2011 INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTIONMOOT COMPETITION

MEMORANDUM FOR CLAIMANT

TEAM 235

ON BEHALF OF

MR. CHARLES PENG
REPUBLIC OF ID

AGAINST

MR. SIGMUND FREUD
FEDERAL REPUBLIC OF EGO

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TABLE OF ABBREVIATIONS

¶	Paragraph of materials
§	Section
Id	Republic of Id
Ego	Federal Republic of Ego
UNCITRAL	United Nations Commission on International Trade Law
UML	UNCITRAL Model Law on International Commercial Arbitration
NYC	New York Convention
Art.	Article
1rt	First
Clause	The ADR clause
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	HKIAC Arbitration rules
Draft HK	Draft Hong Kong Code of Conduct for Mediators
CEO	Chief Executive Officers
UNIDROIT	International Institute for the Unification of Private Law
CLOUT	Case law on UNCITRAL texts

INDEX OF AUTHORITIES

Laws、Conventions and treaties:

UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration on Arbitration
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
The UNIDROIT Principles	the UNIDROIT Principles of International Commercial Contracts 2004
UMLEC	UNCITRAL Model Law on Electronic Commerce (1996)

Rules:

CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules

Cases:

Patel v.Kanbay	Canada: Ontario Court of Appeal No. C48699 Patel v.Kanbay International Inc. (23 December 2008)
Jean Estate v. Wires Jolley	Canada: Ontario Court of Appeal No. C48730 Jean Estate v. Wires Jolley LLP (29 April 2009)
Bayerisches Oberstes Landesgericht	German: MDR 2003, 1132; http://www.dis-arb.de (DIS – Online Database on Arbitration Law)
Oberlandesgericht Köln	Germany: Oberlandesgericht Köln; 9 Sch 15/99 (22 December 1999)
Limited v. Sino-American Trade Advancement Co. Ltd	Hong Kong: High Court of Hong Kong; Oonc Lines Limited v. Sino-American Trade Advancement Co. Ltd. (2 February 1994)

STATEMENT OF FACTS

Peng Importing Corporation ("Claimant") is a company incorporated by Mr. Peng and located in the Republic of Id (Id). Freud Exporting. ("Respondent") is a company charged by Mr. Sigmund Freud and located in the Federal Republic of Ego (Ego) which supplies wheat.

On **10 January 2009** Claimant send an ordering email to Respondent expressing its intention to purchase the material and its specific requirements that the average protein quality must be 11.5%. Besides, Claimant required 100,000 metric tones per month to be landed no later than the20th day of each month at our port Lobe City, ID (+ or – 2 days).The arbitration clause is accepted.

On **15 January 2009** Respondent faxed in response to former email inviting Claimant to discuss business in Sun Island.

On **30 January 2009** Claimant replied that he had shown the signed memo drawn up together to its purchasing manager.

On **22 February 2009** Claimant received the first shipment.

On **3 March 2009** Claimant send a letter in response to the first shipment reminding the protein quality as most of the wheat supplied was at the lower end close to 11.5%. Besides, Claimant paid extra $5,000 translation costs due to the wrong marked language.

On **6 March 2009** Respondent replied the reminding.

On **18 March 2009** Claimant received the second shipment. But Claimant again paid extra $5,000 translation costs for the markings on the container were in the Ego language. In addition, Claimant was obliged to drop the price to his customers because of the protein quality.

On **28 March 2009** Respondent faxed Claimant to tell that they had lost the right to export grain to overseas suppliers out of the main port. Under such circumstance, they are forced to cancel the contract and want to deliver the last shipment earlier according to the authority's time limit.

On **31 March 2009** Claimant replied that they accepted the earlier shipment but were not willing to cancel the contract. Besides, they blamed Respondent's delayed information and improper option.

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On **5 April 2009** Respondent tried to recover the authority but failed and they were not responsible to the loss regarding their performance.

On **30 April 2009** Claimant received the third shipment. Since the wheat contained only with a protein level of 11% .They demanded Respondent to supply wheat pursuant to the requirement of the contract. In addition, Claimant agreed to terminate the contract after calculating the possible damages which accrue to them.

On **10 May 2009** Respondent claimed that the required quality was not specified in the contract and it is Claimant who breached the contract as they shifted to another supplier. Under such circumstance, Respondent activated ADR clause.

On **20 May 2009** Claimant initiated arbitration proceeding against Respondent in Id after two parties' unsuccessful negotiation and submitted their claims.

On **25 May 2009** Respondent received the relevant documentation from CIETAC and submitted their claims as well.

Arguments on Jurisdiction

I THE TRIBUNAL HAS JURISDICTION TO HEAR THE DISPUTE UNDER THE ADR CLAUSE、UML AND NYC

The tribunal has jurisdiction to hear the dispute because: (A) UML and NYC are applicable to this dispute; and (B) The tribunal is entitled to determine its own jurisdiction; and (C) the reason respondent contest the jurisdiction of CIETAC is untenable as the estoppel principle

A. UML and NYC are applicable to this dispute

¶1-5 provides that both countries (in respect of the dispute) ID and Ego have adopted UNCITRAL ML and New York Convention. Pursuant to NYC Article 10, the convention enters into force for the State at the time of signature, ratification or accession. Besides, the dispute is within the scope of application because UML applies to international commercial arbitration and the dispute is about a contract for sales and shipping within two parties from 2 countries-Id and Ego. Carriage of goods by sea is a relationship of commerce (UML Footnotes-2). Consequently, both UNICITRAL Model Law and NYC are applicable to this dispute.

B. The tribunal is entitled to hear the dispute and determine its own jurisdiction

The tribunal is entitled to hear the dispute and determine its own jurisdiction because: (1) the doctrine of *Kompetenz/Kompetenz;* (2) arbitration clause has been validly modified which CIETAC is authorized to resolve the dispute; (3) the tribunal is constituted in accordance with the ADR clause.

1. Arbitral tribunals can rule on their own jurisdiction under the doctrine of *Kompetenz/Kompetenz*. This principle is supported by Article 16 .1 and Art 21 .2 of the UNCITRAL Arbitration Rules (UNCITRAL ML, 1976) which essentially settled: ``The arbitral tribunal may rule on its own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement." The competence to rule on jurisdiction is well established in Article 16(1) Model Law {CLOUT Case 1016/1048/1044} which governs the procedure of this dispute.

2. Arbitration clause has been validly modified. The former arbitration clause has been modified the moment memorandum has been signed in the island of sun. The memorandum is valid because clauses were been drawn up together and signed by both parties in accordance with the principle of party autonomy. **Further**, the ADR clause on memorandum is valid because terms match the "agreement in writing" [Article 41(1) CIETAC Rule; Article II (2) NYC; Article 7(1) UML] {CLOUT 869/1064/} and clauses are operative and not ambiguous. **Besides**, CIETAC is entitled to resolve the dispute pursuant to the CIETAC Rules Article 4.3.Parties have made an agreement on dispute settled by arbitration under the CIETAC Rules without providing the name of an arbitration institution. Pursuant to CIETAC rules, the parties shall be deemed to have agreed that the arbitration institution is CIETAC [Article4-3 CIETAC Rules].

3. The tribunal is constituted in accordance with the ADR clause and the respondent waived its right to challenging the tribunal composition. The parties are free to agree on a procedure of appointing the arbitrators. [Article 11(2)UML; Article 21 CIETAC] The arbitral tribunal is constituted in accordance with the agreement. Also, Art. 12 of UML and Art. 26 of CIETAC provide the parties of grounds for challenge. Respondent doesn`t challenge the constitution of appointing the arbitrators within fifteen days. [Article 13 UML] {CLOUT Case 442} If the opposing party fails to do so, it thereby waives its right to object to the composition of the Tribunal.

C. The reason respondent contest the jurisdiction of CIETAC is untenable

First, ADR clause expresses intention of parties to arbitrate." any dispute …settled by arbitration in accordance with the CIETAC rules." **Second**, Dispute in this case falls within the scope of arbitral matters under the agreement. §2 of the ADR clause sets 'any dispute arising out of or in relation to the contract including counter claims may be initially settled by arbitration in accordance with the CIETAC rules." **Third**, designation of the arbitration tribunal has jurisdiction to hear the dispute. The parties have made an agreement on that dispute settle by arbitration under the CIETAC Rules without providing the name of an arbitration institution. Pursuant to Article 4-3 on CIETAC rules, the parties shall be deemed to have agreed that the arbitration institution is CIETAC.

II EGO SHALL NOT BE THE SEAT OF ARBITRATION

Respondent submits that the seat of arbitration shall be Ego, while we reject it because (A) Parties have agreed that the seat of arbitration will be Hong Kong in arbitration clause **(**Exhibit2**);** and (B) Parties have never made an agreement that Ego shall be the place of arbitration because the ADR clause in memorandum doesn`t modify the seat of arbitration; and (C) alternatively, even if the arbitration clause is valid, the seat of arbitration shall be the domicile of the CIETAC or its Sub-Commission[Article 31 CIETAC Rules].Consequently, the seat of arbitration shall not be Ego.

ARGUMENT ON SUBSTANCE

III PICC ARE APPLICABLE TO THE DISPUTE

Both countries Id and Ego are common law countries. The UNIDROIT Principles of International Commercial Contract 2004 (The UNIDROIT Principles) have the force of law in all countries involved in the scenario.

The contract is subject is to PICC in accordance with the memorandum of understanding. The clause "This contract is subject to the UNIDROIT Principles of International Commercial Contracts 2004" is specified in Governing Law.

PICC are applicable pursuant to the UNIDROIT Principles Preamble "They (the UNIDOIRT Principles) may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like."

Ⅳ.RESPONDENT BREACHES THE CONTRACT

1. The contract focuses on respondent providing required wheat to claimant every month in the duration of three years.

The contract is a consecutive contract. The offer intending to purchase flour is come up with by clamant by letter on Jan. 10th, which states the quality and quantities required by claimant. Respondent accepts clauses with respect to the deal and both parties sign the memorandum of understanding in the duration between Jan. 15th to Jan. 30th on the island of Sun. The contract has been
modified to rule the quality of the wheat which is not written in the memorandum of understanding. Claimant sets the offer and respondent accepts it by performing acts which will be talked about later. The contract takes effect after the memorandum is signed by both parties.

2. Respondent breaches the contract by not providing goods as required quality.

Both offer and acceptance are effective to the contract. As to offer, claimant has reminded the required quality three times in corresponding letters which you can see if I could draw your attention to see in exhibit 1, 6 and 8 and corresponding letters are enforceable pursuant to the UNIDROIT Principles Art.1.2 with no form required to a contract. Consequently, the offer of requiring the quality of 11.5% is effective. As to acceptance, this is also effective because respondent proves it by performing act pursuant to the UNIDROIT Principles Art.2.1.6 which rules the mode of acceptance saying" However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed." The quality in the first two shipments is within the range of requirement, and respondent agrees on the offer and gives acceptance by performing acts. Consequently, the contract with legal offer and acceptance shall be binding upon two parties.

3. Respondent breaches the contract under by wrongly labeling containers.

Firstly, respondent breaches the contract under the UNIDROIT Principles Art.1.3 ruling "A contract validly entered into is binding upon parties." Both parties agree on that containers shall be marked in English and signed it in the memorandum of understanding but respondent wrongly labels containers in Ego language instead of English in every shipments. Secondly, respondent also breaches the contract under the UNIDROIT Principles Art.3.6 ruling" An error occurring in the expression or transmission of a declaration is considered to be a mistake of the person whom the declaration emanated." Respondent guarantees to label containers in English for the second shipment and to let claimant know when they cannot, and they didn't get claimant informed and delivered the second shipment with wrong labels. As a result, claimant is entitled to damages.

4. Respondent breaches the contract by performing anticipatory breach.

Respondent is not entitled to terminate the contract. The contract between two parties is still within the valid duration but respondent has been twice intended to cancel the contract because of losing the right to use the main port to export wheat. However respondent is still able to deliver goods from the small port which forms a refusal to claimant to not accept respondent intention to terminate the contract. The excuse from respondent doesn't belong to any sort of circumstances pursuant to the Art. 7.3.3, as a result respondent performs anticipatory breach and shall pay for the damages from claimant.

V RESPONDENT HAS NO GROUND TO SUPPORT THE COUNTERCLAIM FOR THE LAST PAYMENT

1. Respondent has no ground to support the counterclaim for the last payment and there are three points to support it.

First, respondent has not provided the goods as the required quality in the last shipment so claimant is entitled not to pay as usual. Second, both parties have not agreement concerning the time of payment, as a result claimant has no obligation to pay as the requirement of respondent. Number three, the contract is a consecutive one and claimant is entitled to withhold its performance until respondent has provided goods under the UNIDROIT Principles Art.7.1.3 which rules "Where the parties are to perform consecutively, the party is to perform later may withhold its performance until the first party has performed."

REQUEST FOR RELIEF

CLAIMANT respectfully requests the Tribunal to find that:

1. CIETAC has jurisdiction to hear this dispute.
2. RESPONDENT breached the contract by

   -not supplying grain out of the second port of Ego

   -the delivery of grain did not match the quality requirements.

   -wrong label on the containers