ARBITRATION UNDER THE CAM-CCBC ARBITRATION RULES 2012 IN THE 8TH LL.M. INTERNATIONAL COMMERCIAL ARBITRATION MOOT COMPETITION

Arbitration Proceeding No. 201/2018/SEC9

CLSA, INC.

Claimant

v.

MARCELO LEE

Respondent

RESPONDENT'S OUTLINE

March 2, 2019

Team 5

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ANoA	Answer to the Notice of Arbitration
Art.	Article
Cl.	Clause
Clar.	Clarifications
Ex.	Exhibit
NoA	Notice of Arbitration
para.	paragraph
paras.	paragraphs

PRELIMINARY ISSUES

I. CLSA'S CLAIMS SHOULD BE DISMISSED AS INADMISSIBLE

A. CLSA's claims should be dismissed because CLSA failed to comply with the time limit for commencing the arbitration

1. According to the arbitration agreement, CLSA could start this arbitration "within 60 days after the failure of the negotiation." Clar., at 1. Failure to start the arbitration within that time limit would mean that CLSA's claims are barred. *Cf.* Born, at 941–42. Here, the 60-day time limit meant that practically CLSA had to start the arbitration, if any, by February 20, 2018. *See* ANoA, ¶ 4. Yet, it filed a valid NoA only four months later—on June 21, 2018. *Id.*, ¶ 6. *See also* Clar., ¶ 17. Therefore, CLSA's claims are foreclosed. *Cf.* CAM-CCBC Commentary, at 66.

B. A finding that CLSA's claims are not barred despite the late initiation of the arbitration would subject the award to set-aside risk

2. When a party commences an arbitration after the contractually agreed time limit, but the Tribunal finds that the party commenced it in time, the award may be set aside. *See Vekoma*.

C. CLSA's claims should be dismissed as abuse of process

1. Applicability of the principle of abuse of process

3. Abuse of process and the related principle of abuse of rights are generally applicable legal principles. *See, e.g.*, *Orascom*, ¶ 541; *Mobil*, ¶ 169; Gaillard, at 33–34; Schaffstein, ¶ 6.115. The principle of abuse of process applies in international commercial arbitration as well. *See Hussmann*, ¶ 85; Gaillard, at 32, 36; Sandy, ¶ 33.21. The principle can also be applied based on an arbitral tribunal's procedural discretion or, as here, authority to apply "general principles of arbitration." *See* Symposium, at 118; CAM-CCBC Rules, Art. 7.8; PAA, Art. 6.

2. Essence of the principle of abuse of process

4. To avoid misuse of law, the principle of abuse of process prevents entertaining a claim when it is made notwithstanding the existence of other, related proceedings designed to recover

for essentially the same economic harm in order to, for example, maximize one's chances of success. *See, e.g.*, *Mobil*, ¶ 169; *Orascom*, ¶ 543; Gaillard, at 22. Typically, a proceeding is abusive if it is oppressive or unjustly harasses the respondent, contains an element of dishonesty, or can produce inconsistent or mutually exclusive results. Ghosh, at 666. As a result, a claim constituting abuse of process is inadmissible. *See, e.g.*, *Orascom*, ¶ 545; Schaffstein, ¶ 6.102.

3. Abusiveness and inadmissibility of CLSA's claims

5. Here, CLSA's claims should be dismissed as abusive because they seek to arbitrate substantially the same dispute, and obtain relief for effectively the same economic harm, that the Endor courts have already decided, and because CLSA would obtain double recovery. *See* NoA, ¶¶ 11–17; ANoA, ¶¶ 17–19; Clar., ¶ 8.

II. THE TRIBUNAL SHOULD ENSURE THAT LEE CAN RECOVER COSTS

A. The Tribunal should order CLSA to post security for costs

6. In Panama, an arbitral tribunal may grant provisional measures when there is a risk of significant, irreparable harm, and reasonable chances of the requesting party's success on the merits. PAA, Art. 34. Here, both criteria are satisfied. First, given CLSA's poor financial situation evidenced, among other things, by its inability to pay a relatively small filing fee for months, CLSA will probably default on an adverse costs award. *See, e.g.*, NoA, ¶ 7; ANoA, ¶¶ 22–25; Clar, ¶¶ 17, 19. Second, Lee will prevail on his defenses and counterclaims. *See* ¶ 10 *et seq.* below.

B. Alternatively, the Tribunal should join CLSA's third-party funder to the arbitration

1. The Tribunal should join CLSA's funder based on part assignment

7. Assignment of a contract generally leads to assignment of the arbitration agreement in it, too. *See, e.g.*, *Nextron Holding*, at N15. Here, by obtaining funding for this arbitration from National Royal Bank in return for entitling it to compensation in case of a favorable award,

CLSA effectively part assigned to the bank rights, to be monetized through this arbitration, under the Corporate Agreement. *See* NoA, ¶ 7; Clar., ¶ 10. Therefore, National Royal Bank should be found to be bound by the arbitration agreement and joined to this arbitration.

2. The Tribunal may join CLSA's funder based on arbitral estoppel

8. When a party accepts the benefits of a contract containing an arbitration agreement, it becomes estopped from denying that it is subject to the arbitration agreement. *See, e.g.*, *ABS*, at 353; Hosking, at 293–94; Steingruber, ¶ 9.54. Here, considering the payment that National Royal Bank would receive in connection with this arbitration, which arises in relation to the Corporate Agreement, the bank is effectively a beneficiary of CLSA's rights, in their monetized form, under that agreement. *See* Clar., ¶ 10. As a beneficiary, the bank should be joined to the arbitration.

3. Policy considerations militate strongly in favor of joinder

9. Courts in jurisdictions with developed third-party funding regimes have recognized the desirability of holding third-party funders accountable for the costs of the successful opposing party—through joinder or costs orders. *See, e.g.*, *PWC*, at 221–22; *Arkin*, ¶¶ 41, 45; *Excalibur*, ¶ 27. The Tribunal should follow that approach and join National Royal Bank to the arbitration.

SUBSTANTIVE ISSUES

III. CLSA'S CLAIMS AGAINST LEE ARE UNFOUNDED

A. CLSA's claims fail because CLSA's evidence is inadmissible

1. Since evidence adduced by CLSA was obtained by theft, the Tribunal should exclude it as inadmissible

10. Parties to an arbitration must take evidence in good faith, and arbitral tribunals may exclude evidence as inadmissible based on, among other things, considerations of fairness. IBA Rules, Preamble, Art. 9.2(g). Evidence obtained illegally, for example, may be excluded. *See Methanex*, ¶¶ 53–60. Here, the evidence CLSA relies on to show Lee's alleged misconduct—

Lee's emails in Exhibit C2—was obtained by theft. ANoA, ¶¶ 14–15. That evidence is thus a product of a crime, evidently obtained in bad faith, and the Tribunal should exclude it.

2. The Tribunal should disregard the stolen evidence because doing otherwise would jeopardize the award

11. An award can be set aside or refused recognition and enforcement if it contravenes public policy. PAA, Art. 67(4); NYC, Art. V(2)(b). Here, the supervisory and enforcement courts might consider the Tribunal's reliance on emails obtained in disregard of criminal law as tantamount to ratifying the underlying criminal conduct and therefore in violation of public policy. The Tribunal should prevent that risk by excluding Exhibit C2 as inadmissible.

B. In any event, CLSA's claims fail because they are unjustified

12. First, CLSA's scant evidence does not support the serious allegations it makes nor the far-reaching inferences it invites the Tribunal to draw. The best example of this point is CLSA's claim for $540,000 based on nothing more than a claim that something "seems." *See* NoA, ¶ 17; Clar., ¶ 2. Second, it is well established that there is nothing wrong with someone making arrangements to compete with their employers. *See generally, e.g.*, *Science Accessories*, at *963.

IV. ALTERNATIVELY, CLSA'S CLAIMS FOR DAMAGES ARE UNFOUNDED

A. CLSA's claim for €1,185,000 in damages for loss of revenue is baseless

13. First, regarding CLSA's claim for €1,185,000 for loss of *revenue*—as opposed to loss of profit—, CLSA has failed establish the legal basis for such an atypical claim. *See* NoA, ¶ 16. Second, given that CLSA has failed to provide the report of its quantum expert, the damages it claims are speculative and should not be awarded. *See generally, e.g.*, *Chemipal*, at 596–97.

B. CLSA's claim for $540,000 in disgorgement damages is unfounded

14. First, there can be no disgorgement of profits for a breach of contract. *See generally, e.g.*, *Topps*, at 269. Second, if CLSA's request for disgorgement is based on a claim about breach

of fiduciary duties, then the latter is foreclosed as it may not be advanced due to the existence of CLSA's breach of contract claim. *See generally, e.g.*, *Nemec*, at 129. Third, even if law allowed for disgorgement here, then, given the extraordinary nature of this remedy, the Tribunal should not grant it absent the parties' express authorization to do so. *See, e.g.*, *Tang Energy Group*.

V. CLSA OWES MONEY TO LEE UNDER THE CORPORATE AGREEMENT

A. CLSA owes Lee compensation for his shares in CLSA

15. Under the Corporate Agreement, Lee is entitled to reimbursement for the value of his shares in CLSA. Ex. C1, Cl. 8. Upon his departure, he returned his 33% of CLSA shares to CLSA but was never reimbursed for their value. Clar., ¶ 3. CLSA must therefore compensate him.

B. CLSA must pay Lee his outstanding wages and corporate advancements

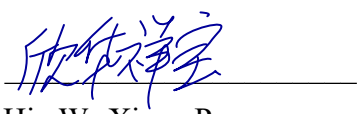
16. Cl. 7 of Corporate Agreement entitles Lee to "Salaries and Drawings." Ex. C1, Cl. 7. During May and June of 2016, however, CLSA paid him neither his salary nor the expenses he incurred furthering CLSA's business. ANoA, ¶ 24; Clar., ¶ 4. Consequently, CLSA must pay him a total of US$27,080 for his outstanding wages and expenses.

RELIEF SOUGHT

17. Lee requests the Tribunal to: (a) dismiss all CLSA's claims; (b) order CLSA to compensate Lee for his 33% shares in CLSA; (c) order CLSA to pay Lee $25,540 for his wages and $1,540 for business development expenses; (d) order CLSA to post $1,000,000 as security for costs; (e) order joinder of National Royal Bank; (f) order CLSA to pay the costs incurred by Lee in relation to this arbitration; (g) grant such other relief as the Tribunal deems appropriate.

March 2, 2019

Respectfully submitted,



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