THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG – AUGUST 2011

MEMORANDUM FOR CLAIMANT

Team Number: 180

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
Art.	Article / Articles
BI	Background Information
CEO/s	Chief Executive Officer/s
CIETAC rules	China International Economic and Trade Commission rules
Claimant	Peng Importing Corporation
ICC	International Chamber of Commerce
MoU	Memorandum of Understanding
No.	number
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
p.	page
Respondent	Freud Exporting
SCC	Stockholm Chamber of Commerce
Tribunal	China International Economic and Trade Commission
UNIDROIT	Principles of International Commercial Contracts of 2004
UNIDROIT Commentary	Commentary on the UNIDROIT Principles of International Commercial Contracts
v.	versus

INDEX OF AUTHORITIES

INDEX OF CASES AND AWARDS

ICC International Court of Arbitration

Other courts and tribunals

Belarus	Schiff Food Products Inc. v. Naber Seed & Grain Co. Ltd. [1996] 28 B.L.R. (2d) 221 (Q.B.). cited as: *Schiff v. Naber*
Finland	Helsinki Court of Appeal, 30 June 1998. cited as: *Skin care products case*
Hong Kong	William Company v. Chu Kong Agency Co. Ltd. And Guangzhou Ocean Shipping Company. High Court of Hong Kong 17 February 1993. cited as: *William v. Chu Kong*
Hungary	Case No. Vb/97142, Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, 25 May 1999 cited as: *Case No. Vb/97142*
Roland Schmidt GmbH v. Textil-Werke Blumenegg AG	Supreme Court, Roland Schmidt GmbH v. Textil-Werk December 2000. cited as: *Roland Schmidt GmbH v. Textil-Werke Blumene*
Switzerland	Arbitration Court of the Lausanne Chamber of Commerce and Industry, January 2002, available at: http://www.unilex.info/case.cfm?id=863 cited as: *Arbitration Court of the Lausanne Chamber of Commerce and Industry* Commercial Court (Handelsgericht) St. Gallen 3 December 2002 cited as: *Commercial Court (Handelsgericht) St. Gallen*

INDEX OF LEGAL INSTRUMENTS

CIETAC rules	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules (Revised and Adopted by the China Council for the Promotion of International Trade /China Chamber of International Commerce on January 11, 2005. Effective as from May 1, 2005.) cited as*: CIETAC rules*
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 cited as: *NY Convention*
UNIDROIT	UNIDROIT Principles of International Commercial Contracts of 2004 cited as: *UNIDROIT*

STATEMENT OF FACTS

I. Mr. Charles Peng is the managing director of Peng Importing Corporation **(„Claimant“)** incorporated and located in the Republic of Id who due to severe drought conditions, had to exchange his supplier of wheat.

II. Mr. Sigmund Freud, is the managing director of Freud Exporting **(„Respondent“)** located in the Federal Republic of Ego, who was found on the internet by the Claimant. They exchanged correspondence, in order to agree on terms of future cooperation.

III. Finally the Memorandum of Understanding was concluded in the Island of Sun and signed by both parties **(„MoU“)**.

IV. **On 22 February 2009**, the first shipment was received by Claimant. The containers were not marked in English language, what breached of contract and accordingly Claimant had to pay translation costs of $5000.

V. **On 30 March 2009,** Claimant sent a letter to Respondent, informing it again about the wrong labelling on containers, which cost it additional translation costs of $5000 plus a penalty of $10,000.

VI. Before that, **on 28 March 2009** Respondent informed Claimant about decision made by government to privatise the grain handling facilities in the main harbour. Respondent lost the auction and as a result, he cannot export grain out of the main port of Ego. However the second smaller port was still available.

VII. **On 5 April 2009,** Respondent insisted on cancellation of the contract.

VIII. **On 30 April 2009,** Claimant acknowledged Respondent that they received the last shipment, however contested its sufficiency.

IX. **On 10 May 2009,** Respondent activated the ADR clause. However negotiations did not end up successfully.

X. **On 20 May 2009** Claimant initiated arbitration.

ARGUMENTS

I. TRIBUNAL HAS JURISDICTION TO DECIDE THIS DISPUTE

1. Tribunal is competent to decide the dispute between Claimant and Respondent in connection with the supply of wheat because **(A)** the arbitration agreement contained in MoU is applicable and **(B)** the parties are not bound by the arbitration clause of Respondent.

(A) THE PARTIES ARE BOUND BY THE ARBITRATION AGREEMENT CONTAINED IN MOU

2. The jurisdiction of Tribunal is based upon MoU because **(i)** the arbitration agreement contained in MoU is valid, **(ii)** this agreement refers to Tribunal, **(iii)** all pre-arbitral requirements were fulfilled and **(iv)** Respondent activated this arbitration agreement.

(i) The arbitration agreement contained in MoU is valid

3. MoU is a written contract concluded between Claimant and Respondent. *[Exhibit 4]* This contract involves the ADR clause pursuant to which *"any disputes in relation to this agreement* (MoU) *must be resolved in good faith by both CEOs of both companies. 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 CIETAC rules." [Exhibit 5]*

4. Arbitration agreement in order to be considered valid must be unequivocal, in writing *[William v. Chu Kong; Schiff v. Naber; Art. II(1), NY Convention]* and cannot be null, void or incapable of being performed. *[Várady, p. 85]* Consequently, arbitration

agreement may be concluded in the form of an arbitration clause which forms a part of a contract. *[Art. 7(1), UNIDROIT]*

5. In this particular case, the arbitration agreement is valid because: firstly, it is clearly unequivocal as both parties to MoU have agreed upon it; secondly, it was concluded in writing and finally, it is not incapable of being performed due to the fact that it fulfills all already mentioned requirements and parties may submit their dispute to Tribunal.

6. All in all, pursuant to the principle of *pacta sunt servanda*, the parties are obliged to act in line with this agreement. *[UNIDROIT commentary, p. 11]* Therefore the dispute between Claimant and Respondent must be settled in accordance with the valid arbitration agreement contained in MoU.

(ii) Arbitration agreement refers to Tribunal

7. The parties to MoU gave a clear commitment to refer any disputes that are not settled amicably to arbitration, which will be governed by CIETAC rules, without providing the name of competent tribunal. *[Exhibit 5]*

8. Although no concrete tribunal has been chosen, under CIETAC rules "*where the parties agree to refer their disputes to arbitration under these Rules without providing the name of an arbitration institution, it can be deemed that the parties have agreed to refer the dispute to arbitration by CIETAC."[Art. 4 (3), CIETAC rules]* Moreover a reference to institutional rules in arbitration clause is an expressed will of the parties to have a dispute administered by institution which created the set of rules. *[Kaufmann-Kohler, p. 10]* Therefore there is no need to mention institution itself. Even in standard model clauses of world's tribunals, only the rules of the institution are stipulated. *[SCC arbitration clause, ICC arbitration clause, etc.]*

9. To conclude this argument, the competence of CIETAC clearly results from CIETAC rules, which are, based on the agreement of parties, *lex arbitri*.

(iii) All pre-arbitral requirements were fulfilled

10. Under the arbitration agreement, any disputes in relation to it must be first resolved in good faith by CEOs of both companies *[Exhibit 5]* as a pre-arbitral requirement. Pursuant to Respondent`s letter, *[Exhibit 13]* CEOs tried to settle the dispute. Unfortunately, as Claimant announced in its letter, the negotiations were unsuccessful. *[Exhibit 14]*

11. All things considered, although these negotiations did not help to settle the dispute, the pre-arbitral requirements were fulfilled.

(iv)Respondent activated the arbitration agreement

12. Based on the Respondent`s letter, *[Exhibit 13]* the ADR clause in MoU was activated because Respondent announced that it *"is activating the ADR clause and will send our CEO to Id."*

13. The possibility to settle the dispute through the CEOs of both companies was only stated in the ADR clause contained in MoU. By stating this, Respondent recognized the ADR clause as applicable in this particular case.

(B) THE ARBITRATION CLAUSE OF RESPONDENT IS NOT APPLICABLE

14. Despite the fact that there is an arbitration clause on Respondent`s website which refers to settlement of disputes by mediation, *[Exhibit 2]* this is not applicable, because the parties have never agreed upon it. Although Claimant in its correspondence wrote that he has no problem agreeing to it *[Exhibit 1]*, such an agreement has never been concluded because the mere expression of interest is not sufficient. *[UNIDROIT commentary, p. 66]*

15. If Tribunal comes to the conclusion that the arbitration clause published on Respondent`s website was entered into, it still does not change the fact that it is not applicable. This occurs as a result that it was latter modified by the ADR clause contained in MoU.

16. All things considered disputes arising from the contract will not be resolved in line with this invalid arbitration clause.

CONCLUSION ON JURISDICTION

17. ADR Clause contained in the MoU is a valid arbitration agreement which should be applicable to this dispute and which was, after all, confirmed by Respondents` activation of this clause. Pursuant to the provisions of arbitration agreement Tribunal has jurisdiction and accordingly should continue these proceedings and issue a valid and enforceable award.

II. RESPONDENT BREACHED THE CONTRACT BY NOT SUPPLYING WHEAT OUT OF THE SECOND PORT OF EGO

18. Respondent breached the contract by not supplying wheat out of the second port of Ego because **(A)** Respondent was obliged to supply from any port in Ego, **(B)** the prohibition to use the main port is not a legitimate reason for not supplying and lastly **(C)** the second port is suitable for supplying wheat.

(A) OBLIGATION OF RESPONDENT TO SUPPLY WHEAT OUT OF ANY PORT IN EGO

19. Under MoU the parties have agreed, that wheat may be supplied out of any port in Ego. *[Exhibit 5]*

20. Pursuant to *UNIDROIT,* parties are free to enter into contract and determine its content. *[Art. 1.1, UNIDROIT]* MoU is a valid commercial contract, which is binding upon its parties. *[Art. 1.3, UNIDROIT]* Therefore Respondent is obliged to act in line with its provisions. Based on this, Respondent should have used any of the two ports for supplying wheat in Ego.

(B) THE PROHIBITION TO USE THE MAIN PORT IS NOT A LEGITIMATE REASON FOR NOT SUPPLYING WHEAT TO CLAIMANT

21. *"The contract performance must be rendered as long as it is possible and regardless of the burden it may impose on the performing party."* This principle is not an absolute one. *[UNIDROIT commentary, p. 182]* There are some exceptions which may excuse the non-performance of a particular party, e.g. hardship, force majeure etc.

22. In this case, the prohibition from government to supply wheat from the main port does not under any circumstance establish a reason which would excuse the non-performance of Respondent, because in time of concluding the contract Respondent should have been aware of the fact that there is a tender and that he does not have to win it. Therefore the prohibition of government is not a legitimate excuse.

(C) THE SECOND PORT IS APPROPRIATE FOR SUPPLYING WHEAT

23. Despite the fact that Respondent was using solely the main port which later became a subject of privatisation, there is still second port which is functional, equipped with grain loading facilities and moreover is considered to be the major grain export harbor of Ego. *[Art. 2, BI]* Although there are occasional floods and pirate attacks, this is of no relevance, because this area is safe and used by many exporters.

24. Therefore Respondent could have supplied wheat to Claimant from the second port without any difficulties.

25. As a result of the fact that Respondent was not permitted to supply wheat from the main port, its obligation towards Claimant remained in existence. Consequently Respondent had no right to cancel this contract because there is still second port which is suitable for supplying wheat.

III. THE CONTRACT WAS BREACHED DUE TO THE DELIVERY OF WHEAT WHICH DID NOT MACH THE QUALITY REQUIREMENTS

26. Respondent should have supplied Claimant with wheat of agreed quality because **(A)** in prior negotiations the quality requirements were set and **(B)** Respondent accepted them by the first supply.

(A) IN PRE-AGREEMENT NEGOTIATIONS THE QUALITY CONDITIONS WERE SET

27. In MoU the parties agreed that wheat should be of *"correct quality."[Exhibit 5]* The term was defined in the pre-agreement negotiations during which Claimant clearly showed its intent to buy wheat of particular quality, namely Claimant stressed out that *"the average protein quality must be 11.5%"* and that the lower one will not be acceptable. *[Exhibit 1]* This notification was sufficiently clear *[Skin care products case]* and was repeatedly mentioned in mutual inter- communication. *[Exhibit 6, 8, 12]*

28. The specific content of the contract is based on the interpretation of the agreement between the parties *[Roland Schmidt GmbH v. Textil-Werke Blumenegg AG; Honnold, p. 115]*. To determine the intent of the parties, due consideration must be given to all relevant circumstances including the negotiations.

29. Consequently, not only MoU establishes a list of obligations but some of them may be found in pre-agreement negotiations too. These are also binding because of the fact that the contract does not include a merger clause, which would exclude all prior agreements *[Art. 2.1.17, UNIDROIT]*. As a result, prior statements and evidence should supplement this contract as well.

(B) RESPONDENT ACCEPTED THE QUALITY REQUIREMENTS BY SUPPLYING THE WHEAT OF CORRECT QUALITY TO CLAIMANT

30. By first supply of wheat of correct quality, *[Exhibit 6]* Respondent accepted the offer. The acceptance was confirmed by the second shipment which was still of acceptable quality. *[Exhibit 8]*

31. Under UNIDROIT Principles *"provided that the offer does not impose any particular mode of acceptance, the indication of assent may either be made by an express statement or be inferred from the conduct of the offeree." [UNIDROIT commentary, p. 66]* Although the form of the conduct is not specified mostly it will consist in acts of performance, such as the shipment of goods.

32. Moreover, in an initial phone call Respondent guaranteed that it could fulfill all requirements of Claimant without any exceptions in connection with quality *[Art. 1, BI]* Accordingly Respondent was aware of the Claimant's requirements, without fulfillment of which the Claimant would not have entered into the contract with Respondent but would have chosen another supplier.*[Exhibit 1]*

33. All in all, Respondent which is bound by the principles of fair dealing and good faith accepted the quality requirements and therefore is obliged to supply wheat of average quality of 11.5%. Otherwise by supplying non-conforming goods Claimant would be

substantially deprived of what it is entitled to expect. *[Marques Roche; Wine case; Shoes case; Sport Clothing case]*

IV. CLAIMANT IS ENTITLED TO CLAIM DAMAGES DUE TO THE WRONG LABELLING ON THE CONTAINERS

34. Claimant is entitled to claim Damages due to the wrong labelling on the containers because: **(A)** exception to the right to require performance due to customs legislation in Ego does not exclude the right to claim damages, **(B)** Respondent failed to disclose the information concerning the impossibility to perform the obligation stipulated in MoU thus acting inconsistently with the principle of good faith and fair dealing, **(C)** damage is a direct and certain consequence of the non-performance of Respondent, **(D)** the damages were foreseeable to Respondent and **(E)** Claimant did not fail to take measures to mitigate its loss.

(A) EXCEPTION TO THE RIGHT TO REQUIRE PERFORMANCE DOES NOT EXCLUDE THE RIGHT TO CLAIM DAMAGES

35. With reference to the governing law, a contract validly entered into is binding upon the parties *[Art. 1.3, UNIDROIT].* In our case MoU concluded by the parties stipulated the obligation of labelling the containers in English language *[Exhibit 5].*

36. However a performance which is impossible in law cannot be required *[Art. 7.2.2, UNIDROIT].* Nevertheless it has to be noted that such impossibility, in present case caused by the customs legislation in Ego, did not make the contract null *[UNIDROIT commentary, p.210; ICC No. X].*

37. Therefore if Tribunal finds that Respondent´s performance cannot be demanded because of the aforementioned impossibility, there are still other remedies that may be available to

the aggrieved party *[UNIDROIT commentary, p.210].* Accordingly since Claimant is unable to get performance *in natura* it is, in accordance with the governing law, entitled to seek damages *[Arbitration Court of the Lausanne Chamber of Commerce and Industry].*

(B) RESPONDENT ACTED INCONSISTENTLY WITH THE PRINCIPLE OF GOOD FAITH

38. Appropriate weight may be attached to the fact that Respondent was probably aware of the impossibility of performance at the time of contracting *[Exhibit 15]* or at least should have known about it, considering the principle *ignorantia juris non excusat*.

39. Therefore the burden to provide the information concerning the impossibility to perform the obligation lied on Respondent as party whose place of business is located in the State that impose such impossibility.

40. Moreover it is important to note that Claimant cannot be generally expected to know public law requirements in the Respondent´s country.

41. Since the information concerning impossibility to perform the obligation should be regarded as a circumstance that has to be disclosed according to reasonable commercial standards of fair dealing and good faith *[Art.1.7, UNIDROIT; Bonell, p. 128; Internationales Schiedsgericht der Wirtschaftskammer Österreich]* and thus Respondent found itself in breach with this obligation.

(C) DAMAGE IS A DIRECT AND CERTAIN CONSEQUENCE OF THE NON-PERFORMANCE OF RESPONDENT

42. Respondent's breach directly caused Claimant's damages. Claimant would not have suffered any harm but for Respondent's failure to disclose the information concerning the

impossibility to perform the obligation and thus its action was in violation of the principle of good faith and fair dealing.

(D) THE DAMAGES WERE FORESEEABLE TO RESPONDENT

43. Damages in the amount of $ 20,000 were foreseeable loss for the purposes of *Art. 7.4.4 UNIDROIT*. The pertinent standard for the foreseeability of loss is what a reasonable person ought to have anticipated at the time of the conclusion of the contract *[Case No. 8324/1995; Downs Investment v. Perjawa Steel].* Therefore since Respondent knew of the impossibility of performance at the time of contracting *[Exhibit 15]* or at least should have known about it, he must have been aware of the fact that as a consequence there will be harm caused to Claimant.

(E) CLAIMANT DID NOT FAIL TO TAKE MEASURES TO MITIGATE ITS LOSS

44. Claimant did not fail to mitigate its loss *[Art. 7.4.8, UNIDROIT]*, since there were no mitigation measures that were reasonable in the circumstances. The only possible step one could think of would have been completely avoiding the shipment from Ego. However that would have caused not only loss which Claimant suffered, but also any gain of which it would have been deprived of.

45. Moreover, whether Claimant has failed to mitigate loss is a question of fact and the burden of proof lies with Respondent *[Case No. 9187; HG Switz. 3/12/2002; OG Austria 6/2/1996]*. There is a rebuttable presumption in favour of the injured party *[Saidov, p. 14]*.

46. All in all, Claimant is entitled to obtain damages particularly the required translation costs of together $10,000 plus a penalty $10,000 for the second infringement.

CONCLUSION ON MERITS

47. Due to above mentioned arguments Respondent breached the contract by not supplying Claimant with wheat of correct quality from the second port of Ego despite of its obligation contained in MoU. Moreover claimant is entitled to claim Damages due to the wrong labelling on the containers since Respondent acted inconsistently with the principle of good faith by not disclosing the information concerning the impossibility to perform the obligation.

RELIEF REQUESTED

48. Claimant respectfully request Tribunal to declare that:

(A) Tribunal has jurisdiction to decide dispute between Claimant and Respondent;

(B) Respondent breached the contract by not supplying grain out of the second port of Ego;

(C) Respondent breached the contract due to delivery of grain which did not match the quality requirements; and

(D) Respondent breached the contract due to wrong labelling on the containers.

49. Consequently, Claimant respectfully request Tribunal to order, that Respondent is obliged to pay damages due to wrong labelling on containers.

For Peng Importing Corporation

(signed) _____ , 1 July 2011