THIRD ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

MEMORANDUM FOR CLAIMANT

Team Number:016

On Behalf of	**Against**
Longo Imports	Chan Manufacturing
Minuet	Cadenza
"CLAIMANT"	**"RESPONDENT"**

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TABLE OF ABBREVIATIONS

UNCITRAL	United Nation Commission on International Trade Law
PICC	Principles of International Commercial Contracts 2010
CIETAC	China International Economic and Trade Arbitration Commission
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TABLE OF CONVENTIONS AND LAW

UNIDROIT Principles of International Commercial Contracts 2010

(Cited: PICC)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(Cited: New York Convention)

Arbitration Law of the People's Republic of China

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China International Economic and Trade Arbitration Commission Arbitration Rules

(Cited: CIETAC Rules)

UNCITRAL Model Law on International Commercial Arbitration

(Cited: UNCITRAL Model Law)

Official Comments on Articles of the UNIDROIT Principles of International Commercial Contracts, 2010

(Cited: Off Cmt)

Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China

(Cited: Interpretation of the Supreme People's Court)

TABLE OF CASES AND AWARDS

Matthew Krigbaum & Abbe Stensland, The validity of virtual attachments: conveying standard terms and conditions to a contract via the Internet, December 13, 2007

(Cited: Matthew Krigbaum & Abbe Stensland)

Zurich Chamber of Commerce, Preliminary award of 25 November 1994

Bulletin of the Swiss Arbitration Association, 1996, No.2 PP.303-318; Yearbook Commercial Arbitration, 1997, pp.211-212.

(Cited: Preliminary award)

Case no. 4A_46/2011 of 16 May 2011, Swiss Supreme Court

(Cited: Case no. 4A_46/2011)

Stockholm Institute, interim award of 17 July 1992, XXII *YBCA* 197(1997) 201

(Cited: Interim award)

Rooney and another v. CSE Bournemouth Ltd [2010] EWCA Civ 1285

(Cited: Rooney)

Sterling Hydraulics Ltd v. Dichtomatik Ltd [2006] EWHC 2004(QB),

(Cited: Sterling)

Balmoral Group Ltd v. Borealis (UK) Ltd [2006] EWHC 1900 (Comm)

(Cited: Balmoral)

ICC International Court of Arbitration, Arbitral Award

October 2001, ICC case NO.9078

(Cited: ICC Award NO.9078)

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Gary B. Born, International Commercial Arbitration, Kluwer Law International, 2009

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JURISDICTION

I. CIETAC HAS THE JURISIDICTION OVER THE DISPUTE

A. The Arbitration Clause in CLAIMANT's Terms and Conditions [Clause 12, Ex. 2] is binding between both parties.

1. The Arbitration Clause was agreed by both parties.

Before there can be a valid arbitration, there must first be a valid agreement to arbitrate [Redfern P14]. In the initial step, CLAIMANT clearly indicated his intention of incorporating his own Terms and Conditions [Ex. 2] into the order he was to send by attaching an absolute path directly link to his Terms and Conditions [Cl. 12]. However, RESPONDENT only asked CLAIMANT to Google under his company name to find his terms and conditions, which failed to manifest his seriousness and certainty to incorporate his standard terms as a response [Ex. 3].

Furthermore, after CLAIMANT sent his Order Form [Ex. 9], RESPONDENT still talked about his terms ambiguously without providing a specific location or a hard copy [Ex. 10, Matthew Krigbaum & Abbe Stensland, p19]. Hence, this could not be deemed as an adequate notice let alone a valid incorporation. Therefore, FAS and PICC were the only modification [Ex. 10], which was accepted by CLAIMANT by conduct and statement respectively [Ex. 13, PICC Art. 2.1.6(1)]. Consequently, Arbitration Clause from CLAIMANT was impliedly agreed by RESPONDENT

without any objection in the acknowledgment of the ORDER FORM [UNCITRAL Model Law, Art. 7(1)].

2. The Arbitration Clause from CLAIMANT is valid

(a). The Arbitration Clause [Clause 12, Ex. 2] satisfied the requirement of a valid arbitration clause.

The arbitration clause was in writing, since it was recorded on the website along with other terms and conditions from CLAIMANT, which was accessible so as to be useable for subsequent reference, conforming to the requirements in UNCITRAL Model Law, Art.7(3),(4) and New York Convention, Art II(2).

(b). The China Trade Commission mentioned in the Arbitration Clause referred to CIETAC

Although the China Trade Commission mentioned by CLAIMANT did not exactly accord with the relevant CIETAC names under CIETAC Rules, Art. 1 (2), the jurisdiction of CIETAC remains unaffected. As the parties clearly agreed to arbitration (as opposed to litigation), a determination of their dispute in China (as opposed to a determination in any other countries), and an institutional arbitration (as opposed to a mere ad hoc arbitration), concerning the international commercial character of the disputes between them, the reference to “China Trade Commission” only meant CIETAC (as opposed to the CMAC, dealing with maritime disputes) [Preliminary award]. Therefore, CIETAC shall be logically inferred to operate its

jurisdiction under 'Competence-Competence' doctrine [CIETAC Rules, Art. 6, Born, p853].

Furthermore, UNCITRAL Model Law, Art. 34(2)(a)(i) and New York Convention, Art. V(1)(a) implicate that the law of the seat of arbitration shall be applied to the arbitration agreement provided that no applicable law is selected by parties. The Arbitration Clause expressly indicated that the seat of arbitration was Beijing; hence, laws related to Arbitration of PRC apply.

Where the name of an arbitration institution as stipulated in the agreement for arbitration is inaccurate, but the specific arbitration institution can be determined, it shall be ascertained that the arbitration institution has been selected [Interpretation of the Supreme People's Court, Art. 3]. Accordingly, the arbitration clause is valid with a determined arbitration institution nominated [Arbitration Law of PRC, Art. 16, 18].

B. Pre-arbitral condition had been fulfilled by both parties

1. The informal meeting between parties [Ex. 20] satisfied the "conciliation" requirement in the Arbitration Clause

Arbitration Clause stipulated that "…shall be conciliated. If no agreement can be reached it must be referred to arbitration…" The parties have fulfilled the pre-arbitral condition as a meeting between the parties took place in the charge of CIETAC, though was informal, showing their attempt to conciliate before arbitration [Ex. 20]. Besides, the fact that they have nominated arbitrators indicated their breakdown of the

meeting and the deterioration of their relationship [Case no. 4A_46/2011]. The pre-condition was fulfilled; hence arbitration follows [Cl. 7].

2. Even if, the informal meeting failed to amount to 'conciliation', this will not affect the CIETAC's jurisdiction

Nevertheless the word 'shall be' used in the Arbitration Clause, it can hardly be recognized as a mandatory procedure prior to arbitration, as it lacked specific requirements and definiteness or objective standards by which compliance can be measured [Case no. 4A_46/2011]. The Arbitration Clause failed to stipulate a time limitation, procedural framework or even whether a conciliator should be appointed or not, which is hardly workable [interim award]. Therefore, the jurisdiction of CIETAC shall be upheld in any event.

II.CONCLUSION ON JURISDICTION

CIETAC has the jurisdiction over the dispute

MERITS

I. THERE IS A VALID CONTRACT BETWEEN THE PARTIES

A. RESPONDENT expressed great intention of establishing the contractual relationship with CLAIMANT

CLAIMANT indicated the criteria, namely the proviso "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"[Ex. 5, 7, 8], along with the requirement of the qualified sample during negotiation [Ex. 7]. RESPONDENT showed his consent to the criteria and the positive attitude towards the requirement of the sample [Ex. 8].

Furthermore, the performance of the sample car strengthened the RESPONDENT's intention to activate the following Contract [Ex.11]

Besides, RESPONDENT stated that he expected CLAIMANT to nominate a ship for further shipment, and conveyed his confidence in meeting the requirement of the sample and his endeavor to meet the deadline [Ex. 11]. Hence, it is evident to find RESPONDENT's willingness to be bound in the Contract with CLAIMANT.

B. The Order Form [Ex. 9] sent by the CLAIMANT constituted 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 Art 2.1.2]. The Order Form that the CLAIMANT sent to the RESPONDENT clearly

showed its definiteness and intention to be bound by specifying 10 essential terms in the form. Therefore, the Order Form was an offer.

C. Terms and Conditions from CLAIMANT were effectively incorporated into the Order Form

After CLAIMANT expressed his interest of 1000 cars' preliminary order, CLAIMANT gave a reasonable notice of his own Terms and Conditions by stating at the bottom of the Exhibit 1 "For Terms and Conditions see http://12345", which clearly indicated CLAIMANT's intention to incorporate the Terms and Condition into the Order that he was to send [Rooney]. Afterwards, the Order Form sent by CLAIMANT did not betray his original intention and reasonable reliance that RESPONDENT could have relied on [Ex. 9]. Furthermore, CLAIMANT provided a clear and specific location of the Terms and Conditions of his own with a URL attached, namely "http://12345", which left no ambiguity or uncertainty [Cl. 12]. Accordingly, Terms and Conditions were validly incorporated.

D. The Contract was concluded on CLAIMANT's Terms and Conditions by CLAIMANT's conduct of accepting the counter-offer [Ex.13]

1. Terms and conditions from RESPONDENT were not validly incorporated into the Contract

RESPONDENT did not have a strong intention to incorporate the terms and conditions into the Contract, for he only required CLAIMANT to Google under his

company name, which left a great uncertainty without the specific location of the terms and conditions. Furthermore, in the response to the Order Form, RESPONDENT, as a manufacturer with 30 years' experience [Background Information para. 4], still generalized about his Terms and Conditions without providing a specific location or copy [Ex. 10]. Rather than a specific and dedicated URL through which terms and conditions are accessible directly simply by typing the address, the only name of company available on Google, where even a conspicuous hyperlink was not given, was far from enough to amount to a reasonable notice of the existence of those terms, let alone a valid incorporation into the Contract [Sterling, Matthew Krigbaum & Abbe Stensland, p19].

2. RESPONDENT's emphasis on FAS term, request of separate shipment and payment of the sample car and proposal of PICC as the governing law constituted a counter-offer against the Order Form

As the terms and conditions from RESPONDENT failed to be incorporated into the Contract reasonably and effectively, only FAS term and PICC term survived for their explicit expression, along with the separate shipment and payment of the sample car, which materially altered the requirement in the Order Form. Hence, RESPONDENT made a counter-offer with additions and modifications supplementary to the Order Form [PICC Art. 2.1.11].

3. CLAIMANT accepted the counter-offer from RESPONDENT. Hence, the Contract was concluded on the basis of the Terms and Conditions from CLAIMANT

As is stipulated in PICC Art 2.1.6, a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. CLAIMANT accepted the separate shipment and payment of the sample car by paying for it in advance and giving the instruction of loading on March 21, 2011 [Ex. 11].

Furthermore, the instruction of nominating a ship made by RESPONDENT [Ex. 11] was merely a supplementation to the modified shipment term in the counter-offer, which did not go against the FAS itself as per the INCOTERMS 2010. And thereafter, CLAIMANT accepted it and FAS term by nominating the ship (SS Heriminia) for further shipment [Ex. 13, B3 of FAS INCOTERMS 2010]. Also, PICC as the governing law, was expressly agreed by CLAIMANT. Therefore, the Contract has been concluded by acceptance from CLAIMANT. Since CLAIMANT's Terms and Conditions was the only effective shot due to its valid incorporation, the contract was concluded on the basis of the Terms and Conditions from CLAIMANT [Balmoral]. CLAIMANT's reiteration of his own Terms and Conditions was only a reminder to RESPONDENT as the word "note" showed [Ex.13].

4. RESPONDENT himself acknowledged the conclusion of the Contract

RESPONDENT himself acknowledged the conclusion of the Contract by the words

that "it is you who has breached the Contract" and "you breached our term and therefore breached the Contract of sale for 1000 cars" [Ex. 17].

E. The Contract took effect on June 17, 2011, as per the "Quality term" in the Order Form and the criteria agreed by RESPONDENT [Ex. 5, 8]

The "Quality term" in the Order Form supplemented the criteria by imposing a time limit of the notification of any defects or unsatisfactory performance concerning the sample car, which amounts to a future uncertain event that makes a contract conditional [PICC Art. 5.3.1]. Therefore, according to the "Quality term" and the criteria, the Contract took effect on June 17, 2011, a week later after CLAIMANT received the sample car, as no notice of defects or unsatisfactory performance was delivered [PICC Art 5.3.2(2)].

II. RESPONDENT BREACHED THE CONTRACT BASED ON THE ORDER FORM BY HIS NON-PERFORMANCE

A. RESPONDENT's failure to perform the obligation under the Contract amounts to a fundamental non-performance and CLAIMANT may terminate the Contract

There was no express obligation for CLAIMANT to send the confirmation of the Order to RESPONDENT as Contract was concluded when counter-offer was accepted by CLAIMANT. Even if RESPONDENT had any question concerning whether a confirmation should be sent, RESPONDENT, as a binding party, should act positively

by communicating with CLAIMANT in no time.

RESPONDENT sold the cars ordered by CLAIMANT in the Contract to his competitor, who could dominate the market in a few months [Ex.18], which resulted in RESPONDENT's non-performance and would certainly aggravate the losses of CLAIMANT.

Under PICC Art.7.3.1, RESPONDENT failed to perform his obligation of delivering the reminding 999 cars, which satisfied that, a) the non-performance substantially deprived CLAIMANT of all the goods he was entitled to expect as RESPONDENT sold these cars to others that RESPONDENT did foresee or could reasonably have foreseen such result; b) the strict compliance with the obligation of delivering 999 cars was of essence under the Contract; c) the non-performance was intentional; d) the non-performance gave CLAIMANT reasons to believe that it cannot rely on RESPONDENT's future performance; e) RESPONDENT would not suffer disproportionate loss as he made no preparation or performance. Therefore, RESPONDENT fundamentally breached the Contract and CLAIMANT may terminate the Contract.

B. RESPONDENT breached the duty to cooperate with CLAIMANT on providing information about ports nominated

A contract, to a certain extent, must be viewed as a common project in which each party must cooperate [Off Cmt Art. 5.1.3]. RESPONDENT should give CLAIMANT the information on all three ports nominated by him, because such cooperation was

reasonably expected for the performance of CLAIMANT's obligation, as the ports are all main deep sea ports and the most important harbour is Cadenza which gives businessmen outside of Cadenza, especially businessman like Mr. Longo who has little knowledge on portworthiness since there is only one port in Minuet, an impression that ship that can dock in Cadenza could possibly load out of other deep sea ports [Background Information, paras. 1,2, PICC Art. 5.1.3]. Under this circumstance, and notwithstanding the contractual provisions, RESPONDENT can be expected to give at least some assistance of providing ports information in Cadenza to CLAIMANT [Off Cmt Art.5.1.3]. Unfortunately, by failing to do so, RESPONDENT hindered CLAIMANT in performing his obligation, contrary to the duty of cooperation [Off Cmt Art. 5.1.3].

C. RESPONDENT breached the obligation of performing 100 cars by failing to load the cars

1. The RESPONDENT was not in good faith

CLAIMANT asked RESPONDENT which port the SS Herminia has to dock [Ex. 16], but RESPONDENT did not give any response. Therefore, RESPONDENT did not act in good faith and cooperatively [PICC Art. 1.7, Art. 5.1.3].

2. RESPONDENT could not act inconsistently with the understanding that had been reasonably relied on

No information of ports was given by RESPONDENT, which caused CLAIMANT to

have an understanding resulting from such silence when CLAIMANT reasonably expected RESPONDENT to correct a known misunderstanding that Cadenza was the right port as the parties had completed the performance of the sample car in Cadenza [Ex. 10]. As such understanding was relied upon, RESPONDENT could not act inconsistently [PICC Art. 1.8, Off Cmt Art. 1.8].

III. CLAIMANT is entitled to compensation for harm sustained as a result of RESPONDENT's non-performance of delivering the reminding 999 cars

A. The compensation is due for the harm CLAIMANT sustained as a result of RESPONDENT's non-performance including the loss he suffered and the gain he was deprived

CLAIMANT is entitled to damages exclusively based on the non-performance of RESPONDENT as the non-performance shall not be excused under these Principles due to RESPONDENT's own fault [PICC Art.7.4.1]. CLAIMANT can claim compensation of the loss he has suffered, such as the freight fee, and any gain he was deprived, which is the profit of selling the 999 cars [PICC Art. 7.4.2(1)]. The calculation of lost profit may adopt current price for the performance contracted for, which is the price in Cadenza on the date of the termination of the contract [PICC Art. 7.4.6]. Besides, interest on damages for RESPONDENT's non-performance of the Contract accrues as from the time of non-performance [PICC Art. 7.4.10].

B. The compensation is due for the loss of chance of entering into contracts with potential customers

If RESPONDENT fulfilled the contractual obligation of delivering the cars, CLAIMANT would have, to some extent, grasped a large market share in the field of electric cars, as his competitor actually did. However, RESPONDENT violated the agreement by selling the cars to CLAIMANT's competitor, thereby depriving CLAIMANT of the chance to sell the cars to potential customers and the profit gained from such deals [ICC Award NO.9078]. Therefore, such loss of a chance is established with a reasonable degree of certainty [PICC Art. 7.4.3(1)].

C. RESPONDENT did foresee or could have reasonably foreseen the harm resulted from his non-performance at the time of the conclusion of the contract

The requirement of foreseeability must be seen in conjunction with that of certainty of harm set out in PICC Art. 7.4.3 [Off Cmt, Art. 7.4.4]. RESPONDENT should have foreseen that the cars were intended for immediate re-sale as CLAIMANT stated "time is of the essence" [Ex.13]. Moreover, having been in the automotive industry for the past 30 years [Background Information para. 4], RESPONDENT surely has rich experience in the market of electric cars, and, should have known the loss of profit and loss of a chance suffered by CLAIMANT in such competitive market if he sold these cars ordered by CLAIMANT to his competitor. Consequently, RESPONDENT is liable for the harm [PICC Art.7.4.4].

REQUEST FOR RELIEF

CLAIMANT respectfully requests the tribunal to find that:

A. The tribunal of CIETAC has the jurisdiction over this dispute.

B. There is a valid Contract based on the Order Form between the parties.

C. RESPONDENT is liable for the damages for breaching of Contract.

(2768 words)