THIRD ANNUAL

THE INTERNATIONAL (ADR) ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

MEMORANDUM FOR CLAIMANT

On behalf of:	**Against:**
Longo Imports	Chan Manufacturing
PO Box 234	PO Box 111
Minuet	Cadenza
"CLAIMANT"	**"RESPONDENT"**

Team No. 019

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TABLE OF ABBREVIATIONS

CIETAC	China International Economic and Trade Arbitration Commission
Clause 9	Arbitration Clause Under Respondent's Terms and Conditions
Clause 12	Arbitration Clause Under Claimant's Terms and Conditions
Ex.	Exhibit
INCOTERMS	International Commercial Terms 2010
L/C	Letter of Credit
SIAC	Singapore International Arbitration Centre
T&Cs.	Terms and Conditions
The Contract	Sales contract of the 1,000 cars
UNCITRAL	United Nation Commission on International Trade Law

TABLE OF AUTHORITIES

Primary Sources

Arbitration Law of the People's Republic of China 1994

(Cited: *PRC Arbitration Law*)

Arbitration Rules of the Singapore International Arbitration Centre 2010

(Cited: *SIAC Rules*)

China International Economic and Trade Arbitration Commission Arbitration Rules 2012

(Cited: *CIETAC Rules*)

International Institute For the Unification of Private Law – Principles of International Commercial Contracts 2010

(Cited: *UNIDROIT*)

Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China (23 August 2006)

(Cited: *SPC Interpretation 2006*)

United Nation Commission on International Trade Law – Model Law on International Commercial Arbitration (as amended in 2006)

(Cited: *Model Law*)

United Nations Convention on Contracts for the International Sale of Goods

(Cited: *CISG*)

Golden Ocean Group Ltd v Salgaocar Mining Industries PVT [2011] EWHC 56 (Comm)

(Cited: *Golden v Salgaocar*)

Interfoto Picture Library v Stiletto Visual Programmes [1988] QB 433

(Cited: *Interfoto v Stiletto*)

O'Brien v Mirror Group Newspapers [2001] EWCA Civ 1279

(Cited: *O'Brien v Mirror*)

Supreme Commercial Court (No. BAC-1831/12 of 28 March 2012)

(Cited: *Supreme Commercial Court (No. BAC-1831/12 of 28 March 2012)*)

Wellington Associates Ltd v Kirti Mehhta AIR 2000 SC 13

(Cited: *Wellington*)

STATEMENT OF FACTS

CLAIMANT referred RESPONDENT to a specific document containing CLAIMANT's T&Cs since they started negotiating, intending for them to be incorporated into a future contract. RESPONDENT did not object to majority of the T&Cs, one of them being an arbitration clause. After a series of negotiations, CLAIMANT offered to purchase 1000 cars from RESPONDENT and terms of offer were recorded in the order form [*Ex*. 9]. RESPONDENT subsequently accepted CLAIMANT's terms and only replaced the term CIF with FAS [*Ex*. 10]. CLAIMANT, through instructing RESPONDENT to load the sample car and paying for it, accepted RESPONDENT's reservation to CLAIMANT's terms by conduct and the contract of sale for the 1000 cars was formed [*Ex.*11].

JURISDICTION

Lex arbitri

As the seat of the arbitration under Clause 12 is Beijing, China, it follows that the *lex arbitri* of the arbitration is *PRC Arbitration Law*, and the applicable rules are the *CIETAC Rules*.

Competence-Competence Principle

The principle of Competence-Competence is enshrined in *CIETAC Rules* Article 6.1. It states that CIETAC has the power to determine the existence and validity of an arbitration clause, and whether it has jurisdiction over the arbitration case.

Separability of Arbitration Clause

CIETAC Rules Article 5.5 also provides for the doctrine of separability for an arbitration clause to be effective and applicable even if there was no contract between CLAIMANT and RESPONDENT.

I. CLAUSE 12 IS APPLICABLE TO THE DISPUTE

A. Clause 12 is the binding arbitration agreement between the parties

1. Clause 12 was validly incorporated into the Contract

Clause 12 can be found in CLAIMANT's T&Cs. It states:

> All disputes must be referred to the China Trade Commission. And the following clause applies:
>
> "All dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination shall be conciliated. 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]

Clause 12 was validly incorporated into the Contract by reference and applies to any dispute "arising out of or in connection with the Contract". In order to incorporate a written term as part of a contract, a party has to take reasonable steps to bring it to the attention of the other party [*Interfoto v Stiletto*; *O'Brien v Mirror*]. CLAIMANT included the hyperlink to his webpage containing his T&Cs, including Clause 12, in his first letter of communication to

RESPONDENT [*Ex.* 1]. This specific reference to a written document shows that CLAIMANT had the intention to include the T&Cs, including Clause 12, into the Contract. CLAIMANT took all reasonable steps to make RESPONDENT aware of these terms, hence Clause 12 was validly incorporated into the Contract by reference.

2. RESPONDENT's letter dated 15 January 2011 [*Ex.* 3] does not constitute a counter-offer

Furthermore, RESPONDENT's letter dated 15 January 2011 [*Ex.* 3] stating "you [CLAIMANT] will find the relevant technical descriptions as well as our conditions on our webpage which you can google under our company name" cannot be construed as a counter-offer as RESPONDENT's reference to their T&Cs was too general and vague. The letter only provided CLAIMANT with an indirect means on how to reference RESPONDENT's T&Cs, with possibilities of error page and wrong result. Such reference does not meet the requirement of the objective test of agreement regarding intention of the parties [*Golden v Salgaocar*]. RESPONDENT failed to make reference to a specific document containing his T&Cs, therefore they were never incorporated, including any dispute resolution clause contained in those terms.

3. RESPONDENT is barred from raising objection to Clause 12

Finally, *CIETAC Rules* Article 6.4 requires that any timely objection be raised in writing before the first meeting, failing which the party would have waived its right to object. In this case, the RESPONDENT had not filed any objection as to the validity of the Clause 12 and is therefore barred from objecting to jurisdiction.

B. The arbitration process should commence

Clause 12 constitutes a multi-tiered dispute resolution agreement whereby the parties agreed to conciliate the dispute prior to initiating arbitration. However, the wording of Clause 12 intended to make the conciliation informal. There is a lack of a designated set of formal rules to govern the conciliation and an absence of time limit providing for the commencement of conciliation or the subsequent arbitration. Thus, the parties in agreeing upon Clause 12 did not intend to make conciliation a pre-condition to arbitration, but a mere informal negotiation and an option open to the parties. In fact, CLAIMANT commenced the informal conciliation soon after the dispute emerged [*Ex*. 16] with the participation of RESPONDENT [*Ex*. 17]. Upon unsuccessful amicable conciliation, arbitration could be initiated.

Even if the Tribunal found the condition precedent to arbitration has not been fulfilled, RESPONDENT's failure to object to the commencement of arbitration during the 11-month period between the notice of initiating arbitration [*Ex*. 18] and the acknowledgement of arbitration application by CIETAC [*Ex*. 19] operates as an implied consent to arbitration and a waiver of the requirement to conciliate. Thus, CLAIMANT was free to commence arbitration under Clause 12.

II. CLAUSE 12 IS VALID

A. Clause 12 fulfills the requirements of a valid arbitration agreement under the law of the seat with a designated arbitration institution

According to *PRC Arbitration Law* Article 16, a valid arbitration must designate an institution for arbitration. *SPC Interpretation 2006* Article 3 further states that even if an institution has not been specifically named as the seat of arbitration, the agreement will be valid as long as specific arbitration institution can be determined.

The term "China Trade Commission" under Clause 12 is an abbreviation of "China International Economic and Trade Arbitration Commission", i.e. CIETAC. There are 3 arbitration institutions in Beijing – CIETAC, China Maritime Arbitration Commission (CMAC) and Beijing Arbitration Commission (BAC). With the seat of the arbitration clearly named in Clause 12, "China Trade Commission" can, without any ambiguity, only mean China International Economic and Trade Arbitration Commission. None of the arbitration institutions resembles the emphasis on trade except for CIETAC. In fact, CIETAC has accepted that the agreement *prima facie* provides for arbitration in CIETAC before submitting the case to the tribunal [*CIETAC Rules* Article 6.2] [*Ex*. 19].

B. Clause 9 is a defective clause that cannot be saved

Clause 9 is defective, as it provides two arbitration clauses with two different seats. There can be no consent to two arbitration clauses with two different seats, as the clauses are irreconcilable. Regardless of whether it was a clerical error, such wording would render the result to be unenforceable as the consent to arbitration itself would be too uncertain.

Should RESPONDENT argue that Clause 9 constitutes an optional clause, its validity is still doubtful, as the rule of giving only one party the option to choose is contrary to the fundamental principles of equality of parties and equal access to justice [*Supreme Commercial Court (No. BAC-1831/12 of 28 March 2012)*]. In this case, it would be unfair to CLAIMANT if RESPONDENT was the only party having the choice of the seat of the arbitration.

Even if Clause 9 was held to be valid, it would still be inapplicable as there is uncertainty as to who has the option of choosing the seat once the clause is triggered. If the parties assume that the claimant in the arbitration could choose the seat, it gives rise to another issue as both

CLAIMANT and RESPONDENT may be the claimant when triggering the arbitration clause [*Wellington*]. Such uncertainty in Clause 9 must therefore render it unenforceable.

C. The dispute falls within the scope of Clause 12

As CLAIMANT's claim for the loss of profit as a result of RESPONDENT's failure to deliver the cars "arises out of and is in connection with the Contract", the tribunal constituted under CIETAC has the jurisdiction to hear it.

MERITS

Applicable Law

According to *CIETAC Rules* Article 47.1, the Tribunal shall render an award 'based on the facts of the case and the terms of the contract, in accordance with the law'. The Parties agreed that *UNIDROIT* applies as the governing law of the Contract [*Ex.* 13]. Additionally, under the same CIETAC Article, the Tribunal must apply the Contract terms, such as the FAS INCOTERMS, which were agreed upon by the parties. The Tribunal may also refer to other 'international practices'. In this case, *CISG*, which is a restatement of the international trade usages in the field of sales of goods, could be taken into account by the Tribunal in arriving at its decision.

III. CLAIMANT'S TERMS ARE THE ONLY APPLICABLE TERMS OF THE CONTRACT

A. RESPONDENT has accepted CLAIMANT's T&Cs

CLAIMANT's order form contained a number of terms such as the price ($US 12,000 per car), quantity (1000 cars), delivery date (1 December 2011) and payment (L/C) [*Ex*. 8, 9]. This offer was sufficiently definite as it expressly makes provision to fix the quantity and the price [*UNIDROIT* Article 2.1.2/*CISG* Article 14(1)]. RESPONDENT in his reply specifically referred CLAIMANT to the FAS term and to the new shipping arrangement of the sample car [*Ex*. 10]. This clearly demonstrated that RESPONDENT purported to accept CLAIMANT's terms with a sole reservation to the CIF term and the purchase of the sample car (due to the advanced payment). This reservation was subsequently accepted by CLAIMANT [*Ex.* 11]. Since RESPONDENT neither objected to other terms nor made a counter-offer to CLAIMANT [*Clarification* 10, 19], CLAIMANT's terms in the order form must apply, with the exceptions of the CIF term and the payment of the sample car.

B. RESPONDENT affirmed CLAIMANT's "unless unsatisfactory term"

The Contract was a firm sales contract of 1000 cars [*Ex.* 9]. Unless CLAIMANT notified RESPONDENT of his dissatisfaction with the sample car within one-week upon the receipt of it, i.e. 17 June 2011, RESPONDENT had a firm duty to deliver the remaining 999 cars and he must ship them by the delivery date, i.e. 1 December 2011 [*Ex*. 8, 9]. This term is hereinafter referred to as the "unless unsatisfactory term".

Subsequent to his acceptance of CLAIMANT's offer [*Ex.* 10], RESPONDENT affirmed that he would try their best to meet the delivery date [*Ex*. 11]. This proves without doubt that RESPONDENT intended to adhere to the "unless unsatisfactory term", unless otherwise notified. Given the common intention of the Parties to be bound, the "unless unsatisfactory term" must be applicable to the contract.

Even if there remains any doubt as to the binding effect of the "unless unsatisfactory term", CLAIMANT, upon the testing of the sample car, clearly notified RESPONDENT on 10 June

2011 of his request for a delivery of the remaining cars by nominating a vessel "for further shipments" [*Ex.* 13].

C. RESPONDENT's terms were not incorporated as part of the Contract

As mentioned above in I.A.2, RESPONDENT's reference to his own T&Cs was too general and vague to be incorporated into the contract. RESPONDENT failed to provide a clear and certain reference to their terms, hence there could not have been an intention to incorporate his T&Cs into the Contract.

IV. THERE IS A VALID CONTRACT

A. There was a meeting of minds and hence a valid Contract

RESPONDENT's acceptance of the other terms of CLAIMANT's offer, except for those RESPONDENT specifically objected to (as submitted above), indicates that there was a meeting of minds between the parties [*UNIDROIT* Article 2.1.6]. RESPONDENT's affirmation of the "unless unsatisfactory term" further demonstrates that RESPONDENT acknowledged CLAIMANT's intention to proceed with the contract. RESPONDENT's subsequent objection to the return policy was only a unilateral attempt to introduce a new term after the conclusion of contract [*Ex.* 12]. This does not show parties' cross-purpose. In fact, CLAIMANT had immediately rejected RESPONDENT's proposal by referring RESPONDENT to CLAIMANT's T&Cs again [*Ex.* 13]. As there was a meeting of minds at the time when the contract was concluded, a valid contract was formed.

B. RESPONDENT had the duty to deliver the 999 cars

The Contract was a firm sales contract in which RESPONDENT's duty to deliver was only postponed until one week after the receipt of the sample car. Therefore, RESPONDENT wrongfully alleged that CLAIMANT did not wish to purchase the remaining cars [*Ex.* 15]. Indeed, the three following elements demonstrate RESPONDENT's duty to deliver and ship the remaining cars:

First, the parties had expressly waived the need for communication under the "unless unsatisfactory term". It was clear that RESPONDENT had the contractual obligation to deliver the remaining cars. Since there was no indication from CLAIMANT of any dissatisfaction upon the expiration of the deadline, i.e. 17 June 2011, RESPONDENT should have proceeded with the second delivery.

Second, RESPONDENT had full knowledge of CLAIMANT's intention to proceed with the contract, since the L/C was issued in accordance with the payment term of the Contract [*Ex.* 9, *Clarification* 37]. RESPONDENT must have been notified of the opening of the L/C and therefore knew of CLAIMANT's clear intention to proceed with the purchase of the 999 cars.

Finally, pursuant to the FAS term of the Contract [*Ex.* 10], CLAIMANT nominated a vessel for the purpose of the second delivery [*Ex.* 13]. CLAIMANT had clear intention to proceed with the Contract and RESPONDENT was expressly notified on 10 Jun 2011 of this intention [*Ex.* 13]. Thus, CLAIMANT fails to understand how RESPONDENT could have assumed that CLAIMANT did not want the remaining cars.

Based on the above reasons, RESPONDENT wrongly alleged that CLAIMANT's silence amounted to a withdrawal of the Contract.

V. RESPONDENT IS LIABLE FOR DAMAGES FOR THE BREACH OF CONTRACT PURSUANT TO *UNIDROIT* ARTICLE 7.4.1

A. RESPONDENT breached the Contract by failing to perform his contractual obligations

1. RESPONDENT failed to comply with his duty to deliver the 999 cars under the Contract

Failure to ship the remaining 999 cars amounts to a material non-performance of the Contract on RESPONDENT's end [*UNIDROIT* Article 7.1.1]. Since the Contract agreed between the parties contained the "unless unsatisfactory term" [*Ex*. 11], RESPONDENT was wrong in alleging that CLAIMANT did not wish to proceed with the purchase upon silence [*Ex.* 15]. Furthermore, RESPONDENT deliberately ignored the "unless unsatisfactory term" and failed to ship the cars by the contractual delivery date, i.e. 1 December 2011 [*Ex.* 9] in accordance with *UNIDROIT* Article 6.1.1. As the duty to deliver the goods is central to every sales contract, RESPONDENT's failure to deliver the cars amounted to a material breach of his contractual obligation under the definition of non-performance in *UNIDROIT* Article 7.1.1.

2. RESPONDENT had the contractual quantity available, but deliberately sold the contracted cars to CLAIMANT's competitor

RESPONDENT entered into the Contract knowing that the sale was for 1000 cars, and he had the exact quantity available. In fact, RESPONDENT sold a sample car to CLAIMANT [*Ex*. 11], stated on 15 August 2011 that he had 100 cars left [*Ex.* 15], and therefore must have sold 899 cars to CLAIMANT's competitor [*Ex.* 18]. The fact that RESPONDENT had the exact quantity of contracted cars yet failed to deliver them to CLAIMANT shows that

RESPONDENT deliberately chose not to comply with his contractual obligation. RESPONDENT therefore could not be validly excused from non-performance.

B. CLAIMANT HAS TAKEN REASONABLE STEPS TO MITIGATE HIS LOSS

1. RESPONDENT prevented CLAIMANT from mitigating loss

CLAIMANT tried to mitigate his loss as under *UNIDROIT* Article 7.4.8 by agreeing to accept the remaining 100 cars under the Contract. Under FAS INCOTERMS, the buyer, i.e. CLAIMANT, has the right to nominate both vessel and port [B7]. The seller, i.e. RESPONDENT, only has the right to nominate a port if CLAIMANT fails to do so.

CLAIMANT nominated SS Herminia for further shipment [*Ex.* 13], and informed RESPONDENT that SS Herminia was nearing Cadenza [*Ex.* 14], indicating that CLAIMANT nominated Cadenza as the port. RESPONDENT had the duty to transport the 100 cars from Piccolo to Cadenza (port), where SS Herminia docked, for the 100 cars to be loaded. RESPONDENT's failure to transport the cars thereby amounted to a breach of the FAS INCOTERMS A4.

2. CLAIMANT did not breach any duty

CLAIMANT has no duty to accept a partial delivery offer made by RESPONDENT of either the 100 or 400 cars [*Ex.* 15 & 17] under *UNIDROIT* Article 6.1.3. CLAIMANT's only duty is to mitigate his own loss and reasonable effort was made in CLAIMANT's attempted mitigation when he was willing to accept the remaining 100 cars [*Ex.* 16].

RESPONDENT offered to ship another 400 cars to CLAIMANT in November 2011 [*Ex.* 17]. However, CLAIMANT could not accept RESPONDENT's offer as by the time the cars reach

Minuet the market would have been flooded with CLAIMANT's competitor's cars, indicating a possible loss to CLAIMANT even if sales of the cars could be made. Time was of the essence in the Contract, and RESPONDENT's multiple failures to comply with his contractual duties amount to substantial breaches of the Contract.

C. RESPONDENT is liable for CLAIMANT's loss of profit

Since *UNIDROIT* Article 7.4.1 provides for the right of the aggrieved party to damages and other remedies, *UNIDROIT* Article 7.4.2 further states that CLAIMANT is entitled to full compensation for harm sustained as the result of non-performance by RESPONDENT, including loss suffered, i.e. the cost of appoint a vessel for further shipment [*Ex.* 14], and gain deprived, i.e. the profit CLAIMANT could have made by selling the contracted cars. CLAIMANT therefore has the right to claim full compensation owing to RESPONDENT's non-performance.

D. CLAIMANT's right to damages

Based on the above reasons, RESPONDENT is fully responsible for the damages for the breach of contract pursuant to *UNIDROIT* Article 7.4.1, and CLAIMANT as the aggrieved party has the right to claim such damages.

REQUEST FOR RELIEF

CLAIMANT respectfully requests the Tribunal to find that:

1. The Tribunal has jurisdiction to hear this dispute;

2. RESPONDENT materially breached the contract;

3. RESPONDENT is liable for damages and loss of profit suffered by CLAIMANT under *UNIDROIT* Article 7.4.1.

Respectfully submitted

For Longo Imports

(signed) ___________________, 22 June 2012

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