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INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

29 JULY – 4 AUGUST 2012

HONG KONG

MEMORANDUM FOR RESPONDENT

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

TEAM NO. 007

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ARGUMENT ON JURISDICTION

I. TRIBUNAL HAS NO JURISDICTION TO DECIDE THE PRESENT DISPUTE

1. Pursuant to Art. 6 of CIETAC Rules, Tribunal is competent to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case [Art. 20, China Arbitration Law; Born, pp. 855-856; Redfern/Hunter, pp. 5-39].
2. RESPONDENT, however, contests the jurisdiction of Tribunal to adjudicate this dispute, because (**A**) Parties have not agreed upon any arbitration clause; alternatively, even if Tribunal decides that Parties have agreed upon the CLAIMANT's arbitration clause (**B**) the clause is still invalid because Parties did not agree on arbitration under Tribunal; additionally (**C**) CLAIMANT's breach of arbitral precondition is a procedural matter depriving Tribunal of its jurisdiction.

A. Parties have not agreed upon any arbitration clause

3. The validity of an arbitration clause is related to the issue whether Parties consented to arbitration [*UNCTAD, p. 15*]. As it will be specified subsequently, Parties failed to conclude a valid contract for the purchase of 999 cars containing CLAIMANT´s terms and conditions as well as its arbitration clause.
4. Consequently, as no contract was ever validly formed, then, *prima facie*, there was no agreement to arbitrate [*Várady/Barceló/VonMehren, p. 126*].
5. Should Tribunal find that the arbitration clause was validly incorporated into an existing contract under CLAIMANT´s terms RESPONDENT submits that Tribunal still has to decline its jurisdiction because CLAIMANT´s arbitration clause is invalid.

B. CLAIMANT´s arbitration clause is invalid because Parties did not agree upon arbitration under Tribunal

6. RESPONDENT submits, that Tribunal still lacks jurisdiction to hear Parties' dispute because **a)** no common intention of Parties to agree on Tribunal can be found; **b)** the principle of *contra proferentem* requires an interpretation against the arbitration under Tribunal; additionally **c)** Parties failed to reach a supplementary agreement on the proper arbitration forum.

a) <u>No common intention of Parties to agree on Tribunal is present</u>

7. Contrary to CLAIMANT's assumption [*Exhibit 19*], Parties did not agree upon arbitration under Tribunal because CLAIMANT´s arbitration clause, in the alleged contract for the purchase of 999 cars, clearly refers to the China Trade Commission [*Exhibit 2*].
8. Even though RESPONDENT acknowledges, that the existence of this institution, with its office located in Beijing, might be subject of a dispute, this will not affect the original intent of Parties to submit the dispute to it.
9. On the contrary, the real intention, established with a significant degree of certainty via interpretation [*Art. 4.1, UNIDROIT*] of the arbitration clause, stating *„all disputes must be referred to the China Trade Commission (and) the seat shall be Beijing*", was to agree on institutionalised arbitration under China Trade Commission and not under Tribunal [*Exhibit 2*]. As discussed above and again, putting aside the question whether it will be proved that it is an existent institution or not. It is clear that Parties expressed their intent to agree on institutionalised arbitration under China Trade Commission by the correct indication of the name of this institution.

10. Accordingly, the task conferred on every arbitrator is to follow the clearly expressed intentions of parties [*BGH, 1955; ICC Award No.2138; ICC Award No.4392*], in this particular case to arbitrate under the auspices of the China Trade Commission.
11. In *OLG Hamm,* the German court refused to enforce an arbitration agreement and declined to read the clause to refer to arbitration under the closest designation because "*it is uncertain whether this would be in accordance with the expectation of the parties*" [*OLG Hamm, 1994*]. Therefore, even if might be argued that Tribunal´s name was stated almost correctly, it must be held that the arbitration clause is void as it did not refer to the intended arbitral institution.
12. Additionally, Party´s intention to engage in arbitration under the auspices of Tribunal can neither be conferred from the applicable rules listed in the clause as the clause speaks ambiguously only about "*the relevant rules*" without any further specification.
13. All things considered, the jurisdiction cannot be based on an interpretation of arbitration clause as agreement on institutionalised arbitration under Tribunal.

b) <u>The principle of *contra proferentem* requires an interpretation against the arbitration under CIETAC</u>

14. The *contra proferentem* rule provides that any ambiguous clause, which has not been individually negotiated, has to be interpreted against the party that drafted the clause [*Fouchard/Gaillard/Goldman, pp. 259-260; DiMatteo, p.202; Berger, p. 551*].
15. As the drafter of the clause, CLAIMANT must bear the risk of its ambiguity [*Roberts, pp 1-10*]. Moreover, due consideration must be attached to the fact that this clause is part of CLAIMANT´s standard terms [*Exhibit 2*]. It was not a last minute negotiated midnight clause [*Roberts, p. 1-10*], accidently ending up with an ineptly drafted manner.

16. Consequently, it must be held that Tribunal, as an institution having jurisdiction to decide upon this matter, has not been validly chosen.

c) Parties failed to reach a supplementary agreement on the proper arbitration forum

17. According to the People's Republic of China arbitration statute, applicable as the *lex loci arbitri* [*Bahar/Besse, p. 5*], if the arbitration commission in the agreement is not named or named improperly, the parties must reach a supplementary agreement on the proper arbitration forum failing which, the arbitration agreement is void [*Art. 18, China Arbitration Law]*.
18. It is clear from the facts of the case that no such agreement was reached. Therefore, CLAIMANT´s arbitration clause must be considered void.

C. CLAIMANT´s breach of an arbitral precondition is a procedural matter depriving Tribunal of its jurisdiction

19. Tribunal should exercise its competence to find that it does not have jurisdiction to hear the dispute because **a)** the condition precedent to arbitration was not properly fulfilled; failing which **b)** an award made in favour of CLAIMANT would not be enforceable.

a) The condition precedent to arbitration was not properly fulfilled

20. RESPONDENT submits, that: (*i*) the conciliation procedure was a sufficiently definite condition precedent to arbitration (*ii*) the conciliation procedure was not exercised.

i. The conciliation procedure was a sufficiently definite condition precedent to arbitration

21. In several jurisdictions dispute resolution steps in multi-tiered arbitration clauses are viewed as conditions precedent that form an integral part of an arbitration agreement [*Berger (2006), p. 7; Sanders, p. 109*]. Failure to comply with such a condition can constitute *"a jurisdictional defect affecting the arbitral proceedings"* [*Born, p. 842*].
22. Whether a dispute resolution step is enforced as a condition precedent depends on the wording of the arbitration clause [*Berg, p. 4*]. Generally, the clause must be sufficiently definite and precise to permit such enforcement [*Jolles, p. 336*].
23. In this case, the arbitration clause is with regard to the condition of a mandatory conciliation, sufficiently precise to form an enforceable condition precedent.
24. The first part of the clause states: *„All disputes (...) shall be conciliated"*. The obligatory nature is expressed in unqualified term by using the word "*shall*" as opposed to a mere permissive "*may*".
25. In the second part is the agreement preceded by the conditional term "if". *„If no agreement can be reached it must be referred to arbitration (...)"* indicating that Parties have agreed to conciliate before proceeding to arbitration [*Berger, p. 5*].
26. Accordingly, Tribunal should make use of its authority to enforce the pre-arbitral step and send Parties to a mandatory conciliation.

ii. The conciliation procedure was not exercised

27. *„Conciliation means a process, whereby parties request a third person to assist them in their attempt to reach (...) settlement of their dispute (...)*" [*Art. 1(3), UNCITRAL Model Law on ICC*].

28. Even though CLAIMANT´s arbitration clause does not require a precise type of conciliation procedure, Parties did not engage in any type of it. Parties merely attended the informal meeting that cannot be viewed as Party´s attempt to engage and solve the dispute in conciliation because Parties met to sort out only procedural issues [*Clarifications, para. 23*].

b) An award made in favour of CLAIMANT would not be enforceable

29. An award in favour of CLAIMANT would be unenforceable as it would be made in violation of the arbitral procedure established by Parties. Art. 36(1)(a)(iv) of UNCITRAL Model Law and Art. V(1)(d) of NY Convention likewise, allow enforcement of the arbitral award to be refused if a court finds that the arbitral procedure was not in accordance with the agreement of Parties.
30. In the present matter CLAIMANT´s arbitration clause is a clear multi-tiered agreement which states that conciliation is the first procedural step in resolving any dispute [*Exhibit 2*], prohibiting Tribunal proceed to the arbitration.
31. Consequently, if Tribunal disregards RESPONDENT's arguments and affirms its jurisdiction, an award made would not be enforceable under both of the terms of the aforementioned statutes [*Jolles, p. 336; Paulsson, p. 613*].

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32. For all these reasons, Tribunal has no jurisdiction to adjudicate on the merits of this dispute.
33. Moreover, neither CLAIMANT´s nor RESPONDENT´s arbitration clauses are valid because no contract for the purchase of 999 cars was ever formed therefore the competent court shall have a jurisdiction to rule on the merits of the dispute.

ARGUMETS ON MERITS

II. THE CONTRACT FOR 999 CARS WAS NOT DULY CONCLUDED, THE ONLY CONCLUDED CONTRACT IS THAT FOR 1 CAR

A. Applicable law to this dispute is UNIDROIT

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

35. Firstly, the contract is international when there is an international element involved [*UNIDROIT commentary, p. 2*]. Parties have their seats in different countries and so the international element is present and first condition satisfied. Following, in this case, the contract was dealing with a sale of goods and therefore the transaction is commercial in nature. Consequently, the contract falls within the scope of first condition. Secondly, Parties opted [*Exhibit 10, 13*] for UNIDROIT as governing law. Therefore the second condition has been fulfilled.

36. 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

37. The order form sent by CLAIMANT on February 5, 2011, which contained detailed specification of the order, including the specification of goods – both quality and quantity, price, payment, delivery date and other specifications, is to 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*].

38. On March 20, 2011, RESPONDENT ultimately rejected an offer and made a counter offer which included modification of some of the 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 terms.

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

39. In cases, where both parties are contracting under standard terms, "if the two parties 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, which was made, was RESPONDENT's with the inclusion of his 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.

40. Even while CLAIMANT remained silent about the modification he performed the payment [*Exhibit 11*] for 1 car and took over the goods. Acceptance may be done by a conduct, [*Art. 2.1.6., UNIDROIT*] and "*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 tacitly by paying the price and taking over the goods and therefore the contract was duly concluded.

b) Contract dealing with remaining 999 cars was separate proposal for contract, not accepted by CLAIMANT and therefore not concluded

41. There was a different situation with respect to the offer dealing with 999 cars. CLAIMANT did not express an acceptance of the offer by any means. His silence and inactivity cannot be considered as an acceptance. [*Art. 2.1.6. (2), UNIDROIT*] Instead, CLAIMANT made a modified acceptance [*Art. 2.1.11 (2), UNIDROIT*] by his letter dated June 10, 2011. CLAIMANT modified the offer in the part concerning the standard terms, by explicitly stating that "*we urge you to note our terms and conditions*" [*Exhibit 13*]. RESPONDENT did not accept CLAIMANT´s counter offer and therefore the contract was not concluded.

III. CLAIMANT is not entitled to claim damages which in any case cannot be recoverable

42. CLAIMANT is not entitled to claim damages as RESPONDENT did not breach any contractual obligation since "the right to damages exists in the event of failure to perform any of the obligations which arise from the contract" [*UNIDROIT commentary, p. 235*].
43. In other words, without a breach of a contractual obligation no claim for damages is possible [*Schlechtriem, p. 3*]. Importantly in this case, as shown above in section I., no contract for 999 was concluded thus no breach of a contractual obligation occurred. Therefore, CLAIMANT is not entitled to claim damages.
44. Should Tribunal find that this contract indeed existed then RESPONDENT argues that damages for the loss of profit and goodwill **(A)**, and costs of the SS Herminia's second nomination **(B)** are not recoverable under the Art. 7.4.1 UNIDROIT and also declares that CLAIMANT failed to mitigate losses **(C)**.

A. RESPONDENT is not liable nor for the loss of profit a) or loss of goodwill b) because this damage was unforeseeable

45. UNIDROIT is clear on this matter because in its Art. 7.4.4 it states that "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 as being likely to result from its non-performance".

46. When entering into a contract, a party must be able to assess the extent of liability that it will assume [*OGH, 14 Jan 2002; Brunner, Art. 74, para. 11; Zeller, p. 91; Huber/Mullis, p. 272*] and at the time of the conclusion it was absolutely not certain for RESPONDENT whether the new electric cars would be in demand on the Minuetiese market.

a) CLAIMANT is not entitled to claim damages in form of loss of profit

47. RESPONDENT claims that damage in the form of loss of profit in this extent has not been foreseeable since foreseeability depends on RESPONDENT's "*subjective knowledge or representation of possible facts and circumstances at the time of the conclusion of the contract*" [*Knapp in Bianca-Bonell, pp. 539-41; Sutton*] together with its objective understanding of its own and other partie's industry [*Sutton; Propane case*].

b) CLAIMANT is not entitled to claim damages in form of loss of goodwill

48. Loss of goodwill represents an uncommon damage for RESPONDENT as he has no knowledge about the Minuetiese market or retail business and there is no objective foreseeability in cases of uncommon damages. Uncommon damages are those exceptionally high damages, which CLAIMANT had been able to recover only if it had informed RESPONDENT about their probable occurrence and if RESPONDENT had agreed to contract nevertheless [*Huber/Mullis, pp. 273-274*].

49. In the case at hand, CLAIMANT attempts to recover damages RESPONDENT could not foresee and therefore should be denied.

B. RESPONDENT is also not entitled to claim damages for the nomination of SS Herminia

50. CLAIMANT can recover only such payments as it was forced to undertake as direct result from RESPONDENT's breach [*Huber/Mullis, p. 386*]. *A contrario* in our case no such breach occurred and moreover "*avoidable losses are not recoverable*" [*Schlechtriem/Schwenzer, para. 1*]. Therefore no compensation is recoverable.

C. CLAIMANT failed to mitigate the losses reasonably as required by Art. 7.4.8 UNIDROIT

51. Should Tribunal find that the contract for 999 cars is valid, RESPONDENT has right to claim a reduction because CLAIMANT failed to mitigate the losses reasonably as required by UNIDROIT.

52. The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps [*Art. 7.4.8, UNIDROIT*]. CLAIMANT was contractually obliged to "*nominate a ship which can load out of the nominated ports which are Cadenza, Cantata and Piccolo*" [*Exhibit 11*] since, as shown above, RESPONDENT's terms would apply.

53. CLAIMANT failed to do so because SS Herminia was only able to load out of Cadenza. No prudent business person in CLAIMANT's position would have taken such measures [*Huber/Mullis, p. 290*] what therefore led to CLAIMANT's failure to reasonably mitigate his loss by accepting the 100 cars from Piccolo offered by RESPONDENT as evidence of good will. Moreover a "*party threatened by loss as a consequence of a breach is not*

permitted to passively await the loss and then to pursue damages" [*Knapp p. 559; Frozen Meat Case; Enderlein/Maskow p. 307*].

54. In conclusion CLAIMANT is to take suitable mitigation measures not only after a loss has occurred, but also before it arises [*Schlechtriem/Schwenzer, p.788*] and as shown above he failed to do so and indeed neglected to mitigate his loss pursuant to Art. 7.4.8 UNIDROIT.

PRAYER FOR RELIEF

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

- Tribunal has no jurisdiction to adjudicate on the merits of this dispute;
- Neither CLAIMANT's nor RESPONDENT's arbitration clause are valid
- Contract for 999 cars was not concluded; and
- RESPONDENT is not liable for damages since no breach of contract occurred

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