THIRD ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOT COMPETITION

MEMORANDUM FOR CLAIMANT

TEAM 017

CLAIMANT	**RESPONDENT**
Longo Imports	Chan Manufacturing
Miunet	Cadenza
Longo	Chan

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AUTHORITIES

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Treaties, Conventions and Laws

1. UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006)
(Cited: UNCITRAL Model Law) Commentary
2. UNIDROIT Principles of International Commercial Contracts 2010
(Cited: PICC)
3. Convention on the Recognition and Enforcement of Foreign Arbitral Awards
(Cited: New York Convention)
4. China International Economic and Trade Arbitration Commission Arbitration Rules
(Cited: CIETAC Arbitration Rules)
5. United Nations Convention on Contracts for the International Sale of Goods
(Cited: CISG)

Cases

1.Lovelock, Ltd. V. Exportles [1968] 1 Lloyd's Rep. 163
(Cieted: Lovelock)
2. Mutual Life Ins. Co. v Hill (1904) 193 US 551.
(Cieted: Mutual life)

STATEMENT OF FACTS

CLAIMANT, Longo Import located in Minuet is a company dealing with wind turbines, solar panels but intends to branch out into electric cars.
RESPONDENT, Chan Manufacturing is a company of automotive industry specializing in electric car located in Cadenza.

On **5th January 2011**, CLAIMANT sent a letter to RESPONDENT to invite RESPONDENT to establish a business relationship about electric cars. In the letter, CLAIMANT simply introduced their requirement about the transaction and refer the terms and conditions on the internet.

On **15th January**, RESPONDENT replied the letter from CLAIMANT and stated the price list of three models of electric cars and the terms and conditions of the company on the internet .Also, the wheat produc-tion in Ego and confirmed that CLAIMANT said the quality meeting the lower end of its requirements was still excellent.

On **20th January**, CLAIMANT sent a letter to RESPONDENT to ask a sample car for testing and noted the boat SS Herminia which calling into the port in Cadenza will have room for the car and the date of delivery.

On **30th January**, RESPONDENT decline the require since CLAIMANT didn't provide a firm sales contract.

On **5th February**, CLAIMANT was happy to note that the RESPONDENT's introduce matched expectation and agreed to sent an order with the proviso, which is "if the car does not come up to expectations CLAIMANT will not execute the order". Furthermore, CLAIMANT copied the requirements which RESPONDENT agreed in the phone call 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 1, 2011".

On **20th March**, RESPONDENT referred the terms are FAS and prefer to separate the shipment of single car from 1000 cars and will loaded the car until receive payment. RESPONDENT also pointed out the governing law is the UNIDROIT principles 2010.

On **25th March**, RESPONDENT loaded the car on SS Herminia and except CLAIMANT to nominate a ship for further actions.

On **30th March**, RESPONDENT sorted the payment of return of the car and the obligation of shortcoming sof the car.

On **10th June**, CLAIMANT received the car and showed no objection about using the UNIDROIT Principles 2010 as the governing law.CLAIMANT urge RESPONDENT to note the terms and conditions of them on the website.

On **10th August**, CLAIMANT concerned the none docking instructions of RESPONDENT and noted RESPONDENT that the order has been enlivened.

On **15th August**, RESPONDENT informed CLAIMANT that there is no confirmation from CLAIMANT and RESPONDENT simply assumed CLAIMANT do not wish to proceed with the purchase of 999 cars. RESPONDENT stated that remaining cars were sold except 100.

On **20th August**, CLAIMANT restated the terms that if they do not complain all is well and that they expect the contract of the sale to continue. Since RESPONDENT forced CLAIMANT to accept the circumstance as there are forward orders, CLAIMANT pointed out that RESPONDENT breached the contract and claimed the 100 cars to mitigated the losses.

On **1st September**, RESPONDENT pointed out that CLAIMANT breached the contract as clause 11 of RESPONDENT's general terms stated. For remedy, RESPONDENT suggested a new contract for the sale of 400 cars at a discount rate of 2%.

On **10th September**, CLAIMANT refused the new contract and would like to notify the lawyers to commence arbitration as per clause 12 on CLAIMANT's website.

SUMMARY OF SUBMISSIONS

I. This tribunal has jurisdiction to hear this dispute.
A.Both parties have clearly expressed their intention to resort their disputes to arbitration.
B.Arbitration clauses listed on RESPONDENT's webpage [Exhibit 4 Clause 9] is not valid.
C.CLAIMANT's arbitration clause addresses more details and should prevail.
(A) CLAIMANT's arbitration clause addresses more details.
i.CLAIMANT nominated CIETAC as the arbitration institution.
ii.CLAIMANT addresses other important details.
(B)CLAIMANT'S arbitration clause should prevail.

II.The contract between the two parties was valid
A.The order form is an offer for the sale of 1000 cars
B.The contract was concluded by RESPONDENT's acceptance
(A)RESPONDENT gave an acceptance by statement
(B)If the statement is not convincing enough, the conduct of RESPONDENT amount to an acceptance

III.RESPONDENT breached the contract and was liable for the damage
A. RESPONDENT failed his obligation under the contract
(A)there was a fixed time of delivery by agreement
(B)RESPONDENT acted inconsistently with the Agreement
(C)RESPONDENT failed his obligation of best efforts
B.RESPONDENT UNLAWFULLY TERMINATED THE CONTRACT
(A)RESPONDENT'S termination breached the contract
(B)RESPONDENT did not performed his obligation to notice CLAIMANT

ARGUMENT ON JURISDICTION

I. This tribunal has jurisdiction to hear this dispute.

A. Both parties have clearly expressed their intention to resort their disputes to arbitration.

CLAIMANT and RESPONDENT have listed their arbitration clause on their webpage [Exhibit 2 Clause 12 and Exhibit 4 Clause 9]. Both parties reminded each other to refer to their own terms and conditions on webpage [Exhibit 1 and Exhibit 3]. These terms could be deemed as clear expressions of both parties' intention to resort their disputes to arbitration.

B. Arbitration clauses listed on RESPONDENT's webpage [Exhibit 4] is not valid.
RESPONDENT nominated two arbitration seats in its arbitration clause [Exhibit 4 Clause 9]. According to the case Lovelock, court cannot give effect to the arbitration clause which has two arbitration seats because it is conflicting and uncertain to be applied. Therefore, RESPONDENT's arbitration clause is defective and should not prevail.

C.CLAIMANT's arbitration clause addresses more details and is applicable.
(A)CLAIMANT'S arbitration clause addresses more details.

i. CLAIMANT nominated CIETAC as the arbitration institution.
Arbitration institution stipulated by CLAIMANT is inaccurate. However, where the name of an arbitration institution as stipulated in the agreement for arbitration is inaccurate, but the specific arbitration institution can be determined, it shall be ascertained that the arbitration institution has been selected[Article 3 of Interpretation].
It is stated by CLAIMANT that "All disputes must be referred to the China Trade Commission [Exhibit 2 Clause 12]", and CIETAC is the only arbitration institution which could be determined. Therefore, CIETAC has been selected as the arbitration institution.

ii CLAIMANT addresses other details.
CLAIMANT stated in its standard terms "it must be referred to arbitration in Cadenza using the relevant rules. The seat shall be Beijing and the language English". Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect [Article 4.5 of PICC]. Therefore, to interpret CLAIMATN's arbitration clause, all the terms shall be given effect. CLAIMANT nominated Beijing as the arbitration seat, Cadenza as the place to hold the arbitral proceedings [Exhibit 2 Clause 12].

CLAIMANT has nominated CIETAC as the arbitration institution. The parties shall be deemed to have agreed to arbitration in accordance with these Rules if they have provided for arbitration by CIETAC [Article 4.2 CIETAC Rules].Therefore, CIETAC Rules shall be the applicable arbitration rules.

(B)CLAIMANT's arbitration clause should prevail.

According to the case Mutual Life, clauses which address a matter in detail will take precedence over clauses that address a matter in general terms.

CLAIMANT nominated the arbitration institution, arbitration seat, place to hold the arbitration proceedings, and arbitration rules. On the contrary, RESPONDENT's arbitration clause on Exhibit 4 nominated two arbitration seats which contain conflicts in it and RESPONDENT hasn't nominated a special arbitration institution. It is obvious that CLAIMANT's clauses address more important details and should prevail.

ARGUMENT ON MERITS

II. The contract between the two parties was valid

A. The order form was an offer for the sale of 1000 cars.
A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance[Article 2.1.2 PICC].

A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price [Article 14 CISG].

The order form referred to the sale of the cars containing the goods, electric cars; quantity, 1000; price, $US 12,000 and other items[Exhibit 9] and addressed to Longo Imports. The definite expression on the order form and previous negotiations showed CLAIMANT's intention to be bound once acceptance [Exhibit 8].

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including
(a) preliminary negotiations between the parties;
(b) practices which the parties have established between themselves;
(c) the conduct of the parties subsequent to the conclusion of the contract;
(d) the nature and purpose of the contract;
(e) the meaning commonly given to terms and expressions in the trade concerned;
(f) usages.

B.The contract was concluded by RESPONDENT's acceptance.

(A)RESPONDENT gave an acceptance by statement.

A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.[ARTICLE 2.1.1]

RESPNDENT replied the letter which attached the order form and primarily expressed the acceptance of the order form [Exhibit10]. On March 25, RESPONDENT consent that he would meet the deadline of delivery of the remaining cars [Exhibit 11] and all his statements constitute an acceptance.

(B)If the statement is not convincing enough, the conduct of RESPONDENT amount to an acceptance.

A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance [ARTICLE 2.1.6].

By virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph [Article 18 CISG].

Pursuant to CLAIMANT's phone instruction, RESPONDENT loaded the car, which was part of the contract, on the SS Herminia and received CLAIMANT's payment [Exhibit 11]. These conduct satisfied the elements of assenting by performing an act, namely dispatch of the goods or payment of the price hence was effective at that moment.

(C) RESPONDENT's reply was not amount to a counter-offer.

If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy.[ARTICLE 2.1.12]

III. RESPONDENT breached the contract and was liable for the damage

A. RESPONDENT failed his obligation under the contract.

(A) There was a fixed time of delivery by agreement.

The CLAIMANT clearly noted the expected delivery date is December 1, 2011 and RESPONDENT agreed to the criteria set out on Feb 5th and order form [Exhibit 8 and 9]. As the contract is valid, and the parties has reached an agreement on the shipping date, RESPONDENT is bound with the obligation to deliver the product before due time. However the RESPONDENT confirmed his anticipatory breach owing to a not justifiable excuse, and sold the ordered car to CLAIMANT's competitors [Exhibit 15].

(B)RESPONDENT acted inconsistently with the agreement.

To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result [ARTICLE 5.1.4].

The delivery date was fixed and agreed by both parties, not only can be found on the offer and the acceptance, but also the previous negotiation between the two parties [Exhibit 8]. Moreover, the two parties both emphasized that "time is of essence"[Exhibit10 and 13], which provides that "time " is the Condition Clause in this contract and the breach of the condition clause lead to material breach of the contract.

(C)RESPONDENT failed his obligation of best efforts.

Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations. [ARTICLE 5.1.3]

To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.[ARTICLE 5.1.4(2)]

Even if RESPONDENT's obligation was defined a best effort one, RESPONDENT did not come to time. On June 10, CLAIMANT notified RESPONDENT the car was arrived and RESPONDENT nominated SS Herminia for further shipments. Two months later, CLAIMANT wrote to RESPONDENT again to urge [Exhibit 14].However, neither RESPONDENT gave response duly to CLAIMANT nor did he let CLAIMANT know the wrong nomination of the ship until September 1[Exhibit 17], which wasted time and were not in accordance with best efforts.

B.RESPONDENT unlawfully terminated the contract.

(A)RESPONDENT'S terminated the contract.

[Exhibit.8] RESPONDENT agreed with the criteria set out on January 20 which is: Once we receive the sample car we will test it and unless we find it unsatisfactory will expect the reminding cars to be sent by December 1, 2011. It sufficiently shows that RESPONDENT has an obligation to send the reminding cars December 1, 2011, if CLAIMANT didn't find any unsatisfactory.

What's more, this term is also part of the contract. It is clearly stated in order from that "Any defects or unsatisfactory performance will be notified within one week of receipt of the sample car". RESPONDENT accepted this term without modification, therefore, this term became part of the contract.

It is very clear that: the fact that CLAIMANT didn't notify RESPONDENT unsatisfactory of the sample car after receiving it, means RESPONDENT still had an obligation to deliver 999 cars, but RESPONDENT failed to do so. Therefore, RESPONDENT breached the contract by failing to perform its obligation of sending 999 cars.

(B)RESPONDENT did not performed his obligation to notice CLAIMANT

On June 10, CLAIMANT notified RESPONDENT that we nominated SS Herminia for further shipments [Exhibit 13].

However, it showed in EX.17 [dated September 1] 2011 it is after 3 months that RESPONDENT notified us the wrong nomination of the ship. In this period, RESPONDENT just kept science without any action. What else, they sold cars ordered by us to our competitors in advance [Exhibit 18]. Any reasonable person could have acted in a totally different way.

C. RESPONDENT should be liable for all damages.

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 [Article7.4.1 PICC] .

The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.

Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress [ARTICLE 7.4.2 PICC].

REQUEST FOR RELIEF

CLAIMANT respectfully requests the tribunal to find that:

1. The tribunal has jurisdiction over the dispute;
2. RESPONDENT breached the contract;
3. RESPONDENT is liable for damages to CLAIMANT; and
4. CLAIMANT should be awarded the costs of the arbitration.