16th LAWASIA International Moot

FURTHER CLARIFICATIONS

LAWASIA
THE LAW ASSOCIATION FOR ASIA AND THE PACIFIC

Organiser of the LAWASIA International Moot Competition

FURTHER CLARIFICATIONS

General Notes

(a) Where questions have neither been answered nor recorded in these Clarifications, it should be assumed that they are immaterial, the omission is intentional, or that the resolution of the issue is a matter for the Parties to determine by reference to the law and inference to the facts.

(b) Any reference to a clarification number in this document refers to the numbering adopted in Clarification No. 1, unless expressly stated otherwise.

Formatting Clarification and Amendments

1. ***As the Arbitral Tribunal had directed the Parties to refer to the Inquisitorial Rules of Taking Evidence in International Arbitration, does this means that the request by the Claimant to implement the Prague Rules on the Efficient Conduct of Proceeding in International Arbitration is rejected?***

   The correct reference to the Prague Rules is the Rules on the Efficient Conduct of Proceedings in International Arbitration. The Inquisitorial Rules of Taking Evidence in International Arbitration was working title used during the drafting process of the Prague Rules.

2. ***Does the "final MST Agreement" that was signed by the Parties refer to the draft MST Agreement sent by the Claimant on the email dated 27th September 2019?***

   Yes, the final MST Agreement refers to the draft MST Agreement sent by Mr Richard Chang of Malaysian Glory Bhd to Mr Amin Chausse of LeClerc & Co on 27th September 2019.
   There is also an inadvertent typographical error in the first paragraph of Mr Chausse's email dated 10th October 2019 (cf. Cl. Exhibit 3). The correct date is ***27th September 2019*** *and* ***not*** *27th September 2020.*

3. ***Should the last line of page 14, paragraph 22 of the record be 28th July instead of 18th July since on the 23rd July the Claimant was only informed about the non-conformity of the products?***

   There are no typographical errors here as the consignment was disposed off by the authorities on 18th July 2020, even though the Claimant only received the official notification on 23rd July 2020.

4. ***In Respondent's Exhibit 1, page 53, paragraph 2, it is stated "I am also responsible liaising with our panel logistic service providers ("PSLP") for the transportation of our products". Shouldn't it be "PLSP"?***

   This is an inadvertent typographical error. Any reference to "PSLP" in the record is actually a reference to "PLSP".

Questions and Answers

5. ***It was stated that the Respondent had worked with many others entities in developing artisanal food products. Did a similar dispute ever arise that required the Respondent to disclose its Secret Recipe?***

   No, a similar dispute has not arisen in any of the Respondent's prior endeavours regarding its Secret Recipe.

6. ***With respect to Clarifications 4 and 11, is the Claimant requesting for the disclosure of the HGA Recipes based on Clause 2 of the MST Agreement to exert its creative rights? Or is the Claimant only relying on Article 4.5(a) of the Prague Rules? And if only the latter, does this mean that the Claimant will be satisfied with the arbitral tribunal drawing adverse inference pursuant to Article 10 of the Prague Rules in the event of non-disclosure?***

   The Claimant's reliance on Article 4.5(a) of the Prague Rules is an alternate relief to its primary relief of obtaining an order for the disclosure of the HGA recipes.

7. ***In Clarification 11, does "credited equally" mean that the Parties must be conferred equal profits arising from the sale of the Products, or does it mean that they have equal rights over the possession and control of the HGA Recipes?***

   The reference to "credited equally" means that the Parties are equally involved in the creation of the HGA product line and receive due acknowledgment and recognition for their involvement in the same.

8. ***In relation to Clarification 11, is there a time limit imposed on the Parties' creative rights over HGA recipe? If no, is there a general understanding/interpretation for such right between them?***

   No, a time limit has not been imposed as the Parties had assumed that so long as the HGA Product line remained viable, both Parties should be able to profit from the fruits of the collaboration.

9. ***In Clarification 11, how is the Respondent credited equally in the HGA line? Is their company on the packaging of the cheese or mentioned in the menu?***

   All promotional efforts including social media posts always specify that the HGA product line is a collaboration between the Claimant and the Respondent. The packaging of the HGA Product line also makes reference to the Parties as the creators of the product and specifies that the product is manufactured by the Respondent and distributed by the Claimant.

10. ***While the Claimant's culinary science experts may be able to determine that the Respondent's culinary experts were experimenting with the HGA Recipes, how was it concluded that this was to reduce the Respondent's production overheads?***

    This was an inference made by the Claimant's culinary experts based on their conversations with the Respondent's culinary experts given that regular references were made during the course of the experimentations to minimising production overheads and maximising the profitability of the collaboration between the Claimant and the Respondent. The Respondent has reinforced this position at paragraph 32 of the Response to the Notice of Arbitration.

11. ***Was there ever a report submitted by the Claimant's Culinary Experts regarding the supposed experimentation on the HGA Recipes, or was it simply an oral report based on the results of the trials where samples failed the fermentation requirements?***

    Yes, as with any other experimentation process, the results of the experiments using the HGA Recipes were documented and a joint report was submitted by the Parties' culinary experts to both the Claimant and the Respondent for approval before launching the HGA Product line. A copy of the joint report has not been filed by either Party at this stage of the arbitration proceedings due to the sensitivity of the contents of the report and also because the Parties wish to file substantive reports by their relevant culinary experts once the outcome of the upcoming hearing is known.

12. ***With regard to Clarification 22, was the Claimant aware of the Respondent's proposed term regarding the documents-only basis arbitration? Did they have discussion on the terms and what was their final decision?***

    Yes, the Claimant would have been aware since this was referenced in its email to the Respondent dated 10th October 2019. The Respondent did not reply to the said email and there was no further discussion between the Parties on this matter.

13. **With reference to Clarification 9 regarding the subjective nature of assessing the dispute, what are the relevant financial positions/information of the parties?**

    The Claimant expected its estimated earnings from the HGA product line to be approximately USD3.3M per annum, *which would increase the Claimant's annual net income by 10%.* To date, the Claimant has invested USD8M in its collaborative efforts with the Respondent in establishing the boutique hotel and the HGA product line, whilst the Respondent has invested approximately EUR10M.

    The value of the last shipment can be ascertained by reviewing the record. If necessary, any other financial information of the parties should be understood on the basis of case facts.

14. **In Clarification 9, does the word 'value' mean anything that contains commercial value to the respective Parties?**

    The world "value" shall be understood in light of its literal meaning and the factual background.

15. ***What is the relationship and difference between logistics provider and carrier?***

For the purpose of this dispute, the logistics provider assists the Respondent with procuring quotes and transporting the goods to be delivered to the selected carrier. The carrier transports the consigned goods by sea from Port A to Port B.

16. ***Did the Respondent inform ELK, and in turn Pulau Lama, that the temperature of the shipment has to be altered when the stipulated ageing process of 12 weeks is complete?***

This was not expressly communicated by the Respondent to ELK because it was envisaged that the aging process would continue while the products were being transported by sea. However, the Respondent had communicated to ELK the temperature at which the products had to be maintained to prevent spoilage (see Paragraph 8 of the Witness Statement of Madeline Beauregarde). Y

17. ***In relation to the 4th shipment, why did ELK not obtain quotations on Easy A on behalf of the Respondent, since quotations from Easy A were consistently sought in the first three shipments?***

Easy A's quote had sky-rocketed by the time the products were ready for the 3rd shipment. ELK had been verbally advised that a similar quote from Easy A would be likely for the 4th shipment which was why it opted for the other three carriers whose quotes were, by far, more competitive.

18. ***With respect to Clarification 29, is the Respondent responsible to follow up with the Claimant to ensure that on the date of the arrival of the shipment, the goods are to be reached to the claimant's hands as stipulated in the contract?***

There are no express terms in the MST Agreement stipulating any responsibilities on the Respondent to follow up with the Claimant. Nonetheless, standard business practice provides that it is good practice for contracting parties to maintain clear, concise and constant communication at all times.

19. ***With respect to Clarification 30 and the refrigeration temperatures which needed to be monitored at all times, did ELK report the changes of temperature from aging temperature to storage temperature in their reports to the Respondent?***

Whilst ELK constantly provided updates and status reports on the condition of the shipment to the Respondent, these updates and reports did not include any information on the temperature changes.

20. ***Why did the Claimant reject the Respondent's offer to remedy the breach?***

The Claimant opted to exercise its right of avoidance pursuant to the CISG.

21. ***With respect to the 4th shipment, had the Claimant made any payment to the Respondent?***

Yes, the Claimant has made payments to the Respondent for all the deliveries, including the 4th shipment.

22. ***Was the routine inspection on the 4th shipment more stringent than the earlier three shipments?***

The routine inspections carried out on all the shipments followed the same standard operating procedures that are in place to ensure that all imported food meets the requirements for public health and safety and is compliant with Malaysia's food standards.

23. ***What was the Claimants' reply to the Respondents' offer for a fresh batch of the 4th shipment?***

The Claimant did not respond to the Respondent's offer as at that point in time, the Claimant had already served its Notice of Avoidance on the Respondent.

24. ***Is there any specific reason as to why the Respondent did not inform the Claimant about the change in the agreed carriers after the former had shipped the cheese products?***

The Respondent was mindful that it needed to meet its performance and delivery obligations under the MST Agreement given that time was of the essence.

25. ***In Clarification 31, it is stated that it is industry knowledge that the Pulau Lama is involved in a few complex arbitrations relating to transportation breaches. Does this industry knowledge refer to logistic industry?***

It refers to the shipping and logistics industry.

26. ***In relation to Clarification 31, how reputable and reliable is the publisher behind the 'scathing blog post' about Pulau Lama? Has Pulau Lama formally disputed the blog post's contents stating 'negligence in the transportation of temperature-sensitive goods by sea due to issues in Pulai Lama's named ship's refrigeration plant'?***

The blog post in question was published on a reputable website that covers the latest trends, news and insights in the shipping and logistics industry called "Global Shipping Review" ("GSR"). The blog post does not credit a particular author but its contents were verified by the GSR Editorial Team before the publication went live. Information is presently unavailable as to whether the Pulau Lama has commenced negligence or defamation proceedings against GSR.

27. ***Were there any findings made in the arbitration disputes that the Pulau Lama shipment carrier definitely had faulty refrigeration?***

It should be reinforced that arbitral proceedings are confidential even though the subject matter in one arbitration may relate to the subject matter in other arbitration. No further clarification will be given.

28. ***Was the Claimant aware of the negotiation between the Respondent and Trendy Henry before the Busileaks post on 30th August 2020?***

No, the Claimant was not aware.

29. ***Was there ever any substantiation of the negotiations between the Respondent and Trendy Henry beyond the Busileaks article?***

See Clarification 26 in Clarification No. 1.

30. ***Apart from alleging a breach of Article 3 of the MST Agreement, is the Claimant also alleging a breach of confidence in respect of the Respondent's negotiations with Trendy Henry?***

At this point in time, the Claimant's request for an injunction is only based on its contention that the Respondent is in breach of Article 3 of the MST Agreement.

31. ***In relation to Clarifications 20, 25, 26 and 32, is the Respondent disputing the admissibility and contents of the BusiLeaks article (Cl. Exhibit 4)? Is this the only piece of evidence that the Claimant relies on to support its injunction request?***

Rather than disputing the admissibility and contents of the BusiLeaks article, the Respondent is asserting that it has rights to deal with the HGA recipes as it sees fit vis-à-vis its exclusive rights over the recipes (see paragraph 35 of the Response to the Notice of Arbitration).

Yes, the Claimant's request for an injunction is primarily based on the BusiLeaks article but it is also based on the financial and reputational harm it would suffer if the Respondent tries to create a product similar to the HGA product line with Trendy Henry.

It should be clarified that the type of injunction sought by the Claimant is an interim injunction for the Respondent to refrain from continuing negotiations with Trendy Henry until the outcome of this arbitral proceeding is known.