUSE WILL BE APPLICABLE AND IN VIEW OF THIS IT IS THE SIAC THAT HAS JURISDICTION OVER THE DISPUTE

An offer to buy containing the purchaser's terms, which is followed by an acknowledgement containing seller's terms, which is followed by delivery, generally results in a contract on seller's terms, seller's terms being a counter offer.[9] In this case, no further documents were exchanged between the parties once the respondent put forth their terms and conditions. Moreover, claimant took delivery of the sample car. By this action of claimant, it is Respondent's terms that will become applicable. In furtherance of this, since Respondent's

[4] *Watkins-Johnson* v. *Bank Saderat Iran*, Award no 429-370-1,(28 July, 1989)
[5] Art.16(2), UNCITRAL Model Law, 2010
[6] Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration law and Practices in the Global Economy, Higher Education press and Global Verlag*, 2006, p.10
[7] *Reily v. Russell*, 34 Mo. 524, 528 (Mo. 1864)
[8] *Supra 6*
[9] Phillip Morgan, *Battle of forms: Restating the Orthodox*, The Cambridge Law Journal, Vol.69, Issue 2, p.230

arbitration clause is to be applied, it is the SIAC that now has jurisdiction to hear this case and not CIETAC.

2: THERE IS A VALID ARBITRATION CLAUSE

The parties have consented to arbitration; however, the various requirements of arbitration, pertaining to the arbitration clause are not fulfilled. It is hence contented that there is no valid arbitration clause as there is an ambiguity in the arbitration clause and there is no consensus between the parties with respect to the arbitration clause.

A. THERE IS AMBIGUITY IN THE ARBITRATION CLAUSE

There are certain essentials for an arbitration clause to be valid and applicable. There exists dissent over major issues like which arbitral tribunal holds jurisdiction and the seat of arbitration between the parties.

Both the parties have different arbitration clauses with different forums and procedural rules for resolving disputes. There have been no negotiations regarding the same and no conclusion has been arrived at. Hence, there is a high degree of ambiguity as to whose arbitration clause is to be followed. It is not possible to resort to arbitral proceedings without there being clarity pertaining to whose clause is applicable to the dispute. National courts in some developing countries have held that any ambiguity in the arbitration agreement invalidates the clause.[10]

B. THERE IS NO CONSENSUS BETWEEN THE PARTIES WITH RESPECT TO THE ARBITRATION CLAUSE

The contract between the parties is a fundamental constituent of international arbitration.[11] Hence for the arbitration to take place the consent of each party is required.[12] An arbitrator's power to resolve a dispute is found upon the common intentions of the parties to that

[10] *Hoteles Doral CA* v. *Corporacion l'Hoteles CA*, Expte. 0775 (Venezuela S. Ct. of Justice)
[11] Fouchard Gaillard Goldman on International Commercial Arbitration, E. Gaillard and J. Savage (eds.) (Kluwer Law International: 1999) para.46
[12] Julian D M Lew QC, Loukas A Mistelis, Stefan M Kroll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2004, p.212

dispute.[13] In the present case, there is corroboration of the fact that both the parties intended to submit all arising disputes to arbitration.[14] However, th**e** arbitration agreement binds only those parties that have entered into it.[15]

One of the most fundamental characteristics of international commercial arbitration is the parties' freedom to agree upon the arbitral procedure.[16] Thus, the validity of the arbitration clause also brings into question the principle of party autonomy. This affirms the parties' freedom to select both the arbitral seat, arbitral procedure and the law governing the arbitration agreement.[17]

Applying the party autonomy principle, in the present matter, parties have proposed their individual arbitration clauses to be incorporated in the sales contract. There was no consensus on a vital aspect of the proceedings i.e. the seat of arbitration to govern the dispute, dispute-settling forum and the law of procedure to be applied to the arbitration. Thus, they have not arrived at any conclusion regarding the settlement of disputes by the CIETAC. The Respondent's right to choose the tribunal for dispute resolution has not been fulfilled, as there has been no consensus to approach the CIETAC. Since, there is no consent to the arbitration agreement, between the parties, as to where the arbitration should be conducted and which rules should be followed, it's sufficient to deem the arbitration clause invalid and incapable of being performed.[18] Moreover, one of the main characteristics of an agreement to arbitrate is that the tribunal's jurisdiction is determinable from what the parties have agreed.[19] It has

[13] *Supra* 11, p.13
[14] Ex.2,Cl.12, Ex.4,Cl.9
[15] *Supra* 11,p.280
[16] Gary Born on *International Commercial Arbitration*, Kluwer Law International, 2009, 5th Edn., p.1748, *Sapphire International Petroleum Ltd. v. National Iranian Oil Co* (15 March, 1963) 35 ILR 136
[17] *Supra* 16, p.273, *Supra* 11,p.280
[18] *Murphy Exploration and Production Company International* v. *Republic of Ecuador*, ICSID case no.ARB/08/4
[19] Mustill and Boyd, *Commercial Arbitration*, 2nd Edn., p.41; *David Wilson Homes* v. *Survey Services Ltd*.[2001]B.L.R.267

thus been established that since the pre-requisites of a valid arbitration clause are not fulfilled, the parties cannot be governed by an invalid arbitration clause.

3: THE RESPONDENT'S TERMS ARE APPLICABLE

A. THE LAST SHOT DOCTRINE IS APPLICABLE

In the present case, both parties had their respective standard forms, to which neither agreed. This, led to a conflict of terms ('battle of forms'). In such circumstances, as per the general practise, seller's terms shall apply on the basis of "last shot doctrine", where the buyer sends his form (offer to buy); seller replies with form which contains material modifications (counter-offer); seller dispatches the goods which are received and accepted by the buyer. The last shot doctrine evolves until the last one is accepted when one party indicates assent by performance or other conduct.[20] Therefore, if a party fails to object to an additional or modified term and performs or partially performs, then he has accepted the additional or modified term. Also, it is usually the standard contract of the party who is in a stronger bargaining position that will govern the situation.[21]

A German Court held that an eighty-day notice of defects provision in a confirmation letter was enforceable at the time the buyer took delivery of the goods.[22] The notification terms, confirmation letter were additional material terms that amounted to a counter-offer under Article 19(1) UNIDROIT, but the Court found that the buyer accepted those terms by accepting delivery.[23]

This acceptance of goods is regarded as an acceptance by buyer of the terms contained in seller's form.[24] The Claimant (buyer) had put forth an offer with his terms, to which seller accepted not wholly but responded with material modifications by sending his own terms.

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[20] Charles Sukurs, *Harmonizing the Battle of Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods*, 34 VAND J TRANSNAT'L L.1481, 1512-13 (2001)
[21] Allgemeinen Geschäftsbedingungen 21-23, 93
[22] OLG Saarbrucken, 1 U 69/92, Jan. 13, 1993, (FRG), available at www.cisg.law.pace.edu/cisg/wais/db/cases2/930113g1.html
[23] Id.
[24] www.cisgw3.law.pace.edu/cisg/biblio/pperales.html

The seller then supplied the sample car which was accepted by buyer. This shows that, as per last-shot doctrine, buyer has complied with seller's terms. As a result, seller's terms dominate the contract as it is seller who fired the 'last shot' in the battle of forms.

When there is a suitable act of performance by the recipient of the counter-offer in accordance with the Art. 18(1) or (3) r.w. Art. 19 CISG, then the party who made the counter-offer, that party's terms shall apply.[25] Here, buyer nominated the ship SS Herminia pursuant to seller's terms. This act of performance of the buyer shows the acceptance to seller's terms.

B. THE EXEMPTION CLAUSE OF THE SELLER DOES NOT EXCLUDE HIS LIABILITY TO RENDER HIS CONTRACTUAL PROMISE

A party to a contract would be precluded from relying upon an exemption clause contained in it where he had been guilty for a fundamental breach of contract or a fundamental term and thus commits a default which destroys the very purpose of the contract. [26]. If an exemption clause doesn't entirely exclude the liability of one party, but merely limits or reduces his liability, it does not entirely render his contractual promise illusory.[27] The exemption clause of seller is not deprived as there has been no fundamental breach committed by him. The exemption clause restricts liability merely till the extent of consequential damages. The party can therefore not be deprived of such an exemption clause. It can thus be established that the Respondent's terms will apply.

[25] *Supra 24*
[26] *Chitty on Contracts* Vol. I General Principles.
[27] *Ailsa Craig Fishing Co. Ltd.* v. *Malvern Fishing Co. Ltd.* [1983]AC 149

4: THERE WAS NO VALID CONTRACT IN THE EYE OF LAW

For a contract to be valid, the fulfilment of pre-requisites like valid offer and acceptance of that offer, valid consideration and the intention of the parties to create legal relations becomes essential.

A. THERE WAS NO VALID OFFER AND ACCEPTANCE

The indication of assent must be congruent with the offer ('mirror image rule') and contain no modifications on the proposed terms otherwise such purported acceptance implies rejection[28]. The offeree's intention in an agreement to accept the offer must be conclusive and must unreservedly assent to the exact terms proposed by the offeror. An acceptance to be effective, it must accept all the terms contained in the offer.[29] While purporting to accept the offer as a whole, the offeree introduces a new term thus making it a 'counter-offer'. The effect of this in the eyes of law is to destroy the original offer.[30] Here, both parties had put-forth their own terms and kept referring to it[31] to which neither party accepted nor rejected. Since there was no acceptance on common terms, it never leads to valid offer-acceptance, and thus never concluded a contract.

In case of sale, where price is one of the essentials of sale, and if it is still left to be agreed between the parties, then there is no contract. [32] There would be no contract, because the price was to be settled in a certain way and it has become impossible to settle it in that way, and therefore there is no settlement[33]. Here, the standard term with regard to the price which was an essential requisite in the contract remained unsettled.

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[28] Art.2.1.11 UNIDROIT
[29] *Jones v. Daniel* [1894]2CH332
[30] *Hyde* v. *Wrench* (1840)3BEAV334
[31] Ex.10, 13
[32] *Foley* v. *Classique Coaches Ltd.* [1934]2KB1(CA)
[33] *May and Butcher Ltd v. R* [1934]2KB17

Both the parties had not reached to any consensus on important matters like terms of the contract, price, liability in case of consequential damages which constitute the fundamentals of a contract. No agreement on such grounds led to no conclusion of contract. Thus, no party is bound by any legal obligations.

A purported acceptance which modifies the offer is a rejection of the offer and is considered instead to be a counter-offer.[34] A reply to an offer which purported to be an acceptance but which contained different terms that materially altered the terms of the offer, such as a uncertainty regarding settlement of disputes, as provided for in Art.19(3) CISG, did not amount to acceptance.[35] There was merely an ostensible acceptance which has resulted in the frustration of the original offer, and has given rise to a counter-offer.[36]

Art.2.1.22 UNIDROIT talks about the battle of forms where the standard terms governing the contract are conflicting which follows the 'knock out rule' where only those terms which are in common will apply and would govern the contract.

In *Butler Machine Tool Co. v. Ex-Cell-O Corp.*[37] Court held that the contract should be governed by buyer's terms in case of conflicting terms. It also discussed that the position would have been different if the seller had not acknowledged the terms.

In this case, seller did not acknowledge the buyer's terms. Also all the standard terms of the contract are conflicting of both the parties, and none of the terms are common to which no consensus could be reached. Thus, there were no terms to govern the contract, because of which there was no valid contract between the parties.

[34] Art.19 CISG
[35] *S.A. Les Verreríes de Saint-Gobain* v. *Martinswerk GmbH, CLOUT Case No. 242*
[36] Art.2.1.11 UNIDROIT
[37] [1979]1All ER965

5: THE RESPONDENT IS NOT LIABLE FOR DAMAGES FOR THE BREACH OF CONTRACT

As referred above, there exists no valid contract, and hence, the Claimant is not entitled to any damages.

A. ALTERNATIVELY, ASSUMING THE EXISTENCE OF A VALID CONTRACT DOES NOT MAKE THE RESPONDENT LIABLE FOR DAMAGES, EVEN THEN RESPONDENT IS NOT LIABLE FOR DAMAGES

Assuming, the contract is valid, then seller's clauses will apply according to last shot doctrine. Last shot doctrine can be seen as evolving from the rules of offer and acceptance with each new offer being a counter-offer until the last one is accepted when one party indicates assent by performance or other conduct.[38] Here, seller was the last party to lay down his terms, to which buyer impliedly accepted by nominating SS Herminia. This shows that buyer shared the intention of being governed by Seller's terms. Also, Clause 7 of seller discharges himself from consequential damages including loss of profits. Thus Respondent is not liable for damages.

As in *Beck & Co. v. Szymanowski & Co.*[39], buyer, in this case, was to inform seller in case of any dissatisfaction of goods within a stipulated time period of 7 days. Since buyer neither expressed any discontent nor confirmed the order, buyer cannot apply to a claim for damages.

A party who does not perform perfectly[40] is not entitled to claim payment or performance from the other party.[41] In this case, Claimant was expected to nominate a ship which could dock at all the three ports nominated by seller, but instead nominated a ship which could dock

[38] *Supra* 22
[39] [1924]AC43
[40] Art.80 CISG
[41] *Cutter v. Powell* (1795)6 Term Rep320

only at Cadenza. This shows carelessness on the part of buyer as he did not adhere to the provision which required the ship to be potential enough to be docked at all the three ports. Thus, Claimant clearly failed to fulfil their part of the obligation.

B. UNREASONABLE BURDEN ON THE RESPONDENT ON THE CONTRACT BEING ENLIVENED

The other party may require a party who owes an obligation, to perform such an obligation, unless the performance has become impossible in fact[42] or the enforcement of such a performance is unreasonably burdensome[43]. In the present case, the contract had died before it was enlivened, and hence Respondent was relieved from his obligations. Therefore, by the time the order was revived [Ex.14], performance had become impossible in fact and unreasonably burdensome for Respondent. Also, it is not prudent for a businessman to take the risk of keeping aside 1000 cars as dead stock and wait for the contract to revive.[44] It was a genuine expectation of the seller to have received a fresh order form pursuant to the contract. It was thus required by the buyer to have placed a fresh order form for the remaining 999 cars to have the contract enlivened. The contract can be put entirely to an end one by way of *Freeth v. Burr*[45] i.e. when each party apprehends that the other party has terminated the contract.

Similarly, on not receiving notice of confirmation from Claimant and due to the conflicting terms between the parties, each of the party apprehended that the contract had been dead. Hence on letter dated August 10, 2011 [Ex.14] Claimant specifically mentioned the phrase "the order has been enlivened" i.e. the contract had been dead before revival.

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[42] Art.7.2.2 (a)UNIDROIT
[43] Art.7.2.2 (b)UNIDROIT
[44] *Monarch Steamship Co. Ltd. v. Karlshamms Oljefabriker (A/B)* [1949]AC.196
[45] L.R. 9C.P.208

Therefore, Respondent is not liable for damages even if there was an existing contract.

RELIEF REQUESTED

The Respondent respectfully requests that the Arbitral Tribunal find that:

I. That the tribunal does not have jurisdiction to hear the present dispute;

II. That there was no valid contract in existence between the parties;

III. That in absence of valid contract supply of cars became impossible;

IV. That Respondent has not breached contract hence not liable for damages;

V. That the Claimant has not performed his necessary obligation

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