THIRD ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

MEMORANDUM FOR RESPONDENT

Team Number:016

On Behalf of	**Against**
Chan Manufacturing	Longo Imports
Cadenza	Minuet
"RESPONDENT"	**"CLAIMANT"**

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TABLE OF ABBREVIATIONS

UNCITRAL	United Nation Commission on International Trade Law
PICC	Principles of International Commercial Contracts 2010
CIETAC	China International Economic and Trade Arbitration Commission
para.	Paragraph
Ex.	Exhibit
Cl.	Clarifications
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TABLE OF CONVENTIONS AND LAWS

UNIDROIT Principles of International Commercial Contracts 2010

(Cited: PICC)

UNCITRAL Model Law on International Commercial Arbitration

(Cited: UNCITRAL Model Law)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(Cited: New York Convention)

Arbitration Law of the People's Republic of China

(Cited: Arbitration Law of PRC)

China International Economic and Trade Arbitration Commission Arbitration Rules

(Cited: CIETAC Rules)

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

(Cited: Off Cmt)

TABLE OF CASES AND AWARDS

Bauhinia Corporation v. China National Machinery & Equipment Import & Export Corp., Et Al., 819 F.2d 247 (9th Cir. 1987)

(Cited: Bauhinia)

Société Polyclinique des Fleurs v. Peyrin, 2001 Rev. arb. 749 (French Cour de cassation civ. 2e)

(Cited: Société)

White v. Kampner, 641 A.2d 1381, 1387 (Conn. 1994)

(Cited: White)

Manasher v. NECC Telecom, 2007 WL 2713845 (E.D.Mich. Sept. 18, 2007)

(Cited: Manasher)

O'Brien v. MGN Ltd [2001] EWCA Civ 1279, [2002] CLC 33

(Cited**:** O'Brien)

Crawford v. Talk America, Inc., 2005 WL 2465909 (S.D.Ill. 2005)

(Cited: Crawford)

Poel & Arnold v. Brunswick-Balke-Collender Co.110 N.E. 619 (N.Y. 1915)

(Cited: Poel & Arnold)

Butler Machine Tool Co. Ltd v. Ex-Cell-O Corporation(England) Ltd [1979] 1 WLR 401

(Cited: Butler)

Tekdata Interconnections Ltd v. Amphenol [2009] EWCA Civ 1209

(Cited: Tekdata)

Felthouse v. Bindley (1862) EWHC CP J 35

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JURISDICTION

I. CIETAC HAS NO JURISDICTION OVER THE DISPUTE

A. The Arbitration Clause in CLAIMANT's Terms and Conditions [Clause 12, Ex. 2] is not binding

1. There is no agreement on Arbitration Clause contained in CLAIMANT's Terms and Conditions between CLAIMANT and RESPONDENT

The agreement to arbitrate is the foundation stone of international arbitration. It records the consent of the parties to submit to arbitration [Redfern, p85]. The Arbitration Clause in CLAIMANT's Terms and Conditions is only a unilateral expression which failed to acquire consent from RESPONDENT. After RESPONDENT referred to his own Terms and Conditions which were obtainable for CLAIMANT simply by typing the company name of RESPONDENT under Google [Ex. 10], CLAIMANT led RESPONDENT to his Terms and Conditions with the attachment of a URL [Ex. 13], which indicated CLAIMANT's disagreement on Arbitration Clause. Afterwards, neither conduct nor any express statement was made by RESPONDENT to accept the Arbitration Clause contained in Terms and Conditions from CLAIMANT [PICC Art. 2.1.6(1)]. Mere silence of RESPONDENT did not in itself amount to acceptance [PICC Art. 2.1.6(1)]. Therefore, there was no agreement on CLAIMANT's Arbitration Clause [UNCITRAL Model Law, Art. 7(1)].

2. Alternatively, CLAIMANT's Arbitration Clause is void

(a). The place of arbitration selected by CLAIMANT is ambiguous

It is stated in Clause 12 that "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" [Ex. 2]. Cadenza and Beijing were both mentioned which lacks any indication what place of arbitration was intended. At the same time, no further agreement was reached to this regard. Therefore, the Arbitration Clause is void due to such ambiguity [Bauhinia].

(b). Even if the place of arbitration is identified, CLAIMANT's Arbitration Clause is void under Arbitration Law of People's Republic of China

Due to the word "seat" used in Clause 12, the place of arbitration selected by CLAIMANT might be identified as Beijing. And no applicable law was chosen by the parties to govern the Arbitration Clause. Accordingly, as per the *seat theory*, a clear territorial link is created between the place of arbitration and the law governing that arbitration, *the lex arbitri* [Redfern, p180]. Furthermore, UNCITRAL Model Law Art. 34(2)(a)(i) and New York Convention, Art. V(1)(a) implicate that the arbitration agreement subjects to the law of the seat of arbitration, hence Arbitration Law of PRC shall be applied in terms of the validity of the Arbitration Clause.

Moreover, all the relevant procedural matters relating to arbitration complied with CIETAC Rules [Cl. 27]. The arbitration institution selected by CLAIMANT was

"China Trade Commission", which was not clearly referred to or adequately defined because it did not exactly accord with the required names under CIETAC Rules [CIETAC Rules, Art. 1(2)]. Hence, CIETAC cannot presume the jurisdiction without an alternative institution name to be logically inferred from. Additionally, no supplementary agreement on arbitration institution has been reached. Therefore, the Arbitration Clause is void under Arbitration Law of PRC, Art.18.

B. Alternatively, the arbitration to CIETAC was inadmissible as pre-condition of arbitration was not fulfilled

As per CLAIMANT's Arbitration Clause [Ex. 2], conciliation is a condition precedent to arbitration, in which situation claim for arbitration is inadmissible [Société]. And it is quite obvious that conciliation is the mandatory condition as the word "shall be" shows [Born, p842], which requires both parties to participate in the mandatory conciliation [White]. What's more, informal meeting does not equal to conciliation as it is to sort out procedural issues that facilitates the process of arbitration [Cl. 23], which is irrelevant with substantial issues related to this dispute. Therefore, the pre-condition was not fulfilled, which affects the ability of CLAIMANT to pursue a particular submission or reference to arbitration [Born, p847].

II. ALTERNATIVELY, DISPUTES SHALL BE REFERRED TO AD HOC ARBITRATION IN CADENZA

A. Both parties has clear common intention of referring disputes to arbitration, which shall be respected and upheld

Both parties had their own arbitration clause in their standard terms [Ex. 2, 4], which clearly indicated that their common intention of resolving the disputes in their contractual relationship is resorting to arbitration, as opposed to litigation.

B. Both parties should resort to ad hoc arbitration in Cadenza

Disputes shall not be referred to institutional arbitration due to the non-existence of arbitration agreement. Both parties incorporated Cadenza into each Arbitration Clause as the place of arbitration, or, as an alternative place of arbitration. To give effect to this common intention, arbitration shall be upheld where there is a territorial link to *lex arbitri* that could govern the procedure of arbitration. Accordingly, ad hoc arbitration is needed and Cadenza could be reasonably deemed as the place of arbitration.

Moreover, the place of arbitration could also be determined by arbitral tribunal having regard to the circumstances of the case [UNCITRAL Model Law, Art. 20(1)]. In terms of convenience, Cadenza is the best choice for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents since disputes mostly took place in Cadenza [UNCITRAL Model Law, Art. 20(2)].

III. CONCLUSION ON JURISDICTION

CIETAC has no jurisdiction over the dispute.

MERITS

I. THERE IS NO CONCLUSION OF THE CONTRACT BASED ON ORDER FORM

A. CLAIMANT proposed the offer based on the Order Form [Ex. 9] without the support of his own Terms and Conditions [Ex. 2]

1. The Order Form sent by CLAIMANT constitutes the offer of purchasing 1000 cars [Ex. 9]

The Order Form, which was sufficiently definite and indicated the intention of CLAIMANT to be bound in case of acceptance, constitutes the offer of purchasing 1000 cars [PICC Art. 2.1.2].

2. CLAIMANT's own Terms and Conditions [Ex. 2] were not validly incorporated into his offer

CLAIMANT failed to mention his Terms and Conditions on the official Order Form [Ex. 9] which is defined as an offer. The non-existence of the word in the Order Form that took the role as reference to standard terms amounts to the impossibility of

drawing RESPONDENT's attention to those Terms and Conditions. And nothing in the Order Form could reveal a clear intent of incorporating CLAIMANT's Terms and Conditions [Manasher]. Accordingly, the requirement of an adequate and reasonable notice of those terms was not satisfied, and CLAIMANT's intention of incorporating his own Terms and Conditions into his offer of purchasing 1000 cars was not found, despite of the fact that CLAIMANT indeed referred to his own Terms and Conditions the first time he showed his interest in purchasing cars [Ex. 1]. Therefore, CLAIMANT's own Terms and Conditions were not validly incorporated into his offer.

B. RESPONDENT rejected the offer based on Order Form by proposing the counter-offer

1. There is a valid incorporation of RESPONDENT's Terms and Conditions

RESPONDENT mentioned his own Terms and Conditions, which were accessible to CLAIMANT on webpage by Googling under the company name [Ex. 3]. Furthermore, RESPONDENT explicitly expressed his intention of incorporating his own standard terms by the word "we again refer you to our Terms and Conditions" in his reply to the offer [Ex. 10]. It is clearly recognized that terms can be incorporated by reference to another document in which they can be found. And it is sufficient that such reference to the existence of those standard terms is valid as they are obtainable to CLAIMANT regardless of the burden of surfing the Internet in order to learn the terms. [O'Brien, Crawford].

2. The Terms and Conditions incorporated contains material alteration which constitutes a counter-offer

The Terms and Conditions incorporated contains additions, limitations and modifications on subject-matter including clauses on price, shipment, arbitration, and liability exemption, etc [Ex. 4]. There is separate emphasis on FAS and PICC term, together with a proposal of separating the shipment and payment of the sample car from the order of 1000 cars [Ex. 10]. Hence, such reply was a rejection to the offer and constituted a counter-offer [PICC Art. 2.1.11(1)].

C. CLAIMANT rejected RESPONDENT's counter-offer by incorporating his own Terms and Conditions

1. A valid incorporation of CLAIMANT's own Terms and Conditions is made

In response to the counter-offer from RESPONDENT, different from the circumstances where no word of reference to his own terms was mentioned, CLAIMANT clearly referred to his own Terms and Conditions by the word "urge you to note" and address of website that contains those Terms and Conditions [Ex. 13]. Therefore, those Terms and Conditions were validly incorporated by specific reference to the location of them on the internet.

2. The Terms and Conditions incorporated contains material alteration which amounts to another counter-offer

The price term and Arbitration Clause contained that relate to the subject-matter are materially different from those in RESPONDENT's terms. Therefore, CLAIMANT made another counter-offer by killing the one sent by RESPONDENT [PICC Art. 2.1.11(1)].

3. CLAIMANT had no intention of accepting counter-offer from RESPONDENT

If the intention of CLAIMANT has been to accept the counter-offer or the new proposal made in RESPONDENT's letter of March 20, 2011 [Ex. 10], it would have been a simple matter for CLAIMANT to have indorsed his acceptance upon the counter-offer which RESPONDENT's letter of March 20, 2011 has enclosed. Instead of adopting this simple and obvious method of indicating an intention to accept, CLAIMANT submitted his own proposal by incorporating the Terms and Conditions which should be accepted [Poel & Arnold]. Therefore, no intention of accepting counter-offer from RESPONDENT was found but the intention of CLAIMANT of concluding the Contract on his own Terms and Conditions was explicitly clear.

D. Silence or inactivity of RESPONDENT did not in itself amount to acceptance

In such battle of forms, the traditional analysis of offer, counter-offer and acceptance shall be applied [Butler]. Upon the application of general rule of offer and acceptance, there is either no Contract at all since CLAIMANT sent his counter-offer at last, or, if the two parties have started to perform without objecting to each other's standard form, a Contract would be considered to have been concluded on the basis of those terms which are the last to be sent or to be referred to (the "last shot")[Off Cmt Art. 2.1.22(2)].

The prerequisite of the adoption of last shot doctrine is the possibility of accepting the counter-offer by conduct [Jill Poole, p61]. Where the facts are no more complicated than that A makes an offer on his conditions and B accepts that offer on his own conditions and, without more, performance follows, Contract is concluded on B's conditions [Tekdata], because the performance from A is regarded as an acceptance to B's counter-offer.

However, RESPONDENT did not make performance after the receipt of counter-offer from CLAIMANT, which precluded the application of the ‘last shot’ doctrine.

RESPONDENT was free not only to accept or not to accept the offer, but also simply to ignore it [Off Cmt Art. 2.1.6(3)]. Therefore, acceptance cannot be imposed due to silence or inactivity of RESPONDENT [Felthouse]. The lacking of acceptance excludes a Contract from coming into existence [PICC Art. 2.1.1].

E. No confirmation of the order from CLAIMANT has arrived [Ex. 15]

Both parties insisted on their own Terms and Conditions, each constituting a counter-offer, and RESPONDENT's silence and inactivity have made it clear that the Contract has not been concluded, which should have been known by CLAIMANT. If CLAIMANT did have the intention and will to continue to proceed with the purchase based on the Order Form, he should have delivered a confirmation of the order, as a new offer, and discussed again with RESPONDENT whose Terms and Conditions shall be applied. Since no confirmation has arrived, RESPONDENT could reasonably believe that CLAIMANT simply did not wish to proceed with the purchase.

With regard to the criteria, though agreed by both parties [Ex. 8], that if CLAIMANT did not notify RESPONDENT of the defects and unsatisfactory performance of the sample car within one week the reminding cars shall be delivered, it was meaningless due to the non-existence of the Contract.

F. Assumption on conclusion of Contract is not equivalent to the real existence of the Contract

In *Anson's Law Contract*, unless and until the counter-offer is accepted, there is no Contract even though both buyer and seller may firmly believe that a Contract has been made. RESPODENT was allegedly to have believed the conclusion of the Contract by words that "it is you who has breached the Contract" [Ex. 17]. But the subjective assumption shall not be taken as one of the elements in proving the real

existence of the Contract for the reasons that reasonable businessmen do not necessarily start resolving their problems by making legal assertions and counter assertions, which is left for the lawyers later [Tekdata], and, more importantly, the most essential requirement of the formation of the Contract，namely the general rule of offer and acceptance, has not been satisfied.

G. Consequently, RESPONDENT is not bound by the Contract

Since the Contract based on Order Form was not concluded between the two parties, RESPONDENT had no obligation to perform subject to any requirement. Hence, RESPONDENT was free to sell cars to others, as no Contractual relationship existed between them.

II. CLAIMANT BREACHED THE CONTRACT OF 100 CARS

A. the Contract of 100 cars was valid

The proposal of Contract of 100 cars got express acceptance from CLAIMANT [Ex. 15, 16]. CLAIMANT agreed to nominate a ship himself under FAS INCOTEMS 2010 for the shipment of the reminding 999 cars by his conduct as per the instruction from RESPONDENT [Ex. 13]. Due to the non-existence of the Contract based on Order Form, the shipment of 999 cars is no longer obligatory, in spite of which , CLAIMANT still agreed to insist the ship originally nominated being loaded with 100 cars as per the previous instruction given by RESPONDENT after he accepted the new offer [Ex. 16]. Therefore, the Contract of 100 cars is valid with the incorporation

of the FAS INCOTERMS 2010 and instruction given by RESPONDENT on March 25, 2011 [Ex. 11].

B. CLAIMANT breached Clause 11 in RESPONDENT's terms by nominating an inappropriate ship (SS Herminia)

Since CLAIMANT has agreed to the instruction given by RESPONDENT that the ship nominated need to be able to load out of Cadenza, Cantata and Piccolo [Ex. 11, 13], it was certainly CLAIMANT's obligation to investigate the information about all three ports and then nominate a qualified ship. Moreover, by no means was the investigation of information on three ports deemed as hard work that went beyond the capability of CLAIMANT as CLAIMANT could have searched the internet or made a phone call to managerial department in those ports or even asked RESPONDENT positively. However, by ignoring the obligation to investigate the information concerned and acting negatively, CLAIMANT failed to nominate a ship that could load out of all three ports nominated by RESPONDENT in performing 100 cars' contract [Ex. 17], for it was too big to load in Piccolo where the goods was in storage [Cl. 14], constituting the defective performance under PICC Art.7.1.1. Therefore, it is CLAIMANT who breached the Contract of 100 cars.

III. RESPONDENT IS NOT LIABLE FOR DAMAGES

RESPODENT is not liable for damages since the Contract based on Order Form is inexistent, and it was CLAIMANT that breached the Contract of 100 cars.

IV. CONCLUSION ON MERITS

There is no Contract based on Order Form between both parties, and RESPONDENT is not liable for damages.

REQUEST FOR RELIEF

RESPONDENT respectfully requests the tribunal to find that:

A. The tribunal of CIETAC has no jurisdiction over the dispute, and alternatively, disputes shall be referred to ad hoc arbitration in Cadenza;

B. There is no Contract based on the Order Form between both parties;

C. CLAIMANT breached the 100 cars' contract;

D. RESPONDENT is not liable for damages.

（2620 words)