

INTERNATIONAL ALTERNATIVE DISPUTE

RESOLUTION

MOOT COMPETITION

MEMORANDUM FOR

CLAIMANT

Claimant:

Longo

Respondent:

Chan Manufacturing

Team Number: 010

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....3

INDEX OF ARBITRAL AWARDS.....9

ABBREVIATIONS.....12

ARGUMENTS.....13

I. THE TRIBUNAL HAS JURISDICTION TO HEAR THE DISPUTE13

A. UML AND NYC ARE APPLICABLE TO THIS DISPUTE

B. THE TRIBUNAL IS ENTITLED TO HEAR THE DISPUTE AND DETERMINE ITS OWN JURISDICTION.....13

C THE AGREEMENT CONTAINED A VALID ARBITRATION CLAUSE...14

II. RESPONDENT COMMITTED THE BREACH OF CONTRACT

A. RESPONDENT BREACHED THE CONTRACT BY NON- DELIVERING THE CARS.....14

i) The cars did not meet the Quantity required by the Contract under Article 35 (1) CISG

1. The Parties’ have agreed upon the delivery of 1000 cars.....15

2. CLAIMANT reasonably relied on RESPONDENT’s skill and judgment.....16

3. RESPONDENT’s Conduct was an Expression of Implied Consent.....17

010

III. ANY DETRIMENT CAUSED BY RESPONDENT’S BREACHES SUBSTANTIALLY DEPRIVED CLAIMANT OF WHAT IT WAS ENTITLED TO EXPECT UNDER THE CONTRACT.....19

(a) CLAIMANT’s expectation interest could be clearly discerned from the communication with RESPONDENT.....19

(b) CLAIMANT’s detriment reached such degree of gravity as to be substantial...20

i) The detriment caused by RESPONDENT’s breach was substantial.....20

ii) The consequences of breach were foreseeable.....21

IV. CLAIMANT is entitled to Damages for Loss Pursuant to Article 7.4.1 OF UNIDROIT PRINCIPLES22

RELIEF REQUESTED23

010

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010

ABBREVIATIONS:

CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Clause.	Clause of the Agreement
ICC	International Chamber of Commerce
NYC	Convention United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
UNCITRAL	United Nations Commission on International Trade Law
Arb	Arbitration
Intl	International
Para	Paragraph
Ex	Exhibit
Art	Article
ICC	International Commercial Court
V	Versus
Para	Paragraph
INCOTERM	International Commercial Term
CIF	Cost Insurance Freight

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ARGUMENTS**I. THE TRIBUNAL HAS JURISDICTION TO HEAR THE DISPUTE****A. UML AND NYC ARE APPLICABLE TO THIS DISPUTE**

Both countries (in respect of the dispute) Minute and Cadenza have adopted UNCITRAL ML and New York Convention (*background information*). Pursuant to NYC Article 10, the convention enters into force for the State at the time of signature, ratification or accession. Besides, the dispute is within the scope of application because UML applies to international commercial arbitration and the dispute is about a contract for sales between two parties from 2 countries- Minute and Cadenza. Consequently, both UNICITRAL Model Law and NYC are applicable to this dispute.

B. THE TRIBUNAL IS ENTITLED TO HEAR THE DISPUTE AND DETERMINE ITS OWN JURISDICTION

The tribunal is entitled to hear the dispute and determine its own jurisdiction because: (1) the doctrine of *Kompetenz/Kompetenz*; (2) arbitration clause has been validly modified which CIETAC is authorized to resolve the dispute.

CLAIMANT respectfully requests the Tribunal to find that it has jurisdiction over the dispute despite RESPONDANT's allegation that one of the prerequisites for commencing arbitration was not satisfied. There is a broad international consensus that an alleged non-conformity with a mandatory contractual pre-arbitral process is a question concerning the tribunal's jurisdiction [*Berger*, Arb Int 22(1), p 6; *Born3*, p 844; *Pryles*, p 160; SCC Case, 17 July 1992]. The tribunal's authority to consider and decide on its own jurisdiction, i.e. the principle of Competence-Competence, is considered as a generally accepted principle in international arbitration [*Born3*, pp 855-856; *Redfern/Hunter4*, para 5-39]. Said principle is

010

also codified in Art 23.1 of the UNCITRAL Arbitration Rules and Art 6 of CISG, the applicable procedural rules in the case at hand and the applicable *lex arbitri*.

C. THE AGREEMENT CONTAINED A VALID ARBITRATION CLAUSE

Clause 12 of the CLAIMANT's condition included an arbitration clause (Ex. 2) stating that:

“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.”

This arbitration clause was one of the conditions of purchase used by CLAIMANT. It was also emphasized by the claimant in the letter of June 10 (Ex. 13) and which was not challenged by the respondent. Clause 12 thus becomes a part of the agreement.

Conclusion: The Tribunal has the power to rule on its own jurisdiction in accordance with the Competence-Competence codified in the *lex arbitri* and the applicable procedural rules.

II. RESPONDENT COMMITTED THE BREACH OF CONTRACT

A. RESPONDENT BREACHED THE CONTRACT BY NON- DELIVERING THE CARS

RESPONDENT did not deliver the cars in conformity with the contract and therefore breached its obligation under INCOTERMS- CIF [A1] and Art. 35 CISG [*see section A, B*]

i) The cars did not meet the Quantity required by the Contract under Article 35 (1) CISG

The seller must provide the goods in conformity with the contract of sale and any other evidence of conformity which may be required by the contract in accordance with INCOTERMS- CIF, A1.

010

According to Article 35 (1) CISG, the seller must deliver goods which are of the quantity required by the contract. RESPONDENT breached its obligation to deliver goods of the contractually agreed quantity.

Following the letters from both of the parties, Chan Manufacturing Company had agreed upon the sale of 1000 cars capable of requirements met by the Longo Imports (1.) and CLAIMANT could reasonably rely upon the skill and judgment of the RESPONDENT to deliver the cars (2) and the RESPONDENT conduct can be taken as an implied consent.(3)

1. The Parties' have agreed upon the delivery of 1000 cars.

In its letter dated 5 January 2011, CLAIMANT unambiguously clarified its need of 1000 cars. [Ex 1]. In the following letter dated January 20 2011, the CLAIMANT very clearly stated that "unless finding the sample car unsatisfactory, the reminding cars to be sent by December 1, 2011." Thereby, any reasonable person in RESPONDENT's position pursuant to Article 8 (2) CISG had to be aware of CLAIMANT's demand for a machine in the stipulated time.

RESPONDENT's answer dated March 20, 2011 [Ex 10] constituted an acceptance to these specifications (UNDROIT Art 2.1.6). Chan Manufacturing Company mentioning the treatment to the shipment of "one car being different from the other 1000 cars" has provided enough ground to the fact that Chan Manufacturing Company has taken the amount of cars to be 1000 in number. Thus, the agreement has been validly made upon the quantity of the cars.

Where a buyer describes the goods and the seller does not raise any objections, the goods must be delivered as required by the buyer (*BIANCA/BONELL Art. 35 § 2.3*). RESPONDENT confirmed that it had cars "for [CLAIMANT's] task" [Exhibit 3, line 1], without objecting to any of the characteristics required by CLAIMANT. RESPONDENT has not further provided any specifications to such required characteristics. Hence, a reasonable

010

person in CLAIMANT's position had no grounds upon which to doubt that RESPONDENT accepted its requirement of cars. Consequently, the parties reached an agreement in this regard.

With this agreement in mind, CLAIMANT focused on assuring itself that the RESPONDENT would be fulfilling its duty of providing the cars. Claimant has mentioned that "any defects or unsatisfactory performance will be notified within one week of receipt of the sample car [Ex 9]. Furthermore, the CLAIMANT had also given time and again notice to the RESPONDENT about following the proviso as stated in the letter dated January 20 [Ex 8]

As RESPONDENT made no objections at this point of time either, CLAIMANT reasonably concluded that "[t]he cars would be delivered on time. Thereby, it expressed its belief that the sample car was of the specifications discussed in the foregoing communications.

2. CLAIMANT reasonably relied on RESPONDENT's skill and judgment

Liability under Art. 35(2) (b) CISG further requires that the buyer could reasonably rely on the seller's skill and judgment. It can generally be expected that the seller is better informed about its goods than the buyer (*STAUDINGER Art. 35 § 31*).

This is particularly the case if the seller is the manufacturer of the goods, and not only a trading agent who indicates that it has no special knowledge (*ENDERLEIN/MASKOW p. 146 § 14*). CLAIMANT as deal with wind turbines, solar panels cannot be expected to be as knowledgeable about electric cars as RESPONDENT, which is a specialist manufacture with experience of 30 years of information in the automotive industry. CLAIMANT, in contrast, was inexperienced in the electric cars, as it was a newcomer intending to enter the business.

[Background information]

Even if RESPONDENT possessed no expert knowledge, it failed to notify CLAIMANT of this fact. The buyer can generally assume that "the [seller carries] the analytic expertise

010

necessary” unless the seller clearly notifies the buyer of its lack of knowledge (*HG Aargau 5 November 2002 (Switzerland)*). RESPONDENT, however, failed to make such a statement at any time prior to the conclusion of the contract.

A reasonable person in RESPONDENT’s position had to be aware that CLAIMANT was depending upon its advice regarding the type of machine that would comply with CLAIMANT’s needs. In conclusion, CLAIMANT could reasonably rely on RESPONDENT’s skill and judgment to deliver the cars.

3. RESPONDENT’s Conduct was an Expression of Implied Consent

RESPONDENT intentionally participated in the performance of the contract by sending a sample car [*Ex 11*] to move further with the sale of the cars, and implicitly consented to the arbitration agreement.(UNDROIT Art 4.1.)

If a party has not signed an arbitration agreement, the courts and arbitral tribunals will take into consideration the conduct of the party in the negotiation and performance, and will infer consent to be bound where there was significant involvement by the party [*Hanotiau 271; Zuberbühler 21; X S.A.L.*].

RESPONDENT was directly involved in the performance of the sale contract. In this regard there was complete reliance upon RESPONDENT by CLAIMANT. RESPONDENT was directly and substantially involved in the contract, and this involvement was undertaken in full knowledge of the arbitration agreement. This conduct demonstrates that RESPONDENT consented to being bound by the arbitration agreement.

This was acknowledged by RESPONDENT which in the course of exchange of letters, stated that “we are positive that the car will meet your requirements and we will do our best to meet the deadlines.” [*Ex. 11, line 4*]. Obviously, RESPONDENT viewed itself as being engaged in a commercial relationship with CLAIMANT framed by the contract including the arbitration

010

agreement, and expected that to continue. Thus, RESPONDENT must be considered bound by the agreement to arbitrate. The autonomous validity and effectiveness of the arbitration agreement supports the conclusion that RESPONDENT consented to the agreement by its conduct.

Furthermore, Under Art. 7 CISG, the principle of good faith applies to the interpretation of the individual contract and to the parties contractual relationship as such [*HG Zürich HG 930634, (Switzerland 1998); ICC Award No. 8611 (France 1997); CCIB VB/94124 (Hungary 1995); SARL Bri Production "Bonaventure" v. Society Pan African Export (France 1995)*]. This provides for the existence of a duty to inform based on the general principle of cooperation of the contracting parties [*BGH VIII ZR 60/01 (Germany 2001); Staudinger-Magnus, Art. 7 para. 47*].

Additionally, the RESPONDENT has breached the principle of loyalty. According to the principle, the parties to a contract have to act in favor of the common goal; they have to reasonably consider the interests of the other party." [Helsingin Hovioketus (2000)]. In essence, each party owes a duty of loyalty to the other party to preserve the viability of the transaction. [DiMatteo, *Presumption of Enforceability*]. In the instant case, the Chan Manufacturing Company has breached the 'loyalty' towards the Longo Imports providing the promised cars to the competitor of Longo. [Exhibit 18, line 2]

Moreover, According to Art. 45(1) CISG all failures of a party to perform any of its obligations under the contract can amount to a breach of contract [*Herber/Czerwenka, Art. 45 para. 2; Chengwei, para. 2.2.; OLG Köln 27 U 58/96 (Germany 1997)*]. If a contract is to be interpreted as requiring the seller to protect, warn or inform the buyer then a breach of this obligation is also judged as such a failure to perform [*Achilles, Art. 45 para. 2*]. Therefore, by not immediately providing CLAIMANT with such substantial information as capacity of ports to load goods and which ship to select for the use of the carriage of the cars,

010

RESPONDENT committed a breach of its obligation under Art. 45 CISG along with A3, A4 INCOTERMS-CIF.

Such breach of a secondary obligation under the contract can also be fundamental [*OLG Frankfurt U 164/90 (Germany 1991); Staudinger-Magnus, Art. 25 para. 7; Herber/Czerwenka, Art. 25 para. 5*].

Conclusion:

RESPONDENT breached the contract by non-delivering the agreed cars when they had provided the implied consent to the CLAIMANT whereupon CLAIMANT had relied upon the skill and judgment of the RESPONDENT.

III. ANY DETRIMENT CAUSED BY RESPONDENT'S BREACHES SUBSTANTIALLY DEPRIVED CLAIMANT OF WHAT IT WAS ENTITLED TO EXPECT UNDER THE CONTRACT.

Since the cars were never sent to CLAIMANT it was deprived of its discernible expectation interests in the contract (a.). This deprivation was substantial within the meaning of Art. 25 CISG (b.)

(a) CLAIMANT's expectation interest could be clearly discerned from the communication with RESPONDENT

The seller must give the buyer sufficient notice required in order to allow the buyer to make measures which are normally necessary to enable him to take the goods [INCOTERMS-CIF, A7]. Under Art. 25 CISG, the expectations of a party must have been discernible from the contract. [Enderlein, Fritz and Maskow, Dietrich, *International Sales Law* (New York: Oceania 1992), Art. 25 para. 3.3.]. According to its inquiry CLAIMANT expected cars

010

without any restrictions, which could have been derived from the contract itself and from the surroundings of the case.

(b) CLAIMANT's detriment reached such degree of gravity as to be substantial

Each of the detriments established by RESPONDENT is to be considered substantial, since any of them caused severe loss and interfered to a great extent with CLAIMANT's commercial activities (i.) and the breach foreseeable (ii.)

(i) The detriment caused by RESPONDENT's breach was substantial

According to Art. 25 CISG, if a party affected by a breach suffers an impairment of a material interest under the contract, this establishes a substantial detriment [*Schlechtriem-Schlechtriem, Art. 25 para. 9*]. All the ordered cars were never supplied to the CLAIMANT. As a result of the non-delivery, CLAIMANT was hindered in pursuing his commercial activities, as he could not continue his car trading business without products ready for sale. Since a detriment is always considered substantial if the buyer, assumed it would have foreseen the breach at conclusion of contract, would not have contracted at all [*OGH 20b 163/97b (Austria 1999)*], RESPONDENT's non delivery of cars cost a great deal of loss of profit which to a substantial detriment.

The term detriment generally has to be interpreted broadly, covering any harmful consequence [*Bianca/Bonell-Will, Art. 25 para. 2.1.1.2.; Enderlein/Maskow/Strohbach, Art.25 para. 3; Lorenz, II. H.; Neumayer/Ming, Art. 25 para. 7*]

Further, when determining what kind of deficiency may lead to a fundamental breach, case law mainly focuses on economical criteria, especially the actual loss suffered by the aggrieved party [*Graffi, p. 342; Koch, II. C. 2. a), cf. Delchi Carrier, S.p.A. v. Rotorex Corp.(US 1995); LG Landshut 54 O 644/94 (Germany 1995); OLG Hamm 19 U 97/91 (Germany)*] Not being able to import the 999 cars, Minuet has suffered a great loss.

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Calculating the total price of 999 cars being \$US 117482490(with discount of 2% to \$US 1198800), CLAIMANT has lost a great amount of money as its demand in of the cars in Minuet was raising high with the popularity of the cars. The demand was so much augmenting that the Longo Imports even could sell 2000 cars [Exhibit 16, line 4] with the anticipation of yearly sales of the cars to be 10,000.[Exhibit 1, line 4] This loss establishes a substantial detriment towards the Longo Imports.

(ii) The consequences of breach were foreseeable

A reasonable person of the 'same kind' and 'in the same circumstances' would have foreseen the consequences of the non-delivery of the cars which would deprive CLAIMANT of his expectation of resale and profits. [Art. 25CISG].

In relation to actual foreseeability, whether RESPONDENT foresaw CLAIMANT's substantial deprivation must be assessed 'in the light of the facts and matters of which he then knew' [Bianca/Bonnell 217]. This includes all the relevant circumstances of the case, as well as negotiations and correspondence between the parties [Koch 229].

The RESPONDENT knew from the nature of the contract of sale formed with CLAIMANT, that 'non-conformity' would preclude resale and result in loss of profits. The RESPONDENT would therefore have been aware of the subsequent possibility of CLAIMANT's loss, in light of the CLAIMANT's letter dated 5 January 2011 stating that the yearly sales of the cars can be 10,000.

A reasonable person like RESPONDENT refers to reasonable Imports (the CLAIMANT) that are not intellectually or professionally substandard compare to the relevant industry standard [Bianca/Bonnell 217]. Such a merchant would have foreseen that non delivery of cars would preclude resale and result in loss of profits.

010

Knowledge acquired by the RESPONDENT throughout the letters suffices the ground for foreseeability by the RESPONDENT is relevant for determining subjective foreseeability. This is reflected in the legislative history of Art. 25 [*Ghestin 22; Erdem 184*]. While Art. 25 of the CISG does not specify at what point of time foreseeability should be measured, the article's legislative history demonstrates that the relevant time was omitted in order to permit decision on a case by case basis, considering subsequent knowledge of the parties [*First Committee Report, A/Conf.97/11, 99A/Conf.97/11, 99; Honsell-Karollus, Erdem, p. 184*].

The fact that other provisions of the CISG, such as Arts. 74(2), 31(b), 35(2)(b), 42(2)(a), 73(3) and 79(1), explicitly state the relevant point in time, while Art. 25 omits to do so, suggests the inclusion of subsequent knowledge under Art. 25 [*Botzenhardt 249*]. while all the issues related to the sample test had been settled out in the previous letters and even the letter of credit for 999 cars has been already issued by the CLAIMANT [Clarification Question no: 37]. Thus CLAIMANT's letter dated 10 June 2011 is relevant in discerning foreseeability.

Conclusion:

Detriment caused by RESPONDENT's breaches substantially deprived CLAIMANT of what it was entitled to expect under the contract as The detriment caused by RESPONDENT's breach was substantial and the consequences were foreseeable.

IV. CLAIMANT is entitled to Damages for Loss Pursuant to Article 7.4.1 OF UNIDROIT PRINCIPLES

Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the nonperformance is excused under these Principles.

010

Pursuant to Art. 7.4.1, CLAIMANT is entitled to claim damages. The loss suffered by CLAIMANT is a consequence of RESPONDENT's breach of contract and the damages caused were foreseeable to RESPONDENT. CLAIMANT is therefore entitled to recover its losses.

RELIEF REQUESTED

1. Claimant respectfully requests the Tribunal to find that:

(A) CIETAC has jurisdiction to hear this dispute.

(B) Claimant's Arbitration Clause is applicable.

(C) Respondent breached the contract

Consequently, Claimant respectfully requests Tribunal to order Respondent:

(A) To pay for the damage incurred.