THE INTERNATIONAL ADR
(ALTERNATIVE DISPUTE RESOLUTION)
MOOTING COMPETITION

MEMORANDUM FOR RESPONDENT

ON BEHALF OF	AGAINST
CHAN MANUFACTURING	LONGO IMPORTS

TEAM NUMBER: 015

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ABBREVIATIONS

&	And
CIETAC	China International Economic & Trade Arbitration Commission Arbitration
e.g.	exemplum gratia (for example)
et al.	and others
etc.	et cetera (and so on)
Ex	Exhibit
ICC	International Chamber of Commerce
Id.	idem (the same)
i.e.	id est. (that is)
Incoterms 2010	International Rules for the Interpretation of Trade Terms, International Chamber of Commerce
inter alia	among other things
Model Law	UNCITRAL Model Law on International Commercial Arbitration
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PICC	UNIDROIT Principles of International Commercial Contracts 2010
Para	Paragraph
Supra	Above
SIAC	Singapore International Arbitration Center

UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

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ARGUMENT

I. The Tribunal has no jurisdiction to hear the dispute.

The Tribunal does not have jurisdiction over this case for lack of a valid Arbitration Agreement, because CLAIMANT's Arbitration Clause comply with neither the substantive requirements [**A**] nor the requirement of writing form [**B**].

A. CLAIMANT's Arbitration Clause is not valid for non-conformity with the substantive requirements.

The New York Convention contemplates, in the absence of an agreement by the parties as to the law governing their Arbitration Clause, the substantive law of the place where the award will be made (i.e., the seat or place of arbitration) shall apply.[1] Since the countries concerned in this case, i.e., Cadenza, Minuet and China, are all contracting parties of New York Convention, the substantive law of the arbitral seat shall also apply.

Furthermore, where the parties included a choice-of-law clause in their underlying contract selecting the law governing that contract, the parties' choice-of-law clause extends, either expressly or impliedly, to the separable arbitration agreement.[2] Therefore, the UNIDROIT Principles 2010, which was chosen by the parties as the governing law, shall also be applied to examine the validity of the arbitration

[1] *Born*, P460.
[2] *Born*, P475.

agreement.

The substantive grounds for challenging consent to or the existence of an international arbitration agreement may include, *inter alia*, lack of assent and serious inherent defects, like reference to non-existent arbitral institutions or rules and internally contradictory provisions.[3]

1. CLAIMANT's Arbitration Clause lacks assent of RESPONDENT.

An arbitration agreement must fulfill the ordinary requirements for the conclusion of a contract. The parties must have agreed on arbitration and their agreement must not be vitiated by related external factors.[4] First, according to Article 2.1.1 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. However, RESPONDENT had never agreed expressly or impliedly by conduct to CLAIMANT's Arbitration Clause which was contained in its terms and conditions. Second, after CLAIMANT first referred to its terms and conditions including its Arbitration Clause in the letter of January 5,[5] RESPONDENT explicitly raised its objection by referring to its own Arbitration Clause twice in the letter of January 15[6] and March 20[7] respectively. Third, even if the Tribunal find RESPONDENT did not propose an effective objection, silence or inactivity does not itself amount to acceptance according to Article 2.1.6 PICC, because the offeree is free not only to accept or not to accept the offer, but also simply

[3] *Born*, P655.
[4] *Lew*, P141, para.7-34.
[5] *Ex.*1.
[6] *Ex.*3.
[7] *Ex.*10.

to ignore it.[8]

2. CLAIMANT's Arbitration Clause contains internally contradictory specifications of arbitral seat and a non-existent arbitral institution.

Even if the Tribunal find RESPONDENT agreed to CLAIMANT's Arbitration Clause, it is nevertheless invalid. First, CLAIMANT's Arbitration Clause prescribes two conflicting arbitral seats, i.e. Cadenza and Beijing, which is unenforceably indefinite and causes conflict of applicable laws, thus 'no arbitration agreement at all'.[9] Furthermore, CLAIMANT's Arbitration Clause referred to a non-existent arbitral institution, China Trade Commission,[10] therefore incapable of being performed under Model Law Article 8(1) and null under China Arbitration Law Article 18, which are the laws of Cadenza and Beijing respectively. Lastly, although some courts and tribunals have construed references to non-existent entities liberally, finding ways to equate them to institutions which do exist[11], the CIETAC does not bear such a construction, because according to CIETAC Rules Article 2(1)(2)(3)(4), the effective reference to CIETAC should be its prior and incumbent names.

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[8] *Comm* on Article 2.1.6.
[9] *Born*, P683; ICC Award No.2321.
[10] CTC was established in 1996 to promote joint venture opportunities between Chinese and western business ventures & facilitate funding. *Available at* http://chinatradecommission.org/.
[11] *Born*, P681.

3. Should the Tribunal find the Arbitration Agreement has been concluded on the basis of "battle of forms", CIETAC still has no jurisdiction over the case.

CLAIMANT may argue that an Arbitration Agreement has been concluded based on ''battle of forms'' as provided by Article 2.1.22 PICC, but even with the application of Article 2.1.22, CIETAC still has no jurisdiction in the present case.

By comparing each party' Arbitration Clauses contained in their standard terms and conditions, the standard term which is common in substance is ''arbitration in Cadenza'' and there are no other agreed terms. Additionally, CLAIMANT's Arbitration Clause designates a non-existent arbitral institution as well as another arbitration seat conflicting with Cadenza, whereas RESPONDENT's Arbitration Clause stipulates the use of the SIAC Rules. This is exactly ''a case where the both parties agree to arbitration but each has a different arbitration clause with discrepancies as to the place where the process will take place or other circumstances relative to the arbitration''. In such case, it seems clear that with a strict application of the knock-out rule, the dispute would be tried before national courts.[12] Moreover, even less strict application of the knock-out rule requires that ''where there is disagreement about some clauses, contradictory clauses be cancelled out and those, though not contradictory, excluded for material alterations.''[13] Consequently, both references to arbitral institution and another arbitral seat by CLAIMANT and

[12] *Viscasillas.*
[13] *Id.*

references to arbitration rules by RESPONDENT should be cancelled out, because they materially altered each others' terms.

Alternatively, the reference to China Trade Commission by CLAIMANT should be voided or eliminated as surplusage. Even if the Tribunal finds that China Trade Commission refers to CIETAC, it should be kicked out for contradiction with RESPONDENT's choice of SIAC as the arbitral institution implied by choosing SIAC Rules based on well-established case law.[14] Therefore, the Arbitration Agreement has been merely concluded on the terms of 'arbitration in Cadenza' without specifications regarding arbitration institution as well as arbitration rules, a situation where the dispute should be referred to courts, according to Model Law Art8(1), which is the law of the arbitral seat, namely, Cadenza.

B. Should CLAIMANT's Arbitration Clause fulfill the substantive requirements, it does not satisfy the form requirement.

Article II of the New York Convention establishes a uniform substantive rule governing the formal validity of international arbitration agreements subject to the Convention. In particular, Article II(1) and II(2) impose a "writing" requirement which requires that international arbitration agreements be in writing and be "signed by the parties or contained in an exchange of letters or telegrams." Thus, Article II "introduced a directly applicable substantive rule, which binds the State-Parties and does not allow the court, in the field of application of the Convention, the possibility

[14] *Zhao Xiuwen*; ICC Award No.12688; *Reply* No.78.

to resort to another rule of substantive or private law in order to confirm the validity of the form of the conclusion of the agreement to arbitrate."[15] In the present case, Cadenza, Minuet and China are all contracting parties to the New York Convention, so the form requirement should be applied. Moreover, there is substantial judicial authority in both civil law and common law jurisdictions to the effect that Article II(2) establishes a minimum as well as a maximum form requirement and that this requirement supersedes national laws purporting to give effect to international arbitration agreements based on lesser form requirements.[16]

In the present case, CLAIMANT's Arbitration Clause is not signed by the parties or contained in an exchange of letters or telegrams. Even though CLAIMANT may argue that its Arbitration Clause conforms to the requirement under Model Law, it is irrelevant, for Model Law as the national law of Cadenza is not applicable here, which prescribes lesser form requirement and should be superseded by the New York Convention. Moreover, the Recommendation regarding Article II of the New York Convention provided by UNCITRAL is not compulsory and binding.

IN CONCLUSION, the Tribunal has no jurisdiction over this case without the existence of a valid arbitration agreement.

[15] *Born*, P536.
[16] *Born*, P538-539.

II. RESPONDENT had no obligation to deliver 999 cars since CLAIMANT sent no confirmation of the order.

A. The contract was concluded with a suspensive condition.

1. The sale of 999 cars would take effect on condition that the sample car satisfied the quality requirement.

A contractual obligation may be made conditional upon the occurrence of a future uncertain event so that the contractual obligation only takes effect when the suspensive condition is fulfilled.[17] CLAIMANT required that it would execute the order only if the sample car satisfied its quality requirement after being tested.[18] This arrangement was concluded in the contract because both parties confirmed and agreed on this provision.[19] Therefore, the contract was concluded with a suspensive condition that the sample car met the quality requirement.

2. CLAIMANT should notify RESPONDENT to proceed with the sale of 999 cars after testing the sample car.

For a contract with a suspensive condition, the obligation only arises upon the fulfillment of the condition.[20] RESPONDENT could only be aware of such fulfillment when CLAIMANT notified RESPONDENT of its satisfaction with the

[17] Article 5.3.1 PICC.
[18] *Ex.*5&7&8.
[19] *Ex.*8.
[20] Article 5.3.2 PICC.

sample car. "Notice" includes a declaration, demand, request or any other communication of intention which is appropriate to the circumstances.[21] Notices are not effective unless and until they reach the person to whom they are given.[22] In this case, CLAIMANT's silence could not indicate its satisfaction on the sample car. Therefore, only if CLAIMANT expressly manifests its satisfaction, would RESPONDENT's obligation to deliver 999 cars be enlivened.

B. The suspensive condition was not fulfilled and therefore RESPONDENT's obligation to deliver the remaining cars was inoperative.

1. CLAIMANT failed to notify RESPONDENT of its satisfaction with the sample car within the testing period.

CLAIMANT stated in its order form that it would test the sample car within one week after receiving it and notify RESPONDENT whether it satisfied its requirement within that testing period. The testing period constituted a "closing date" on or before which date all the stipulated conditions should have been satisfied.[23] CLAIMANT should notify RESPONDENT within the testing period if the sample car satisfied its criteria. CLAIMANT received the sample car before June 10,[24] however, it did not notify its satisfaction until August 10 -- one month later after the receipt of the sample car,[25] which obviously exceeded the testing period.

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[21] Article 1.10(1)&(4), PICC.
[22] *Comm* on Article 1.10(2).
[23] *Comm* on Article 5.3.1.
[24] *Ex.*13.
[25] *Ex.*14.

2. Therefore, the obligation to deliver 999 cars was inoperative.

CLAIMANT failed to notify RESPONDENT within the testing period and the suspensive condition did not fulfill. Hence, the obligation to deliver the 999 cars did not take effect. RESPONDENT did not bear that obligation after the testing period when CLAIMANT requested it to deliver the cars.

C. Alternatively, there existed no mutual assent on the suspensive condition and RESPONDENT was entitled to perform the obligation during a period of time.

1. There existed no mutual assent to the suspensive condition.

Silence or inactivity does not in itself amount to acceptance.[26] Although CLAIMANT proposed a suspensive condition, RESPONDENT expressed no assent to this provision. Its silence shall not indicate acceptance. Moreover, after CLAIMANT reiterated this provision as an offer,[27] RESPONDENT clearly rejected and materially altered this offer in respect of shipment and governing law in Exhibit 10. According to the PICC, the purported acceptance must contain no variation of the terms of the offer or at least none which materially alters them.[28] Therefore, the suspensive condition in CLAIMANT's offer had been rejected and it was not included in the contract.

[26] Article 2.1.6, PICC.
[27] *Ex. 8*
[28] *Comm* on Article 2.1.6.

2. RESPONDENT was entitled to deliver cars during the delivery period.

CLAIMANT designated December 1 as the delivery date in its order form and RESPONDENT agreed, which shall operate as the deadline for RESPONDENT's performance.[29] Hence, there existed mutual consent to the delivery period as time for performance. According to the PICC, if the contract specifies a period of time for performance, any time during that period chosen by the performing party will be acceptable.[30] Therefore, the specific time to deliver the cars is at RESPONDENT's option as long as it does not exceed the maturity date, in other words, RESPONDENT may refuse to perform before December 1.

3. CLAIMANT's default constitutes a performance impediment for RESPONDENT.

According to Article 7.1.2 PICC, the obligor's failure to perform which results from the obligee's acts and omissions could be excused. [31] RESPONDENT offered to supply 100 cars on August 15, but it was hindered because of CLAIMANT's disqualified shipment (which will be submitted in part III). RESPONDENT made another offer to supply 400 cars on September 1, while CLAIMANT rejected just because it could not wait till the agreed deadline.[32] By juxtaposing all these facts, CLAIMANT's acts caused a serious performance impediment; hence CLAIMANT

[29] *Ex.*11.
[30] *Comm* on Article 6.1.1, P179.
[31] *Vogenauer*, P735.
[32] *Ex.*18.

could not justify its non-performance with that of RESPONDENT.

III. RESPONDENT was entitled to withhold performance since CLAIMANT's failure to nominate a qualified ship constituted non-performance and therefore is not liable for the alleged damages.

Even if the obligation to deliver the cars was effective and operative, RESPONDENT was entitled to withhold performance of its obligation since CLAIMANT failed to nominate a qualified ship.

A. CLAIMANT's obligation to nominate a qualified ship constituted a part of the contract.

1. The parties actually agreed upon the shipment as FAS.

A reply to an offer which purports to be an acceptance but contains material modifications is a rejection of the offer and constitutes a counter-offer.[33] The PICC is silent on what is material modification, but according to Article 19(3) CISG material alterations include additional terms relating to, *inter alia*, payment, quantity, and the settlement of disputes. Though CLAIMANT chose CIF INCOTERMS 2010 as applicable shipment in its standard terms and the order form, [34] RESPONDENT clearly rejected and modified the shipment to be FAS INCOTERMS 2010 in Exhibit 10, thus this modification a counter-offer.

[33] Article 2.1.11 PICC.
[34] *Ex.*2& 9.

Acceptance can be made by conducts[35] and acts of performance, such as the payment of an advance and the shipment of goods, could constitute an acceptance.[36] In Exhibit 11, CLAIMANT indicated its assent through the load of goods and payment for the sample car. Therefore, CLAIMANT accepted this counter-offer by conduct.

2. CLAIMANT was obliged to nominate a ship which was able to load goods in the ports nominated by RESPONDENT.

Under FAS,[37] the buyer is obliged to nominate a ship. As mentioned above, RESPONDENT issued a counter-offer in which RESPONDENT referred to the terms "the purchaser is to nominate a ship which is able to load goods in the ports nominated by the seller"[38]. In Exhibit 11, CLAIMANT accepted the counter-offer by conduct thus incorporating that term into the contract. In this sense, the two parties mutually consented that CLAIMANT was obliged to nominate a qualified ship which was able to load goods in the ports nominated by RESPONDENT.

Moreover, CLAIMANT actually followed RESPONDENT's instructions to nominate a ship for further shipment and expected RESPONDENT to nominate a port.[39] All these indicated that CLAIMANT agreed to bear such an obligation to nominate a qualified ship.

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35 Article 2.1.6(1), PICC.
36 *Comm* on Article 2.1.6.
37 *Incoterms* 2010 FAS.
38 *Ex.*4.
39 *Ex.*13&14.

B. CLAIMANT failed to perform the obligation to nominate a qualified ship.

1. RESPONDENT was entitled to nominate the ports.

In Exhibit 11, RESPONDENT nominated three ports i.e. Cadenza, Cantata and Piccolo. CLAIMANT shall perform its obligation to nominate a qualified ship which could load goods in all the three ports. This established an obligation to achieve a specific result for CLAIMANT.[40]

2. The ship nominated by CLAIMANT was unable to load goods in the nominated ports.

The SS Herminia which was nominated by CLAIMANT for further shipments could not dock in the three ports nominated by RESPONDENT, especially unable to dock in Piccolo where the cars were in storage.[41] This obstructed RESPONDENT to load cars in the nominated port. In sum, CLAIMANT failed to achieve the specific result of nominating a qualified ship.

3. CLAIMANT's failure constituted non-performance.

In the case of an obligation to achieve a specific result, a party is bound simply to achieve the promised result, failure to achieve which amounts in itself to non-performance.[42] In the present case, CLAIMANT failed to achieve the specific

[40] Article 5.1.4, PICC.
[41] *Ex.*17.
[42] *Comm* on Article 5.1.4.

result to nominate a suitable ship, thus it constituted non-performance.

C. RESPONDENT was entitled to withhold performance after CLAIMANT's non-performance.

Article 7.1.3(2) PICC stipulates that where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed. It confers on a contracting party the right to withhold performance if the other party does not comply with its obligation.[43] Delivery of goods is sufficiently related to the arrangement for shipment.[44] RESPONDENT could only load the cars after CLAIMANT had arranged suitable shipment. Since the ship arranged by CLAIMANT was too big to dock in the nominated ports, hence RESPONDENT was entitled to withhold its following performance to deliver cars.

D. Even if RESPONDENT breached the sale contract, RESPONDENT is not liable for the damages relating to 500 cars since CLAIMANT failed to mitigate harm.

According to Article 7.4.8 PICC, the aggrieved party has the duty to mitigate harm. Any harm which the aggrieved party could have avoided by taking reasonable steps will not be compensated.[45] RESPONDENT offered to mitigate the harm by supplying 100 cars on August 15 and 400 cars on September 1. The harm could be mitigated by CLAIMANT to accept the offers as reasonable steps.[46] However, CLAIMANT failed

[43] *Vogenauer*, P739.
[44] ICC Award No. 8547.
[45] *Comm* on Article 7.4.8.
[46] *Payzu v. Saunders.*

to load the 100 cars for nominating a disqualified ship and rejected the offer of 400 cars. Hence, RESPONDENT is not liable for the damages relating to 500 cars. In conclusion, RESPONDENT did not breach the contract and shall not be held liable.

REQUEST FOR RELIEF

RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal has no jurisdiction to hear the dispute.

2. RESPONDENT had no obligation to deliver cars.

3. RESPONDENT is not liable for the alleged cars.

(2980 words)