THE SECOND ANNUAL ALTERNATIVE DISPUTE RESULUTION MOOT COMPETITION

ON BEHALF OF: PENG IMPORTING CORPORATION

AGAINST: FREUD EXPORTING

MEMORANDUM FOR CLAIMANT
TEAM 213

Claimant Memorandum

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INDEX OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
ART.	Article
CEO	Chief Executive Officer
CIETAC	China International Economic and Trade Arbitration Commission
CR	CIETAC Rules
EX.	Exhibit
HKIAC	Hong Kong International Arbitration Centre
MOU	Memorandum of Understanding
PARA	Paragraph
PICC	UNIDROIT Principles of International Commercial Contracts
OFF CMT	Official Commentary on the UNIDROIT principles of international commercial contracts ((http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1)
UP	UNIDROIT Principles of International Commercial Contracts
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UMLA	UNCITRAL Model Law on International Commercial Arbitration

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PRINCIPLES, RULES AND TREATIES

CR	China International Economic and Trade Arbitration Commission Arbitration Rules, as found on: http://www.cietac.org/index/rules.cms.
HR	Hong Kong International Arbitration Centre Rules, as found on: http://www.hkiac.org/show_content.php?article_id=375.
PICC	UNIDROIT Principles of International Commercial Contracts of 2004.
UMLA	UNCITRAL Model Law on International Commercial Arbitration.

STATEMENT OF FACTS

1. The Claimant, Peng Importing Company based in the Republic of Id, in seeking a supplier of wheat approached the Respondent, Freud Exporting based on the Island of Ego, who, in an initial conversation, agreed to supply. This was followed by a letter from the claimant outlining their requirements regarding the requisite quality, amount and timing as well as acknowledging the existence of the respondent's standard dispute resolution clause [Ex. 1]. Following a meeting on the Island of Sun and a phone call [Ex. 3; 4], an MOU was agreed to in late January 2009 stipulating the quantity of wheat, the delivery schedule, arrangements as to pricing, the required labelling and a dispute resolution clause [Ex 5].
2. After each of the first two shipments, the claimant informed the respondent of their concerns regarding the quality of the wheat and the fines that they had incurred due to inadequate labelling [Ex. 6; 8]. A request was also made by the claimant, in vain, for the respondent to contribute an amount of money to mitigate the effects of losses incurred due to market fluctuations [Ex. 6].
3. After the second shipment, the respondent informed the claimant of their unsuccessful tender for the rights to export grain from Ego's main port and that they would thus have to cancel the contract [Ex. 9]. The claimant raised the possibility of using Ego's second port that, though subject to flood tides, silting and occasionally pirates, remained operational but was not taken up by the respondent [Ex. 10; 11].
4. In response to the claimant's urging, a final shipment was made though the quality of wheat was not that desired by the claimant leading them to call for a termination of the contract [Ex. 12]. The respondent replied stating that the quality of the wheat was

not covered in the MOU and that they intended to activate its ADR clause, dispatching their CEO to facilitate discussions [Ex. 13].

5. In response to the failed negotiations, the claimant sent a letter to the respondent outlining their intent to initiate arbitration in Id on the grounds that they breached the contract by not supplying grain out of Ego's second port, the delivered wheat did not match the requisite quality and the wrong labelling had been used [Ex. 14].
6. The respondent replied [Ex. 15] stating that there was no breach of the contract as supply was impossible, no quality requirements existed and they were bound to the laws of Ego regarding the labelling of containers. They also counterclaimed as they had not received payment for the last shipment of wheat delivered and contested that any arbitration should take place on Ego and that CIETAC did not have jurisdiction over the matter.

1 CIETAC HAS JURISDICTION OVER THE CURRENT ISSUE

CIETAC has jurisdiction over the current dispute as the Respondent is bound by the arbitration agreement in the MOU; (para 1.1) The Respondent cannot rely on the website arbitration clause (para 1.2) The parties are bound by the arbitration agreement in the MOU; (para 1.3) The pre-arbitral requirements have been fulfilled; and further (para 1.4) the seat of arbitration is not Ego.

1.1 THE RESPONDENT CANNOT RELY ON THE WEBSITE ARBITRATION CLAUSE AS IT WAS MODIFIED BY THE MOU

1.1.1 The tribunal should decline to give effect to the website arbitration clause as the arbitration agreement was modified by the MOU. The Claimant accepts that, pursuant to the UMLA, an arbitration agreement is merely required to have its 'content recorded' [UMLA art 7(3)]

1.1.2 However, even if the website arbitration clause is a valid arbitration agreement, an agreement can be modified [UP art 1.3]. The MOU signed by both parties, clearly evidences an intention by the parties to oust the website arbitration clause. This conclusion is supported by the fact, that Respondent followed the dispute resolution mechanism in the MOU, by sending their CEO to Id for negotiations, when the dispute initially arose [Ex.13] (CMMIAC).

1.1.3 Alternatively, the website arbitration clause is a standard term of the parties agreement, which has not been negotiated by the parties, and the ADR clause in the MOU is a non-standard term [UP art 2.1.19(2)]. Where there is a conflict between a standard and non-standard term, the latter prevails [UP art 2.1.21]. Accordingly, the ADR clause in the MOU takes precedence over the website arbitration clause.

1.2 THE PARTIES ARE BOUND BY THE ARBITRATION AGREEMENT IN THE MOU

1.2.1 Pursuant to the MOU, signed and agreed upon by both parties [Ex. 4; 5] any dispute arising under the MOU may be settled in accordance with the CIETAC Arbitration Rules.

1.2.2 Where parties agree to refer their disputes to arbitration under the CIETAC Rules, they shall be deemed to have agreed to refer the dispute to arbitration by the CIETAC [CR art 4(3)]. A contract validly entered into is binding upon the parties [UP art 1.3].

1.2.3 The Respondent has affirmed that it views the MOU as a written contract between the parties [Ex.13]. A contract validly entered into is binding upon the parties [UP art 1.3] (JPMMIEC). Accordingly, it is inconsistent for the Respondent to claim that the ADR clause is inoperative.

1.3 THE PRE-ARBITRAL REQUIREMENTS HAVE BEEN FULFILLED

1.3.1 The ADR Clause provides that before arbitration, the CEO of the two companies must attempt to resolve any dispute arising in relation to the MOU in good faith [Ex. 5]. The two CEOs have unsuccessfully attempted to negotiate the dispute [Ex. 13; 14]. There is no evidence to indicate that these negotiations were not undertaken in good faith.

1.4 THE SEAT OF ARBITRATION IS NOT EGO

1.4.1 An agreement of the parties to arbitrate includes the arbitration rules referred to in the agreement [UMLA art.2(e)]. Accordingly, if the Respondent accepts that the CR apply, the Respondent cannot alternatively argue that the seat of arbitration is Ego. This is because art 31 of the CR, which govern this dispute, stipulate that where the parties have not agreed on the place of arbitration, the place shall be the domicile of the CIETAC or its Sub-Commission.

CONCLUSION ON JURISDICTION

CIETAC has jurisdiction over the dispute as: (para 1.1) the Respondent cannot rely on the website arbitration clause (para 1.2) the Parties are bound by the valid arbitration agreement in the MOU; and (para 1.3) the pre-arbitral requirements have been fulfilled.

2 THE CONTRACT HAS BEEN VALIDLY FORMED

The contract has been validly formed as an offer and acceptance has been made a number of email, telephone and fax communications (para 2.1). Further, the MOU incorporates a number of new terms, regarding the English labelling of packages, the price to be paid for the wheat and the ADR clause to be used, into the contract (para 2.2).

2.1 THE CONTRACT IS FORMED THROUGH THE CORRESPONDENCE LETTER

2.1.1 A contract does not need be made in or evidenced by a particular form [UP art 1.2] (ORBIS).

2.1.2 The offer is sufficiently definite [Ex. 1]. The terms relevant to this arbitration are express terms as to the quality and quantity of wheat, the date that the wheat is to be supplied and the requirement of English labeling. These are express terms of the contract [UP art 5.1.1], through the way they are validly entered into and agreed upon by both parties [UP art 1.3]. The letter also demonstrates an intention to be bound [UP art 2.1.2]. This is established on the facts with reference to the circumstances.

2.1.3 Ex. 3 and the phone call [para 1 of facts] constitute valid acceptance. The respondent has assented to the offer [Ex. 3, para 1 of facts, UP art 2.1.6] and the acceptance is valid when it reaches the respondent [UP art 2.1.6;1.10].

2.1.4 Once the contract is validly entered into and accepted it is said to be concluded [UP art 2.1.1] and is binding (*Pacta Sunt Servanda*, UP art 1.3). It can subsequently be modified (or terminated) by agreement of the parties [UP art 3.2; Off Com 1.2]

2.1.5 In the alternative if the Tribunal is not satisfied that there is a valid express contract or where the above terms are not expressly incorporated, it may imply terms or obligations where the contract is silent. This does not invalidate an existing contract (UP art 4.8; 5.1.1). In these circumstances the term will be supplied either by principles (UP art 5.1.4; 5.1.5; 5.1.6; 5.1.7; 6.1.1; 6.1.4; 6.1.6; 6.1.10) or with reference to the relevant factors, including conduct (UP art 4.8).

2.1.6 In the alternative, if the supply or quality of wheat is not an express term it can be implied through practices established between the parties (para; UP art 5.1.2(B); 5.1.2(D)) or under the principles of determination of quality (UP art 5.1.6).

2.2 THE MOU SUCCESSFULLY MODIFIES THE TERMS OF THE CONTRACT

2.2.1 The MOU seeks to introduce new terms to the contract. These terms are the requirement of English labeling and the price to be paid for the wheat. It also seeks to amend the ADR clause to be used.

2.2.2 The MOU validly incorporates new terms to the contract and validly amends the previous ADR clause [UP art 2.2.1; para 1]. Terms are modified by simple agreement between the parties [UP art 3.2; Ex 5]. This is achieved through the freedom of contract [UP art 1.1] and the allowance for modifications to terms after the contract has been entered into [UP art 1.2;1.3].

2.2.3 The duty to label the containers in English can be implied through either a determination of quality [UP art 5.1.6;para 2.1.6] or through place of performance [UP art 6.1.6)].

CONCLUSION ON CONTRACT

The contract was formed through the exchange of emails and correspondence (para 2.1), subsequent to which it was altered by the MOU (para 2.2). Express terms exist as to the quantity, quality, price, arrival date of the wheat and the English labeling. In the alternative, these terms may also be said to exist through implication (para 2.1.5).

3 THE CONTRACT HAS BEEN BREACHED

The respondent has breached the contract (para 2). The contract has been breached due to a failure to follow three key terms, they are; firstly the respondents failure to supply wheat, secondly the inadequate quality of the wheat supplied and finally the incorrect labelling of the packages.

3.1 THE RESPONDENT HAS FAILED TO SUPPLY THE CLAIMANT WITH WHEAT.

3.1.1 The Respondent agreed to supply the Claimant with wheat; accordingly the claimant is bound to achieve that result [UP art 5.1.4(1); Ex 3; 5]. The Respondent is bound to make efforts that a reasonable person of the same kind would have made in the same circumstances [UP art 5.1.4(2)] (JCL).

3.1.2 The Respondent, in failing to exhaust all options, has not made efforts that a reasonably person would make [UP art 5.1.4]. The Respondent, upon loosing the right to export out of the main port in Ego, should have made alternative arrangements. In failing to do so a key term of the contract has been breached [UP art 5.1.4] and thus the Respondent's obligations have not been fulfilled [UP art 7.1.1]

3.1.3 Impossibility or performance being unreasonably burdensome or expensive does not affect the validity of the contract [UP art 3.3(1)]. Further, there lacks any exceptional circumstances so as to invoke [UP art 7.2.2(b)].

3.2 THE QUALITY OF WHEAT SUPPLIED BY THE RESPONDENT DOES NOT MEET THE CONTRACTUAL STANDARD

3.2.1 The agreement that the Respondent will supply the claimant with wheat of a certain quality is an express term. [UP art 5.1, Exhibit 1;4], which was validly entered into and agreed upon by both parties [UP art 1.3]. This term was breached when the quality of the wheat was below the agreed percentage, accordingly the defendant has a requirement to repair, replace or cure the defective product [UP art 7.2.3].

3.2.2 In the alternative, the Respondent has acted inconsistently with an understanding that they have caused the claimant to have, which they have reasonably relied on [UP art;1.8 (Metalclad, Frontier); Ex. 1;2].

3.3 THE RESPONDENT CONTRACTED TO LABEL THE CONTAINERS IN ENGLISH AND IN FAILING TO DO SO IS LIABLE FOR COSTS INCURRED

3.3.1 The Respondent agreed to label the containers in English [Ex 5]. The respondent is bound to make efforts that a reasonable person would have made in the same circumstances [UP art 5.1.4(2)]. The Respondent was at the very least required to communicate to the Claimant the option of changing signs in a bonded warehouse or arranging it on his behalf.

3.3.2 Furthermore, impossibility on account of customs requirements does not affect the validity of the contract [UP Art 3.3(1)].

3.3.3 Although prevented from requiring performance due to the export requirements of Ego [UP art 7.2.2(A)], The Claimant can still seek damages (Art 7.4.1) or terminate the contract (Art 7.1.7(4)).

3.3.4 The claimant has promised to mark the containers in English [Ex 5], and as such the claimant is liable for costs incurred in translating the containers as each party shall bear the cost of performance of its obligations [UP art 6.1.11].

3.4 THE RESPONDENT IS LIABLE FOR THE LOSS THAT THE CLAIMANT HAS SUFFERED AS A RESULT OF THE CHANGE IN SPOT PRICE

3.4.1 The respondent has agreed to supply the wheat at a stipulated date [Ex 7]]. Modification of terms has occurred, with regards to the shipment needing to occur on the 18th [Ex 6; UP Art 1.5]. The respondent has assented to the request made by the claimant (exhibit 7, Art 2.1.6). Consequently, the claimant is now bound by those terms [UP art 1.3].

3.4.2 The respondent, in failing to perform the obligations by the stipulated time, has not performed its obligations under the contract [UP art 7.1.1]. Consequently, the claimant is entitled to damages [UP art 7.4.1].

CONCLUSION ON BREACH OF CONTRACT

The contract has been breached through a failure to perform three specific terms of the contract that is, the failure by the respondent to supply the claimant with wheat (para 3.1), secondly, the failure to supply an adequate quality of wheat (para 3.2) and the containers, by not being marked in English, regardless of being preventing this being done by law, amounts

to a breach (para 3.3). Furthermore the failure to supply the wheat on the specified date is another term the respondent breaches.

4 THE CLAIMANT DOES NOT HAVE TO PAY FOR THE LAST SHIPMENT

That Claimant does not have an obligation to pay for the last shipment as the respondent has not complied with their obligation to supply wheat to an acceptable quality or on time (para 4.1). Further, the Claimant is entitled to withhold performance until Freud Exporting has performed (para 4.2).

4.1 THE RESPONDENT HAS NOT SUPPLIED WHEAT TO AN ACCEPTABLE QUALITY OR ON TIME

4.1.1 The agreement to supply wheat is an express term of the contract [UP art 5.1] which was validly entered into and agreed upon by both parties [UP art 1.3].

4.1.2 The parties agreed to achieve a specific result, that is the respondent agreed to supply the claimant with wheat of a certain quality (para 3.1; 3.2). Accordingly the respondent is bound to achieve that result [UP art 5.1.4(1)] and is bound to make efforts that a reasonable person would have made in the same circumstances [UP art 5.1.4(2)]. The respondent has failed to do so when they did not make any other arrangements for exporting wheat. Consequently, the respondent has not met their obligations under Art 5.1.4 and thus has breached the contract due to non performance [UP art 7.1.1].

4.2 THE CLAIMANT CAN WITHHOLD PERFORMANCE

4.2.1 Pursuant to Art 7.1.3(2) of the UP where the parties are to perform consecutively, the party that is to perform later may withhold performance until the first party has performed.

CONCLUSION ON CROSS APPEAL

Pursuant to Art 7.1.3[2], where the parties are to perform consecutively, the party that is to perform later may withhold performance until the first party has performed. Consequently, due to the respondent's failure to supply wheat of an acceptable quality or in a timely manner [4.1], the Claimant is not liable to pay.

5 CLAIMANT HAS A RIGHT TO TERMINATE

The Claimant has a right to terminate the contract as the Respondent has failed to perform an obligation under the contract (5.1) that amounts to fundamental non-performance (5.2).

5.1 THE RESPONDENT HAS FAILED TO PERFORM AN OBLIGATION UNDER THE CONTRACT.

5.1.1 As established above, Freud Exporting has breach three fundamental terms.

5.2 THE FAILURE TO PERFORM THOSE OBLIGATIONS AMOUNT TO FUNDAMENTAL NON-PERFORMANCE (MATERIAL AND NOT MERELY OF MINOR IMPORTANCE).

5.2.1 The non-performance substantially deprives the respondent [UP art 7.3.1(2)(a)] (ACBUMF). The obligations were of the essence of the contract [UP art 7.3.1(2)(b)]. The non-performance was intentional and reckless [UP art 7.3.1(2)(c)]. The non-performance gives the Claimant reason to believe it cannot rely on the Respondent's future performance [UP art 7.3.1(2)(d)]. The respondent will suffer disproportionate loss as a result of termination [UP art 7.3.1(2)(e)].

6 REQUEST FOR RELIEF

6.1.1 CIETAC has jurisdiction over the current issue

6.1.2 The contract has been validly formed and incorporates terms as to the quality, quantity and date that the wheat is to be supplied, as well as a requirement for English labelling

6.1.3 The contract has been breached by the Respondent and thus is liable for damages

6.1.4 The claimant does not have to pay for the last shipment and has a right to terminate the contract.