THIRD ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOT COMPETITION

MEMORANDUM FOR RESPONDENT

TEAM 017

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

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AUTHORITIES

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.Officail Comment of UNIDROIT Principles of International Commercial Contracts
(Cited: Official comment of UNIDROIT)

6. United Nations Convention on Contracts for the International Sale of Goods
(Cited: CISG)

Commentary

1. M.HUNT	A.Redfern and M. Hunter, Law and Practice of International Commercial Arbitration, Sweet & Maxwell, 2004
2. M.Yang Liangyi	Arbitration Law: From British Arbitration Act 1996 to International Commercial arbitration, Chinese Law Press, 2006

Cases

1. Lovelock	Lovelock, Ltd. V. Exportles [1968] 1 Lloyd’s Rep. 163
2.Lucky-Goldstar	Lucky-Goldstar international (HK) Ltd v. Ng Moo Kee Engineering, Supreme Court of Hong Kong, [1993] 2 HKLR, 73

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.

ARGUMENT ON JURISDICTION

I .CIETAC has no jurisdiction over this dispute.

A.The parties do not reach an arbitration agreement.
B. CLAIMENT's arbitration clause is invalid due to uncertainty.

II. There is no valid arbitration agreement in the contract. Alternatively, parties should resort to ad hoc arbitration with the seat of arbitration in Cadenza.

A.Parties should resort to ad hoc arbitration.
B.The seat shall be in Cadenza.

ARGUMENT ON MERITS

III.The contract between the two parties was invalid.

A.RESPONDENT did not accept CLAIMANT's offer and gave an counter-offer
(A)RESPONDENT did not accept CLAIMANT's offer by modifying the offer
(B)CLAIMANT did not give an acceptance to RESPONDENT's counter-offer
B.RESPONDENT's conduct did not amount to an acceptance

IV.Even if the contract was invalid, RESPONDENT did not breach it.

A.RESPONDENT met its obligation under the contract.
(A)The expression showed that the delivery of the remaining cars is a duty of best efforts
(B)Determination of kind of duty involved should also consider the other party's influence

B.RESPONDENT had the right to withdraw his performance.
C. RESPONDENT's non performance was exempted from the shipment terms.

ARGUMENT ON JURISDICTION

I.CIETAC has no jurisdiction over this dispute.

A.The parties do not reach an arbitration agreement.
The CLAIMENT use its standard terms on website to conclude a contract [See Exhibit. 2]. PICC provided that the general rules on formation apply where parties use standard terms in concluding a contract.[See PICC, Art.2.1.19] As a result, it follows that standard terms proposed by one party bind the other party only on acceptance.[See PICC, Art.2.1.19, Comment 3]. In the case, the RESPONDENT showed no acceptance to the CLAIMENT's arbitration clause especially the CIETAC Rules. On the other hand, after the CLAIMENT send his standard terms as an offer, the RESPONDENT replied with his standard terms. [See Exhibit. 4] Due to the conflicts about arbitration seat and rules in their respective standard terms, there is a battle of forms. Specifically, UNIDROIT Principles of International Commercial Contracts [See PICC Art.2.1.22] says that where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance. It shows PICC takes "knock out" doctrine [See PICC, Art.2.1.22, Comment 3] to settle the battle of standard forms, which means any standard terms not common in substance with the agreed terms will knock out. Although the parties agreed several terms concerning the sale of good, they are no common in substance with either party's arbitration clause. Therefore, pursuant to the general rules on formation [PICC, Art.2.1.19]] and the "knock out" doctrine the Art.2.1.22 has established, the parties reach no arbitration agreement.

B. The CLAIMENT's arbitration clause is invalid due to uncertainty.
The CLAIMENT arbitration clause contained two different seats of arbitration [Clause 12, Exhibit 2], it says" If no agreement can be reached it must be referred to arbitration in Cadenza using the relevant rules." and "The seat shall be Beijing". The words "referred to arbitration in" mean the seat of arbitration where the arbitral award deemed to be made. [Yang Liangyi, Arbitration Law]. The word "seat" also means the judicial seat of arbitration. [Redfern, Hunt, Law and Practice of International Commercial Arbitration]
Furthermore, as the background information indicates, Cadenza is a common law country, but Beijing is the capital of China and China is not a common law country.

So Beijing is not in the county of Cadenza which means the clause has two arbitration seats. In Lovelock Ltd. V. Exportels，the judge Lord Denning said the court cannot give effect to the arbitration clause which has 2 arbitration seats because it is conflicting and uncertain to be applied. Therefore, the CIETAC arbitration clause is invalid due to uncertainty.

II. There is no valid arbitration agreement in the contract. Alternatively, parties should resort to ad hoc arbitration with the seat of arbitration in Cadenza.

A.Parties should resort to ad hoc arbitration.
Even if the parties do not reach a valid arbitration agreement, parties' common intention to resort to arbitration is clear and certain [Clause 12, E.2; Clause 9, Exhibit 4] In the absence of agreed arbitration rules, parties should resort to ad hoc arbitration according to a similar case "Lucky-Goldstar International Ltd v. NgMoo Kee Engineering Ltd". Thus, the RESPONDENT submits that the tribunal should proceed as an ad hoc arbitration.

B.The seat shall be in Cadenza.
Further, the seat of arbitration shall be Cadenza. First, in each party's arbitration clause, they both make Cadenza as a choice of seat. Second, in the case at issue, including the shipment loading problem took place in Cadenza. Having regard to the circumstances of the case, including the convenience of hearing the witness of the car storage and production in Cadenza [Article 20(1) Model Law], RESPONDENT submits that the seat of arbitration should be Cadenza.

ARGUMENT ON MERITS

III The contract between the two party was invalid.

A.RESPONDENT did not accept CLAIMANT's offer and gave an counter-offer.

(A)RESPONDENT did not accept CLAIMANT's offer by modifying the offer.

A reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an

acceptance, unless the offeror, without undue delay, objects to the discrepancy [ARTICLE 2.1.11].

Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.[Article 19(3)]

RESPONDENT insisted on the INCOTERMS of FAS [Exhibit 10] and showed the intention not be bound by the short comings borne by CLAIMANT [Exhibit 12]. These concerned the extent of the two parties' liabilities.

By accepting only the delivery of the sample car requirements and being silent or make change to the other substantial terms, RESPONDENT's reply contained modifications materially altered the terms of the offer and constituted a counter-offer

(B)CLAIMANT did not give an acceptance to RESPONDENT's counter-offer

An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror.

72 days passed after RESPONDENT's 3 letters and counter-offer, but the CLAIMANT, did not accept within a reasonable time in the light of [Art 2.1.7 PICC] but kept silent. Silence or inactivity does not in itself amount to acceptance.[Article 2.1.6(1) PICC]. Therefore, the two parties did not meet any agreement of the remaining cars.

B.RESPONDENT's conduct did not amount to an acceptance
The conduct of sending the sample car and receiving the payment of the sample car only means RESPONDENT had no objection of the sample car requirement, not automatically amount to an acceptance of the terms of the remaining cars.

The transaction of the sample was a precondition of the executing of the order. Any dispute or problem arising may prevent the contract from formation. What's more, RESPONDENT could not rely on the unreasonable late reply and inactivity by CLAIMANT [Exhibit 14].

IV.Even if the contract was invalid, RESPONDENT did not breach it.

A.RESPONDENT met its obligation under the contract.
(A)The expression showed that the delivery of the remaining cars is a duty of best

efforts.
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[P13 Art5.1.4 (2)].

In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to (a) the way in which the obligation is expressed in the contract [P13 Art 5.5.1(a)] ;

On March 25 [Exhibit 11], RESPONDENT gave an acceptance for the remaining cars, he said" we will do our best to meet the deadline", it is obvious its obligation involves a duty of best efforts to attempt to meet the deadline, but no guarantee that it will definitely be met [ARTICLE 5.5.1(a)].

(B)Determination of kind of duty involved should also consider the other party's influence.

In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to(d) the ability of the other party to influence the performance of the obligation.[P13 ARTICLE 5.1.5 (d)]

[Exhibit 11] whether RESPONDENT can fulfill the delivery is depend on CLAIMANT's test results of the car, his confirmation and correct nomination of the ship which finally failed attributable to the fault of CLAIMANT. Hence if RESPONDENT's obligation was defined a specific result duty it is unreasonable [ARTICLE 1.7] and infracts the principles of interpretation [ARTICLE 4.1 (1) PICC].

A contract or a contractual obligation may be made conditional upon the occurrence of a future uncertain event, so that the contract or the contractual obligation only takes effect if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).[ARTICLE 5.3.1 PICC]

B.RESPONDENT had the right to withdraw his performance
Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed [ARTICLE 7.1.3(2) PICC].

[Art 7.1.3(2) PICC] the obligation to load the cars was posterior to the obligation of nominating an appropriate ship, and RESPONDENT could not fulfill its obligation at all unless the CLAIMANT perform its own obligation first, however, ss Herminia cannot dock in the port[Exhibit 17], this defective performance made RESPONDENT withhold its performance. So that CLAIMANT's requirement was irrational under

ARTICLE 7.1.2.

ARTICLE 7.1.2
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.

C. Alternatively, RESPONDENT's non performance was exempted from the shipment terms

The [FAS term B5] provides the buyer must bear all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4. [ARTICLE 6] provides that the buyer must pay any additional costs incurred, either because: (ii) the vessel nominated by the buyer fails to arrive on time or is unable to take the goods. CLAIMANT's nominated ship cannot dock in the right port to load the cars; CLAIMANT shall suffer from the loss so incurred. As a good faith dealer, RESPONDENT is not willing to engage CLAIMANT in such loss only to exercise its legitimate right.

REQUEST FOR RELIEF

RESPONDENT respectfully requests that the Tribunal order that:

1. The Tribunal does not have jurisdiction to hear this dispute;

2. The contract was invalid;

3. Even if the contract was valid, RESPONDENT met its obligation under the contract;

4. Alternatively, RESPONDENT's non performance was exempted from the shipment terms.