SECOND ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOT COMPETITION

MEMORANDUM FOR CLAIMANT

On behalf of:	Against:
Mr. Charles Peng	**Mr. Sigmund Freud**
(Peng Importing Corporation)	**(Freud Exporting)**

TEAM NUMBER: 556

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TABLE OF AUTHORITIES

Abbreviations

MOU	Memorandum of Understanding
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E	Exhibit

Treaties, Conventions and Laws

ML (model law)	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
CIETAC Rules	China International Economic and Trade Arbitration Commission, CIETAC Arbitration Rules
PICC	UNIDROIT Principles of International Commercial The contracts, 2004
Off Cmt	Official Comment of PICC

Commentary

M. Hunter	A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, 2004

Zekos	"Counts' Intervention in Commercial and Maritime Arbitration under US law" (1997) 14 *Journal of international arbitration 99*
Sanders	"The Domain of Arbitration" in "Arbitration" section of the *Encyclopedia of International and Comparative Law* (Martinus Nijhoff), Vol. XVI, Ch.12, pp.113 et seq.
Hanotiau	"The Law Applicable to the Issue of Arbitrability" ICCA Congress, Series No. 14, Paris, 1998.

Award

RECUEIL	International Arbitral Awards, Recueil des Sentences Arbitrales, Decision of Arbitration Concerning the Definite Fixing of the Italian-Swiss, frontier at the place called Alpe de Cravairola, 23 September 1874

Cases

Panel F1	Recommendation S/AC.26 of Panel of the commissioners
Baseball	832 F.2d 214 - Triple-A Baseball Club Assocs. v. Northeastern Baseball

STATEMENT OF FACTS

CLAIMANT Peng importing corporation located in the Republic of Id is a company dealing with flour mill importing. RESPONDENT Freud Exporting is a wheat supplier located in the Federal Republic of Ego.

On **10th January 2009**, CLAIMANT sent a letter to RESPONDENT, inviting it to be the new wheat supplier due to the former one's suffering of drought conditions. Quality, quantity requirements and resolution clause were made clearly in the letter. Five days later, RESPONDENT replied it by fax, inviting Peng couple for a trip to discuss all matters. During the trip, both of the parties signed a Memorandum of Understanding.

On **3rd March 2009** and **30th March 2009**, CLAIMANT wrote to RESPONDENT, complaining about the language marked on containers of the first two shipments received. CLAIMANT paid $10,000 for custom translation fee and another $10,000 for penalty.

On **3rd March 2009**, **30th March 2009** and **30th April 2009**, CLAIMANT showed Unsatisfactory three times on the quality of the consignment provided by RESPONDENT. CLAIMANT suffered losses because of the tight market was easily to be influenced.

On **28th March 2009**, RESPONDENT wrote a letter stating that it couldn't export grain to overseas suppliers out of the main port, thus RESPONDENT was forced to cancel the contract. However, CLAIMANT was told that RESPONDENT's second harbor was still open to all shipping and felt it was not impossible for RESPONDENT to carry on the contract. On **5th April 2009**, RESPONDENT sent an E-mail，stating that there was nothing can be done to save the situation. In order to minimize the damage, CLAIMANT planned to solicit other suppliers.

ARGUMENT ON JURISDICTION

I. CIETAC HAS JURISDICTION OVER THIS DISPUTE

CIETAC has jurisdiction over this dispute, because **(A)** ADR Clause in MOU is applicable; and **(B)** The preconditions to arbitration had been fulfilled; and **(C)** Jurisdiction of CIETAC derives from ADR Clause.

A. ADR Clause in MOU is applicable

ADR Clause in MOU is applicable, because **1.** ADR Clause in MOU is a part of the contract; and **2.** ADR Clause in MOU meets the formal requirement; and **3.** ADR Clause in MOU meets the substantial requirement.

1. ADR Clause in MOU is a part of the contract

PICC provides that a contract validly entered into is binding upon the parties. [Article 1.3 of PICC]. Both CLAIMANT and RESPONDENT signed memorandum of understanding, which was a part of the contract and illustrated the consensus of being bound by the ADR Clause and process. Hence, CLAIMANT and RESPONDENT had the obligation to abide the ADR Clause in MOU.

2. ADR Clause in MOU meets the formal requirement

The formal requirement of an applicable ADR Clause is that the arbitration agreement shall be in writing, which is expressly stipulated in article 7 (2) model law. The CLAIMANT and RESPONDENT signed ADR Clause in MOU in written form. Hence, ADR Clause in MOU meets the requirement.

Furthermore, a Court will only declare an arbitration agreement invalid if it is inoper-

ative or incapable of being performed [Article II (3) of NYC; Article 8 (1) of ML]. ADR Clause is not inoperative because the clause clearly states that any dispute arising out of or in relation to the contract may be initially settled by arbitration in accordance with the CIETAC Rules. Hence, ADR Clause in MOU is legally binding on both parties.

3. ADR Clause in MOU meets the substantial requirement

The substantial requirement is that there should be a defined legal relationship between CLAIMANT and RESPONDENT, and the subject-matter of the contract should be capable of settlement by arbitration.

As for a defined legal relationship between CLAIMANT and RESPONDENT, almost all international arbitrations arise out of the contractual relationships between the parties [M. Hunter P90]. For the purpose of model law, it is sufficient that there should be a 'defined legal relationship' between the parties, whether the contractual or not [Article 7(1) of ML]. Clearly, ADR Clause in MOU to proceed the arbitration is based on the contractual dispute between CLAIMANT and RESPONDENT.

As for the subject-matter of the contract capable of settlement by arbitration, arbitrability involves determining which type of dispute may be resolved by arbitration and which belongs exclusively to the domain of courts [M. Hunter P91]. This is expressly stipulated and limited by the model law [M. Hunter P145; Article 45 of ML]. Here, CLAIMANT and RESPONDENT got involved in the dispute of sales of goods, which conforms to the arbitrability.

B. The preconditions to arbitration had been fulfilled

ADR Clause in MOU stipulates that 'Any disputes in relation to this agreement must be resolved in good faith by Chief Executive Officers of both companies. Failing

that...' Accordingly, the preconditions to arbitration had been fulfilled because the CEOs of both parties had negotiated the disputes in the conference room at the airport and their negotiations at the airport were not successful [E13 and E14].

C. Jurisdiction of CIETAC derives from ADR Clause

In accordance with CIETAC Arbitration Rule, if the parties agree to refer their disputes to arbitration under these Rules without providing the name of an arbitration institution, they shall be deemed to have agreed to refer the dispute to arbitration by the CIETAC [Article 4-3 of CIETAC Rules]. ADR Clause in MOU provides that 'Failing that, any dispute arising out of or in relation to the contract including counter claims may be initially settled by arbitration in accordance with the CIETAC Rules'. Claimant and Respondent both chose the arbitral rule but neither Seat of Arbitration nor arbitral institution. Hence CIETAC was authorized to hear the dispute, which was stipulated in CIETAC Arbitration Rules.

II. SEAT OF ARBITRATION COULD BE THE REPUBLIC OF ID (ID)

Reasonably, if both parties failed to agree on the place of arbitration, the Seat of Arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties [Article 20(1) of ML]. As ADR Clause in MOU stipulated no agreement on Seat of Arbitration, CLAIMANT kindly and friendly requested that Seat of Arbitration could be in Id. For the place of goods and the disputes on goods quality being in Id, it is proper and reasonable that Id could be Seat of Arbitration in accordance with the convenience principle [RECUEIL].

III. CONCLUSION ON JURISDICTION

In conclusion, CIETAC has the jurisdiction over the case and Seat of Arbitration shall be in Id.

ARGUMENT ON THE MERITS

I. RESPONDENT BREACHED THE CONTRACT AND SHALL BE LIABLE FOR THE ENSUING DAMAGES

RESPONDENT breached the contract and shall be liable for the ensuing damages, because **(A)** The contract was concluded when RESPONDENT's first fax delivered; and **(B)** The wheat supplied was not in conformity with the contract; and **(C)** RESPONDENT breached the contract by the cease of supply.

A. The contract was concluded when RESPONDENT'S first fax was delivered

The contract was concluded when RESPONDENT'S first fax was delivered, because **1.** CLAIMANT'S first letter amounts to an offer; and **2.** RESPONDENT'S first fax amounts to an acceptance; and **3.** MOU confirms the conclusion of the contract.

1. CLAIMANT'S first letter amounts to an offer

CLAIMANT'S first letter shall be regarded as an offer if the CLAIMANT'S proposal (i) is sufficiently definite to permit the conclusion of the contract by mere acceptance and (ii) indicate the intention of the offeror to be bound in case of acceptance [Article 2.1.2 of PICC]. CLAIMANT listed all the requirements in the initial letter with an intention to be bound [E1].

2. RESPONDENT'S first fax amounts to an acceptance

An acceptance was defined as a statement made by or other conduct of the offeree indicating assent to an offer [Article 2.1.6 of PICC] within a fixed period of time [Article 2.1.7 of PICC]. It will become effective when it reaches the offeror. RESPON-

DENT acknowledged CLAIMANT'S requirement in its first fax within the 5-day time limitation which shall be regarded as an acceptance to CLAIMANT'S offer [E2]. Plus, RESPONDENT replied by stating that "we acknowledge that we can supply your required quantity as per…" in which the word "required" indicated RESPONDENT'S consent to CLAIMANT'S offer. Thus the contract was concluded.

3. MOU confirms the conclusion of the contract

The MOU signed by both parties on SUN Island shall be regard as a writing in confirmation sent after the conclusion of the contract, and the containing terms became part of the contract under the condition that they didn't materially alter the contract [Article 2.1.12 of PICC].

B. The wheat supplied was not in conformity with the contract

The wheat supplied was not in conformity with the contract, because **1.** RESPONDENT failed to fulfill the quality requirement; and **2.** RESPONDENT failed to fulfill the labeling requirement.

1. RESPONDENT failed to fulfill the quality requirement

RESPONDENT failed to fulfill the quality requirement, because **a.** RESPONDENT failed to achieve the specific result, and **b.** Alternatively, RESPONDENT failed to fulfill its duty of best efforts; and **c.** RESPONDENT failed to fulfill its obligation of good faith and fair dealing; and **d.** RESPONDENT was liable for the damages.

a. RESPONDENT failed to achieve the specific result

RESPONDENT failed to achieve the specific result, because **(1)** Wheat quality had been clarified by CLAIMANT; and **(2)** RESPONDENT failed to achieve the specific

result required by all writing documents.

(1) Wheat quality had been clarified by CLAIMANT

Any form of communication can be regarded as evidence of showing the establishment of a contract [Article 1.2 of PICC], thus all of the letters, emails, faxes between two parties are to be considered as terms of the contract. CLAIMANT made a clear offer of wheat quality, which should be above the average protein of 11.5% [E1] and RESPONDENT agreed to offer the products with required quality [E3]. So RESPONDENT shall be bound by these expressed letters, e-mails and faxes, and shall meet its quality requirements.

(2) RESPONDENT failed to achieve the specific result required by all writing documents

A supplier who undertakes to reach a requirement of sales will be under the duty to achieve a specific result [Article 5.1.4(1) of PICC]. RESPONDENT was required to sell grain with the average protein quality above 11.5%, but in fact grain at the lower end close to 11.5% was sold for the first two times and 11% at the third time [E6, E8, and E12]. Therefore RESPONDENT failed to supply the grain with specific standard.

b. Alternatively, RESPONDENT failed to fulfill its duty of best efforts

To the extent that an obligation of a party involves a duty of best efforts ... that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances [Article 5.1.4(2) of PICC]. RESPONDENT failed to fulfill its duty of best efforts [Baseball] because RESPONDENT became aware of the quality required by CLAIMANT and had enough facilities in January 2009 but failed to notify CLAIMANT until May 2009 [E13].

c. RESPONDENT failed to fulfill its obligation of good faith and fair dealing

Regard should also be had on the obligation that (1) each party must act in accordance with good faith and fair dealing in international trade; (2) the parties may not exclude or limit this duty [Article 1.7 of PICC]. RESPONDENT guaranteed to offer the goods which met the quality standard of Id [E3]. However, RESPONDENT broke the promise by selling grain at the lower end close to 11.5% for the first two times and only 11% at the third time, which lacked trust and faith [E6, E8, E12]. Moreover, RESPONDENT insisted that they should agree to send the grain they had on stock, which lacked evidence to prove it [E13].

d. RESPONDENT was liable for the damages

Any non-performance gives the aggrieved party a right to damages and under some circumstances damages may be combined with other remedies [Article 7.4.1 of PICC]. Remedies based on the right to performance include the right to require repair and re-placement [Article 7.2.3 of PICC]. As CLAIMANT mentioned, market in Id was very tight [E8], and dissatisfaction was expressed to RESPONDENT for several times. That means it was reasonably foreseeable that the bad quality of wheat would surely lead to bakeries shifting to other suppliers thus CLAIMANT would suffer losses [Article 7.4.4 of PICC] [E8].

2. RESPONDENT failed to fulfill the labeling requirement

RESPONDENT failed to fulfill the labeling requirement, because **a.** The labeling clause was legally binding; **b.** RESPONDENT failed to achieve the specific requirement; **c.** RESPONDENT should be liable for damages.

a. The labeling clause was legally binding

The labeling clause was legally binding because it was an additional terms contained in the confirmation of the contract. If a writing which purports to be a confirmation of the contract contains additional or different terms such terms become part of the contract [Article 2.1.12 of PICC]. The MOU is a confirmation of the contract. The labeling clause is an additional terms contained in the MOU. RESPONDENT was bound by the packaging clause as it is a part of the contract.

b. RESPONDENT failed to achieve the specific requirement

RESPONDENT failed to achieve the specific requirement because RESPONDENT was required to provide containers marked in English [E5], but only provide containers marked in the language of Ego [E6 and E8].

c. RESPONDENT should be liable for damages

RESPONDENT was bound to meet the requirement because this was the obligation in the contract. Non-performance is failure by a party to perform any of its obligations under the contract [Article 7.1.1 of PICC]. RESPONDENT failed to perform the obligation by providing containers marked in the language of Ego. CLAIMANT suffered additional cost of translation and penalty. Any non-performance gives the aggrieved party a right to damages [Article 7.1.4 of PICC]. RESPONDENT should be liable for damages.

C. RESPONDENT breached the contract by the cease of supply

RESPONDENT breached the contract by not supplying wheat during the term of the contract, because **1.** RESPONDENT had the obligation to make the monthly shipment in duration; and **2.** It was possible for RESPONDENT to perform the contract; and **3.** RESPONDENT ceased performing its obligation; and therefore **4.** RESPONDENT should pay the compensation.

1. RESPONDENT had the obligation to make the monthly shipment in duration

In the contract (MOU), the parties agreed that RESPONDENT should make monthly delivery for three years. The first shipment was on 22nd of February [E6]. That means the contract ought to be maintained from February 2009 to February 2010. A contract validly entered into is binding upon the parties [Article 1.3 of PICC]. Therefore RESPONDENT should be obligated to make the monthly shipment in duration.

2. It was possible for RESPONDENT to perform the contract

There were possibilities for RESPONDENT to make the monthly shipment. The government offered an auction for the privatization of the main port but RESPONDENT did not try his best in the auction. Besides, there was another port in Ego. In the contract, the wheat could be exported from any Port in Ego [E5]. Therefore, RESPONDENT could use another port to perform the contract but he did not make any effort again.

3. RESPONDENT ceased performing its obligation

Failure to perform any of the obligations under the contract is non-performance [Article 7.1.1 of PICC]. RESPONDENT said that he could not make the shipment any more on March 28, 2009 and did not make the monthly shipment since May 2009 [E9]. This constituted a non-performance [Off Cmt 7.3.3].

4. RESPONDENT should pay the compensation

Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies [Article 7.4.1 of PICC]. Compensation can be full for the harm sustained as a result of the non-performance [Article 7.4.2 of

PICC]. This includes future harm [Article 7.4.3 of PICC] which is established with a reasonable degree of certainty and has been or could have been reasonably foreseen at the time of the conclusion of the contract [Article 7.4.4 of PICC]. RESPONDENT constituted a non-performance, and therefore should pay the compensation. CLAIMANT was forced to change supplier [E12]. Since it was the result of RESPONDENT's breach of the contract, CLAIMANT was entitled to get full compensation of the harm.

II. CLAIMANT DID NOT BREACH THE CONTRACT BY DISCUSSING WITH A NEW SUPPLIER

CLAIMANT did not breach the contract by discussing with a new supplier because CLAIMANT shifting to a new supplier was for mitigation.

RESPONDENT regarded the discussion as CLAIMANT's shifting to a new supplier [E13]. However, CLAIMANT had both the right and the obligation to shift to a new supplier because it was for mitigation. The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps [Article 7.4.8 of PICC]. "…the panel stated that this was a general principle of law reflected, among others, in Art.7.4.8 PICC, which the CLAIMANT was under a duty to mitigate damages and panels should not compensate the losses that could reasonably have been avoided…" [Panel F1] Therefore, it is the legitimate obligation of the aggrieved party to take action to reduce the harm, otherwise, the non-performing party is not liable for that harm and the aggrieved party cannot claim for damage. Since RESPONDENT had stated that it was forced to cancel the contract twice [E9 and E11], and it could not see any other viable alternative [E11], CLAIMANT shall take measures for mitigation under this circumstance. So, CLAIMANT lawfully shifted to a new supplier because it was for mitigation.

III. CONCLUSION ON MERITS

In conclusion, RESPONDENT breached the contract and shall pay the compensation, while CLAIMANT did not breach the contract by discussing with a new supplier.

REQUEST FOR RELIEF

CLAIMANT respectfully requests the Tribunal to find that:

1. CIETAC has jurisdiction over this dispute and Seat of Arbitration could be the Republic of Id (Id).

2. RESPONDENT breached the contract and shall be liable for the ensuing damages.

3. CLAIMANT did not breach the contract by discussing with a new supplier.