THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG – AUGUST 2012

MEMORANDUM FOR RESPONDENT

TEAM CODE: 013

On Behalf Of:	Against:
CHAN MANUFACTURING	**LONGO IMPORTS**

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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

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TREATIES, CONVENTIONS AND LAW

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ARGUMENTS

1. THE CLAIMANT'S ARBITRATION CLAUSE IS NOT APPLICABLE.

1.1 RESPONDENT did not consent to CLAIMANT'S arbitration Clause:

1. Clause 9 of the RESPONDENT'S arbitration agreement states that disputes would be referred to arbitration in Cadenza or in Hong Kong using SIAC rules [*Cl. 9 Ex. 4*]. It can clearly be inferred that CLAIMANT's arbitration clause will not be applicable. RSPONDENT'S arbitration cl. governs disputes arising out of the contract because it was the last arbitration clause accepted by the parties.

1.2 RESPONDENT is not bound by CLAIMANT'S arbitration clause:

2. When a reply purports to accept an offer, but in fact contains additions, limitations, or other modifications that materially alter the terms of the offer, the reply functions as a rejection of the offer and constitutes a counter-offer [*Art. 19(1) CISG; Sarcevic and Volken*].Additional or different terms relating to the settlement of disputes are considered to materially alter the terms of the offer [*Art. 19(3) CISG; Sarcevic and Volken 111- 113*]. Pursuant to Art.19 (3) CISG, RESPONDENT materially altered the offer by substituting the arbitration clause. CLAIMANT accepted the counteroffer. An offeree's conduct may demonstrate acceptance [*Art. 18 CISG*]. The Secretariat Commentary to the CISG states: "if the original offeror responds to [the counter-offer] by shipping the goods a contract may eventually be formed by notice to the original offeree of the shipment and the terms of the contract would be those of the counter-offer, including the additional or different term" [*Comm. of CISG*]. CLAIMANT accepted the counter offer of the RESPONDENT when it sent its request for a sample car and further sent its Order Form [*Ex 5 & 9*]. CLAIMANT did not object to the arbitration clause when it had the opportunity to do so.

1.3 CIETAC should terminate the arbitration proceeding due to of lack of jurisdiction:

3. The *Kompetenz-Kompetenz* doctrine dictates that the arbitral tribunal has authority to determine whether it has jurisdiction to evaluate the validity of the arbitration agreement [*CICA*]. *Kompetenz-Kompetenz*is a basic principle of International Commercial Arbitration holding that despite the arbitration agreement's unclear designation of the proceedings' location, the tribunal was authorized to rule on its own jurisdiction [*UMLA, Art. 16(1); UPICC Arbitration Rules §*

15(2); RA-CAB Arts. 15(2), 16(2); ICC Case No. 6515; ICC Case No. 6516; ICC Case No. 5294]. SIAC also has power to rule on its own jurisdiction. [*Art. 25.2 SIAC*]

II. THE ARBITRATION CLAUSE OF THE CLAIMANT IS INVALID.

2.1Precondition of the Arbitration Clause of CLAIMANT has not been fulfilled:

4. The CLAIMANT'S arbitration clause states "If no agreement can be reached it must be referred to arbitration in Cadenza using the relevant rules. The seat shall be Beijing and the language English (*Ex. 2 Cl. 12*). This does not fulfill the precondition of the arbitration clause being definite [*Born*]. Here CLAIMANT has nominated two places for arbitration i.e. Cadenza and Beijing, Beijing being the seat of arbitration. The arbitral seat is referred as the location selected by the parties (or sometimes by the arbitrators, an arbitral institution, or a court) as the legal or judicial home or the place of arbitration. The CLAIMANT'S arbitration clause is thus indefinite regarding the place of arbitration.

5. The arbitration clause [*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*]. The maxim *qui indicem forum elegitius* ('a choice of forum is a choice of law') is rejected by most scholars and is almost totally abandon in arbitral practice *[Hunter]*.

6. Pursuant to Art. II(1) NY Convention, an arbitration agreement: (1) must be in writing, (2) the parties have to possess a defined legal relationship, and (3) the matter must be capable of settlement by arbitration. Each Contracting State shall recognize an agreement in writing in which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration[*Art. 2(1), NYC*]. The Arbitration Clause of RESPONDENT'S satisfies the Article II (1) of NYC writing requirement because the clause was included in the contract. A defined legal relationship arises when a contract contains an Arbitration Clause that applies to all disputes arising out of that contract [Oberlandesgericht; Tweeddale]. CLAIMANT and RESPONDENT consummated a defined legal relationship by entering into the contract. Thus the Arbitration Clause also constitutes a defined legal relationship within the meaning of Art. II (1) NYC. Lastly, RESPONDENT is

seeking damages for losses it incurred as a result of CLAIMANT'S breach of contract, a matter suitable for settlement by arbitration.

8. CLAIMANT'S arbitration Cl. states that all disputes must be referred to China Trade Commission, which clearly means CIETAC has been chosen to govern the procedure but it does not indicate the applicable substantive law. The 'relevant laws' mentioned in the arbitration clause [*Cl. 12, Ex. 2*] is ambiguous and hence there is no proper statement of the applicable substantive law to the arbitration proceeding [*Sammartano*]. An arbitration agreement must contain all the relevant elements to be applicable. Since the CLAIMANT'S arbitration clause is silent about or indefinite regarding the substantive law, it is strongly put forward that the CLAIMANT'S arbitration clause [*Cl.12, Ex.2*] is invalid.

2.2 In any event, Cl. 9 of RESPONDENT'S arbitration agreement is ambiguous and it should still be given effect:

9. Arbitration should proceed as both the CLAIMANT and the RESPONDENT demonstrated their intention to settle disputes by arbitration[*Cl. 12 &. 9*].An arbitration agreement with ambiguous language will not necessarily be inoperative or unenforceable [*Tweeddale*].Arbitration clause may still be given effect by asking what reasonable persons in the same circumstances would have understood by such language [*Arbitral Award 2001*].A reasonable person would understand Cl. 9 of RESPONDENT'S arbitration agreement to mean that disputes must be referred to arbitration [*Art. 8 (2) CISG*].

III. INCOTERMS FAS ARE THE APPLICABLE TERMS IN THE PRESENT CASE.

10. In the present case the RESPONDENT accepted the offer of the claimant for the purchase of cars only with after a certain important modification in the terms of the contract. [*Exhibit* 10] It clearly states that the INCOTERMS are the FAS (Free Alongside Ship) INCOTERMS. This is a classic example of modification of a contract. Although the claimant while making the offer to the respondent stated that the CIF INCOTERMS 2010 "CIF Minuet South" will be the applicable terms for the transaction-taking place between the CLAIMANT and the RESPONDENT. [*Exhibit 7*] But since there was a modification in the terms and conditions of the offer by the respondent, the applicable terms were altered.

11. 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 constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. [*Art 2.1.11 UPICC*]

3.1 There was no indication of objection to the modifications in the 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 objected to the alteration of the terms from CIF to FAS as done by the respondent. Furthermore, the claimant even after the modification of the terms by the RESPONDENT terms did not in any way object to the change [*Exhibit 13*], in fact the claimant asserted the point that it had gone through the terms and conditions of the respondent and it had no objections to it. Hence the above mentioned acts on the part of the claimant confirms the position that the applicable terms in the present case are the INCOTERMS FAS as altered by the respondent, and to which the claimant raised no objection.

3.2 Silence or non- objection amounts to acceptance:

13. Silence or inactivity on the part of the CLAIMANT allow the inference that he assents to the modification of the offer [¶ *(1) of Art. 2.1.11 UPICC*].

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 will amount to a valid one, unless objected by the CLAIMANT in a proper way as prescribed under the principles. And silence on the part of the CLAIMANT can be assumed to be acceptance of the modified terms.

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. Since in the present case there was proper performance on the part of the RESPONDENT, thus making the

contract a valid contract. Thus in the present case the CLAIMANT was silent and never objected to the modification of terms from CIF to FAS, so his silence will amount to acceptance of FAS terms, and since the contract is perfectly valid, the INCOTERMS FAS are perfectly applicable to the contract.

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 CLAIMANT in the present case, by applying the relevant Article of UNIDROIT Principles it is argued that the terms applicable are the INCOTERMS FAS as provided by the RESPONDENT.

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

17. A contract consists of an actionable promise or promises. Every such promise involves atleast 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. 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 shows that the RESPONDENT had 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*]. Therefore, considering the continual communication between the parties the contract is valid, however, the terms of the Respondent shall be applicable.

5. RESPONDENT IS NOT LIABLE FOR DAMAGES FOR THE BREACH OF CONTRACT PURSUANT TO ARTICLE 7.4.1 UPICC 2010.

23. The CLAIMANT is not entitled to seek damages for breach of contract pursuant to Article 7.4.1 UPICC 2010 on the following grounds: (1) CLAIMANT himself did not act in accordance with good faith and fair dealing, resulting in breach of contract (2) CLAIMANT acted against Arts. 5.1.3 & 5.1.4 of UPICC 2010 with disrespect for its obligations of co-operation and best efforts (3) CLAIMANT failed to perform obligation on its part, thus not entitled to seek damages.

5.1 CLAIMANT himself did not act in accordance with good faith and fair dealing, resulting in breach of contract:

24. Article 4.6 UPICC 2010 of expressly provides for the *contra proferentem rule* which states "if *contract terms supplied by one party are unclear, an interpretation against that party is preferred"*. CLAIMANT did not communicate via post or through telephone their confirmation for the order which compelled the RESPONDENT to simple assume that CLAIMANT did not wish to proceed with the purchase of the remaining 999 cars [*Exhibit 15*]. Thus, it's the CLAIMANT who did not act in accordance with good faith and fair dealing.

25. Also Clause 11 of RESPONDENT's general terms states "The purchaser is to nominate a ship which is able to load goods in the ports nominated by the seller" [*Exhibit 17*]. The port nominated by the RESPONDENT was Piccolo where the remaining 100 cars were currently stored. CLAIMANT nominated SS Herminia which could dock only in Cadenza. Thus, it's the CLAIMANT who breached the terms and therefore breached the contract of sale for 1000 cars [*Exhibit 4 & 17*].

5.2 CLAIMANT acted against Arts. 5.1.3 and 5.1.4(2) of UPICC 2010 with disrespect for its obligations of co-operation and best efforts:

26. CLAIMANT did not correspond to the RESPONDNENT final confirmation order for delivery of remaining 999 cars. RESPONDENT could not know the actual circumstances because CLAIMANT left RESPONDENT in misconception. RESPONDENT was in state of total neglect and simply forced to assume that CLAIMANT was not interested in purchasing the remaining 999 cars so agreed [*Exhibit 15*]. It was contrary to Article 5.1.3

UPICC 2010.CLAIMANT explicitly stated in the order form that any defects or unsatisfactory performance will be notified within one week of receipt of the sample car [*Exhibit 9*], which was never communicated. CLAIMANT also did not comply with Article 5.1.4 (2) because it did not pay attention in such circumstances as stated above.

5.3 CLAIMANT failed to perform obligation on its part, thus not entitled to seek damages:

27. The contractual obligations of the parties may be expressed or implied [*Article 5.1.1 UPICC 2010*]. CLAIMANT failed to perform its contractual obligations as specified in the contract. CLAIMANT failed to nominate a ship for a port as asked by the RESPONDENT [*Exhibit 17*]. CLAIMANT also failed to send the RESPONDENT the final order and any notification with regard to unsatisfactory performance of the sample car [*Exhibit 9 & 15*]. As CLAIMANT failed to perform its obligation he is not entitled to seek damages.

28. Clause 8 of RESPONDENT'S agreement states 'Under no circumstances will the seller be responsible for consequential damages including loss of profits'. Hence, as stated above RESPONDENT is also not liable for any other relief sought by the CLAIMANT.

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 RESPONDENT respectfully requests the Arbitral Tribunal to find that:

1. The RESPONDENT'S arbitration clause is valid and applicable.
2. The Tribunal is empowered to dismiss the arbitration proceeding for lack of jurisdiction.
3. There is a valid contract concluded between CLAIMANT and RESPONDENT.
4. RESPONDENT is not liable for damages for the breach of contract pursuant to Article 7.4.1.

The RESPONDENT 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

CHAN MANUFACTURING