THIRD ANNUAL

THE INTERNATIONAL (ADR) ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

MEMORANDUM FOR RESPONDENT

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

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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

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TABLE OF AUTHORITIES

Primary Sources

UNCITRAL 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*)

Aiton v Transfield [1999] NSWSC 996

(Cited: *Aiton v Transfield)*

Cable & Wireless plc v IBM United Kingdom Ltd [2002] EWHC 2059

(Cited: *Cable v IBM UK*)

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd (1993) 2 WLR 262

(Cited: *Channel Tunnel v Balfour Beatty*)

China National Metal Products v. Apex Digital (No. 03-55231 D.C. No. CV-02-00631-RT)

(Cited: *CNMP v Apex*)

COSCO v CMEC International Commercial Transportation Agency Co (Nov. 6, 2009, *SPC*)

(Cited *COSCO v CMEC*)

Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194

(Cited: *Hooper v Natcon*)

ICC Case no. 6276, Partial Award of January 20, 1990

(Cited: *ICC Case no. 6276*)

PepsiCo Inc. v Sichuan Pepsi-Cola Beverage Co Ltd [2008] Cheng Min Chu Zi No. 912 (Chengdu IPC, 30th April 2008)

(Cited: *PepsiCo v Sichuan Pepsi*)

Pepsi Co Investment (China) Ltd v Sichuan Province Yun Lu Industrial Co. Ltd. [2008] Cheng Min Chu Zi No. 36 (Chengdu IPC, 30 April 2008)

(Cited: *Pepsi China v Sichuan Yun Lu*)

Petromec Inc v Petroleo Brasileiro SA Petrobras (No. 3) [2005] EWCA (Civ) 891

(Cited: *Petromec v Petroleo*)

M.R. Engineers v Som Datt Builders (2009) 7 SCC 696

(Cited: *M.R. Engineers v Som Datt Builders*)

Star Shipping AS v China National Foreign Transportation Corporation (1993)

(Cited: *Star Shipping v CNFTC*)

William Company v Chu Kong Agency Co Ltd & Another [1995]

(Cited: *William v Chu*)

STATEMENT OF FACTS

After a series of negotiations, CLAIMANT offered to purchase 1000 cars from RESPONDENT on terms recorded in the order form [*Ex*. 9]. RESPONDENT counter-offered to incorporate RESPONDENT's own set of general T&Cs [*Ex*. 10]. RESPONDENT further requested to separate shipment of the sample car from the order of 1000 cars. Incorporation of RESPONDENT's terms into the Contract defeated all terms previously proposed by CLAIMANT. CLAIMANT instructed RESPONDENT to load the sample car and pay for it, thereby accepting the counter-offer by conduct, and the contract of sale for 1000 cars was formed [*Ex.*11].

JURISDICTION

Lex Arbitri

Under RESPONDENT Clause 9, the seat of arbitration could be Hong Kong or Cadenza, both *Model Law* countries. It follows that the *lex arbitri* is *Model Law*, and the applicable rules are *SIAC Rules*. *SIAC Rule* 18.1 states that if the parties fail to agree on the seat of arbitration, the Tribunal has power to decide which seat would be more appropriate in the case.

Competence-Competence Principle

SIAC Rule 25.2 enshrines the principle of competence-competence. It states that SIAC has power to determine the existence, termination and validity of an arbitration clause, and whether it has jurisdiction over the arbitration case.

Separability of Arbitration Clause

SIAC Rule 25.2 enshrines the doctrine of separability which provides for the arbitration clause to be effective and applicable even if there were no contract between CLAIMANT and RESPONDENT.

I. THE ARBITRATION CLAUSE APPLICABLE TO THIS ARBITRATION IS CLAUSE 9 AND NOT CLAUSE 12

A. Clause 9 is applicable

RESPONDENT twice gave CLAIMANT sufficient notice and specific reference of RESPONDENT's T&Cs, including Clause 9, the arbitration clause. It states:

> "All disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination shall be referred to arbitration in Cadenza using the SIAC Rules
>
> Or
>
> All disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination shall be referred to arbitration in Cadenza using the SIAC Rules" [*Ex.* 4]

At commencement of negotiations, RESPONDENT notified CLAIMANT of a way to locate RESPONDENT's T&Cs on RESPONDENT's webpage, via Google. Hence, RESPONDENT made known his intention to incorporate his T&Cs into any future contract [*Ex.* 3]. RESPONDENT again gave CLAIMANT sufficient notice in the counter-offer dated 20

March 2011 [*Ex*. 10]. When CLAIMANT paid for the sample car, he agreed to RESPONDENT's T&Cs, including Clause 9 [*Ex*. 11] and concluded the contract.

B. RESPONDENT did not consent to Clause 12

Incorporation of new terms after conclusion of contract must be coupled with the other party's consent; silence or inactivity does not amount to consent [*UNIDROIT* Article 2.1.6]. CLAIMANT only made a unilateral attempt to incorporate their arbitration clause three months after the contract was concluded [*Ex*. 13]. RESPONDENT never consented to CIETAC arbitration, and there is no evidence that RESPONDENT consented to Clause 12.

C. CIETAC must decline jurisdiction

PRC Arbitration Law Article 4 states that parties should agree to arbitrate on their own free will. The Arbitration Commission shall refuse to accept any application for arbitration by a single party without such agreement. Given lack of mutual consent, the Arbitration Commission constituted under Clause 12 must decline jurisdiction.

D. Even if Clause 12 were applicable, CLAIMANT's claim to arbitrate is premature

Assuming the Arbitration Commission formed under Clause 12 has jurisdiction, the prerequisite to arbitration is nevertheless unmet. As Clause 12 is a multi-tiered dispute resolution clause, all disputes must first be submitted to conciliation. CLAIMANT's failure to initiate conciliation amounts to a bar to the pending arbitration, and hence, a defect to the formation and jurisdiction of the tribunal.

1. The conciliation phase under Clause 12 is a prerequisite of arbitration

An agreement to conciliate is enforceable as long as the parties intend to perform [*Hooper v Natcon*] and conciliation is made a condition precedent to arbitration [*Aiton v Transfield*]. Clause 12 was drafted in a way that required the parties to undergo conciliation before arbitration; it is not a mere agreement to agree. 'Shall' indicates the duty to refer the dispute to conciliation first. Further, Clause 12 explicitly states that arbitration may only be commenced 'if no agreement can be reached'. The language demonstrates that the conciliation is a condition precedent for commencing arbitration. It would be unreasonable to refuse to enforce contractual terms willingly entered into [*Petromec v Petroleo*].

2. CLAIMAINT has not yet fulfilled the pre-condition to conciliate, thus the Tribunal is not properly constituted

Since CLAIMANT alleges that he has a claim against RESPONDENT, he has the duty to initiate conciliation pursuant to Clause 12. RESPONDENT has no such duty. CLAIMANT remained silent for 11 months between his letter dated 10 September 2011 expressing his discontent [*Ex.* 18] and the introduction of arbitration [*Ex.* 20]. He failed to request conciliation in that period.

The tribunal must either remit the dispute back to the parties for conciliation [*Cable v IBM UK*] or dismiss the arbitration for defect to its formation and jurisdiction [*Channel Tunnel v Balfour Beatty;* ICC Case no. 6276].

Failure to comply with pre-arbitral conciliation requirements has been held to be a valid ground for resisting enforcement, as it contravenes the arbitration agreements [*PepsiCo v Sichuan Pepsi; Pepsi China v Sichuan Yun Lu*]. As CLAIMANT failed to establish the issuance of any notice to resolve the dispute through conciliation, nor had a conciliator been

appointed, this indicates a procedural defect to the formation of the Tribunal. The Tribunal should accordingly dismiss the CLAIMANT's request.

II. RESPONDENT ARBITRATION CLAUSE IS VALID

A. Clause 9 satisfies the 'in writing' requirement of the *Model Law* and was incorporated into the Contract

Clause 9 is clearly stated on RESPONDENT's webpage [*Ex.* 4] and satisfies the *Model Law* Article 7(6) for the arbitration agreement to be in writing. The Clause was brought to CLAIMANT's notice via RESPONDENT's first letter to CLAIMANT dated 15 Jan 2011 [*Ex.* 3]. Clause 9 was validly incorporated into the Contract by express reference to all RESPONDENT's T&Cs in the letter containing RESPONDENT's counter-offer dated 20 Mar 2011 [*Ex.* 10], and RESPONDENT showed his intent for such T&Cs to be incorporated [*M.R. Engineers v Som Datt Builders*].

B. Clause 9 is a valid arbitration agreement

Clause 9 provides for an optional clause as to the seat of arbitration. The use of optional clauses is a commonly accepted practice in international arbitration [*Star Shipping v CNFTC; William v Chu; CNMP v. Apex Digital*]. If there is no former agreement on the seat, *SIAC Rule* 18.1 operates as a default provision and the Parties may subsequently agree on the seat of arbitration. Should the parties fail to reach an agreement, the seat of arbitration shall be Singapore, unless the Tribunal deems that another seat is more appropriate. SIAC as the designated tribunal has full competence to decide its jurisdiction and to determine the most appropriate seat for the benefit of the Parties.

C. Clause 12 is not valid under its designated law of the seat, and therefore cannot be applied

Clause 12 provides for the arbitration seat to be in Beijing. *PRC Arbitration Law* Article 16(3) requires a designated arbitration commission in an arbitration agreement. Yet, Clause 12 fails to meet this requirement, as "China Trade Commission" is not an existing arbitration commission. Thus, the Clause 12 is not valid as it failed to indicate an existing arbitration institution in Beijing. [*COSCO v CMEC*].

Pursuant to *CIETAC Rules* Article 1. 2, using other names such as the China Council for the Promotion of International Trade and China Chamber of International Commerce shall be deemed that the parties have agreed to arbitration by CIETAC. As a valid arbitration clause has the power to oust the jurisdiction of the court, any inference must be drawn restrictively. However, the names provided in Art 1.2 do not include 'China Trade Commission'.]

Additionally, *PRC Arbitration Law* Article 18 provides that where an agreement for arbitration fails to specify the choice of arbitration commission, parties concerned may conclude a supplementary agreement. If a supplementary agreement cannot be reached, the agreement for arbitration is invalid. The use of "China Trade Commission" in the arbitration clause under CLAIMANT's terms is unclear [*Ex.* 2], and the parties could not have agreed to an arbitration institution. Clause 12 is hence null and void.

D. The dispute falls within the scope of Clause 9

Since the dispute is one that arises from and is in connection with the Contract for the sale of electric cars, Clause 9 should apply in accordance with the *SIAC Rules* and the present Tribunal constituted under CIETAC has no jurisdiction to hear the dispute.

MERITS

However, assuming the Tribunal decided it has jurisdiction, RESPONDENT would now proceed to the merits of the dispute.

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. RESPONDENT's T&Cs ARE THE APPLICABLE TERMS OF THE CONTRACT

A. RESPONDENT incorporation of his T&Cs was a material alteration of CLAIMANT's offer and hence a counter-offer

Additional or different terms that materially alter the terms of the offer are to be construed as a counter-offer [*UNIDROIT* Article 2.1.11(1)]. *CISG* Article 19 copies *UNIDROIT* Article 2.1.11 with an additional provision under Article 19(3). It provides a non-exhaustive list of additional or different terms and the alterations of which should be regarded as material.

RESPONDENT's counter-offer [*Ex.* 10] to CLAIMANT's offer [*Ex.* 9], with reference to RESPONDENT's T&Cs, contains an arbitration clause and an objection to the CIF term [*Ex.* 10]. Such addition of a dispute resolution provision and delivery arrangement [Arbitral Award 1999 (Paris), ICC case no 8547, (2003) XXVIII YB Comm Arb 27, 21-32] falls squarely within the scope of *CISG* Article 19(3) and hence amounts to a material alteration under *UNIDROIT* Article 2.1.11. Therefore, RESPONDENT's letter amounts to a counter-offer.

B. CLAIMANT accepted RESPONDENT's counter-offer and agreed to be bound by RESPONDENT's T&Cs

CLAIMANT's attempt to incorporate his T&Cs in the initial stage [*Ex.* 1] was immediately rejected by RESPONDENT's express referral to his own T&Cs [*Ex*. 3]. When CLAIMANT later offered his T&Cs to be incorporated in the Contract [*Ex*. 8, 9], it was met with a counter-offer by RESPONDENT [*Ex*. 10].

CLAIMANT subsequently accepted RESPONDENT's counter-offer by conduct, evidenced by the purchase of the sample car [*Ex.* 11], which was the first of the 1000 cars to be purchased. A contract was concluded. Therefore, CLAIMANT's unilateral attempt to incorporate their T&Cs three months after the contract was concluded must fail [*Ex*. 13].

C. The Contract terms required CLAIMANT's confirmation for further shipment as a suspensive condition

RESPONDENT's counter-offer [*Ex.* 10] clearly stated that he "would prefer to treat the shipment of the single (sample) car being separate from the order of 1000 cars". CLAIMANT accepted RESPONDENT's counter-offer [*Ex.* 11] and agreed to treat the shipment of the

sample car separate from the further shipment of the remaining 999 cars. This separation of shipment creates a suspensive condition under *UNIDROIT* Article 5.3.1.

UNIDROIT Article 5.3.2(1) provides that RESPONDENT's contractual obligation, i.e. duty to ship the remaining cars, takes effect only if a future uncertain event occurs, i.e. CLAIMANT confirms further purchase of the remaining cars with RESPONDENT. Under Article 5.3.2(1), CLAIMANT had the duty to further confirm with RESPONDENT as to whether CLAIMANT would purchase the 999 cars.

D. RESPONDENT's Clause 11 applies to the Contract

Clause 11 modified the duties of the buyer and the seller under the FAS term. The Contract was concluded under RESPONDENT's T&Cs, and CLAIMANT reaffirmed Clause 11 in his letter dated 10 Jun 2011 [*Ex.* 13] stating "As per your (RESPONDENT's) instructions we nominate the SS Herminia for further shipments", in reply to RESPONDENT's letter dated 25 Mar 2011 [*Ex.* 11] stating "Please note that we expect you (CLAIMANT) to nominate a ship which can load out of the nominated ports which are Cadenza, Cantata and Piccolo". Hence, RESPONDENT's Clause 11 applies.

IV. THERE WAS AN INEFFECTIVE CONTRACT

A. CLAIMANT never triggered the suspensive condition

There was a suspensive condition which had to be met before RESPONDENT's duty of further shipment was triggered. Yet that condition was unmet as RESPONDENT never received CLAIMANT's confirmation of a subsequent purchase [*Ex.* 15]. In fact, CLAIMANT's nomination of a vessel "for futher shipments" and stating that he was testing

the sample car [*Ex.* 13] did not fulfil the suspensive condition. RESPONDENT clearly stated that the sample car was to be treated separately from the order of 1000 cars [*Ex.* 10], and the separation creates a duty on CLAIMANT to confirm his further purchase with RESPONDENT [*Ex.* 15]. Given lack of further confirmation, RESPONDENT's contractual obligation was never triggered.

B. RESPONDENT's contractual obligation to ship the 999 cars never took effect

As mentioned above in III C, UNIDROIT Article 5.3.1 provides for a suspensive condition, which suspends the effectiveness of a contractual obligation to the condition being fulfilled. In this case, the suspensive condition was unfulfilled, i.e. CLAIMANT never confirmed his further purchase by a confirmation order, as noted by RESPONDENT [*Ex.* 15]. Therefore, RESPONDENT had no contractual obligation to ship the 999 cars to CLAIMANT.

C. Even if the Tribunal finds the "unless unsatisfactory condition" valid, it is ineffective

CLAIMANT's alleged confirmation of second shipment was too unclear to be effective. CLAIMANT informed RESPONDENT of the testing of sample car and nominated a vessel for further shipments [*Ex*. 13]. The "testing" left doubt in RESPONDENT's mind as to a possibility of dissatisfaction, which could lead to the Contract being terminated. Given the chance of termination of Contract, which would leave RESPONDENT with no recourse, it was unreasonable for CLAIMANT to expect RESPONDENT to simply keep the cars while waiting for CLAIMANT's confirmation without a deadline.

Even if there remains any doubt as to the binding effect of the "unless unsatisfactory condition", the condition is contrary to *UNIDROIT* Article 5.1.3, which requires cooperation between the parties. Thus, the condition is invalid and inapplicable. It was unreasonable for

CLAIMANT to expect RESPONDENT to deliver the cars upon CLAIMANT's own inactivity. Instead, in accordance with Article 5.1.3, CLAIMANT should duly cooperate with RESPONDENT in confirming further purchase.

V. RESPONDENT HAS NOT BREACHED ANY DUTY AND IS NOT LIABLE FOR DAMAGES

A. Assuming the Contract is effective, RESPONDENT has fulfilled all his duties

UNIDROIT Article 5.1.2 states the implied obligation of parties, stemming from (a) the nature and purpose of the contract, (b) practices established between parties and trade usages, (c) good faith and fair dealing, and (d) reasonableness. UNIDROIT Article 5.1.3 requires reasonable cooperation from the parties for the performance of contractual obligations.

RESPONDENT had executed his duties in accordance with Article 5.1.2 and 5.1.3, such as shipping the sample car to CLAIMANT, nominating the ports for docking of a ship that CLAIMANT has to nominate [*Ex.* 11], and was reasonable in expecting CLAIMANT to confirm the purchase of the remaining cars. However, further confirmation was never received by RESPONDENT [*Ex.* 15].

B. Even if CLAIMANT's "Unless Unsatisfactory Condition" was applicable, it was unreasonable and RESPONDENT's non-performance is excused under hardship

CLAIMANT did not cooperate with RESPONDENT in good faith and was unreasonable. Even when CLAIMANT argued that by staying silent he had fulfilled his "unless unsatisfactory term" [*Ex.* 16], *UNIDROIT* Article 5.3.3(2), which states that the "party may

not rely on fulfilment of the condition if it was in contrary to good faith or duty of cooperation" must apply, rendering the fulfilment of the condition unreliable and unreasonable.

Furthermore, *UNIDROIT* Articles 6.2.2 and 6.2.3 excuse RESPONDENT's non-performance of the contractual obligation if hardship occurs and renegotiation has been sought. Given the substantial degree of risk of the order, the lack of notice was sufficient to render a termination to the contract as costs of keeping the cars stored in the warehouse would give arise to hardship. RESPONDENT however tried twice to renegotiate by offering to sell CLAIMANT 100 cars, and then 400 cars with 2% discount as a good will gesture [*Ex.* 17], but both offers were rejected by CLAIMANT [*Ex.* 18].

C. RESPONDENT's Clause 11 is applicable, it was CLAIMANT who breached the Contract

Upon CLAIMANT's acceptance of Clause 11 as mentioned in III D, it was then CLAIMANT's duty to nominate a ship that could dock in all three ports nominated by RESPONDENT [*Ex*. 11]. Yet, SS Herminia could not dock at the port RESPONDENT nominated, namely Piccolo [*Ex.* 17]. Therefore, CLAIMANT's failure to appoint a ship in accordance with Clause 11 amounts to a breach by CLAIMANT.

D. CLAIMANT has no Right to Damages

For the aforementioned reasons, RESPONDENT is not liable for any breach of contract or damages pursuant to *UNIDROIT* Article 7.4.1.

REQUEST FOR RELIEF

RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal does not have jurisdiction to this case;

2. RESPONDENT did not breach any duty owed towards CLAIMANT, as there is not a valid contract;

3. Hence, RESPONDENT is not liable for any damages pursuant to *UNIDROIT* Article 7.4.1.

Respectfully submitted

For Chan Manufacturing

(signed) _____, 22 June 2012

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