
THIRD ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

**MEMORANDUM FOR
CLAIMANT**

CLAIMANT

RESPONDENT

LONGO IMPORTS

CHAN MANUFACTURING

PO BOX 234

PO BOX 111

MINUET

CADENZA

TEAM 002

TABLE OF ABBREVIATIONS.....	3
TABLE OF AUTHORITIES	3
ARGUMENT ON JURISDICTION.....	6
THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE.....	6
I. The Tribunal has competence to determine its own jurisdiction	6
II. The intention to nominate CIETAC as the arbitral tribunal is clear	6
A. Nomination of the China Trade Commission does not invalidate the arbitration clause	7
B. The arbitration agreement must be interpreted according to the parties’ intent	7
C. CIETAC is the appropriate institution for this arbitration.....	7
III. The condition precedent in clause 12 is unenforceable.....	8
A. The requirement to conciliate is vague and uncertain	8
B. The RESPONDENT has contributed to the non-compliance.....	9
ARGUMENT ON MERITS	10
I. THE EXISTENCE OF A CONTRACT IS DETERMINED BY THE PICC	10
A. The parties agreed that the PICC should be the governing law.....	10
B. The parties excluded the application of the CISG.....	11
II. THE PARTIES CONCLUDED A CONTRACT FOR SALE.....	11
A. The RESPONDENT submitted a valid counter-offer	12
B. The CLAIMANT accepted the RESPONDENT’s counter-offer	12
C. There was an agreement on the essential terms of the contract.....	12
D. Sale of the single car was a condition precedent to the contract of 1000 cars, rather than a separate contract	13
III. THE AGREED TERMS FORM A BASIS FOR THIS CONTRACT	14
IV. THE STANDARD TERMS ARE REPLACED BY OPERATION OF THE KNOCK-OUT-DOCTRINE.....	15
V. THE CLAIMANT IS ENTITLED TO DAMAGES UNDER ARTICLE 7.4.1 PICC	16
A. The RESPONDENT’s actions amount to non-performance	16
B. The damage sustained by CLAIMANT was foreseeable	16
C. The CLAIMANT took all reasonable steps to mitigate its harm.....	17
D. The RESPONDENT cannot effectively exclude its liability.....	17
REQUEST FOR RELIEF	19

TABLE OF ABBREVIATIONS

Art	Article
CIETAC	China International Economic and Trade Arbitration Commission
CISG	UN Convention on the International Sale of Goods
Ex	Exhibit
FAS	Free Alongside Ship (INCOTERMS, 2010)
ICC	International Chamber of Commerce
PICC	UNIDROIT Principles of International Commercial Contracts
SIAC	Singapore International Arbitration Centre
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration

TABLE OF AUTHORITIES

TREATIES, CONVENTIONS AND LAWS

CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
PICC	UNIDROIT Principles of International Commercial Contracts, 2010
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1986

RULES

CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules, 2012
--------------	---

COMMENTARY

Ashford	Peter Ashford, Handbook on International Commercial Arbitration (New York, JurisNet, LLC: 2009)
Berger	Klaus Peter Berger, 'Law and Practice of Escalation Clauses' 2006 22(1) <i>Arbitration International</i>
Bianca/Bonell-Bonell	Bianca and Bonell, Commentary on the International Sales Law: The 1980 Vienna Sales Convention (Milan, Dott A Giuffre Editore: 1987)
Born	Gary B. Born, International Commercial Arbitration (Netherlands, Kluwer Law International: 2009)
Ferrari	Franco Ferrari, Contracts for the International Sale of Goods: Applicability and Applications of the 1980 United Nations Sales Convention (Martinus Nijhoff Publishers: Netherlands 2011)
Fouchard/Gaillard/Goldman	Fouchard, Gaillard, Goldman on International Commercial Arbitration (Netherlands, Kluwer Law International: 1999)
Off Comm PICC	Official Comments on Articles of the UNIDROIT Principles
Pryles	Michael Pryles, Multi-Tiered Dispute Resolution Clauses in Albert Jan van den Berg (ed), International Arbitration and National Courts: he Never Ending Story, ICCA Congress Series 2000 (New Delhi, Kluwer Law International, 2001)
Redfern/Hunter	Nigel Blackaby, Constantine Partasides with Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration (5 th Ed.) (New York, Oxford University Press: 2009)
Redfern/Hunter 2004	Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, Law and Practice of International Commercial Arbitration (4 th Ed) (London, Sweet & Maxwell: 2004)
Schwenzer	Ingeborg Schwenzer, Pascal Hachem, Christopher Kee, Global Sales and Contract Law (New York, Oxford University Press: 2012)
Vogenauer	Stefan Vogenauer and Jan Kleinheisterkamp (ed), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), (New York, Oxford University Press: 2009)

CASES

Aberfoyle Plantations	<i>Aberfoyle Plantations Ltd v Cheng</i> (1960) UK
Aiton	<i>Aiton Australia Pty Ltd v. Transfield Pty Ltd</i> [1999] 153 FLR 236
Bentworth Finance Ltd	<i>Bentworth Finance Ltd v Lubert</i> (1968)
Elizabeth Bay	<i>Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd</i> [1995] 36 NSWLR 709
Hooper Bailie	<i>Hooper Bailie Associated Ltd v. Natcon Group PTY Ltd</i> [1992] 28 NSWLR 194
ICC 5983	<i>ICC Case No. 5983</i> , 11 ASA Bulletin 507
Murphy	<i>J Murphy & Sons Ltd v Johnston Precast Ltd</i> (2008) EWHC 3024 (TCC)
Judgement, 15.3.1999	<i>Judgment of 15 March 1999</i> , 20 ASA Bulletin 373 (Kassationsgericht Zurich) (2002)
Laboratories Grossman	<i>Laboratories Grossman v. Forest Laboratories</i> 295 NYS2d 756
Lucky-Goldstar	<i>Lucky-Goldstar Int'l (HK) Ltd v. Ng Moo Kee Eng'g Ltd</i> , [1994] Arbitration & Dispute Resolution Law Journal 49
Olley	<i>Olley v Marlborough Court Ltd</i> , 1949
Richie	<i>Richie Co., LLP v. Lyndon Ins. Group, Inc.</i> , 2001 WL 1640039

AWARDS

ICC Award 8223	ICC International Court of Arbitration, Arbitral Award 1998, Case No 8223
----------------	---

ARGUMENT ON JURISDICTION

THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE

The Arbitral Tribunal has jurisdiction to hear this dispute because: (A) the Tribunal has competence to determine its own jurisdiction; (B) the intention to nominate CIETAC as the arbitral tribunal is clear; and (C) the condition precedent in the arbitration agreement is unenforceable.

I. The Tribunal has competence to determine its own jurisdiction

The Tribunal is authorised to determine its own jurisdictional competence [*Born*, 855; *Redfern/Hunter*, 347]. The doctrine of *Kompetenz-Kompetenz* allows tribunals to rule on their own jurisdiction. This is mirrored in Article 6 (1) CIETAC Rules and Article 16(1) UNCITRAL Model Law.

II. The intention to nominate CIETAC as the arbitral tribunal is clear

The CLAIMANT's arbitration agreement [*Clause 12, Ex 2*] indicates that all disputes must be referred to the 'China Trade Commission'; a non-existent institution. The CLAIMANT argues that: (A) nomination of the China Trade Commission does not invalidate the arbitration clause; (B) the arbitration agreement must be interpreted according to the parties' intent; and; (C) CIETAC is the appropriate institution for this arbitration.

A. Nomination of the China Trade Commission does not invalidate the arbitration clause

National courts and arbitral tribunals will validate arbitration clauses that nominate non-existent institutions [*ICC 5983; Laboratories Grossman*]. This is consistent with the pro-arbitration approach of developed jurisdictions [*Born, 678-9*]. Courts and Tribunals have sought to correct or supplement erroneous clauses [*Lucky-Goldstar; Born, 679*].

B. The arbitration agreement must be interpreted according to the parties' intent

A drafting error requires interpretation of the contract, in light of the parties' intent. Both the CLAIMANT and RESPONDENT circulated arbitration clauses [*Ex 2 and Ex 4*]. The intention for both parties was to arbitrate any disputes arising out of the contract. Further, both arbitration clauses referenced a 'Commission' [*Ex 2*] or an institution's arbitral rules [*Ex 4*] thus demonstrating the parties' intent for institutional arbitration. The reference to the 'China Trade Commission' and Beijing as the location further demonstrate the agreement to conduct the arbitration in China. The literal wording of the arbitration agreement is not the sole basis for the application and interpretation of the clause.

C. CIETAC is the appropriate institution for this arbitration

As the parties have demonstrated their intention to engage in an institutional arbitration in China, CIETAC is the appropriate institution. CIETAC is a prominent arbitration institution in China that accepts international disputes [*CIETAC Rules Article 3(2)(a)*] and has been established for over 50 years.

III. The condition precedent in clause 12 is unenforceable

The requirement to conciliate in Clause 12 is unenforceable because (A) the requirement to conciliate is vague and uncertain; and (B) the RESPONDENT has waived its right to conciliate because it is partly to blame for the non-compliance with the conciliation requirement.

A. The requirement to conciliate is vague and uncertain

The requirement to conciliate in Clause 12 is vague and uncertain. The clause fails to (1) indicate a framework for the conciliation and (2) indicate when conciliation efforts are deemed to be exhausted.

A conciliation agreement can only be enforced if it is sufficiently certain to allow a tribunal to objectively assess whether it has been complied with [*Ashford, 19; Hooper Bailie; Elizabeth Bay*]. The requirement for conciliation should indicate the framework to be followed and the stage at which the efforts will be deemed to be exhausted [*Aiton, 74; Berger, 9; Pryles, 168*]. Clause 12 does not provide a framework for the conciliation and does not provide a time at which the conciliation is exhausted, potentially allowing the conciliation to extend indeterminably, thereby risking an effective arbitration [*Redfurn/Hunter 2004, 46*]. Hence, the CLAIMANT is not bound to conciliate as the requirement lacks certainty [*Aiton, 252; Richie, 1337*]

B. The RESPONDENT has contributed to the non-compliance

A party is not permitted to rely on the requirement to conciliate where they are partly to blame for the failure in the conciliation process [*Born, 841; Judgement 15.3.1999*]. In this case, the RESPONDENT should not be allowed to rely on the non-compliance of the conciliation requirement to prevent this arbitration because there were ten months between the CLAIMANT's notice of an intention to arbitrate [*Ex 18*] and CIETAC's notice of arbitration [*Ex 19*]. The RESPONDENT made no attempt to resolve the conflict through conciliation or other means. The RESPONDENT's failure to conciliate in this period prevents it from relying on this non-compliance to stay proceedings.

ARGUMENT ON MERITS

The RESPONDENT is liable to pay damages because: (I) the existence of the contract is determined by the UNIDROIT Principles (PICC); and as a result (II) the parties concluded a contract for sale; which the RESPONDENT breached. Further; (III) the agreed terms form the basis of this contract; and (IV) the standard terms are replaced by operation of the ‘knock-out-doctrine’; this invalidates the RESPONDENTS exclusion clause; and as a result; (V) the CLAIMANT is entitled to damages under Article 7.4.1 PICC.

I. THE EXISTENCE OF A CONTRACT IS DETERMINED BY THE PICC

The contract between the parties is governed by the PICC because: (A) the parties agreed that the PICC should be the governing law; and, (B) the parties excluded the application of the CISG.

A. The parties agreed that the PICC should be the governing law

The PICC applies where parties agree that it shall be the governing law of the contract [Art 2.1.1 PICC]. The RESPONDENT stated in Clause 10 of its standard terms that the PICC shall be the governing law [Ex 4] and restates this in Exhibit 10. The CLAIMANT accepted the PICC by stating ‘we have no objection to using the UNIDROIT Principles as the governing law’ [Ex 13].

B. The parties excluded the application of the CISG

A party can expressly or impliedly exclude the operation of the CISG [*Schwenzer, 60*]. An implied exclusion of the CISG exists where the parties' intent is determinable [*Ferrari, 151*]. Parties can communicate their intention to exclude the CISG through designation of a replacement law [*Ferrari, 156; Bianca/Bonell-Bonell, Art 6 at 1.2, Art 6 at 30*]. The RESPONDENT excluded the CISG through its nomination of the PICC as the governing law [*Ex 4, 10*] and the CLAIMANT agreed to the application of the PICC [*Ex 13*].

Further, in order to subject the contract to the CISG, the RESPONDENT did not need to include a choice-of-law clause. The CISG would govern the contract between the parties in the absence of a choice-of-law clause, because the countries of both the CLAIMANT and RESPONDENT are parties to the CISG [*Clarification 20*]. It was the RESPONDENT who nominated the PICC to govern the contract [*Ex 4, 10*]. The only rationale for the RESPONDENT to draft this clause was to exclude the CISG's application and replace it with the PICC. According to the principle of effective interpretation (*Article 4.4 PICC*) the interpretation which gives effect to the clause, rather than rendering it useless is preferred [*Fouchard/Gaillard/Goldman, 250, 825*].

II. THE PARTIES CONCLUDED A CONTRACT FOR SALE

The CLAIMANT and RESPONDENT concluded a contract for sale of 1000 cars because: (A) the RESPONDENT submitted a counter-offer; the (B) CLAIMANT accepted the RESPONDENT's counter-offer; (C) there was an agreement on the essential terms of the contract and; (D) the sale of the single car was a condition precedent to the contract of 1000 cars, rather than a separate contract.

A. The RESPONDENT submitted a valid counter-offer

An offer exists where the proposal is sufficiently definite and indicates an intention to be legally bound [Art 2.1.2 PICC, Schwenger, 36]. To be sufficiently definite, the offer must contain the essential terms of the contract [Schwenger, 132]. The CLAIMANT communicated a sufficiently definite offer that confirmed the price, quantity and delivery of the goods [Ex 9].

An offer that purports to be an acceptance but contains terms which materially alter the offer constitutes a counter-offer [Art 2.1.11 PICC]. The RESPONDENT replied to the CLAIMANT's offer in Exhibit 10. The RESPONDENT modified the offer by referring to FAS, requiring payment in advance and delivery of the single car separately. This constitutes a counter-offer as it materially modifies the terms of the CLAIMANT's offer [Vogenauer, 283].

B. The CLAIMANT accepted the RESPONDENT's counter-offer

Acceptance of an offer can be made either by statement or by conduct [Art 2.1.6 PICC]. The CLAIMANT assented to the terms of the RESPONDENT's offer by paying for the car [Ex 11], and taking delivery of the car to commence testing [Ex 13].

C. There was an agreement on the essential terms of the contract

A contract requires agreement on the essential terms including the goods, quantity and price [Schwenger, 132]. The sale of 1000 electric (Gardeners model) cars was agreed upon by the parties [Ex 9, 10, 11]. The price of each car was agreed upon [Ex 3, 9]. The only

disagreement regarding the price exists in the parties standard terms, where the CLAIMANT states that it is entitled to a 2% discount [Ex 2] and the RESPONDENT states that no discounts are given [Ex 4].

Essential terms in a contract must be agreed upon for a contract to exist [Schwenzer, 132], whereas standard terms are pre-drafted terms that are not negotiated by the parties [Schwenzer, 164]. Standard terms do not need to be agreed upon [Schwenzer, 132]. The parties agreed on all essential terms of the contract, and disagreed only on the standard terms. This does not in any way invalidate the existence of a contract

D. Sale of the single car was a condition precedent to the contract of 1000 cars, rather than a separate contract

A condition precedent within a contract provides that substantive terms will not come into operation until the occurrence of a specified event [Aberfoyle Plantations]. The CLAIMANT stated that the performance of the cars was vital to the purchase [Ex 5] and later stated that it would send the RESPONDENT an order with the 'proviso' that if the car did not meet its expectations, it would not execute the order [Ex 7]. The CLAIMANT asserted that the order for 999 cars would occur unless it was dissatisfied with the single car, this constitutes a condition precedent. As the CLAIMANT did not voice any dissatisfaction with the car, the contract was enlivened as soon as the CLAIMANT determined that its performance was satisfactory [Bentworth Finance].

III. THE AGREED TERMS FORM A BASIS FOR THIS CONTRACT

Throughout the correspondence between the parties, it was agreed that the CLAIMANT was not required to notify the RESPONDENT if it was satisfied with the single car [Ex 7]. The CLAIMANT communicated clear criteria for the quality of the car, namely that it must operate for 500 miles without recharging, and that the recharging would cost less than operating on petrol [Ex 7]. This criterion was assured by the RESPONDENT in a phone conversation [Ex 8] and reaffirmed in Exhibit 11. Therefore, it was clear to the RESPONDENT that the cars were likely to conform, and that the contract was likely to proceed.

It was established that the CLAIMANT was not required to notify the RESPONDENT that the cars were in conformity with the contract, only if they *were not* in conformity. The CLAIMANT stated that they would notify the RESPONDENT of any defects within a week of receiving the single car [Ex 9]. As the CLAIMANT received the car and notified the RESPONDENT of this in Exhibit 13, and a week had passed without any notification by the CLAIMANT, it is clear that the CLAIMANT intended to proceed with the order.

The RESPONDENT contends that it was waiting for the CLAIMANT to confirm its order [Ex 15]. The RESPONDENT inconsistently claims, however, that it had already sold all but 100 cars [Ex 16]. Therefore, even if the CLAIMANT had expressed its satisfaction with the car in August 2011, the RESPONDENT would not have been able to fill the order. A reasonable person in the RESPONDENT's position would have made contact with the CLAIMANT before effectively terminating the contract.

IV. THE STANDARD TERMS ARE REPLACED BY OPERATION OF THE KNOCK-OUT-DOCTRINE

The agreed terms, along with the determined quantity, model and price of cars will form the basis of the contract. However, the conflicting standard terms must be settled. A ‘battle of the forms’ situation occurs where parties’ routinely refer to their standard terms during the formation of the contract, and these standard terms conflict with each other. The PICC implements the ‘knock-out-doctrine’ to determine which standard terms form part of the contract where there is a battle of the forms [*Art 2.1.22 PICC*].

The knock-out-doctrine is a fair solution where both parties do not specifically refer to, or acknowledge the conflicting standard terms [*Vogenauer, 346*]. In cases where the parties routinely refer to their standard terms and conditions and they conflict, it would be incorrect to deny the existence of the contract or to simply give preference to the terms that were referred to last [*Off Comm PICC, 72*].

The knock-out-doctrine provides that where both parties use standard terms and come to an agreement except on those terms, any agreed terms and non-conflicting standard terms form part of the contract [*Art 2.1.22 PICC*]. The court or tribunal will then determine the parties’ obligations through general agreements made between the parties and the general principles underlying the PICC [*Vogenhauer, 344*].

The CLAIMANT and the RESPONDENT referred to their standard terms on multiple occasions [*Ex 1, 2, 13, 16, 18 and Ex 3, 4, 10, 17*]. As the CLAIMANT and RESPONDENT have reached agreement on the essential terms, a contract will be formed on the basis of the agreed terms and any standard terms that are common in substance. Any standard terms that conflict will be ‘knocked out’ [*Art 2.1.22 PICC*]. This includes the standard terms both parties had regarding shipping, discount and returns.

Importantly, the RESPONDENT seeks to limit its liability for consequential damages in their standard terms [*Clause 7, Ex 4*]. This conflicts with the CLAIMANT's Clause 11 which states that the CLAIMANT is entitled to damages for non performance. Article 21.2.22 PICC will operate to knock out Clause 7 and Clause 11. As there is no exclusion clause remaining, Article 7.4.1 PICC will entitle the CLAIMANT to compensation for non-performance.

V. THE CLAIMANT IS ENTITLED TO DAMAGES UNDER ARTICLE 7.4.1 PICC

As a valid contract exists, the RESPONDENT is liable for damages under Article 7.4.1 PICC because: (A) the RESPONDENT's actions amount to non-performance; (B) the damage sustained by CLAIMANT was foreseeable; and, (C) the CLAIMANT took all reasonable steps to mitigate its harm. Additionally, (D) The RESPONDENT cannot effectively exclude its liability

A. The RESPONDENT's actions amount to non-performance

Non-performance is the failure by a party to perform its obligations [*Art 7.1.1 PICC*]. The RESPONDENT was contracted to deliver the remaining cars by 1 December 2011. The RESPONDENT failed to do so and must compensate the CLAIMANT for the harm it has suffered as a result of the non performance.

B. The damage sustained by CLAIMANT was foreseeable

Damages under Article 7.4.1 PICC can only be awarded if the harm was foreseeable [*Art 7.4.4 PICC*]. As the CLAIMANT notified the RESPONDENT that he intended to sell the

imported cars in a competitive market [*Ex 1*], it is reasonably foreseeable that failing to send the cars, and supplying them to a competitor would cause the CLAIMANT to suffer consequential damages.

C. The CLAIMANT took all reasonable steps to mitigate its harm

Under Article 7.4.8, the CLAIMANT is required to take all reasonable steps to mitigate its losses. The CLAIMANT accepted the offer of the RESPONDENT for the 100 cars to mitigate some of its losses [*Ex 16*]. However, beyond this there were no reasonable steps the CLAIMANT could have taken to mitigate its losses. The RESPONDENT did not have any more cars available at the time, and waiting two months for the RESPONDENT to send more cars would not help as the market had already been flooded by his competitor [*Ex 18*].

D. The RESPONDENT cannot effectively exclude its liability

The RESPONDENT cannot effectively exclude its liability because: (i) invoking the exclusion clause would be prejudicial to the CLAIMANT; and, (ii) the exclusion clause is set aside by the ‘knock-out doctrine’. In any event, (iii) the RESPONDENT’s exclusion clause is invalid because it is a ‘surprising term’.

i. Invoking the exclusion clause would be prejudicial to the CLAIMANT

Contract terms that have not been individually negotiated may be invoked as long as adequate notice of terms was given before, or at the time the contract is made [*Olley v Marlborough Court Ltd, 1949*]. Simply bringing the existence of standard terms to the attention of the other party does not amount to incorporation [*Murphy*]. The RESPONDENT merely told the CLAIMANT that its conditions were on its webpage that the CLAIMANT could find on

‘google under [their] company name’ [Ex 3]. This is simply not enough to have the exclusion clause incorporated, and doing so would be prejudicial to the CLAIMANT.

ii. The exclusion clause is set aside by the ‘knock-out- doctrine’

As noted above [IV], the knock-out doctrine will apply and replace the RESPONDENT’s exclusion clause.

iii. In any event, the RESPONDENT’s exclusion clause is invalid because it is a surprising term

If the Tribunal finds the RESPONDENT’s exclusion clause to be applicable, the RESPONDENT may not invoke it because it is a ‘surprising’ standard term. A standard term without assent cannot be considered a common intention of the parties [ICC Award 8223]. A party will not be bound by a standard term if that term is surprising [Vogenauer, 316]. A surprising term is one which a reasonable person in the CLAIMANT’s position could not have reasonably expected [Art 2.1.20 PICC]. The RESPONDENT’s Clause 7 is a surprising term as the CLAIMANT could not have reasonably expected that its right to consequential damages would be completely denied.

REQUEST FOR RELIEF

Therefore, CLAIMANT respectfully asks this Tribunal to adjudge and declare that:

1. The Tribunal has jurisdiction
2. The contract for 1000 cars exists, and is governed by the PICC
3. The CLAIMANT is entitled to damages under Art 7.4.1

Respectfully submitted,

Counsel for the CLAIMANT