Third Annual International Alternative Dispute Resolution

Mooting Competition

MEMORANDUM FOR

RESPONDENT

Submitted by the team 006

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

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List of Abbreviations:

Abbreviation	Full meaning
CISG	UN Convention on Contracts for the International Sales of Goods
Claimant	Longo Imports
Conciliation Model Law	UNCITRAL Model Law on International Commercial Conciliation
CQ	Clarification Question No.
Ex. / Exs.	Exhibit / Exhibits
p.	Page
PECL	Principles of European Contract Law
Respondent	Chan Manufacturing
UPICC	UNIDROIT Principles of International Commercial Contracts

List of Authorities:

BERGER, K.P.: *Law and Practice of Escalation Clauses*. In Arbitration International, Volume 22, 2006.

BORN, G.B.: *International Arbitration and Forum Selection Agreements*. Aalpen aan den Rijn : Kluwer Law International, 1999, p. 76.

COMMISION ON EUROPEAN CONTRACT LAW: *Principles of European Contract Law*, 1999.

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

UNCITRAL: *UNICTRAL Model Law on International Commercial Conciliation*. 2002.

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

List of Cases:

ICC Award No. 12073 of 2003

ICC Award No. 9977 of 1999

I. Overview of Arguments

1. It is Respondent's position, the tribunal lacks competence to decide the present dispute. The Respondent will demonstrate that Claimant's arbitration clause is not applicable, and even if it was, the Claimant failed to honor its obligation to conciliate rendering the request for arbitration inadmissible.
2. The Respondent will provide evidence the communication of the parties called for two separate contracts from which only one was validly concluded - the sale of the sample car. The Respondent will show that no offer to conclude the main agreement for the sale of 1.000 cars was validly accepted, and the line of communication is not sufficient to show any agreement with that regard.
3. On the issue of liability, firstly, it is Respondent's position, it did not breach the contract for the sale of the sample car and no other contract was eventually concluded. The Respondent may not be held liable for the failure to reach an agreement. Secondly, even if the main contract would be held concluded, the consequential damages were excluded by the parties' negotiations, as Respondent's terms and conditions would then form a part of the sales contract. Thirdly, Claimant's behavior rendered the possible contract inoperative, and the Respondent cannot be held liable for a 'breach' of an ineffective contract.

II. The tribunal lacks competence to decide the dispute

II.I. Claimant’s arbitration clause is not applicable

4. The present arbitration proceedings were commenced by the Claimant according to the arbitration clause in section 12 of its general terms and conditions. It is Respondent’s position the arbitration clause was never agreed upon because the

sales contract for the 1.000 cars was never concluded [see part 3 for further elaboration].

II.II. Even if Claimant's arbitration clause is applicable, request for arbitration is inadmissible

5. Claimant's arbitration clause is a multi-tier clause. Therefore, when a dispute between the parties arises, this dispute has to be resolved through a sequence of multi-step levels of dispute resolution process and arbitration proceeding cannot be initiated until the end of such a sequence [Born, p. 76]. Claimant's arbitration clause calls for conciliation, and only if the conciliation fails, the arbitration may commence.
6. It is Respondent's position the parties are under a legal obligation to comply with the sequence of escalation levels set out in the clause. The wording of the clause "all disputes (…) shall be conciliated" indicates the conciliation is a mandatory condition precedent to initiating arbitral proceedings [ICC Award No. 9977].
7. In the case at hand, the conciliation phase has not even begun as neither party sent the other an invitation to commence conciliation [Conciliation Model Law, Art. 4.2]. When the Claimant tried to apply its multi-tier clause, but skipped right to the arbitration proceedings, it failed its primary obligation to conciliate first.
8. National court or arbitral tribunal must refer the parties to conciliation where they have expressly undertaken not to initiate arbitration proceedings until a specified event has occurred [Conciliation Model Law, Art. 13]. In the case at hand, parties expressly agreed the arbitration may start only "if no agreement can be reached [in conciliation]" [Ex. 2]. Therefore, the tribunal must dismiss Claimant's request for arbitration as currently inadmissible [Berger: "Law and Practice of Escalation

Clauses"], because the Claimant has not undertaken the conciliation contrary to its contractual obligation.

9. For the abovementioned reasons, the tribunal lacks the competence to decide on the present dispute.

III. UNIDROIT Principles are applicable

10. Although the Claimant and the 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 UNIDROIT Principles shall take precedence in the case at hand.

IV. The sale of the sample car is the only valid contract concluded

IV.I. The communication of the parties called for two separate sales contracts

11. It is Respondent's position the intention of the parties was to have two separate contracts: one for the sample car and the other for the main order of 1.000 cars.
12. To interpret the will of the parties, it is necessary to understand their communication.
13. From the wording of the letter of January 30, 2011, it is obvious the Claimant asked for a free sample in order to determine whether it will be doing any business with the Respondent whatsoever [Exs. 5, 6]. This was not Respondent's standard business practice, and the Respondent therefore refused Claimant's offer [Ex. 6].
14. As a response [Ex. 7], the Claimant agreed to pay for the sample car. In its order, the Claimant included a provision, "Once we receive the sample, we will test it and unless we find it unsatisfactory, we expect the reminding cars to be sent by

December 1, 2011." [Ex. 8]. This provision needs to be interpreted in connection with Claimant's previous statement, which was "if the car does not come up to expectations, the Claimant will not execute the order" [Ex. 7]. Claimant's intention [UPICC 4.2(1)] is obvious – 'we will buy a sample car, and if we like it, please treat the future order we will send you as a binding one, however, if we do not, do not concern yourself with it'.

15. As there was no guarantee whether the Claimant would prefer the preliminary order for 1.000 cars to be executed after the delivery of the sample car [Ex. 7], the Respondent insisted on the shipment of the sample car to be treated as a contract separate from the main order of 1.000 cars [Ex. 10].

16. The Claimant did not object. On the contrary, it paid the contractual price [Ex. 11], and ultimately informed the Respondent about the receipt of the car [Ex. 13]. This behavior is sufficient to show that the Claimant concurred with Respondent's request for two separate contracts.

17. The Claimant could argue the "treatment of the shipment" defines a way of handling the transportation of the sample car, which would be literally "separate" from the rest of the cars. The Respondent asserts the fact the sample car would be shipped separately was obvious from Claimant's own provision that "Once we receive the sample we will test it and unless we find it unsatisfactory [we] will expect the reminding cars to be sent by December 1, 2011." [Exs. 5, 8]. There was no other way for the Respondent to deliver the goods than to send them in two separate shipments. The only interpretation a reasonable person of the same kind would provide in the same circumstances [UPICC 4.2(2)] is that the Respondent requested for two separate sales contracts – one for the sample car and one for the cars specified in the order of February 5, 2011.

18. All-in-all, this conduct is typical when it comes to securing international transactions. International businessmen are prudent persons who foresee future problems. After all, it is also their duty [UPICC 7.4.4]. In this case, the parties have never done any business together and possible disagreement was likely. The Respondent, a prudent businessman, had to minimize possible risks. Therefore, it sought the most secure position, i.e. to conclude two separate contracts, and to be paid in advance for the first contract [Ex. 10]. The tribunal, as a third person, should honor Respondent's position as it is consistent with both the general business standard and the intention of the parties.

IV.II. The only contract concluded was for the sample car

19. It is Respondent's position the contract for the sample car was concluded. The Claimant ordered the car on January 20, 2011, requesting the cheapest in production, which was the Gardener's model costing USD 12.000 [Ex. 3]. Subsequently, the parties agreed on delivery terms [Exs. 6 - 8]. On March 20, 2011, The Respondent expedited the ordered car [Ex. 10]. In turn, the Claimant paid the purchase price [Ex. 11]. Later on, the Claimant confirmed the receipt of the car [Ex. 13], and commenced its testing. This conduct clearly shows the parties have indeed agreed on the sales contract for the sample car [UPICC 2.1.1] and ultimately executed it.

IV.III. No other contract was ever concluded

20. The communication prior and after to the delivery of the sample car concerning the other shipment indicates mere negotiations between the parties. It is Respondent's position that neither an offer to conclude the main agreement was validly accepted, nor the line of communication is sufficient to show any agreement with that regard

[UPICC 2.1.1]. The tribunal shall view the facts from the position of a reasonable third person [UPICC Art. 4.1(2)] because no common intention of the parties [UPICC 4.1(1)] may be found in the instant communication. To prove its statements, the Respondent will provide such interpretation of the negotiations with the Claimant.

21. Exhibits 1 through 4 constitute neither an offer, nor an acceptance. In its first letter of January 5, 2011, the Claimant expressed its interest in a preliminary order of 1.000 cars, and "expected to be offered a very good price and [...] the quality" [Ex. 1]. Providing the Claimant with the basic information about its products, the Respondent referred the Claimant in its letter of January 15, 2011 to the detailed specifications, which were made publicly available on its website [Ex. 3]. It is clear from the Respondent's line "thank you for the inquiry" [Ex. 3], that both parties treated this communication as a simple exchange of letters providing inquiry [Ex. 1] and answer [Ex. 3] about Respondent's line of products. Therefore, exhibits 1 through 4 do not constitute offer or acceptance, as they lack intent to be bound.
22. It was only on February 5, 2011 [Ex. 8], when the Claimant sent a valid offer to the Respondent for the goods specified in the attached order form [Ex. 9]. This offer called for the delivery of 1.000 cars, and contained detailed conditions for the shipment.
23. In Respondent's answer of March 20, 2011 [Ex.10], the offer was not accepted – it served the Respondent rather as a base for further negotiations between the parties. This is clear from two Respondent's statements. Firstly, the Respondent offered its sales terms and conditions. Secondly, the Respondent proposed for the contract to be governed by UNIDROIT Principles 2010. This answer is a rejection of all

Claimant's terms, and effectively constitutes a counter offer, as it contains materially altering terms [UPICC 2.1.11].

24. In its letter of March 25, 2011, the Respondent acted according to its terms and conditions proposed alongside the counter-offer [Ex. 10], when called for the Claimant to nominate a ship which can load out of all the nominated ports [Ex. 11].
25. The call had not been answered until June 10, 2011 [Ex. 13], which is seventy days after the counter-offer. An offer must be accepted within a reasonable time [UPICC 2.1.7]. Seventy days is too late to be considered a reasonable time, especially when the parties generally communicated within several days, ten days tops. The letter should be therefore interpreted as a new offer.
26. The Respondent reacted to the new offer after another sixty-five days, stating "we simply assumed that you do not wish to proceed with the purchase." Such statement may not be, in any case, viewed as an acceptance.
27. To summarize, it is true during the negotiations several offers were presented, none of them was in fact accepted. As the parties failed to reach an agreement, the contract for the main order was never concluded.

V. The Respondent is free from any damages claimed

V.I. The Respondent should not be held liable for the breach of the contract that never existed

28. The Respondent did not breach the contract for the sale of the sample car and no other contract was eventually concluded. When the negotiations fail, no damages shall be awarded, because "a party is free to negotiate and is not liable for a failure to reach an agreement" [UPICC 2.1.15 (1)]. As a result, the Respondent cannot be held liable for lost profit.

V.II. Consequential damages were excluded by the contract

29. If the tribunal holds a contract for 1.000 cars was concluded, the Respondent is still not liable for any damages claimed. The Respondent is shielded from liability based on clause 7 of its terms and conditions which would then form a part of the sales contract.

30. The Claimant could argue the sales contract was concluded when the purchase price for the sample car was paid. If the tribunal accepts such an argumentation, the letter of February 5 [Ex. 8] together with the order form [Ex. 9] can be seen as an offer. The Respondent then counter-offered by suggesting its terms and conditions [Ex. 10]. The Claimant did not make any reservations. In fact, it impliedly accepted them and concluded the sales contract by paying part of the purchase price equaling the price of the sample car [Ex. 11].

31. Clause 7 which is a part of the contract for 1.000 cars excludes Respondent's liability for "consequential damages" including loss of profit [Ex. 4]. Since the Claimant requests the compensation for lost forward orders [Ex. 16] it in fact claims lost profits. As per agreement of the parties such claims are inadmissible and the tribunal should reject them.

V.III. The Claimant failed to notify the Respondent about the suitability of the sample car and rendered the main contract inoperative

32. Even if the tribunal holds the clause 7 was not part of the contract, the Respondent is still not liable for damages as it acted in accordance with the contract.

33. Although the Claimant relies on supposedly unequivocal wording of the Unless clause, the opposite is true.

34. The Unless clause stipulates that "Once we receive the sample we will test it and unless we find it unsatisfactory we expect the remaining cars to be sent by December 1, 2011." [Exs. 7, 8]. The Claimant argues the contract should have been executed automatically when it stayed silent on the matter of the car quality. However, the tribunal should not adopt this formalistic approach, as it would lead to commercially unfeasible results.

35. It is Respondent's position the Claimant was obliged to inform the Respondent about the termination of the testing process.

36. A duty to notify derives from the general obligation of the parties to cooperate [UPICC Art. 5.1.3, PECL 7:104, ICC Award No. 12073]. In addition the tribunal should apply the contra proferentem rule which states "if contract terms supplied by one party are unclear, an interpretation against that party is preferred" [UPICC Art. 4.6, PECL Art. 5:103]. With Unless clause being unclear, the Claimant must bear all the consequences arising out of the uncertain position which it created.

37. If there was no notification duty on Claimant's side, the Respondent would face unsurpassable uncertainty how and when to execute the contract. It may take several days, even weeks, to prepare the cars for the shipment and subsequent delivery to final destination. It follows if the Respondent wanted to meet the deadline it must have sent the cars approximately in the middle of November. But if formalistic approach was taken, the Respondent would not know whether to send the cars until the very last day – December 1, 2011. Only then it would become clear the Claimant would accept the cars, as it had not stated otherwise. However, if the Respondent have waited for the last day of the deadline, it would be impossible to perform on time – in fact on the same day. Such scenarios would certainly lead to a dispute over the late delivery and this is certainly not what the parties wished

for. To sum up, this absurd result can only be overcome by Claimant's express notification without undue delay after the Claimant finished the testing of the sample car and found it satisfactory for its purposes.

38. Express notification is not only well-established principle of international commercial law but also the only commercially feasible solution in this case.

39. The Respondent did not breach the contract as it has waited for Claimant's notification about the suitability of cars. Only the notification could trigger Respondent's performance duties, for which it could be held liable. As no notification was send, the Respondent could not have performed the contract or in fact breached it. In conclusion, the Respondent cannot be held liable for a 'breach' of an ineffective contract.

VI. Request for relief

40. For all the reasons stated, the Respondent submits to the tribunal that the sales contract for the delivery of 1.000 cars was never concluded and therefore:

    - The tribunal lacks competence to decide the dispute as there is no arbitration agreement.
    - The Respondent could not have breached a 'non-existing' contract and thus could not be held liable.

41. Even if the tribunal finds the sales contract existed based on the Claimant's terms and conditions:

    - The Claimant is barred from requesting the arbitration, as no conciliation has taken place.
    - The Respondent could not be held liable for the claimed damages, because the Claimant failed to notify the Respondent about the suitability of the sample car and rendered the main contract inoperative.