Pitkowitz & Partners

CHEAT SHEET

31st Willem C. Vis International Commercial Arbitration Moot

Links to sources:
Problem (including PO2)
Analysis for Arbitrators
ICC Rules
CISG
Danubian Contract Act (UNIDROIT Principles)
Equatorianian Data Protection Act (GDPR)

CLAIMANT ("*CL*") – *SensorX plc*
(Mediterraneo)
Tier 2 producer of sensors / Seller under the FA

Mr Enzo Isetta (CEO) [*WS C6 p17-18*]
Ms Bertha Durant (Head of Sales) [*WS C8 p49-50*]
Mr Li Worry (former Head of Sales and Purchasing)
Ms Telsa Audi (former Account Manager responsible for RE)
Mr Gustaf Gabrielsson (Account Manager responsible for RE since Aug 2022)
Ms Armanda Peugeotroen (Account Manager responsible for L-1 sensors)

FRAMEWORK AGREEMENT ("*FA*")
Concluded by the Parties on 7 June 2019 to regulate RE's future supply with CL's sensors [*RfA §6 p5; C1 p9-12*]

RESPONDENT ("*RE*") – *Visionic Ltd*
(Equatoriana)
Tier 1 producer of optical systems / Buyer under the FA

Ms Mercedes Ford (CEO)
Mr William Toyoda (Head of Purchasing) [*WS R4 p36*]
Mr Henry Royce (person responsible for relation with CL)

- **June 2019 – Jan 2022:** Parties conclude 22 purchase orders under the FA, under which CL delivered more than 5,000,000 sensors to RE without problems [*RfA §10 p5-6*]

FIRST CLAIM arising out of Purchase Order No. 9601 ("*PO 9601*") [*C2 p13*]

1,200,000 S4-25899 radar sensors for USD 38,400,000

- **2020:** RE falls victim of a cyberattack and informs CL [*C6 §8 p17; ARfA §2 p30; R1 p33; R2 p34; R4 §2 p36*]
- **5 Jan 2022:** CL falls victim of a cyberattack ("***2022 Cyberattack***") [*RfA §14 p6; C6 §4-10 p17-18; PO2 §25-26 p64*]
- **17 Jan 2022:** Parties conclude PO 9601 [*C2 p13*]
- **23 Jan 2022:** CL discovers the 2022 Cyberattack [*RfA §27 p7; C6 §5 p17*]; CL instructs the leading cybersecurity firm in Mediterraneo to evaluate the 2022 Cyberattack, which failed to acknowledge that unknown cybercriminals had managed to place sophisticated malware including a trojan horse in CL's CRM system [*PO2 §25 p64*]; CL considers the 2022 Cyberattack to be of "*minor relevance*" [*C6 §6 p17; PO2 §25 p64*]
- **28 Mar 2022:** Unknown cybercriminals send email to RE (impersonating Ms Audi from CL), instructing RE to transfer the purchase price under PO 9601 to a new (foreign) bank account ("***Spoof Email***"); the Spoof Email came from a wrong domain (@se**m**sorx.me instead of @sensorx.me) and contains other minor flaws [*C5 p16*]
- **30 Mar 2022:** Unknown cybercriminals send second spoof email to RE (impersonating CL) confirming that the exchange of emails is sufficient to fulfil the writing requirement and change the banking details [*R4 §4 p36*]
- **3 Apr and 30 May 2022:** CL delivers the sensors to RE [*RfA §13 p6; C3 p14*]
- **15 May 2022:** It becomes apparent for CL that the 2022 Cyberattack it had suffered was severe [*C6 §10 p17-18*]
- **15 May – 30 June 2022:** CL investigates and sanitizes its IT systems following the 2022 Cyberattack [*RfA §14 p6*]
- **20 May 2022:** Equatorianian journal publishes an article reporting about increased cyberattacks in the automotive industry, explicitly mentioning the 2022 Cyberattack on CL [*R3 p35; PO2 §17 p63*]
- **3 May and 30 June 2022:** Payments under PO 9601 fall due [*RfA §14 p6, §24 p7; C3 p14*]
- **2022:** RE pays purchase price to (wrong) bank account stated in Spoof Email [*RfA §25 p7; C4 p15; ARfA §9 p31*]
- **25 Aug 2022:** CL notices missing payments [*RfA §14-15 p6*]
- **5 Sep 2022:** CL requests payment from RE [*RfA §17 p6; C3 p14*]
- **8 Sept 2022:** RE refuses to pay (a second time) [*C4 p15*]
- **9 June 2023:** CL submits RfA to ICC claiming payment of the purchase price [*RfA p5-8*]
- **10 July 2023:** RE submits Answer to RfA and argues that its payment qualifies as performance [*ARfA p30-32*]
- **30 Aug 2023:** Parties sign Terms of Reference [*Answer to Authorization Request §4 p54-55; PO1 §1 p58*]

SECOND CLAIM arising out of Purchase Order No. A-15604 ("*PO A-15604*") [*C7 p48*]

200,000 L-1 sensors for USD 24,000,000 payable in two installments

- **4 Jan 2022:** Parties conclude PO A-15604 [*C7 p48*]
- **18 Mar 2022:** RE pays first installment following delivery of sensors on 16 Feb 2022 [*C8 §6 p49*]
- **4 Apr 2022:** RE announces to withhold second installment because sensors are defective [*R5 p56*]
- **20 May 2022:** Second installment under PO A-15604 falls due [*Authorization Request §4 p46-47*]
- **8 Sep 2023:** CL notices missing payment (late notice caused by internal problems) [*C8 §7 p49; PO2 §43(e) p66*]
- **11 Sep 2023:** CL requests the Tribunal to add the second claim (payment of second installment) to the pending arbitration; alternatively, CL requests consolidation of the proceedings [*Authorization Request p46-47*]
- **2 Oct 2023:** RE objects and alleges defectiveness of sensors [*Answer to Authorization Request p54-55*]

PROCEDURAL ISSUE (a) [*PO1 §4(1)(a) p58*]

Can and should the Tribunal add the SECOND CLAIM to the pending arbitration?

Art 23(4) ICC Rules: *"(…), no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so (…) consider the nature of such new claims, the stage of the arbitration and other relevant circumstances."*

CL: YES / **RE:** NO
- Tribunal has the power to add the second claim under Art 9 ICC Rules (allowing multi-contract arbitration) in connection with Art 6(4)(ii) ICC Rules (because the arbitration clauses in the FA, PO 9601 and PO A-15604 are compatible)
- Close connection of the claims (common questions of law and fact)
- Procedural efficiency resulting from only one proceeding (time and costs)

TO FURTHER CONSIDER:
- *Specific requirements for adding new claims according to the Parties' Terms of Reference ("noticeable savings in cost and time")*
- *Three separate arbitration clauses in the FA, PO 9601 and PO A-15604*
- *Arbitration clauses in PO 9601 and A-15604 are unsigned*
- *CL's late request (1.5 years knowledge of defectiveness of sensors)*

PROCEDURAL ISSUE (b) [*PO1 §4(1)(b) p58*]

Can and should the Tribunal consolidate the proceedings, in case the SECOND CLAIM has to be raised in a separate arbitration?

Art 10 ICC Rules: *"The Court may (…) consolidate (…), where: (…), or (b) all of the claims (..) are made under the same arbitration agreement(s); or (c) (…) the same parties, (…) the same legal relationship, and [the] arbitration agreements [are] compatible. (…) may take into account any circumstances it considers to be relevant, (…)."*

Art 41(5) FA: *"Consolidation. If the Parties initiate multiple arbitration proceedings in relation to several contracts concluded under this framework agreement, (…) common questions of law or fact and which could result in conflicting awards or obligations, the Arbitral Tribunal of the first arbitration proceedings has the power to consolidate (…)."*

CL: YES / **RE:** NO
- Tribunal has the power (valid power shift from ICC Court to Tribunal)
- Close connection of the claims (common questions of law and fact)
- Risk of conflicting awards and obligations in case of separate proceedings

TO FURTHER CONSIDER:
- *Interplay between Art 10 ICC Rules and Art 41(5) FA*
- *Interplay between arbitration clauses in the FA, PO 9601 and PO A-15604*

MERITS ISSUE (c) [*PO1 §4(1)(c) p58*]

Is CL entitled to payment under PO 9601 or can RE invoke a violation of a contractual (information) duty or obligation or rely on a CISG defense?

Art 80 CISG: *"A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission."*

Art 77 CISG: *"A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages (…)."*

CL: CL is entitled to payment / **RE:** CL is not entitled to payment
- RE performed by paying to the new (wrong) bank account
- Even if RE's payment to the new (wrong) bank account is considered a non-performance, CL is precluded from asserting the claim because it failed to inform RE about the 2022 Cyberattack (Art 80 CISG)
- *In eventu*, the claim should be reduced (to zero) due to CL's failure to prevent/mitigate the loss by informing RE about the 2022 Cyberattack (Art 77 CISG)

TO FURTHER CONSIDER:
- *Were the banking details in Art 7 FA amended by the Spoof Email (resulting in a performance by RE)?*
  - *Can the Spoof Email be attributed to CL?*
  - *Could RE reasonably rely on the Spoof Email?*
  - *Did the Spoof Email comply with the form requirements of Art 40 FA or have these been waived?*
  - *Would Ms Audi have had authority to amend the banking details in Art 7 FA?*
- *Did CL have an obligation to inform RE about the 2022 Cyberattack under (i) Art 9 CISG (usage/practice), (ii) Art 7 CISG and 1.7 and 5.1.2 Danubian Contract Act (principle of good faith), (iii) Art 5.1.3 Danubian Contract Act (cooperation duty), or (iv) Art 34 Equatoranian Data Protection Act (overriding mandatory provision)?*
- *Did RE act negligently by complying with the request in the Spoof Email?*
- *Is Art 77 CISG applicable to performance claims?*