THE INTERNATIONAL ADR MOOTING COMPETITION

HONGKONG 2012

MEMORANDUM FOR CLAIMANT

TEAM NUMBER 005

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INDEX OF ABBREVIATIONS

Art.	Article
CIETAC	China International Economic Trade and Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Clause	Claimant's Arbitration Clause [Clause 12 of its T&C]
CLOUT	Case Law on UNCITRAL Texts
Digest	UNCITRAL Digest of Case Law on CISG 2012
Ex	Exhibit of the Moot Problem
FAS	Free Alongside Ship
ICC	International Chamber of Commerce
MAL	UNCITRAL Model Law on International Commercial Arbitration (as amended 2006)
No.	Number
para.	Paragraph in the Memorandum
PICC	UNIDROIT Principles of International Commercial Contracts of 2010
Rules	CIETAC Arbitration Rules
T&C	The Parties' general terms and conditions [Ex2&4]
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

INDEX OF AUTHORITIES

Backaby	*Backaby/Partasides*, "Redfern and Hunter on International Arbitration" Oxford University Press (2009)
Digest	UNCITRAL Digest of Case Law on CISG (2012)
Kornet	*Kornet*, "Evolving General Principles of International Commercial Contracts: The Unidroit Principles and Favor Contractus" Maastricht European Private Law Institute Working Paper (2011)
Lew	*Lew/Mistelis*, "Comparative International Commercial Arbitration" Kluwer Law International (2003)
Magnus	*Magnus*, "Last shot v. Knoch Out – Still Battle over the Battle of Forms under the CISG" Commercial Law Challenges in the 21st Century (2007)
Piñeiro	*Argumedo Piñeiro*, "Multi-Step Dispute Resolution Clauses", M. Á. Fernández-Ballesteros and David Arias Liber Amicorum Bernardo Cremades (2010)
Vogenauer	*Vogenauer/Kleinheisterkamp*, "Commentary on the Unidroit Principles of International Commercial Contracts (PICC)" Oxford University Press (2009)

INDEX OF CASES AND AWARDS

I. THE ARBITRATION CLAUSE CONTAINED IN CLAIMANT'S T&C IS APPLICABLE

1.1. The applicability and validity of the Clause is to be assessed independently from the main contract

1. As will be shown below, the arbitration clause is governed by UNCITRAL Model Law ("MAL") [para.5] and requires the arbitration to be conducted under the auspices of CIETAC [para.3]. Both MAL and CIETAC Arbitration Rules ("Rules") acknowledge the doctrine of separability [Art.16(1) MAL, Art.5(5) Rules]. Thus, the question of applicability and validity of Claimant's arbitration clause ("Clause") is to be assessed independently.

1.2. Claimant's arbitration clause is applicable

2. Claimant's Terms and Conditions ("T&C") contain an arbitration clause [Ex2]. The correct interpretation of the Clause shows that it is both unambiguous and applicable. First, the Clause stipulates Cadenza as the seat of arbitration as it states that disputes "*must be referred to arbitration in Cadenza using the relevant rules*".

3. Second, the Clause states that "*all disputes must be referred to the China Trade Commission*" [Ex2]. The wording "*must be referred*" indicates the clear intention that arbitration is to be initiated if disputes arise that cannot be solved. The competent arbitration institution is the "China International Economic and Trade Arbitration Commission" ("CIETAC") as the major permanent Chinese arbitration institution. The Clause specifically calls for the arbitration to be administered at the headquarters ("the seat") of CIETAC in Beijing and not at any of CIETAC's sub-commissions [Art.2(3)(5) Rules]. As this dispute was in fact referred to CIETAC [Ex19], the arbitral proceedings should be conducted in accordance with its Rules [Art.4(2) Rules]. Further, CIETAC has acknowledged its jurisdiction over this dispute which indicates that the Clause is indeed applicable.

1.3. CIETAC was satisfied by *prima facie* evidence of its jurisdiction

4. CIETAC has the power to determine the existence and validity of an arbitration agreement and its jurisdiction over a dispute [Art.6(1) Rules]. In the case at hand, CIETAC was satisfied that an arbitration agreement providing for arbitration under the Rules did exist. Hence it acknowledged the request for arbitration based on the Clause, forwarded the notice of arbitration to Respondent and initiated the informal hearing and nomination of arbitrators [Ex19,20]. CIETAC's implicit confirmation of its jurisdiction indicates that the Clause is not only applicable, but also valid.

II. CLAIMANT'S ARBITRATION CLAUSE IS FORMALLY AND SUBSTANTIVELY VALID

2.1. The arbitration agreement fulfills the formal requirements pursuant to Art.7 MAL

5. It is widely acknowledged in doctrine and case law that the applicable law to an arbitration agreement shall be that of the seat of arbitration [Backaby, p.167]. As Cadenza is the seat of arbitration, its law including MAL, is the applicable law to the Clause.

6. The Clause provides for all disputes arising out of or in connection with a defined legal relationship to be submitted to arbitration [Art.7(1) MAL]. Further, a reference to any document containing an arbitration clause constitutes an arbitration agreement provided that "*the reference is such as to make that clause part of the contract*" [Art.7(6) MAL]. Claimant referred to its T&C several times before and after the conclusion of the Parties' contract [para.14; Ex1,13,16,18]. Claimant showed its intention to incorporate its T&C into a contract

from the beginning, thus making it clear that the Clause contained therein shall also be part of the contract [compare Engineers; Lew, pp.136-137].

2.2. Respondent's reference to its arbitration clause is too imprecise to be incorporated into a contract

7. Respondent's reference to its arbitration clause does not fulfill the requirement of Art.7(6) MAL as it is too imprecise to be incorporated into a contract. Respondent's mere invitation to google its T&C is simply too vague [Ex3]. It is not guaranteed at all that Claimant would find Respondent's website containing its arbitration clause [compare Illinois]. Claimant on the contrary referred to its T&C with a cited and precise link in its first letter [Ex1]. The link connects directly to Claimant's website and Clause included in the T&C. For this very reason, only Claimant's reference to its T&C is valid and can be taken as a basis for arbitration proceedings only.

2.3. Respondent waived its right to object by acting in compliance with the only operable arbitration clause

8. Both parties clearly expressed their intention to resolve disputes arising out of their contractual relationship via arbitration (Claimant's Clause 12 [Ex2], Respondent's Clause 9 [Ex4]). Claimant announced to commence arbitration on September 10, 2011 [Ex18] and filed the application for arbitration 9 months later with CIETAC on July 1, 2012 [Ex19]. Both Parties participated in the pre-arbitral process by attending the informal meeting and both Parties nominated an arbitrator [Ex20]. Thus, there were obviously at least three opportunities for Respondent to state its objection to an arbitration proceeding before CIETAC.

9. In fact, Respondent did not react at all, showing its cooperation as a demonstration of its consent to arbitration pursuant to the Clause. Respondent has thereby waived its right to object since it did not express any doubts concerning the validity of the arbitration agreement promptly and without undue delay [Art.4 MAL, Art.10 Rules; CLOUT No.266, 637]. Consequently, Respondent has agreed to arbitrate under the Clause and is bound by it.

III. CONCILIATION IS NOT A PRECONDITION OF ARBITRATION AS IT IS NOT MANDATORY

10. The Clause also provides for the option of an amicable settlement of the matter via conciliation. Already the wording indicates that this step is not mandatory. In particular, the Clause does not determine when the attempt to conciliate is satisfied. If it were a pre-arbitral requirement, there should be a definite time limit for conciliation. Otherwise the parties would be trapped in an endless series of reproaches instead of finding a result in the arbitration [Poiré; Piñeiro pp.738-739]. Nevertheless, it is a fact that nine months after Claimant announced to commence arbitration, every reasonable time limit for conciliation has elapsed. The operability of the Clause therefore is not dependent on a mandatory conciliation.

11. Moreover, the Parties could not even reach an agreement during the informal meeting, *"hence arbitration follows"* [Clarifications No.7]. Even if the Arbitral Tribunal considers conciliation to be mandatory, the initiation of arbitration proceedings does not prevent conciliation. Art.45 of the Rules provides for the possibility to conciliate during the course of arbitration.

IV. CONCLUSION ON JURISDICTION

12. The Clause is applicable as well as valid. CIETAC is also satisfied by *prima facie* evidence of its jurisdiction. Therefore, the arbitral proceedings initiated under the Rules are admissible

and the Arbitral Tribunal has the power to decide the dispute. Conciliation is a mere option, therefore the arbitration shall proceed.

V. THE PARTIES CONCLUDED A CONTRACT ON MARCH 20, 2011

5.1. CISG supplements PICC since the Parties' autonomy prevails

13. The Parties mutually agreed on the application of the UNIDROIT Principles 2010 ("PICC") to govern their contract [Ex13]. Further, the CISG is applicable pursuant to Art.1(1) lit a, as the Parties are situated in different contracting States. Since the Parties intended to apply the PICC as *lex contractus*, it prevails as *lex specialis* due to the Parties' autonomy. Therefore, the CISG shall only supplement the PICC [Vogenauer, p.86]. Case law applying CISG can be used, provided that the rules involved correspond in both CISG and PICC.

5.2. Respondent agreed to the order form sent by Claimant on February 5, 2011

14. On March 20, 2011 the Contract was concluded between the Parties, after Respondent agreed to Claimant's order form containing the *essentialia negotii* [Ex9,10]. Respondent's references to FAS, PICC and the advance payment for the single car constitute ancillary terms deliberately left open for further negotiations [Art.2.1.14(1) PICC].

15. The Contract concluded on March 20, 2011 contains the agreement on 1000 cars to be delivered until December 1, 2011 at a price of USD 12.000 as had already been discussed in great detail by the Parties since January 20, 2011 and even before [Ex1,3,5]. The Contract also includes all terms in the order form containing detailed covenants such as payment and shipping conditions, quality requirements and a discount arrangement. It further encompasses

the resolutive condition which the Parties agreed upon during the phone call on February 4, 2011 [Ex8] and was confirmed in the order form [Ex9]. The ancillary terms deliberately left open concern Incoterms, the separation of payment as well as the governing law [Ex10]. Nonetheless, the Parties clearly "*marked a point of no return*" by exchanging concrete details of a binding contract [Ex9,10; Vogenauer, pp.293-298].

16. The conclusion of the Contract cannot be rendered invalid by the fact that the Parties intended to agree on minor points, such as the separation of payment afterwards [ICC, No.7110]. All communication between the Parties after March 20, 2011 only concerned the specific performance of the Contract already in place. This is underlined by the fact that Respondent even loaded the sample car on SS Herminia while negotiations were still ongoing and prior to any payment being made [Ex10].

17. In any case Art.2.1.14(1) PICC establishes the presumption that a contract has been concluded [Vogenauer, p.295], which is also supported by *favor contractus*, a common principle of Private International Law [Kornet; Digest, p.45].

5.3. The contract was never dissolved by the resolutive condition

18. The contract contains the resolutive condition that in case of unsatisfactory performance of the sample car, the order of 999 cars shall not be enlivened. This condition was expressed several times by Claimant [Ex5,7,8] as well as being included in the order form which explicitly states that unsatisfactory performance will be notified within one week after receipt of the car [Ex9]. Hereby Claimant accommodated Respondent's wish to have a firm sales contract in place before delivering any goods [Ex6]. On June 10, 2011 Claimant informed Respondent that it had received the sample car, thus it was clear that notification of

dissatisfaction had to be made until June 17, 2011 at the latest [Ex13]. Since Claimant did not send such notification, the contract was not dissolved according to the agreed condition and Respondent had the contractual obligation to deliver the remaining 999 cars.

VI. THE PARTIES AGREED ON CLAIMANT'S T&C INCLUDED IN THE CONTRACT

6.1. The Parties agreed on the majority of Claimant's T&C via individual negotiation

19. The Parties' individual agreement always prevails over standard T&C [Art.2.1.21 PICC]. When placing its order, Claimant explicitly included the discount of 2% (Clause 1) and the responsibility of the seller for all costs of return of unsuitable goods (Clause 10) of its T&C [Ex9]. This was fully accepted by Respondent, hence Clauses 6 of Respondent's T&C is not applicable. Moreover, the Parties agreed on a special, individual arrangement by modifying the Incoterms by conclusive action and ad-hoc modifications. Thus, neither of their Clauses referring to Incoterms apply [Claimant's Clause 7, Respondent's Clauses 4&11]. Finally, the Parties agreed on PICC to be the law governing their contract [Ex13].

6.2. Conflicting terms are knocked-out

20. The only competing clauses left are Claimant's Clause 11 and Respondent's Clause 7, both treating liability for damages. In order to deal with this conflict and in the absence of a specific agreement, the PICC as the governing law, is applicable. According to the *knock-out* doctrine based on Art.2.1.22 PICC, conflicting terms do not become part of the contract [Magnus, pp.192-193; BGH]. Thus, none of the Clauses contained in the Parties' T&C dealing with liability for damages became a part of the Parties' Contract.

6.3. In any case Respondent's reference to its T&C is invalid

21. Prior to the conclusion of the Contract [Ex10], both Claimant and Respondent unilaterally referred to their T&C [Ex2,4]. Respondent's invitation to google its company name as a reference for its T&C [Ex3] is too vague, since there is a serious risk not to find Respondent's website let alone Respondent's T&C by just "googling" a company name [see also para.7]. However, should the Arbitral Tribunal consider that Respondent's reference to its T&C was sufficiently precise, the Parties still never explicitly agreed on any T&C, except for those included in Claimant's order form [para.19].

VII. RESPONDENT IS LIABLE FOR DAMAGES SINCE IT BREACHED THE CONTRACT

7.1. Respondent's non-performance constitutes a breach of contract

22. Art.7.1.1 PICC defines non-performance as "*a failure by a party to perform any of its obligations under the contract*". After the delivery and advance payment of the sample car [Ex11], Respondent's contractual obligation was to load 999 cars [Ex9]. Respondent failed to do so. This non-performance cannot be excused [Art.7.1.2, Art.7.1.7 PICC]. Further, no force majeure event occurred and the contract contains no exemption clause. If Respondent was uncertain of its obligations, it should have simply asked.

7.2. Respondent should have foreseen Claimant's damages

23. Pursuant to Art.7.4.4 PICC Respondent is only liable for the damages that were foreseeable to it. Further, Claimant's loss is a direct result of Respondent's non-performance and hence was causal.

24. From the very beginning, Respondent was fully aware of the consequences of its non-performance, in particular Claimant's loss of prospective business opportunities. Claimant made clear that it is an importer of small cars acting in a competitive market [Ex1]. Knowing that, Respondent sold the cars to Claimant's competitor who has since flooded the market [Ex18].

7.3. Respondent did not cure its non-performance by offering 100 cars

25. The attempt to deliver 10% of the total value of the contractual agreement does not constitute an adequate offer to cure. Nevertheless, Claimant, as a diligent business man, accepted the offer of the delivery of 100 cars as an attempt to mitigate its enormous losses. However, Respondent once again failed to deliver as promised.

7.4. Claimant is entitled to full compensation

26. According to Art.7.4.2(1) PICC Claimant is entitled to receive compensation "*for any loss it has suffered and any gain of which it was deprived*". If delivered as agreed Claimant would have been able to enter into a new market as repeatedly communicated to Respondent [Ex1,16].

7.5. In any case Respondent breached its pre-contractual obligations

27. Should the Arbitral Tribunal consider that no contract was concluded, Claimant still has a right of action for damages based upon Respondent's pre-contractual liability. Since Respondent negotiated in bad faith [Art.2.1.15 PICC], the rules governing damages for non-

performance may be applied by analogy [Vogenauer, p.870]. Respondent's behaviour during the pre-contractual negotiations shows that it continued the negotiations "*despite its intention not to reach a deal*" [Vogenauer, p.303]. Respondent cannot use negotiations with Claimant a mere "*fall-back option*" [Vogenauer, p.303] in case the deal with the competitor goes wrong [para.24]. This clearly constitutes negotiations in bad faith pursuant to Art.2.1.15 PICC. Respondent's hidden agenda is the only possible explanation why it sold the cars ordered by Claimant to its competitor [Ex18]. This action caused Claimant's loss of profit and additionally prevented Claimant from concluding another contract with a third party for electric cars [Art.2.1.15(2) PICC].

VIII. CONCLUSION ON THE SUBSTANTIVE ISSUE

28. For the reasons stated above [**V.-VII.**], there can be no doubt that the Parties concluded a contract on March 20, 2011. Respondent failed to deliver the remaining 999 cars and consequently breached its contractual obligations. It is thus liable for all damages arising out of this non-performance.

IX. RELIEF REQUESTED

29. Therefore, Claimant respectfully requests that the Arbitral Tribunal find that:

- **this Arbitral Tribunal constituted under the Rules has jurisdiction, because Claimant's arbitration clause is applicable and valid; and**
- **Respondent is liable for damages for the breach of the valid Contract pursuant to Art.7.4.1 PICC.**

30. Consequently, Claimant respectfully requests the Arbitral Tribunal to order Respondent:

- **to pay damages;**
- **to pay loss of profit;**
- **to pay interest; and**
- **to pay the costs for this arbitration.**

For Longo Imports.

(signed) _____ , July 2012