INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

MEMORANDUM FOR CLAIMANT

On behalf of:	**Against:**
Longo Imports	**Chan Manufacturing**

TEAM NO. 020

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INDEX OF ABBRREVIATIONS

Abbreviation	**Citation**
CIETAC	China International Economic and Trade Arbitration Commission
CLAIMANT	Longo Imports
RESPONDENT	Chan Manufacturing
Parties	CLAIMANT and RESPONDENT
PICC	UNIDROIT Principles of International Commercial Contracts, 2004
INCOTERMS 2010	International Commercial Terms 2010 by the International Chamber of Commerce (ICC)
FAS	Free Alongside Ship
CIF	Cost Insurance and Freight

INDEX OF AUTHORITIES

Abbreviation	Citation	Cited in
Conventions, Laws and Rules		
PICC	UNIDROIT Principles of International Commercial Contracts, 2012	6-20
Colo. Rev. Stat.	Colorado Revised Statutes	7
ISPC	Interpretations of the Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China	8
Books, Articles and Restatements		
Fouchard pp.264	Fouchard, Gaillard, Goldman, *On International Commercial Arbitration*, Kluwer Law International 1999.	7
ICCA GUIDE *pp.54*	ICCA, *ICCA'S Guide to The International Of The 1958* New York Convention, ICCA 2011	8
ICC GUIDE on *INCOTERMS* *pp80,110*	ICC, *ICC rules for the use of domestic and international trade terms*, The world business organization 2010.	
Cases and Awards		
Avedon	Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279(10th Cir 1997)	7
German company	*ICC Award No. 2626 (1977), German company v. Italian company,105 J.D.I 980(1978), and observations by S.Jarvin*	8
European companies	*ICC Award No. 5103 (1988), Three European companies v. Four Tunisian companies,115 J.D.I 1206(1988), and observations by G. Aguilar Alvarez;*	8
Cable & Wireless	*[2002] EWHC 2059 (Comm), [2002] 2 All ER (Comm) 1041, [2003] BLR 89 Cable & Wireless plc v IBM United Kingdom Ltd*	9
Smith	*Smith (Paul) Ltd v H & S International Holding Inc [1991] 2 Lloyd's Rep 127*	9
One Beacon	One Beacon Insurance Company v. Crowley Marine Services, INC. v. TUBAL-CAIN MARINE SERVICES, INC. (648 F.3d 258)	14

ARGUMENTS ON JURISDICTION

I. TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE

The Tribunal is competent to decide the dispute between Claimant and Respondent in connection with the sale of electric cars because: (A) claimant's arbitration clause is the only valid and applicable arbitration agreement between the Parties and (B) The matters to arbitrate fall within the scope of the arbitration clause and no enforceable pre-arbitral requirement exists.

A. claimant's arbitration clause is the only valid and applicable arbitration agreement between the Parties

(a) Claimant's terms and conditions including arbitration clause are applicable to the sales contract of the 999 cars except the shipment term shall be FAS and no discount.

All correspondence regarding the 999 cars before June 10, 2011 lack of definiteness and/or intention to be bound and therefore are negotiations, invitations to treat or offers. [Art.2.1.2, *PICC*]The letter of June 10, 2011[exhibit 13] constitutes an acceptance with modification which does not materially alter the offer issued by respondent in previous letters. Since claimant's terms and conditions in exhibit 13 are not rejected by respondent in the reasonable period, therefore Clause 12 in exhibit 2 is part of the contract.[Art.2.1.11 (2), *PICC*]

(b) Clause 12 is not a material alteration and become part of the contract because no hardship or objective surprise exists when applying it.

Terms which materially alter a contract include those which result in surprise or hardship to the parties. [Art 4-2-207, *Colo. Rev. Stat.*] The non-assenting party has burden of proving surprise or hardship. Surprise occurs when a term is included without the express awareness of the other party. Hardship depends on whether the clause would impose substantial economic hardship on the non-assenting party. It was held that the arbitration term was not a material alteration, and became part of the contract. [*Avedon*] Since clause 12 has been clearly and repeated referred to by claimant therefore no objective or subjective surprise exists in this case. Also, since inconvenience accompanies most litigation and no indication of substantial economic hardship can be proved, there is no hardship in the instant case either. Consequently, clause 12 is not a material alteration and become part of the contract.

(c) Clause 12 is not pathological because the China Trade Commission refers to CIETAC and should only be construed in this way

Arbitration clauses selecting an institution which does not exist or which is inadequately defined will remain effective if the institution can be identified with a significant degree of certainty.*[Fouchard* pp.264*]* It has been held by ICC located in Paris that the arbitration clause designating the International Chamber of Commerce "in Geneva", to be valid because it adequately reflected the parties' intention to refer their disputes to arbitration under the ICC Rules in the specified city.*[German*

*Company]*ICC also held that a clause referring to the non-existent "International Section of the Paris Chamber of Commerce" should be interpreted as a valid reference to the International Chamber of Commerce. *[European Companies]*

The inaccuracy of arbitration clauses may be overcome by reasonable interpretation of the clause. *[ICCA GUIDE pp.54]*Also as a general rule, when determining the validity arbitration clause, we should see whether a specific arbitration institution can be inferred from the name the arbitration clause uses for the arbitration panel. If so, the arbitration institution inferred will be considered to be the nominated arbitration institution.

CIETAC shall refer to *ISPC* of PRC in deciding jurisdictional issues because CIETAC awards are subject to judicial review by Chinese courts. It is stipulated that where the name of an arbitration institution as stipulated in the agreement for arbitration is inaccurate, but the specific arbitration institution can be determined, it shall be ascertained that the arbitration institution has been selected.*[Article 3, ISPC, PRC, (2006)7]*

Theoretically and legally speaking, China Trade Commission literally is quite and only similar to China International Economic and Trade Arbitration Commission (CIETAC). Considering that the seat shall be Beijing in clause 12, China Trade Commission should be and can only be interpreted as CIETAC.

(d) Clause 9 on the webpage of Chanhas never been agreed and is uncertain and therefore invalid.

Claimant has never agreed on clause 9. The letter of January 15, 2011, does not indicate the intention that clauses in exhibit 4 shall be incorporated into the contract. Clause 9 is clearly rejected by claimant and can not be part of the contract. *[Art.2.1.22, PICC]* On the contrary, claimant not only made it clear in the first letter *[Exhibit 1 and 2]* but also repeatedly and consistently *[Exhibit 13 and 18]* indicated that clause 12 is the only valid arbitration agreement.

B. The matters to arbitrate fall within the scope of the arbitration clause and no valid pre-arbitral requirement exists.

This case is apparently a dispute arising out of the contract and shall be resolved according to clause 12. Although clause 12 provides that all disputes shall be conciliated, it does not mean that conciliation is the precondition for arbitration. It was held that there is an obvious lack of certainty in an agreement to strive to settle a dispute amicably.*[Cable & Wireless]*It was also held that the provisions that the parties shall strive to settle the matter amicably, and that a dispute shall, in the first place, be submitted for conciliation, do not create enforceable legal obligations.*[Smith]* Further, clause 12 does not indicate the time, place or institution regarding conciliation which are essential to be definite, therefore the conciliation clause is vague, uncertain and unenforceable. Since there is no enforceable pre-arbitral condition to be satisfied, no significant legal barrier exists on the way to CIETAC.

ARGUMENTS ON MERITS

II. CLAIMANT and RESPONDENT ENTERED INTO A CONTRACT FOR THE 999 CARS on June 16, 2011.

CLAIMANT and RESPONDENT entered into two separate sales contracts, i.e. the sales contract for the sample car, and the sales contract for the 999 cars.

For four reasons, a valid contract for the 999 cars was formed between CLAIMANT and RESPONDENT on June 16, 2011: (A) the completed sale of the only one sample car was separate from the contract for the 999 cars; (B) RESPONDENT made an counter-offer to sell the 999 cars on 20 March，2011; (C) CLAIMANT accepted RESPONDENT's counter-offer with immaterial modifications on 16 June，2011 and RESPONDENT did not object to any of the modifications.

A. The completed sale of the only one sample car was separate from the contract for the 999 cars.

CLAIMANT and RESPONDENT agreed to enter into two separate contracts for the sample car and the 999 cars.

CLAIMANT issued an order form for 1,000 cars to RESPONDENT on February 5, 2011 [Exhibit 9]. On March 20, 2011 RESPONDENT replied to CLAIMANT that RESPONDENT would prefer to treat the shipment of the single car (the sample car) being separate from the order of 1,000 cars [Exhibit 10]. CLAIMANT agreed to

separate the transaction of the sample car from the transaction of 999 cars by timely payment for the sample car and by acknowledgement of the receipt of the sample car [Exhibit 11 and Exhibit 13].

CLAIMANT and RESPONDENT completely performed their respective obligations under the sales contract for the sample car and they have no dispute regarding this contract.

B. RESPONDENT made a counter-offer to sell the 999 cars on 20 March, 2011.

After lengthy negotiations RESPONDENT made a counter-offer to sell the 999 cars on 20 March, 2011.

(i) On January 5, 2011 CLAIMANT sent a letter to RESPONDANT, which is an invitation to trade specifying that CLAIMANT intended to buy 1,000 cars and expected RESPONDENT offer a good price and good quality [Exhibit 1].

(ii) On January 15, 2011 RESPONDANT sent an offer to CLAIMANT specifying the price and referring to RESPONDENT's terms and conditions, which is sufficiently definite and indicated RESPONDANT's intention to be bound in case of acceptance [Exhibit 3, Article 2.1.2 *PICC*].

(iii) However on January 20, 2011 CLAIMANT rejected RESPONDENT's offer dated January 15, 2011 by imposing a condition precedence of sample testing to the formation of contract for the 1,000 cars [Exhibit 5, Article 2.1.5 *PICC*]. Such condition precedence is related to the formation

of potential contract and hence materially changed the terms of RESPONDENT's offer, so CLAIMANT's rejection is a counter-offer to RESPONDENT's offer dated January 15 [Article 2.1.11 *PICC*].

(iv) On January 30, 2011 RESPONDENT rejected CLAIMANT's counter-offer dated January 20 [Exhibit 6].

(v) On February 5, 2011 CLAIMANT sent an order form to RESPONDENT which specified the good, price, quantity, delivery date, payment by L/C, CIF term and quality term. Such order form is sufficiently definite and indicates CLAIMANT's intention to be bound in case of acceptance, so such order form is a new offer [Exhibit 8 and Exhibit 9].

(vi) On March 20, 2011 RESPONDENT rejecting CLAIMANT's order form by imposing FAS term to replace the CIF term suggested in CLAIMANT's order form. The duties of buyer and seller under the FAS term and the CIF term are materially different in that which party bears the carriage cost and insurance cost [*INCOTERMS 2010*]. Therefore the FAS term suggested by RESPONDEN was a material modification to CLAIMANT's offer by materially reducing RESPONDENT's transaction cost. So RESPONDENT's letter dated March 20, 2011 is a counter-offer to CLAIMANT's order form [Article 2.1.11, *Off Cmt, PICC]*.

C. CLAIMANT accepted RESPONDENT's counter-offer with immaterial modifications on June 10, 2011 and RESPONDENT did not object to any of the modifications

(a) The modifications made by CLAIMANT in its acceptance did not materially alter RESPONDENT's counter-offer and RESPONDENT did not object to any of the modifications.

On June 10, 2011 CLAIMANT accepted RESPONDENT's offer and referred to CLAIMANT's terms and conditions. However, CLAIMANT's terms and conditions were immaterial modifications to RESPONDENT's counter-offer, and RESPONDENT did not object to any of such modifications, hence CLAIMANT' terms and conditions were the terms of the contract of the 999 cars [Article 2.1.11 *PICC*].

(i) CLAIMANT waived its CIF term and discount term. Under the FAS term it is the buyer's obligation to nominate a ship for shipment, while under the CIF term it is the seller's obligation to contract for the carriage of the goods [*ICC GUIDE on INCOTERMS 2010*, pp80, 110]. CLAIMANT actually accepted RESPONDENT's FAS term by nominating a ship for further shipment of the 999 cars. CLAIMANT also accepted the price of goods by timely payment for the sample car. Therefore Clause 1 [the 2% discount clause] and Clause 7 [CIF term] of CLAIMANT's terms and conditions [Exhibit 2] were actually waived by CLAIMANT.

(ii) Clause 10 [the return cost clause], Clause 11 [the consequential damages clause] and Clause 12 [the arbitral clause] of CLAIMANT's terms and conditions [Exhibit 2] are commonly used in international sales contract and do not come as a surprise to RESPONDENT, hence such three clauses are immaterial modifications to RESPONDENT's counter-offer.

(iii) RESPONDENT did not raise any objection to the foresaid immaterial modifications. [Article 2.1.11, *Off Cmt, PICC*]

(iv) Furthermore CLAIMANT had reasonably notified RESPONDENT to read the terms and conditions on website. RESPONDENT had reasonable access to CLAIMANT's terms and conditions and should have knowledge of such terms. According to the doctrine of incorporation by reference CLAIMANT's terms and condition are incorporated into the sales contract of the 999 cars except the discount term and the CIF term [Article 2.1.11, *Off Cmt, PICC, One Beacon Case*].

However CLAIMANT's acceptance is still subject to CLAIMANT's satisfaction with the sample car. Since CLAIMANT was satisfactory with the sample testing, according to the quality clause in the order form issued by CLAIMANT [Exhibit 9], CLAIMANT's acceptance took effect on June 16, 2011, i.e. one week after CLAIMANT received the sample car [Exhibit 9 and Exhibit 13]. Therefore the sales contract for the 999 cars also took effect on June 16, 2011[Article 2.1.6(2), *PICC*].

(b)Sample testing is the condition precedent to the formation of the 999 cars contract.

RESPONDENT may argue that sample testing is the condition precedence to CLAIMANT's contractual obligation to purchase the 999 cars, not the condition precedent to the formation of the contract. However pursuant to the interpretations rules provided by *PICC* [Article 4.3(a)] preliminary negotiations between the parties should be considered while interpreting the parties' intention or conduct. During the lengthy negotiations CLAIMANT reiterated that unless CLAIMANT found the sample unsatisfactory CLAIMANT would purchase the remaining cars (the 999 cars) [Exhibit 5], and that if the car did not come up to expectations CLAIMANT will not execute the order [Exhibit 7]. According to such reiterations the sample testing should be interpreted as the condition precedence to the formation of the sales contract for the 999 cars. RESPONDENT clearly showed its assent to this condition precedence by performing its contractual obligation under the sales contract for the sample car.

D. THE TERMS OF THE SALES CONTRACT FOR THE 999 CARS.

The sales contract for the 999 cars consists of the following terms: good, electric cars; model, Gardeners model; price, US$12,000; quantity, 999; delivery date, December 1, 2011; payment, L/C made out to Cadenza City Bank; quality, any defects or unsatisfactory performance will be notified within one week of receipt of the sample car; shipment, FAS, CLAIMANT shall nominate a ship; the ports nominated by RESPONDENT are Cadenza, Cantata and Piccolo; governing law, *PICC*; and CLAIMANT's arbitral clause.

III. RESPONDENT BREACHED THE SALES CONTRACT FOR THE 999 CARS

A. CLAIMANT duly performed its obligation under the sales contract for the 999 cars.

Claimant opened L/C with Cadenza bank in order to pay for the 999 cars [Clarification 37]. Claimant completed testing and did not raise objection to the quality of the sample car during the one-week notice period. According to the FAS term agreed by the parties Claimant nominated SS Herminia (a ship) for the shipment of the 999 cars.

B. RESPONDENT breached the sales contract for the 999 cars by failure to deliver the 999 cars

(a). RESPONDERN clearly knew that CLAIMANT was satisfactory with the sample testing and CLAIMANT would buy the 999 cars.

On February 5, 2011 CLAIMANT stated in its order form that "quality: any defects or unsatisfactory performance will be notified within one week of receipt of the sample car" [Exhibit 9]. Though RESPONDENT rejected CLAIMANT's order form on March 20, 2011 by using FAS term [Exhibit 10], the quality clause in the order form should be considered to interpret CLAIMANT's intention to purchase the 999 cars after completion of the sample testing [Article 4.2, 4.3(a), *PICC*]. Pursuant to the quality clause and the fact that CLAIMANT did not object to the quality of the sample car after CLAIMANT received the sample on June 10, 2011, RESPONDENT

should clearly know that the contract of the 999 cars took effect on June 16, 2011 and CLAIMANT expected RESPONDENT duly deliver the 999 cars. In the sales contract for the 999 cars there is no contractual term requiring CLAIMANT to expressly confirm the order of the 999 cars after completion of the sample testing. Hence RESPONDENT could not argue that CLAIMANT did not wish to proceed with the purchase of the 999 cars.

(b). RESPONDENT sold the 999 cars ordered by CLAIMANT to CLAIMANT's competitor in bad faith.

CLAIMANT and RESPONDENT entered into a sales contract for the 999 cars. As a seller RESPONDENT's fundamental obligation under the contract was to deliver the 999 cars on December 1, 2011. However on August 15, 2011 RESPONDENT stated that it had sold the cars ordered by CLAIMANT to other persons and could not keep up with delivery. RESPONDENT breached the sales contract of the 999 cars by failure to deliver the 999 cars, which did not conform to the good faith requirement [Article 1.7(1) *PICC*].

(c). RESPONDENT refused to mitigate CLAIMANT's losses by refusing to deliver the 100 cars.

To mitigate the losses incurred by RESPONDENT's non-performance CLAIMANT was forced to accept the 100 cars RESPONDENT had at that time [Exhibit 16]. Again RESPONDENT refused to cooperate by arguing that the ship nominated by

CLAIMANT could not dock in Piccolo. On March 25, 2011 RESPONDENT stated that "we (RESPONDENT) expect you (CLAIMANT) to nominate a ship which can load out of the nominated ports which are Cadenza, Cantata and Piccolo" [Exhibit 11]. As a reasonable person such statement shall be understood in the way that RESPONDENT nominated three ports and each one would be suitable to load the 999 cars. The ship SS Herminia nominated by CLAIMANT could dock in Cadenza which is one of the three ports nominated by RESPONDENT. Furthermore CLAIMANT notified RESPONDENT on June 10, 2011 by correspondence that CLAIMANT had nominated SS Herminia for further shipment of the 999 cars [Exhibit 13]. RESPONDENT clearly knew whether SS Herminia was suitable for further shipment because it loaded the simple car on SS Herminia on March 21, 2011 at Cadenza port. However RESPONDENT did not make any objection to SS Herminia nominated by CLAIMANT until September 1, 2011 when SS Herminia arrived Cadenza [Exhibit 17]. Therefore RESPONDENT could not argue that because CLAIMANT nominated an unsuitable ship RESONDENT could not load the 100 cars. Pursuant to good faith requirement and fair dealing requirement [Article 1.7 *PICC*] RESPONDENT should transport the 100 cars from Piccolo to Cadenza for shipment. It is impossible for CLAIMANT to re-nominate a ship at that time due to the high cost and the long shipping duration.

IV. CLAIMANT IS ENTITLED TO FULL COMPENTION FOR HARM SUSTAINED AS A RESULT OF RESPONDENT'S NON-PERFORMANCE

Pursuant to Article 7.4.1 and Article 7.4.2 of *PICC* CLAIMANT claims the losses of profits which CLAIAMNT would obtain upon full performance of the sales contract for the 999 cars, the carriage lost for nominating SS Herminia and the interest losses incurred by opening L/C.

REQUEST FOR RELIEF

CLAIMANT respectfully requests the tribunal to find that:

(i) The Tribunal has jurisdiction to hear this dispute under the CIETAC rules;

(ii) RESPONDENT breached the contract by failure to deliver the 999 cars; and

(iii) CLAIMANT is entitled to full compensation for harm sustained as a result of RESPONDENT's non-performance.