THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG – JULY 2012

MEMORANDUM FOR CLAIMANT

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

INDEX OF ARBITRAL AWARDS AND JUDICIAL DECISIONS

ICC International Court of Arbitration

Court: ICC International Court of Arbitration Arbitral Award

Number: 83/2008

Date: 22.12.2008

Available at: http://www.unilex.info/case.cfm

Court: ICC International Court of Arbitration Arbitral Award

Number: 9651

Date: 00. 08. 00

Available at: http://www.unilex.info/case.cfm

Court: ICC International Court of Arbitration Arbitral Award

Date: 30.11.06

Available at: http://www.unilex.info/case.cfm

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 THE JURISDICTION OVER THE PRESENT DISPUTE PURSUANT TO A VALID AGREEMENT ENTERED INTO BETWEEN THE PARTIES.

A. THE AGREEMENT TO REFER TO ARBITRATION IN BEIJING IS VALID UNDER CADENZAN LAW.

In referring to the statement of facts, both parties contend that their arbitration clause prevails over the other. However, to determine the validity of their claim, first, it is to be considered whether there was a valid arbitration clause, in which the first issue is in regards to the dispute of the law governing this matter.

Referring to Exhibit 2 and Exhibit 4, both parties express their intention to refer to arbitration in Cadenza.[1]

It is contended that the law that governs this arbitration, i.e the substantive law, is the law of Cadenza, as the law most closely related to this matter.

In determining the law, the principle to be applied is the principle of "*Lex Loci Solutionis*", in which means the application of the law of the place where most relevant performance occurs.[2]

The legal system under which a contract is created and by which it is governed is known as the proper law of the contract. In *Amin Rasheed Shipping Corp. v Kuwait Insurance Co. (1983),*[3] Lord Wilberforce stated that in the absence of a choice of law,

> '... it is necessary to seek the system of law with which the contract has its closest and most real connection.'

1 Moot Problem, pg 3 and pg 5.

2 Garner, B. A. (2001). *A Dictionary of Modern Legal Usage 2 ed.* Oxford University Press.

3 [1984] AC 50.

The factors which help the court determine the proper law of the contract are those with which the transaction had its 'closest and most real connection' per Lord Simonds in *Bonython v Commonwealth of Australia (1951)*;[4] (approved by Lord Wilberforce in Amin Rasheed, supra).

The case of *The Assunzione*,[5] provides very useful clarification of the balance between the various arguments made by the courts in order to choose the proper law of the contract. In this case, the contract was formally concluded in Paris and was written in the English language and in an English standard form. However, the freight and demurrage were payable in Italian lire. The courts stated unanimously that Italian law was the proper law of the contract mostly due to the fact that both parties had to perform their part of the contract in Italy.[6]

In application, there are three reasons why the Cadezan law is the most relevant, i.e the most closely connected to the transaction. First, Cadenza is the port of loading, whereby most of the performance to contract agreed by both parties takes place in Cadenza. Second, the subject matter of the contract i.e the cars, resides in Cadenza. Thirdly, as mentioned earlier, both parties express their intention to refer to arbitration in Cadenza.[7]

Therefore, as the Cadenza law applies to this dispute, the UNIDRIOT 2010 Principles, the New York Convention and the UNCITRAL model Law, shall apply due to the fact that Cadenza is a signatory to all these conventions.

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4 [1951] AC 201 per Viscount Simmonds.

5 ER (CA), 1954

6 David McClean, *Morris: The Conflict of Laws* (London, Sweet & Maxwell Ltd, 2000) at 324.

7 Note 1.

B. THERE WAS ACCEPTANCE BY CHAN MANUFACTURING TO THE PROPOSAL MADE BY LONGO IMPORTS TO ARBITRATE IN BEIJING.

In reference to the facts of the problem, the arbitration clause from both parties were mentioned in their respective websites.[8] Both parties did not showed their intention in accepting any of those clauses. The only acceptance noticeable is in respect of the contract of sale.[9] It is contended that the acceptance of the contract of sale incorporates acceptance to the arbitration clause as well.

Generally, the contract of sale and the arbitration agreement are separate and distinct contracts, although both are found in the same document. It is known as the doctrine of separability. The doctrine of separability allows an arbitral panel to consider an arbitration clause independent of its underlying contract.[10] Although this doctrine applies to many arbitration disputes, there is one circumstance in which application is inappropriate: where the very existence of the underlying contract has been challenged.[11] Here, as the Respondent challenges the very existence of the underlying contract and therefore the arbitration clause cannot be
separated.[12]

In *Southwest Airlines Co. v. Boardfirst*,[13] it is ruled that where the terms of the contract include a reference to an electronic document, acceptance by performance will confirm acceptance of that electronic document as well.

In application there was an acceptance to the arbitration clause of Longo Imports by Chan Manufacturing. When the order form as stated in Exhibit 9 was sent to Chan Manufacturing and in their reply in Exhibit 10, there is nowhere mention of the

8 Moot Problem, pg 3 and pg 5.

9 Moot Problem, pg 9.

10 Redfern, A. and Martin Hunter (2004). *Law and Practice of International Commercial Arbitration*. Sweet & Maxwell. 3-63.

11 Ibid, 5-44. See also Poundret, J.F. and Sebastien Besson (2007). *Comparative Law of International Arbitration*.2d ed. Sweet & Maxwell. 167.

12 Poundret, J.F. and Sebastien Besson (2007). *Comparative Law of International Arbitration*.2d ed. Sweet & Maxwell. 167. See also Garnett, R. et. al (2000). *A Practical Guide to International Commercial Arbitration*.Ocean Publications. 37.

13 LLC, 2007 U.S. Dist. Lexis 96230, 16 (N.D. Tex. 2007)

arbitration clause.[14] Chan Manufacturing only contested on other terms such as the INCOTERMS applicable. In Exhibit 13, again Longo Imports urged Chan Manufacturing to note of their terms and conditions, which includes the arbitration clause.[15] Nonetheless, by accepting the order for the 1000 cars, it also signifies that Chan Manufacturing agreed to accept the terms and conditions by Longo Imports, which includes the arbitration clause. Regardless of the fact that they oppose to some of the terms set out by Longo Imports but they still, by their conduct, perform their part of the contract.

Therefore, there is indeed a valid arbitration clause in which the claimant's arbitration clause is applicable.

[14] Moot Problem, pg 10 and pg 11.
[15] Moot Problem, pg 14.

PLEADINGS ON CONTRACTUAL TERMS

I. THE TERMS MADE BY THE APPLICANT IS LEGALLY BINDING, THUS THERE IS A VALID CONTRACT.

A. THERE IS ACCEPTANCE BY WAY OF CONDUCT

Under the UNIDROIT Principles of International Commercial Contracts, Article 2.1.1 states that an acceptance can be verified by way of conduct. In a case decided by the International Court of Arbitration, under the Arbitral Tribunal[16]; claimant, a German company and respondent , a Russia company had entered into a contract of selling goods between the states . The principle brought forth by the tribunal is if terms are modified and is agreed by parties, they can no longer rely on the original, as it will be detrimental upon the contract.

In exhibit 5, page 6[17] of the contract, it is stated by the applicant that they will nominate the ship, in line with the agreement made by both parties that the ship will dock at the respondent's port of choice. Although the applicant is bound by a cost, insurance, and freight INCOTERM (CIF), which states that the seller should nominate a vessel, the CIF term in this case is modified. This modification is accepted in modern shipping practices, so long as it is agreed by both parties[18]. By nominating SS Cadenza to dock at one of the nominated ports, it indicates Longo's intention to pursue with the contract of 999 cars by way of conduct which can make a contract enforceable. Therefore, the act of extending the FAS on part of Longo is valid.

B. THE TERMS WERE EXPRESSLY STATED

In regards to the term "if we find it unsatisfactory we will expect the reminding cars to be sent by December 1, 2011" in exhibit 5, page 6[19], which was later reiterated in exhibit 8,

[16] International Court of Arbitration, Arbitral Tribunal , German v Russia.
[17] Moot problem page 6.
[18] Ten Guiding Principles of the Incoterms, L/C Monitor ,Vol.2,Issue 1,Jan 2000.
[19] Moot problem page 6.

page 9[20] it can be seen that the claimant has made their intention clear, by expressly writing the term that if they do not send any replies after receiving the car, the contract should proceed. Respondent had failed to honour this term which they had agreed upon, as there were no indications of retaliation or disagreement on their part. It has been notified twice and the respondent should consider this as a crucial part of the contract. In another case decided by the ICC between a German company and an Indian company to determine the law of arbitration , the tribunal decided that terms should be interpreted according to the meaning that a reasonable person would give to the parties in the same circumstances. Similarly in applying this test to the present case, a reasonable person would acknowledge the terms stated by Longo.

II. RESPONDENT IS LIABLE FOR DAMAGES DUE TO BREACH OF CONTRACT

A. FAILURE ON PART OF THE RESPONDENT TO NOMINATE A SPECIFIC PORT AMOUNTS TO A BREACH

In another case decided by the ICC, between a Mexican planter and a US distributor[21] , the respondent (Mexico) did not distribute the crops as promised due to the "El Nino" phenomenon and were accused of breach. The tribunal agreed with the claimant, as the respondent can reasonably foresee of the future out comings, based on experience and they should have been prepared to face the phenomenon.

Based on exhibit 11, page 12,[22] the statement nominating a ship which can load out of the nominated ports which are Cadenza, Cantata and Piccolo had allowed the applicant to interpret that it is sufficient for them to nominate a ship which can dock at either one of these ports. This is because, it would be impossible for them to nominate a ship that can dock at different places within a short period of time, and if they had to nominate different ships, it would be costly and impractical. The vagueness in the respondent's

[20] Moot problem page 9.
[21] International Court of Arbitration, Arbitral Tribunal , Mexico v United States of America.
[22] Moot problem page 12

statement in explaining with greater detail the distance between these ports , and which port would highly likely accept the SS Herminia gives very little scope of interpretation for the applicant to understand that they must nominate ships that could dock at all three ports, and thus by choosing the SS Herminia which could dock at Cadenza, they have discharged their duty towards the contract as they had obliged to the terms. Thus, the respondent should be liable for breach as their terms were impractical and vague.

Based on Article 7.1.1,[23] non performance is failure by a party to perform. Inability to nominate a suitable port, added with the fact that the respondent did not try to confirm the contract with the claimant had caused them to breach the terms. In addition, Article 7.4.2,[24] states that if a breach has occurred due to non performance, the aggrieved party is entitled to compensation. Therefore as there is a clear breach by Chan, they should be held liable for damages.

[23] Unidroit Principles of International Commercial Contracts 2010.
[24] Ibid.

REQUEST FOR RELIEF

Claimant respectfully requests the tribunal to find that:

1. The claimant arbitral clause is applicable.
2. There is valid arbitration clause.
3. The terms applicable to the contract of sale are extended terms of FAS.
4. There is a valid contract between the parties.
5. The RESPONDENT is liable for damages pursuant to Article 7.4.1.