THE INTERNATIONAL ADR (ALTERNATIVE DISPUTE RESOLUTION) MOOTING COMPETITION

MEMORANDUM FOR CLAIMANT

ON BEHALF OF	**AGAINST**
CHAN MANUFACTURING	**LONGO IMPORTS**

TEAM NUMBER: 015

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ABBREVIATIONS

&	And
CIETAC	China International Economic & Trade Arbitration Commission Arbitration
e.g.	exemplum gratia (for example)
et al.	and others
etc.	et cetera (and so on)
Ex.	Exhibit
ICC	International Chamber of Commerce
Id.	idem (the same)
i.e.	id est. (that is)
Incoterms 2010	International Rules for the Interpretation of Trade Terms, International Chamber of Commerce
inter alia	among other things
Model Law	UNCITRAL Model Law on International Commercial Arbitration
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PICC	UNIDROIT Principles of International Commercial Contracts 2010
Para	Paragraph
Supra	Above
SIAC	Singapore International Arbitration Center

UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

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ARGUMENT

I. The Tribunal has jurisdiction as the parties are bound by CLAIMANT's arbitration clause.

The Tribunal should decide that it has jurisdiction over the present case, for CLAIMANT initiated arbitration before the CIETAC based on its Clause 12, an arbitration agreement validly formed by the parties, which fulfils the requirements of both substantive consent **[A]** and applicable form **[B]**.

A. The arbitration agreement is properly formed between the parties.

Preliminarily, the general principle of party autonomy underlies the parties' freedom to choose the law governing their arbitration agreement.[1] Here, the parties have chosen the PICC as the governing law.[2] Such an explicit choice of law, though intended for the underlying contract, is generally interpreted by authorities and court decisions as extending to the arbitration clause contained therein, except for a strong contrary indication.[3] Thus, the formation of the parties' arbitration agreement is also governed by the PICC, according to which the parties have agreed to arbitrate **[1]** and the Arbitration Agreement is based on CLAIMANT's arbitration clause **[2]**.

1. There is an agreement to arbitrate between the parties.

The PICC provides that "a contract may be concluded by the acceptance of an offer".[4]

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1 *Born*, P426.
2 *Ex* 10&13.
3 *Born*, P407-25.
4 Article 2.1.1.

Moreover, Article 2.1.22 thereof confirms that once the basic requirements for the existence of a contract have been satisfied, the formation of the contract is divorced from questions relating to its terms.

In this case, the offer and acceptance between the parties were contained in the exchange of letters: RESPONDENT materially altered the original offer by CLAIMANT in consecutive letters dated 20, 25 and 30 of March, thus the counter-offer emanating from RESPONDENT; CLAIMANT later made an acceptance in its letter dated June 10, 2011. Both parties made merely general reference to their terms[5] containing the arbitration clauses (*relatio imperfecta*),[6] but it is recognized by both the New York Convention[7] and case law[8] that the parties may incorporate an arbitration clause by reference to a separate document where such clause is known to exist. Clearly, it follows that both parties have chosen arbitration over litigation to settle any disputes arising from their business dealings by reference to their arbitration clauses respectively.[9] Hence, the common intention to arbitrate is dominant and suffices to operate as an arbitration agreement which should at minimum bind the parties to the extent that the proper dispute resolution machinery is arbitration in Cadenza.[10]

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[5] *Ex* 10.
[6] *Mistelis* P5-10.
[7] Note of the Secretariat on Draft Article 1 to 24 on Scope of Application, Arbitration agreement.
[8] *Supra* note 6.
[9] *Peters Fabrics Inc. v Jantzen Inc.*
[10] *Lory Fabrics, Inc. v Dress Rehearsal Inc.*

2. The parties have agreed to arbitrate as per CLAIMANT's clause.

Notwithstanding the establishment of an agreement to arbitrate, RESPONDENT may argue that the agreement is based on its arbitration clause. However, as mentioned above, CLAIMANT also referred to its arbitration clause, resulting in a "battle of forms"[11] situation where incongruent stipulations in the parties' standard terms shall be cancelled out under the knock-out rule enshrined in Article 2.1.22 PICC. The rule also assumes that the default rules (underlying statutory provisions, usage or practice, or prior agreement) are effective where a party is silent on a particular issue: the point of departure should be whether there is in fact a contradiction between the default rules and other party's express terms.[12] In the present case, except for the parties' agreement to arbitrate in Cadenza, RESPONDENT's silence on other issues as well as its failure to clarify its determination to form the agreement only on its own terms allows for the application of CLAIMANT's clause. It is clear that the arbitral seat [a], the institution [b] and the procedural rules [c] provided by CLAIMANT's Clause 12 will not be negated by any default rules and shall apply here.

a) The arbitral seat is Cadenza.

Clause 12 provides that the seat of the arbitration shall be Beijing, yet the parties have agreed to refer the dispute to arbitration in Cadenza. However, inconsistent terms are not unusual in international arbitration agreement[13] and can be reconciled by arbitral tribunals through liberal interpretation[14] to preserve their efficacy.

[11] *Born*, P667.
[12] *Vogenauer*, P344.
[13] *Born*, P655.
[14] *Born*, P683.

Here, the parties have agreed that the arbitral seat is Cadenza and nominated arbitrators to constitute this tribunal, which shall have the authority to eliminate the inconsistency by designating Beijing, the domicile of the CIETAC, as the place where any part of the proceedings is to be held under Article 20(2) Model Law adopted by Cadenza.

b) The arbitration shall be referred to the CIETAC.

The selection of arbitration forum is almost invariably left to the parties, subject to few or no mandates of the applicable law. CIETAC is the proper forum because CLAIMANT commenced this proceeding before CIETAC based on its Clause 12, while RESPONDENT fails to designate a forum of its own.

CLAIMANT's inaccurate reference to the China Trade Commission should be interpreted as a reference to the CIETAC by this tribunal as a question of arbitral procedure.[15] First, it has been confirmed by weighty authority that a lack of precision may not necessarily vitiate an arbitration clause.[16] Providing that the agreement to arbitrate is unmistakable, courts and tribunals are generally willing to disregard or minimize imperfections in the parties' arbitration agreement.[17] As with other references to non-existent entities, this tribunal may equate the reference to CTC to CIETAC, an existing prominent institution.[18] Moreover, the failure to accurately specify an institution is usually condoned in an international context,[19] and the procedural rules of the CIETAC do not reject references other than those expressly

[15] *Born*, P678.
[16] *Paulsson*, para 9.03.
[17] *Born*, P676.
[18] *Born*, P681.
[19] *Astra Footwear Indus. v. Harwyn Int'l, Inc.*

enumerated.[20] Also, CLAIMANT's application for arbitration by CIETAC has given meaning to its prior reference to CTC, thereby sufficiently definite for the purpose of selecting an arbitration forum.

Conversely, there is no sufficient link between the use of SIAC Rules and SIAC arbitration: the SIAC Rules may be adopted for use in any international arbitration with or without reference to SIAC and arbitration at the SIAC does not entail the use of these rules. By contrast, reference to arbitration by CIETAC generally means arbitration under the CIETAC rules and vice versa, unless a modification of these rules or the application of other rules are agreed upon by the parties.[21] Since arbitration by the CIETAC as proposed by CLAIMANT by no means contradicts with RESPONDENT's intended use of the SIAC Rules, it forms part of the parties' agreement.

c) The proceedings shall be governed by the CIETAC Rules.

It has been established that the parties have agreed to arbitration by CIETAC, thus the CIETAC Rules applicable in the present case. Also, as analyzed above, these rules admit of modifications by the SIAC Rules.

B. The arbitration agreement is valid as it satisfies applicable form requirements.

New York Convention applies only to "agreements in writing" defined by Article II(2) to include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. However, such written

[20] Article 1.
[21] Article 4(2) and 4(3).

requirement is not exclusive, if one takes into account the need to conform to the current international commercial practice. This approach of interpretation has been affirmed by the UNCITRAL Recommendation.[22] Therefore, the interpretation of Article II(2) in the context of the Model Law and UNCITRAL Recommendation should include the provisions in the Article 7 Model Law.

According to option I of Article 7, the written form requirement is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference. Both parties referred to the standard terms posted on their website respectively and the arbitration clauses are contained in their standard terms, which are common in substance. Thus, the Arbitration agreement satisfies the formal requirement.

IN CONCLUSION, this Tribunal has jurisdiction over the present case based on the parties' validly formed arbitration agreement, as represented by CLAIMANT's arbitration clause.

II. The sale contract of electric cars is valid and operative.

Chosen by both parties, PICC governs the merits of this dispute,[23] under which the parties concluded a sale contract of electric cars. This contract is both valid **[A]** and operative **[B]**.

A. The parties concluded a valid sale contract of electric cars.

A contract of sale is concluded between the parties. The February 5, 2011 letter from CLAIMANT to RESPONDENT constitutes an effective offer **[1]**, and the March 20,

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22 Recommendation regarding the interpretation of Article II(2) and Article VII(1) of the New York Convention.
23 *Ex* 10&13.

2011 letter and March 25, 2011 letter from RESPONDENT to CLAIMANT constitute an effective counter-offer collectively **[2]**. Thus, when CLAIMANT sends the confirmation letter to RESPONDENT on June 10, 2011, the sale contract of electric cars is concluded **[3]**.

1. February 5, 2011 letter from CLAIMANT to RESPONDENT constitutes an effective offer.

CLAIMANT's letter (order form included) to RESPONDENT dated February 5, 2011 constitutes an effective offer pursuant to Article 2.1.2 PICC. In order to qualify as an offer capable of acceptance, it needs to meet two conditions: sufficiently definiteness of the contract terms, and the intention to be bound in case of acceptance.[24]

First, the letter is sufficiently definite: it indicates the subject matter of this transaction, Gardeners model electric car, and it expressly makes provision about both quantity and price. Second, the letter demonstrates CLAIMANT's intention to be bound upon RESPONDENT's acceptance. The more specific the terms of the proposal are, the more likely the proposal is to be construed as an offer.[25] The letter contains a great amount of details of the sale contract, including the price, quantity, shipment and payment methods, so it indicates CLAIMANT's intention to be bound.

2. March 20th, 2011 letter and March 25th, 2011 letter from RESPONDENT to CLAIMANT constitute an effective counter-offer collectively.

According to Article 2.1.11 PICC, a reply to an offer which contains material

[24] *Vogenauer* , P223.
[25] *Comm* on Article 2.1.2.

modifications is a rejection of the offer and constitutes a counter-offer. Alternations are not material if the offeree could reasonable expect the offeror to agree to them tacitly.[26] Compared with Article 19(3) CISG, material alterations include additional terms relating to, *inter alia*, payment, quantity, and the settlement of disputes.

Two letters sent from the RESPONDENT to CLAIMANT collectively constitute the counter-offer, by including three material alternations: first, the term should be FAS as indicated in the Exhibit 10; second, as stated in the Exhibit 11, CLAIMANT bears the obligation to nominate a ship; third, Exhibit 10 contains a choice of law clause. These material alterations to shipment and choice of law clause convert RESPONDENT's purported acceptance into a counter-offer.

3. CLAIMANT's June 10th, 2011 letter constitutes an effective acceptance and the sale contract of electric car is concluded.

"Battle of forms" arises where the parties reach agreement on the essential terms, usually through a reply to an offer which identifies itself as an acceptance, but both parties indicate that their respective standard terms should govern the contract.[27] CLAIMANT's June 10, 2011 letter is an acceptance by which the parties have reached an agreement except on the standard terms which both parties have referred to [a]. Consequently, the sale contract consists of the agreed terms and the standard terms which are common in substance [b].

[26] *Vogenauer* , P282.
[27] *Comm* on Article 2.1.22.

a) The parties have reached an agreement except on the standard terms which both parties refer to.

Pursuant to Article 2.1.19 PICC, where one party or both parties refer to their standard terms in concluding a contract, the general rules on formation apply. As for standard terms contained in an electronic file, express reference is normally required.[28] Availability on a website should be sufficient, provided that the other party can save and reproduce. Therefore, both parties have incorporated by reference their standard term contained in the electronic file in their correspondence.

Article 2.1.6 PICC further demonstrates that a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. By stating that CLAIMANT will nominate a ship as per RESPONDENT's instruction and CLAIMANT does not have objection to PICC, CLAIMANT's June 10, 2011 letter illustrates the assent to the counter-offer. In addition, CLAIMANT's subsequent conduct, which is to nominate a ship and enquire for the RESPONDENT's further instruction, also manifests its assent to the counter-offer. Therefore, a valid contract is concluded between both parties, though the differences exist between the standard terms of CLAIMANT and RESPONDENT.

b) The contents of the sale contract of electric cars consist of the agreed terms and the standard terms which are common in substance.

Pursuant to Article 2.1.22 PICC, 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.

[28] *Vogenauer* , P321.

The agreed terms are the contents of the counter-offer including the order form with three material alternations and the additional proviso. Since the standard terms of the parties are apparently in contradiction except for respective arbitration clauses, nothing contained therein shall be included in the sale contract.

B. The sale contract of electric cars is operative.

According to Article 5.3.1 PICC, the proviso is a resolutive condition for the sale contract. It is stated in the proviso that unless CLAIMANT finds the model car unsatisfactory, RESPONDENT has the obligation to deliver the cars by December 1, 2011. It is further reiterated in order form that any defects or unsatisfactory performance will be notified within one week of receipt of the sample. By juxtaposing the proviso with the said term in the order form, the interpretation shall be: unless CLAIMANT finds the model car unsatisfactory and gives a notice to that effect within one week of the receipt, RESPONDENT has the obligation to deliver the cars by December 1 2011.

Article 5.3.2 of the PICC stipulates that unless the parties otherwise agree, the relevant contract or contractual obligation comes to an end upon fulfillment of a resolutive condition. After CLAIMANT has received the sample car, no objection of unsatisfactory is notified to RESPONDENT, therefore the sale contract is operative.

III. RESPONDENT breached the contract and therefore is liable for damages.

The right of the aggrieved party to recover damages depends upon proof of non-performance by the other party to the contract. RESPONDENT fails to perform its contractual obligation **[A]**. RESPONDENT does not have the right to withhold

such contractual obligation on account of CLAIMANT's preceding failure to perform its obligation **[B]**. RESPONDENT is liable for damages ensuing from such non-performance **[C]**.

A. RESPONDENT fails to perform its contractual obligation.

Article 7.1.1 PICC stipulates that non-performance is failure by a party to perform any of its obligations under the contract. RESPONDENT fails to perform its obligation to deliver the electric cars by December 1, 2011, which constitutes a non-performance under the sale contract.

B. RESPONDENT does not have the right to withhold such contractual obligation by claiming that CLAIMANT has breached the previous obligation.

Article 7.1.3 lays down the *exceptio non adimpleti contractus* which reflects general principle[29] and confers on a contracting party the right to withhold performance if the other party does not comply with its obligation.[30] A literal interpretation may entitle the other party to withhold its performance of an obligation that arises from a consecutive contract although this obligation is not synallagmatic with respect to the obligation that the other party wishes to withhold.[31] However, the right to withhold the respective performance for non-synallagmatic is accepted, *mutatis mutandis*, as long as it is consistent with good faith.[32]

[29] Arbitral Award, ICC case no.8547.
[30] *Vogenauer* , P739.
[31] *Vogenauer* , P742.
[32] *Comm* on Article 7.1.3.

Here, RESPONDENT cannot justify its non-delivery of the electric cars by claiming that CLAIMANT fails to nominate a proper ship which can dock in all of the three ports. First, payment of the contract price is the synallagmatic obligation related to the delivery of the good as recognized by most of the countries in the sale contract, but the obligation to nominate a proper ship is not. Second, RESPONDENT withhold the delivery of electric cars is inconsistent with good faith enshrined in Article 1.7 PICC. Abuse of rights is typical example of the behavior contrary to good faith.[33] RESPONDENT knowingly nominated a port which the ship of CLAIMANT cannot dock in, especially after CLAIMANT's accusation of breach of the sale contract and refuse to seek land transportation and other options to make its cars available at Cadenza. Furthermore, RESPONDENT has sold electric cars ordered by CLAIMANT to its competitor. All these reveal its bad intent. RESPONDENT adducing Article 7.1.3 is nothing but a deception used to evade its contractual obligation. Hence, RESPONDENT does not have the right to withhold its obligation pursuant to Article 7.1.3 PICC.

C. RESPONDENT is liable for damages.

Pursuant to Article 7.4.1 and 7.4.2 PICC, any non-performance gives the aggrieved party a right to damages including both losses from which it suffered and gains of which it was deprived, either exclusively or in conjunction with any other remedies. CLAIMANT suffers significant losses including the payment made to RESPONDENT and the loss of profits.[34] Such loss is due to RESPONDENT's non-performance, or its failure to deliver the electric cars to CLAIMANT. Therefore, RESPONDENT is liable for damages.

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[33] *Comm* on Article 1.7.

[34] *Comm* on Article 7.4.2.

REQUEST FOR RELIEF

CLAIMANT respectfully requests the Tribunal to find that:

1. The Tribunal has jurisdiction to hear this dispute.

2. RESPONDENT has breached the Sale contract.

3. RESPONDENT is liable for the damages due to its breach of the contract.

(2943 words)