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

CLAIMANT'S OUTLINE

March 2, 2019

Team 5

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TABLE OF ABBREVIATIONS

ANoA	Answer to the Notice of Arbitration
Art.	Article
Arts.	Articles
CAM-CCBC	Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada
Cl.	Clause
Clar.	Clarifications
Ex.	Exhibit
NoA	Notice of Arbitration
P.O.	Order of the President of the CAM-CCBC dated September 26, 2018
para.	paragraph
paras.	paragraphs

PRELIMINARY ISSUES

I. CLSA DID NOT COMMENCE THIS ARBITRATION TOO LATE

A. The purported requirement to start an arbitration within 60 days after the failure of negotiations is unreasonable and should not apply

1. Contractual time bars are valid if they are reasonable. *See, e.g.*, *Shaw*, at 386. Here, if the 60 days are interpreted as a mandatory time period within which to start an arbitration, then that period seeks to operate effectively as an unreasonable time bar and should not be enforced.

B. Even if the arbitration agreement validly imposes a 60-day period to start an arbitration, CLSA started the arbitration in time

2. When a contract requires starting an arbitration within a given number of days, a sole notification that the dispute be referred to arbitration suffices to comply with that requirement. *Cf. ICC Case No. 5029*, ¶¶ 39–42. Here, Lee submits that CLSA had to start the arbitration by February 20, 2018. ANoA, ¶ 4. CLSA filed its NoA five days before that—i.e., on February 15, 2018. P.O., ¶ 1. That sufficed for CLSA to comply with the 60-day requirement.

II. THIS ARBITRATION DOES NOT CONSTITUTE AN ABUSE OF PROCESS

A. Lee's claim about abuse of process lacks legal basis

3. Neither the applicable arbitration rules (i.e., CAM-CCBC Rules) nor the law of the seat (i.e., PAA) recognizes the alleged doctrine of abuse of process. *Cf.* Schaffstein, ¶¶ 0.23, 6.91; ILA Int. Rep., at 63. Hence, Lee's claim should be dismissed for lack of legal basis alone.

B. Applying the doctrine of abuse of process would in any event be misplaced in the present case

4. Any supposed doctrine of abuse of process might, at best, be relevant either where there is impermissible corporate restructuring to gain access to investor–State arbitration or where claims brought in a subsequent proceeding could have been made in an earlier proceeding. *See, e.g.*, *Gremcitel*, ¶ 183; *Johnson*, ¶ 31. *See also* Schaffstein, ¶¶ 1.31–1.32. Here, there is no

corporate restructuring. Also, considering the arbitration agreement in the Corporate Agreement, CLSA was unable to make claims against Lee in the earlier Endor proceeding. Ex. C1, Cl. 9.

C. In any event, any perceived abuse should not render CLSA's claims inadmissible given that abuse can be cured

5. To the extent there is perceived abuse, it can be cured short of denying the allegedly abusive claim. *Cf. Azurix*, ¶ 116. Specifically, a tribunal can require the allegedly abusive party to elect which proceeding to purse, or remedy any problems in the quantum phase, or resolve the problems in the operative part of the award. *See, e.g.*, *Ampal*, ¶¶ 334, 338–39; *Lauder*, ¶ 172; *EGAS*, ¶ 1659; Gaillard, at 27; *ICC Case No. 15453*, ¶¶ 236, 250(vii). Given these options, the Tribunal should not dismiss CLSA's claims but adopt one of these approaches instead.

III. LEE'S REQUEST FOR SECURITY FOR COSTS IS UNFOUNDED

A. Lee's request fails to meet the exceptionally high threshold that must be met before security for costs can be ordered

6. Given its exceptional nature, ordering security for costs is subject to a high threshold. *See, e.g.*, ICCA-QM, at 166; Bogart, p. 47. It is justified only by "exceptional circumstances" and is ordered "rarely and restrictively." ICC Bulletin, at 61. Here, Lee has simply failed to establish any circumstances that would justify the ordering of this extraordinary measure.

B. Lee's request fails to meet the specific conditions that it is subject to

7. As a request for provisional measures, Lee's request for security for costs must prove the existence of conditions required for granting provisional measures, and grounds for granting security for costs. Specifically, Lee must establish the existence of a risk of significant, irreparable harm, and reasonable chances of his success on the merits. PAA, Art. 34. He must also establish that CLSA will be unable to satisfy an adverse costs order, lacks assets, and that granting security for costs would be fair. CIArb, Art. 1.2. But to show all that, Lee relies on mere speculations and, therefore, has failed to establish the requisite conditions. *See* ANoA, ¶ 25; ICCA-QM, at 171.

IV. LEE'S REQUEST FOR JOINDER OF CLSA'S LENDER IS BASELESS

A. National Royal Bank may not be joined to this arbitration between CLSA and Lee because it has not consented to arbitrate with them

8. A party can be joined to an arbitration only if it has consented to arbitrate. *See* Caron/Caplan, at 54; Redfern/Hunter, ¶ 2.59. *See also* Lew et al., ¶ 6-1. As a result, joinder of an entity merely funding an arbitration would be bizarre. *Cf.* ICCA-QM, at 161; Lévy/Bonnan, at 82–84. Here, Lee has certainly failed to show how National Royal Bank would have consented to an arbitration with him, not least because its consent cannot be presumed simply on the basis of the underlying loan agreement between it and CLSA. *Cf.* Steingruber, ¶ 9.58.

B. Even if National Royal Bank could be joined, the Tribunal should not join it given the considerable prejudice that doing so would cause

9. A third party joined to an arbitration needs to have a reasonable opportunity to present its case, and an equal opportunity to constitute the arbitral tribunal. *See, e.g.*, Paulsson/Petrochilos, at 141, ¶ 44. Failure to ensure those rights exposes the award to set-aside and non-enforcement risks. Caron/Caplan, at 54; Brekoulakis, ¶ 3.61. *See also* PAA, Art. 67(2); NYC, Art. V(I)(b); *Dutco*, at 140–41. Here, given the late stage of the potential joinder, National Royal Bank would be afforded none of those rights. Therefore, the Tribunal should not order its joinder.

SUBSTANTIVE ISSUES

V. LEE BREACHED HIS OBLIGATIONS UNDER THE CORPORATE AGREEMENT AND HIS FIDUCIARY DUTIES

A. Lee breached his contractual obligations and fiduciary duties by secretly diverting away CLSA's business and through other misconduct

10. Under the Corporate Agreement, Lee committed to devote his entire time to his work at CLSA, not compete with CLSA, avoid conflict of interest, and give full disclosure. Ex. C1, Cl. 4. As a director of CLSA, Lee also owed it fiduciary duties of loyalty and good faith. *See,*

e.g., *Dweck*, at *12. He cynically breached all these obligations. Among other things, he entered into and acted upon a contract contemplating competition with CLSA, failed to disclose business opportunities to CLSA, diverted away existing and potential CLSA's business, and appropriated CLSA's funds. *See* NoA, ¶¶ 4–6, 12–15; Ex. C2; Clar., ¶¶ 11, 15, 18, 20–21. *See also Dweck*.

B. Lee's attempt to suppress evidence of his wrongdoing reflected in Exhibit C2 by claiming that it is inadmissible cannot succeed

1. Lee wrongly relies on the rules of Panamanian civil procedure

11. Rules of domestic civil procedure of a given jurisdiction generally do not apply in international arbitrations seated in that jurisdiction. Born, at 2199. *See also* Judicial Code, Art. 461; PAA, Art. 1. Therefore, Lee's reliance on Art. 783 of the Panamanian Judicial Code, a domestic evidentiary rule, cannot support his contention that CLSA's evidence is inadmissible.

2. In any event, Lee has failed to show that the evidence reflecting his wrongdoing came to light as a result of some illegality

12. The evidence showing Lee's wrongdoing came to light in Hong Kong. There, the acts by virtue of which that evidence emerged are not necessarily illegal—as Lee himself recognizes. ANoA, ¶ 14. In addition, and contrary to Lee's allegation, they are not illegal in Panama either, since Panamanian Penal Code jurisdictionally does not apply to those acts. *See* PPC, Arts. 18–21.

3. Even if CLSA's evidence initially surfaced by virtue of some impropriety, that does not make it inadmissible

13. Arbitral practice strongly suggests that even if evidence emerges as a result of some impropriety, it is nevertheless admissible, certainly when the party adducing it has not committed the impropriety. *See, e.g.*, *Caratube*, ¶¶ 150–56; *Hulley Enterprises*, ¶ 1223. Here, since CLSA did not commit the impropriety that Lee complains of, the Tribunal should follow the established arbitral practice and admit the evidence—which in any event is made up by CLSA's own emails. *See* Ex. C2.

VI. LEE IS LIABLE TO PAY CLSA DAMAGES

A. Lee should pay CLSA €1,185,000 in damages for its loss of revenue

14. The party injured by another's breach should be placed in the same place as it would have been had there been no breach, and its damages should be measured by the losses caused and gains prevented by the breach. *See generally Paul*, at *146–47. According to an expert's evaluation, Lee's breaches caused CLSA to lose revenue amounting to €1,185,000. NoA, ¶ 16. Accordingly, Lee should compensate CLSA for that amount.

B. Lee should pay CLSA also $540,000 in disgorgement damages

15. All profits obtained from a breach of the duty of loyalty are to be disgorged. *See, e.g.*, *Triton*, at *28. Disgorgement may be ordered by arbitral tribunals, too. *Adam Assocs.*, at *3, *6. Here, given Lee's breaches (*see* ¶ 10 above), he should be disgorged of his profit of $540,000.

VII. LEE'S COUNTERCLAIMS SHOULD BE DISMISSED

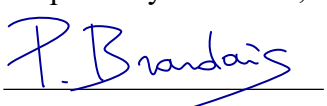
16. Lee returned his shares to CLSA by his own volition. Clar., ¶ 3. Also, the Corporate Agreement does not entitle him to "corporate advancements" for "drinks and cocktails." Further, his claims are barred by the materiality of his breaches. *See generally, e.g.*, *Brandin*, at *21.

RELIEF SOUGHT

17. CLSA requests the Tribunal to: (a) order Lee to pay CLSA €1,185,000 and $540,000 in damages; (b) dismiss all Lee's claims and requests; (d) order Lee to pay the costs incurred by CLSA in relation to this arbitration; (e) grant such other relief as the Tribunal deems appropriate.

March 2, 2019

Respectfully submitted,



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