Third Annual International Alternative Dispute Resolution Mooting Competition

MEMORANDUM FOR CLAIMANT

Submitted by the team 006

On the behalf of	Against
Longo Imports	**Chan Manufacturing**
PO Box 234	PO Box 111
Minuet	Cadanza

CONTENT

List of Abbreviations

Abbreviation	Full meaning
¶	Paragraph
CISG	UN Convention on Contracts for the International Sales of Goods
Claimant	Longo Imports
Commentary	Commentary to UPICC (see Table of Authorities)
CQ	Clarification Question No.
Ex. / Exs.	Exhibit / Exhibits
p.	Page
Respondent	Chan Manufacturing
UNCITRAL Model Law	Model law on International Commercial Arbitration as proposed by UNCITRAL, with 2006 amendments
UPICC	UNIDROIT Principles of International Commercial Contracts

Table of Authorities

UNCITRAL: UN Convention on Contracts for the International Sales of Goods. 1980.

UNCITRAL: *UNCITRAL Model Law on International Commercial Arbitration*, with amendment as adopted 2006, version I. 1985.

UNIDROIT : *UNIDROIT Principles of International Commercial Contracts.* 2010.

Vogenauer, S., Kleinheisterkamp, J.: *Commentary on the UNIDROIT Principles of International Commercial Contracts.* Oxford : Oxford University Press. 2009.

1 Overview of arguments

1. It is Claimant's position, the questions of the existence of the contract and the applicable terms and conditions are preliminary issues to determination of the existence of the arbitration agreement itself.

2. Therefore, in the light of the factual background of this case, the Claimant will firstly prove, the parties indeed reached an agreement on the sale of 1.000 cars in two dependent deliveries. Secondly, the Respondent may not object the applicability of Claimant's business terms as it was its own behavior that reasonably led the Claimant to rely on applicability to Claimant's detriment suffered by loss of its business.

3. As the valid sales contract exists, the Claimant will consecutively demonstrate the existence of valid arbitration agreement that grounds the jurisdiction of this tribunal.

4. Thirdly, the Claimant will prove that by non-delivering the second installment of 999 cars the Respondent breached its obligations and substantiated the claim for damages [UPICC 7.4.1].

2 A single valid sales contract was concluded by a concurrent negotiation

2.1 UPICC are applicable to the merits of the dispute

5. Although the Claimant and Respondent have their places of business in the Contracting States of CISG [CQ, para. 20], and the Convention is therefore applicable to their relationship, both parties wished for the "*UNIDROIT Principles*" to be applicable [Exs. 4, 10, 13]. Under Article 6 CISG any of its provision may be derogated from, thus UPICC shall take precedence in the case at hand.

2.2 Even during the preliminary negotiations parties demonstrated intent to be bound

6. No clear sequence of an offer and acceptance may be proposed in the case at hand. Such situation is not uncommon as parties tend to negotiate contracts in steps and "*[a] contract may be concluded […] by conduct of the parties that is sufficient to show agreement*" [UPICC 2.1.1]. Such rule is further strengthened when considering that no particular form for the contract is prescribed - contracts may be evidenced by any means, e.g. exchange of letters, conduct of the parties [UPICC 1.2].

7. On January 5, 2011, the Claimant approached the Respondent and presented its interest in buying approximately 1.000 electric cars [Ex. 1]. Eventually, the Claimant invited the Respondent to present a commercial offer.

8. On January 15, 2011, the Respondent demonstrated its interest in the deal by sending price list for individual products it offered at the time [Ex. 3].

9. On January 20, 2011, the Claimant investigated the possibility of the sample car to be delivered to its premises for testing purposes [Ex. 5]. It further indicated that the performance of the contract would be dependent on the results of those tests. The Claimant expressly stipulated the condition subsequent for the rest of the delivery "*unless [Claimant] finds [the sample car] unsatisfactory, [Claimant] will expect the remaining cars to be sent by December 1, 2011*."

10. On January 30, 2011, the Respondent expressed its unwillingness to provide free samples and the need for the "*firm*" contract to be concluded first [Ex. 6].

11. Under traditional offer and acceptance analysis, this statement would most certainly constitute a rejection of the offer [UPICC 2.1.5]. However, in the light of concurrent negotiations, Exhibit 6 merely demonstrates the need for further negotiation of the terms of sale, yet acknowledging the willingness of the Respondent to concluded sales agreement.

2.3 Claimant did not intend the delivery of the sample car to be a separate contract

12. Claimant's letter from February 5, 2011 [Ex. 7] demonstrated its intent to treat the delivery of the sample car as a mere separate invoice item out of 1.000 cars, not as a separate sales contract.

13. Claimant's acts must be analyzed according to Claimant's intentions, which the Respondent knew or could not have been unaware of [UPICC 4.2 (1)]. In such an interpretation, all circumstances must be analyzed, including the subsequent conduct of the parties [UPICC 4.3 (c)].

14. Firstly, from the letter dated February 5, 2011 [Ex. 8] it follows that the Respondent agreed in the telephone discussion to the terms stated in Claimant's letter dated January 20, 2011 [Ex. 5] where the Claimant invited the Respondent to ship a sample car and if all had gone well to ship "*the remaining cars*" by December 1, 2011.

15. Even if the Respondent suggested on March 20, 2011, "[it] *would like to treat the shipment of single car being separate from the order of 1000"* [Ex. 10], such statement should not be taken into account, as it follows from the principle of good faith and fair dealing [UPICC 1.7.] that the Respondent may not act inconsistently [UPICC 1.8].

16. The inconsistency may be easily demonstrated by Respondent's letter from August 15, 2011, where the Respondent itself stated, "*[w]e simply assumed you do not wish to proceed with the purchase of the 999 cars*" [Ex. 15]. Such statement may be interpreted only in a way the Respondent certainly understood that it was to deliver 1.000 cars as ordered [Ex. 9], in two lots – one containing the sample car, the other containing the remaining 999 cars conditioned upon satisfactory test results.

17. Secondly, if the tribunal could not determine such subjective knowledge of the Respondent's, Claimant's statements and acts must be interpreted according to the 'reasonable third person test', where regard should be taken to all circumstances [UPICC 4.2 (2) & 4.3 (c)]. It follows from the Claimant's correspondence [Exs. 7, 8, 14], that the Claimant consistently contemplated on the delivery of 1 and 999 cars as part of a single sales contract.

18. To conclude, the sale of the sample car should not be considered as a separate contract, but merely as a separate invoicing item from the whole order of 1.000 cars.

2.4 Parties reached an agreement on the sale of 1.000 cars

19. The correspondence and acts that took place between February 5 and March 25, 2011 [Exs. 8-11], effectively demonstrate parties reached agreement on the sale of 1.000 cars [UPICC 2.1.1].

20. From the order form of February 5, 2011, it may be undoubtedly derived that 1.000 electric cars, gardeners model, USD 12 000 per unit should be delivered by December 1, 2011 [Ex. 9]. This has never been questioned or denied by the Respondent.

21. To the contrary, it was the Respondent who on March 20, 2011, dispatched the sample car to docks, not waiting for the reactions of the Claimant on its new proposal on delivery terms or separate treatment of the sample car sale [Ex. 10]. Again, it was the Respondent who on March 21, had the sample car loaded onto SS Herminia [Ex. 11] and on March 25, instructed the Claimant to nominate the ship for further shipments and declared, "*[it] will do [its] best to meet the deadline*" [Ex. 11]. And last but not least, it was yet again the Respondent who in hindsight stated it "*simply assumed that [Claimant] do not wish to proceed with the purchase of 999 cars*" [Ex. 15].

22. It was clear that even in Respondent's view at least elementary agreement on the sale existed. Otherwise, there would be no need for the Respondent to act as if the contract was concluded. Because surely, if the Respondent did not believe there is an agreement of sale, it would not have loaded the sample car, asked for the nomination of the ship for the remaining cars nor expressed its eagerness to meet the deadline for the second delivery.

23. Therefore, it may be positively established that the behavior of the parties until March 25, 2011, demonstrated sufficiently the sales contract existed - to deliver 1.000 electric cars, gardeners model, USD 12 000 per unit, by December 1, 2011, in two contingent installments, one with the sample car, the other with the remaining 999 cars.

2.5 Claimant's terms and conditions constitute a part of the sales contract

24. Regarding remaining terms and conditions of the contract, the tribunal should again look at the concurrent negotiations; however, it should also consider the inconsistent behavior of the Respondent.

25. The use of the standard terms [UPICC 2.1.9 (2)] of either party may be allowed if the reference to such rules is provided. In other words, standard terms must be incorporated into the sales contract, a mere knowledge of their existence is not sufficient [Commentary, p. 320, ¶ 8]. On the other hand, the reference does not necessarily need to be in the offer itself, the intention to use standard terms may be already clear from previous stages of negotiations [Commentary, p. 321, ¶ 13].

26. Again, if the tribunal looks on the concurrent mode of negotiation, it was the Claimant, who already in its first letter of inquiry referred explicitly to its business terms and conditions when stated "*For Terms and Conditions see http://12345*" [Ex. 1].

27. The Respondent could argue, it also referred to its terms and conditions and the tribunal should treat the situation as a standard battle of forms scenario. However, such argument fails for two reasons.

28. Firstly, the referral was at most vague when it only stated "*[y]ou will find […] our conditions on our webpage which you can Google under our company name*" [Ex. 3]. Such reference is neither sufficiently specific nor clear.

29. Secondly, the Respondent acted according to Claimant's terms and conditions, and effectively contradicted the intent to use its own, when it loaded the car onto the ship in a port. Such obligation is hardly a part of Respondent's proposed FAS INCOTERM term [Ex. 4].

30. The Respondent could also try to prove that it relied on the acceptance of own terms and such reliance should not be turned in its disadvantage. The Respondent may draw

such reliance from the fact the Claimant observed the duty set in Respondent's terms and nominated a ship for delivery of the cars [Ex. 4].

31. First occurrence happened on January 20, 2011 [Ex. 5], but the Claimant also nominated the port, though pursuant to Respondent's terms port should have been designated by the Respondent. On June 10, 2011 the Claimant again nominated ship for further deliveries [Ex. 13]. However, the nomination and choice here were made expressly "*as per [Respondent's] instruction*" [Ex. 13].

32. To summarize, the tribunal should conclude that parties impliedly included Claimant's terms into the sales contract. The Respondent could not object to such a conclusion, because it was its own behavior that led the Claimant to trust the contract existed, with the terms as proposed by the Claimant. A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment [UPICC 1.8.], in the case at hand – the Claimant ending with 1 instead of ordered 1.000 cars.

3 Valid arbitration clause forms a part of the sales contract

33. The validity of the main contract closely relates to the validity of the arbitration clause. The Claimant established the sales contract was concluded and Claimant's terms formed the part of the contract, including clause 12 which called for the arbitration of all the disputes arising out of the contract before "*China Trade Commission"* [Ex. 2].

34. Such clause fulfills the requirements of applicable procedural law, because such agreement evidently determines the extent of arbitrable disputes ("*all*") as well as their origin ("*sales contract*") [UNCITRAL Model Law Art. 7].

35. Formal requirements are also met, because the terms and conditions containing the arbitration clause formed part of the contract by the means of explicit reference [UNCITRAL Model Law Art. 7 (6)].

36. In conclusion, parties validly formed the arbitration agreement and empowered this tribunal to rule over the matter, especially to determine the breach of the contract and subsequent claim for damages.

4 The Claimant is entitled to damages due to Respondent's non-performance

4.1 The Respondent failed to meet its contractual obligations

37. The Respondent's obligations were positively established in the contract. It was to deliver 1.000 cars by December 1, 2011. Nevertheless, it was clear from Respondent's statement from August 15, 2011, that it does not intend to live up to such obligation, offering Claimant not more than 100 cars [Ex. 15].

38. Failure to deliver almost 90 % of the ordered goods certainly substantially deprived the Claimant of what it was entitled to under the sales contract and thus constituted a fundamental non-performance [UPICC 7.3.1].

39. Even though under such circumstances the Claimant was entitled to terminate the contract immediately [UPICC 7.3.4], it chose to further cooperate with the Respondent and solve out the situation. The Claimant was therefore willing to accept at least partial performance of 100 cars as a way to mitigate a possible harm [UPICC 7.4.8].

40. However, once the Claimant responded in order to accept the partial delivery and inquired about the port SS Herminia were to dock, the Respondent unexpectedly declared designation of SS Herminia as the breach of the contract because the ship

could not load in the port of Piccolo, where 100 cars were stored at the time [Ex. 17]. Such allegation needs to be dismissed for two reasons.

41. Firstly, the Respondent referred to obligation to nominate the ship which is able to load in the port nominated by the Respondent as the obligation existing under Respondent's terms and conditions. However, those have never become part of the sales agreement. On the contrary, applicable Claimant's terms and conditions stipulate no such a duty.

42. Secondly, even if the obligation to nominate suitable ship for ports designated by the Respondent existed based on the subsequent agreement of the parties [Exs. 11, 13], the Respondent is barred from using such duty against the Claimant.

43. On March 25, 2011, the Respondent chose three ports - Cadenza, Cantata and Piccolo for the loading of car shipments [Ex. 11]. On June 10, 2011, the Claimant designated SS Herminia for further shipments [Ex. 13]. At that precise moment, the Respondent could have declined such nomination, as the ship could not load from Piccolo. Nevertheless, the Respondent remained silent. The Respondent did not question the nomination of SS Herminia not even on August 15, 2011, when it offered the Claimant mitigative shipment of 100 cars [Ex. 15]. First time, the Respondent objected to SS Herminia was only on September 1, 2011 [Ex. 17], almost three months after the ship designation was announced to the Respondent, and only once the Claimant pointed out that the Respondent breached the sales contract. Such a baffing purpose-based argument of the Respondent is therefore evidently against the principles of fair dealing and should be dismissed accordingly [UPICC 1.7].

44. As demonstrated, Respondent's action indicated, without doubt, the Respondent was not willing to carry out its part of the bargain. Therefore, the Claimant saw no other solution than to claim damages, which it had suffered.

4.2 Claimant's lost profits of undelivered cars were foreseeable

45. Any non-performance gives the aggrieved party a right to damages [UPICC 7.4.1] and the aggrieved party must be compensated in full for the harm suffered, including any gain it was deprived of [UPICC 7.4.2]. Right to claim loss of profit is also affirmed by the agreement of the parties in Clause 11 of Claimant's applicable terms [Ex. 2].

46. The Claimant submits that it is entitled to full compensation for the lost future sales of 999 cars not delivered by the Respondent.

47. If the Respondent were to decline liability for damages due to the lack of unforeseeability [UPICC 7.4.4], tribunal should dismiss such defense.

48. The Claimant informed the Respondent at the very beginning of negotiations it acted as an importer of cars, envisaged "*yearly sales […] around 10 000 cars*" and finally emphasized that Minuet's car market is competitive [Ex. 1].

49. These statements must have made it apparent to the Respondent, that the Claimant was to resell the cars to its final customers and would be having a forward orders in place.

50. What is more, the Respondent must have been evidently aware that it was to deal with a merchant who would require strict adherence to contractual terms as any failure might have endangered Claimant's position in dynamic Minuet's car market.

51. Therefore tribunal may conclude with a sufficient certainty, the Respondent could have easily foresaw at the moment when the sales contract was concluded that in the

dynamic car market failure of Respondent to deliver cars by December 1, 2011, would most certainly lead to the loss of the forward orders placed with the Claimant. Such result is affirmatively testified by Claimant's statement from September 10, 2011, where the Claimant pointed out it could not wait for two months to receive a substitute delivery of 400 cars as "*by that time [Claimant's] competitor would have flooded the market"* [Ex. 18].

52. The Claimant adhered to the sales contract. Not only the Respondent not tried to honor its duties, it even supplied the cars to Claimant's competitors in Minuet's market. Respondent's liability is inevitable.

5 Request for relief

53. For all the reasons stated, the Claimant submits to tribunal that:

- The sales contract for the delivery of 1.000 cars in two dependent installments was validly concluded.
- By the means of implied reference and subsequent reliance on the behavior of the Respondent, Claimant's terms and conditions constitute an inherent part of the sale contract.
- Arbitration clause contained in Claimant's terms and conditions is valid and applicable, granting the jurisdiction of the tribunal to rule over the dispute.
- The Claimant is entitled to damages as the Respondent failed to meet the conditions of the contract, when the Respondent failed to deliver the rest of the 1.000 cars as ordered, and failed to provide for a suitable substitute performance or any reasonable alternatives.