THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG - AUGUST 2011

MEMORANDUM FOR RESPONDENT

Team Number: 180

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INDEX OF ABBREVIATIONS

§	Section of the Memorandum
Claimant	Peng Importing Corporation
Respondent	Freud Exporting
MoU	Memorandum of Understanding
Tribunal	Tribunal under CIETAC rules
Arbitration clause	Arbitration clause of Exporting
ADR clause	ADR clause in Memorandum of Understanding
CIETAC rules	China International Economic and Trade Arbitration Commission
UNIDROIT	International Institute for the Unification of Private Law, 2004
UNCITRAL	United Nations Commission on International Trade Law

NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
CEO	Chief Executive Officers
HKIAC Rules	Hong Kong International Arbitration Centre

INDEX OF AUTHORITIES

Treitel, Guenter	The Law of Contract Eleventh Edition Thomson Sweet & Maxwell, London, 2003 cited: *Treitel*
Europe	1982 "Nordsee" Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG, 1982 E.C.R. 1095 Court of Justice of the European Communities, 23 March 1982, Case 102/81 cited : *"Nordsee" Deutsche Hochseefischerei v.*
ICC	*Reederei Mond Hochseefischerei* ICC Case No. 3383 of 1979 cited: *ICC Case No. 3383 of 1979*
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*

INDEX OF CASES AND AWARDS

Europe	*"Nordsee" Deutsche Hochseefischerei v Reederei Mond hochseefischerei*
Signapore	*Bovis Land Lease v Jay Tech Marine and Project (Singapore)Case No. Vb/97142*

STATEMENT OF FACTS

I. Mr. Charles Peng is the managing director of a flour mill incorporated and also located in the Republic of Id. Due to severe drought conditions, Claimant had to exchange his previous supplier of wheat. Mr. Sigmund Freud, the managing director of Freud Exporting located in the Federal Republic of Ego, was found on the internet by the Claimant. They exchanged correspondence, in order to agree on terms of future cooperation. Memorandum of Understanding was concluded in the Island of Sun and signed by both parties.

II. **On 22 February 2009**, the first shipment was received by Claimant. Protein level within the flour was 11.5%, which was acceptable; however containers were not marked in English language, which accordingly to Claimant, required translation costs of $5000.

III. **On 30 March 2009,** Claimant sent a letter to Respondent, informing him that since Respondent did not mark containers in English language, he had to pay translation costs of $5000, plus a penalty of $10,000 as this was the second infringement. Furthermore, he also suggested that Respondent should contribute an amount due to the spot price collapse after March 18, which meant that Claimant incurred a loss.

IV. Before that, **on 28 March 2009,** Respondent sent Claimant a fax, informing him about decision made by the government to privatize 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. Since the smaller port does not have loading equipment and the wharf

facilities as good as are those of the main port, Respondent wanted to cancel the contract, and offered Claimant to supply grain earlier due to these specific conditions. Claimant accepted earlier supply and anticipated on maintaining their contractual relationship.

V. On 5 April 2009, Respondent insisted on cancellation of the contract and refused to pay a contribution to Claimant's loss caused by grain price collapse.

VI. On 30 April 2009, Claimant acknowledged Respondent, that they had received the shipment, however, contested its sufficiency. He also said that they were having discussions with another supplier. As Claimant was shifting to a new supplier, Respondent activated the ADR clause, because of breach of the contract.

VII. Negotiations did not end up successfully and therefore, **on 20 May 2009,** arbitration was initiated by the Claimant.

STATEMENT OF ARGUMENTS

I. THE ARBITRAL TRIBUNAL LACKS JURISDICTION TO HEAR THE PARTIES' DISPUTE

1. The arbitration agreement is the fundamental constituent of any international commercial arbitration *[Redfern/Hunter, para. 1-08; Gaillard/Savage, para. 46]* and the source of any arbitral tribunal's jurisdiction *[Fouchard/Gaillard/Goldman, para. 648]*. Respondent is aware of the universally accepted principle of competence – competence which allows Tribunal to rule on its own jurisdiction *[UNCITRAL, Art. 16(1)]*. At the same time, Respondent is not waiving its right to later challenge the award or resist enforcement by agreeing that Tribunal can determine its own jurisdiction *[UNCITRAL, Arts. 4, 16(2), 34(2)(a)(iv), 36(1)(a)(iv); NY Convention, Art. V(1)(d)]*

2. Tribunal should exercise its competence to rule that it does not have jurisdiction to hear the dispute for the reason that **(A)** the Arbitration clause of Exporting published on Respondent's website is applicable. In the alternative, **(B)** if Tribunal concludes that the arbitration clause in MoU is applicable, then the parties had a common intention to submit to *ad hoc* arbitration under the CIETAC rules. In the alternative, **(C)** the seat of arbitration should be Ego.

(A) THE ARBITRATION CLAUSE PUBLISHED ON RESPONDENT'S WEBSITE IS APPLICABLE

3. Tribunal should rule that it has no jurisdiction because **(i)** it was not constituted in accordance with the agreement of the parties. Furthermore, **(ii)** ADR clause does not constitute an explicit obligation to arbitrate.

(i) It would be contrary to the parties' agreement if Tribunal finds it has jurisdiction to decide the dispute

4. A tribunal's power to decide a dispute between two parties is derived solely from the parties' consent and common intention expressed in either an arbitration agreement or an arbitration clause *[Redfern/Hunter, para. 1-08; Fouchard/Gaillard/Goldman, para. 471; Chukwumerije, p. 172; Gaillard/Savage, paras 44- 46; Bovis Land Lease v Jay Tech Marine and Project (Singapore); "Nordsee" Deutsche Hochseefischerei v Reederei Mond hochseefischerei (Europe)]*. The agreement of the parties is, in itself, sufficient to conclude a contract and the concepts of offer and acceptance have traditionally been used to determine whether, and if so when, the parties have reached agreement *[UNIDROIT commentary, p. 57]*. A contract is concluded by the mere agreement of the parties, without any further requirements *[Art. 3(2) UNIDROIT]*, and thus the arbitration agreement between the parties was established by Claimant's acceptance of Respondent's offer to enter into the arbitration clause, by means of Claimant's consent with the Arbitration clause of Exporting placed on the internet *[Exhibit 1]*.

(ii) ADR clause does not constitute an explicit obligation to arbitrate

5. The issue before Tribunal is whether the arbitration clause is sufficiently unquestionable for Tribunal to resolve the disputes in accordance with the parties' arbitration agreement.

6. Respondent emphasizes the necessity to distinguish between ADR clause and arbitration clause. ADR clause cannot be applied in its entirety, because it does not constitute an explicit obligation of the parties to arbitrate under CIETAC rules, but only stipulates that parties '*must'* resolve any disputes in relation with MoU by CEOs.

7. In the wording of ADR clause, the word *'may'* is used when referring to resolution of disputes in relation to the agreement *[Exhibit 5]*. *Vice versa*, it is Arbitration clause of Exporting on Respondent's website which has to be applied as it states: '..any disputes in relation to the quality of the supplied grain and any disputes as to shipping *must* be resolved by mediation ... Failing that disputes *must* be resolved by three arbitrators using HKIAC Arbitration rules. ... *' [Exhibit 2]*. The model arbitration clauses also use the word *'shall'*, indicating the obligation, not a possibility *[http://www.cietac.org/index.cms; ICC Rules 3; HKIAC Rules 2]*. Therefore, activation of ADR clause was only an expression of Respondent's will to escalate the procedure and to initiate arbitration as the final stage of the process of alternative dispute resolution.

8. Tribunal has no power to invent an arbitration agreement by means of aggressive interpretation of ADR clause. If it did so, potential award would be at risk of being set aside or refused recognition and enforcement for being in violation with the arbitral procedure established by the parties. Recognition or enforcement of the arbitral award may be refused if a court finds that the arbitral procedure was not in accordance with the agreement of the parties *[Art. 36(1)(a)(iv), UNCITRAL; NY Convention Art. V(1)(d); Van den Berg 1]*. In the present case, the parties agreed to resolve their disputes by mediation or (failing mediation) arbitration using HKIAC Arbitration rules and having the seat in Hong Kong.

(B) IN THE ALTERNATIVE, ADR CLAUSE CAN ONLY PROVIDE FOR *AD HOC* ARBITRATION BECAUSE THERE IS NO COMMON INTENTION TO ARBITRATE INSTITUTIONALLY

9. The parties did not choose institutional arbitration administered by CIETAC as ADR clause does not specify an institution to administer arbitral proceedings, it only refers to CIETAC rules. *[Bovis Land Lease v. Jay Tech Marine and Projects (Singapore)]*. Therefore, it should be concluded that the parties wished to arbitrate *ad hoc.*

10. The common intention to arbitrate should not be regarded as assent to arbitration under any circumstances, but only to arbitration under the circumstances defined in the arbitration agreement, which must include the specific set of procedural rules agreed upon. The parties agreed to arbitrate in accordance with CIETAC rules, but did not express explicitly their intention to have the dispute settled by CIETAC as ADR clause mentions neither CIETAC nor any other arbitral institution *[Exhibit 5]*.

11. In order to validly agree on institutional arbitration, the parties have to determine an arbitral institution with a significant degree of certainty. Clauses that sufficiently identify an arbitral institution include certain words to evidence the parties' conscious choice of institutional arbitration instead of ad hoc arbitration. Such words may include "institution" or "chamber". The absence of such terms in the arbitration clause means that the parties failed to identify an institution and thus, the arbitration clause is not enforceable.

12. To conclude, Tribunal cannot claim jurisdiction because there is no indication that the parties intended institutional arbitration. If Tribunal concludes that ADR clause is applicable, then it should find that it was for *ad hoc* arbitration. ADR clause does not adequately specify an arbitral institution to administer the proceedings and since Tribunal is an institutional tribunal, it should not have jurisdiction over the dispute. ADR clause can only be enforced by an *ad hoc* tribunal and therefore (i) a new *ad hoc* tribunal has to be created.

(C) IN THE ALTERNATIVE, THE SEAT OF ARBITRATION SHOULD BE EGO

13. In the alternative, if the Tribunal finds that it has jurisdiction over the present case, it should determine the place of the arbitration as the parties are unable to do so, taking into account circumstances of the case *[Art. 20 (1), UNCITRAL]*. Respondent suggests the seat of the arbitration to be in the Federal Republic of Ego. The main reason is economic efficiency and decrease of the arbitration costs, as the company Freud Exporting is located in Ego, as well as the ports. The aforesaid is a practical advantage for inspection purposes and may provide Tribunal with internal perspective on which it may base a fair award.

CONCLUSION ON JURISDICTION

14. Tribunal should rule that it has no jurisdiction over the present dispute as: **(A)** Arbitration clause published on respondent's website is applicable and **(B)** in the alternative, ADR clause can only provide for ad hoc arbitration because there is no common intention to arbitrate institutionally. In the alternative, **(C)** the seat of arbitration should be Ego.

II. RESPONDENT DID NOT BREACH THE CONTRACT

15. Respondent did not breach the contract for the following three reasons: **(A)** Respondent was not liable for the breach since *Art. 7.1.7 UNIDROIT* force majeure applies; **(B)** Respondent has not breached quality requirement.

(A) RESPONDENT WAS NOT LIABLE FOR THE BREACH SINCE *ART. 7.1.7 UNIDROIT* FORCE MAJEURE APPLIES

16. Respondent is not liable for breach of the contract due to force majeure. Respondent notified Claimant about the changes in circumstances *[Exhibit 9]* - Government in Ego closed the main port to public, allowing only one company to export grain from this port. Pursuant to the fact that smaller port does not have loading equipment and the wharf facilities as good as are those of the main port, and the fact that Respondent has never exported grain from this port, he cannot maintain his contractual obligation. Respondent entered into the contract only on the basis that he would only export grain from the main port.

17. The main port was not open to public, thus constituting an impediment, which excused Respondent's non-performance *[Art.7.1.7(1) UNIDROIT]*. In order to establish force majeure, there are two key requirements under *Art. 7.1.7 (1) UNIDROIT* which have to be met. Firstly, impediment must be beyond party's control and secondly, party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences *[UNIDROIT commetary, p. 206]*.

18. As to the first requirement, impediment was beyond Respondent's control. The government in Ego decided to privatize the grain handling facilities in the main harbor by putting them up for tender in 2008, which was unsuccessful. On 28 March 2009, Government organized an auction for top tenderers, which was attended by Respondent as well. Claimant was notified of the auction on the next day, 28 March 2009 *[Exhibit 9]*. The impediment was beyond Respondent's control, since the government decided to set up the auction. Secondly, Respondent could not reasonably have been expected to foreseen the impediment at the time of the conclusion of contract or avoid its consequences, because Mr. Freud did not know that the auction would take place being followed by the privatization *[UNIDROIT commetary, p. 206]*. Since all the requirements of *Art. 7.1.7 UNIDROIT* are met, Respondent is not liable for the breach of contract.

(B) RESPONDENT HAVE NOT BREACHED THE QUALITY REQUIREMENT

(i) MoU did not stipulate the quality requirement

19. The Parties concluded a contract not affixing the quality requirement of wheat. In the section *Duration [Exhibit 5]* parties agreed on "*supply of wheat for a period …if the parties agree"*. They also agreed that duration is contingent on availability of the correct quality wheat in Ego *[Exhibit 5]*, but correct quality was not stipulated by the contract. Though MoU does not provide what correct quality is, with respect to *Art. 5.1.6. UNIDROIT*, in case where the quality of performance is neither fixed nor determined, (i) performance must be of average quality and (ii) must be reasonable *[§21]*.

(II) Quality of performance did not result from prior statements

20. Considering that MoU did not contain a merger clause *[Art. 2.1.17 UNIDROIT]*, which would specifically excluded everything but the final contract, quality of performance may result from prior statements or agreements. Claimant by letter *[Exhibit 1]*, before MoU was signed, proposed to be supplied by grain of protein quality of 11.5%. Respondent has never agreed to this quality requirement. Therefore there has never been prior statement or agreement, which would bind Respondent to supply grain of certain quality.

(iii) **Respondent gave performance of average quality with respect to *Art. 5.1.6 UNIDROIT***

21. Pursuant to §*19* and §*20,* in Ego, wheat of protein content of 12% down to 10% is produced *[Exhibit 7],* i) average quality performance would then be 11% of protein content, exactly in between 12% and 10%. Since such protein content is generally acceptable in Ego, ii) Respondent gave reasonable average performance *[UNIDROIT commetary, p. 136]*.

III. NO BREACH OF CONTRACTIONAL OBLIGATION TO DISPLAY SIGNAGE IN ENGLISH

(A) CLAIMANT SHOULD HAVE BEEN ACQUAINT WITH CUSTOM LEGISLATION

22. Pursuant to *Art. 1.4 UNIDROIT*, principles cannot restrict the application of mandatory rules regardless of national, international or supranational origin. In Ego, there is a mandatory rule that signages have to be displayed in the language of Ego. Therefore, no such provision, which restricts the application of custom legislation can be part of a

contract concluded between parties *[UNIDROIT commetary, p. 12]*. In addition no such provision can override mandatory rules. Consequently, this causes that MoU is partially invalid with respect to *Art. 3.16 UNIDROIT* and therefore it would not be possible to validly agree on obligation to mark containers in English.

(B) CLAIMANT WAS OBLIGED TO CHANGE SIGNAGE

23. It is customary that all these duties are fulfilled by the importers. Claimant and Respondent agreed in MoU on Free on Board shipping *[Exhibit 5]*, which according to *INCOTERMS* means that Respondent fulfils its obligation to deliver at the point when the goods have passed over the ship's rail at the named port of shipment. Claimant has to bear all costs and risks of loss or damage to the goods from that point. Since custom duties are part of the costs that importers bear and normally importers change the signing in the bonded warehouse *[Exhibit 15]*, Claimant was obliged to change the signage.

IV. CLAIMANT BREACHED ITS OBLIGATIONS UNDER THE CONTRACT

24. As stated above, Claimant and Respondent concluded a contract on delivery of wheat and Claimant' s obligations under this contract were to pay the price and to overtake the goods when delivered. **(A)** Claimant breached the contract by means of refusing performance, specifically by non-paying for the last shipment.

(A) REFUSING PERFORMANCE BY MEANS OF NON-PAYING FOR THE LAST SHIPMENT

25. Pursuant to the definition, contract is a legally binding and enforceable agreement between two or more parties with mutual obligations *[UNIDROIT, Art. 1.4; Treitel, p. 1]*. Claimant breached its obligations to pay although Respondent supplied according to his requirements, i.e. **(i)** Respondent supplied on schedule and **(ii)** Respondent supplied in due form.

(i) Claimant did not pay for the last shipment although respondent supplied on schedule

26. Respondent supplied grain in accordance with requirements of Claimant. Claimant was notified by fax *[Exhibit 9]* about changes in circumstances that occurred due to Respondent's loss in national tender, which prevent Respondent from exporting grain from main port of Ego. Respondent offered Claimant an earlier performance to which Claimant agreed *[Exhibits 10 and 11]*.

27. The obligee may reject an earlier performance unless it has no legitimate interest in so doing *[Art. 6.5.1 UNIDROIT]*. However, situations may arise in which the obligee's legitimate interest intimely performance is not apparent and when its accepting earlier performance will not cause it any significant harm *[UNIDROIT Commentary, p. 155]*. Mr. Peng stated that he *did not care whether he had the shipment early [Exhibit 10]*, which means that Claimant did not have right to reject an earlier performance. Respondent's earlier performance does not amount to non-performance *[UNIDROIT Commentary, p. 155]*, thus he supplied accordingly to Claimant's requirements and MoU.

(ii) Claimant did not pay for the last shipment although respondent supplied in due form

28. As stated above, Respondent performed in due form by supplying Claimant with grain of average and reasonable quality *[§21]*, shipped all the stocks it had and Claimant simply refused to fulfill its basic contractual obligation to pay for the received shipment.

CONCLUSION ON SUBSTANTIVE PART

29. Tribunal should find that:

I. Respondent was not liable for breach since *Art. 7.1.7 UNIDROIT* force majeure applies and Respondent has not breached the quality requirement;

II. Respondent did not breach contractual obligation to display in English;

III. Claimant breached its obligations by non-paying for the last shipment.

RELIEF REQUESTED

30. Respondent respectfully requests Tribunal find that:

- Tribunal has no jurisdiction;

- Claimant breached his obligation;

- Respondent did not breach the contract.

31. Consequently, Respondent respectfully requests Tribunal to order Claimant

- to pay damages;

- to pay loss of profit;

- to pay last shipment; and

- to pay the costs of arbitration.