THIRD ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOT COMPETITION

MEMORANDUM FOR RESPONDENT

Team number: 014

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TABLE OF ABBREVIATIONS

Art	Article
CIETAC	China International Economic and Trade Arbitration Commission
Ex.	Exhibit
PICC	Principles of international Commercial Contracts
UNCITRAL	United Nation Commission on International Trade Law

TABLE OF AUTHORITIES

Primary Sources

Secondary Sources

Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006

(Cited: *EN on UML*)

Stefan Vogenauer and Jan Kleinheisterkamp, Commentary on the UNIDROIT principles of international commercial contracts (PICC), Oxford University Press

(Cited: *Vogenauer*)

Official Comments on Articles of the UNIDROIT Principles of International Commercial Contracts (PICC), 2010

(cited as: Official)

JURISDICTION

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

The tribunal does not have jurisdiction to hear this dispute because: (1.1) No agreement reached on CLAIMANT's arbitration clause 12; (1.2) even though there is an arbitration clause, Clause is invalid because it violates a mandatory provision of the law applying to the arbitration proceedings; (1.3) alternatively, Clause 12 is inoperative because it is uncertain; and (1.4) RESPONDENT's arbitration clause is a valid arbitration agreement

1.1 No agreement reached on CLAIMANT's arbitration Clause 12

The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract [UML, Option I, Art 7(6)]. The ORDER FORM sent by the CLAIMANT on Feb. 5, 2011 constitutes an offer [PICC Art 2.1.2]. CLAIMANT did not mention or refer to the arbitration clause neither in that ORDER FORM nor in the same letter. Both parties reach agreement except for the standard terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance [Vogenauer, P341]. CLAIMANT and RESPONDENT both indicated that their arbitration clauses should govern the contract, but their terms actually conflict with each other. It is not fair to give preference to either party's term. Instead, when both behave as if the 'deal is on' in spite of conflicting standard terms, and without explicitly addressing this issue, they should equally share in the resulting risk of leaving the matter to remain uncertain.

CLAIMANT only referred to Clause 12 on January 5, 2011 [Ex.2]. RESPONDENT never accepted that expressly since after. Silence does not in itself amount to acceptance [PICC Art 2.1.6(1)].

1.2 Even though Clause 12 is part of the contract, it is invalid because it violates a mandatory provision of the law applying to the arbitration proceedings

CLAIMANT applied for arbitration at CIETAC and RESPONDENT did not deny that [Ex. 19 Ex. 20]. Therefore, the parties are deemed to have agreed to arbitrate in accordance with CIETAC Rules [CIETAC Rules Art 4(2)]. Where the parties agree to refer their dispute to CIETAC for arbitration but have agreed on a modification of these Rules or have agreed on the application of other arbitration rules, the parties' agreement shall prevail unless such agreement is inoperative or in conflict with a mandatory provision of the law as it applies to the arbitration proceedings [CIETAC Rules Art 4(3)].The seat of an arbitration determines the *lexarbitri* and the courts with supervisory jurisdiction over the arbitration. Therefore, PRC Arbitration Law applies since the seat is in Beijing. Under PRC Arbitration Law, an arbitration agreement is invalid unless it contains an appointed arbitration commission [PRC Arbitration Law Art 16, 18]. "China Trade Commission" mentioned in Clause 12 is not the full name of CIETAC. Actually, there is no arbitration commission in Beijing that is named after that. To which institution the "China Trade Commission" referred to is not clear. Clause 12 violates the mandatory provision of PRC Arbitration Law because it does not refer to an arbitration commission in a clear way; therefore, it is invalid.

1.3 Alternatively, Clause 12 is inoperative because it is uncertain

Clause 12 is inoperative because when the second last sentence is read in conjunction with the first sentence it is uncertain. A court will void an arbitration agreement if the uncertainty is such that it is difficult to make sense of it. 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 [NYC Art 2(3)]. The second last sentence provides that the dispute must be referred to arbitration in Cadenza using the relevant rules. The first sentence however provides that all disputes must be referred to the China Trade Commission. Definitely, these two sentences are in conflict with each other. This complete contradiction renders the clause void for

uncertainty. With no valid arbitration agreement, this Tribunal has no jurisdiction to hear the dispute.

1.4 Alternatively, RESPONDENT Arbitration Clause is a valid Arbitration Agreement

RESPONDENT Arbitration Clause embodies all the criteria of a valid arbitration agreement as required by Article 7 of UML. According to Article 7(6) of UML, the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract [UML]. After CLAIMANT offered the ORDER FORM as the offer [Ex.9], RESPONDENT's reply constituted a counter-offer as it materially altered the terms [PICC Art 2.1.1]. In the modified acceptance, RESPONDENT referred to his conditions on the webpage [Ex.10] and RESPONDENT obviously intended to make Clause 11 part of the contract. Thus, Clause 11 constitutes an arbitration agreement in writing. The conduct of the offeree indicating the assent to an offer amounts to acceptance [PICC Art 2.1.6]. CLAIMANT's receipt and testing of the sample car is the conduct of acceptance to the counter-offer. Thus, the terms from RESPONDENT's website are included in the contract [Ex.4].

According to Article 7(4), posting the clause on the Internet so that the content is accessible and useable for subsequent reference meets the requirement for the agreement in writing. Signatures of the parties are no longer required [EN on UML, para.19] Arbitral agreement as defined by Article II, paragraph 2 of the New York Convention is also interpreted widely to recognize the widening use of electronic commerce.

MERITS

2. CLAIMANT BREACHED THE CONTRACT AS CLAIMANT VIOLATED CLAUSE 11 FROM RESPONDENT'S WEBPAGE

CLAIMANT breached the contract because: (2.1) PICC is the governing law; and (2.2) CLAIMANT did not nominate a ship able to load goods in the ports nominated by RESPONDENT.

2.1 PICC is the governing law

The preamble of PICC provides that it shall be applied when the parties have agreed that their contract be governed by it. Parties wishing to provide that their agreement be governed by the Principles might use the following words, adding any desired exceptions or modifications: "This contract shall be governed by the UNIDROIT Principles (2010) [except as to Articles …]". RESPONDENT pointed out that PICC is the governing law [Ex.10] and CLAIMANT agreed to that [Ex.13]. Therefore, the two parties' contract should be governed by PICC.

2.2 CLAIMANT did not nominate a ship able to load goods in the ports nominated by RESPONDENT

(A) Clause 11 of RESPONDENT's conditions on the webpage is a part of the contract

According to PICC, a contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement [PICC Art 2.1.1]. The ORDER FORM from CLAIMANT shows sufficient definiteness and CLAIMANT's intention to be bound by it; therefore, it constitutes an offer.

A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications, which materially alter the terms of the offer, is a rejection of the offer and constitutes a counter-offer [PICC Art 2.1.11]. RESPONDENT referred to his terms and conditions on the webpage [Ex.10]. So the terms on the webpage, together with the modification raised in Ex.10 constitute a counter-offer as it has been suggested that shipment, payment and choice of law are material content of a contract [PICC ART 2.1.11(1) Vogenauer, P.283]. CLAIMANT's conduct of receipt and testing the car amounts to acceptance to the counter-offer [Ex.13 PICC Art 2.1.1]. Therefore, CLAIMANT's offer and RESPONDENT's modified acceptance constitute a valid contract [PICC Art.2.1.11(2)].

As the terms and conditions are included in RESPONDENT's counter-offer, clause 11 is definitely included. Thus, the acceptance of CLAIMANT concluded a contract with clause 11 in it.

(B) Because SS Herminia can only dock in Cadenza but not in Piccolo, RESPONDENT is unable to load any cars

According to RESPONDENT's terms and conditions, Clause 11 provides that the purchaser is to nominate a ship which is able to load goods in the ports nominated by the seller [Ex.4]. RESPONDENT also mentioned that it would send the cars to the docks to be loaded [Ex. 10]. It should be pointed out that the word "docks" is in plural form. So according to Clause 11, the ship nominated by CLAIMANT should be able to load goods in all the ports nominated by RESPONDENT.

RESPONDENT nominated Cadenza, Cantata and Piccolo as the ports [Ex.11] for the reminding 999 cars. And CLAIMANT nominated SS Herminia for further shipment [Ex.13]. However, the SS Herminia can only dock in Cadenza but not in Piccolo where the 100 cars are currently in storage. Even though RESPONDENT has enough cars to sell to CLAIMANT, since CLAIMANT nominated a ship that is not able to load goods in the ports nominated by

RESPONDENT, RESPONDENT is not able to load any cars. Therefore, it is CLAIMANT who breached the contract.

3. RESPONDENT DID NOT BREACH THE CONTRACT

RESPONDENT did not breach the contract because: (3.1) The order of 999 cars have not been in effect as the proviso is not part of the contract; (3.2) even if the proviso is in the contract, CLAIMANT needs to confirm the order; and (3.3) alternatively, RESPONDENT's non-performance is interfered by CLAIMANT's omission

3.1 The order of 999 cars have not been in effect as the proviso is not part of the contract

(A) The proviso raised in Ex.8 by CLAIMANT is not part of the contract

In defining an offer as distinguished from other communications which a party may make in the course of negotiations initiated with a view to concluding a contract, PICC Art 2.1.2 lays down two requirements: the proposal must (i) be sufficiently definite to permit the conclusion of the contract by mere acceptance and (ii) indicate the intention of the offeror to be bound in case of acceptance [Official Art 2.1.2]. The proviso in Ex.8 is not an offer definite to permit the conclusion of the contract by mere acceptance. CLAIMANT stated this fact of RESPONDENT's assent to the criteria, but not proposed it to RESPONDENT and needed acceptance. Thus, the proviso in Ex.8 is not a part of the offer, thus not a part of the contract.

(B) The proviso raised in Ex.5 and Ex.7 does not conclude a contract

The proviso in Ex.5 and Ex.7 is an offer raised by CLAIMANT. However, RESPONDENT never expressly agreed to that or had any conduct amounting to accept that. Silence does not in itself amount to acceptance [PICC Art 2.1.6(1)]. Thus, CLAIMANT's offer of the proviso was never accepted expressly by RESPONDENT.

(C) The terms in the ORDER FORM do not require the order of reminding cars to be sent automatically if CLAIMANT does not complain

The terms in the ORDER FORM only states that any defects or unsatisfactory performance will be notified within one week of receipt of the sample car. The ORDER FORM does not ask the reminding 999 cars to be sent if CLAIMANT does not express defects or unsatisfactory performance. The ORDER FORM does not clarify when the reminding 999 cars should be sent. Under this situation, supplement can be invoked according to PICC. Where the parties to contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied [PICC Art 4.8(1)]. Good faith and fair dealing and reasonableness can be regarded in determining [PICC Art 4.8(2)]. Here the contract does not mention when or under which circumstance that the reminding cars should be sent. Thus, according to good faith and fair dealing and reasonableness, CLAIMANT should confirm the order of the reminding 999 cars. Otherwise, it would be unfair to RESPONDENT if he have to send the 999 cars without any confirmation.

3.2 Even if the proviso is in the contract, CLAIMANT needs to confirm the order

(A) According to interpretation of the terms, CLAIMANT needs to confirm the order

The proviso states that "once we receive the sample we will test it and unless we find it unsatisfactory will expect the reminding cars to be sent by December, 2011". The Quality term in the ORDER FORM clarifies the period to notify the defect or unsatisfactory performance. But those terms have not clarified whether CLAIMANT shall notify if there is no unsatisfactory performance. So these terms need to be interpreted.

The fairness and equity of a particular interpretation must also be considered. Contracts must be construed according to the standard of good faith and fair dealing [PICC Art. 1.7]. If the

Quality term means that if CLAIMANT is satisfied with the sample, he does not have to notify to RESPONDENT. That puts RESPONDENT into such disadvantage that it is completely unfair to let the order automatically execute if CLAIMANT does not complain about the sample. RESPONDENT will have to bear great risk fulfilling the contract without the confirmation of CLAIMANT, which includes cost of money and labor. Therefore, RESPONDENT cannot be expected to execute the order without CLAIMANT's confirmation according to good faith and fair dealing principle.

(B) Alternatively, confirmation of the order should be supplied according to PICC Art 4.8

Even if the requirement of confirmation of the order cannot be interpreted from the terms of the contract, it should be supplied according to PICC Art 4.8. Where the parties to contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied [PICC Art 4.8(1)]. Good faith and fair dealing and reasonableness can be regarded in determining [PICC Art 4.8(2)]. According to Merits 4.1(B), confirmation of the order is in accordance with good faith and fair dealing.

(C) CLAIMANT's confirmation constitutes a suspensive condition

As stated above, CLAIMANT is obliged to confirm the order of the reminding 999 cars. This has constituted a suspensive condition according to PICC Art 5.3.2(a). RESPONDENT's contractual obligation of sending the reminding cars only take effect if CLAIMANT confirms the order. The terms do not clarify when CLAIMANT should confirm the order. But according the Quality term, any defect or unsatisfactory performance will be notified within one week of receipt of the sample car [Ex.9]. If the contract does not state a specific time by which the condition must occur, in appropriate circumstances the time may be implied on the basis of an interpretation of the intentions of the parties under Chapter 4 [Official Art 5.3.1].

The Quality term in the contract shows the parties' intention to confirm the effect of the order within one week of the receipt of the sample car. CLAIMANT received the car on June 10, 2011 [Ex.13]. However, CLAIMANT did not confirm the quality of the sample until August 10, 2011, two months later [Ex.14]. Thus, RESPONDENT's contractual obligation of sending the 999 cars have not been in effect.

3.3 Alternatively, RESPONDENT's non-performance is interfered by CLAIMANT's omission

A Party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event for which the first party bears the risk [PICC Art 7.1.2]. Inaction only qualifies under Art 7.1.2 (PICC) if it constitutes an omission of an act necessary for complying with the duty to co-operate under Art 5.1.3 (PICC) [Vogenauer P.735]. According to PICC Art 5.1.3, each party shall co-operate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations. The duty of co-operation provides that each party is under a duty to engage in actions if such actions are required to enable or facilitate the other party's performance [Vagenauer, P544]. Typical situation are those in which the obligor depends on the oblige participation in an act or supplying information, and the oblige fails to do so [Vagenauer, P544-545].

RESPONDENT's sending the reminding cars depends on CLAIMANT's notification of the satisfaction with the sample car. However, CLAIMANT did not co-operate by notifying in the reasonable period. Thus, RESPONDENT's non-performance was interfered by CLAIMANT's omission.

REQUEST FOR RELIEF

RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal does not have jurisdiction to this case.
2. CLAIMANT breached the contract.
3. RESPONDENT did not breach the contract by non-performance

(2718 words)