HONG KONG INTERNATIONAL ADR MOOT COURT COMPETITION

29 July – 4 August 2012 City University of Hong Kong

MEMORANDA FOR THE RESPONDENT

TEAM 009

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

II. Memoranda for the RESPONDENT

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
ADR	Alternate Dispute Resolution
Ex.	Exhibit
para.	Paragraph
p.	Page

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*)

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

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

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*)

C. Jurisdiction

1. THE TRIBUNAL CONSTITUTED UNDER THE CIETAC RULES DOES NOT HAVE JURISDICTION

1.1 The CLAIMANT's Arbitration Clause is not the Binding Arbitration Clause between the Parties

1. *CIETAC Rules,* Article 5.1 stipulate that CIETAC shall accept a case in accordance with an arbitration agreement that is 'concluded between the parties.' *CIETAC Rules,* Article 6.1 gives CIETAC the power to determine the existence and validity of an arbitration agreement and its jurisdiction over a case.

2. As the CLAIMANT's arbitration clause, contained in its standard terms [*Ex.* 2, *Cl.* 12] contain the only reference to CIETAC, the Tribunal must accept that arbitration clause in order to validly constitute the Tribunal. However, the CLAIMANT's arbitration clause cannot be considered as being 'concluded between the parties.' Both parties have used their own standard terms, and more specifically, their own arbitration clauses which differ in substance [*Ex.* 2 and 4]. As the CLAIMANT*'s* arbitration clause has not been accepted by the RESPONDENT, CIETAC does not have jurisdiction to hear this matter.

1.2 The CLAIMANT's Arbitration Clause is Null and Void

3. In the alternative, if the Tribunal were to find that there is an arbitration agreement, the CLAIMANT's arbitration clause is null and void as it lacks certainty. The *New York Convention,* Article II(3) stipulates that parties shall be directed to arbitrate their difference, where an arbitration agreement exists, unless the agreement is 'null and void, inoperative, or incapable of being performed.'

4. The CLAIMANT's arbitration clause [*Ex.* 2] lacks certainty regarding the location of the arbitration. It is uncertain whether arbitrations are to be held in Cadenza or Beijing. Uncertainties such as this are capable of resulting in extensive litigation and detract from the merits of the dispute [*New York Convention,* Article II(3)]. The lack of certainty regarding to location makes the arbitration agreement null and void without any effect [*New York Convention,* Article II(3)].

1.3 The Preconditions to Arbitration have not been Fulfilled

5. In the alternative, if the Tribunal finds that a valid arbitration agreement exists, the preconditions to arbitration have not been fulfilled. Parties to an arbitration agreement may decide that, prior to submitting the dispute for arbitration, they will attempt to settle any disputes through alternate means [*Redfern,* p. 115]. This is most commonly achieved through the use of a 'multi-tier' Alternate Dispute Resolution Clause [*Redfern,* p. 115].

6. *Cl.* 12 [*Ex.* 2] of the CLAIMANT's terms state that '[a]ll disputes must be referred to the China Trade Commission…' and that '[a]ll disputes arising out of or in connection with this contract, including any questions regarding its existence, validity or termination shall be conciliated.' The wording suggests that *Cl.* 12 may better be described as an Alternate Dispute Resolution clause, rather than an arbitration clause.

7. Before the CLAIMANT can refer the matter for arbitration it is obliged to refer the matter to the China Trade Commission in an attempt to conciliate the dispute. As the claimant has not referred the matter to the China Trade Commission for conciliation the Tribunal should refuse to exercise its jurisdiction to hear this matter.

1.4 As the RESPONDENT*'s Arbitration Clause Should Apply the* CLAIMANT*'s Cannot*

8. By application of *PICC,* Article 2.2.22, the RESPONDENT's standard terms will prevail over the CLAIMANT's [see below, *para.* 20-22]. Thus, the RESPONDENT's arbitration clause shall be applicable, not the CLAIMANT's.

D. Merits

1. THERE IS NO VALID CONTRACT

9. *PICC,* Article 2.1.1 stipulates that a contract may only be concluded by acceptance of an offer or by conduct of the parties that is sufficient to show agreement. It is clear that the RESPONDENT never accepted the CLAIMANT's offer nor can an inference be made from the correspondence that an agreement was created. Rather, the RESPONDENT rejected the CLAIMANT's offer and provided a counter-offer which was never accepted by the CLAIMANT.

1.1 There is No Valid Contract as the RESPONDENT *did not Accept the* CLAIMANT*'s Offer*

10. 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)].

11. 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]. However, if one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intent to be bound by such a contract then a contract will not be concluded [*PICC,* Article 2.1.22].

12. Upon receiving the notice of interest from the CLAIMANT, which annexed its own terms [*Ex.* 1 and 2], the RESPONDENT immediately, and without undue delay informed the CLAIMANT of the RESPONDENT's terms and condition [*Ex.* 3]. Again, after receiving the CLAIMANT's order form [*Ex.* 8 and 9] the RESPONDENT, without undue delay, informed the CLAIMANT that it objected to the CLAIMANT's terms and conditions and wished to use its own [*Ex. 10*].

13. Thus, under *PICC,* Article 2.1.22, despite the fact both parties have used standard terms a contract cannot have been concluded as the parties did not agree on the terms of the

contract and the RESPONDENT twice notified the CLAIMANT, without undue delay, that they did not intent to be bound by the CLAIMANTs terms.

14. Further, the RESPONDENT expressed several concerns relating to the CLAIMANT's order form for 1,000 cars [*Ex.* 9]. The RESPONDENT urged the CLAIMANT to refer to its own terms, which were materially different to the CLAIMANT's terms upon which the offer was based. There were difference in relation to the price of the goods (via application of a non-discount provision) and the scope of liability. Where a reply to an offer purports or appears to be acceptance but contains 'material' additions, limitations or other modifications it is classified as a rejection of the offer and constitutes a counter-offer (*PICC,* Article *2.1.11(1)).*

15. In its reply [*Ex.* 10], the RESPONDENT has 'added' a no-discount provision and 'limited' the scope of its liability. As both of these modifications can be considered material the reply by the RESPONDENT can be considered a counter-offer. Further, the RESPONDENT wished to treat the sale of 1,000 cars as separate from the single 'test car'.

16. The CLAIMANT has no grounds to rely on *PICC,* Article 2.1.11(2) to interpret the contract as concluded. Even, if the Tribunal were to find that the modifications were not material, as demonstrated in *para.* 12 above the RESPONDENT adequately objected to the discrepancy.

1.2 The RESPONDENT*'s Counter-Offer was Never Accepted by the* CLAIMANT

17. The RESPONDENT's counter-offer was an offer to conclude a contract for 1,000 cars with the single 'test car' being a separate contract [*Ex.* 10]. The next piece of correspondence from the CLAIMANT was regarding the arrival and testing of the single 'sample car' [*Ex.* 13]. Whilst the CLAIMANT's conduct may be interpreted as acceptance of the contract for the single 'sample car' it cannot be considered acceptance for the 1,000 car shipment. As the CLAIMANT did not accept the counter-offer for 1,000 cars no valid contract was created.

1.2 Notification of the Successful Testing of the Car was a Suspensive Condition

18. A contract maybe be made conditional upon the occurrence of a future event so that the contract only comes into effect if the event occurs (*PICC,* Article 5.3.1). This is known as a suspensive condition (*PICC,* Article 5.3.1(a)). If the Tribunal finds favour in the CLAIMANT's argument that a contract on its terms exists, the Tribunal must recognise that the CLAIMANT has made its existence conditional upon the successful testing of the 'sample car' [*Ex.* 5, 8 and 9].

19. Whilst the CLAIMANT phrased the condition in a negative fashion; that being, '…*unless we find it unsatisfactory* we expect the remaining cars to be sent by December 1, 2011 (*emphasis added*)' [*Ex.* 5], it is unreasonable to create a suspensive condition that hinges on a lack of notification. Unless the CLAIMANT notifies the RESPONDENT of the result of the testing, the RESPONDENT cannot be certain whether the test has been completed or whether the results were satisfactory. It is unreasonable for the CLAIMANT to argue that the RESPONDENT should have begun production of such a large quantity of Cars without having confirmation that the suspensive condition was fulfilled.

2. IF THE TRIBUNAL DETERMINES THERE IS A VALID CONTRACT, THE CLAIMANT'S TERMS AND CONDITIONS ARE NOT APPLICABLE

2.1 The CLAIMANT's Terms and Conditions are Not Applicable

20. If the Tribunal determines that a valid contract has been concluded by application of *PICC,* Article 2.1.22, the CLAIMANT's terms and conditions are not applicable. The CLAIMANT's confirmation of the contract based on its terms [*Ex.* 13] is incapable of forming part of the contract by application of *PICC,* Article 2.1.12. For *PICC,* Article 2.1.12 to apply the confirmation notice must be sent within a reasonable time after the conclusion of the contract. The contract must be fresh in the minds of the parties [*Vogenauer,* p.287].

21. The CLAIMANT confirmed the contract based on their terms on 10 June 2011 [*Ex. 13*] almost four months after the alleged conclusion of the contract on 20 March 2011 [*Ex.* 10]. Thus, the CLAIMANT's confirmation cannot be interpreted as being sent within a reasonable time and therefore cannot form part of the contract.

2.2 The RESPONDENT*'s Terms and Conditions are Applicable*

22. The RESPONDENT's reply [*Ex.* 10] to the CLAIMANT's order form [*Ex.* 9] can be considered a counter-offer. The CLAIMANT has accepted this counter offer via conduct evidenced in *Ex.* 11; that is, a phone call asking the RESPONDENT to load the sample car on to ss Herminia. Almost two months had passed before the CLAIMANT notified the RESPONDENT of its terms [*Ex.* 13]. Under *PICC,* Article 2.1.22 the CLAIMANT's objection to using the RESPONDENT's terms and is unduly delayed and therefore it will be bound by the contract under the RESPONDENT's terms.

3. TERMINATION

23. The CLAIMANT has invalidly terminated the contract as it cannot demonstrate fundamental non-performance. In the alternative, if the Tribunal determines that there has been fundamental non-performance the CLAIMANT is unable to rely on it to terminate the contract as it has been caused by its own acts and omissions.

3.1 The CLAIMANT has Invalidly Terminated the Contract as the RESPONDENT has Not Committed a Breach

24. 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.

25. The RESPONDENT was obliged to deliver 1,000 cars by 1 December 2011, however the CLAIMANT stated that the RESPONDENT had breached the contract on 20 August 2011 [*Ex*. 16]. The CLAIMANT's accusation took place well before the delivery date of 1 December 2011; before it became clear whether there would be fundamental non-performance by the RESPONDENT.

26. The RESPONDENT's refusal to ship all 1,000 cars in a single transaction on 15 August 2011 cannot be classified as fundamental non-performance [*Ex.* 15]. The RESPONDENT did not have an obligation to ship all the cars at once. The RESPONDENT maintained that it was willing to ship 100 cars and that 'it could not keep up with delivery due to the strong demand for the cars' [*Ex.* 15]. The

RESPONDENT's remarks were in regard to loading the 1,000 cars on to the ss Herminia on 15 August 2011.

27. The RESPONDENT's contractual obligation was merely to deliver the cars by 1 December 2011. Further evidence of the RESPONDENT's position to be able to fulfil the contract by 1 December 2011 can be seen in *Ex.* 17 where the RESPONDENT offered the CLAIMANT another 400 Cars by November. Thus, the RESPONDENT's refusal to ship 1,000 cars on 15 August 2011 cannot be viewed as fundamental non-performance capable of giving to a right to terminate (*ICC Case: 10422*).

3.2 The CLAIMANT Contributed to the RESPONDENT's Non-performance

28. In the alternative, if the Tribunal determines there has been fundamental non-performance, the CLAIMANT cannot rely on that non-performance to terminate the contract (PICC, Article 7.1.2). There are a number of acts and omissions committed by the CLAIMANT that preclude it from relying on the RESPONDENT's non-performance to terminate.

29. Firstly, as demonstrated above in *para.* 15-16 the CLAIMANT has contributed to the RESPONDENT's non-performance by not notifying them of the suspensive condition; that is, the testing of the single car.

30. Secondly, the CLAIMANT did not nominate a ship that was capable of docking in all three ports as required by the contract [*Ex.* 11]. The ss Herminia was only not capable of docking in Piccolo, thus preventing the RESPONDENT from performing its obligation to deliver the cars.

31. Thirdly, the CLAIMANT refused to accept the 400 cars offered by the RESPONDENT [*Ex.* 18]. The contract was for the delivery of 1,000 cars before 1 December 2011; the RESPONDENT was not under an obligation to ship all the cars at once. By not accepting 400 cars of the 1,000 lot, the CLAIMANT has contributed to the RESPONDENT's non-performance.

32. It is clear that there were a number of acts and omissions committed by the CLAIMANT that restricted the RESPONDENT from performing its contractual duties.

Thus, the CLAIMANT cannot rely on the RESPONDENT's non-performance to terminate the contract and seek damages (PICC Article 7.1.2).

4. LIABILITY FOR DAMAGES

4.1 The RESPONDENT is not Liable for Damages

33. As no contract has been concluded the RESPONDENT is not liable for any damages suffered by the CLAIMANT; including, but not limited to, loss of profit and loss of reputation.

4.2 If the Tribunal Determines that the RESPONDENT is Liable for Damages, the RESPONDENT is not Liable to Pay Full Compensation

4.2.1 The RESPONDENT is not Liable for Consequential Loss under the Contract

34. In the alternative, if the Tribunal finds that a valid contract exists, as the contract is based on the RESPONDENT's terms, the RESPONDENT is not liable for any consequential loss. The RESPONDENT has made it clear that it will, under no circumstances, be responsible for any consequential loss, including loss of profits [*Ex.* 4, *Cl.* 7 (*sic*)].

4.2.2 The Future Loss of Profit and Reputation is not Capable of being Determined with a Reasonably Degree of Certainty

35. In the alternative, if the Tribunal determines that the contract is based on the CLAIMANT's terms loss of profit and loss of reputation are not capable of being compensated. Future harms may only be compensated if it can be established with a reasonable degree of certainty [*PICC,* Article 7.4.3(1)]. The success of a new type of electric car would be difficult to predict and any future loss of profit or reputation is incapable of being determined with a reasonable degree of certainty.

36. In *Ex.* 1 the CLAIMANT stated that it would have been able to sell approximately 10,000 cars per year and in *Ex.* 16 states it was capable of selling 2,000 initially. However, from the evidence available there is no way to reasonably determine the accuracy of such claims. The CLAIMANT has not produced any scientific data or

expert witnesses to demonstrate its chances of success in the electric car market or the supply and demand of such cars.

37. Thus, as the Tribunal cannot determine the loss of profits or loss of reputation the CLAIMANT has suffered with a reasonable degree of certainty, compensation should be awarded proportionally to the probability of the loss occurring [*PICC,* Article 7.4.3(2) and (3)].

4.2.3 The CLAIMANT has Contributed to the Harm it Suffered

38. Where the CLAIMANT has contributed to the harm it has suffered the amount of damages shall be reduced to the extent of the contribution [*PICC,* Article 7.4.7]. *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 parties own acts or omissions.

39. As demonstrated in *para.* 15-16 and 28-32 the CLAIMANT has committed a number of acts and omission that have contributed to the harm it has suffered. This includes; failing to notify the RESPONDENT of the successful testing of the single ‘sample car’, nominating a ship that was incapable of docking in all ports and not receiving the 400 cars offered by the RESPONDENT [*Ex.* 18.].

E. Request for Relief

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

1. The Tribunal does not have jurisdiction to hear this matter;
2. A valid contract does not exist; and
3. The RESPONDENT is not liable for damages.

41. In the alternative:

1. A valid contract exists based on the RESPONDENT terms;
2. The CLAIMANT has invalidly terminated the contract; and
3. The RESPONDENT is not liable:
    a. for any damages; or
    b. to make full compensation.