THE INTERNATIONAL AND MOOTING COMPETITION

HONG KONG – AUGUST 2011

MEMORANDUM FOR RESPONDENT

TEAM NUMBER: 177

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INDEX OF ABBREVIATIONS

§	Article of PICC
Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission
Ego	The Federal Republic of Ego
Ex.	Exhibit
HKIAC	Hong Kong International Arbitration Centre
Id	the Republic of Id
INCOTERMS	International Rules for the Interpretation of Trade Terms (2010)
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

	Commercial Arbitration (as amended in 2006)
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PICC	UNIDROIT Principles of International Commercial Contracts of 2004

INDEX OF CASES AND AWARDS

Date: December 6, 1961

(Cited as: White)

(Para: 23)

the United States

Pan-American Life Insurance Co. v. Sympson & Associates, Inc., [2004 WL 1794554 (E.D. La. 2004)]

Date: August 9, 2004

(Cited as: Pan-American)

(Para: 5)

Renaissance Capital Group, Ltd. v. Hedge Fund Administrators, Ltd., [2000 WL 1716353 (S.D.N.Y. 2000)] Date: November 15, 2000

(Cited as: Renaissance)

(Para: 5)

STATEMENT OF FACTS

Peng Importing Corporation (Claimant) is a company located in the Republic of Id (Id), which supplies mainly bakeries with wheat. Freud Exporting (Respondent) is a company located in the Federal Republic of Ego (Ego), which exports grain grown exclusively in Ego.

On 10 January, 2009 Claimant contacted Respondent with an intention to buy wheat, Claimant recognized the dispute resolution clause which Respondent puts on its website. Respondent invited Claimant to the Island of Sun to discuss more details. By the end of January, Claimant and Respondent concluded a Memorandum of Understanding ("MOU"), which included an ADR clause, but no quality requirement was embodied.

On 22 February, 2009 Claimant received the first shipment from Respondent and recognized the wheat with protein of 11.5%. However, Claimant complained about the Ego language marked on the containers. Respondent stated it would endeavor to put English labels but was uncertain with custom regulations.

On 30 March, 2009 Claimant confirmed it had received the second shipment with protein of 11.5%, but the early shipment resulted in its loss and it requested compensation. It also disputed the language of container markers again.

On 28 March, 2009 Respondent noticed Claimant of impossibility of continuing

supply as it had lost the auction for the grain handling facilities. Claimant requested Respondent to supply one more shipment in April regardless the shipment time. Respondent supplied what it had on stock in 5 days. Claimant was unsatisfied with the quality and refused to pay for this last shipment. Meanwhile, Claimant tried to find another supplier and terminate the contract with Respondent.

On 20 April, 2009 Claimant and Respondent negotiated but failed to reach any agreement. **On 20 May, 2009** Claimant initiated an arbitration proceeding to CIETAC institution. **On 25 May, 2009** Respondent submitted its response.

ARGUMENTS

I.CIETAC HAS NO JURISDICTION OVER THE DISPUTE

1. CIETAC has no jurisdiction over this dispute: (A) Respondent's arbitration clause is applicable while the jurisdiction of CIETAC breaches the agreement of arbitration; (B) In the alternative, the seat of arbitration would be Ego.

A. The Arbitration Clause on Respondent's Website Is Applicable While the Jurisdiction of CIETAC Breaches This Clause

(i) An arbitral agreement exists between the two parties

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

2. Respondent's website contains arbitration clause to which Claimant agreed [Ex.1&2]. However, the two parties concluded another ADR clause in the MOU [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 clause on Respondent's website prevails

4. The two arbitration clauses are not identical. The ADR clause is a general arbitration clause because it is used for any disputes in relation to MOU [Ex.5] while the arbitration clause on Respondent's website is a specific dispute resolution provision as it is only used for the quality of the supplied grain and any dispute as to shipping [Ex.2].

5. If one arbitration clause is general while another is more specific, the court often held that the more specific one applied over another one [Pan-American, Renaissance]. In this case, the arbitration clause on Respondent's website prevails.

6. Choosing the rules of a specific arbitration institution often means the intention of being arbitrated by this institution, except additional agreement, such as CIETAC Rules [Art. 4(3) CIETAC Rules], provides otherwise. As the arbitration clause of this case made Hong Kong the seat of arbitration, both parties agree to arbitration by HKIAC.

(ii)The jurisdiction of CIETAC breaches the agreement of arbitration

7. The jurisdiction of CIETAC breaches the agreement since both parties agreed to arbitration by HKIAC. An arbitral award by CIETAC, in this case, might be set aside by the court or be refused on recognition or enforcement [Art. 34(2)(a)(iv) & 36(1)(a)(iv) Model Law, Art.5(1)(d) NY Convention], therefore, Respondent contests the jurisdiction of CIETAC.

B. In the Alternative, the Seat of Arbitration Would Be Ego

(i) The arbitral tribunal shall determine the seat of arbitration

8. Even if the ADR clause is the applicable arbitration clause, there is no agreement as to the seat of the arbitration. The place of arbitration shall be determined by the arbitral tribunal with consideration of relevant circumstances of the case, including the convenience of the parties [Art.20 Model Law].

9. The arbitral tribunal shall take great caution in determining the seat of arbitration, as it would impact the recognition of the arbitration agreement, the proceedings and the recognition or enforcement of the award [Phillip Capper].

(ii) EGO would be the seat of arbitration

10. Since no other places have been chosen, the arbitral tribunal shall consider the places such as the domicile of CIETAC, Sun, Id or Ego.

(a) Sun is not a proper seat

11. The seat must be a state that has acceded to NY Convention to assure the arbitration agreement and any resulting award of maximum enforcement potential [Gary B. Born]. In this regard, Sun is not a proper choice.

(b) The domicile of CIETAC is not a proper seat

12. The ideal seat of arbitration should be geographically convenient for both parties, with an excellent arbitration law and have efficient courts [Simon Greenberg]. The

domicile of CIETAC is far from both parties' home bases, and it would be disproportionately expensive to move representatives, counsels, witnesses and arbitrators there [Phillip Capper].

(c) Ego is the most proper seat

13. Ego is geographically convenient and financially efficient. Also, Ego has adopted Model Law and NY Convention, which would enhance the recognition and enforcement potential of the arbitration award.

CONCLUSION ON JURISDICTION

14. In conclusion, CIETAC has no jurisdiction over this dispute: (A) The arbitration clause on Respondent's website is applicable while the jurisdiction of CIETAC breaches this clause; (B) In the alternative, the seat of arbitration would be Ego.

II. RESPONDENT DID NOT BREACH THE QUALITY REQUIREMENT

15. The Respondent did not breach the quality requirement: (A) No specific quality requirement was included in the contract; (B) Respondent consistently supplied Claimant with proper wheat.

A. No Specific Quality Requirement Was Included in the Contract

16. Parties are free to enter into a contract and to determine its content [§1.1]. The contract [Ex.5] of this case regards PICC as the governing law.

17. No specific quality requirement exists in the contract. Where 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 circumstances [§ 5.1.6].

18. According to Claimant's requirement [Ex.1&7], the average and reasonable quality of wheat is with protein of 11.5%, which is of excellent quality in Ego [Ex.7].

B. Respondent Consistently Supplied Claimant with Proper Wheat

19. The first two shipments contained wheat of 11.5% or more protein, which was acceptable [Ex.6&8]. Thus, the first two shipments have not breached the quality requirement.

III.RESPONDENT HAS GROUNDS FOR TERMINATION

20. Respondent has the following grounds for termination: (A) Respondent's claim for termination is due to Claimant's anticipatory non-performance. Moreover, Termination of the contract is inevitable also due to: (B) hardship and (C) force majeure.

A. Respondent Claimed Termination Because of Claimant's Anticipatory Non-performance

(i) Claimant is obligated to fulfill its duties in accordance with the contract

21. A contract validly entered into is binding upon the parties [§1.3]. In this case,

Claimant was strictly obligated to act as the purchaser and do wheat business with Respondent within the duration of the contract [Ex.5].

(ii)Claimant's anticipatory non-performance gives Respondent grounds for termination

(a)Claimant had the right to terminate the contract immediately

22. Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract [§7.3.3]. Therefore, after Respondent's communication with Claimant about impossibility of supply, Claimant may immediately treat the contract as breached and sue for damages [Hochster].

(b)Claimant did not accept the repudiation of the contract, thus maintained contractual relationship with Respondent

23. The innocent party has one option to accept or to reject the repudiation of the contract [Avery]. Claimant agreed to cancel the contract as soon as it finalized its discussion with the new supplier [Ex.12], which means the contract was maintained before Claimant secures a new supplier. It appeared that Claimant was given the right to keep the contract alive [White]. Besides，Claimant waived the right to treat the contract as repudiated and could not change its choice later [Panchaud].

(c) Respondent obtained grounds for termination due to Claimant's shifting to a new supplier

24. Claimant's shifting to a new supplier within the duration of the contract breached the contract. Respondent might be able to escape liability under the contract [Fercometal]. Respondent is also given grounds for termination because of Claimant's anticipatory non-performance.

B. Claimant Could Terminate the Contract because of Hardship

(i) The main port in Ego could not be used by Respondent any more

(a)Losing the right to use the main port could not reasonably have been taken into account by Respondent at the time of the conclusion of the contract

25. Respondent tried its best to win the bid by offering the best price, becoming one of the top 5 domestic tenders [Ex.9]. Full of confidence and capability, Respondent had not ever thought of losing the main port at the time the contract was concluded [§6.2.2(b)].

26. Even if Respondent had known the likelihood of losing the main port, the takeover by the grain handling authority came so drastically in one week after the auction [Ex.9] that Respondent had never expected.

(b)Deprival of the right to use the main port were beyond the control of Respondent

27. Deprival of the right to use the main port occurred two months after the conclusion of the contract [Ex.4&9] [§6.2.2(a)]. The risk of deprival of this right had not been assumed by Respondent from the very nature of the contract [§6.2.2(d)]. Moreover, the results of tender and auction were not controlled by Respondent, but determined by the price offered [§6.2.2(c)].

(c)Respondent's contact with grain handling authority had failed

28. In order to maintain contractual relationship and fulfill its duties, Respondent tried to convince the grain handling authority to take over the contract but failed [Ex.11].

(ii) The increasing costs of using the second port substantially altered the equilibrium of the contract

(a)The current situation in Ego's second port was not suitable for grain shipment

29. "Cost" here means not only money, but time, risk as well. The second port is located on the opposite side of the main port, which increases the cost for Respondent to prepare all the wheat at this faraway port. Besides, pirate operation in that area makes it unsafe for both Respondent and Claimant to use the second port.

(b)Excessive use of the second port after the auction could not guarantee the requirement of both parties

30. Smaller size, outdated grain loading facilities and occasional silting of the second port all led to the difficulty in use. Moreover, remaining domestic grain suppliers would use the second port excessively after the auction.

31. In conclusion, Respondent's substantial increase in cost and uncertainty of performance would alter the equilibrium of the contract.

(iii)Upon the failure to reach an agreement, either party may resort to the court and terminate the contract due to hardship

32. Respondent renegotiated with Claimant but failed to reach an agreement [Ex.13&14]. Either party may resort to the court ("court" includes arbitral tribunal [§1.11]). If the court finds hardship as reasonable, the contract could be terminated [§6.2.3].

C. Claimant Could Terminate the Contract for *Force Majeure*

33. Deprival of the right to use the main port and failure to convince grain handling authority to take over the contract were considered as the impediment. Respondent was so well prepared for the tender and auction and it had never expected to lose the main port at the time of concluding the contract. Even if Respondent had realized the possibility to lose the main port, it did not expect the grain handling authority to refuse to take over the contract. Subsequent consequences of the tender and auction were beyond the control of both parties, and could not be avoided or overcome

[§7.1.7]. Force majeure excused Respondent from liability in damages.

IV.RESPONDENT IS NOT LIABLE FOR CLAIMANT'S LOSSES

34. Following losses occurred in this case: - (A) Losses due to wrong labeling, (B) losses due to collapse of wheat price, and (C) losses due to Claimant's voluntary drop of the selling price. All these resulted from Claimant's improper performance.

A. Respondent Is Not Liable for Claimant's Damages on Labeling

(i) Obligator of labeling was uncertain according to the packaging clause

35. The packaging clause did not indicate who bears the burden of labeling [Ex.5]. FOB requires sellers to deal with customs formalities for export and buyers for import. Both customs formalities include marking on the containers [INCOTERMS]. Therefore, Respondent was obligated to do the labeling in Ego language for export, as it always does. Claimant was obligated to change the labels in the bonded warehouse for import in accordance with international practice [§1.9] and co-operation principle [§5.1.3].

(ii)Respondent's endeavor to mark in English did not amount to acceptance

36. Respondent promised to endeavor to mark in English, which should not be regarded as acceptance [§2.1.6]. Therefore, Respondent's failure to label in English did not breach the contract.

(iii)Claimant should have known Ego's customs legislation and Respondent is not liable for damages of $20,000

37. The uncertainty of labeling due to Ego customs legislation reminded Claimant of the legal differences between two countries. Claimant should have paid enough attention to relating legislation in exporter's country when negotiating a business contract with a foreign exporter. Thus, Respondent is not liable to the total losses of labeling.

B. Respondent Is Not Liable for Claimant's Loss of Collapsed Wheat Price

38. Respondent's endeavor to deliver the shipment by March 18 [Ex.6 &7] was not a mode of acceptance, which meant Respondent did not breach the contract if the shipment was later than March 18. Moreover, it was Claimant's gambling on the low spot price of wheat that caused the loss [Ex.8].

C. Respondent Is Not Liable for Loss Caused by Claimant's Voluntary Drop of Selling Price to Its Customers

39. Respondent supplied wheat in accordance with the quality requirement [Ex.8]. It was the tight market that made Claimant drop the selling price and thus Claimant is liable for it [Ex.8].

V. RESPONDENT COUNTERCLAIMS THAT CLAIMANT SHOULD PAY FOR THE LAST SHIPMENT

40. Respondent counterclaims that Claimant should pay for the last shipment: (A) There was a modification in the third shipment; (B) Respondent supplied with wheat in

accordance with the modification; (C) Claimant should pay for the last shipment.

A. There Was a Modification in the Third Shipment

41. Respondent only had five days to ship the wheat [Ex.9]. Considering the possibility of losing money and customers if customers would not be supplied in April [Ex.1&10], Claimant agreed to accept what Respondent had on stock. This was a modification regarding shipment time and wheat quality. Claimant agreed to it by nominating the ship and transporting the wheat [§2.6.1(1)].

B. Respondent Supplied with Wheat in Accordance with the Modification

42. The wheat agreed by parties is what Respondent had on stock. Respondent tried its best to supply the wheat, which would have been made by any reasonable person of the same kind in the same circumstances [§5.1.4(2)]. Respondent prepared the wheat in only 5 days. It was hard for Respondent to secure high quality wheat from growers, since it was nearly 20 days earlier than ordinary supply, let alone mixing the wheat before shipment. Respondent performed with good faith [§ 1.7].

43. Each party shall cooperate with the other when such co-operation may reasonably be expected for the performance of that party's obligations [§5.1.3]. In the last shipment, the preparation time for Respondent was inadequate while Claimant had at least 16 days before he supplied his customers, so Claimant should mix the wheat. Although Claimant has no facility to mix grain, it worth renting the facility considering the potential risk of losing the customers if the wheat could not meet the protein

requirement.

C. Claimant Should Pay for the Last Shipment

44. Respondent has performed its obligation and has the right to ask for payment of the last shipment and the interest.

CONCLUSION ON SUBSTANSIVE ISSUE

45. The tribunal should find that: (II) Respondent has not breached the quality requirement; (III) Respondent is given the grounds for termination; (IV) Respondent is not liable for Claimant's losses; (V) Claimant should pay for the last shipment.

RELIEF REQUESTED

Respondent respectfully requests that the Arbitral Tribunal find that:

- CIETAC has no jurisdiction over the dispute;
- Respondent has not breached the quality requirement;
- Respondent is given the grounds for termination;
- Respondent is not liable for Claimant's losses;
- Claimant should pay for the last shipment.

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

- to pay for the last shipment;
- to pay interest on the said sums;
- to pay the costs of arbitration.

For Freud Exporting

(signed)_____, 1 July 2011