INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION MOOT COMPETITION

MEMORANDUM FOR RESPONDENT

Claimant:	Respondent:
Longo	Chan Manufacturing

Team Number: 010

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HENSCHEL, René Franz	Conformity of Goods in International Sales governed by CISG Article 35: Caveat Venditor, Caveat Emptor And Contract Law as Background Law And as a Competing Set of Rules 2 Nordic Journal of Commercial Law (2004-1), pp. 1-21(Cited as: HENSCHEL NORDIC JOURNAL)
Enderlein, Fritz., Maskow, Dietrich.	*International Sales Law* (1992) *Cited As: Enderlein, F., Maskow, D.*
Figueres, D. J.	Multi-Tiered Dispute Resolution Clauses, in ICC Arbitration, ICC International Court of Arbitration Bulletin, Vol 14 No 1, (2003), pp 71-88. (Cited as *Figueres)*

Wolrich, P. M.	Multi-tiered clauses: ICC perspectives in light of the new ICC ADR rules, Available at http://www1.fidic.org/resources/contracts/multi_tiered_clauses-wolrich02.pdf. (Cited as *Wolrich)*
Pryles, M.	Multi-Tiered Dispute Resolution Clauses, in Journal of International Arbitration, Vol 18 No 2 (2001), pp 159-176. (Cited as *Pryles)*
Blackaby/Partasides	Nigel Blackaby, Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Commercial Arbitration* (5th Ed.) (New York, Oxford University Press: 2009). (Cited as *Blackaby/Partasides)*

JOURNAL ARTICLES

Chengwei, Liu,

'Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL' (2003)

<http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html>.

Cited As: Chengwei, Liu 2003

Ziegel, Jacob S.,

'Report to the Uniform Law Conference of Canada on the Convention on Contracts for the International Sale of Goods' (1981).

http://www.cisg.law.pace.edu/cisg/text/ziegel60.html

Cited As: Ziegel, JS 1981

List of Case:

NSWSC 996, No 55020/99, 1 October 1999, *Aiton Australia Pty Ltd. v. Transfield Pty Ltd*,

Available at www.austlii.edu.au

ABBREVIATIONS

CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Clause.	Clause of the Agreement
NYC	Convention United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
UNCITRAL	United Nations Commission on International Trade Law
Arb	Arbitration
Intl	International
Para	Paragraph
Ex	Exhibit
Art	Article
ICC	International Commercial Court
V	Versus
Para	Paragraph
P	Page no
INCOTERM	International Commercial Term
FAS	Free Alongside Shipment

ARGUMENTS

II. ARGUMENTS IN REGARD TO JURISDICTION OF THE TRIBUNAL

1. THIS TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THIS DISPUTE

This Tribunal does not have jurisdiction to hear this dispute because: **(a)** the ADR clause presented by Claimant is inoperative and uncertain; **(b)** the CIETAC does not have jurisdiction to hear this dispute and in the alternative, the seat of arbitration would be Cadenza; **(c)** in any event, the pre-arbitral requirement under the Model Law and the Agreement has not been met.

A. THE ADR CLAUSE PRESENTED BY CLAIMANT IS INOPERATIVE BECAUSE IT IS UNCERTAIN

The ADR Clause in the Claimant's website is inoperative because when read in conjunction with the arbitration clause in the Respondant's website, it is uncertain. The two clauses contradict each other. A court will void an arbitration agreement if the uncertainty is such that it is difficult to make sense of it (*Blackaby* 145, 146). Recognition and enforcement of an award may be refused if the "said agreement is not valid under the law to which the parties have subjected it (Art. II (3) *NYC)*. The arbitration clause on Respondent's website provides that the law applying is the **SIAC** rules (Ex. 4). Whereas, the rules applied by the applicant's **CIETAC** rules. This flat contradiction in terms renders the ADR clause void for uncertainty and Respondent's arbitration clause is applicable.

B. SEAT OF ARBITRATION SHALL NOT BE IN BEIJING

The Seat of Arbitration shall not be in Beijing, because Seat of Arbitration should be in Cadenza. The respondent had never agreed to have Beijing as the seat of Arbitration. Model law provides that. If failing to agree on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties" [Art 20(1) of UML]. So RESPONDENT kindly and friendly proposed that Seat of Arbitration should be in Cadenza because of cadenza's closest connection with the dispute (UNDROIT Art. 1.11, UNCITRAL Art. 18). Furthermore, even the claimant had regarded Cadenza as a destination of arbitration in Clause 12 in its webpage (Ex 2).

C. THE PRECONDITIONS TO ARBITRATION AS PROVIDED IN CLAUSE 12 OF CLAIMANT'S TERM AND CONDITION WERE NOT FULFILLED

Even assuming that the arbitration clause presented by the Claimant is valid, the precondition of arbitration is not fulfilled by the Claimant themselves. On January5, 2011, the Claimant sent the terms and condition containing a multi-tiered dispute resolution clause ("Clause 12") that required the settlement of dispute to be conciliated as a prerequisite for commencing arbitration. After a dispute arose, no conciliation was conducted between the parties rather the Claimant directly applied for the arbitration. The conciliation procedure was therefore not conducted at all in accordance with the Clause 12 of the claimant's terms and condition.

D. ANALYSIS OF CLAUSE 12 SHOWS THAT THE CONCILIATION TIER IS A MANDATORY AND ENFORCEABLE PROCEDURAL CONDITION PRECEDENT FOR COMMENCING THE ARBITRATION

Clause 12 of the claimant's condition included an arbitration clause (Ex. 2) stating that: "***All disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination shall be conciliated***. If no agreement can be reached it must be referred to arbitration in Cadenza using the relevant rules. The seat shall be Beijing and the language English."(emphasis added)

Clause 12 thus stipulates a two-tiered dispute resolution mechanism. When a dispute arises, the Parties, represented, first have to attempt resolving it by conciliation. In order for a conciliation tier to be considered a procedural condition precedent, this must be reflected in the phrasing of the clause [*Figueres*, p 73; *Wolrich*, p 4; *Pryles*, p 168; *Aiton Australia Pty Ltd. v. Transfield Pty Ltd; Scott v. Avery*]. This is the case here as the Parties agreed on a clear and express obligation to submit the dispute to conciliation and, further, agreed that arbitration shall be initiated only after the fulfil. *"…If no agreement can be reached (i.e after the conciliation) it must be referred to arbitration in Cadenza using the relevant rules…"* (Ex 2, clause 12). It is therefore required that the conciliation procedure was properly held, making it a procedural condition precedent for the subsequent arbitral proceedings [*Jones*, p 191; *Sutton/Gill*[22], para 2-055; *Craig/Park/Paulsson*[3] pp 105-106; *Rubino-Sammartano*[2], pp 254 *et seq*; *Schwab/Walter*[7], p 47; *White v. Kampner*].

Further, the conciliation procedure is mandatory and enforceable, as all necessary prerequisites, developed in case law and scholarly writings, are fulfilled. [see *Boog*, pp 105 *et seq*; *Pryles*, pp 168 *et seq*; *Carter*, p 462]. Firstly, the obligatory nature must be expressed in unqualified terms. Thus it must be derived from the wording of the clause that the pre-arbitral tier is compulsory [*Figueres*, p 72; ICC 1025; *Cable & Wireless v. IBM United Kingdom Ltd.*]. This is fulfilled due to the use of the

imperative words "*shall*" as opposed to a mere permissive "*may*" ("… *all disputes (…) shall be conciliated (…)"* ;which clearly evidences the Parties' agreement on an obligatory clause.

Conclusion: That this Tribunal has no jurisdiction as the preconditions to arbitration are not fulfilled and there is no valid arbitration clause.

II. RESPONDENT did not breach an obligation under Art. 45(1) CISG to warn CLAIMANT about the delivery

A. RESPONDENT had no obligation under Art. 45(1) CISG to warn CLAIMANT about the carrier of the goods.

Under the CISG, there is no general obligation for a seller to warn the buyer against certain carrier of the goods. Such an obligation only exists when the contract mandates an affirmative obligation to warn (*Schlechtriem/Huber, Art. 45 at 3*). Furthermore, and contrary to CLAIMANT's argument, no obligation to warn arises under Art. 45 (1). Rather, a plain reading of Art. 45(1) clearly reveals that it governs purely procedural matters; no legal obligations arise under this provision. Art. 45(1) merely lays out the remedies available to a buyer in the case of a seller's breach of contractual obligations. Therefore, CLAIMANT's assertion that an obligation to warn originates in this provision is mistaken.

B. Even if there is an obligation to warn, it did not attach because RESPONDENT was never sufficiently informed of CLAIMANT's intent of importing the cars.

RESPONDENT was not sufficiently informed of CLAIMANT's intention to import the cars. Thus, RESPONDENT did not have to warn CLAIMANT. The off-handed mention of cars

that CLAIMANT made during the telephone conversation of 10 June 2011 did not sufficiently alert RESPONDENT that CLAIMANT planned to import the cars.

RESPONDENT has always taken the agreements severe concern. CLAIMANT's referral to the proviso "that if the car does not come up to the expectations we will not execute the order"[Ex 7] has been taken seriously by the CLAIMANT. However, CLAIMANT's non confirmation after the sample test suffices the ground to assume that CLAIMANT does not wish to proceed with the further purchase of 999 cars. The RESPONDENT was performing its best to meet the deadlines [Ex 11]; the non confirmation of the ships created no ground for the RESPONDENT to export the ships.

At no time did CLAIMANT indicate that it wanted to discuss the ship, its capacity of carrying goods and the places it can dock was informed by the RESPONDENT. eg, ss Hermania could only dock only in Cadenza [Exhibit 17 line 4] but CLAIMANT never gave concern towards knowing the storage of 999 cars or the port to import from.

As far as RESPONDENT was concerned, CLAIMANT could have provided a clear confirmation after the sample test.

C. RESPONDENT fulfilled the obligation to warn with the ports and the shipment

Even if RESPONDENT had an obligation to warn, this obligation was fulfilled when RESPONDENT provided CLAIMANT with the information about the shipment (that SS Hermania can only be docked in Cadenza port) [Ex 17]. This information explicitly warned against the choice of CLAIMANT for the shipment of the cars.

As soon as the CLAIMANT presented the interest about the purchase of 999 cars after the sample test [Exhibit 14], the RESPONDENT has warned the CLAIMANT of the shipments.

RESPONDENT made it clear that it is ready to provide the 100 cars as available.[Exhibit 15 line 2-3]. Furthermore, the requirements desired by the CLAIMANT of the car have been met

after the sample test. [Ex 14] Although the RESPONDENT held no obligation to warn, the RESPONDENT in the instant case performed its duty of informing the CLAIMANT from the very beginning of the agreements. For example, the RESPONDENT had made the CLAIMANT aware the nomination of the ship should be by the CLAIMANT for the sample test [Ex 11]. Furthermore, the RESPONDENT has made it clear that they expect the CLAIMANT to nominate a ship. Clause 11 in the general terms states: "the Purchaser is to nominate a ship which is able to load goods in the ports nominated by the seller."[Exhibit 17 line 3]

Conclusion:

RESPONDENT had not breached any obligation to warn CLAIMANT about the delivery as RESPONDENT had no obligation under Art. 45(1) CISG to warn CLAIMANT about the carrier of the goods. Even if there had been an obligation to warn, it did not attach because RESPONDENT was never sufficiently informed of CLAIMANT's intent of importing the cars and the RESPONDENT has fulfilled the obligation to warn with the ports and the shipment.

III. RESPONDENT'S BEHAVIOUR DID NOT CONSTITUTE A FUNDAMENTAL BREACH OF CONTRACT

RESPONDENT has provided the goods in conformity with the contract of sale and all other evidence of conformity which may be required by the contract. [A.1 FAS Incoterms]

Article 49(1) (a) CISG grants an aggrieved party the right of avoidance in the event of a fundamental breach. According to Art. 25 CISG, a fundamental breach will be established if

RESPONDENT foresees that non-delivery would result in such detriment to the other party as substantially to deprive it of what it is entitled to expect under the contract.

RESPONDENT submits: **(1)** there has been no detriment that has caused a substantial deprivation to CLAIMANT, and alternatively, **(2)** if there was a substantial deprivation, this was not foreseeable to any reasonable person in RESPONDENT's position. For these reasons, RESPONDENT refutes any allegation that they committed a fundamental breach.

A. The has been no detriment that cause a substantial deprivation to CLAIMANT

RESPONDENT submits that the only possible breach is that of a delay in performance, rather than non-delivery, as RESPONDENT always intended to fulfill its contractual obligations. The learned author Schlechtriem is of the view that delay in performance of itself is not a fundamental breach entitling automatic avoidance *(Schlechtriem, P., 1986, p. 417)* If this Tribunal finds that late performance amounts to a minor breach,

RESPONDENT submits that the breach did not result in such detriment as to substantially deprive CLAIMANT. Article 25 requires the expectations of the aggrieved party to be foiled before a fundamental breach will be constituted. Hence a substantial deprivation will only arise where a party's interest in the performance of the contract is dispelled *(Chengwei, L., 2003, Chapter 8; Schlechtriem, P., 1986, p. 48)*. RESPONDENT asserts that CLAIMANT's disinterest in the completion of the contract would have only occurred where CLAIMANT did not receive the car by the time they were required for if they had provided the confirmation letter (UNDROIT Art 7.1.3).

As a consequence, RESPONDENT submits that CLAIMANT has not suffered a substantial deprivation, as RESPONDENT was willing and able to make delivery of the remaining .[Exhibit 16 line 4].

B. If there was a substantial deprivation, this was not foreseeable to any reasonable person in RESPONDENT's position

Should this Tribunal find that there has been a breach resulting in a substantial deprivation, RESPONDENT submits this was not foreseeable. Article 25 stipulates that for a breach to develop fundamentally, the result of it must be foreseeable to reasonable person in the same circumstances. RESPONDENT emphasises that in these circumstances, a reasonable person waits for the confirmation letter of the order. Hence, in order for a substantial detriment to be foreseeable, a reasonable person in RESPONDENT's position must recognize the consequences of the breach to the aggrieved party *(Chengwei, L., 2003, chapter 8; Schlechtriem, P., 1986, p. 178).*

RESPONDENT asserts that at the time of contracting the parties did not stipulate that 'delivery

time' was an essential term of the contract. CLAIMANT stated " after receiving the sample car, that unless found unsatisfactory, the cars, they expect the reminding cars by 1 December 2011". [Exhibit 5 line 5-6]. However, the CLAIMANT never sent confirmation letter to such cars.

Additionally, the letter sent by CLAIMANT dated 20 January 2011 communicated a clear statement of its unhurried need for the car. CLAIMANT has clearly stated that the cars shall be sent by December 1, 2011 to describe its need for the car. [Exhibit 5 line 5-6].

RESPONDENT maintains that the date required for the delivery of the cars which is December 1, 2011 alone suggests that CLAIMANT did not consider non delivery to amount to a 'substantial deprivation.' If such were the case, CLAIMANT ought to have provided explicit details in its correspondence, as to when 'an immediate pressure' to receive the car would have arisen. RESPONDENT asserts that the relaxed approach adopted by

CLAIMANT gave a strong indication that time was not 'of the essence' and therefore punctual delivery was not of central importance to CLAIMANT.

As a result of CLAIMANT's relaxed approach to establishing a specific delivery time and the requirement of Incoterms CIF B7, RESPONDENT asserts that delay in performance of the goods did not cause CLAIMANT detriment that was foreseeable by a reasonable person in

RESPONDENT's position. Therefore, if CLAIMANT wishes to avoid the contract, it must resort to Art. 49(1)(b) CISG.

Conclusion:
RESPONDENT'S behavior did not constitute a fundamental breach of contract as there had been no detriment that cause a substantial deprivation to CLAIMANT and neither was the substantial deprivation foreseeable to any reasonable person in RESPONDENT's position.

IV. RESPONDENT HAS NOT COMMITTED A BREACH UNDER ARTICLE 49(1)(b)

A. CLAIMANT failed to fix an additional delivery period pursuant to Article 47 CISG

Article 49(1)(b) CISG gives the buyer the right to avoid the contract in the case of non-delivery, if the seller has not delivered the goods within an additional period of time fixed by the buyer pursuant to Article 47 CISG. The purpose of Art. 47 is to make time of the essence where it had not previously been of such significance and, to confer upon the buyer a right to avoid for non compliance without establishing a fundamental breach *(Schlechtriem, P., 1986, p. 395)*. Therefore, in order to effectively avoid the contract, CLAIMANT must establish that an extended period of time was provided for pursuant to Art. 49(1)(b).

RESPONDENT submits that CLAIMANT failed to make 'time of the essence' by establishing an extra period of time for delivery, a breach of which would have permitted avoidance under Art. 49(1)(b).

Art. 47 CISG requires a buyer to fix an additional period of time of reasonable length, and to make such an extension of time known to the seller in order to secure a remedy in the event of a breach *(Bianca, C., Bonell, M., 1987, p. 345)*. RESPONDENT asserts that the deadline must be unequivocal and expressed so clearly to the extent that the seller is made aware of his last chance to perform *(Ziegel, J. S., 1981, p. 9; Bianca, C., Bonell, M., 1987, p. 345)*. Further, a demand for performance, without fixing a specific date for performance, is insufficient to warrant avoidance of the contract *(Schlechtriem, P., 1986, p. 395)*. As a consequence, demands not specifying a fixed date do not open up the route for CLAIMANT to avoid the contract under Art. 49(1)(b) *(Schlechtriem, P., 1986, p. 396)*.

RESPONDENT submits that at no time in all its correspondence did CLAIMANT stipulate a specific date for performance. The RESPONDENT has failed to provide a specific deadline after its sample test to which RESPONDENT must have adhered. CLAIMANT's failure to provide with the confirmation letter has indicated the failure of RESPONDENT to give a specific time.

RESPONDENT contends that the provision of a non-specific term, does not amount to an unequivocal and clear extension of the delivery date.

Conclusion:

Consequently, RESPONDENT submits that CLAIMANT was not entitled to declare avoidance pursuant to the operation of Art. 49(1)(b) as no such deadline had been fixed.

V DAMAGES

RESPONDENT submits: **(A)** CLAIMANT is not entitled to damages pursuant to Art. 74 CISG; and

(B) CLAIMANT is not entitled to damages pursuant to Art. 75 CISG.

A. CLAIMANT IS NOT ENTITLED TO DAMAGES PURSUANT TO ARTICLE 74 CISG

Article 74 CISG permits a recovery of damages equal to the loss suffered by the aggrieved party as a consequence of the breach. Whilst the provision does not mandate an avoidance of the contract, its application is restricted to those losses that are foreseeable to the breaching party at the conclusion of the contract *(Enderlein, F., Maskow, D., 1992, p. 298)*. The party in breach must foresee the extent of the damage, and calculate its risk *(Enderlein, F., Maskow, D., 1992, p. 300)* on the balance of probabilities *(Bianca, C., Bonell, M., 1987, p. 541)*.

In the present dispute CLAIMANT seeks damages equal to the loss resulting from RESPONDENT's delay in delivering[Exhibit 16]. RESPONDENT asserts that loss resulting from late delivery was unforeseeable.

B. CLAIMANT IS NOT ENTITLED TO DAMAGES PURSUANT TO ARTICLE 7.4.1UNDROIT

Pursuant to Article 7.4.1 of UNDROIT, "any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the nonperformance is excused under these Principles."

RELIEF REQUESTED

Respondent respectfully requests the Tribunal to find that:

(A) CIETAC should not exercise the jurisdiction of the dispute.

(B) Claimant's Arbitration Clause is not applicable.

(C) Respondent did not breach the contract.

(D) Respondent is not liable for the damages.

Consequently, Respondent respectfully requests the Arbitral Tribunal to order RESPONDENT:

(A) To come into possible remedy and wait for another two months and to enter into new sale contract.