THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG – AUGUST 2012

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# MEMORANDUM FOR CLAIMANT

## TEAM CODE: 013

On Behalf Of: **LONGO IMPORTS**

Against: **CHAN MANUFACTURING**

TABLE OF CONTENTS

**INDEX OF ABBREVIATIONS**........................................................................................i
**INDEX OF AUTHORITIES**........................................................................................ii
TREATIES, CONVENTIONS AND LAW……..…………………………………….ii
BOOKS AND COMMENTARIES………………………………………...……....ii
INDEX OF CASES AND AWARDS. …………………………………………….iii
**ARGUMENTS**........................................................................................................ 1
I. **CLAIMANT'S ARBITRATION CLAUSE WILL BE APPLICABLE**.......................... 1
1.1 Precondition of the Arbitration Clause has been fulfilled ...................................... 1
1.2 Respondent impliedly consented to Claimant's arbitration Clause which can be established by its conduct ........................................................................................ 1
1.3 Claimant is not bound by Respondent's arbitration Clause.................................... 2
1.4 Arbitral tribunal has the power to deal with the applicability and validity of the agreement...................................................................................................... 2
II. **THE ARBITRATION CLAUSE OF THE CLAIMANT IS VALID**............................. 2
2.1 Clause 12 is a mandatory obligation to conciliate disputes first and then arbitrate. 2
2.2 Clause 12 of the Claimant is not obscure............................................................... 2
2.3 In any event, Clause 12 of Claimant's arbitration agreement is ambiguous, it should still be given effect ......................................................................................... 3
III. **INCOTERMS CIF (COST INSURANCE AND FREIGHT) ARE THE APPLICABLE TERMS IN THE PRESENT CASE**…………………………………….3
3.1 There was an indication of assent to an offer ....................................................... 4
3.2 Silence or inactivity does not itself amount to acceptance………………………..4
IV. **THERE IS A VALID CONTRACT BETWEEN CLAIMANT AND RESPONDENT**5
4.1 Claimant made an offer.......................................................................................... 5
4.2 The Offer was accepted by the Respondent........................................................... 5
4.3 There was Consensus-ad-idem .............................................................................. 6
V. **RESPONDENT IS LIABLE FOR DAMAGES FOR THE BREACH OF CONTRACT PURSUANT TO ARTICLE 7.4.1 UPICC 2010** .......................................... 6

5.1 Respondent failed to perform his obligations warranting the Claimant to seek damages....................................................................................................................7

(A) Claimant entitled to full compensation on account of loss of profits ..................7

(B) Claimant is also entitled to consequential damages including loss of profits ... …7

(C) Claimant is also entitled to compensation for non-pecuniary loss……………......7

5.2 Respondent did not act in accordance with good faith and fair dealing, resulting in breach of contract……………………………………………………………….8

5.3 Respondent's failure to deliver 999 cars amounts to fundamental non-performance of the Agreement…………………………………………………….8

**RELIEF REQUESTD**………………………………………………………………….9

# INDEX OF ABBREVIATION

| | |
|---|---|
| ¶ | Paragraph |
| § | Article of UPICC |
| Agreement | Arbitration Agreement |
| Art. | Article |
| CISG | United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 |
| Cl. | Clause of the Agreement |
| CLAIMANT | Longo Imports |
| Ex. | Exhibit |
| ICC | International Chamber of Commerce |
| UMLA | UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) |
| NYC | United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards |
| RESPONDENT | Chan Manufacturing |
| UNCITRAL | United Nations Commission on International Trade Law |
| UPICC | UNIDROIT Principles of International Commercial Contracts of 2004 |

# INDEX OF AUTHORITIES

## TREATIES, CONVENTIONS AND LAW

| | |
|---|---|
| CIETAC | China International Economic and Trade Arbitration Commission |
| Model Law | UNCITRAL Model Law on International Commercial Arbitration, 1985 |
| NYC | Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 |
| UPICC | UNIDROIT Principles of International Commercial Contracts, 2004 |

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(Para: 8)

England and Wales — Adams v. Lindsell,

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(Cited as: Adams)

(Para: 21)

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|---|---|
| Hong Kong | William Company v. Chu Kong Agency Co. Ltd. and Guangzhou Ocean Shipping Company<br>High Court— Court of First Instance, Hong Kong,<br>(1993) HKCFI 215<br>(Cited as: William Company)<br>(Para: 1) |
| New York | Irving R Boody& Co. Win Holding Int'l Inc.<br>213 F.Supp 2D 378, SDNY (2002)<br>(Cited as: Irving R Boody)<br>(Para: 3) |
| Singapore | Canada Packers v. Fujian Shipping Co. (China)<br>High Court of Singapore, Admiralty Division,<br>March 2, 1992,<br>Yearbook Commercial Arbitration 1998, 750.<br>(Cited as: Canada Packers)<br>(Para: 1) |
| ICC | ICC International Court of Arbitration, Arbitral Award 2001, ICC Case No. 10422<br>(Cited as: Arbitral Award 2001)<br>(Para: 9) |

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# ARGUMENTS

## I. CLAIMANT'S ARBITRATION CLAUSE WILL BE APPLICABLE

### 1.1 Precondition of the Arbitration Clause has been fulfilled:

1. The arbitration agreement ("Agreement") [*Cl. 12, Ex. 2*] should at least cover the following areas namely description of the dispute being referred to arbitration, direct or indirect choice of arbitrators, choice of the substantive law, direct or indirect regulation of the arbitral proceedings, choice of the place of arbitration, possible waiver of attack against the award and choice of the language of arbitration [*Canada Packers*]. CLAIMANT'S arbitration Cl. fulfils all the above-mentioned prerequisites. An arbitration agreement may be in the form of an arbitration Cl. in a contract or in the form of a separate agreement. [*Art. 7, UMLA*]. The agreement should be in writing [*William Company*]. Therefore, all the condition precedent are fulfilled by the CLAIMANT in his arbitration Cl. [*Cl.2, Ex. 2*].

### 1.2 RESPONDENT impliedly consented to CLAIMANT'S arbitration Clause which can be established by its conduct:

2. A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement. [*Art. 2.1.1 UPICC*]. Action implying consent can lead to formation of a contract [*O Palandt*].

3. There is indeed a valid contract formed between the parties as per the communications exchanged between them [*Ex. 2 and Ex. 9*]. In the present matter, Order Form of the CLAIMANT was duly received and accepted by the RESPONDENT [*Ex.10*]. This leads to the inference that the RESPONDENT accepted all the terms and conditions proposed by the CLAIMANT. The reference in a contract to a document containing an arbitration Cl. constitutes an agreement provided that the contract is in writing and the reference is such as to make that Cl. part of contract [*Rubino*]. Ratification by failure to object serves as the equivalent of prior authorization [*Irving R Boody*].

4. The RESPONDENT always responded to query of the Claimant and was even sending the sample car and also receiving the order form the Claimant leads to the conclusion that the Respondent impliedly consented to CLAIMANT'S arbitration clause and never objected to it [*Ex. 6*].

### 1.3 CLAIMANT is not bound by RESPONDENT'S arbitration clause:

5. An arbitration Cl. contained in a contract shall be treated as a Cl. independent and separate from all other Cl. of the contract, and an agreement attached to a contract shall also be treated as independent and separate from all other Cl. of the contract [*Kolios*]. The validity of an arbitration Cl. shall not be affected by any modification, cancellation, termination, transfer, expiry, invalidity, ineffectiveness, rescission or non-existence of the contract [*Art.5 (4), CIETAC*]. The RESPONDENT'S arbitration Cl. is not definite as it gives option for the place of arbitration i.e. arbitration in Cadenza or in Hong Kong [*Cl. 9, Ex. 4*].

### 1.4 Arbitral tribunal has the power to deal with the applicability and validity of the agreement:

6. Arbitral tribunals can rule on their own jurisdiction under the doctrine of Kompetenz/Kompetenz [*Hunter*]. CIETAC shall have the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case [*Art. 6(1) CIETAC*]. Also the arbitration shall proceed notwithstanding an objection to the arbitration agreement and/or jurisdiction over the arbitration case [*Art. 6(5) CIETAC*]. The arbitral tribunal can hear the arguments as to jurisdiction and proceed to decide on its own jurisdiction despite non-recognition or non-acceptance of the RESPONDENT.

## II. THE ARBITRATION CLAUSE OF THE CLAIMANT IS VALID

### 2.1 Cl. 12 is a mandatory obligation to conciliate disputes first and then arbitrate:

7. Cl. 12 provides that, this Agreement and all its provisions may be governed in all respects by the CIETAC rules. If Cl. 12 were not given effect the parties would be left with no possible way to resolve their disputes.

### 2.2 Cl. 12 of the CLAIMANT is not obscure:

8. Cl. 12 is a valid agreement to arbitrate. A Court will only declare an arbitration agreement invalid if it is inoperative or incapable of being performed [*Art. 2(3) NYC; Art. 8(1) UMLA*]. Also an arbitration Cl. found in terms and conditions easily accessible by clicking on a hyperlink appearing at the bottom of pages visited by the customer is not an external Cl. [*Dell Computer Corp*]. The CLAIMANT'S arbitration Cl. was on webpage and was

easily accessible which renders it a valid arbitration Cl. [*Ex.1*]. Cl.12 of the CLAIMANT'S agreement are not inoperative because the Cl. clearly states that CIETAC has jurisdiction to hear all disputes relating to the agreement.

**2.3 In any event, Cl. 12 of CLAIMANT'S arbitration agreement is ambiguous, it should still be given effect:**

9. The Tribunal should even if the CLAIMANT'S arbitration Cl. is dubious find that Cl. 12 is a valid arbitration agreement because it is clear in the circumstances that the parties intended to arbitrate their disputes. A Cl. may still be given effect by asking what reasonable persons in the same circumstances would have understood by such language [*Arbitral Award 2001].* Preference should be given to interpretations that give the arbitration Cl. effect [*Art 4.5 UPICC; ICC Award 10422*]. RESPONDENT acknowledged the order form of the CLAIMANT and also referred to FAS terms "Thank you for your Order form. The SS Herminia has docked in Cadenza. We again refer you to our terms and conditions and advise that our terms are FAS" [*Ex. 10*]. A reasonable person would understand Cl. 12 of CLAIMANT'S agreement to mean that disputes must be referred to arbitration [*Art. 8 (2) CISG*].

## III. INCOTERMS CIF ARE THE APPLICABLE TERMS IN THE PRESENT CASE

10. Cl. 7 on Ex. 2 says INCOTERMS 2010 "CIF Minuet South" will be the applicable terms for the transaction-taking place between the CLAIMANT and the RESPONDENT. This means it is a "CIF Buyer" Term. The Order Form in Ex. 9 speaks about the applicability of CIF INCOTERMS. Giving a reading of Ex. 2 with Ex. 9 order form, it is contended that a valid contract is formed as per the specifications and details set in. Hence, CIF INCOTERMS become applicable in the present case, as Order Form is a binding condition.

11. Further on a reading of Ex. 10, it is seen that the RESPONDENT accepted the Order Form but changed the INCOTERMS by stating FAS INCOTERMS are applicable. This amounts to modification of contract. But this would not alter the applicable terms, which are CIF as per order form because FAS could not be made applicable, as claimant never accepted it. Silence or inactivity does not in itself amount to acceptance [*Art 2.1.6 UPICC*].

**3.1 There was an indication of assent to an offer:**

12. For there to be acceptance the offeree must in one way or another indicate 'assent' to the offer. The mere acknowledgment of receipt of the offer, or an expression of interest in it, is not sufficient. However in the present case the CLAIMANT never accepted the alteration of the terms from CIF to FAS as done by the respondent. Furthermore, the claimant even after the failed attempt of modification of the terms by the RESPONDENT reinstated the point that the terms applicable are the INCOTERMS CIF, to which the respondent raised no objection.

**3.2 Silence or inactivity does not itself amount to acceptance:**

13. Mere silence or inactivity on the part of the offeree does not allow the inference that the offeree assents to the offer [*¶ (1) of Art. 2.1.6 UPICC*]. In no event, however, is it sufficient for the offeror to state unilaterally in its offer that the offer will be deemed to have been accepted in the absence of any reply from the offeree.

14. As it was agreed by the parties in Ex. 10 and Ex. 13 that the governing law would be UNIDROIT Principles, there should arise no confusion. Therefore as the offer made by the RESPONDENT for changing the terms of the contract from CIF to FAS would not amount to a valid one, unless accepted by the CLAIMANT in a proper way as prescribed under the principles. And silence on the part of the CLAIMANT cannot in any way be assumed to be performance or acceptance.

15. However, if by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph. In no way does silence on the part of one of the parties will amount to acceptance of the terms. Hence, in the present case the CLAIMANT was though silent but his silence will not amount to acceptance of FAS terms in any manner.

16. Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract

[*Art. 2.1.22 of UPICC*]. This not being done by the RESPONDENT in the present case, by applying the relevant Article of UNIDROIT Principles it is argued that the terms applicable are the INCOTERMS CIF as provided by the CLAIMANT and agreed by the RESPONDENT to be the standard terms.

## IV. THERE WAS A VALID CONTRACT BETWEEN CLAIMANT AND RESPONDENT

17. A contract consists of an actionable promise or promises. Every such promise involves at least two parties and an outward expression of common intention and expectation as to the declaration or assurance contained in the promise [*Guest*], this outward expression of a common intention and expectation normally takes the form of an agreement.
18. A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement. The concepts of offer and acceptance have traditionally been used to determine whether, and if so when, the parties have reached agreement [*Art. 2.1.1 of UPICC*].

### 4.1 An offer was made by CLAIMANT:

19. A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance [*Art. 2.1.2, UPICC*]. The CLAIMANT in the present case has expressly made an offer for the sale of 1000 cars, unless the performance of the test model does not meet with their satisfaction. The same has been reiterated time and again. Since the CLAIMANT didn't mention his displeasure, it was obvious that the contract for the 1000 cars was enforceable (*Ex 1, 5, 8 &9*).

### 4.2 The offer was accepted by the RESPONDENT:

20. A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance [*Art. 2.1.6 (1), UPICC*]. The RESPONDENTS in this case had communicated to the CLAIMANT by letter stating that, "Also we would prefer to treat the shipment of the single car being separate from the order of 1000 cars and hence would like to be paid in advance [*Ex.10*]". This clearly shows that the RESPONDENT accepted the offer, as they refer to the sale of 1000 cars as offered by the Claimant.

    If, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act

without notice to the offeror, the acceptance is effective when the act is performed [*Art. 2.1.6 (3), UPICC*]." Since the CLAIMANT did not express dissatisfaction on the performance of the car, it was to be assumed by both the parties that the contract was in force.

**4.3 There was Consensus Ad-Idem**:

21. Since both the parties had agreed to the terms of the contract, there was consensus-ad-idem [*Adams*]. 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 of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract [*Art. 2.1.22, UPICC*].

22. In commercial transactions, both the offeror and offeree when making and accepting an offer, refer to their own standard terms. In the absence of express acceptance by the offeror of the offeree's standard terms, the problem arises as to whether a contract is concluded at all and if so, which, of the two conflicting sets of standard terms should prevail. In certain situations parties might not even be aware of the conflict between their respective standard terms [*Gary B.Born*]. In such cases there is no reason to allow the parties subsequently to question the very existence of the contract or, if performance has commenced, to insist on the application of the terms last sent or referred to. Therefore, considering the continual communication between the parties the contract is valid.

## V. RESPONDENT IS LIABLE FOR DAMAGES FOR THE BREACH OF CONTRACT PURSUANT TO ARTICLE 7.4.1 UPICC 2010

23. Art. 7.4.1 UPICC establishes the principle of general right to damages in case of non-performance. The CLAIMANT is entitled to seek damages for breach of contract pursuant to Art. 7.4.1 UPICC.

### 5.1 RESPONDENT failed to perform his obligations warranting the CLAIMANT to seek damages:

24. Damages can be claimed no matter whether the breach of contract has been culpably committed intentionally or negligently or in any other way. The mere fact of a breach of contract is sufficient [*Fritz Enderlein*]. RESPONDENT breached the contract by failing

to perform its obligation to deliver 999 cars within the time frame allotted after all the necessary requirements were met by the CLAIMANT [*Exhibits 9, 13 & 14*]. Hence, the CLAIMANT is entitled to damages.

**A. CLAIMANT entitled to full compensation on account of loss of profits:**

25. The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance [*Art. 7.4.2(1) UPICC*]. CLAIMANT had made it clear that "Once we receive the sample we will test it and unless we find it unsatisfactory will expect the reminding cars to be sent by December 1, 2011" [*Ex. 8*]. As the RESPONDENT was left with only 100 cars CLAIMANT had no choice but to simply forced to accept the remaining 100 cars as they had forward orders [*Ex 16*]. Hence, the CLAIMANT is entitled to full compensation for the harm suffered as it would put the CLAIMANT into the same position as he would have been had the RESPONDENT complied with the terms of the agreement. RESPONDENT'S failure impeded CLAIMANT'S future business transactions.

**B. CLAIMANT is also entitled to consequential damages including loss of profits:**

26. An injured party may recover as damages a sum equal to the loss, including loss of profit, suffered by the as a consequence of the breach and the loss must be foreseen as `a possible consequence of the breach [*Art. 74 CISG*]. Cl. 11 of Ex. 2 clearly states buyer is entitled to consequential damages including loss of profits. Hence, failure on part of the RESPONDENT to fulfil its obligation clearly entitles the CLAIMANT to claim loss of profits as well as consequential damages.

**C. CLAIMANT is also entitled to compensation for non-pecuniary loss.**

27. Art. 7.4.2(2) UPICC expressly provides for compensation also of non-pecuniary harm Non-pecuniary loss can be defined as loss, owing from an injury or damage to non-material values, which are such values that do not have `economic content' and are inseparable from the personality of a bearer of these values [*Piliounis*]. As the CLAIMANT had received advance orders he had no choice but to forcibly accept the remaining 100 cars otherwise would have resulted in loss of goodwill of its business. Hence, the CLAIMANT is also entitled to compensation for loss of goodwill in business suffered by him.

### 5.2 RESPONDENT did not act in accordance with good faith and fair dealing, resulting in breach of contract:

28. "Each party must act in accordance with good faith and fair dealing in international trade and the parties may not exclude or limit this duty [*Article 7.1 of UPICC*]." The RESPONDENT was obligated to perform the obligation of delivery of 999 cars, as there was no dissatisfaction with the sample car as stated by the CLAIMANT [*Ex. 8*]. RESPONDENT himself agreed to deliver the remaining cars unless a red signal came from the CLAIMANT [*Ex.10*]. Therefore, RESPONDENT'S failures to perform its obligations clearly result in breach of contract.

### 5.3 Respondent's failure to deliver 999 cars amounts to fundamental non-performance of the Agreement

29. Non performance is failure of a party to perform any of its obligations under the contract pursuant to Art. 7.1.1 UPICC. As per communications there was clear and unequivocal intention of the CLAIMANT to purchase the 1000 cars [*Ex. 8 & 9*]. RESPONDENT'S failure to deliver the same clearly amounts to fundamental non-performance. CLAIMANT also stated that time was the essence in this contract and further nominated SS Hermania for further shipment of the cars [*Ex.13*]. The RESPONDENT failed to load the cars in SS Hermania due to which the cars could not be delivered and this amounted to Breach of Contract. Thus, RESPONDENT'S non –performance amounts to breach and the claimant is entitled to seek damages.

## RELIEF REQUESTED

In pursuance of the contract concluded between the parties, issues framed for the hearing agenda, and the rules of CIETAC, and the submission of the memorandum, the CLAIMANT respectfully requests the Arbitral Tribunal to find that:

1. The CLAIMANT arbitration clause is valid and applicable.
2. The Tribunal is empowered to adjudicate in the matter.
3. There is a valid contract concluded between CLAIMANT and RESPONDENT.
4. RESPONDENT is liable for damages for the breach of contract pursuant to Article 7.4.1.

The CLAIMANT requests the Tribunal to order damages arising out of:

a. Breach of Contract
b. Loss of Profit and loss of Business
c. To pay the cost of Arbitration

For Longo Exports