International Alternative Dispute Resolution

Mooting Competition 2012

MEMORANDUM OF SUBMISSIONS

CLAIMANT

TEAM 004

On Behalf of:	Against:
Longo Imports	Chan Exports

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TRIBUNAL HAS JURISDICTION TO HEAR THIS MATTER

The Tribunal has jurisdiction to hear this dispute on the basis that: **(1)** the Tribunal may determine its own jurisdiction; **(2)** the Tribunal determine the place of arbitration; **(3)** a valid arbitration agreement is in place; and **(4)** Clause 12 is a valid arbitration clause.

1. Jurisdiction determined by Tribunal

The arbitral may rule on its own jurisdiction including any objection with respect to the existence or validity of the arbitration agreement [Article 16(1) *UNCITRAL Model Law*].

2. Place of arbitration determined by Tribunal

The parties to a dispute are free to agree upon the place of arbitration, and where they fail to reach an agreement the determination shall be left to the tribunal [Article 20 *UNCITRAL Model Law*]. As the parties have not reached a specific agreement in relation to the place of arbitration it ought to be left to the discretion of the tribunal.

3. Valid arbitration agreement

Before a matter may be conferred for arbitration there must be a valid agreement between the parties in writing [Article 7 *UNCITRAL Model Law*]. There has been no specific agreement for arbitration reached between the parties; however both have expressed a clear intention to confer disputes to arbitration [See exhibit 2 and 4]. Pursuant to Article 7(6) of the *UNCITRAL Model Law* this reference within the contract to documents containing arbitration

clauses constitutes an arbitration agreement in writing. As such, the parties have a valid arbitration agreement

4. Valid arbitration clause

Clause 12 of the CLAIMANT's terms and conditions is a valid arbitration clause, consisting of a mandatory obligation to arbitrate. An arbitration agreement will only be invalid where it is inoperative or incapable of being performed [Article II(3) *New York Convention*; Article 8(1) *UNCITRAL Model Law*]. Clause 12 clearly ousts national courts of their jurisdiction and confers jurisdiction to the arbitral tribunal.

Should the tribunal determine that Clause 12 is ambiguous, it should still be given effect. A clause may still be given effect by analysing what reasonable persons in the same circumstances would have understood from the language used [*ICC Award 10422*]. Preference should be given to preserving the effectiveness of the clause through interpretation [*ICC Award 10422*]. A reasonable person would understand that Clause 12 refers disputes to arbitration.

Furthermore, the arbitration clause contained within the RESPONDENT's terms and conditions [See exhibit 2] is ambiguous in referring to both Cadenza and Hong Kong as the seats of arbitration and failing to nominate a designated arbitrator. On that basis the RESONDENT's arbitration clause is invalid on grounds of inoperability.

APPLICABLE LAW

UNCITRAL Model Law and UNIDROIT Principles are applicable law

Both Minuet and Cadenza have adopted the *New York Convention* and *UNCITRAL Model Law*. As signatories to the New York Convention the countries must abide by Article II(3) in conferring the matter for arbitration rather than settling the matter locally.

Under Article 1 of the *UNCITRAL Model Law* arbitration shall take place for international commercial matters. The *UNCITRAL Model Law* defines international matters as those which involve places of business in differing states [Article 1(3) *UNCITRAL Model Law*]. Minuet and Cadenza are different states, and as the places of business for the parties each reside in an opposing state the matter is to be considered international under the *UNCITRAL Model Law*. The term commercial is defined within the *UNCITRAL Model Law*;

> *'... is given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to... any trade transaction for the supply or exchange of goods or services...'* [Article 1, Footnote 2 *UNCITRAL Model Law*]

On this basis, the matter is one of both international and commercial nature, and thus the *UNCITRAL Model Law* is applicable.

Both parties have agreed to the use of *UNIDRIOT Principles* as the governing law in this matter [See exhibit 10 and 13]. Article 28(1) of the *UNCITRAL Model Law* states that the tribunal shall decide the relevant dispute in accordance with the rules of law that are chosen by the parties, and that are applicable to the substance of said dispute. On the basis of this agreement the *UNIDROIT Principles* shall be the governing law.

ARGUMENT ON FORMATION

NO REQUIREMENT AS TO FORM

There is no requirement that the parties hold an agreement in writing or any other form to evidence the existence of a contract [Article 1.1 *UNIDROIT Principles*]. The substance of the contract between the parties has arisen through the course of their dealings, communications, and conduct in the formation and conclusion of an agreement for the sale of goods.

A VALID CONTRACT EXISTS BETWEEN THE PARTIES

A valid contract exists between the parties on the basis that: **(1)** CLAIMANT clearly asserted adoption of his terms and conditions; and **(2)** the conduct of the parties is sufficient to constitute a valid agreement.

1. Valid offer and assertion of terms

An offer is validly constituted if it is sufficiently definite and indicates the intention for the offeror to be bound in the case of acceptance [Article 2.1.2 *UNIDROIT Principles*]. The CLAIMANT made an initial offer [See exhibit 9] which was rejected by way of a counter-offer from the RESPONDENT [See exhibit 10]. The CLAIMANT then sought to assert his standard terms [See exhibit 13]. Where the parties have started to perform without objecting to each other's standard terms, a contract would be considered to have been concluded on the basis of those terms which were the last to be sent or to be referred to [Official Comment 2, Article 2.1.22 *UNIDROIT Principles*]. As the RESPONDENT failed to address the assertion of these terms they will be deemed to be the applicable terms to the agreement.

2. Conduct of the parties constitutes agreement

A contract may be concluded by conduct of the parties that is sufficient to show agreement [Article 2.1.1 *UNIDROIT Principles*]. Although the precise moment of formation cannot be determined with accuracy, the conduct of the parties is sufficient to constitute a valid agreement. The ongoing dealings between the parties reflect a clear intention to conclude a contract involving the sale of goods. The contract is to be interpreted by reference to the intention of the parties [Article 4.1 *UNIDROIT Principles*]. In determination of common intention regard must be to the relevant circumstances [Article 4.3 *UNIDROIT Principles*]. Acts which are indicative of a common intention between the parties include preliminary negotiations for the terms and method for shipping [Article 4.3(a) *UNIDROIT Principles*]. In loading the SS Herminia and receiving payment for the goods the RESPONDENT's conduct demonstrates acceptance and thus conclusion of the terms to the contract. Similarly, the CLAIMANT's telephone instructions for the loading of the ship and his willingness to provide payment demonstrates mutual acceptance.

APPLICABLE TERMS

The terms and conditions outlined by the CLAIMANT are applicable on the basis that: **(1)** the RESPONDENT failed to address the final assertion of the CLAIMANT's terms and conditions; **(2)** alternatively, due to a lack of specific agreement upon the terms of the contract, it was concluded on those which were common in substance.

1. RESPONDENT failed to address CLAIMANT's terms

As previously discussed, the RESPONDENT failed to address the final assertion of the CLAIMANT's terms and conditions. Where the parties have started to perform without objecting to each other's standard terms, a contract would be considered to have been concluded on the basis of those terms which were the last to be sent or to be referred to [Official Comment 2, Article 2.1.22 *UNIDROIT Principles*]. Thus the terms and conditions outlined by the CLAIMANT are applicable to the agreement [See exhibit 2].

2. Alternatively, agreement concluded on terms common in substance

Should the Tribunal find that no agreement has been reached regarding the terms and conditions of the contract, it should be concluded on those terms which are common in substance. Both parties have made attempts to assert their individual standard terms [Article 2.1.19 *UNIDROIT Principles*]. Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance [2.1.22 *UNIDROIT Principles*]. Neither party has expressly agreed to the standard terms of the other, therefore those which are common in substance are applicable. The *INCOTERMS* listed by the parties are substantially similar in that the only distinguishing feature is the cost applicable to freight and insurance. The prices listed for the goods by the RESPONDENT did not indicate an exclusion of freight and insurance costs. As the terms of the CLAIMANT indicate that CIF are the applicable *INCOTERMS* it would be unreasonable to require the additional payment of freight and insurance costs to be borne by him. The applicable *INCOTERMS* should be CIF which is similar in substance to FAS and thus allowing for the greatest efficacy of the contract without unnecessarily causing detriment to the CLAIMANT.

ARGUMENT ON MERITS

RESPONDENT HAS BREACHED THE AGREEMENT

The RESPONDENT has breached the agreement on the basis that: **(1)** the suspensive condition required to enliven the remainder of the agreement was met by the CLAIMANT; **(2)** RESPONDENT did not act with good faith and fair dealing; furthermore **(3)** CLAIMANT entitled to terminate the contract on the grounds that the conduct of the RESPONDENT amounted to a fundamental non-performance.

1. Suspensive condition was met by CLAIMANT

A contract or contractual obligation may be made conditional upon the occurrence of a future uncertain event, so that the contract or the contractual obligation only takes effect if the event occurs [Article 5.3.1 *UNIDROIT Principles*]. The sale of the remaining 999 cars was reliant upon the suspensive condition of satisfaction with the sample being provided by the CLAIMANT [See exhibit 9]. CLAIMANT specified that silence would be indicative of satisfaction with the sample car [See exhibit 5, exhibit 8, and exhibit 9]. This suspensive condition was met by the CLAIMANT, as no notice of the sample car being unsatisfactory was provided. Thus the contract for the sale of the remaining 999 cars was enlivened. The RESPONDENT ought to have reasonably have expected that silence on behalf of the CLAIMANT would indicate satisfaction with the sample provided. The CLAIMANT repeatedly indicated that any defect or unsatisfactory performance with the sample would be communicated to the RESPONDENT. As no communication to that effect was given the suspensive condition was met.

Pending fulfilment of a condition a party may not act so as to prejudice the other party's rights in the case of the fulfilment of that condition [Article 5.3.4 *UNIDROIT Principles*]. The

RESPONDENT materially prejudiced the rights of the CLAIMANT with respect to the subject matter of the contract. Having not received notification of dissatisfaction the RESPONDENT was not entitled to deal with the goods, as the suspensive condition had been enlivened. In selling the goods to a third party pending fulfilment of the condition, the RESPONDENT prejudiced the CLAIMANT's ability to acquire the cars in accordance with the contract.

2. RESPONDENT failed to act in good faith and fair dealing

By selling the goods to a competitor of the CLAIMANT, the RESPONDENT is in breach of the fundamental principles of good faith and fair dealing [Article 1.7 *UNIDROIT Principles*]. Where a party exercises a right merely to damage the other party or where the exercise is disproportionate to the originally intended result that party will be in breach of good faith and fair dealing [Comment 2, Article 1.7 *UNIDROIT Principles*]. The RESPONDENT has abused his rights following a lack of correspondence with the CLAIMANT. This is compounded by the RESPONDENT selling the goods directly to a competitor of the CLAIMANT, increasing the damage suffered beyond that of mere non-compliance. A party who negotiates or breaks negotiations in bad faith is liable for losses caused to the other party [Article 2.1.15(2) *UNIDROIT Principles*].

3. CLAIMANT entitled to terminate due to fundamental non-performance

CLAIMANT is entitled to terminate the contract as the RESPONDENT has failed to perform his obligations. This amounts to a fundamental non-performance [Article 7.3.1(1) *UNIDROIT Principles*]. The nature of the non-performance prevents the intended purpose of the contract from being fulfilled. Time was of the essence within the agreement between the parties, which went to the nature of the RESPONDENT's obligations [Article 7.3.1(1)(b) *UNIDROIT Principles*]. This non-performance by the RESPONDENT was reckless, which is

repugnant to the principle of good faith and fair dealing [Article 7.3.1(1)(c) *UNIDROIT Principles*]. By failing to take reasonable steps to avoid causing detriment to the CLAIMANT, it can be said that the RESPONDENT was effectively reckless in performing his obligations. The conduct of the RESPONDENT has damaged the relationship between the parties to the point where the CLAIMANT can no longer reasonably rely upon him for future transactions. Damages pursuant to termination are more appropriate as a remedy in lieu of salvaging the agreement.

RESPONDENT NOT LAWFULLY ENTITLED TO TERMINATE THE AGREEMENT

The RESPONDENT is not lawfully entitled to terminate the agreement on the basis that: **(1)** the CLAIMANT is not in breach of Clause 11; and **(2)** CLAIMANT is not obliged to accept partial performance from the RESPONDENT.

1. CLAIMANT not in breach of Clause 11

RESPONDENT purports to terminate the agreement on the basis that the CLAIMANT is in breach of Clause 11 for failing to nominate a ship capable of docking at the designated ports. However, the RESPONDENT failed to disclose facts relevant to the shipment of goods; namely, the nomination of a port for the acquisition of the remaining 999 cars. The CLAIMANT proceeded to designate the SS Herminia to collect the goods [See exhibit 13]; therefore the respondent was obliged to rectify the erroneous assumption or understanding held by the CLAIMANT [*Walton Stores*; Official Comment 2, Article 1.8 *UNIDROIT Principles*]. A party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party [Article 2.1.15 *UNIDROIT Principles*].

A party cannot act inconsistently with an understanding which it has caused the other party to hold upon which that other party reasonably has acted in reliance to its detriment [Article

1.8 *UNIDROIT Principles*]. Having relied upon previous dealings with the RESPONDENT for the sale of the sample car, the CLAIMANT placed material reliance upon that conduct for future transactions between the parties in the absence of instructions to the contrary. The nature, conduct, and communications between the parties are sufficient to establish that the CLAIMANT reasonably relied upon the conduct and representations of the RESPONDENT.

2. CLAIMANT is not obliged to accept partial performance

Partial performance occurs when a promisor tenders less for a contractual obligation than was stipulated in agreement [Page 625 *Vogenauer & Kleinheisterkamp*]. The RESPONDENT has offered to remedy the contract by partial performance. The CLAIMANT should not be obliged to accept partial performance. Part performance may be refused where a party holds a legitimate interest in doing so [Article 6.1.3 *UNIDROIT Principles*] Here the CLAIMANT has a legitimate interest in rejecting partial performance, as the nature of that performance would substantially deprive the CLAIMANT of what he was entitled to expect at the conclusion of the contract [Article 7.3.1(1)(a) *UNIDROIT Principles*].

Where non-performance occurs the non-performing party may provide a cure on the basis that it is appropriate in the given circumstances [Article 7.1.4(1) *UNIDROIT Principles*]. RESPONDENT has given effective notice of a cure involving the future sale of goods at a discounted rate [See exhibit 17]. This cure is not appropriate given the nature of the goods in question. The lower quantity of goods would detriment the CLAIMANT's position within the competitive automotive industry.

REQUEST FOR RELIEF

CLAIMANT respectfully requests the Tribunal to find that:

1. The Tribunal does have jurisdiction to hear this dispute.
2. Clause 12 of CLAIMANT's terms and conditions is a valid arbitration clause.
3. A valid contract exists between the parties.
4. The CLAIMANT's terms and conditions are applicable.
5. The RESPONDENT is in breach of the agreement and the CLAIMANT is lawfully entitled to terminate the contract; furthermore the CLAIMANT is not obliged to accept partial performance.