THE INTERNATIONAL AND MOOTING COMPETITION

HONG KONG – AUGUST 2011

MEMORANDUM FOR CLAIMANT

TEAM NUMBER: 177

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INDEX OF ABBREVIATIONS

Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission
Ego	The Federal Republic of Ego
Ex.	Exhibit
HKIAC	Hong Kong International Arbitration Centre
ICC	The International Chamber of Commerce
Id	the Republic of Id
Model Law	UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006)
MOU	Memorandum of Understanding
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PICC	UNIDROIT Principles of International Commercial Contracts of 2004
Sun	the Kingdom of the Island of Sun

INDEX OF AUTHORITIES

Elisabeth Opie	Commentary on the manner in which the UNIDROIT Principles may be used to interpret or supplement Article 77 of the CISG January 2005 http://www.cisg.law.pace.edu/cisg/text/anno-art-77.html#uni (Cited as: Elisabeth) (Para: 22)
Gary B.Born	International Arbitration and Forum Selection Agreement: Drafting and Enforcing (second edition) Kluwer Law International Press 2006 (Cited as: Gary B.Born) (Para: 7)
John Felemegas	An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sales of Goods (1980) as Uniform Sales Law Cambridge Press 2007 (Cited as: John Felemegas)

	(Para: 17)
Richard Schaffer Filiberto Agusti Beverley Earle	International Business Law and Its Environment Cengage Lerning, Inc. 2009 (Cited as: Richard) (Para: 17)
UNIDROIT 2004 Rome	UNIDROIT Principles of International Commercial Contracts Published by the International Institute for the Unification of Private Law, Rome 2004 (Cited as: UNIDROIT 2004 Rome) (Para: 15 & 17 & 22)
UNCITRAL	The UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods 2004 http://www.cisg.law.pace.edu/cisg/text/anno-art-77.html (Cited as: UNCITRAL Digest) (Para: 22)
Model Law	UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006)
New York	United Nations Convention on the Recognition and

Convention	Enforcement of Foreign Arbitral Awards

INDEX OF CASES AND AWARDS

Canada	Nova Tool v. London Industries, Ontario Court of Appeal Date: 26 January 2000 (Cited as: Nova) (Para: 22)
Costa Rica	Arbitration Centre of the Costa Rican Chamber of Commerce Country: Arbitral Award Date: 29.07.2002 (Cited as: CRCCAC 2002*)* (Para: 22)
ICC	Arbitral Award 1997 ICC case no.8817 Date: 01.12.1997 (Cited as: ICC 8817) (Para: 22)
México court	Centro de Arbitraje de México Country: Arbitral Award

	Date: 30.11.2006
	(Cited as: CAM2006)
	(Para: 15)
the United States	Delchi Carrier v. Rotorex
	Federal District Court (Northern Dist. New York)
	Date: 9 September 1994
	(Cited as: Delchi)
	(Para: 22)

STATEMENT OF FACTS

Claimant Peng Importing Corporation is a flour mill incorporated and located in the Republic of Id, which purchases wheat from suppliers. Respondent Freud Exporting is a company located in the Federal Republic of Ego, which exports wheat grown exclusively in Ego.

Since **10 January 2009**, Claimant began to connect with Respondent by letter and fax. They reached an agreement to cooperate for at least one year for wheat purchase. On the island of Sun, both parties signed a memorandum of understanding (MOU).

On **22 February 2009**, Claimant received the first shipment, of which containers were marked in Ego language, inconsistent with requirement of the MOU. Claimant paid $5000 for translation, and informed Respondent of this wrong labeling. Respondent stated it would endeavor to put English labels. In **March 2009**, Claimant paid another $5000 for translation and a penalty of $10,000, as the second consignment was still labeled in Ego language.

On 28 March 2009, Respondent notified Claimant of cancelling the contract, as a result of losing the right to use the main port in Ego. Claimant expected Respondent to take other measures to maintain their contractual relationship, but Respondent did not provide any proper solutions.

The shipment in **April 2009** contained wheat with 11% protein, which was under

fixed level.

The CEOs of both parties renegotiated at an airport in **May 2009**, but failed to reach an agreement. On **20 May 2009**, Claimant filed a notice of the dispute with CIETAC.

ARGUMENTS

I.CIETAC HAS JURISDICTION OVER THE DISPUTE

1. CIETAC has jurisdiction over the dispute: (A) The jurisdiction of CIETAC is in accordance with the arbitration agreement in MOU; (B) The seat of arbitration would not be Ego.

A . The Jurisdiction of CIETAC Is in Accordance with the Arbitration Agreement in MOU

(i) The ADR clause in MOU is the applicable arbitration agreement

(a) Two arbitration clauses exist and both satisfy the form of writing

2. On the internet, there is Respondent's arbitration clause and Claimant agreed to that [Ex.1&2]. However, in MOU, there is another ADR clause [Ex.5].

3. Id and Ego have adopted Model Law and NY Convention [Background information], which require the arbitral agreement be in writing [Art. 7(2) Model Law, Art.2 NY Convention]. Model Law interprets "writing" as including, "electronic communication", which applies to the arbitration clause on Respondent's website [Ex.2] and Claimant's e-mail message [Ex.1]. The ADR clause in the MOU is in accordance with the form of writing.

(b)The arbitration agreement shall be the ADR clause

4. Although Claimant once agreed to the arbitration clause on the internet [Ex.1&2], both parties renegotiated an arbitration clause, the ADR clause, in the MOU [Ex.3&5]. The previous arbitration clause was hence replaced by the new ADR clause, which shall be regarded as the applicable arbitration agreement in this case.

(ii)The jurisdiction of CIETAC is in accordance with the agreement of arbitration

5. The parties agreed to refer their disputes to arbitration under CIETAC Rules, but did not specify any arbitration institution. This shall be construed as an agreement to arbitration by CIETAC [Art. 4(3) CIETAC Rules]. The jurisdiction of CIETAC is therefore in accordance with the agreement of arbitration.

B. The Seat of Arbitration Would Not Be Ego

(i) No seat of arbitration is agreed in the agreement

6. The MOU ADR clause did not provide the seat of arbitration. As a result, the place of arbitration shall be the domicile of CIETAC or its Sub-Commission [Art.31(2) CIETAC Rules].

(ii)The seat of arbitration would not be Ego considering the neutrality of arbitration

7. Ego is the country where Respondent is located [Background information]. If the seat of arbitration would be Ego, it might not be able to produce fair outcomes due to the

potential prejudice and discrimination against the other party. If there is a material difference between an international arbitral tribunal sitting in a particular state and a local court (or jury), the reluctance of arbitration in counter-party's domicile will be exaggerated [Gary B.Born]. It is widely recognized that both parties should choose a third country, which has little connection with the dispute, as the seat of arbitration.

CONCLUSION ON JURISDICTION

8. CIETAC has jurisdiction over the dispute: (A) The jurisdiction of CIETAC is in accordance with the arbitration agreement in MOU; (B) The seat of arbitration would not be Ego.

II. RESPONDENT BREACHED THE CONTRACT AND IS LIABLE TO CLAIMANT

9. From February 2009, Respondent began to export grain to Claimant as a wheat supplier. However, Respondent did not fulfill its obligations stipulated in the contract, which resulted in great financial losses for Claimant. Respondent breached the contract as followings: (A) Respondent cannot continue to supply grain after April 2009; (B) Respondent delivered grain inconsistent with quality requirements; and (C) Respondent failed to label the containers as required. Respondent is liable to Claimant also because (D) Claimant did not breach contract by finding another supplier.

A. Respondent Cannot Continue to Supply Grain after April 2009

(i) Respondent failed to export gain out of the second port in Ego

10. The parties agreed that either port in Ego could be used as export port [Ex.1]. Claimant only cared about getting qualified grain timely, while Respondent was responsible for securing a reliable port.

11. Conditions in the second port were in fact suitable for exporting. Once the major export port of Ego, it also has functioning grain loading facilities [background information]. Distance from the east coast to the west coast, as well as possible flood tides and pirates, should not be regarded as significant obstacles. The navy of Ego patrols the area regularly and keeps the problems of pirates to a minimum. In fact, some other exporters were using it, despite the fact that the wharf facilities there are not as good as those of the major port. Nevertheless, Respondent never tried this port, which manifestos its failure in performing contractual obligation.

(ii)Even if Respondent's failure to use the smaller port was reasonable, it did not act in good faith to overcome consequences of the privatization of the main port

(a) Respondent did not try its best in the tender for the main port

12. If Respondent offered a higher price which could also guarantee a profit, or sought assistance from Claimant, it might have succeeded in the auction [Ex.10].

(b) Respondent did not find new exporters positively

13. After losing the bid, Respondent asked the grain handling authority to take over the contract but failed. Respondent could also find other exporters to continue this dealing but it did not try. The second port in Ego was still functioning [Ex.12], but Respondent did not try, either.

(iii) Hardship or *force majeure* does not excuse respondent's non-performance

(a) The four-prone requirements formulated in hardship had not been fulfilled

14. The right to transport grain out of Ego's main port was put to tender in late 2008 [Ex.9]. Respondent should have reasonably known the possibility of losing the license of exporting through the main port when it contracted Claimant [Art.6.2.2(b) PICC]. Governmental act was beyond Respondent's control, but its consequences could have been avoided by, for instance, shifting to the smaller port. In this regard, Respondent did not experience hardship.

15. Furthermore, the request for renegotiation does not in itself entitle Respondent to withhold performance [Art.6.2.3(1) &(2)PICC,CAM2006]. Respondent requested to cancel the contract after it lost the bid [Ex.9], but this action could not be justified unless the alteration of the equilibrium of the contract was fundamental in two ways: first, increasing in cost of performance, and second, decreasing in value of the

performance received by Claimant [UNIDROIT 2004 Rome p184-190]. Respondent failed to prove such extreme conditions.

(b) *Force majeure* does not give a ground for not assuming liability

16. Art 7.1.7 of PICC prescribes that non-performance by a party is excused if that party proves that that nonperformance was due to *Force majeure*. No *force majeure* could be established in this case as Respondent's failure to take into consideration of the possible loss in the bid and its consequences was unreasonable from an average business perspective.

B. The Grain Which Respondent Delivered Did Not Match the Quality Requirements

17. It is a fundamental principle in commercial dealings that the seller must deliver goods which are of description required by the contract and are contained or packaged in the manner required by the contract [Richard p140]. The agreement between the parties is the primary source for assessing conformity [John Felemegas p168]. Additionally, contracts are not bound in certain formal forms and are often mixed with conversations, telefaxes, paper contracts, e-mail and web communication [UNIDROIT 2004 Rome p9]. Although no specific quality standard was set up in the MOU [Ex.5], Claimant's first letter to Respondent [Ex.1], which shall be regarded as a part of the contract, did clearly put it forward. As Respondent did not object this criterion, it must deliver grain containing protein in the range of 13% to 10.5% and at an average of 11.5% or above.

18. In the shipment on April 2009, Respondent delivered wheat with a protein level under 11.5% [Ex.12], which did not conform to the quality required. Although it is acceptable on stock in Ego, it could not overcome the standards agreed by the parties. This requirement is expressed in the contract and Claimant will be influenced by wrong protein level in the fierce competition. When the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstance [Art.5.1.6 PICC]. Although the parties reached an accord on period of performance in April 2009, they only made modification on this clause. Other description and requirements in the contract are as same as the former one. So an earlier performance does not affect other terms. The seller must respect the particularities of each sale and do all that is necessary to make the goods usable and conform to the agreement.

C. Claimant Is Entitled to Damages due to Wrong Labeling Made by Respondent

19. Under MOU all containers should be marked in English only, but all three consignments from Respondent were labeled in Ego language. Claimant informed Respondent of the wrong markings [Ex.6 & 8] and paid translation costs plus penalty. Respondent is liable to all these losses.

20. Even if signage in Ego could only be in Ego language and it required the importers to change the signs in the bonded warehouse, Respondent is still liable as it failed to

indicate this clearly in the contract, or, when the shipments arrived at port Lobe City, Id, particularly after noticed by Claimant of the translation fee. This instruction should be explicit and reasonable. Under this circumstance, commercial practice cannot become a judgment to change this. Claimant's experiences of importing grain from the Island of Oz did not involve such complexity; otherwise it would have prepared bonded warehouse in advance. If this situation only exists in Ego, Respondent was on a better position to know it, particularly as a regular exporter in Ego, and should have taken necessary precautions. As Respondent failed to notify Claimant of this regulation in the course of negotiation the contract, as well as during the performance of its obligation, even after being reminded by Claimant, it shall be liable to Claimant's losses resulting from such wrong labeling.

21. In the letter of 6 March 2009, Respondent promised that it would let Claimant know whether Customs in Ego allowed English labels onto the containers [Ex.7]. It is more convenient for Respondent to search its domestic law, but Claimant's waiting did not meet any further information from Respondent.

D. To Find Another Supplier Did Not Imply Claimant Breaching The Contract

22. Claimant was obliged to find alternative supplier once Respondent informed it of possible cancelation of the contract. A party suffering harm must take steps to mitigate the harm [ICC 8817, CRCCAC 2002]. Respondent is not liable for harm suffered by Claimant to the extent that the harm could have been reduced by Claimant's taking reasonable steps [Art.7.4.8(1) PICC]. It is to avoid the aggrieved

party passively sitting back and waiting to be compensated for harm which it could have avoided or reduced [UNIDROIT 2004 Rome p244]. Claimant's move to secure a new supplier was to reduce harm and mitigate Respondent's liability, and should not be construed as breach of contract. The obligation imposed on the aggrieved party is to be interpreted in light of reasonable in the circumstances. The assessment of reasonableness is a question of fact and will take into account circumstances such as the time within which action was undertaken to diminish an avoidable loss and whether a substitute transaction was conducted on an arm's length basis [Elisabeth]. Specifically, decisions have found the following measures by aggrieved buyers to be reasonable based on other similar cases: paying another supplier to expedite delivery of already-ordered compressor that could be substituted for defective compressors [Delchi]; contracting with a third-party supplier because of inability of breaching party to deliver molds in time [Nova] [UNCITRAL Digest]. Under this circumstance, Claimant had contract with the third party reasonably. It found another supplier after Respondent notified it of cancelling the contract. If Claimant could not get grain on time, it will induce losses on Claimant and the third party. Consequently, this replacement transaction aims to eliminate the loss caused by Respondent.

CONCLUSION ON SUBSTANSIVE ISSUES

23. The Tribunal should find that (II) Respondent breached the contract and is liable to Claimant: (A) for Respondent could not continue to supply grain after April 2009; (B) for the grain Respondent delivered did not match the quality requirements; (C) for

Claimant is entitled to damages due to wrong labeling made by Respondent; and (D) for finding another supplier did not imply Claimant breaching the contract.

RELIEF REQUESTED

Claimant respectfully requests that the Arbitral Tribunal find that:

- CIETAC has jurisdiction over the dispute:

  (a) The jurisdiction of CIETAC is in accordance with the arbitration agreement in MOU; and

  (b) The seat of arbitration would not be Ego;

- Respondent breached the contract and is liable to Claimant due to:

  (a) Respondent could not continue to supply grain after April 2009;

  (b)The grain which Respondent delivered did not match the quality requirements;

  (c) Claimant is entitled to damages due to wrong labeling made by Respondent; and

  (d) To find another supplier did not imply Claimant's breach of contract.

Consequently, Claimant respectfully requests the Arbitral Tribunal to order Respondent:

- to pay translation costs of $10,000 plus a penalty of $10,000;
- to pay damages
- to pay interest on the said sums; and
- to pay the costs of arbitration

For Peng Importing Corporation

(signed)_____, 1 July 2011