

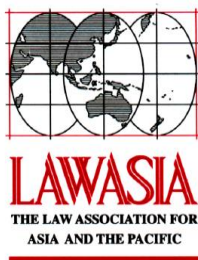


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# 16<sup>th</sup> LAWASIA International Moot

## CLARIFICATIONS TO THE MOOT PROBLEM

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Organiser of the LAWASIA International Moot Competition

# CLARIFICATIONS TO THE MOOT PROBLEM

## 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) The Parties are reminded to discuss only the procedural and substantive issues indicated under Paragraphs 4 (a) of Procedural Order No. 1 in their written and oral submissions. No further questions should be addressed at this stage of the proceedings.

## Formatting Clarification and Amendments

1. ***In the Claimant’s Notice of Arbitration, page 17 paragraph 32, it is stated that “Article 12 of the MST Agreement clearly states that “The Parties further agree that where perishable goods are involved, the arbitration is to proceed on a documents-only basis...” However, in the Claimant’s Exhibit 1, page 28 and 29, it is Article 13 that concerns the dispute resolution. Is this a typographical error?***

This is an inadvertent typographical error. The Claimant’s Notice of Arbitration at page 17 paragraph 32 should read “Article 13 of the MST Agreement clearly states that ...”.

2. ***In Claimant’s Exhibit 1, page 28, Clause 8 provides that “In the event any Products do not comply with the specifications Clause 3 and are rejected by Buyer, Buyer may, at its option...” However, Clause 3 concerns the distribution and ownership of products, whereas Clause 4 concerns the standards of the products. Should the specifications stated under Clause 8 therefore be Clause 4 rather than Clause 3?***

This is an inadvertent typographical error. Clause 8 of the MST Agreement as found in Claimant's Exhibit 1, page 28, should read: " ... In the event any Products do not comply with the specifications Clause 4 and are rejected by Buyer, Buyer may, at its option...".

3. ***In Respondent's Exhibit 1, page 55, paragraph 10, it is stated "Nonetheless, all the goods were delivered to the Respondent on or before the contracted date of delivery". However, shouldn't the goods be delivered to the Claimant instead of the Respondent?***

This is an inadvertent typographical error. The Witness Statement of Madeine Beauregarde as found in the Respondent's Exhibit 1 should read at paragraph 10, page 55: "Nonetheless, all the goods were delivered to the Claimant on or before the contracted date of delivery".

4. ***Is the reference to Article 4.2(a) of the Prague Rules at paragraph 44, page 20, correct?***

This is an inadvertent typographical error. The reference should be to Rule 4(5)(a) of the Prague Rules and not Rule 4.2(a).

5. ***Is the reference to "Morning Glory Berhad" on page 30 of the record a typographical error?***

This is an inadvertent typographical error. The reference to "Morning Glory Berhad" on page 30 should actually be a reference to the Claimant, that is "Malaysian Glory Berhad".

6. ***Is the reference to the ICC Incoterms 2019 as stated on page 31 of the record actually meant to refer to either the Incoterms 2010 or the Incoterms 2020?***

This is an inadvertent typographical error. The reference should be to the Incoterms 2010.

7. ***With respect to the Witness Statement of Madeine Beauregarde as found in the Respondent's Exhibit 1, are the references to the "Pulau Lamai" actually a reference to the "Pulau Lama"? Also, what is meant by the term "jumped ship" at paragraph 20, page 58 of the record?***

This is an inadvertent typographical error. Any reference to the “Pulau Lamai” in the record is actually a reference to the “Pulau Lama”. The term “jumped ship” is a colloquial expression which refers to a person resigning from their place of employment.

- 8. *When exactly did the Malaysian authorities disposed of the goods and what was the exact date the Respondent offered to remedy the breach/offered a fresh batch of goods to the Claimant?***

This is an inadvertent typographical error. The Notice of Arbitration at paragraph 42, page 20, should state “**18<sup>th</sup> July 2020**” instead of “20<sup>th</sup> July 2020”. Similarly, the Response to the Notice of Arbitration at paragraph 21, page 46, should state “**On the same day**” instead of “10<sup>th</sup> August 2020”.

### **Questions and Answers**

- 9. *Is there an objective criterion to determine what is a low value dispute and a high value dispute as mentioned in CL. EXHIBIT 3 and RS. EXHIBIT 2?***

The Parties did not agree on an objective criterion to distinguish between a low value and a high value dispute. Rather, the such categorisation is a subjective matter that needs to be considered against the relevant financial positions of the Parties and the extent of the loss, if any, incurred.

- 10. *With reference to the contents of Paragraph 23 of the Claimant’s Notice of Arbitration, was the Respondent aware of the Claimant’s commitment to the KL Cheesy Festival?***

No, the Respondent was not aware of the Claimant’s commitment to the KL Cheesy Festival. However, the Respondent was aware that the Claimant was reliant on the timely delivery of the artisanal cheese products given the Claimant’s need to supply the said products to its hotel chains, as well as its commitments to other domestic and international artisanal food retailers.

- 11. *Do the creative rights over the HGA recipes as shared equally between the parties under Clause 2 of the MST Agreement also include the process by which the HGA was arrived at?***

During the contract negotiation phase, the Parties did not discuss the meaning of “creative rights” as stated in Clause 2 of the MST Agreement. However, the understanding between the Parties was that any collaboration which includes creation of the HGA product line would be credited equally by and to both Parties, on goodwill basis.

**12. What were the contents of the Claimant’s notice of avoidance?**

The Claimant issued its Notice of Avoidance on 6<sup>th</sup> August 2021, via email, excerpts of which are reproduced below:

Dear Dom,

In view of the recent delivery of the goods that are not in accordance with the standards contained in the Agreement, we are left with no choice but to exercise our rights to avoid the Agreement as a whole.

**NOTICE OF AVOIDANCE**

Please note that due to your failure to manufacture and deliver the goods in accordance with the terms and standards provided in the Manufacturing and Delivery Agreement, you have committed a fundamental breach of the said Agreement.

As per the Agreement and in accordance with the principles under the international sale of goods, please accept this email as our notice of avoidance of the Agreement, effective immediately upon receipt of this email.

We further reserve our rights to claim for damages, including but not limited to loss of profits.

Thank you.

Best regards,

*Daniel Lee*

**DATO’ DANIEL LEE**

**CEO**

**MALAYSIAN GLORY BHD**

Lot 84, Jalan Manis,

Taman Mutiara, 53200

Cheras, Selangor, Malaysia



13. ***Do parties agree that the merits of the dispute on Issues (iv) and (v) should be determined exclusively based on the CISG rather than English law (despite Article 16 of the MST Agreement stipulating both as the governing law)?***

Yes.

14. ***Who is named as the shipper and consignee in the bill of lading for the 4<sup>th</sup> shipment?***

The named shipper was the Respondent, the carrier was The Pulau Lama, and the consignee was the Claimant.

15. ***Did the Claimant reimburse the freight costs for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> shipments?***

No, because the Claimant intends to reimburse the Respondent the total freight costs upon completion of all four (4) shipments.

16. ***Did the Respondent provide quotations from Pulau Lama to the Claimant for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> shipments? If yes, did the Claimant express any objection to its inclusion?***

No quotes were obtained from The Pulau Lama for the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> shipments. Rather, for these shipments, quotes were obtained from Easy A, Afternoon Delight and Kuljao Semsai.

17. ***Why did the logistics provider (ELK) only notify the Respondent on the arrival of the 4<sup>th</sup> shipment on 16<sup>th</sup> July 2020 but not its disposal of goods on 18<sup>th</sup> July 2020? Is ELK responsible to notify the Claimant or Respondent on the status of clearance of all shipments?***

It is not the responsibility of the logistics provider to notify the Respondent of the status of the clearance of the goods.

18. ***Are parties required to submit on the recoverability and quantum of damages sought by the Claimant, particularly on the loss of profits?***

No.

19. ***In Claimant Exhibit 2, page 33, paragraph 5, Mr Kair Raman mentioned that he had received a notification regarding the delay of the 4th shipment via phone call. However, in the Claimant's NoA, page 14, paragraph 20, it is stated that this notification was received via email. Is this a mere typographical error?***

No, this is not a typographical error. As a matter of professional courtesy, Ms. Beauregarde did call Mr. Raman before sending him an email to a similar effect.

20. ***The Claimant asserts that there has been a breach of the MST in their NoA, at page 20, paragraph 43, relating to the Respondent's negotiations with another artisanal foods retailer in Singapore (Trendy Henry). Is this in reference to a specific clause of the MST Agreement?***

The Claimant alleges that the Respondent is in breach of Article 3 of the MST Agreement.

21. ***Why is there an intentional blank space in Clause 8 of the MST Agreement?***

It appears that Clause 8 was left incomplete at the time of the signing of the Agreement. Hence, the Claimant is relying on the provisions of the CISG, pursuant to Clause 16 to exercise its right of avoidance.

22. ***Was there a reply to the 10<sup>th</sup> October 2019 email from the Respondent?***

There was no reply to the email dated 10<sup>th</sup> October 2019 from the Respondent.

23. ***When the final MST Agreement sent to the Respondent to sign did not reflect the proposed term in the email dated 10<sup>th</sup> October 2019, did the Respondent ask the Claimant about it? Or did the Respondent sign the agreement without asking?***

The Respondent signed the Agreement without asking further.

24. ***Did the Claimant have access to the HGA Recipes at any point in time? How did the Claimant's culinary experts test the recipes as stated in the Notice of Arbitration at paragraph 40, page 19, if they had no access to the HGA Recipes?***

The Claimant's culinary experts had access to the HGA Recipes throughout the experimentation process. However, where the Respondent's Secret Recipe was concerned, none of the documents to which the Claimant's culinary experts had access set out the process or the ingredients used to make the Respondent's Secret Recipe – rather, the ingredient list would simply state a batch number for the Respondent's Secret Recipe. This was because during the experimentation phase, the Respondent's culinary experts would provide batches of cheese made using the Respondent's Secret Recipe to the Claimant's culinary experts, who would then test out permutations and combinations of the Claimant's Signature Recipe when combined with the various cheese batches provided to achieve an optimum flavour balance. Once achieved, the Respondent's culinary experts would note down the batch number of the utilised cheese batch to create cheese for the HGA product line using an identical method.

- 25. *What kind of "Asian artisanal delights" do the Respondent's ongoing discussions with Trendy Henry concern? Do these products involve the use of HGA Recipes?***

The Respondent and Trendy Henry discussed about various Asian artisanal delights including an artisanal cheese range. As stated in Claimant's Exhibit 4, "*...LeClerc & Co intends to re-create the magic it recently waded with its joint venture with Malaysian Glory Berhad to establish The Hidden Gems of Asia artisanal cheese range*".

- 26. *When do the Respondent and Trendy Henry intend to release the line of artisanal products?***

Discussions about their collaboration are still underway and no dates have been projected thus far.

- 27. *Did the MOH give any indication of why the Product was not fit for human consumption? Is there anything in the notice that indicates it might be due to Pulau Lama's improper refrigeration?***

The notification from the Food Safety and Quality Division found that the Product was not in accordance with the Food Act 1983 and was unfit for human consumption. It is not this division's duty to investigate or speculate the cause of the spoilage.



- 28. *Were the previous 3 shipments of Products also examined by customs and the Ministry of Health? If that is not the case, is there any particular reason as to why MOH decided to examine the 4<sup>th</sup> shipment?***

Yes, routine inspections were also carried out on all the previous shipments.

- 29. *If the shipments were all subject to customs inspection by the relevant authorities, were the contractually stipulated delivery dates the date of arrival in Malaysia or the date it reached the Claimant's hands?***

The due date reflects the date the Products are to be received by the Claimant.

- 30. *What does "kept in proper refrigeration conditions" at paragraph 14, page 12 of the record refer to? During the HGA Products 45- day shelf life, are they kept in the same refrigeration conditions as when they are ageing? What happens if the refrigeration conditions do not change from when they are ageing?***

The reference to "kept in proper refrigeration conditions" relates to the temperature specified by the Respondent to the carrier, via the ELK, that the HGA Products were required to be maintained at to best facilitate the aging process (i.e. 11°C). Once the ageing process concludes, the HGA Products are required to be stored at normal refrigeration temperature (3-4°C). If such change in temperature does not occur, the HGA Products would continue to age and may be at risk of spoilage.

- 31. *Did anything result from the "scathing blog post" about Pulau Lama at page 33? Did a lawsuit against Pulau Lama ensue?***

It is industry knowledge that the Pulau Lama is involved in a few complex arbitrations relating to transportation breaches. However, the precise nature of these disputes is unknown due to the confidential nature of arbitration proceedings.

- 32. *Is BusiLeaks a reputable and reliable source of business information?***

BusiLeaks is in many ways similar to WikiLeaks. The only difference lies in the subject matters covered in BusiLeaks which only focuses on international commerce and trade.