IN THE MATTER OF AN ARBITRATION
BETWEEN "LONGO IMPORTS," AND "CHAN MANUFACTURING" ON CONTRACT FOR THE INTERNATIONAL SALE OF MOTORIZED VEHICLES (the "SALES CONTRACT")

-and-

THE CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISION ARBITRATION RULES ("CIETAC Arbitration Rules")

ADMINISTERED BY THE CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISION ("CIETAC")

-between-

LONGO IMPORTS

("Buyer" or "Longo" or the "Claimant")

v.

CHAN MANUFACTURING

(the "Seller" or "Chan" or "Respondent" and together with the Claimant, the "Parties")

CLAIMANT'S MEMORANDUM

TEAM 001

Table of Contents

I. Governing Law 3

A. The Convention on the International Sale of Goods ("CISG") Governs the Contract Between the Parties as Supplemented by the UNIDROIT Principles 2010..... 3

1. *The Parties did not Show the Requisite Intent to Derogate from the CISG Nor, Did they Effectively Opt Out of the Convention*..... 3

II. Longo and Chan Entered Into a Binding Agreement on March 20, 2011 5

A. Longo Extended an Offer on February 5 and Both Parties Understood that the Offer Included Longo's Terms and Conditions 5

B. The Parties Agreed to Arbitrate the Disputes According to the Arbitration Agreement in Clause 12 of Longo's Terms and Conditions..... 7

1. *The Lex Arbitri is the China Arbitration Act of 1994*..... 7

2. *The CIETAC Rules Govern the Proceedings*..... 8

3. *Cadenza is the Chosen Location for Hearings* 8

III. Chan is Liable for Breach of Contract 9

IV. Request for Relief 12

I. Governing Law

A. *The Convention on the International Sale of Goods ("CISG") Governs the Contract Between the Parties as Supplemented by the UNIDROIT Principles 2010.*

As set forth in detail in Section II of this Memorandum, following an extensive exchange of oral and written communications between January 5, 2011 and March 20, 2011, Longo Imports ("Longo") and Chan Manufacturing ("Chan") finally entered into a binding agreement for the sale of 1000 cars to be delivered to Longo in Minuet on December 1, 2011. Later, on June 10, 2011 the parties modified the agreement with the addition of one term concerning the method for transportation of the cars sold by Chan. (*See* Ex. 13 "As per your instruction we nominate the [SS] Herminia for further shipments").

According to the final terms of this agreement the parties' intent, as revealed by the record of written communications, was to incorporate the UNIDROIT Principles as "the governing law" to the extent that it specifically regulates issues not covered by the CISG, which applies *ipso facto* the international sale of goods between parties having principal place of business in contracting states to the Convention. (*See* Ex. 10; *see* CISG Art. 1(1)(a)). Because the parties' transaction squarely falls within the operative ambit of the Convention and they have not effectively opted out of it, the contract is governed by the CISG as supplemented by the UNIDROIT Principles 2010.

1. *The Parties did not Show the Requisite Intent to Derogate from the CISG, Nor Did they Effectively Opt Out of the Convention*

The Convention on the International Sale of Goods ("CISG" or "Convention") governs transactions for the international sale of goods when both parties have their place of business in a contracting state. (*See* CISG, Art. 1(1)(a); *see* ALLISON E. BUTLER,

PRACTICAL GUIDE TO THE CISG: NEGOTIATIONS THROUGH LITIGATION (Aspen Publ. 2007), at p. 3 (citing to numerous CISG cases)). Both Longo and Chan have their respective principal places of business in contracting states to the Convention. (*See Clarification to Fact Pattern*, at ¶ 20). Although parties may agree to exclude the application of the Convention either explicitly or implicitly, the parties need to rely on more than a choice of governing law, and the intent to opt out of the CISG must be set forth in the contract clearly and unequivocally. (*See St. Paul Guardian Ins. Co. v. Neuromed Med. Sys.*, WL 465312, at *3 (S.D.N.Y. 2002); *see* CISG, Art. 6, *see also* PETER HUBER AND ALASTAIR MULLIS, THE CISG, at p. 62 (European Law Publ. 2007)). "Perhaps the most fundamental mistake parties make … is in assuming that a … choice of law clause … is sufficient to opt out of CISG merely because it designates the law of a particular jurisdiction to govern the contract. It is not." (*See* Timothy Murray, *CISG: Opt Out, Or Not? CISG In A Nutshell* (citations omitted), available at http://www.mhandl.com/content/cisginanutshell (last visited on June 20, 2012)). In this case, both Cadenza and Minuet have adopted the UNIDROIT Principles as their domestic law governing international transactions. This means that the parties' reference to the UNIDROIT Principles as the "governing law" is practically a reference to the identical domestic laws of Cadenza and Minuet and as such is not sufficient for a derogation from the CISG. "The parties have not explicitly or impliedly excluded the application of the CISG through the direct choice of any national substantive law." (*See* Switzerland 3 December 2002 Commercial Court St. Gallen, (citation omitted) available at http://cisgw3.law.pace.edu/cases/021203s1.html).

The lack of implied exclusion of the Convention is also evidenced by Longo's qualified acceptance of the application of the UNIDROIT Principles. In its response to Chan's suggestion that the governing law is UNIDROIT (*See* Ex. 10), Longo specifically mentions its familiarity with the CISG (*See* Ex. 13) showing Longo's intent not to derogate from the CISG.

II. Longo and Chan Entered Into a Binding Agreement on March 20, 2011

A. Longo Extended an Offer on February 5 and Both Parties Understood that the Offer Included Longo's Terms and Conditions

When the month-long series of negotiations between Longo and Chan culminated with a formal order form (*see* Ex. 9), both parties understood that Longo's offer to Chan incorporated Longo's standard terms. "Due to … the strong support by the literature and the aim of a conforming interpretation of the CISG in all countries, the law is that according to Article 8(3) of the CISG, prior negotiations between the parties can be evidence of the content of a contract under the CISG." (*See* Butler*, The Doctrines of Parol Evidence Rule and Consideration – A Deterrence to the Common Law Lawyer? 54-66, at 58 available at http://cisgw3.law.pace.edu/cisg/biblio/butler4.html*). In the very first correspondence between the parties, Longo included its terms and conditions. (*See* Ex. 1). From the start, prior to any interaction between the parties, Longo found it necessary to include its terms and conditions in a simple introductory letter. A reasonable onlooker would interpret this immediate insertion as an indication that Longo intended to incorporate them in any resulting sales contract. Thus, Chan "knew from the negotiations that [Longo] applied its general terms and conditions and intended to include them in the contract." (20 U 3863/08, Appellate Court Munchen*, http://cisgw3.law.pace.edu/cases /090114g1.html, 2009*.) What is more, Chan exhibited an understanding that Longo's

terms and conditions applied by specifically requesting that merely one such term be altered. (*See* Ex. 10). "In applying Article 8, reference is to be made to the time that the conduct had its effect." (Alan Farnsworth*, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 95-102, at 97*). From the common viewpoint that the parties had in March 2011, Chan's reference to just a single item from its own terms and conditions indicates acceptance of alternative terms and conditions (*i.e.*, Longo's terms and conditions).

Chan accepted Longo's order form by responding to it with non-material modifications. (*See* Ex. 10). A "reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance." (CISG, Art. 19(2)). Whether a term is material depends upon circumstances of a case. The determining factor is whether a modified term unambiguously favors one of the parties. (*See* Andrea Fejõs*, Formation of Contracts in International Transactions: The Issue of Battle of the Forms under the CISG and the UCC* (citations omitted), available at http://www.cisg.law.pace.edu/cisg/biblio/fejos.Html). UNIDROIT as the governing law is not a material term because it does not displace the CISG. Both countries adopted the same substantive law. Unless one party wishes to displace the CISG—and there is no evidence in the record that either party does—it should not come as a surprise to either of these sophisticated parties that the UNIDROIT will apply since it is the domestic law governing international transactions. Moreover, Chan never objected to the quantity, goods or price, or any of the items that "are considered to alter the terms of the offer materially." (Art. 19(3)). Finally, Longo is not required to reply to the immaterial modifications: because Longo did "not so

object, the terms of the contract are the terms of the offer with the [immaterial] modifications contained in [Chan's] acceptance." (Art. 19(2) CISG).

Additionally, Chan accepted Longo's offer by its actions, which is an equally valid mode of acceptance. (*See* Art. 18(1)). Chan started acting on the offer even before Longo received its March 20 letter. (*See* Ex. 10). At the very time that Chan wrote to Longo, it announced that it was sending a car "to the docks to be loaded" and shipped to Longo. (*See Id*). "[T]he acceptance is effective at the moment the act is performed." (Art. 18(3). However, an offer is only terminated "when a rejection reaches the offeror." (Art. 17). Chan's March 20 letter is an acceptance of Longo's offer, but even if it were a rejection, it would not be a valid one: Chan had already accepted by acting upon Longo's offer.

B. The Parties Agreed to Arbitrate the Disputes According to the Arbitration Agreement in Clause 12 of Longo's Terms and Conditions

As set forth above Claimant's Terms and Conditions were incorporated in the offer to Chan of February 5, 2011, which he accepted on March 20, 2011. This included Clause 12 of the Claimant's Terms and Conditions, which calls for arbitration seated in Beijing.

1. *The Lex Arbitri is the China Arbitration Act of 1994*

Clause 12 reflects Claimant's intention to arbitrate in Beijing, which states that the "seat shall be in Beijing." According to the "seat" theory the applicable *lex arbitri* is the law of the jurisdiction where the parties agreed to have the seat. (*See* REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 2009, at p. 168). Thus, this arbitration is subject to the China Arbitration Act of 1994.

2. *The CIETAC Rules Govern the Proceedings*

Clause 12 begins with a reference to the "China Trade Commission," a private, non-regulatory entity that purports to offer "fair arbitration services" in case a party becomes victim to "scam" or "non-payment" by "a local Chinese." (*See* Chinatradecommission.org). The Claimant had no intention to be bound by such haphazard services. The parties in this arbitration have their principle place of business in Minuet and Cadenza, not China and the performance of the contract would not involve China in any way. Clause 12's reference to the "China Trade Commission" is a reference to the China International Economic and Trade Arbitration Commission, CIETAC. Not only are there similarities in the names, but CIETAC is one of the most active arbitral institutions in the world, boasting a 50-year history and a panel of 300 arbitrators from 30 different jurisdictions and routinely hearing cases related to the business of Longo (unlike the "China Trade Commission"). In light of the Claimant's intention to refer all disputes to CIETAC, the reference to "relevant rules" should be read to mean the CIETAC Rules [CIETAC Rules 2005 4(2)]. In the mind of the party the seat of the arbitration is Beijing, with possible hearings taking place in Cadenza under the CIETAC rules, referred to in the arbitration agreement as the "relevant rules."

3. *Cadenza is the Chosen Location for Hearings*

In the sentence prior to the Claimant's clear statement that the "seat shall be in Beijing," clause 12 also mentions that absent agreement following conciliation, any disputes on the contract "must be referred to arbitration in Cadenza." This merely refers to the Claimant's intent to conduct oral hearings in Cadenza. In concurrence with other arbitral rules, the CIETAC Rules allow parties and arbitrators to conduct oral hearings and

deliberations in different locations from the place or seat of arbitration (CIETAC 2005 – clause 32(1)). For the sake of party convenience, Claimant offered to hold oral hearings in Cadenza, the Respondent's place of business. The seat of arbitration, as explicitly mentioned in Clause 12, is Beijing. "Arbitration in Cadenza," on the other hand, does not clearly show that the seat or place of arbitration was meant to be Cadenza. Furthermore, Cadenza's *lex loci arbitri*, the UNCITRAL Model Law, explicitly allows for oral hearings to take place in any place that the arbitral tribunal considers to be appropriate. (*See* Model Law, Art. 20).

III. **Chan is Liable for Breach of Contract**

In the midst of Longo's execution of the contract, Chan expressed confusion—perhaps even genuine—about the status of the deal. (*See* Ex. 15). The parties' negotiation history (*see* Ex. 5) and the formal order form (*see* Ex. 9) indicate that the deal for the remaining 999 cars is operational unless Longo affirmatively declares that the cars are unsatisfactory. Longo never did that. Whether Chan sincerely believed—just a couple months after accepting Longo's offer—that there was no deal for the remaining 999 cars is insignificant: a deal was in place. Therefore, Chan's sudden announcement that it would not fulfill its obligation to deliver 999 cars, effectively, is a declaration of avoidance. (*See* Ex. 15; *see* CISG Art. 64). However, Chan could only declare the contract avoided if Longo "fundamental[ly] breach[ed]" it. Longo accidentally nominated a ship that did not meet the narrow strictures that Chan imposed. (*See* Ex. 13). Yet Longo's mistake is insufficient grounds for Chan to avoid; it would only be "fundamental if it result[ed] in such detriment to [Chan] as substantially to deprive him of what he is entitled to expect under the contract." (Art. 25). In contrast, if Longo's mistake does not

"go to the root of the contract" then Chan cannot avoid on those grounds. (*See Koompahtoo v. Sanpine Ltd*., S221/2007, High Court of Australia). Nominating a ship was a mere operative clause governing the basic execution of the deal. In fact, what Chan was "entitled to expect" was to be paid for delivering 1,000 cars. Since a delay in shipment is not a material breach (*See Macromex SRL v. Globex Int'l,* WL 1752530 (S.D.N.Y. 2008)), it stands to reason that a simple delay in nominating the shipment vessel is not either.

Further, Chan acted in bad faith by neglecting to clarify Longo's innocent mistake. One of the fundamental features of the CISG is "the need to promote … the observance of good faith in international trade." (Art. 7(1)). It is "contrary to good faith … to terminate a contract if the non-performance … is insignificant." (*See* UNIDROIT Notes, at p. 251). If Chan intended "to terminate the contract [it] must give notice to [Longo] within a reasonable time after it [became] … aware of the non-performance." (*See id.*, at p. 254). Longo's mistake occurred on June 10 (*see* Ex. 13), but Chan waited over two months before terminating the contract (*see* Ex. 15) and did not clarify the mistake until September 1. (*See* Ex. 17). Chan's bad faith not only caused the problems between the parties, but also disqualifies it from terminating.

In light of Chan's impermissible avoidance of the contract, it owes damages to Longo. Specifically, Chan owes Longo compensation for Longo's lost profits (consequential damages), expenses and non-pecuniary harm. First, Longo's lost profits were foreseeable and certain. There is such strong demand for these cars that Chan cannot produce them fast enough. (*See* Ex. 15). Therefore, it is reasonable to conclude that Longo would have been able to sell the 1,000 cars for which it contracted. Moreover, since Longo had made

advance sales, the retail value that the market places on individually resold vehicles is certain. (*See* Ex. 16). Chan also owes Longo for expenses that Longo incurred unnecessarily in light of Chan's bad faith. Longo incurred expense in commissioning the Herminia to retrieve the cars from Cadenza. (*See* Ex. 14). Chan knew about Longo's investment, knew it was an honest mistake and owed Longo a duty of good faith to clarify the situation. As a result, Chan owes Longo compensation for this unnecessary expense.

Chan owes Longo for non-pecuniary harm, as well. An aggrieved party "may obtain compensation not only for the material loss suffered but also for the harm to [its] reputation and the loss of the chance of becoming better known" in the fledgling electric car industry. (*See* UNIDROIT Notes, at p. 269). Longo was on the precipice of establishing itself as a player in an industry undergoing what both parties describe as explosive growth. Chan blindsided Longo by calling off the deal and selling the cars to Longo's main competitor instead. (*See* Ex. 18). As this was Longo's initial foray into the electric car industry, it was "reasonable in the circumstances" for it to delay purchasing replacement cars. (*See* Art. 77 CISG). Moreover, Longo was not necessarily aware of a product with capabilities tantamount to Chan's "new generation" vehicles. (*See* Ex. 1). Therefore, "It would be distinctly surprising if the onus of proof cast upon the party in breach by the second sentence of Article 77 could be cast off by that party simply asserting non-compliance by the innocent party with the obligation [to mitigate] created by the first sentence of the Article." (*See Castel Electronics Ltd. v. Toshiba Singapore Ltd*. [2011] FCAFC 55, Federal Court of Australia). Consequently, Chan owes Longo damages for non-pecuniary harm, as well.

IV. Request for Relief

Claimant respectfully requests the Tribunal to find that:

1. The Tribunal has jurisdiction to hear this dispute.
2. That the Parties entered into a valid sale – purchase agreement
3. Respondent materially breached the Contract.
4. Respondent owes Claimant actual damages as well as damages for consequential and non-pecuniary harms

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