THIRD ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

29 JULY – 4 AUGUST 2012

HONG KONG

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:	**AGAINST:**
Longo Imports	Chan Manufacturing
CLAIMANT	**RESPONDENT**

TEAM NO. 007

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ARGUMENTS ON JURISDICTION

I. TRIBUNAL HAS JURISDICTION TO DECIDE THIS DISPUTE

1. Pursuant to Art. 6(1) of CIETAC Rules under which this Tribunal was constituted [*Clarifications, para. 27*] Tribunal is competent to determine the existence and validity of an arbitration clause and its jurisdiction over a case [*Born, pp. 855-856*].
2. Accordingly, Tribunal should declare that it is competent to decide the dispute between Parties in connection with the supply of electric cars because (**A**) Parties agreed upon an arbitration clause referring to Tribunal; (**B**) the dispute falls within the scope of the arbitration clause and is arbitrable and (**C**) pre-arbitral requirements were fulfilled.

A. Parties agreed upon arbitration clause referring to Tribunal

3. In order to establish jurisdiction of a tribunal several conditions must be met: **a)** Parties had to agree upon CLAIMANT`s arbitration clause and **b)** arbitration clause must be valid.

a) Parties agreed upon CLAIMANT`s arbitration clause

4. The validity of an arbitration clause is related to the issue whether parties consented to arbitration [*UNCTAD, p. 15*]. As shown subsequently, Parties concluded contract for the purchase of 999 cars containing CLAIMANT´s terms together with its arbitration clause. Consequently, CLAIMANT`s arbitration clause is applicable to this case.

b) CLAIMANT`s arbitration clause is valid

5. In order to claim CLAIMANT`s arbitration clause valid, it has to fulfill requirements as set forth in Art. II(3) of NY Convention and Art. 8(1) of UNCITRAL Model Law under

which an arbitration clause cannot be (*i*) null or void; (*ii*) inoperative or (*iii*) incapable of being performed [*Várady, p. 85*].

i. CLAIMANT`s arbitration clause is not null or void

6. An arbitration clause is null or void when it is invalid right from the beginning [*Born, p. 160*]. One of such reasons may be the vague language, due to which the parties' intent cannot be determined [*Mosses, p. 33; Case No. 31; Wilson v. Lignotock; Fowler v. Lynch*].
7. When the plain wording of an arbitration clause does not fully reflect the parties' real intent but the latter can be established by interpretation, tribunal shall give effect to the parties' real intent [*Case No. ARB/81/1; Award No. 1434; Fouchard/Gaillard/Goldman, para. 477*]. Evidence of such intent can be found in the language of the clause and in the surrounding circumstances [*Gaillard/Savage 262-3; Lew/Mistelis/Kröll 155-6*].
8. In this case, both the language and the circumstances indicate that Parties agreed to (1) arbitration by Tribunal; (2) governed by CIETAC Rules; (3) with seat of arbitration in Beijing, place of hearings in Cadenza and conducted in English.

(1) Parties agreed upon arbitration by Tribunal

9. Where the agreement permits an interpretation that accords with both parties intent and logic, the agreement should be construed in favor of an arbitration at the institution that best effectuates the parties' intent [*Lew/Mistelis/Kröll pp. 155-6; Convert v. Droga*].
10. Despite of the fact that the arbitration clause involves only abbreviation of the whole name, namely China Trade Commission [*Exhibit 2*], it is clear from the surrounding circumstances that Parties intended to settle their dispute before Tribunal since no other institution would suit their requirements.

11. Tribunal is the only arbitral institution with its seat in Beijing which could be inferred from the title China Trade Commission and at the same time entitled to settle international disputes. Same happened in *Award No. 151*, where the parties did not name the arbitration institution accurately. Since there was no other institution which would be entitled to settle international commercial disputes as required by the parties, the tribunal concluded that the parties must have had intended to submit their disputes to the only institution entitled to settle disputes.
12. Therefore even when there is a reference to similar institution with office in Beijing called China Trade Commission, this institution (if exists) deals only with breaches of obligations to pay and thus is not entitled to settle this dispute [*www.chinatradecommission.org*].
13. All things considered, since only Tribunal is appropriate arbitral institution with a seat in Beijing, it is undisputed that the institution mentioned by Parties refers to Tribunal.

(2) Arbitration should be governed by CIETAC rules

14. Pursuant to Art. 4(2) of CIETAC Rules *"parties shall be deemed to have agreed upon arbitration in accordance with CIETAC Rules if they have provided for arbitration by Tribunal."*
15. As stated above, Parties have decided to settle their disputes by Tribunal and pursuant to the *"relevant rules"* [*Exhibit 2*]. Relevant rules in connection with established jurisdiction of Tribunal may be only CIETAC Rules what is confirmed by the fact that the procedural matters relating to arbitration have been complied with CIETAC Rules [*Clarifications 27*].

(3) The seat of arbitration shall be Beijing, the place of hearings Cadenza and language English

16. Pursuant to CIETAC Rules parties are free to agree upon the seat of arbitration [*Art. 7, CIETAC Rules*], place of oral hearings [*Art. 34, CIETAC Rules*] and upon the language of arbitration [*Art. 71, CIETAC Rules*].

17. In this case, Parties have agreed that the seat of arbitration shall be Beijing, the place of hearings Cadenza and that the arbitration shall be in English [*Exhibit 2*].

ii. CLAIMANT`s arbitration clause is operative

18. Arbitration clause is inoperative when it was once valid but has ceased to have effect. This may be the case, *inter alia*, where it was revoked or waived, where it is *res judicata*, or where a time limit has expired [*Berg, pp. 155-8*]. In this case CLAIMANT`s arbitration clause does not fulfill the abovementioned conditions and therefore cannot be considered as inoperative.

iii. CLAIMANT`s arbitration clause is capable of being performed

19. The words "*incapable of being performed"* apply to those cases where the arbitration cannot be effectively set into motion [*Berg II, p. 11*]. This can happen for example if parties agreed upon arbitrator, who was at the time of the dispute, deceased or unavailable. In this case CLAIMANT`s arbitration clause does not fulfill abovementioned conditions and therefore cannot be considered as incapable of being performed.

B. The dispute falls within the scope of the arbitration clause and is arbitrable

20. Another condition for establishing the jurisdiction of Tribunal is that the dispute must **a)** fall within the scope of the arbitration clause and **b)** be arbitrable.

a) The present dispute falls within the scope of the arbitration clause

21. The wording of arbitration clause determines the scope of the agreement [*Broches, pp. 39-40*]. According to CLAIMANT`s arbitration clause "*all disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination shall…*" [*Exhibit 2*]. The phrase "*arising out of or in connection with*" is the broadest language and covers all claims flowing from contractual obligations [*Redfern/Hunter, pp. 3-40*]. Consequently, the present dispute falls within the scope of CLAIMANT`s arbitration clause.

b) The present dispute is arbitrable

22. The requirement of arbitrability is covered by Art. II(1) of NY Convention, pursuant to which the subject-matter of the arbitration must be capable of settlement by arbitration [*Berg, pp. 152-4; Born, p. 243*]. Typically, tribunals have found that claims dealing with anti-trust and competition, securities transactions, insolvency, intellectual property rights, illegality and fraud, bribery and corruption, and investments in natural resources are incapable of settlement by arbitration [*Gaillard/Savage, pp. 339-42*]. The subject-matter of the present dispute does not fall within any of these categories and is therefore arbitrable.

C. Pre-arbitral requirements were fulfilled

23. Generally, before arbitration is commenced all pre-arbitral requirements must be fulfilled. However, there are some exemptions. Those are: the lack of specification of **a)** mandatory character of the pre-arbitral requirements or **b)** conciliation proceeding.

a) CLAIMANT`s arbitration clause did not specify the mandatory character of the conciliation

24. CLAIMANT`s arbitration clause requires to solve the dispute firstly by the means of conciliation [*Exhibit 2*]. However, this wording does not indicate that such a pre-arbitral step was a condition precedent to the admissibility of a request for arbitration. The general approach is that conciliation remains optional, except where the parties have agreed to the contrary [*Award No. 8073*]. This lack of specification did not speak in favor of the mandatory character of conciliation [*Voser/Truttmann/Wittmer; Case No. 4A_46/2011*] and therefore the conciliation pre-condition involved in the CLAIMANT's arbitration clause was not meant to be obligatory.

b) CLAIMANT`s arbitration clause did not specify the conciliation proceeding

25. CLAIMANT`s arbitration clause did not contain a precise description of the conciliation process. Nor did it indicate if the proceedings had to be initiated within a certain timeframe what could cause creating the risk that conciliation could continue indefinitely, thereby precluding CLAIMANT from access to arbitral justice [*Cremades, p. 67*]. This lack of specification causes that the conciliation is for lack of certainty unenforceable [*Smith v. H&S, para. 131; Courtney & Fairbairn; Walford v. Miles, para. 181*].

26. All things considered, the absence of conciliation should not necessarily lead to the inadmissibility of the request for arbitration, as the conciliation was because of lack of certainty not mandatory and therefore not a condition precedent to arbitration.

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27. All in all, Tribunal is competent to decide the dispute between Parties because a valid arbitration clause referring to Tribunal exists; the dispute falls within the scope of the arbitration clause and is arbitrable and pre-arbitral requirements were fulfilled.

ARGUMENTS ON MERITS

II. THERE IS A VALID CONTRACT BETWEEN PARTIES

28. CLAIMANT states that separate contracts for 1 car and for 999 cars were duly concluded because all relevant provisions of the applicable law were satisfied.

A. Applicable law to this dispute is UNIDROIT

29. UNIDROIT is applicable for "*international commercial contracts"* and "*when the parties have agreed that their contract be governed by them*" [*UNIDROIT – Preamble*].

30. Firstly, the contract is international when there is international element involved [*UNIDROIT commentary, p. 2*]. Parties have their seats in different countries and so the international element is present. Following, concept of a term "commercial contract" contains trade transactions for the supply or exchange of goods or services [*UNIDROIT commentary, p. 2*]. In this case, the contract was dealing with a sale of goods, is commercial in nature and therefore falls within the scope of first condition. Secondly, Parties opted [*Exhibit 10; Exhibit 13*] for UNIDROIT as governing law.

31. For all the presented reasons, UNIDROIT is the law governing the contract.

B. Parties concluded two separate contracts: a) contract for 1 testing car; and b) contract for 999 cars

32. The order form sent by CLAIMANT on February 5, 2011, should be considered as offer, because it is "*sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance*" [*Art. 2.1.2, UNIDROIT*].

33. On March 20, 2011, RESPONDENT rejected the offer and made a counter offer which involved modification of some aspects of the offer. The modifications consisted of two

aspects: (1) a separation of the initial offer into two distinct orders – for 1 car and for 999 cars – and (2) a change in the applicable standard terms. Neither test period clause [*Exhibit 8*], nor quality clause [*Exhibit 9*] were modified by RESPONDENT and therefore remained applicable for both offers.

a) Contract dealing with 1 car was validly concluded, because of application of last shot principle

34. In cases, where parties are contracting under standard terms, and "*have started to perform without objecting to each other's standard terms, a contract would be considered to have been concluded on the basis of those terms which were the last to be sent or to be referred to (the "last shot")"* [*UNIDROIT commentary, p. 72*]. Last offer made was the one of RESPONDENT with the inclusion of his standard terms. Due to the application of the last shot principle [*Gabriel, pp. 1058 – 1061; Ruhl, p. 191; UNIDROIT commentary, p. 72*], RESPONDENT´s standard terms are applicable to the contract dealing with 1 car.

35. "*In practice, most common mode of acceptance by conduct is payment of price, or sending or receiving the goods*" [*Bejcek/Hajn, p. 154; Farnsworth, p. 3*]. CLAIMANT has accepted the offer by paying the price and taking over the car and therefore the contract was duly concluded.

b) Contract dealing with remaining 999 cars was a separate contract validly concluded by means of modified acceptance

36. CLAIMANT made a modified acceptance [*Art. 2.1.11 (2), UNIDROIT*] by his offer concerning the standard terms dated June 10, 2011, by explicitly stating that "*we urge you to note our terms and conditions*" [*Exhibit 13*].

37. CLAIMANT´s modification was not a material modification. "*An important factor to be taken into account in this respect is whether the additional or different terms are commonly used in the trade sector concerned and therefore do not come as a surprise to the offeror*" [*UNIDROIT commentary, p. 51*]. Since Parties have included arbitration clauses in their standard terms, it is to be considered that arbitration is commonly used. Also, inclusion of standard terms in correspondence was not automatic, but intentional because it had been stressed by Parties repeatedly. Modification of the standard terms was not a surprise to Parties because Parties changed standard terms several times.

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38. All things considered the contract for 999 cars was duly concluded under CLAIMANT´s standard terms and is valid.

III. CLAIMANT IS ENTITLED TO CLAIM DAMAGES CAUSED BY RESPONDENT'S NON- PERFORMANCE

A. RESPONDENT's non-performance of a valid contractual obligation cannot be excused under UNIDROIT

39. Pursuant to the governing law, a contract validly entered into is binding upon parties [*Art. 1.3, UNIDROIT*]. As argued above, both contracts (for 1 car and also for 999 cars) were duly concluded and are therefore binding.

40. That in connection with the fact that "*it is enough for the aggrieved party simply to prove the non-performance, i.e. that it has not received what it was promised*" [*UNIDROIT commentary, p. 232*] signifies RESPONDENT's liability for damages under UNIDROIT.

B. RESPONDENT is liable for a) loss of profit; b) loss of goodwill as well as c) for costs connected with the nomination of SS Herminia

a) CLAIMANT is entitled to claim damages for loss of profit

41. The loss of profit or is the benefit which would normally have accrued to the aggrieved party if the contract had been properly performed [*UNIDROIT commentary, p. 234*]. The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract [*Art. 7.4.4, UNIDROIT*].

42. At the time of the conclusion of the contract RESPONDENT was aware that he is a manufacturer of a new generation car which is unique on the market and so "*the amount of the damages must be examined in light of the circumstances*" [*Schaefer, p. 6; Weaving machines case*].

43. Since "*only utterly implausible consequences of the breach are to be considered non-foreseeable*"[*Faust, p. 33*] RESPONDENT could have foreseen the "*loss of a chance, obviously only in proportion to the probability of its occurrence*" [*UNIDROIT commentary, p. 232*] for CLAIMANT.

44. It is clear from Exhibits 16 and 18 that the demand after the electric cars in Minuet is high and also that CLAIMANT already has forward orders. The purpose of the damages provisions "*is to place the aggrieved party in the same pecuniary position it would have been in had the breach not occurred and had the contract been properly performed*" [*Schlechtriem/Schwenzer, p. 445*].

45. CLAIMANT is thence entitled to all the profit which he would have achieved from the 999 cars sold if the non-performance by RESPONDENT had not occurred and the contract was carried out duly.

b) CLAIMANT is entitled to claim damages for loss of goodwill

46. Art. 7.4.2 of UNIDROIT expressly provides for compensation also of non-pecuniary harm (...) as well as harm resulting from attacks on honor or reputation [*UNIDROIT commentary, p. 235*].

47. Importantly, losses recoverable as damages are not merely confined to actual losses, but can include future losses and loss of chance as well [*Zeller, pp. 43-44*]. As a direct and foreseeable result of RESPONDENT's breach, CLAIMANT was deprived not only of his potential business advantage in the electric cars market but also his reputation as he already had forward orders and "*could in fact sell 2000 cars*" [*Exhibit 16*].

48. With regard to the condition of certainty of harm expressed in UNIDROIT, RESPONDENT "*need not foresee the exact amount of damages, but rather only the assumed risk and potential liability that would result in damages at the conclusion of the contract*" [*Singh/Zeller, p. 228*]. Therefore the loss of goodwill, in case of non-performance, was certain and foreseeable.

c) CLAIMANT is entitled to claim damages for the nomination of SS Herminia

49. A full compensation must take into account any gain to the aggrieved party resulting from its avoidance of cost or harm [*UNIDROIT commentary, p. 235*].

50. Moreover a full compensation must make up for all "*harm sustained as a result of the non-performance*" [*Art. 7.4.2, UNIDROIT*] hence also a loss which could have been avoided by CLAIMANT if it was not for the omission. RESPONDENT must therefore also compensate CLAIMANT for the costs regarding the nomination of SS Herminia on June 10, 2011.

C. CLAIMANT did not fail to take measures to mitigate its loss

51. CLAIMANT's submits that any mitigation of the damage is not possible [*Art. 7.4.8, UNIDROIT*] because no mitigation measures are reasonable at the circumstances. The loss of profit and chance is irreparable. Moreover, whether CLAIMANT has failed to mitigate loss is a question of fact and the burden of proof lies on RESPONDENT [*Case No. 9187; HG Switz.; Ob518/95*]. There is a rebuttable presumption in favor of the injured party [*Saidov, p. 14*].

PRAYER FOR RELIEF

52. In light of the submissions made above, CLAIMANT respectfully requests Tribunal to declare that:

- Tribunal has jurisdiction since CLAIMANT`s arbitration clause is applicable and valid;
- Contract for 999 cars was duly concluded under CLAIMANT´s standard terms; and
- RESPONDENT is liable for damages for the breach of contract.

Respectfully signed and submitted by counsel on June 22, 2012.