International Alternative Dispute Resolution

Mooting Competition 2012

MEMORANDUM OF SUBMISSIONS

RESPONDENT

TEAM 004

On Behalf of:	Against:
Chan Manufacturing	Longo Imports

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ARGUMENT ON JURISDICTION

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 9 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 9 of the RESPONDENT'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 9 clearly ousts national courts of their jurisdiction and confers jurisdiction to the arbitral tribunal.

Should the tribunal determine that Clause 9 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 9 refers disputes to arbitration.

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)** a valid offer was made by the CLAIMANT to which the RESPONDENT posed a valid counter-offer; and **(2)** the conduct of the parties is sufficient to constitute a valid agreement.

1. Valid offer

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]. This counter-offer was a valid offer as it sufficiently defined the conclusion of the contract upon acceptance, providing for terms and conditions inclusive of price, delivery, and arbitration.

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 CLAIMANT did not specifically reply to the counter-offer by the RESPONDENT, his conduct is conducive of acceptance. The CLAIMANT's instructions to load the SS Herminia and his payment of the price indicated by the RESPONDENT are conduct which demonstrates his acceptance of the counter-offer. A contract is to be interpreted by reference to the intention of the parties [Article 4.1 *UNIDROIT Principles*]. In determination of a common intention regard is to be had to the relevant circumstances [Article 4.3 *UNIDROIT Principles*]. Negotiations between the parties evince a clear intention to conclude an agreement for the sale of goods. As the

conduct of the CLAIMANT reflects this intention he has accepted the counter-offer by the RESPONDENT.

APPLICABLE TERMS

The terms and conditions outlined by the RESPONDENT are applicable on the basis that: **(1)** the CLAIMANT accepted the terms of the RESPONDENT's counter-offer by way of his conduct; **(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. CLAIMANT accepted RESPONDENT's terms

As previously discussed, the CLAIMANT has accepted the counter-offer of the RESPONDENT by way of his conduct. On that basis the terms and conditions outlined by the RESPONDENT are applicable to the agreement [See exhibit 4].

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

price listed for the goods by the RESPONDENT does not include for the cost of freight and insurance. As the terms of the RESPONDENT indicate that FAS are the applicable *INCOTERMS* it would be unreasonable to require the additional payment of freight and insurance costs. The applicable *INCOTERMS* should be FAS which is similar in substance to CIF and thus allowing for the greatest efficacy of the contract without unnecessarily causing detriment to the RESPONDENT.

ARGUMENT ON MERITS

RESPONDENT LAWFULLY ENTITLED TO TERMINATED THE AGREEMENT

The RESPONDENT has lawfully terminated the agreement between the parties on the basis that: **(1)** CLAIMANT breached Clause 11 of the RESPONDENT's terms and conditions; **(2)** CLAIMANT did not act with good faith and fair dealing; and **(3)** the suspensive condition required to enliven the remainder of the agreement was not met by the CLAIMANT. Alternatively, **(4)** CLAIMANT is obliged to accept partial performance.

1. CLAIMANT in breach of Clause 11

CLAIMANT has breached Clause 11 on the basis that: **(i)** CLAIMANT failed to nominate a ship able to load in the nominated ports; **(ii)** CLAIMANT failed to fulfil the duty of best efforts; and as such **(iii)** failure to nominate a capable ship alongside derogation from the duty of best efforts amounts to a fundamental non-performance of the contract.

i. Failure to nominate capable ship

The CLAIMANT has failed to nominate a ship able to load at the ports nominated by the seller. The SS Herminia is unable to dock at the port Piccolo, making the specific result required by Clause 11 impossible to perform.

ii. Failure to fulfil duty of best efforts

Parties to a contract are bound by a duty of best efforts [Article 5.1.4(2) *UNIDROIT Principles*]. This requires that each party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances. Between receiving the sample car on 10 June 2011 and requesting advice as to the status of the order on 10 August 2011the CLAIMANT had ample time to notify the RESPONDENT of satisfaction. In failing to provide notification within a reasonable time the CLAIMANT acted repugnant to his duty of best efforts.

The CLAIMANT also failed to fulfil the duty of best efforts by nominating a ship incapable of loading at the designated ports. Following notification of the ship's unsuitability the CLAIMANT's failure to delegate a suitable alternative ship was repugnant to his duty of best efforts.

iii. Fundamental non-performance

To entitle termination non-performance must be fundamental [Article 7.3.1(1) *UNIDROIT Principles*]. Strict compliance with Clause 11 was essential to the performance of the contract. RESPONDENT has been substantially deprived by the non-performance of the CLAIMANT, having been unable to load the goods at the nominated ports. RESPONDENT has suffered a loss as a result of non-performance, and it would be unreasonable for the

RESPONDENT to further rely upon the CLAIMANT in allowing future performance. Notice of termination must be given within a reasonable time period following a party becoming aware of the non-conforming performance [Article 7.3.2(1) *UNIDROIT Principles*]. Constructive notice was given by the RESPONDENT on 1 December 2011 [Exhibit 17]. Following being provided notification of his breach of Clause 11, the CLAIMANT's refusal of the suggested remedy is implicit of his acceptance of termination.

2. CLAIMANT did not act with good faith and fair dealing

The CLAIMANT by failing to communicate within a reasonable time, acted to the detriment of the RESPONDENT. Good faith and fair dealing are seen as fundamental principles underlying international commercial contracts [Article 1.7 *UNIDROIT Principles*]. These principles have been enforced in contracts for negotiation and performance in various international jurisdictions [*Hughes Aircraft Systems*]. The CLAIMANT knew or ought to have known the gravity of detriment suffered by the RESPONDENT would be significant by failing to communicate within a reasonable time. The RESPONDENT trades in a competitive automotive industry where the electric car is of significant value in the current market, and any significant delay would greatly affect the RESPONDENT'S interests in selling the cars. Undue delay in confirmation of the order is inconsistent with the principles of good faith and fair dealing in this context.

As it was for the CLAIMANT to ensure satisfaction of the sample car and confirmation of order was communicated to the RESPONDENT within a reasonable time frame. The act of the CLAIMANT constitutes undue delay in communication to the RESPONDENT, and with time being of the essence constitutes a breach of these principles.

3. Suspensive condition not 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]. This suspensive condition was not met by the CLAIMANT, as no notice of satisfaction was provided. Thus the remainder of the contract for the sale of the remaining 999 cars was not enlivened. The RESPONDENT could not have reasonably have expected that silence on behalf of the CLAIMANT would indicate satisfaction with the sample provided, and as no express agreement was reached on that term it shall not be effective [Article 2.1.20 *UNIDROIT Principles*].

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*]. RESPONDENT did not materially prejudice the rights of the CLAIMANT with respect to the subject matter of the contract. Having not received notification of satisfaction within a reasonable time the RESPONDENT was entitled to deal with the goods; the suspensive condition had lapsed.

4. Alternatively, CLAIMANT is obliged to accept partial performance

A party may only reject partial performance where it has a legitimate interest in doing so [Page 627 *Vogenauer & Kleinheisterkamp*]. Should the Tribunal find that the RESPONDENT is not lawfully entitled to terminate the agreement, CLAIMANT is obliged to accept partial performance. CLAIMANT does not have a legitimate interest in rejecting partial performance, as he is responsible for the substantial lacking of goods available through failure to notify the RESPONDENT of satisfaction.

Although the respondent has disposed of the goods which are the subject of the agreement, the contract itself will still remain validly binding [Article 3.1.3 *UNIDROIT Principles*]. As such

CLAIMANT is obliged to fulfil his obligation to purchase the goods, wherein partial performance will be satisfactory. 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 appropriate given the nature of the goods in question. The manufacturing process is one which requires a high degree of time and skill, and as such the offer to cure the non-performance with the future sale of goods at that amount is sufficient.

REQUEST FOR RELIEF

RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal does have jurisdiction to hear this dispute.
2. Clause 9 of RESPONDENT's terms and conditions is a valid arbitration clause.
3. A valid contract exists between the parties.
4. The RESPONDENT's terms and conditions are applicable.
5. The RESPONDENT is lawfully entitled to terminate the contract; alternatively CLAIMANT is obliged to accept partial performance.