THE INTERNATIONAL ADR MOOTING COMPETITION

HONGKONG 2012

---

# MEMORANDUM FOR RESPONDENT

---

TEAM NUMBER 005

# TABLE OF CONTENT

**LIST OF ABBREVIATIONS........................................................................................4**

**INDEX OF AUTHORITIES ......................................................................................6**

1. Treaties, Conventions, Laws and Rules .............................................................6
2. Bibliography.........................................................................................................7
3. Websites ...............................................................................................................8
4. Cases.....................................................................................................................8
5. People's Supreme Court ........................................................................................8

**I. THE TRIBUNAL HAS NO JURISDICTION OVER THE DISPUTE ..........................9**

1. No agreement on Claimant's arbitration clause ...................................................9
2. Explicit objection to jurisdiction ..........................................................................9
3. No competence of CIETAC in the present case .................................................10
   - 3.1. CAL is the applicable law ..............................................................................10
   - 3.2 No competence of CIETAC over this case .....................................................10
4. No fulfilment of mandatory conciliation ...........................................................11
5. Conclusion..........................................................................................................12

**II. THERE IS NO VALID ARBITRATION CLAUSE CONCERNING THIS DISPUTE.........................................................................................................13**

**III. THE PARTIES CONCLUDED A VALID CONTRACT FOR THE SAMPLE CAR UNDER RESPONDENT'S T&C ... 13**

1. Laws governing the Contract ... 13
2. Contract for the sample car under Respondent's T&C ... 14
3. Conclusion ... 14

**IV. THERE IS NO VALID CONTRACT FOR FURTHER CARS ... 15**

1. No valid contract for 999 cars ... 15
2. No valid contract for 100/400 cars ... 17
3. Conclusion ... 17

**V. DAMAGES ... 18**

1. No breach of contract and therefore no liability of Respondent under Art. 7.1.4 PICC .. 18
2. Respondent did not negotiate in bad faith ... 18
3. Even in case of a contract no entitlement to damages under Art.7.1.4 PICC for Claimant ... 18
4. Violation of Claimant's duty to mitigate the harm ... 19
5. Conclusion ... 20

**VI. REQUEST FOR RELIEF ... 21**

# LIST OF ABBREVIATIONS

| | |
|---|---|
| Art. | Article |
| ADR | Alternative Dispute Resolution |
| CAL | Arbitration Law of the People's Republic of China |
| Claimant | Longo Imports |
| Clause | Claimant's Arbitration Clause [Ex 2, Clause 12] |
| CIETAC | China International Economic and Trade Arbitration Commission |
| CIF | Cost Insurance Freight |
| CISG | United Nations Convention on Contracts for the International Sale of Goods |
| CTC | China Trade Commission |
| e.g. | exempli gratia, for instance |
| Ex | Exhibit |
| FAS | Free Alongside Ship |
| File | The Moot Problem including background information and clarifications |
| INCOTERMS | International Commercial Terms |
| NYC | Convention on the Recognition and Enforcement of Foreign Arbitral Awards |
| MAL | UNCITRAL Model Law on International Commercial Arbitration |
| MLICC | UNCITRAL Model Law on International Commercial Conciliation |
| p. | page |
| para | Paragraph |
| Parties | Longo Imports and Chan Manufacturing |
| PICC | UNIDROIT Principles of International Commercial Contracts 2010 |

| | |
|---|---|
| PRC | People's Republic of China |
| Respondent | Chan Manufacturing |
| Rules | China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules |
| SIAC | Singapore International Arbitration Centre |
| Tribunal | the Arbitral Tribunal, which deals with the case at hand [Ex19] |
| T&C | Terms and Conditions [Ex2&4] |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNIDROIT | International Institute for the Unification of Private Law |

# INDEX OF AUTHORITIES

## 1. Treaties, Conventions, Laws and Rules

| | |
|---|---|
| CAL | Arbitration Law of the People's Republic of China (1994) |
| CIETAC Rules | China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules (2011) |
| CISG | The United Nations Convention on Contracts for the International Sale of Goods ("the Vienna Convention") |
| MAL | UNCITRAL Model Law on International Commercial Arbitration (1985) |
| MLICC | UNCITRAL Model Law on International Commercial Conciliation (2002) |
| NYC | Convention on the Recognition and Enforcement of foreign Abitral Awards (1958) |
| PICC | UNIDROIT Principles of International Commercial Contracts 2010 |
| SIAC Rules | Arbitration Rules of the Singapore International Arbitration Centre (2010) |

## 2. Bibliography


| | |
|---|---|
| *Berger* | Klaus Peter Berger, Law and Practice of Escalation Clauses, Arbitration International 22(1), Kluwer Law International, 2006 |
| *Born* | Gary B. Born, International Commercial Arbitration, Kluwer Law International, 2009 |
| *Huang* | Huang Tao, The Validity of Arbitration Agreements under Chinese Law, in King & Wood China Bulletin, August 2009 |
| *Jianlong* | Yu Jianlong, Conciliation in Action in China and CIETAC's Practice, Asia Pacific Law Review, Vol 17, Special Issue on Mediation, 2009 |
| *Kronke* | Herbert Kronke, The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond, 2004, available at: http://www.uncitral.org/pdf/english/CISG25/Kronke.pdf |
| *Pryles* | Michael Pryles, Multi-Tiered Dispute Resolution Clauses, Journal of International Arbitration 18(2), 159-176, 2001, Kluwer Law International |
| *Zhou* | Jian Zhou, Arbitration Agreements in China: Battles on Designation of Arbitral Institution and Ad Hoc Arbitration, Journal of International Arbitration 23(2); 145-170, 2006, Kluwer Law International |

**3. Websites**

| | |
|---|---|
| CTC | www.ChinaTradeCommission.org |
| | www.prlog.org/10404844-china-trade-commission-opens-beijing-office |

**4. Cases**

| | |
|---|---|
| *IBM* | Cable & Wireless v IBM (2002) |
| *Ramsgate* | Ramsgate Victoria Hotel Co. Ltd v Montefiore (1866) |
| *Robobar* | Robobar Ltd. v. Finncold (1995) |
| *Walford* | Martin Walford v Charles Miles (1992) |
| *White* | White v Kampner (1993) |

**5. People’s Supreme Court**

| | |
|---|---|
| *Judicial Reply* | Supreme People's Court, Judicial Reply Regarding Missing Words in the Spelling of Arbitral Institution Names in an Arbitration Agreement, Doc. No. Fajin (1998), at 159, available at www.bjac.org.cn. |
| *Interpretation* | The Interpretation of Issues Relating to Application of the Arbitration Law of People’s Republic of China, promulgated by the Supreme People’s Court on December 26. 2005, and became effective on September 8, 2006. |

## I. THE TRIBUNAL HAS NO JURISDICTION OVER THE DISPUTE

### 1. No agreement on Claimant's arbitration clause

1 The Parties have not manifested their common intention to be bound by this arbitration agreement *(Born,* p.640*)*, as there was no meeting of minds regarding Claimant's arbitration clause ("Clause" [Ex2, Clause12]). Claimant's unilateral reference to its T&C does not constitute an agreement *(Robobar).*

2 Moreover, CIETAC as an arbitral institution is unacceptable for Respondent. Contrary to the universally recognized principle of *competence-competence* (*Born*, p.855) Art.6 CIETAC Rules ("Rules") gives the institution the power to determine the existence and validity of an arbitration agreement and its jurisdiction. Therefore, Respondent suggested the SIAC Rules [Ex4]. The Tribunal alone should have the power to decide over its jurisdiction in the present case.

3 Lastly, any award rendered by this Tribunal would be unenforceable, as Art.V/1a NYC stipulates that the recognition and enforcement of an award that is not based on a valid and applicable arbitration agreement will be refused.

### 2. Explicit objection to jurisdiction

4 Respondent's objection is timely, since the first oral hearing has not yet been held (Art.6(4) Rules). In order to contest CIETAC's and the Tribunal's jurisdiction, Respondent had to nominate an arbitrator and attend the first informal hearing. These actions cannot be interpreted as a waiver to its right to object (Art.10 Rules).

5 For the avoidance of doubt Respondent hereby explicitly rejects the jurisdiction of the Tribunal pursuant to Art.6(4) Rules, as it never agreed on the Clause.

**3. No competence of CIETAC in the present case**

**3.1. CAL is the applicable law**

6 If the Tribunal finds the Clause applicable, *"the seat shall be Beijing"* [Ex2]. Chinese Arbitration Law ("CAL") applies to all arbitration proceedings seated in the PRC arising from economic activities involving a foreign element (Art.65 CAL). The fact that hearings are held outside of the PRC does not affect the choice of the seat and hence the applicable law.

7 The People's Supreme Court has established a specific procedure for determining the validity of an arbitration clause: If the Parties choose a specific law, it shall apply to the examination of the validity of an arbitration agreement. Otherwise the law of the seat of arbitration shall be applicable (*Interpretation*, Art.16).

8 The Clause does not establish a law to govern the arbitration clause. Hence, CAL, as the law of the seat, is applicable, even if the hearing takes place elsewhere [para.6].

**3.2 No competence of CIETAC over this case**

9 The Clause explicitly refers to China Trade Commission ("CTC") which has an office in Beijing (*www.prlog.org/10404844-china-trade-commission-opens-beijing-office*) and provides arbitration since 1996 (*www.ChinaTradeCommission.org)*. However, Claimant filed its claim with CIETAC [Ex19]. Therefore, even if the Tribunal finds that the Clause is

applicable, CIETAC has no jurisdiction over the case because it was not designated as the competent arbitration institution.

10 However, Claimant may argue that it meant to designate CIETAC but merely failed to state the accurate name of the institution. In practice, Chinese courts recognize arbitration agreements as valid, *"as long as an arbitration commission can be determined through reasonable analysis of the agreement"* (*Zhou,* p.155). The omission of only one word is an acceptable mistake (*Judicial Reply*), but Claimant left out three essential words, namely *"International", "Economic"* and *"Arbitration"*. China has more than 190 arbitration institutions and most of them accept foreign related arbitrations (*Huang,* p.10). In fact, Claimant named a different arbitral institution with an office in Beijing. Therefore, Claimant's reference is highly ambiguous and it cannot be determined with reasonable certainty that CIETAC was the envisioned arbitration institution.

**4. No fulfilment of mandatory conciliation**

11 If the Tribunal finds that the Clause is applicable, it has to take into account that this is a *"multi-step ADR clause",* which provides that dispute resolution is to proceed through a sequence of *"multi-step levels"* (*Berger*, p.2). The Clause refers *"all disputes arising out of or in connection with the contract"* first to conciliation and to arbitration only if no agreement can be reached. The use of the word *"shall"* makes conciliation mandatory (*White, IBM*).

12 *"Conciliation"* is commonly understood as a negotiation assisted by a neutral (Art.1 MLICC). Such conciliation never took place between the Parties. Claimant neither invited Respondent to an official conciliation nor tried in any other way to conciliate the dispute. As no conciliation has taken place, this pre-requisite is not fulfilled and arbitration proceedings are not admissible.

13 Conciliation cannot be interpreted to be an informal meeting or written process (*Jianlong,* p.89). Therefore, the informal meeting [Ex20], as well as the correspondence between the Parties cannot be seen as a failed attempt to conciliate the dispute. As evidenced by the File [clarifications#23], the meeting only concerned organisational issues regarding the arbitration proceedings.

14 Consequently, the claim should have been rejected, because the pre-arbitral conciliation has not been properly fulfilled pursuant to the Clause (*Pryles*, p.166). By accepting this application for arbitration, a procedural error occurs which may result in the refusal of the recognition and enforcement of the award according to Art.V(1)d NYC (*Born*, p.843). Even if Respondent does not accept CIETAC's jurisdiction, Respondent is always ready to find an amicable solution to the Parties' differences.

**5. Conclusion**

15 The Clause is neither applicable nor valid as the Parties did not agree on it. Furthermore, CIETAC has no jurisdiction over this dispute as it is not the arbitral institution nominated in the Clause. Finally, as the Clause is a multi-step clause, Claimant is barred from initiating arbitration without having attempted conciliation. Therefore, the Tribunal constituted and acting under the Rules has no jurisdiction over this case.

## II. THERE IS NO VALID ARBITRATION CLAUSE CONCERNING THIS DISPUTE

16 The Parties have neither concluded a contract over the sale of 999 cars [para.28] nor have agreed on any arbitration clause applicable to this issue. The Parties have both only unilaterally referred to their own T&C which do not correspond [Ex2&4]. Hence, there is no valid arbitration clause concerning the dispute over 999 cars.

17 However, there is a valid contract on the sale of the sample car under Respondent's T&C [see III]. Respondent's arbitration clause is applicable concerning disputes arising out of this contract.

## III. THE PARTIES CONCLUDED A VALID CONTRACT FOR THE SAMPLE CAR UNDER RESPONDENT'S T&C

### 1. Laws governing the Contract

18 Both Parties agreed in their correspondence [Ex10&13] that the UNIDROIT Principles 2010 *("PICC")* are the law governing the contract, therefore these principles are applicable. If, however, the chosen law fails to address relevant issues, these gaps may be filled by consulting the CISG, which has been ratified by both the seller's and the buyer's country [clarification#20]. In the event that the provisions of the two conventions concur, it is possible to refer to CISG case law in order to interpret the corresponding provisions of the PICC (*Kronke*, p.458).

**2. Contract for the sample car under Respondent's T&C**

19 Claimant initiated the contract negotiations [Ex1] by indicating its interest in a larger order and requested information on the types and prices of the cars that Respondent produces. Upon this, Respondent explained that it had three different models on offer, and that both the technical descriptions and its T&C are available online [Ex3]. Claimant, however, decided to test the specifications itself and asked Respondent for a sample of its cheapest model (gardeners model, $US 12000) requesting it to be shipped on the SS Herminia [Ex5]. Respondent immediately clarified that it does not send free samples and that it only does business on the basis of firm sales contracts [Ex6]. Hence, Claimant made an offer to buy one car and confirmed that it would pay for it separately [Ex7]. This constitutes an acceptance of Respondent's offer and T&C, which is further evidenced by the Parties subsequent conduct: the price was paid in advanced as required [Ex10] and the sample car was shipped [Ex11]. Thus, this contract was properly fulfilled [Chapter6 PICC] under Respondent's T&C.

20 The sale of the sample car constitutes a separate contract which was concluded before negotiating the remaining cars. Respondent especially emphasised that the shipment of the sample car is separate from the order of the remaining cars [Ex10]. This is further evidenced by the separate treatment concerning the loading [Ex11] and return of the sample car [Ex12].

**3. Conclusion**

21 Respondent's T&C are applicable to the sales contract over the sample car. As no further contracts have been concluded [para.28], there was also no agreement on T&C governing those contracts.

## IV. THERE IS NO VALID CONTRACT FOR FURTHER CARS

### 1. No valid contract for 999 cars

22 In the course of ordering the sample car Claimant indicated that it was interested in future cooperation with Respondent, but did not specify the necessary details as required under Art.2.1.1 PICC.

23 After the Parties concluded the contract for the sample car, negotiations on the contract for the sale of further cars became more concrete. Claimant reiterated its "previous requirements" that this second contract would depend on the sample car meeting its expectations and Respondent's ability to deliver by December 1, 2011 [Ex5&8]. An order form was sent for 1000 cars including Claimant's T&C [Ex9]. Taking into account the said negotiations this order form can only be seen as the confirmation of the sale of the sample car and an offer for 999 cars under said "requirements".

24 However, Respondent did not agree to this offer. In particular, Respondent did not accept the *"requirements"* but instead reminded Claimant of its T&C [Ex10]. Respondent's T&C include a clause stating that no discounts will be given and that the FAS Incoterms apply. This is a material alteration of the price, payment, place and time of delivery, and therefore constitutes a counter-offer according to Art.2.1.11 PICC and even more precisely stipulated in Art.19(3) CISG. As a consequence, the Parties were still negotiating over the details of a possible second sales contract and no agreement had been reached. Respondent even spelled out its T&C for Claimant by explaining that it must nominate a ship which can load out of Cadenza, Cantata and Piccolo [Ex11].

25 Claimant replied 2½ months later with the mere notice that it was currently still testing the car and indicated that it would only conclude the contract under its own T&C [Ex13]. Therefore, the Parties once again failed to reach an agreement. Further, as the testing was still in progress it remained uncertain whether the car was satisfactory and whether Claimant was interested in the second contract at all. Therefore Respondent was under no obligation to reply.

26 Respondent had clearly and repeatedly stated that it was only willing to sell the cars under its T&C. Further Respondent never agreed to the suggested condition that if no problems emerged the order of the 999 is enlivened. It must be considered that the organization of the shipment of 999 cars needs time to prepare and Claimant still had to nominate a ship.

27 Art.2.1.7 PICC states that an offer must be accepted within a reasonable time, afterwards it lapses *(Ramsgate).* Due to the previous rapidity of communication between the Parties (of 10-15 days on average), 2½ months - the time period Claimant showed no reaction [Ex14] - represents an unreasonably long time and therefore the offer was no longer open. Thus, Respondent was no longer bound to its counter-offer [Ex10].

28 Claimant had initially approached Respondent but then not agreed to Respondent's T&C and simply ignored Respondent's condition that it only acts upon firm sales contracts. Claimant could only understand Respondent's behaviour to mean that it was no longer interested in concluding a further contract. If it had waited longer Respondent could have faced serious losses. It was thus under Art.7.4.8 PICC even obliged to sell the remaining 999 cars in order to mitigate possible damages. Therefore, Respondent, as a prudent businessman, sold the cars to another buyer and prevented any damages.

### 2. No valid contract for 100/400 cars

29 When Claimant finally inquired about the delivery of the remaining cars, Respondent showed its good will by offering to sell Claimant 100 cars it still had in stock “as proposed” [Ex15]. With this wording Respondent once more made clear that the contract should be concluded under its T&C.

30 In its answer [Ex16], Claimant pointed to its own T&C by suggesting that Respondent should load the 100 cars on the SS Herminia as per Claimant’s order form [Ex9]. This constitutes a counter-offer according to Art.2.1.11 PICC. Respondent immediately informed Claimant that the cars cannot be shipped via the SS Herminia because the 100 cars were currently in Piccolo and the SS Herminia cannot dock at this particular port [Ex17]. Therefore the Parties failed to reach an agreement on the sale of 100 cars.

31 In order to find an amicable solution for both Parties, Respondent offered to sell Claimant 400 cars in two months at a discount rate of 2% as good will gesture [Ex17]. However, Claimant unambiguously stated that it is no longer interested in a future contract and informed Respondent that it would commence arbitration [Ex18].

### 3. Conclusion

32 Although the Parties agreed on the contract for the sample car, they never concluded a firm sales contract over the remaining 999 cars. Furthermore, the Parties failed to reach an agreement on either 100 or 400 cars which Respondent offered as a good will gesture.

## V. DAMAGES

### 1. No breach of contract and therefore no liability of Respondent under Art. 7.1.4 PICC

33 Respondent cannot be held liable for any damages since it properly fulfilled all its contractual obligations regarding the sample car. No further contract concerning 999, 100 or 400 cars was concluded between the Parties [IV.2.]. Thus, Respondent cannot be held liable for any breach of contract and damages under Art.7.1.4 PICC.

### 2. Respondent did not negotiate in bad faith

34 Each party to the negotiations is entitled to pursue its own interest *(Walford).*There are no indications that Respondent acted in bad faith while defending its interests during the negotiations. Therefore it cannot be held liable for damages based on Art.2.1.15 PICC.

### 3. Even in case of a contract no entitlement to damages under Art.7.1.4 PICC for Claimant

35 If the Tribunal finds that the Parties have concluded a contract for 1000 cars, this contract could only have been concluded on March 25, 2011 under Respondent's T&C which exclude all liability for consequential damages [Ex11, Clause7].

36 Claimant made an offer with regard to 1000 cars under its conditions [Ex8&9]. Respondent answered with a counter-offer in which it clarified that it only sells under its T&C and that the one-car-shipment has to be paid in advance and be treated separately from the "order of 1000 cars" [Ex10]. This implies that Claimant had to inform Respondent about the results of the

testing and its willingness to proceed with the purchase. Hence, Respondent would only be obliged to deliver the remaining 999 cars if Claimant confirmed the order of the remaining cars.

37 In response to this counter-offer, Claimant called Respondent and gave loading instructions without contesting any of the above conditions [Ex11]. Claimant also fulfilled one of the conditions by paying the sample car in advance as required by Respondent's counter-offer [Ex11]. Consequently, Claimant fully accepted Respondent's counter-offer (Art.2.1.6. PICC).

38 Respondent has not received any definite instructions from Claimant for four months. It cannot be expected that Respondent keeps 999 cars in stock for such an unreasonably long time. Due to its own omission, Claimant cannot rely on Respondent's non-performance (Art.7.1.2 PICC).

39 After several months, Respondent could reasonably presume that Claimant was no longer interested in the purchase of 999 cars. Respondent made the decision to sell the cars to another buyer in order to avoid damages caused by Claimant's omission, as it was obliged under Art.7.4.8 PICC. In any case, Respondent could only be held liable for damages which were foreseeable and could be established with reasonable certainty (Art.7.4.3., 7.4.4. PICC).

**4. Violation of Claimant's duty to mitigate the harm**

40 Should the Tribunal find that Respondent was obliged to deliver 1000 cars without Claimant's confirmation, Claimant would have been under the obligation to mitigate its damages pursuant to Art.7.4.8 PICC.

41 Initially, Respondent offered 100 cars to help Claimant [Ex15]. However, Claimant could not take advantage of this offer due to its own failure to nominate a ship that was able to dock in Piccolo [Ex17].

42 Additionally, Respondent made a new offer on September 1, 2011 to deliver 400 cars within the initial deadline December 1, 2011 [Ex17]. However, Claimant refused this offer and announced that it will commence arbitration [Ex18]. Without Claimant's unreasonable actions the damages – if any – could have been significantly reduced.

**5. Conclusion**

43 Respondent cannot be held liable for any damages as it properly fulfilled all its contractual obligations under the contract for the sample car and no other contract has been concluded. Respondent also acted in good faith throughout the negotiations.

44 If the Tribunal considers that a contract for 999 cars was concluded, Claimant would also not be entitled to damages as it failed to confirm the order as contractually required. Even if the Tribunal concludes that Respondent breached this contract, Claimant would still not be entitled to the full amount of damages since it violated its obligation to mitigate the harm.

**VI. REQUEST FOR RELIEF**

45 In light of the submissions made above, Respondent respectfully asks the Tribunal to find that:

(1) it has no jurisdiction over this case, and/or

(2) there is no valid contract concerning the 999 cars,

(3) Respondent is not liable for any damages,

(4) Respondent should be awarded the costs of the arbitration.

Cadenza, June 22, 2012

Chan Manufacturing

(Lawyer on behalf of Chan Manufacturing)