THE SECOND ANNUAL ALTERNATIVE DISPUTE RESULUTION MOOT COMPETITION

ON BEHALF OF: PENG IMPORTING CORPORATION

AGAINST: FREUD EXPORTING

MEMORANDUM FOR RESPONDENT

TEAM 213

Respondent 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 DISPUTE

CIETAC does not have jurisdiction over the current dispute for two reasons; (para 1.1) the website arbitration clause is the operative dispute resolution clause and (para 1.2) further; in the alternative the seat of arbitration should be Ego.

1.1 THE WEBSITE ARBITRATION CLAUSE IS THE OPERATIVE DISPUTE RESOLUTION CLAUSE

1.1.1 The website arbitration clause governs the dispute resolution procedure between the parties for three reasons firstly, it is a valid arbitration agreement secondly, the parties have agreed to be bound by the clause and thirdly, the arbitration clause contained in the MOU is not binding and does not override the website arbitration clause.

1.1.2 Pursuant to article 7(2) of the UMLA an arbitration agreement must be in writing. To satisfy this requirement the content of the agreement must be recorded in any form [UMLA art 7(3)]. In the present case both the content of the agreement and the agreement of Mr Peng to agree to be bound by the arbitration clause are recorded [Ex.1; 2] (CNOJSCSB).

1.1.3 Accordingly, Ex 1 represents a valid acceptance by the Respondent of the terms of Claimant's offer insofar as they explicitly agree [UMLA art 2.1.6.1] to the dispute resolution clause [Ex. 2] that is advertised on the Respondent's website. A contract validly entered into is binding upon the parties [UP art 1.3].

1.1.4 Although a contract can be modified by agreement [UP art 1.3], the MOU does not have the effect of overriding the website arbitration clause. Critically, the ADR clause in the MOU is not binding on either party as it simply states that any dispute may be settled by arbitration under the CR (emphasis added). Such a formulation provides the parties with a choice rather than an obligation to arbitrate.

1.1.5 In contrast Ex. 2 expressly states that any dispute must (emphasis added) be resolved by mediation and, failing that, by arbitration under the HKIAC arbitration rules. This clause imparts a clear obligation on both parties to proceed to arbitration under the HKIAC rules.

1.1.6 Accordingly, it is submitted that the effect of the ADR clause contained in the MOU, in relation to arbitration, is merely to provide an alternate option to that which must take place as a result of the agreement outlined in Ex. 2. Thus Freud Exporting may validly exercise their discretion and refuse to proceed to arbitration under the MOU, however the parties remain bound to the proceedings outlined by the website arbitration clause.

1.2 IN THE ALTERNATIVE, THE SEAT OF ARBITRATION SHOULD BE EGO.

1.2.1 Where parties fail to specify the seat of arbitration it shall be determined by the arbitration tribunal, having regard to the circumstances of the case [UMLA; art 20]. Given that the dispute between the parties has arisen out of events which have occurred in Ego, it is submitted that it would be most appropriate seat of arbitration [Ex. 9] (JMP).

1.2.2 Alternatively, if this tribunal determines that as a result of the agreement of the parties the arbitration rules of CIETAC or HKIAC will determine the seat, the seat cannot be Id. The CIETAC and the HKIAC arbitration rules stipulate that, unless there is an express prior agreement, the seat of arbitration will be, in the former case, the domicile of the CIETAC or its Sub-Commission or, in the latter case, Hong Kong [CR art 32; HR art 15].

CONCLUSION ON JURISDICTION

CIETAC does not have jurisdiction over the dispute as: (para 1.1) the website arbitration clause is the operative arbitration agreement and thus confers jurisdiction under the HKIAC rules and (para 1.2) secondly, in the alternative the seat of arbitration is Ego.

2 THE CONTRACT IS FORMED THROUGH THE CORRESPONDENCE LETTER

The agreement is formed through the letter, fax and phone call exchange (statement of facts, para 1). Only the express terms regarding the quantity and the initial ADR clause on the Internet are valid terms of the Contract. As such, the remaining express terms are contained in the MOU (the English translation, the delivery date and price to be paid). The MOU does not amend the arbitration clause. Finally, quality is never assented to and does not become an express term.

2.1 THE CONTRACT EXISTS AS PER 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). The key issue is evidence of consent.

2.1.2 The letter from the Claimant [Ex. 1] constitutes a valid offer as it is sufficiently definite and permits the conclusion of the contract by mere acceptance [UP art 2.1.2]. The letter also exhibits an intention to be bound [UP art 2.1.2]. This is established on the facts with reference to the circumstances.

2.1.3 Only two of the terms in the offer; the quantity of wheat to be supplied and the ADR clause, are express terms and are sufficiently definite. The quality term is not sufficiently definite as it is open to further negotiation or clarification, and is therefore not a valid offer [UP art 2.1.2].

2.1.4 The fax [Ex. 3] and phone call (para 1 of statement of facts) constitute valid acceptance [UP art 2.1.6], because the respondent has assented to the offer [Ex 3; para 1 of statement of facts]. The acceptance is valid when it reaches the respondent [UP art 2.1.6; 1.10]. In the alternative, the Respondent only expressly consents to the quantity term in the original offer (Ex 3). At no time does the Respondent assent to quality, and this is evidenced by later conduct.

2.1.5 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] and can only be modified (or terminated) by agreement of the parties (UP art 3.2].

2.2 THE ADR CLAUSE THAT APPLIES IS THE INTERNET ADR CLAUSE NOT THE MOU ADR CLAUSE

2.2.1 Art 1.1 of the UP allows for freedom of contract and thus allows for later modification of terms by agreement. Article 1.2 does not restrict parties' later changes to the original form they subscribed to when concluding the contract initially.

2.2.2 The MOU seeks to add further express terms to the Contract (price to be paid and the English Translation packaging requirement). The MOU is able to add these express terms to the Contract without making it void [UP art 1.2; 1.3].

2.2.3 The MOU also seeks to amend one express term, that is the ADR Clause, but does not validly amend the ADR clause as below. Therefore, the express term of quality of supply is never agreed to.

2.2.4 The ADR clause in the MOU is not valid because firstly, the MOU is only a written confirmation of what was agreed at the Island of Sun and secondly, it materially alters the Contract. If a term contained in a written confirmation materially alters the agreement it will not be valid, and the first term will apply [UP art 2.1.12]. Accordingly in the present case the MOU materially alters the previously agreed ADR clause in the contract.

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, and arrival time of the wheat as well as requirements of English labeling and price to be paid. In the alternative, these terms may also be said to exist through implication. The Internet ADR clause was not amended in the MOU, and validly exists as per the contract.

3 THE CONTRACT HAS NOT BEEN BREACHED

The Claimant has not breached the contract that exists between itself and the Respondent as the terms of the agreement were met. In any event any failure to perform was as a result of impossibility (para 3.1) force majeure (para 3.2) or hardship (para 3.3).

3.1 THE CONTRACT IS NOT BREACHED AS ANY FAILURE TO PERFORM IS DUE TO IMPOSSIBILITY OF PERFORMANCE

3.1.1 The respondent recognises that impossibility does not invalidate a contract [UP art 3.3(1)]. Nevertheless, performance cannot be enforced due to the fact that performance is impossible [UP art 7.2.2(a)] and because it is unreasonably burdensome and expensive [UP art 7.2.2(b)]

3.1.2 Performance, as required by the claimant, is impossible or unreasonably burdensome due to the inability of exporting the wheat out of the main port [Ex. 9].

3.1.3 The wheat cannot be exported out of the main port of Ego. Furthermore, the exporting of wheat out of the second port in ego would be unreasonably burdensome and expensive [UP Art 7.2.2(b)]. Due to the change in circumstance after the conclusion of the contract, although performance is still technically possible out of the second port, it is contrary to the principle of good faith to require performance due to the increased expense [UP art 7.2.2; 1.7; Off Comm 7.2.2; Vogenauer page 789].

3.1.4 Similarly the Claimant is prevented from labelling the containers in English due to customs legislation, which excuses performance of the duty [UP Art 7.2.2(a)].

3.1.5 In the alternative that the tribunal does not find that the MOU validly alters the contract, then there was no agreement on the labelling and therefore no breach. If the Claimant submits that there is an implied obligation this would either be the market average or common practice [UP art 5.1.6] both of which would not include English labelling.

3.2 THE CONTRACT HAS NOT BREACHED AS ANY FAILURE TO PERFORM IS DUE TO A FORCE MAJEURE

3.2.1 The respondent is unable to perform the contract due to the inability to export out of the main port in Ego, this is an impediment beyond its control that it could not reasonably be expected to have taken into account at the time of the conclusion of the contract or have avoided its consequences [UP art 7.1.7]

3.2.2 The respondent notified the claimant of the inability to fulfil performance due to the inability to export out of the main port in Ego [Ex. 9, UP art 7.1.1(b)]

3.2.3 Consequently, it is excused from not performing its obligations due to Force Majure.

3.3 THE CONTRACT HAS NOT BEEN BREACHED AS ANY FAILURE TO PERFORM IS DUE TO HARDSHIP

3.3.1 In the alternative, if the first two submissions are rejected, the claimant is excused from performance on the grounds of hardship [UP art 6.2.2].

3.3.2 The claimant was not aware that they would be unable to export from the main port of Ego until after the conclusion of the contract [UP art 6.2.2(a)]. Further, the events could not have reasonably been taken into account at the time of the conclusion of the contract [UP art 6.2.2(b)] and finally, the events were beyond the control of the claimant [UP art 6.2.2(c)].

4 THE RESPONDENT IS ENTITLED TO PAYMENT OF THE LAST SHIPMENT

The Claimant has not complied with a term, that is a monetary obligation for the supply of wheat on April 5 2009 (para 4.1) and the Respondent can enforce payment (para 4.2).

4.1 THE CLAIMANT HAS AN OBLIGATION TO PAY FOR THE WHEAT AS AGREED

4.1.1 As the Contract and MOU are valid and binding, and the term to pay on delivery is contained therein, the Claimant has an obligation to pay. The early timing of wheat does not preclude payment as the Claimant requested the shipment after being notified of it being sent sooner [UP art 1.9]. Lastly, as established above, the Claimant cannot act inconsistently with an understanding it has caused the Respondent to have, upon which it has acted in reliance to its detriment [UP art 1.8]. Failure to pay is a breach of good faith [UP art 1.7].

4.2 THE RESPONDENT MAY ENFORCE REPAYMENT

4.2.1 Pursuant to UP art 7.2.1 where a party who is obliged to pay money does not do so, the other party may require payment.

5 THE RESPONDENT HAS THE RIGHT TO TERMINATE THE CONTRACT

The Respondent has not breached an obligation that amounts to fundamental non-performance (para 5.1). If it has, and in the alternative, the Claimant has lost its right to terminate as notice has not been given (para 5.2). If notice has been given, and again in the alternative, the notice given was not made within a reasonable time and therefore the Claimant loses its right to terminate (5.3). Further, the Respondent has a right to terminate for anticipatory non-performance (para 5.4).

5.1 THE RESPONDENT HAS NOT BREACHED TERMS OF THE CONTRACT THAT AMOUNT TO FUNDAMENTAL NON PERFORMANCE

5.1.1 As above, the Respondent has not breached terms of the contract. If it has, these terms to not amount to fundamental non-performance [UP art 7.3.1] (ACBUMF).

5.2 THE CLAIMANT HAS NOT GIVEN NOTICE.

5.2.1 The right of a party to terminate the contract is exercised by notice to the other party [UP art 7.3.2(1)]. There is no *ipso facto* termination of the contract, even if all the requirements of 7.3.1 are met.

5.3 THE CLAIMANT HAS NOT GIVEN NOTICE WITHIN A REASONABLE TIME AFTER IT BECAME AWARE OF SUBSTANTIAL NON-PERFORMANCE, AND THEREFORE LOSES ITS RIGHT TO TERMINATE.

5.3.1 The Claimant has not given reasonable notice in the circumstances [UP art 7.3.2(2)] because they were made aware at least a month prior of the inability to supply wheat.

5.4 THE RESPONDENT HAS A RIGHT TO TERMINATE BASED ON ANTICIPATORY NON-PERFORMANCE.

5.4.1 The respondent reasonably believes that there will be a fundamental non-performance by the Claimant [UP art 7.3.1] and so they may demand adequate assurance of due performance [UP art 7.3.4]. Where this assurance is not provided within a reasonable time [UP art 7.3.4] or where it is clear there will be a fundamental non-performance [UP art 7.3.3] they may terminate.

6 REQUESTS FOR RELIEF

6.1.1 CIETAC does not have jurisdiction to hear the matter

6.1.2 A contract exists, the terms of which are limited to the quantity of the wheat supplied, and the ADR clause to be used.

6.1.3 The Respondent has not breached any of the terms found in the contract or the MOU and thus is not liable for damages.

6.1.4 The Claimant has an obligation to pay for the last shipment

6.1.5 The Respondent, not the Claimant, has the right to terminate the contract.