TEAM 012

THIRD ANNUAL INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION MOOTING COMPETITION

MEMORANDUM FOR THE CLAIMANT

On Behalf Of	**Against**
Longo Imports	Chan Manufacturing
"CLAIMANT"	"RESPONDENT"

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INDEX OF ABBREVIATIONS

Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
Cl.	Clarification
Ex.	Exhibit
INCOTERMS	International Rules for the Interpretation of Trade Terms of 2000
Model Law	UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006)
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
Para/Paras	Paragraph/Paragraphs
SIAC Rules	Singapore International Arbitration Centre Rules
UNCITRAL	United Nations Commission on International Trade Law
UNDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts of 2010

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ARGUMENTS

JURISDICTION

I. THERE EXISTS A VALID ARBITRATION AGREEMENT BETWEEN THE PARTIES

A. The Tribunal Constituted Under CIETAC Has Relevant Powers

According to the common law principle of **"competence-competence"**, an arbitral tribunal has the inherent power to determine its own jurisdiction. This includes determination of existence of a valid arbitration clause. *[Redfern §5-39 et seq]*

B. There Exists A Valid Arbitration Clause

a) Art.II(2) of the *New York Convention*, which defines the scope of the mandatory condition of an arbitration agreement being **'in writing';** includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. A broader interpretation of Art.II(2) followed universally comprises other means of communications like telexes in its purview. An arbitration clause resulting from only an exchange of documents is also valid in law. *[Israel Chemical Phosphates Ltd v. NV Algemene Oliehandel Rechtsbank]*

b) Further, similar provision can be found in Art.7(2) of the *Model Law*, which permits the **incorporation of an arbitration clause by general reference.** *[Trygg Hansa Insurance Company Ltd. v. Equitas Ltd]*. Under this, a mere reference to a

document containing arbitration clause is sufficient and no explicit reference to the arbitration clause contained therein is required. *[Astel Peiniger Joint Venture* v. *Argos Engineering and Heavy Industries Co Ltd.]*

c) A general reference to general conditions which do not contain any mention of the fact that an arbitration clause is contained therein, also meets the requirements of Art.II(2) of the Convention, if the other party which challenges it has had **knowledge of said standard conditions** and if it has accepted them by its silence. *[DIETF Ltd.* v. *RF AG]*. In the present case, the CLAIMANT repeatedly told RESPONDENT to refer to its website wherein all the general conditions of the CLAIMANT were incorporated. *[Ex.1, Pg2; Ex.13, Pg14]*. Thus the RESPONDENT had ample opportunity to go through the terms and conditions of the CLAIMANT, including the arbitration clause and the same was accepted by it by its silence.

d) Thus the mere fact that the arbitration clause is not referred to in the contract and that there is a mere **reference to standard conditions** which had neither been accepted nor signed, is not sufficient to exclude the existence of the valid arbitration clause. *[Dreistern Werk v. Crouzier]*

MERITS

II. THERE EXISTS A VALID CONTRACT BETWEEN THE PARTIES

A. *Favor Contractus*

Favor contractus constitutes the general principle underlying the *UPICC*. It aims to preserve the contractual relation by limiting the number of situations in which the existence or validity of the contract is questioned or in which it may be terminated *[Bonell]*. *UPICC* attempts to preserve the contractual relations as much as possible by favoring binding agreements and **presuming contract validity**. Art.2.1.14 facilitates the formation of a binding contract even though its terms have not been fully agreed upon, by establishing a presumption that a contract has been concluded. *[Schnyder and Straub]*

B. The Contract Is In Valid Form

Art.1.2 of *UPICC* states that the **conduct of parties is sufficient** to prove a contract, which can be in any form and may be proved by any means, including **exchange of letters**. Further, Art.3.1.2 provides that a contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement. Thus the parties are simply required to establish that they have **reached an agreement** and are released from the requirement to provide evidence of offer and acceptance. *[Kleinheisterkamp]*

C. All Mandatory Requirements Of Contract Formation Are Fulfilled

An Order Form for 1000 cars was issued by the CLAIMANT as per its terms and conditions and the communication between the parties. As per agreement between the parties, the CLAIMANT made payment for one car since the RESPONDENT demanded the payment in advance. However, in its letters, the CLAIMANT repeatedly mentioned that unless the sample is found unsatisfactory, the order for the remaining cars to be sent by December 1, 2011 will still be in force. Moreover, the **RESPONDENT had also agreed to the order form**. *[Ex.10]*. It also agreed to try and meet the deadline *[Ex.11]*. Thus there was a **meeting of minds** between the parties as to the formation of contract. Further, the **subject matter of the contract was definite** and made for 999 cars + 1 sample car. Ex.15 elucidates that the RESPONDENT did not treat the order of the 1000 cars separately from the sample and hence there was an agreement on the quantity. This fulfils the mandatory requirements under Art.2.1.1 and Art.2.1.2 of *UPICC* for contract formation.

D. Application Of *CISG*

a) Since the CLAIMANT and the RESPONDENT had agreed to apply *UPICC* as the governing law, *CISG* should only be used till the extent of filling in gaps left by the *UPICC* in the present matter. Nonetheless, the present contract fulfils all conditions under the *CISG*

b) For a **contract formation under the CISG,** an offer to contract must be addressed to a person and should be sufficiently definite in terms of quantity and

price of goods and should indicate an intention for the offeror to be bound on acceptance *[Art.14]*, all of which has been done by the CLAIMANT in the detailed Order Form issued by him *[Ex.9]*. **Consensus ad idem** between the parties is already proven above.

c) Further, **no material changes** in the standard terms of the CLAIMANT have been made by the RESPONDENT, which would amount to a **counter-offer.** The non-exhaustive list of Art.19(3) is **not binding** but solely contains presumptions in favor of materiality, which can be **rebutted** in individual cases relying on practices between the parties, trade usages, their conduct during negotiations and other relevant circumstances. Thus, modifications that would be considered material can be immaterial depending on the circumstances of the case. The crucial point is that the change should not place one party in an obvious disadvantage and unambiguously favour the other. *[Di Matteo]*.

The changes proposed by the RESPONDENT through its standard terms were treated as immaterial by it itself, since no such condition or requirement of strict adherence was raised by it during the shipment of the sample car, even with respect to INCOTERMS.

d) If a dispute arise after the parties have actually carried out the core elements of the sales contract (delivery of goods, payment of price), they have, at a minimum, **manifested a common intention** on the creation of some form of bindi*n*g mutual obligations. Therefore, if after performance, **some aspects of performance** come under disagreement, it will be generally held there is a binding contract

[Nordgemüse Wilhelm Krogmann v. Javier Vierto]. In the present matter, the performance of delivery and payment of 1 sample car in pursuance of the contract have already been done by the parties. Further, letter of credit for 999 cars has also been issued *[Clr.37]*. It is only with respect to the second half of the performance of the contract, pertaining to the delivery of 999 cars that both parties are in disagreement. Since both parties were in agreement about the *essentialia negotii*, it must be assumed that they **waived the validity of their conflicting standard terms** and derogated from the application of Art.19, taking advantage of their autonomy pursuant to Art.6. The terms of the contract should now be determined by searching for a common intent of the parties and the application of Art.8.

E. The RESPONDENT Has Breached The Contract

Pacta Sund Servanda is one of the basic principles of international trade law and grund norm of *UPICC.* Since the existence of a valid contract between the parties has already been proven above, the non-delivery of the agreed cars by the RESPONDENT to the CLAIMANT is a fundamental breach of the contract for which it should be held liable. Provisions of *CISG* have also been breached, wherein also, a seller is incumbent to deliver goods that are of the quantity, quality, and description required by the contract. *[Art.35]*

III. THE CLAIMANT'S TERMS ARE APPLICABLE TO THE PRESENT AGREEMENT

A. The Terms Displayed On The CLAIMANT'S Website Are The Applicable Terms:

The CLAIMANT made the RESPONDENT aware of its terms and conditions prior to any sales contract. Later, the RESPONDENT asked the CLAIMANT to look into their terms and conditions which could be found on their website. After this, an Order Form for 1000 cars was issued by the CLAIMANT as per its own terms and conditions. On receipt, the RESPONDENT asked the CLAIMANT to look into their terms and conditions; **however, it delivered the sample car and accepted payment** for the same. As per communication between the two, the contract was performed. The CLAIMANT **again urged** the RESPONDENT to note their terms and conditions.

B. Application of the *UPICC*

a) Since in international trade the contracting parties do not concern themselves with a detailed analysis of each other's forms, they should subsequently not be allowed to challenge the existence of a contract, except where it has been made clear subsequently **without undue delay** that a party only intends to be bound on its own terms *[Bonell]*. The principle enumerated in Art.1.8 also holds a party bound by contract if it gives rise to reasonable belief that the **'deal is on'**.

b) Further, Art.2.1.1 provides that a contract can be concluded by conduct that is sufficient to show agreement *[Naud`e]*. In the present case, as noted, it was the CLAIMANT who was the last person to urge that the terms on his website be seen and adhered to. Subsequent to this, the **RESPONDENT did not clarify** that it was bound only upon its own standard form terms. In fact, the CLAIMANT had a **reasonable belief** that the contract had been agreed as per his terms and conditions. As per the **Last shot doctrine,** the terms in the last submitting party's form will completely prevail in determining the terms of the contract and the other party's form will remain completely neglected.

c) The RESPONDENT was under a duty to alert the CLAIMANT in a timely fashion of its objection to the standard terms of CLAIMANT, all the more since it knew that the CLAIMANT had already commenced performance by opening the letter of credit. *[Filanto v. Chilewich]* Therefore, the RESPONDENT accepted the CLAIMANT'S standard terms by its silence. *[Industrial Equipment case]*. Thus he is **prohibited by equity** to allege prevalence of his standard terms now.

d) Under the **first-shot approach** also *[ICT v. Princen Automatisiering Oss]* where the terms of the party which first submits its form are applicable for determining the terms of the contract, it will be the CLAIMANT'S terms which will be applicable.

IV. THE CLAIMANT'S ARBITRATION CLAUSE IS APPLICABLE

A. The CLAIMANT'S Standard Terms Are Applicable

As proven above, it is the standard terms of CLAIMANT which are applicable to the contract. Since the CLAIMANT'S arbitration clause is one of the conditions of the standard terms itself, *[Ex.2]* it will be the CLAIMANT'S arbitration clause which will be applicable in the present matter.

V. THE RESPONDENT IS LIABLE FOR DAMAGES FOR BREACH OF CONTRACT UNDER ART.7.4.1

A. The RESPONDENT Did Not Act In Good Faith

a) Art.1.7 of the *UPICC* mandates each party to act in good faith and is an application of **natural law principles** to international trade law. The RESPONDENT had put a suspensive condition under Art.5.3.1 in its Clause 11 of General Terms for the purchaser to nominate a ship which is able to load goods in the ports nominated by the seller. *[Ex.4]* However, Art.5.3.3 states that if fulfillment of a condition is prevented by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the non-fulfillment of the condition. The CLAIMANT had informed the RESPONDENT in June itself that it nominated SS Herminia for further shipments. However, the RESPONDENT did **not inform** the CLAIMANT for 2 months that the cars were in Piccolo where the ship couldn't

dock. Hence, RESPONDENT interfered with its condition by not informing the CLAIMANT as to on which ports the cars were kept.

b) Further, assuming that even if SS Herminia would have had the requisite capacity, the RESPONDENT was yet not ready with the order of the remaining cars in any case. Against the order of 1000 cars, it had only 100 cars ready. The CLAIMANT made it amply clear that unless informed that the sample car sent is unsatisfactory, *it would expect the remaining cars to be sent by December 1, 2011. [Ex.5, Ex.8]* The RESPONDENT never contested the said clause and also sent the sample car, thereby accepting the clause by its conduct. By not selling the remaining cars to the CLAIMANT and in fact selling the cars meant for its order to its competitor, behind its back, the RESPONDENT, has not only breached the contract, but also **acted mala fidely as it infringed the reciprocal trust,** upon which the principle of good faith was based. The CLAIMANT will now have to suffer not only pecuniary loss but also loss to its reputation when its competitors will flood the market with the cars which the CLAIMANT had promised to its customers.

B. Damages Under The *CISG*

a) Art.74 of the *CISG* deals with damages and should be liberally construed to compensate an aggrieved party for all disadvantages suffered as a result of the breach, subject to limitations of the doctrine of foreseeability and mitigation. *[Gotanda]*

b) Under the *CISG,* damages for breach of contract by one party consists of a sum equal to the loss, including loss of profit suffered by the other party as a consequence of the breach *[Hat case]*. Damages awarded under the *CISG* in past have included:

- Expectation *[Silicon metal case]*
- Reliance Damages *[Cooling System Case]*
- Lost Profits *[N.V. Maes Roger* v. *NV Kapa Reynolds]*
- Loss of Business *[Plastic Carpets Case]*
- Non-performance Damages *[Gotanda]*

The CLAIMANT should thus be reimbursed with the abovementioned damages.

c) The CLAIMANT should also be compensated for the loss of reputation. Commercial reputation is an integral part of, and often an important prerequisite for, a successful business activity. Conversely, loss of or injury to reputation is likely to **adversely affect the injured party's business** *[Sergeyev, p.317]*.

Regardless of whether damage to reputation has led to loss of profit or not, reputation in itself will represent a **separate non-material category,** which has its own value.

Further, pecuniary loss caused by loss of reputation has also been held recoverable in several cases. *[Aerial Advertising v. Batchelor's Peas; Groom v. Crocker; Anglo-Continental Holidays v. Typaldos Lines; GKN Centrax Gears Ltd v. Matbro Ltd]*

Good-will damages are recoverable too under the *CISG. [Art Books case]*

The CLAIMANT has already received forward orders based on the contract with the RESPONDENT. As the RESPONDENT has breached this contract, the CLAIMANT finds itself unable to fulfil its obligations to its customers. Not just this, the RESPONDENT has sold the cars ordered by the CLAIMANT to the CLAIMANT'S competitor. While the CLAIMANT will find itself unable to meet the demand, the competitor would have flooded the market. The RESPONDENT'S actions clearly lead to loss of reputation of the CLAIMANT and the RESPONDENT is liable to pay damages for the same.

RELIEF REQUESTED

CLAIMANT respectfully requests the Tribunal to find that:

1. The Tribunal has jurisdiction to hear the present dispute.
2. There exists a valid arbitration clause.
3. The CLAIMANT'S arbitration clause is applicable.
4. There exists a valid contract between the parties.
5. The standard terms of the CLAIMANT are applicable to the contract.
6. The RESPONDENT breached the contract and is liable for damages.