THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CNA INTERNATIONAL, INC., an Illinois Corporation, d/b/a MC APPLIANCE CORPORATION,	)	
Plaintiff,	)	
v.	)	Case No. 05 C 5734
GUANGDONG KELON ELECTRICAL HOLDINGS COMPANY, LIMITED, A Joint Stock Limited Company Incorporated in the People's Republic Of China with Limited Liability, and KELON INTERNATIONAL, INC., A British Virgin Islands Corporation,	)	District Judge Amy St. Eve
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MEMORANDUM ON CHOICE OF LAW

NOW COME the Defendants, Guangdong Kelon Electrical Holdings Company, Limited and Kelon International, Inc., ("Defendants") by and through their attorneys, and for their Response to Plaintiff, CNA INTERNATIONAL, INC., an Illinois corporation, d/b/a MC APPLIANCE CORPORATION's ("Plaintiff") Memorandum on Choice of Law states as follows:

BACKGROUND

This Court granted leave to the parties to brief the issue on choice of law. The Court indicated that the burden is on the Plaintiff to prove choice of law. The Plaintiff, not surprisingly, has argued for the applicability of the International Convention on International Sale of Goods ("CISG"). However, surprisingly the Plaintiff's position is apparently that if CISG does not apply then this Court should apply Chinese law. After approximately three years

of litigation this is the first time the Plaintiff has raised the applicability of Chinese law. In so arguing in the alternative for the application of Chinese law, the Plaintiff has now taken an opposite position than when it filed its response to the Defendants' Motion to Dismiss for Lack of Personal Jurisdiction in May, 2006.[1]

It is clear based on the most recent writings and cases appearing in the international arena, that Hong Kong is a special administrative region ("SAR") of the People's Republic of China. Based on the submissions by both parties here, it is clear that Hong Kong has been given much autonomy. It is also clear that Hong Kong is not likely to apply the CISG. In addition, the one case decided on point that adopts sound reasoning is in the Supreme Court of the People's Republic of France which ruled that the CISG should not apply to Hong Kong. Thus, for the reasons set forth herein below, neither the CISG nor the law of the People's Republic of China would apply. Therefore Defendants submit that the Illinois Uniform Commercial Code would be the most appropriate choice of law.

I. THE CISG DOES NOT APPLY TO COMPANIES DOING BUSINESS IN HONG KONG AND THEREFORE IS INAPPICABLE.

The only case reported that directly has passed on the applicability of the CISG as it pertains to Hong Kong was in the Supreme Court of the Republic of France, Case No. 04-17726, in a ruling dated April 2, 2008.[2] (Exhibit 1) The Court of Appeals in the Republic of France awarded damages to the buyer as against the seller, a Hong Kong company, in the amount of $7,995.00. In the Supreme Court of the Republic of France the buyer asserted that the CISG

[1] While the standard to prove choice of law and personal jurisdiction are different, they share certain similarities. The Court denied the Defendants' Motion For Lack of Personal Jurisdiction indicating that the Plaintiff had established that the Defendant had sufficient contacts necessary for this Court to establish personal jurisdiction over the Defendants. The factual arguments by Plaintiff in the Response, though discussed more thoroughly herein below, are opposite of Plaintiff's arguments here.

[2] The decision is attached hereto as Exhibit 1.

applied to the sale of goods to the territory of Hong Kong which is a special administrative region ("SAR") under the sovereignty of the People's Republic of China without any autonomy under public international law. The buyer asserted further that the People's Republic of China had not declared any reservation or restriction concerning the application of the CISG to the territory of Hong Kong since the retrocession on July 1, 1997. The buyer asserted that in deciding that the CISG did not apply to Hong Kong on the sole ground that it is a special administrative region, the Court of Appeals for the Republic of France violated the principles of the international law, i.e. the application of the CISG. The Supreme Court for the Republic of France disagreed with the buyer:

> According to Article 93 of the CISG: Any contracting state in which different systems of law are applicable in relation to the matters dealt with in the convention may declare that the convention is to only extend to one or more of its territorial units by way of notification of the Secretary General of the United Nations stating expressly that territorial units to which the convention extends. From the documents supplied during the pleadings and notably from the note of the Minister of Foreign European Affairs of January 18, 2008, who questioned the Chinese authorities on this point, results that the People's Republic of China deposited with the Secretary General of the United Nations, a declaration announcing the conventions to which China was a party at that date which should apply to Hong Kong. The CISG did not figure on that list, nor had the CISG applied to Hong Kong before the retrocession of this territory to the People's Republic of China by the United Kingdom. Thereby, the People's Republic of China has effectuated with the depository of the convention a formality equivalent to what is provided for in Article 93, CISG. Consequently, the CISG is not applicable to the SAR region of Hong Kong. For this reason the decision of the Court of Appeal is legally justified. (Emphasis added.)

Pages 1 and 2 of Exhibit 1.

The import of the points underlined hereinabove cannot be over emphasized. The Plaintiff has argued that the Supreme Court of France based its ruling on an incorrect statement of fact. That is the Supreme Court of France, according to the Plaintiff, ruled that the CISG does not apply because the People's Republic of China made a declaration and deposited the same

with the Secretary-General of the United Nations indicating that the CISG would not apply to Hong Kong, SAR. The Plaintiff is mistaken. However, what the Supreme Court is referring to is that any and all international treaties that were to apply the Hong Kong SAR after the retrosession to the People's Republic of China, or after July 1, 1997, were deposited with the Secretary-General of the United Nations. The CIGS treaty was not deposited. Therefore the Supreme Court for the Republic of France reasoned that if the CISG was to apply to Hong Kong it would have been "deposited". It was not. Thus, the reasoning of the Supreme Court for the Republic of France is sound. In fact, attached hereto as Exhibit 2 is a list of international treaties that are in force and applicable to Hong Kong, SAR. While there are numerous treaties listed therein on Exhibit 2, rest assured the CISG is not one of those treaties.[3]

It is clear from the text of the Supreme Court for the Republic of France that the court relied on an expert opinion, the Minister of Foreign and European Affairs, who questioned the Chinese authorities on the point. The expert testimony reveals that the Chinese authorities agree that Hong Kong is not bound by the CISG. Exhibit 1, page 2. Moreover, and in fact more compelling, the Department of Justice for Hong Kong does not list the CISG as a treaty that is bound to. Exhibit 2.

Furthermore, other authors have come to the same conclusion as the Hong Kong Department of Justice and the Supreme Court for the Republic of France that the CISG does not apply to the Hong Kong SAR as follows:

> There are also conventions the CISG is an example, that prior to July 1, 1997, have been applied to China but not Hong Kong. As of December 2003, we have not been made aware of any Hong Kong related depositary notification for the CISG having been filed with the Secretary-General of the United Nations by the

[3] Exhibit 2 is the treatise and international agreements published by the International Law Division Department of Justice, Hong Kong.

> People's Republic of China. We have been advised that it is the position of Hong Kong Justice Department that "no new conventions apply to Hong Kong as a result of the handover". See Exhibit 3, Pace Law School Institute of International Commercial Law, last updated May 1, 2008.

The conclusion we draw from this:

> Pending the filing with the Secretary-General of the United Nations of a suitable CISG-related depositary notification by the People's Republic of China, the courts of China and Hong Kong are unlikely to regard the CISG as in effect in the Hong Kong Special Administrative Region. If, as and when such notice is filed, one can access its text at the website of the United Nations Treaty Section. See Exhibit 3, Pace Law School Institute of International Commerce Law, last updated May 1, 2008.

Moreover, both the Plaintiff here and the Defendants relied on the Law Review article published by Ulrich G. Schroeter. The Status of Hong Kong and Macao under the United Nations Convention on Contracts for International Sales of Goods, 16 Pace INT'L 307. Mr. Schroeter in his law review article comes to the come same "practical conclusion" as does the Supreme Court for the Republic of France. 16 Pace INT'L I. REV, 307, 327. While Mr. Schroeter clearly argues for the application of the CISG to Macao and Hong Kong, SAR the practical result is that both Hong Kong and Macao do not consider themselves bound by the CISG.[4] While neither Mr. Schroeter's law review article nor the ruling by the Supreme Court of the Republic of France is binding upon this Court, what is perhaps most compelling is the fact that the Department of Justice for Hong Kong does not list the CISG treaty as a treaty in force and applicable to a Hong Kong, SAR. Exhibit 2. Thus, the clear and logical conclusion that must be drawn from the foregoing information provided is that Hong Kong is not bound by the provisions of the CISG.

[4] The article was written by Mr. Schroeter four years prior to the Supreme Court of the People's Republic of France's ruling. Thus, it is clear that the court in this instance did not agree with Mr. Schroeter's advocating for the application of a CISG to Hong Kong.

Moreover, the three cases reported by Pace Institute of International Commercial Law attached to Plaintiff's Brief are simply not persuasive. Two of the case so cited by the Plaintiff, discuss a party from Macao. In light of the Hong Kong Department of Justice not recognizing the CSIG as an applicable treaty, it is not clear what weight can be given to a discussion concerning Macao. Moreover, in each of the three cases no party objected to the application of the CISG. Thus, there was no analysis as to why the CISG does or does not apply. It is clear, however, that when a court was finally called upon to determine the applicability of the CISG of Hong Kong SAR, the Supreme Court for the Republic of France decided against its application.

Thus, for the reasons set forth hereinabove, the Defendants respectfully submit that the Court should not apply the CISG to the Hong Kong SAR and to thus this instant dispute.

II. FOR THE FIRST TIME IN APPROXIMATELY THREE YEARS, THE PLAINTIFF NOW ARGUES THAT THE CONTRACT LAW FOR THE PEOPLE'S REPUBLIC OF CHINA SHOULD BE THE CHOICE OF LAW IF THE COURT DOES NOT APPLY THE CISG.

The Plaintiff argues for the first time that if the CISG does not apply then Chinese law should apply as the choice of law in this matter. This is the first time that the Plaintiff has ever suggested that Chinese law should apply. The application of Chinese law at this juncture when both parties have pursued the application of the Illinois Uniform Commercial Code or in the alternative the application of the CISG would be highly prejudicial to the Defendants in that the entire case of the Defendants and discovery throughout has focused on either the application of the Illinois Uniform Commercial Code or the CISG. Notwithstanding the same, it is not clear why Hong Kong SAR would apply the law of the People's Republic of China. As a matter of fact, Ulrich G. Schroeter, addresses the fact that the Hong Kong SAR has its own "basic law" although the People's Republic of China will be responsible for the foreign affairs relating to the

Hong Kong SAR. He writes as follows:

> The basic law of Hong Kong that entered into force on July 1, 1997, the day after the handover, repeats this position. Article 13 of the basic law stipulates as a general rule that the Central People's Government is responsible for foreign affairs relating to the Hong Kong SAR, but it authorizes the Hong Kong SAR to conduct relevant external affairs in accordance with the basic law. 16 Pace INTN'L. REV. 307, 315, (Basic Law of Hong Kong, SAR as cited at footnote 1 of Mr. Schroeter's article citing Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, APR. 4, 1990, Article 5.)

Moreover, the Plaintiff's argument that the choice of law analysis based on the "most significant contacts" test favors the application of Chinese law is disingenuous.[5]

On or about May 5, 2006, the Plaintiff filed with this Court a Response to Defendants' Motion to Dismiss Based on Lack of Personal Jurisdiction. In that response, there are a plethora of factual allegations that the Plaintiff relies on to argue against the dismissal of Plaintiff's claim based on a lack of personal jurisdiction. Starting at Page 10, of the Plaintiff's Brief here, the Plaintiff argues that the "most significant contract" test would result in the application of Chinese law. However, the Plaintiff took a contrary position at page 6 in its Response to Defendants' Motion to Dismiss. There the Plaintiff states "these e-mails also evidence solicitation attempts by Guang Dong Kelon for the sale of new product to Plaintiff". In addition at page 6 of the Plaintiff's Response to Defendants' Motion to Dismiss for Lack of Personal Jurisdiction, the Plaintiff states that "over the course of time, these e-mails contain communications by Guang Dong Kelon relating to renegotiation of terms as price due to cost increases; packaging and rating requirements". Most telling is the Plaintiff's statement as follows:

> The contacts based upon the uncontroverted allegations in the Complaint, based upon the Affidavit of Peter Sjovall, based upon the Affidavit of Chan Ou, and based upon the

[5] Defendants acknowledge and adopt the standard argued by Plaintiff which this Court would resolve the choice of law issue.

> facts and documents submitted by Defendants in response to discovery, when considered together, demonstrate that Defendant Guang Dong Kelon was purposefully and knowingly availing itself of the benefits of this jurisdiction by conduct directly or indirectly designed to introduce Defendants' product and into the stream of commerce in the United States and specifically, Illinois. Moreover, the contacts demonstrate that, in addition to the facts relating to the "stream of commerce" there are a number of contacts whether by e-mail or by physical presence in Illinois arising out of or related to the transactions at issue, to support an assertion of personal jurisdiction by this Court over the Defendants. Page 6, Plaintiff's Response to Defendants' Motion to Dismiss.

The Court denied the Defendants' Motion to Dismiss based upon lack of jurisdiction. Now the Plaintiff wants to argue that the place of negotiations, the place of contracting, the place of performance, and the location of the subject matter weigh in favor of an application of Chinese law. However, the arguments are exactly opposite to the arguments made by the Plaintiff in its Response to the Defendants' Motion to Dismiss for Lack of Personal Jurisdiction. The Plaintiff argued in their Response to the Defendants' Motion to Dismiss that product was imported here in the State of Illinois, and marketing, contracting and negotiating were purportedly done here in the State of Illinois at least in part. It is not reasonable now for the Plaintiff to be allowed to take such a different position in an attempt to perhaps establish that another jurisdiction's law should apply here so that Plaintiff may be able to avoid the application of the Plaintiff's claim.

Plaintiff's argument for the application of Chinese law is also curious in light of the fact that Plaintiff is an Illinois corporation with its principal place of business within the Northern District of Illinois. Also, taking into consideration that the Plaintiff's Amended Complaint pleads Illinois causes of action for breach of contract and unjust enrichment is difficult to take such an argument seriously. Finally, it is not clear Chinese law would apply in light of the application of the Basic Law of Hong Kong SAR. In light of the significant contacts of both parties here in the State of Illinois, i.e. the place of contracting, the place of negotiation, the place

of performing, and the location of the subject matter, the Court would be correct in applying the Illinois Uniform Commercial Code to this instant dispute.

CONCLUSION

Thus, based upon the foregoing the Defendants, Guangdong Kelon Electrical Holdings Company, Limited and Kelon International, Inc., respectfully submit that the CISG does not apply to Hong Kong SAR nor does the contract law of the People's Republic of China this Court should apply the provisions of the Illinois Uniform Commercial Code.

Respectfully submitted,

GUANGDONG KELON ELECTRICAL HOLDINGS COMPANY, LIMITED AND KELON INTERNATIONAL, INC.

By: /s/ Elliot S. Wiczer
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