HONG KONG INTERNATIONAL ADR MOOT COURT COMPETITION

29 July – 4 August 2012 City University of Hong Kong

MEMORANDA FOR THE CLAIMANT

TEAM 009

ON BEHALF OF:	AGAINST:
Longo Imports	Chan Manufacturing
PO Box 234	PO Box 111
Minuet	Cadenza
CLAIMANT	RESPONDENT

I. Memoranda for the CLAIMANT

THE CLAIMANT: Longo Imports

THE RESPONDENT: Chan Manufacturing

A. Table of Abbreviations

UNCITRAL	United Nations Commission on International Trade Law
PICC	UNIDROIT Principles of International Commercial Contracts 2010
CIETAC	China international Economic and Trade Arbitration Commission
Ex.	Exhibit
para.	Paragraph
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B. Table of Authorities

2.1 Primary Sources

China International Economic and Trade Arbitration Commission Arbitration Rules
(Cited: *CIETAC Rules*).

Convention on the Recognition and Enforcement of Foreign Arbitral Awards
(Cited: *New York Convention*).

George Day Construction Co v United Brotherhood of Carpenters and Joiners of America
(1984) 77 F.2d 1471 USCOA: Ninth Circuit.
(Cited: *George Day Construction*).

Pacific Crown Engineering Ltd v Hyundai Engineering & Construction Co. Ltd [2003] 3 HKC 659.
(Cited: *Pacific Crown Engineering*).

Parties: Unknown
Centro de Arbitraje de México (*CAM Arbitral Award*)
Date: 30 November 2006
(Cited: *CAM*)

UNIDRIOT Principles of International Commercial Contracts 2010
(Cited: *PICC*).

Parties: Unknown (10422)
ICC International Court of Arbitration
2001
(Cited: *ICC Case: 10422*)

2.2 Secondary Sources

Blackaby, Parasides, Redfern & Hunter, *Redfern and Hunter on International Arbitration* (2009, 5th ed.) Oxford University Press: United Kingdom.
(Cited: *Redfern & Hunter*).

Sanders, 'Arbitration' in Ulmer & Schricker, *Encyclopaedia of International and Comparative Law, Vol XIV* (2007) Martinus Nijhoff Publishers: Germany.
(Cited: *Sanders*).

C. Jurisdiction

1. THE TRIBUNAL CONSTITUTED UNDER THE CIETAC RULES HAS JURISDICTION

1.1 The CLAIMANT's Arbitration Clause is the Binding Arbitration Clause between the Parties

1. The arbitration clause, contained in the CLAIMANT'S standard terms [*Ex.* 2, *Cl.* 12] contains a valid arbitration clause that is applicable to this dispute. The clause conforms with *UNCITRAL*, Article 7(2) which requires valid arbitration agreements to be in writing and allows for the incorporation of arbitration agreements by reference. The

CLAIMANT has incorporated its arbitration agreement (contained in *Ex.* 2, *Cl.* 12) by reference in *Ex*.1 and 13.

1.2 There is Prima Facie Evidence that an Arbitration Agreement Exists

2. There is *prima facie* evidence that an arbitration agreement exists based on the CLAIMANT'S standard terms [*Ex.* 2]. Under the *CIETAC Rules,* Article 6(2), where CIETAC is satisfied by *prima facie* evidence that an arbitration agreement exists, it may assume jurisdiction.

3. In *Pacific Crown Engineering* Justice Burrell of the High Court of Hong Kong held that, in the context of determining whether an arbitration agreement exists or not, the party seeking to rely on its existence need only prove that there is a good *prima facie* case that the arbitration agreement exists. The test will be satisfied where the evidence is cogent and plainly arguable, and not dubious or fanciful (*Pacific Crown Engineering Ltd* at 663-664).

4. The CLAIMANT asserted the use of its standard terms, including its arbitration clause, twice during the formation of the contract [*Ex.* 1 and 13]. Furthermore, it has asserted the use of its arbitration clause during the exchange for the Request for Arbitration which the RESPONDENT has not denied: *CIETAC Rules,* Article 5(3)*; UNICITRAL,* Article 7(2). It is clear that there is *prima facie* evidence that a valid arbitration agreement exists. Thus, the Tribunal may assume jurisdiction over this matter.

1.3 The RESPONDENT has Implicitly Consented to be Bound by the CLAIMANT's Arbitration Clause

5. Where a party takes part in arbitration proceedings without denying the existence of the arbitration agreement their conduct may be interpreted as implicit consent to be bound by the arbitration agreement constituting those proceedings (*Redfern & Hunter, p. 91; Sanders, p. 106*). The RESPONDENT has taken part in the arbitration by attending the preliminary informal hearing [*Ex.* 20].

6. Informal meetings are common practice in international arbitration and often taken place before the commencement of formal proceedings. As such, they may be interpreted as being part of the arbitration process. By participating in the informal

meeting, the RESPONDENT has implicitly consent to the arbitration clause contained in the CLAIMANT's standard terms [*Ex. 2*].

7. Had the RESPONDENT considered itself to not be bound by the arbitration agreement, it would have notified CIETAC or the CLAIMANT, or alternatively not attended the meeting. A party may not voluntarily submit to the jurisdiction of a Tribunal by attending an informal meeting and then, when they later discover the outcome may be unfavourable to them, challenge the jurisdiction of the Tribunal (*George Day Construction*).

1.4 The Termination of the Contract by the CLAIMANT does not affect the Validity of the Arbitration Clause

8. *CIETAC Rules*, Article 5(5) stipulates that '[t]he validity of an arbitration clause or an arbitration agreement shall not be affected by… termination… of the contract.' Thus, despite the CLAIMANT terminating the contract pursuant to *PICC*, Article 7.3.3, the arbitration clause remains valid and is applicable in this case.

1.5 The CLAIMANT has Rightfully Referred the Matter to Arbitration

9. *Cl.* 12 [*Ex. 2*] is a multi-tiered clause that requires the parties to attempt reconciliation of all disputes before they can be referred to arbitration. The clause is silent regarding the level of attempted 'conciliation' that is required to discharge this duty. However, it appears the parties have attempted to conciliate the matter before submitting it for arbitration.

10. The parties attempted conciliation when the RESPONDENT offered the remaining 100 cars [*Ex.* 15] and for the CLAIMANT to wait an additional two month for the sale of 400 cars at a discount rate of two per cent [*Ex.* 17]. Consequently, in *Ex* 18 the CLAIMANT notified the RESPONDENT that conciliation of the matter on those terms were not possible and therefore initiated arbitration proceedings. As conciliation was not possible the CLAIMANT was justified in seeking arbitration of the matter.

11. Whilst Clause 12 [*Ex.* 12] stipulates that 'all' disputes must be referred to the China Trade Commission this does not mean 'all' in a literal sense. A contract of this size and length is likely to encounter a number of disputes, however it cannot be expected that

all are to be referred to the China Trade Commission for this would be costly and inefficient. Thus, only those of an important nature, such as disputes concerning the existence or termination of the contract, should be referred to the China Trade Commission. Thus, the CLAIMANT was justified in seeking arbitration in this matter.

1.6 The Tribunal has been Lawfully Constituted under the CLAIMANT's Arbitration Clause pursuant to the CIETAC Rules.

12. The CLAIMANT's arbitration clause fulfils the necessary conditions of a valid arbitration agreement capable of being determined by CIETAC (*CIETAC Rules*, Article 5). The CLAIMANT has referred the dispute to CIETAC on the basis of the arbitration agreement which provides for CIETAC as the arbitration body (*CIETAC Rules*, Article 5(1)). Further, the agreement is in writing (*CIETAC Rules*, Article 5(2)) and the CLAIMANT has asserted the use of its arbitration clause during the exchange of Request for Arbitration upon which the RESPONDENT has not denied (*CIETAC Rules*, Article 5(3)).

D. Merits

1. A VALID CONTRACT WAS CONCLUDED BASED ON THE CLAIMANT'S TERMS AND CONDITIONS

1.1 An Offer was Made by the CLAIMANT

13. For an offer to be binding it should be sufficiently definite and indicate the intention of the offeror [*PICC,* Article 2.1.2]. To be of a definite nature, the offeror should accurately describe the goods, the payment and the place of delivery. In its correspondence with the RESPONDENT, the CLAIMANT has described the necessary performance requirements of the car [*Ex.* 7] and provided the RESPONDENT with an order form that details the model, price, quality and delivery date [*Ex. 8*]. *Ex.* 7, 8 and 9 are all evidence of a valid offer.

1.2 A Valid Contract was Concluded

14. *Ex.* 10 (acceptance of the order form) is evidence of the RESPONDENT's assent to the contents of the order form [*Ex.* 9]. However, the RESPONDENT also directs the CLAIMANT to the RESPONDENT's terms and conditions.

15. *PICC,* Article 2.1.11(2) stipulates that '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 constitute acceptance, unless the offeror, without undue delay, objects to the discrepancy.' Despite modifying some of the terms of the contract in the reply, the RESPONDENT has not modified any material terms, such as the performance requirements of the cars, the model, the price or the delivery date. Further, the offeror, that is the CLAIMANT, has not objected to the discrepancy. Thus, the RESPONDENT accepted the CLAIMANT's offer and a valid contract was concluded.

1.3 The CLAIMANT's Terms and Conditions are Applicable

1.3.1 The CLAIMANT and RESPONDENT's Terms can be classified as Standard Terms

16. As demonstrated in *Ex.* 2 and 4, the CLAIMANT and RESPONDENT have both used their own standard terms. Both have prepared these standard terms in advance for the

purpose of general and repeated use [*PICC,* Article 2.1.19(2); *Vogenauer,* p. 318]. Where one or both parties use standard terms in concluding a contract, the general rules of formation apply, subject to *PICC,* Articles 2.1.20-2.1.22 [PICC Art 2.1.19(1)].

1.3.2 The Terms of the Contract can be Determined by Reference to PICC, Article 2.1.22

17. Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and any standard terms which are common in substance [*PICC,* Article 2.1.22]. Thus, despite differences between the CLAIMANT [*Ex.* 2] and RESPONDENT's [*Ex.* 4] terms, a contract was still formed on the basis of the agreed terms and those that were common in substances.

18. There was agreement on the type of goods, the model, the price, the quantity and the delivery date; all of which were expressed in the CLAIMANT's order form [*Ex.* 9] and accepted by the conduct of the RESPONDENT in *Ex.* 10. As neither party stated that their own terms were vital, there is no room for the application of the 'last shot doctrine'.

1.3.3 The CLAIMANT's Terms and Conditions are Applicable by Reference to PICC, Article 2.1.12

19. Where writing is sent within a reasonable time after the conclusion of the contract which purports to be confirmation of the contract but contains additional or different terms, these terms will become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy [*PICC,* Article 2.1.12]. *Ex.* 13 contains a letter sent 10 June 2011 from the CLAIMANT to the RESPONDENT, after the conclusion of the contract, notifying the RESPONDENT of the use of the CLAIMANT's terms.

20. Thus, the CLAIMANT's terms can be said to be incorporated into the contract, as they were sent within a reasonable period of time after the conclusion of the contract. Further, the RESPONDENT did not object to the discrepancy.

2. TERMINATION

2.1 The RESPONDENT Breached its Obligation to Deliver 1,000 Cars by 1 December 2011

21. The RESPONDENT is obliged to perform its obligation to deliver the goods by the time fixed in the contract [*PICC,* Article 6.1.1(a)]. The CLAIMANT and RESPONDENT have contractual agreed that the cars are to be delivered by 1 December 2011 [*Ex.* 8 and 10]. The RESPONDENT admitted in a letter dated 15 August 2011 [*Ex.* 15] that it would be unable to deliver the Cars by the due date.

2.2 The CLAIMANT Validly Terminated the Contract

22. Despite the RESPONDENT having until 1 December 2011 to perform its obligation, by its own admittance it would have been unable to deliver the cars by the due date [*Ex.* 15]. Where, prior to the date of performance, it become clear that there will be a fundamental non-performance by one of the parties *PICC,* Article 7.3.3 allows the other party to terminate the contract.

23. In determining whether a failure to perform an obligation amounts to fundamental non-performance regard must be had to the list of factors contained in *PICC,* Article 7.3.1(2). It is clear that the failure to deliver the cars has substantially deprived the CLAIMANT of what it was entitled to expect under the contract [*PICC,* Article 7.3.1(a)]; strict compliance with the obligation to deliver the cars was essential [*PICC,* Article 7.3.1(a)] and the non-performance gave rise to a situation where the CLAIMANT could not rely on the RESPONDENT's future performance [*PICC,* Article 7.3.1(a)].

24. In a case involving unknown parties, the Centro de Arbitraje de México [*CAM*] held that the RESPONDENT's breach was fundamental as it had fulfilled at least three of the criteria in *PICC,* Article 7.3.1(a). Similarly, in this case there has been fundamental non-performance of the key term of the contract which has resulted in the fulfilment of three of the criteria listed in *PICC,* Article 7.3.1(a). Thus, the CLAIMANT validly terminated the contract.

25. Whilst the CLAIMANT did not explicitly stating that it terminated the contract, its correspondence on *Ex.* 16 is enough to fulfil the condition of notice in *PICC,* Article 7.3.2(1) (*ICC Case: 10422)*. The CLAIMANT retained the right to terminate the contract as it notified the RESPONDENT merely five days after it became aware of the RESPONDENT's breach (*PICC,* Article 7.3.2(2).

2.3 The Acceptance of the 100 Cars does not Prevent the CLAIMANT from Terminating the Contract

26. As the CLAIMANT relied on the contract to its detriment, it had no choice but to accept the 100 cars to mitigate the loss it would suffer due to its advance orders [*Ex. 16*]. The CLAIMANT's acceptance of the 100 cars does not prevent the CLAIMANT from terminating the contract and claiming damages. The acceptance was merely to mitigate the amount of loss caused by the RESPONDENT's breach.

3. LIABILITY FOR DAMAGES

3.1 The CLAIMANT has a Right to Claim Damages

27. Termination of the contract by the CLAIMANT does not preclude a claim for damage [*PICC,* Article 7.3.5]. Under *PICC,* Article 7.4.1 any non-performance by a party gives the other party the right to claim damages. Non-performance is described as a 'failure by a party to perform *any* of its obligations under the contract' (*emphasis added*) [*PICC,* Article 7.1.1].

28. Thus, despite the CLAIMANT terminating the contract, it still has the right to claim damages due to the RESPONDENT's failure to perform a fundamental requirement of the contract.

29. Further, there was no interference by the CLAIMANT that could preclude a claim for damages. *PICC,* Article 7.1.2 stipulates that a party cannot rely on the non-performance of another party to claim damages if the non-performance is a result of the party's own acts or omissions. In *Ex.* 15 the RESPONDENT claims the reason they did not perform was because they did not receive confirmation from the CLAIMANT. Further, in *Ex.* 17, the RESPONDENT claims that the CLAIMANT breached the

contract for 1,000 Cars by nominating the ss Herminia which is unable to dock at Piccolo.

30. The CLAIMANT, in the *Ex.* 9 order form, clearly expressed to the RESPONDENT that '*any defect or unsatisfactory performance [would] be notified within one week* of receipt of the sample car (*emphasis added*).' In *Ex.* 13 on 10 June 2011 the CLAIMANT notified the RESPODENT that the sample car had arrived and that the testing was being completed. As the CLAIMANT's had no obligation to provide notice of satisfactory performance this cannot be viewed as an interfering act or omission.

31. In relation to the CLAIMANT's nomination of the ss Herminia, if the RESPONDENT was aware that it was an unsuitable vessel it should have notified the CLAIMANT. Under *PICC,* Article 1.7 each party must act in accordance with good faith and fair dealings in international trade and this duty may not be excluded or limited. Good faith dictates that if the CLAIMANT nominates an inappropriate vessel that is incapable of entering the required dock, the RESPONDENT, with local knowledge of the docks in their country, would alert the CLAIMANT of the potential problem in order to facilitate the performance of the contract.

32. As per the RESPODNENT's instruction, the CLAIMANT nominated the ss Herminia on 10 June 2011 [*Ex.* 13]. It was not until 10 September 2011 that the RESPONDENT simultaneously notified the CLAIMANT that the ss Herminia was inappropriate and that the CLAIMANT had therefore breached the contract. The practice of good faith dictates that sometime between 10 June 2011 and 10 September 2011 the RESPONDENT should have notified the CLAIMANT to the potential problem to insured that the contract could properly be performed. The RESPONDENT cannot exclude or limit its duty of good faith to escape liability.

3.2 The CLAIMANT is Entitled to Compensation because of the RESPONDENT's Breach

3.2.1 The CLAIMANT is entitled to full compensation

33. Under *PICC,* Article 7.4.2(1) the aggrieved party is entitled to full compensation for harm sustained as a result of the other party's non-performance. Such harm includes

any loss suffered and any gain of which it was deprived. Such harm may also be non-pecuniary [*PICC*, Article 7.4.2].

34. Thus, the CLAIMANT is entitled to compensation for profit it would have made had it resold the 1,000 cars. Further, the CLAIMANT has suffered non-pecuniary harm in the form of loss of reputation.

3.2.2 Certainty of Harm

35. Future harm may only be compensated if it can be established with a reasonable degree of certainty [*PICC*, Art 7.4.3(1)]. The profit that the CLAIMANT could have acquired by reselling the 1,000 electric cars is future harm, however it can be determined with a reasonable degree of certainty.

36. In *Ex.* 1 the CLAIMANT determined that they would have been able to sell approximately 10, 000 cars per year and in *Ex*. 16 states that it would have been capable of selling 2,000 initially. Thus, it appears that the CLAIMANT could have easily sold 1,000 cars.

37. Alternatively, if the Tribunal does not find that there is a reasonable degree of certainty that the CLAIMANT could have sold the 1,000 cars, compensation should still be awarded proportionally to the probability of the loss occurring [PICC Art 7.4.3(2) and (3)].

3.2.3 Foreseeability of Harm

38. The RESPONDENT is liable for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract that was likely to arise as a result of its non-performance [*PICC*, Article 7.4.4]. The RESPONDENT was well aware through correspondence with the CLAIMANT that the CLAIMANT intended to resell the cars for commercial gain. Thus, the RESPONDENT could easily foresee that by failing to perform the CLAIMANT would suffer loss of profit and loss of reputation.

3.2.4 The CLAIMANT has not contributed to the harm suffered

39. Where the CLAIMANT has contributed to the harm the amount of damages shall be reduced to the extent of the contribution [*PICC* Art 7.4.7]. As demonstrated in para. 31-33 above, the CLAIMANT was not required to provide confirmation regarding the satisfactory performance of the sample car and the RESPONDENT should have provided notice to the CLAIMANT regarding ss Herminia's inability to dock at all ports. Thus, the CLAIMANT has not contributed to the harm it has suffered and is therefore entitled to full compensation for the loss of profit and reputation it has suffered.

E. Request for Relief

40. The CLAIMANT respectfully requests the Tribunal to find that:

1. The Tribunal has jurisdiction to hear this matter;
2. A valid contract exists based on the CLAIMANT's terms and conditions;
3. The CLAIMANT validly terminated the contract due to the RESPONDENT's fundamental breach; and
4. The CLAIMANT is entitled to full compensation for loss suffered as a result of the RESPONDENT's fundamental breach.