THIRD ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOT COMPETITION

MEMORANDUM FOR CLAIMANT

Team number: 014

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TABLE OF ABBREVIATIONS

Art	Article
CIETAC	China International Economic and Trade Arbitration Commission
Ex.	Exhibit
PICC	Principles of international Commercial Contracts
UNCITRAL	United Nation Commission on International Trade Law

TABLE OF AUTHORITIES

Primary Sources

UNIDROIT principles of international commercial contracts 2010

(cited as: PICC)

UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006)

(cited as: UML)

China International Economic and Trade Arbitration Commission Arbitration Rules

(Cited: CIETAC Rules)

Secondary Sources

Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006

(cited as: EN on UML)

Official Comments on Articles of the UNIDROIT Principles of International Commercial Contracts (PICC), 2010

(cited as: Official)

Stefan Vogenauer and Jan Kleinheisterkamp, Commentary on the UNIDROIT principles of International Commercial Contracts (PICC), Oxford University Press

(cited as: Vogenauer)

JURISDICTION

I. THE TRIBUNAL HAS JURISDICTION TO DECIDE THE DISPUTE

Although the jurisdiction of CIETAC is challenged, arbitration has been brought to the CIETAC and the CIETAC shall have the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case [CIETAC Art. 6.1]. When CIETAC is considering the jurisdiction, the CIETAC Rules uniformly apply to CIETAC [CIETAC Art. 4.1].

1.1 Clause 12 from CLAIMANT's webpage is the valid arbitration agreement

An arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other [UML Art.7 (5); EN on UML]. Also, an arbitration agreement shall be deemed to exist where its existence is asserted by one party and not denied by the other during the exchange of the Request for Arbitration and the Statement of Defense [CIETAC Art.5.2]. The CLAIMANT and the RESPONDENT exchanged their statements of claim and defence [E.16, E.17, E.18]. The CLAIMANT claimed to commence arbitration as per its clause 12 by stating the clause directly [E.18], and by referring to the webpage in the letter [E.16]. When making exchanging statements, RESPONDENT did not deny those claims [E.17]. And within an undue delay, namely, from September 2011 to July 2012, RESPONDENT did not deny those claims. Thus Clause 12 is an arbitration agreement in writing.

According to Clause 12, China Trade Commission and the seat of Beijing refer to CIETAC. The proceedings could happen in Cadenza using relevant rules. The clause is clear and enforceable, so it is valid.

1.2 The pre-arbitral requirement is satisfied

The defendant suggested a remedy that the CLAIMANT can wait another two months before entry into a contract for the sale of 400 cars [E.17]. However, the CLAIMANT rejected the suggestion, so no agreement can be reached about the dispute. According to Clause 12, if no agreement can be reached it must be referred to arbitration in China using the relevant rules.

1.3 No agreement was reached on Clause 9 from RESPONDENT's webpage

Both Clause 9 and Clause 12 are standard terms offered by the two parties respectively. When the parties reach agreement except for the standard terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance [Vogenauer, P341]. CLAIMANT and RESPONDENT both indicated that their arbitration clauses should govern the contract, but their terms actually conflict with each other. It is not fair to give preference to either party's term. Instead, when both behave as if the 'deal is on' in spite of conflicting standard terms, and without explicitly addressing this issue, they should equally share in the resulting risk of leaving the matter to remain uncertain.

CLAIMANT referred to Clause 12 [Ex.18] expressly, which RESPONDENT did not rely. Thus, Clause 12 is the binding arbitration agreement. However, Clause 9 is only a standard term from RESPONDENT. It cannot be included in the contract, and it has never been accepted expressly by CLAIMANT. RESPONDENT did not even refer to it in the exchange of statements of claims and defence. Thus, no agreement was reached on Clause 9 from RESPONDENT's webpage

MERITS

2. RESPONDENT'S CONDUCT CONSTITUTED A NON-PERFORMANCE

2.1 A valid contract has been established between two parties

(A) The PICC is the governing law

RESPONDENT has stated in its conditions on the website that the PICC is the governing law [Ex.4]. After CLAIMANT offered the ORDER FORM, RESPONDENT offered a modified acceptance which added that PICC is governing law [Ex.10, PICC Art 2.1.11]. And CLAIMANT accepted this by its post afterwards [Ex.13]. Also, there was no contradictory terms or conditions on the CLAIMANT's webpage or letters. Thus the two parties have agreed that PICC is the governing law.

(B) CLAIMANT's offer and RESPONDENT's acceptance concluded the contract

A contract may be concluded either by the acceptance of an offer or by the conduct of the parties that is sufficient to show agreement [PICC Art.2.1.1]. The offer has been made by CLAIMANT in the letter attached with the ORDER FORM [Ex.8 Ex.9].

Since the ORDER FORM is attached in the letter [Ex.8], thus both of the ORDER FORM and the letter should be deemed as the offer. Besides, CLAIMANT wrote in the letter on February 5 that 'we will send you an order with the proviso that if the car does not come up to expectations we will not execute the order' [Ex.7]. Obviously, CLAIMANT intended to be bound by the proviso. The contract needs not to be made in a particular form [PICC Art 1.2]. Thus the letter in Ex.8 is also a part of offer.

A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance [PICC Art 2.1.2]. The content in the letter, especially the requirement ("once we receive the sample we will test it and unless we find it unsatisfactory will expect the reminding cars to be sent by December 1, 2011") was noticed

several times, thus definitely indicates the intention of CLAIMANT to be bound in case of acceptance.

RESPONDENT accepted the offer with several revisions. A reply to an offer that purports to be an acceptance but contains additions, limitations or other modifications, which materially alter the terms of the offer, is a rejection of the offer and constitutes a counter-offer [PICC Art 2.1.11]. The shipment, payment and choice of law were modified or added by RESPONDENT [Ex. 10]. These have already altered the terms of the offer materially [Vogenauer p. 283]. The conduct of the shipment and payment, and the expressly acceptance of the choice of law, show the acceptance of the counter-offer by CLAIMANT [Ex. 11 Ex. 13 PICC Art 2.1.1]. Thus, a contract with the above contents was concluded by CLAIMANT and RESPONDENT.

(C)The quantity of electric cars in the contract should be 1000

The quantity in the ORDER FORM is 1000 [Ex.9]. RESPONDENT asked to treat the shipment of the sample car separate from the order of 1000 cars [Ex.10], which means the shipment was separated but the contract was not separated into two. Thus both the shipment of the sample car and that of the reminding 999 cars are contractual obligations of RESPONDENT.

2.2 The sending of the 999 cars is a conditional contractual obligation

(A) The proviso urged by CLAIMANT is included in the terms of the contract

Demonstrated in Merits 2.1(B) as above, the letter including the proviso that a sample should be shipped first for testing, and unless the sample was found unsatisfactory the reminding cars should be sent is also a term of the contract [Ex.8].

Alternatively, the proviso can also be interpreted from the terms of the ORDER FORM. A contract shall be interpreted according to the common intention of the parties [PICC Art 4.1]. Preliminary negotiations between the parties can be taken into considerations [PICC Art 4.3]. The delivery date in the ORDER FORM is December 1, 2011 [Ex.9]. It is the same as the deadline

raised by CLAIMANT [Ex.5]. And in the same letter, CLAIMANT wrote "once we receive the sample we will test it and unless we find it unsatisfactory we will expect the reminding cars to be sent by December 1, 2011" [Ex.5] The Quality in the ORDER FORM also refers to the requirement raised by CLAIMANT in the same letter. The acceptance of the delivery date and the quality actually shows RESPONDENT's intention to export the reminding 999 cars by the delivery date if the sample car meets the requirement. And as CLAIMANT emphasized in the previous letters, the sample car meets the requirement if he does not express unsatisfactory within one week after the receipt of the sample car.

(B) There is a conditional contractual obligation in the contract

A contract or a contractual obligation may be made conditional upon the occurrence of a future uncertain event, so that the contract or the contractual obligation only takes effect if the event occurs [PICC Art 5.3.1]. The obligation to ship the reminding 999 cars was made conditional by the terms in Exhibit 8 and 9. The condition is that only if CLAIMANT found the sample car unsatisfactory the delivery of the reminding 999 cars are not expected. The reasoning goes that if nothing unsatisfactory had been found, the delivery was expected.

The condition is an uncertain event. Despite that CLAIMANT has a choice whether or not to conclude the contractual obligation, this holds true when the freedom of choice is in actual fact dependent upon external factors [Official Art 5.3.1 Illustration 7]. CLAIMANT's choice depends on the quality of the sample car, so this condition accords with Art 5.3.1 of PICC. Thus, if CLAIMANT does not notify any defect or unsatisfactory performance, the condition is fulfilled and the contractual obligation of sending the reminding 999 cars should take effect.

If no defects are found, CLAIMANT does not owe the obligation to notify the RESPONDENT. There is a time provided and the RESPONDENT's conditional obligation depends only on whether the condition was fulfilled by the time provided, not the notification of CLAIMANT. Also, CLAIMANT does not have this obligation since it is not written in the contract and agreed upon the two parties.

(C) The resolutive condition was not fulfilled and the RESPONDENT's contractual obligation does not come to an end

The condition as stated above is a resolutive condition, which means that the order of the reminding 999 cars is in effect. The parties may in their contract provide for a time by which the condition has to occur [Official Art 5.3.1 Illustration 4/5/7]. If CLAIMANT complained within one week after the receipt, RESPONDENT's contractual obligation of sending the reminding cars comes to an end.

CLAIMANT received the sample car on June 10 [Ex.13]. Within one week after the receipt, CLAIMANT did not notify any defect or unsatisfactory performance. Thus according to Art 5.3.2 of PICC, the condition is fulfilled and the conditional contractual obligation of sending the rest 999 cars did not end.

(D) There is no interference with the condition

If fulfillment of a condition is prevented by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the fulfillment of the condition [PICC Art 5.3.3]. The condition in this case was prevented by CLAIMANT, but it was in accordance with terms in the contract and not contrary to the duty of good faith and fair dealing or the duty of co-operation.

2.3 RESPONDENT's failure to send the reminding 999 cars constituted a non-performance

(A) RESPONDENT's failure to send the reminding 999 cars constituted a non-performance according to PICC Art. 7.1.1

Non-performance is failure by a party to perform any of its obligations under the contract [PICC Art 7.1.1]. Since the resolutive condition was not fulfilled, the contractual obligation of sending the reminding 999 cars was still in effect. However, RESPONDENT was only able to send 100 cars and even failed to send the 100 cars because of the port. It has already constituted a total non-performance, according to PICC Art. 7.1.1.

(B) The non-performance of the RESPONDENT was not interfered by the CLAIMANT.

A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission [PICC Art 7.1.2]. Any such acts are violations of the obligor's duty to co-operate spelt out in PICC Art 5.1.3 [Vogenauer P. 735]. CLAIMANT did not owe an obligation to co-operate by confirming the order as stated in Merits 2.2 (B). And CLAIMANT already confirmed the order in Ex.14. Besides, CLAIMANT did not breach the contract by nominating a ship unable to dock in the port as to be stated in Merits 4. Thus, CLAIMANT did not interfere with the non-performance.

(C) RESPONDENT cannot withhold the performance according to PICC Art 7.1.3 (2)

Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed [PICC Art 7.1.3 (2)]. As stated above, CLAIMANT did not own an obligation to confirm the order before the sending. Thus RESPONDENT cannot with hold the performance according to PICC Art 7.1.3. Even if there needs to be confirmation of the order, CLAIMANT has already confirmed the order on August 10, 2011 [Ex.14]. Then RESPONDENT has no excuse to withhold the performance.

3. RESPONDENT IS LIABLE FOR DAMAGES FOR THE BREACH OF CONTRACT PURSUANT TO ARTICLE 7.4.1

Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles [PICC Art 7.4.1]

3.1 There are damages to CLAIMANT

The electric cars have become popular and CLAIMANT could have sold 2000 cars. CLAIMANT expected the reminding 999 cars but RESPONDENT failed to perform. Thus, RESPONDENT's non-performance caused damages to CLAIMANT.

3.2 RESPONDENT did not have excuses for non-performance according to PICC

The doctrine of *force majeure* does not apply here. According to the doctrine, non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences [PICC Art 7.1.7].

RESPONDENT's only impediment is that the SS Herminia can only dock in Cadenza but not in Piccolo where the cars are in storage [Ex.17]. However, this impediment was not beyond RESPONDENT's control. RESPONDENT could have nominated another port or noticed it to CLAIMANT but he did not. Besides, this impediment could also be expected by RESPONDENT at the time of the conclusion of the contract.

4. CLAIMANT DID NOT BREACH THE CONTRACT BY NOMINATING A SHIP UNABLE TO DOCK IN THE PORT

4.1 Clause 11 from the RESPONDENT's website is not included in the contract

Clause 11 from the RESPONDENT's website is a standard term [PICC Art 2.1.19]. No term contained in standard terms which is of such a character that the other party could not reasonably have expected, is effective unless it has been expressly accepted by that party [PICC Art 2.1.20]. CLAIMANT did not accept Clause 11 expressly. So Clause 11 cannot be effective.

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance [PICC Art 2.1.22]. Clause 11 is not agreed by CLAIMANT expressly nor common in substance with RESPONDENT's standard terms. Thus the contract did not include clause 11 from RESPONDENT's conditions.

4.2 Even though Clause 11 is included in the contract, CLAIMANT did not breach this agreement

RESPONDENT nominated Cadenza, Cantata and Piccolo as the ports [Ex.11] for the reminding 999 cars. And CLAIMANT nominated SS Herminia for further shipment [Ex.13]. RESPONDENT claimed that the cars were stored in Piccolo but the ship was in Cadenza.

(A) CLAIMANT's nomination did not breach the agreement according to PICC Art 5.1.3

Each party shall co-operate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations [PICC Art 5.1.3]. RESPONDENT obviously knew more about the ports in Cadenza but CLAIMANT may not. From a reasonable person's view, RESPONDENT should co-operate to notify the port situation to CLAIMANT. However, after CLAIMANT nominated SS Herminia on June 10, 2011 [Ex.13], RESPONDENT did not notify the problem to CLAIMANT until Semptember 1, 2011 [Ex.17]. CLAIMANT can invoke PICC Art 7.1.2 to excuse himself.

(B) Alternatively, CLAIMANT's nomination did not breach the agreement according to PICC Art 4.8

RESPONDENT's notification of the situation of the port should be supplied according to PICC Art 4.8. Good faith and fair dealing and reasonableness can be regarded in determining the supplement of the obligation [PICC Art 4.8(2)]. According to good faith and fair dealing, or reasonableness, RESPONDENT should tell CLAIMANT that SS Herminia is not suitable to dock

in the port where the cars are stored. Even if this obligation was not in the contract, the supplement is needed.

REQUEST FOR RELIEF

CLAIMANT respectfully requests the tribunal to find that:

1) The tribunal has jurisdiction as RESPONDENT is bound by the arbitration agreement

2) The RESPONDENT's conduct constituted a non-performance

3) RESPONDENT is liable for damages for the breach of contract pursuant to article 7.4.1

4) CLAIMANT did not breach the contract by nominating a ship unable to dock in the port

Consequently, CLAIMANT respectfully requests the Tribunal to order RESPONDENT

1) To pay damages;

2) To pay loss of profit

3) To pay interest on the said sums; and

4) To pay the costs of arbitration

(2833 words)