TEAM 012

THIRD ANNUAL INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION MOOTING COMPETITION

MEMORANDUM FOR THE RESPONDENT

On Behalf Of	**Against**
Chan Manufacturing	Longo Imports
"RESPONDENT"	"CLAIMANT"

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INDEX OF ABBREVIATIONS

Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission
CISG	The United Nations Convention on Contracts for the International Sale of Goods
Clr	Clarifications
Ex.	Exhibit
INCOTERMS	International Rules for the Interpretation of Trade Terms of 2000
Model Law	UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006)
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
Para/Paras	Paragraph/Paragraphs
SIAC Rules	Singapore International Arbitration Centre Rules
UNCITRAL	United Nations Commission on International Trade Law
UNDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts of 2010

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ARGUMENTS

JURISDICTION

I. THE TRIBUNAL CONSTITUTED UNDER CIETAC DOES NOT HAVE JURISDICTION

A. Non-Existence Of A Valid Arbitration Agreement

Art.7(2) of the Model Law and Art.II(2) of the New York Convention require that the agreement be made "in writing".

Furthermore, since party autonomy is a key principle of any arbitration agreement, there is a need for certainty regarding the subject matter upon which the parties have contracted upon *[Aughton Ltd v. Kent Services Ltd.]*. ***Consensus ad idem* is necessary** for a valid arbitration agreement *[Thyssen Canada Ltd. v. Mariana]*.

Wherever an agreement between parties refers only to general conditions which are separate and which include an **arbitration clause lost amongst the other clauses**, the reference is insufficient and no written arbitration agreement exists.

In the present matter, there was no *consensus ad idem* as to the arbitration agreement since both parties agreed to different arbitration clauses, as per their own standard terms.

B. The Arbitration Clause Has Not Been Incorporated

An arbitration clause is said to have been validly incorporated into an agreement, if the effect of the incorporation is to make the arbitration clause a part of the agreement *[Ahmed, p.415]*. When a party seeks to incorporate into an agreement an arbitration clause, which is **unfamiliar to the other party**, an express reference to the clause is

mandatory. Mere **silence or conduct of a party is not sufficient** to determine if there is an agreement to arbitrate *[Born, p.666]*.

The CLAIMANT and the RESPONDENT had separate terms and conditions displayed on their websites. The **CLAIMANT never expressly mentioned** the arbitration clause contained in its standard terms and the RESPONDENT never gave the consent to be bound by it.

C. Telephonic Agreement Does Not Give Rise To A Valid Arbitration Agreement

An arbitration agreement made by telephone, even if subsequently confirmed by one of the parties in a letter but not confirmed in writing by another one, does not give rise to an arbitration agreement *[St`e Britania v. St`e J`ez`equel et Maury]*.

Even in the present matter, the telephonic conversation between the CLAIMANT and the RESPONDENT or the subsequent letters does not prove a valid arbitration agreement.

D. The Tribunal Does Not Have Jurisdiction

The present Tribunal is constituted in accordance with Art.4.3 of the *CIETAC Rules*. RESPONDENT's arbitration clause requires all disputes arising out of or in connection with the contract, including any question regarding its existence, validity or termination to be referred to arbitration in Cadenza using the *SIAC Rules* or in Hong Kong using the SIAC Rules *[Ex. 4 Cl.9]*.

As the **CLAIMANT'S arbitration clause does not apply**, this Tribunal has been constituted without legal grounds and does not have jurisdiction over this matter.

MERITS

II. THERE IS NO VALID CONTRACT

A. The RESPONDENT Has Not Breached Any Contract

The RESPONDENT made it clear that it would treat the **shipment of the single car separately from the order of 1000 cars** and hence would like to be paid in advance *[Ex.10]*. The advance payment was made by CLAIMANT only for the single car, which was duly delivered There was **no subsequent contract regarding the 999 cars** and the RESPONDENT cannot be made liable for a contract that never existed.

B. Application Of The *CISG*

If parties to a contract are from countries that are signatories to the *CISG*, then their contract is governed by the *CISG*. Unless the parties agree to opt out, *CISG* automatically applies to any contract for the sale of goods between parties whose principal place of business is in different *CISG* countries. *[Supermicro Computer v. Digitechnic]*. To opt out of *CISG*, it is insufficient to merely include a choice of law provision stating that the law of that party's state or nation governs. The choice of law provision must expressly exclude application of the *CISG* because without an express exclusion, ***CISG* will govern** *[Easom Automation Systems v. Thyssenkrupp Fabco]*.

In the present case, both the **parties are signatories** to the *CISG [Clarification 20]* and hence it will apply as the law governing the contracts, in absence of any express exclusion of the same by the parties.

C. There Exists No Valid Contract Under The *CISG*

The *CISG* follows the traditional common law **'mirror-image' rule,** whereby the contract is formed with an offer *[Art.14]* and an acceptance *[Art.18]*, which correspond in all respect. Reply to the offer, which purports to be an acceptance, but contains any material additions, limitation or modifications, is rejection of the offer and constitutes a **counter-offer** *[Art.19(1)]* or a new offer that has to be expressly assented by the initial offeror.

A reply to an offer which purports to be an acceptance but contains additional or different terms to the offer is an acceptance if: (a) the offeree intended its communication to be an acceptance; (b) the terms contained therein do not materially alter the offer, and (c) the offeror did not object to the non-material changes in the offeree's communication

In practice, the clauses which affect the liabilities of the parties and the forum selection and arbitration clause are all examples of **material alterations**. *[Farnsworth]*.

In the present case, subsequent to the receipt of CLAIMANT'S Order Form based on its standard terms, the RESPONDENT urged the CLAIMANT to refer to its standard terms instead. This was intended to be a **counter-offer of the RESPONDENT** instead of acceptance of the initial offer of the CLAIMANT. Further, since the two **standard terms differed on material conditions** like liabilities of parties under INCOTERMS and on arbitration clauses, there was a material modification of the initial offer of the RESPONDENT. Finally, the CLAIMANT again objected to the RESPONDENTS standard terms and put forward its own conditions *[Ex.13]*. This shows a **lack of *consensus ad idem*** and non existence of any final contract between

the parties as there was no acceptance by the RESPONDENT to the CLAIMANT'S offer in Order Form.

It is to be noted that as long as the parties **continue to exchange their standard terms**, no contract is concluded, even if one party starts performance, accompanied by sending the standard terms again. Under Art.19, a contract is concluded only when one party gives in and expresses consent without sending or otherwise relying on its own standard terms any longer.

D. The CLAIMANT Has Breached The Contract Under The *CISG*

Alternatively, assuming that there existed a valid contract between the parties, it was the CLAIMANT who had breached the same. Under the *CISG,* the **duty of the buyer** is to take all steps 'which could reasonably be expected' *[Art.60]* to take delivery of the goods, and to pay for them *[Art.53]*.

In the matter at hand, **Clause 11 of RESPONDENT'S terms** states: *"The purchaser is to nominate a ship which is able to load goods in the ports nominated by the seller."* RESPONDENT further made it clear that the nominated ports are Cadenza, Cantata and Piccolo *[Ex.11]*. The CLAIMANT nominated SS Herminia which could only dock in Cadenza and not in any other port. It was incapable of docking at Piccolo where the cars were actually stationed. This shows that the breach is on part of the CLAIMANT.

E. Application Of The *UPICC*

Although *CISG* is the governing law, it does not bar the application of *UPICC*.

The CLAIMANT and the RESPONDENT had both agreed on the application of *UPICC [Ex. 10; Ex. 13]* and hence the same is applicable.

F. The RESPONDENT Has Not Breached The Contract Under The *UPICC*

Under the *UPICC*, the '**intention to be bound'** is the essential component for the formation of contracts. Art.3.2 states that an agreement between parties and *consensus as idem* are mandatory requirements for a valid contract.

In the present matter, the **meeting of minds was limited to the first car** which was delivered by the RESPONDENT as per the understanding between the parties. There was no agreement regarding 999 cars as the CLAIMANT'S offer under Order Form was not accepted by the RESPONDENT. **No subsequent order** after the first car was placed by the CLAIMANT. Thus, no breach was committed by the RESPONDENT.

Further, in *Anderson Consulting v. Arthur Anderson*, it was held that actions which competed to some extent with the counterparty's business market were insufficient to rise to the level of a fundamental breach of the contract. Thus, while good faith should affect the manner in which a party performs a contract, the breach of good faith alone, in the tribunal's opinion, was insufficient to provide a contract remedy to the affected party.

G. The CLAIMANT Has Breached The Contract Under The *UPICC*

Assuming hypothetically, there existed a valid contract between the parties with respect to 999 cars, it was the CLAIMANT who breached the terms of the said contract. When a contractual provides that the performance by one party is dependent upon the performance of the other party, it becomes a mandatory contractual provision. *[Bénédicte Fauvarque-Cosson]*. Art.5.3.2. also states that a contract takes effect upon fulfilment of a **suspensive condition.**

In the present case, the suspensive condition was put by the RESPONDENT that CLAIMANT had to nominate a ship which could load at all the ports nominated by

the RESPONDENT. Since the CLAIMANT did not fulfil this condition, it breached the terms of the said contract and now cannot be allowed to take advantage of its own wrong under equity.

III. ONLY COMMONLY AGREED STANDARD TERMS APPLY

A. The Knock- out Rule

Art.2.1.22 of the *UPICC* deals with conflicting standard terms using the 'knock out' rule, which is a modern approach gaining international recognition *[Naudé p.345]*.

Under the 'knock out' rule, the standard forms of both the parties are compared and the terms of the contract would be **those that commonly appear in both forms**. Or alternatively, none of the terms in either of the forms would become part of the contract unless all terms of the two forms match *[Blodgett p. 427]*.

It is important to establish that the parties have an intention to be bound and that they have reached agreement on the terms characteristic of the individual transaction. The contract is concluded on the basis of the individual terms agreed between the parties and those standard terms which coincide. **Conflicting terms are cancelled out** and the remaining gap is filled by what the parties may have agreed in prior agreements, established practices, usages and/or default rules.

In the present matter, the standard terms of the CLAIMANT and the RESPONDENT containing separate arbitration clauses and INCOTERMS, entailing different liabilities on parties will get knocked out since they do not coincide.

B. Alternatively, The RESPONDENT'S Standard Terms Apply

If standard terms of only one party need to be applied, it should be that of the RESPONDENT. Under the **Last Shot Doctrine**, terms in the last submitting party's form, which is usually the seller, will completely prevail in determining the terms of the contract and the other party's form remains completely ousted.

The offeror has an implied duty to object to the conflicting terms. Failing to object and commencing performance results in an implied consent to the terms of the counter-offer.

In this case, RESPONDENT urged its standard terms as a condition before it delivered the sample car *[Ex.10]* and the same was accepted by the CLAIMANT as it made the payment, despite the condition *[Ex.11]*. Thus payment by the CLAIMANT acted as an **implied acceptance to the RESPONDENT'S terms** of contract.

IV. THE CLAIMANT'S ARBITRATION CLAUSE IS NOT APPLICABLE

As proven above, only the terms which coincide in the standard forms of both the parties are applicable and rest are all knocked out. Since the arbitration clauses of both the parties were part of the standard terms which did not coincide, the same will be **knocked out.**

Alternatively, it will be the **RESPONDENT whose standard terms will apply.** Since the RESPONDENT'S arbitration clause is one of the conditions of its standard terms, *[Ex.4]* it will be the RESPONDENT'S arbitration clause which will be applicable in the present matter.

V. THE RESPONDENT IS NOT LIABLE FOR DAMAGES

A. Damages As Per The *UPICC*

Art.7.4.1 states that non-performance gives the aggrieved party a right to damages.

As the RESPONDENT has already shown, there existed **no valid contract** between the parties and thus it has not breached any contract on account of non-performance.

Alternatively, even if a valid contract existed; the same has been violated by the CLAIMANT as it did not nominate a ship of requisite requirements as per the terms and conditions of the RESPONDENT under the said contract. **The CLAIMANT is hence liable to pay damages**. Not only is the RESPONDENT entitled to damages for loss of reputation suffered by it on account of serious allegations put by the CLAIMANT, but it should also be reimbursed for non- performance of the contract by the CLAIMANT and all the troubles it had to undertake to find a last minute substitute customer for the manufactured cars.

B. Damages As Per The *CISG*

A party will not be liable for damages under Art.74 if there is **no binding contract** between the two *[Frozen salmon case]*.

As there was no binding contract regarding the 999 cars which the CLAIMANT is contending, the RESPONDENT is not liable to pay any damages. Alternatively, if a contract existed, CLAIMANT will be liable to pay damages for **non-performance** *[Gotanda]*, **breach of expectation** *[Silicon metal case]*, **Good-will Damages** *[Art Books case]* and **Reliance Damages** *[Cooling System Case]*. Since **loss of or injury to reputation** is likely to adversely affect the injured party's business *[Sergeyev, p.317]*, pecuniary loss caused by loss of reputation has been held recoverable in

several cases. *[Aerial Advertising v. Batchelor's Peas; Groom v. Crocker; Anglo-Continental Holidays v. Typaldos Lines; GKN Centrax Gears Ltd v. Matbro Ltd]*

C. Doctrine Of Hindrance

The doctrine of hindrance or prevention is well established in the common law *[Calamari & Perillo, p.486]*. **A party who has prevented the other party from performing cannot then claim a remedy for breach.**

The CLAIMANT contends that the RESPONDENT has breached the contract because it failed to deliver 999 cars. However, there was no contract regarding the same. Moreover, even if a valid contract existed, the **ship nominated by the CLAIMANT could not dock at Piccolo**, a condition which was expressly mentioned in RESPONDENT'S terms and conditions. The CLAIMANT thus prevented the RESPONDENT from carrying out the contract and is liable for damages.

D. The RESPONDENT Acted In Good Faith

Despite non existence of any valid contract, alternatively; despite the CLAIMANT breaching the contract for 1000 cars, the RESPONDENT is still willing to enter into another contract for sale of 400 cars at a **discount rate of 2% as a good will gesture** with the CLAIMANT.

The RESPONDENT has not acted in a mala fide manner by selling cars to CLAIMANT'S competitors as the same was a **last minute desperate attempt to save itself from pecuniary and reputational losses.** The RESPONDENT was expecting another Order Form from the CLAIMANT or at least to nominate a ship of the requisite capacity for the cars. Since none of them was undertaken by the CLAIMANT, the RESPONDENT was forced to sell the cars to another importer.

However, the RESPONDENT holds no ill will and is ready to enter into a fresh contract in hope of long lasting business relationship.

RELIEF REQUESTED

The RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal does not have jurisdiction to hear this case.
2. No valid arbitration agreement exists between the parties.
3. There was no valid contract between the parties and thus there has been no breach on the RESPONDENT's part. Alternatively, if a valid contract existed, it was the CLAIMANT who breached the contract.
4. Only commonly agreed standard terms between the parties apply. Alternatively, RESPONDENT'S standard terms apply. In both the cases, the CLAIMANT'S arbitral clause does not apply.
5. The CLAIMANT and not the RESPONDENT is liable to pay damages.