THE INTERNATIONAL ADR

(ALTERNATIVE DISPUTE RESOLUTION)

MOOT COMPETITION

MEMORANDUM FOR RESPONDENT

TEAM NO. 020

On behalf of:	**Against:**
Chan Manufacturing	**Longo Imports**

INDEX OF ABBREVIATIONS

CIETAC	China International Economic And Trade Arbitration Commission
PICC	Unidroit Principles of International Commercial Contracts 2010
CISG	United Nations Convention on Contracts for the International Sale of Goods
UNCITRAL	UNCITRAL Model Law on International Commercial Arbitration
CIETAC RULES	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules
Parties	CLAIMANT and RESPONDENT
CLAIMANT	Longo Imports
RESPONDENT	Chan Manufacturing
FAS	Free Alongside Ship
CIF	Cost, Insurance and Freight
SIAC	Singapore International Arbitration Centre

INDEX OF AUTHORITIES

ARGUMENT ON JURISDICTION

I. CIETAC DOES NOT HAVE JURISDICTION OVER THIS DISPUTE

CIETAC does not have jurisdiction over this dispute for three reasons: (A) CLAIMANT'S arbitration clause is invalid per se; (B) CLAIMANT'S arbitration clause is not applicable; (C) alternatively, RESPONDANT'S arbitration clause is the only valid and applicable clause that prevails in this dispute.

A. CLAIMANT'S ARBITRATION CLAUSE IS INVALID PER SE

(a) CLAIMANT'S arbitration clause is pathological.

(i) It is self-contradicted.

The statement "if no agreement can be reached it must be referred to arbitration in Cadenza using the relevant rules" self-contradicted with "All disputes must be referred to the China Trade Commission" which rendered uncertainty of the clause.

(ii) CLAIMANT'S arbitration clause refers to a commission that lacks arbitral function.

China Trade Commission (CTC) was established in 1996 during the Clinton era in Hong Kong and New York, which opened its Beijing office in 2009 to assist and promote joint venture opportunities between China and western business ventures & facilities funding if required. There is no chance for the parties to refer it as CIETAC. See the following website,

http://www.prlog.org/10404844-china-trade-commission-opens-beijing-office.html

(b) CLAIMANT'S arbitration clause provides no inference for jurisdiction of CIETAC.

Art 1.2 of CIETAC provides that "Where an arbitration agreement provides for arbitration by the China Council for the Promotion of International Trade/China Chamber of International Commerce, or by the Arbitration Commission or the Court of Arbitration of the China Council for the Promotion of International Trade/China Chamber of International Commerce, or refers to CIETAC's previous names, it shall be deemed that the parties have agreed to arbitration by CIETAC." Yet China Trade Commission is not any one of these names on this list. Furthermore, since CIETAC and Beijing Arbitration Commission are both seated in Beijing, by stating "the seat shall be Beijing" can be referred to Beijing Arbitration Commission rather than CIETAC. So stating the seat shall be Beijing does not necessarily give jurisdiction of CIETAC over this dispute. [EXHIBIT 2]

B. CLAIMANT'S ARBITRATION CLAUSE IS NOT APPLICABLE.

(a) CLAIMANT'S arbitration clause was never agreed by RESPONDENT.

CLAIMANT'S arbitration clause was only mentioned twice during the whole correspondence:

(i) Exhibits 1&2 cannot be defined as an offer.

"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" [PICC, 2.1.2]. Exhibits 1&2 are not sufficiently definite since CLAIMANT did not specify the requirement for the quality of the electric cars and the request of "a very good price" lacked certainty. Further, CLAIMANT used the expression "we expect to be

offered…" Any reasonable person would not indicate an intention to be bound in CLAIMANT'S letter. Instead, it only amounted to an invitation to treat. In the later letter on February 5, 2011, CLAIMANT did not refer to its arbitration clause into the order form at all. So even if the order form is an offer, CLAIMANT'S arbitration clause never became part of the offer, or contract. [EXHIBIT 9]

(ii) The arbitration clause in EXHIBIT 13 did not become part of the contract between the parties.

When CLAIMANT referred to its own terms and conditions containing its arbitration clause again on June 10, 2011[EXHIBIT 13], it had already lapsed three months since its last letter on February 5, 2011[EXHIBIT 8]. The parties had concluded and fulfilled the obligations of the sample car contract. So by that time it is too late to incorporate its arbitration clause into that contract. In current dispute, the contract was formed according to the "knock-out" doctrine of UNIDROIT PRINCIPLE 2010. It stated, "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 unless one party clearly indicated in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract" [PICC, 2.1.22]. Although a contract of 1000 cars might be formed under this doctrine, yet the arbitration clause contained in EXHIBIT 13 was never agreed by RESPONDENT. On the contrary, it did materially alter the arbitration clause in RESPONDENT'S offer, so it does not belong to what's "common in substance" when both parties use standard terms and for the same reason, does not become part of the contract.

(b) In any event, the pre-arbitral requirement in CLAIMANT'S arbitration clause

has never been satisfied.

Clause 12 of EXHIBIT 2 stated, “All disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination shall be conciliated.” On the contrary, CLAIMANT never fulfilled this precondition or even initiated any forms of conciliation. So CLAIMANT’S arbitration clause can not be triggered yet.

C. ALTERNATIVELY, RESPONDENT’S ARBITRATION CLAUSE IS THE ONLY VALID AND APPLICABLE CLAUSE THAT PREVAILS IN THIS DISPUTE.

(a) RESPONDENT’S ARBITRAITON CLAUSE IS INCORPORATED INTO THE CONTRACT BY REFERENCE.

“The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.”[UNCITRAL, OPTION I, 7(6)]. “Traditional contract principles applicable to the world of paper transactions regarding the enforceability of contract term apply equally to the emergent world of online contracting” [ONE BEACON INSURANCE COMPANY V. CROWLEY MARINE SERVICES, INC.,]. RESPONDENT stated, “We again refer you to our terms and conditions… [EXHIBIT10] ”. According to that, RESPONDENT’S arbitration clause had been incorporated into the contract on March 20, 2011. That letter is a counter-offer to CLAIMANT’S offer which contains no arbitration clause at all. Yet CLAIMANT did not present any objection in more than three months which is way beyond reasonable time. So even CLAIMANT did present its own arbitration clause on June 10, 2011, it was already “undue delayed” to object to it.

(b) RESPONDENT'S ARBITRATION CLAUSE IS VALID AND SPECIFIC.

Clause 9 stated "All disputes…shall be referred to arbitration in Cazenda using the SIAC Rules Or …in Hong Kong using the SIAC Rules" [EXHIBIT 4] which is much more clear compare to CLAIMANT'S arbitration clause. Cadenza is the loading port of in the current dispute and has closest contact. Hong Kong is a neutral venue to both parties hence a impartial choice. Furthermore, applying RESPONDENT'S arbitration clause imposes no inconvenience on CLAIMANT.

CONCLUSION ON JURISDICTION

The tribunal has no jurisdiction over this dispute.

ARGUMENT ON MERITS

II. RESPONDENT did not breach the contract and is not liable for damages for the breach of contract pursuant to Article 7.4.1.

RESPONDENT did not breach the contract and is not liable for damages because that, (A)RESPONDENT has fulfilled its obligation under the contract of one sample car; (B)Respondent did not breach the contract of sales for 1000 cars; (C) The impossibility of loading 100 cars was caused by CLAIMANT'S own mistake.

A. RESPONDENT has fulfilled its obligation under the contract of one sample car

(a) The contract of one sample car has been shown by conducts of both parties.

"A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance" [PICC, 2.1.6(1) & CISG, Art 18]. "A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement" [PICC, 2.1.1]. When RESPONDENT loaded the car on the ss Herminia pursuant to CLAIMANT'S phone instructions on March 21, 2011 and CLAIMANT paid for the sample car, the contract has been concluded by both parties' conducts. [EXHIBIT 11]

(b) Respondent competently fulfilled its obligation by delivering the car pursuant to CLAIMANT'S instruction.

Even though RESPONDENT clearly stated in EXHIBIT10 that, "Also we would prefer to treat the shipment of the single car being separate from the order of 1000 cars and hence would like to be payed in advance", still RESPONDENT sent the car to the docks to be loaded as soon as possible and did load the ss Herminia pursuant to CLAIMANT'S phone instructions. By doing that RESPONDENT had competently fulfilled its obligation hence did not breach the contract of the sample car.

B. RESPONDENT DID NOT BREACH THE CONTRACT OF SALES FOR 1000 CARS

(a) RESPONDENT has no obligation to deliver 1000 cars to CLAIMANT unless there is a solid confirmation from CLAIMANT.

By adding a precondition of executing the 1000 car contract, CLAIMANT need send a confirmation to RESPONDENT and give feedback of the performance for the

sample car. During the correspondence of both parties, CLAIMANT clearly stated that, “we will send you an order with the proviso that if the car does not come up to expectations we will not execute the order” [EXHIBIT 7]. Then when CLAIMANT did send its order form, it stated, “any defects or unsatisfactory performance will be notified within one week of receipt of the sample car” [EXHIBIT 9]. As a reasonable business dealer, CLAIMANT did not show its intention of buying 1000 cars from RESPONDENT until August 10, 2011 when he stated “…hence the order has been enlivened”. By that time it has lapsed nearly five months since RESPONDENT loaded the sample car on the ss Herminia pursuant to CLAIMANT’S phone instructions [EXHIBIT 11]. From the correspondence of the parties we can know that it only took about two months for the shipment from Minuet to Cadenza. So if CLAIMANT still wanted to buy another 1000 cars, a solid confirmation should be sent to RESPONDENT within one week after the testing, or otherwise it shows that CLAIMANT was not interested in proceed with the purchase of remaining cars.

(b) The existence of condition does not mean acceptance in silence

Silence is never a valid way to show consent or acceptance. This is a universal rule in international trade. “A statement made by or other conduct of the offeree indicating assent to an offer in an acceptance. Silence or inactivity does not in itself amount to acceptance” [PICC.2.1.6 (1)]. “An acceptance of an offer becomes effective when the indication of assent reaches the offeror” [PICC.2.1.6 (2)]. Article 18(1) of CISG has identical prescription as PICC. Just as what’s said above, silence cannot equal to an offer or confirmation of CLAIMANT’S intention to buy 1000 cars from RESPONDENT.

2.3 Even if CLAIMANT redeem the proviso is fulfilled by silence, it never became part of contract since RESPONDENT never agreed to it.

Unlike the one sample car contract which was concluded by both parties' conduct, there is no clear acceptance in the contract of 1000 cars. Every time one party presented an offer or counter-offer, it was rejected by the other parties' new counter-offer. Under this circumstance, no contract can be formed until June 10, 2011 when CLAIMANT stated, "By the way we have no objection using the UNIDROIT Principles 2010 as the governing law… [EXHIBIT 13] ". UNIDROIT provides other solutions for battle of forms. "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 unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract" [PICC, 2.1.22]. So in the case of standard terms, only terms that both parties agreed to or standard terms which are common in substance can be applicable.

In the present case, CLAIMANT'S proviso is not contained in its standard forms, nor did RESPONDENT agreed to take silence as an offer of 1000 cars. On the contrary, when CLAIMANT stated "the order has been enlivened" on August 10, 2011 [EXHIBIT 14], RESPONDENT replied immediately in five days stated, "We have been waiting for a confirmation of your order which has never arrived. We simply assumed that you do not wish to proceed with the purchase of the 999 cars" [EXHIBIT 15]. This clearly shows that RESPONDENT never agreed to silent confirmation hence this part never became applicable as part of the contract.

(c) Furthermore, silent confirmation in current transaction fails the requirement of good faith and fair dealing.

As a cornerstone of business practice, good faith plays an important part in building mutual relationship and promoting future cooperation which forms a basic principle of international treaties. “Each party must act in accordance with good faith and fair dealing in international trade” [PICC, 1.7(1)]. “The parties may not exclude or limit this duty” [PICC, 1.7(2)]. As in the present case, production of 1000 cars needs necessary time and investment of cost. By demanding the remaining cars to be sent by December 1, 2011 [EXHIBIT 5] without a firm confirmation of buying them will put unreasonable burden on the seller. Sending the confirmation on August 10, 2011 leaves less than four months for RESPONDENT to produce and deliver goods over 10 million US dollars value. What’s more beyond reasonable is the statement CLAIMANT made in EXHIBIT 7, “What we are looking for in a car is that it can run 500 miles before it needs to be recharged and that the recharging costs less than using petrol” which sounds impossible in reality. This requirement by CLAIMANT really reduced its credibility of buying the car produced by RESPONDENT.

C. The impossibility of loading the 100 cars was caused by CLAIMANT’S own mistake.

As we stated before, terms and conditions that applicable between CLAIMANT and RESPONDENT are determined by “knock out” doctrine in UNIDROIT Principle 2010. In the comment of UNIDROIT Principle 2010, Article 2.1.22, 3, it is stated, ”The ‘last shot’ doctrine may be appropriate if the parties clearly indicate that the adoption of their standard terms is an essential condition for the conclusion of the contract. Where, on the other hand, the parties, as is very often the case in practice,

refer to their standard terms more or less automatically, for example by exchanging printed order and acknowledgement of order forms with respective terms on the reverse side, they will normally not even be aware of the conflict between their respective standard terms. There is in such cases no reason to allow the parties subsequently to question the very existence of the contract or, if performance has commenced, to insist on the application of the terms last sent or referred to. It is for this reason that this Article provides, notwithstanding the general rules on offer and acceptance, that if the parties reach an agreement except on their standard terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance."

In this dispute, RESPONDENT first stated its Clause 11 in the letter on January 15, 2011, "The purchaser is to nominate a ship which is able to load goods in the ports nominated by the seller. [EXHIBIT 4]" Then RESPONDENT mentioned its terms and conditions again on March 20, 2011. [EXHIBIT 10] And on March 25, 2011 right after loaded the sample car on the ss Herminia in Cadenza, RESPONDENT reiterated that, "Please note that we expect you to nominate a ship which can load out of the nominated ports which are Cadenza, Cantata and Piccolo" [EXHIBIT 11]. By nominating the three ports listed above, RESPONDENT had given clear instruction as to the requirement of the ship. Claimant's letters later had shown its assent to this clause by stating "As per your instructions we nominate the ss Herminia for further shipments" in EXHIBIT 13 and "As you know we are expecting the 999 cars to be loaded at a port nominated by you…" according to "knock out doctrine" we mentioned earlier, this clause has become part of the contract and applicable to both parties. So CLAIMANT has the obligation to nominate a proper ship that can fit the

requirement of the ports. Yet the nominated ship ss Hermina cannot dock in Piccolo where the 100 cars were in storage because it is too big for the ports [EXHIBIT 17 & CLARIFICATION 14]. It is clear that the failure of loading the 100 cars was caused by CLAIMANT'S own fault of nominating the wrong ship which cannot load in nominated ports. For that reason, CLAIMANT should bear the consequence of its own mistake and conduct and RESPONDENT is not liable for any damages that CLAIMANT suffered.

REQUEST FOR RELIEF

RESPONDENT respectfully requests the tribunal to find that:

1) The tribunal has no jurisdiction over the dispute; and in the alternative the RESPONDENT'S arbitration clause applies;
2) RESPONDENT has fulfilled its obligation under the contract of one sample car;
3) RESPONDENT did not breach the contract of 1000 cars;
4) The impossibility of loading 100 cars was caused by CLAIMANT'S own mistake.
5) Respondent is not liable for the breach of contract pursuant to Article 7.4.1.

(2798 words)