THIRD ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

MEMORANDUM FOR RESPONDENT

CLAIMANT	RESPONDENT
LONGO IMPORTS	**CHAN MANUFACTURING**
PO BOX 234 MINUET	PO BOX 111 CADENZA

TEAM 002

INDEX OF ABBREVIATIONS

Art	Article
BGH	Bundesgerichtshof
CIETAC	China International Economic and Trade Arbitration Commission
CISG	UN Convention on the International Sale of Goods
CLOUT	Case Law on UNCITRAL Texts
Ex	Exhibit
FAS	Free Alongside Ship (INCOTERMS, 2010)
ICC	International Chamber of Commerce
NYC	New York Convention
OLG	Oberlandesgericht
PICC	UNIDROIT Principles of International Commercial Contracts
SIAC	Singapore International Arbitration Centre
UNCITRAL Conciliation Model Law	UNCITRAL Model Law on International Commercial Conciliation
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
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
PICC	UNIDROIT Principles of International Commercial Contracts, 2010
UNICITRAL Conciliation Model Law	UNCITRAL Model Law on International Commercial Conciliation, 2002
UNCITRAL Conciliation Rules	UNCITRAL Conciliation Rules, 1980
UNICITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1986

RULES

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

COMMENTARY

Born	Gary B. Born, International Commercial Arbitration (Netherlands, Kluwer Law International: 2009)
Berger	Klaus Peter Berger, 'Law and Practice of Escalation Clauses' (2006) 22(1) *Arbitration International*
Carter	James Carter, Part I – Issues Arising from Integrative Dispute Resolution Clauses in Albert Jan van den Berg (ed) New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series (Kluwer Law International: 2005)
Chitty	Chitty & Beale, Chitty on Contracts (London, Sweet & Maxwell: 2008)

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	Fouchard, Gaillard, Goldman on International Commercial Arbitration (Netherlands, Kluwer Law International: 1999)
Huang Tao	Huang Tao, The Validity of Arbitration Agreements under Chinese Law
Off Comm PICC	Official Comments on Articles of the UNIDROIT Principles
Redfern/Hunter	Nigel Blackaby, Constantine Partasides with Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration (5th Ed.) (New York, Oxford University Press: 2009)
Schwenzer	Ingeborg Schwenzer, Pascal Hachem, Christopher Kee, Global Sales and Contract Law (New York, Oxford University Press: 2012)
Viscasillas	Maria del Pilar Perales Viscasillas, Cross-References and Editorial Analysis: Article 19
Vogenauer	Stefan Vogenauer and Jan Kleinheisterkamp (ed), Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC), (New York, Oxford University Press: 2009)
Wildner	Kaia Wildner, Art. 19 CISG: The German Approach to the Battle of the Forms in International Contract Law The Decision of the Federal Supreme Court of Germany of 9 January 2002 (2008) 20 *Pace International Law Review*

CASES

Ad Hoc Arbitral Tribunal, Florence, 1994	Italy 19 April 1994 Florence Arbitration Proceeding
Assante	*Assante v PMC Technologies 164 F.Supp. 2d*

BGH, Germany, 1996	BGH, Germany, 04.12.1996
Chartbrok Ltd	*Chartbrook Ltd v Persimmon Homes Ltd (2009)* 3 WLR
Chateau des Charmes	*Chateau des Charmes Wines Ltd. v. Sabate USA Inc* [2005] O.J. No. 4604
CLOUT Case No 152	*Marques Roque, Joaquim v. S.A.R.L. Holding Manin Rivière* (1995), CLOUT Case No. 152.
CLOUT Case No 232	*CLOUT Case No 232 Oberlandesgericht Munchen, Germany 11 March 1998*
De Vito	HIM Portland, LLC v DeVito Builders Inc, 317 F.3d 41
Germany 13.1.1993	*Germany, Appellate Court Saarbrücken 13 January 1993*
Germany 23.5.1995	*Germany, Appellate Court Frankfurt* 23 May 1995
ICC Arbitration 8482	*ICC Arbitration Case No. 8482 of December 1996*
ICC 12739	*Award in ICC Case No. 12739*, cited in M. Bühler & T. Webster, *Handbook of ICC Arbitration* 71 (2005)
ICC 225/1996	ICC Case No 225/1996
ICC 9984	ICC Case No. 9984, Preliminary Award of June 7, 1999
OLG, Germany, 1994	*OLG Berlin, Germany, 24 January 1994*
Saarbrucken, 13 January 1993	*Germany, Appellate Court Saarbrücken 13 January 1993*

AWARDS

Arbitral Award 25.1.2007, Geneva	*Arbitral award 25 January 2007 (Geneva), World Intellectual Property Organization Arbitration and Mediation Center*
Arbitral Award, Zurich	Zürich Chamber of Commerce, Switzerland, 25 March 1996
ICC Award No. 7660	*ICC Court of Arbitration Paris, France, 23.08.1994; Award no. 7660/JK*

ARGUMENT ON JURISDICTION

THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THIS DISPUTE

The Tribunal does not have jurisdiction to hear this dispute because: (A) the CLAIMANT's arbitration clause is invalid as it refers to a non-existent arbitral institution; and (B) in any event, the preconditions for arbitration have not been satisfied.

I. The CLAIMANT's arbitration clause is invalid as it refers to a non-existent arbitral institution

Clause 12 of the CLAIMANT's standard terms [*Ex 2*] provides that all disputes are to be referred to the 'China Trade Commission'. The China Trade Commission is a non-existent organisation. This renders the clause invalid because it: (1) is inoperative and uncertain; and (2) permits the CLAIMANT to unfairly choose institutions after a dispute has arisen.

A. The arbitration agreement is inoperative and uncertain

An arbitration clause is invalid where it is inoperable or uncertain [*Article 8(1) UNCITRAL Model Law; NYC Art II.3; Redfern/Hunter, 146*]. The CLAIMANT's nomination of the 'China Trade Commission', a non-existent arbitral institution, is ambiguous and does not identify a suitable arbitral institution. Where the intended institution can be objectively identified with a significant degree of certainty, the clause may remain valid [*Fouchard, 264*]. A reference to the 'China Trade

Commission' cannot be interpreted as referring to CIETAC with a significant degree of certainty. In analogous circumstances, a clause referring to the 'Arbitration Commission in Switzerland', a non-existent arbitral institution, invalidated the clause as it was inoperable [*Arbitral Award, Zürich, 25.3.1996*].

B. The arbitration clause permits the CLAIMANT to unfairly choose institutions after a dispute has arisen

The CLAIMANT may not use the uncertainty in the arbitration clause to bring the arbitration to an institution of its choice. The RESPONDENT did not consent to the CLAIMAINT choosing an arbitral institution after a dispute has arisen. The CLAIMANT should not be permitted to choose arbitral rules retrospectively and 'forum shop', as this is an unfair detriment to the RESPONDENT.

There are over 100 arbitration institutions in China, almost all of which accept both foreign and domestic arbitration cases [*Huang Tao, 4*]. A clause which nominates the 'China Trade Commission', cannot be read to automatically confer jurisdiction on CIETAC. The selection of Beijing as the seat of arbitration in Clause 12 arguably infers that the Beijing Arbitration Commission is the more suitable institution.

II. The Tribunal has no jurisdiction because the requisite preconditions to arbitration in Clause 12 have not been fulfilled.

The requirement for conciliation in the CLAIMANT's arbitration clause is a condition precedent because: (1) the language of the clause imposes a mandatory obligation to conciliate; and (2) the condition precedent is sufficiently certain to be enforced.

A. The language of the clause imposes a mandatory obligation to conciliate

The CLAIMANT's arbitration clause requires the parties to conciliate before proceeding to arbitration. To establish conciliation as a mandatory condition precedent, regard must be given to the wording of the clause [*Berger, 3; Born, 841*]. The requirement to conciliate must be expressed in mandatory terms. The language in Clause 12 indicates a mandatory conciliation requirement.

Clause 12 states that 'All disputes... *shall* be conciliated. *If* no agreement can be reached it must be referred to arbitration...' [*Ex 2, emphasis added*].

The use of 'shall' demonstrates the binding nature of the conciliation requirement [*Born, 841; ICC 9984; DeVito, 42*]. The CLAIMANT has carefully drafted this clause to impose a mandatory obligation. If the CLAIMANT did not intend to impose a mandatory obligation to conciliate, the clause would read the parties *'may'* refer any disputes to conciliation.

Conciliation is established as a precondition to arbitration through the emphasis on *'If'* in the arbitration agreement. This wording requires that arbitration commence only if conciliation is unsuccessful. The use of *if* and *shall* together, unequivocally demonstrates a mandatory condition precedent [*Berger, 4; Born, 841*].

B. The condition precedent is sufficiently certain to be enforced

The CLAIMANT's conciliation provision is not vague or indeterminate. Conciliation agreements do not require a fixed duration [*Carter, 466; Article 16 UNCITRAL Conciliation Rules; Article 13 UNCITRAL Conciliation Model Law*]. Clause 12

precludes arbitration unless 'no agreement can be reached' [*Ex 2*]. This point in time is sufficiently determinable. Article 45.3 of CIETAC rules provides that 'the arbitral tribunal *shall* terminate the conciliation proceedings if either party so requests, or if the arbitral tribunal believes that further conciliation efforts shall be futile'. Further, the presence of a conciliator will prevent the conciliation extending for an unreasonable period of time.

No conciliation took place between the parties. Consequently, a condition precedent to arbitration has not been complied with. The failure to comply with a procedural requirement constitutes a jurisdictional defect. [*Berger, 6; Born, 841; ICC 12739*].

ARGUMENT ON MERITS

The RESPONDENT is not liable to pay the CLAIMANT damages because: (I) any alleged contract is determined by the CISG; and, as a result, (II) no contract for the sale of 1000 cars was concluded. In the alternative, the RESPONDENT is not liable for damages because; as a result of the CISG applying, (III) the RESPONDENT's terms form the contract, and exclude its liability for consequential damages. In any event: (IV) the RESPONDENT is not liable for damages because the CLAIMANT is responsible for the loss sustained; or alternatively, (V) the RESPONDENT's liability is limited because the CLAIMANT contributed significantly to the loss.

I. ANY ALLEGED CONTRACT IS DETERMINED BY THE CISG

If the Tribunal finds that the agreement for the sale of the sample car is a part of the greater sale contract for the remaining 999 cars, the Tribunal should apply the CISG to determine its terms because: (A) the alleged contract is within the scope of Article 1(1)(a); and, (B) the parties did not exclude the operation of the CISG by reference to the PICC.

A. The alleged contract is within the scope of Article 1(1)(a) CISG

The CISG applies to contracts for the sale of goods between parties who have their places of business in different states [*Art 1(1) CISG*]. The disputed contract concerns the sale of electric cars (which indisputably constitutes a sale of goods). The CLAIMANT and the RESPONDENT are based in Minuet and Cadenza respectively, constituting different states. Consequently, the CISG is the governing law of this contract.

B. The parties did not exclude the operation of the CISG by reference to the PICC

Exclusion of the CISG can be achieved expressly or impliedly [*LG München; Redfern/Hunter, 129*].

It is internationally accepted that a choice-of-law clause worded generally and broadly without any further specification will not exclude the application of the CISG [*ICC Award 7660; CLOUT Case No. 152*]. In the absence of both parties nominating another law exclusively and unequivocally, choice-of-law provisions do not preclude

the applicability of the CISG [*Ad Hoc Arbitral Tribunal, Florence 1994; ICC Arbitration 8482*]. Merely choosing a law without an express exclusion of the CISG is insufficient to exclude the CISG [*Assante, 1150*]. The RESPONDENT's choice-of-law clause does reference the UNIDROIT Principles 2010 [*Ex 4, 10*]. This reference however, does not exclude the application of the CISG because the RESPONDENT has not attempted to specifically exclude any law in the drafting of this provision. As a result the CISG has not been expressly excluded.

The operation of the CISG was not impliedly excluded. Implied exclusions are subject to strict requirements [*BGH, Germany, 1996*]. It must be clear that exclusion is intended by both parties [*OLG, Germany, 1994*]. The RESPONDENT failed to take the necessary steps to make it clear that exclusion was intended [*see Redfern 129; Ferrari, 153*]. Further, the CLAIMANT's correspondence makes an express reference to the CISG [*Ex 13*]. From the actions of both parties, it cannot be said that they intended to exclude the function of the CISG.

II. NO CONTRACT FOR THE SALE OF THE REMAINING 999 CARS WAS CONCLUDED

There is no contract for 1000 cars because: (A) the sale of the sample car constitutes a separate contract; (B) the essential terms of the contract were not agreed upon; and, (C) an order for the shipment of the remaining 999 cars was never confirmed.

A. The sale of the sample car constitutes a separate contract

Additional or different terms in relation to price, payment, quantity or delivery are considered to alter the terms of an offer materially [*CISG Art 19(3)*]. In Exhibit 9, the CLAIMANT submitted an offer in the form of an order to the RESPONDENT. The RESPONDENT's subsequent correspondence in Exhibit 10 does not constitute acceptance of the CLAIMANT's offer to purchase 1000 cars. Instead, Exhibit 10 constitutes a counter-offer under Article 19(1) CISG. This is because the variation in shipping terms and request for separate payment for the sample car constitutes a material alteration of the terms of the offer [*CISG Art 19(3)*].

The CLAIMANT accepted the material alterations through its lack of objection to the modifications, its subsequent payment [*Ex 11*], and by accepting the delivery of the car [*Ex 13*], [see *Saarbrücken, 13 January 1993*].

The intentions of the parties may be determined by 'what an objective observer would [think] the intentions of the parties to be' [*Chartbrook Ltd*]. Based on the actions of the parties, an objective observer would think that the intentions of both the CLAIMANT and the RESPONDENT were to form two separate contracts. This is illustrated in Exhibit 10 where the RESPONDENT specifically stated that it wanted to treat the sale of the sample car as a separate transaction. The CLAIMANT did not object to this proposal.

The CLAIMANT concluded the contract for the sale of the sample car by accepting the counter-offer by paying for the sample car upfront [*Ex 11*]. This transaction is separate and distinct from the proposed sale of the additional 999 cars.

B. The essential terms of the contract were not agreed upon

There can be no contract conclusion if the offer and the acceptance do not match in all essential terms [*Wildner, 10*]. The purchase price is an '*essentialium negotii*' (essential term) under Article 14(1) CISG.

There was no corresponding intention with respect to the purchase price. The intention of the CLAIMANT was to receive 2% discount of the total order as evidenced by its standard terms [*Ex 2, 9*]. Conversely, the RESPONDENT did not intend to grant any discount, as evidenced by its standard terms [*Ex 4*] where it is stated that no discounts are given.

At no point did the RESPONDENT and the CLAIMANT have corresponding intentions regarding the purchase price. As the parties did not come to an agreement on this essential term, there can be no contract conclusion.

C. An order for the shipment of the remaining 999 cars was never confirmed

Silence is not enough to show acceptance of an offer [*Art 18(1) CISG; Schlwenzer, 146*]. At no point was it agreed that the CLAIMANT would remain silent after receiving the car if he wanted the contract to proceed. The CLAIMANT agreed to notify the RESPONDENT of any defects, and to expect delivery by 1 December 2011 [*Ex 5, 8*]. This in no way constitutes an agreement to allow non-communication as acceptance.

The allowance for non-communication amounting to acceptance of the contract would not be reasonable in these circumstances. It would be impractical for a contract to proceed without the CLAIMANT notifying the RESPONDENT of whether it actually wanted to purchase the remaining 999 cars. Requiring the RESPONDENT to ship a large number of valuable goods based on almost two months of silence would not be reasonable. In light of the circumstances and the importance that the CLAIMANT attributed to 'quality', a requirement to notify should be imposed on the CLAIMANT.

As no contract for the sale of 999 cars was concluded, the RESPONDENT cannot be held liable for consequential damages resulting from any alleged breach.

III. THE RESPONDENT'S TERMS FORM THE CONTRACT AND EXCLUDE LIABILITY FOR CONSEQUENTIAL DAMAGES

If the Tribunal finds a contract for the sale of 1000 cars to exist, the RESPONDENT's terms should form the contract because: under the CISG; (A) the terms of the contract are decided by application of the 'last shot rule'; (B) the CLAIMANT accepted the RESPONDENT's terms by taking delivery of the sample car; and, (C) any terms proposed after performance of the contract are ineffective. As a result, the RESPONDENT's exclusion clause applies and as a result; (D) the RESPONDENT is not liable for any consequential damages.

A. The terms of the contract are decided by application of the 'last shot rule'

Because the CISG applies, terms of the contract should be determined by applying the 'last shot rule', which is enshrined in Article 19 of the CISG [*Schwenzer, 2006*].

Accordingly, the terms of a contract are determined by the terms of the last submitted form, which is then accepted by performance [*8 CLOUT Case No 232*].

B. The CLAIMANT accepted the RESPONDENT's terms by taking delivery of the sample car

The CLAIMANT accepted the RESPONDENT's terms because: (i) the RESPONDENT's acknowledgement at Exhibit 10 constitutes a counter-offer, rather than acceptance; and, (ii) the RESPONDENT's counter-offer was accepted by the CLAIMANT through performance.

i. The RESPONDENT's acknowledgement at Exhibit 10 constitutes a counter-offer

In order for acceptance to occur, the acceptance must be a 'mirror image' of the offer [*Viscasillas, 1*]. Any material additions, limitations or modifications render the communication a counter-offer [*Art 19(3) CISG*]. The CLAIMANT's order form [*Ex 9*] was received and acknowledged by the RESPONDENT [*Ex 10*]. This acknowledgement contained modifications to the purchase arrangement of the sample car and the shipping terms; which are both deemed material changes [see *Vogenauer, 283*]. Thus, the RESPONDENT's communication is not a "mirror image" of the offer, and constitutes a counter-offer.

ii. The RESPONDENT's counter-offer was accepted by the CLAIMANT through performance

It has been held that a buyer's accepting delivery of goods constituted conduct indicating assent to the offer, and amounted to an implied acceptance of the standard

terms therein [*Germany, 13.1.1993; Germany, 23.5.1995*]. The CLAIMANT's payment and acceptance of the sample car [*Ex 11, 13*] constitute acceptance through conduct under Article 18(1) CISG.

C. Any terms proposed after performance of the contract are ineffective

As the CLAIMANT conducted performance of the contract, the contract is concluded from that point onward. The CLAIMANT's attempts to refer back to its terms and conditions in Exhibit 13 were ineffective. This is because contract had been concluded, meaning that any attempts by the CLAIMANT to alter the agreement were merely offers, requiring the RESPONDENT's assent [see *Chateau des Charmes*].

D. The RESPONDENT is not liable for any consequential damages

As the RESPONDENT had the 'last shot' before performance, the RESPONDENT's standard terms will be the terms followed. This includes the clauses regarding discounts, shipping and liability for damages.

The RESPONDENT's standard terms exclude liability for consequential damages, including loss of profits [*Ex 4, Clause 7*]. This exclusion clause is valid because (i) the RESPONDENT is entitled to limit its liability; and, (ii) the exclusion clause is not a surprising term.

i. The RESPONDENT is entitled to limit its liability

Parties are entitled by virtue of freedom of contract to exclude or limit their liability in the standard terms of a contract [*Chitty, 910*]. In international sale of goods contracts, parties frequently include exclusion clauses to limit their liability in their non-negotiated terms [*Schwenzer, 642; Chitty 971*]. Where a contract involves business parties with proportionate bargaining power, exclusion clauses are not normally deemed invalid merely because they are unfair [*Vogenauer, 334*]. Exemption clauses are not subject to a requirement of fairness [*Schwenzer, 643*]. The CLAIMANT and RESPONDENT had proportionate bargaining power, and the CLAIMANT assented to the RESPONDENT's terms, including the exclusion clause by accepting the RESPONDENT's counter offer. As a result, the CLAIMANT cannot argue that the clause in unfair.

ii. The exclusion clause is not a surprising term

A party is not bound by a term that is considered surprising [*Art 7(1), 8(2) CISG; 2.1.20 PICC*]. The test for whether a term is surprising is whether a reasonable person in the position of the adhering party would have expected such a term [*Vogenauer, 332; Off Comm Art 2.1.20*]. The CLAIMANT, in its standard terms, expressly seeks to attribute liability to the RESPONDENT for consequential damages [*Clause 12, Ex 2*]. The exclusion of liability by the RESPONDENT was therefore clearly in the contemplation of the CLAIMANT and cannot be considered as a surprising term.

As the RESPONENT's exclusion clause is valid, the RESPONDENT is not liable for consequential damages.

IV. IN ANY EVENT, THE RESPONDENT IS NOT LIABLE FOR DAMAGES BECAUSE THE CLAIMANT IS RESPONSIBLE FOR THE LOSS SUSTAINED

A party will not be liable to pay damages under Article 7.4.1 of the PICC when the aggrieved party is solely responsible for the damage sustained [*Arbitral award 25.1.2007, Geneva*]. An aggrieved party may be held responsible for the damage sustained for an omission relating to notice [see *ICC 225/1996*]. The RESPONDENT refrained from shipping the remaining cars because it did not receive confirmation of the order from the CLAIMANT. The CLAIMANT would not have suffered damage had it properly notified the RESPONDENT.

V. THE RESPONDENT'S LIABILITY IS LIMITED BECAUSE THE CLAIMANT CONTRIBUTED SIGNIFICANTLY TO THE LOSS

In any event, the RESPONDENT's liability should be significantly reduced due to the omission of the CLAIMANT to properly notify the RESPONDENT of its desire to take delivery of the remaining cars. Article 7.4.7 of the PICC provides that the quantum of damages may be reduced accordingly when harm is due in part to an act or omission of the aggrieved party [*Off Comm Art* 7.4.7, *PICC, 244*]. Were this Tribunal to find that the CLAIMANT was only partly to blame for its loss; the RESPONDENT would still only be liable to the extent of its contribution.

REQUEST FOR RELIEF

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

i. The Tribunal does not have jurisdiction

ii. The CISG is the governing law

iii. No contract for 1000 cars exists

iv. The RESPONDENT is not liable for damages under Article 7.4.1 UNIDROIT

Respectfully submitted,

Counsel for the RESPONDENT