2011 INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTIONMOOT COMPETITION

MEMORANDUM FOR RESPONDENT

TEAM 235

ON BEHALF OF

Mr. Sigmund Freud
Federal Republic of Ego

AGAINST

Mr. Charles Peng
Republic of Id

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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
CIETAC	China International Economic and Trade Arbitration Commission
NYC	New York Convention
Art.	Article
1rt	First
Clause	The ADR clause
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	The HKIAC Arbitration rules
Draft HK	The Draft Hong Kong Code of Conduct for Mediators
CEO	Chief Executive Officers
UNIDROIT	International Institute for the Unification of Private Law

INDEX OF AUTHORITIES

Laws、Conventions and treaties:

Rules:

Cases:

STATEMENT OF FACTS

CLAIMANT, Peng Importing Corporation, is a company incorporated by Mr. Peng and located in the Republic of Id (Id) which supplies flour. RESPONDENT, Freud Exporting, 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 sent an ordering email to RESPONDENT expressing its intention to purchase the material and its specific requirement that the average protein quality must be 11.5%. Besides, CLAIMANT required 100,000 metric tons per month to be landed no later than the 20th day of each month at CLAIMANT's port Lobe City, ID (+or– 2 days).

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 sent a letter in response to the first shipment complaining about the unsatisfied protein quality. Besides, CLAIMANT paid extra money for wrong label language.

On 6 March 2009, RESPONDENT replied that they will endeavor to put English labels if it their customs allows them to do so. And RESPONDENT thought it is acceptable for CLAIMANT because CLAIMANT said still of excellent quality.

On 18 March 2009, CLAIMANT received the second shipment and asked for the offset of their loss.

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 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.

ARGUMENT ON PROCEDURE

I THE TRIBUNAL HAS NO JURISDICTION TO HEAR THIS DISPUTE

The tribunal has no jurisdiction to hear this dispute for 2 reasons as follow: (A) The tribunal is not authorized to hear the dispute as its composition is under the invalid ADR clause; (B) Even if the ADR clause is valid, the pre-arbitral procedures are unfulfilled to commerce arbitration.

A. The tribunal is not authorized to hear the dispute as its not under the valid arbitration clause but an invalid ADR clause

1. ¶1-5 provides that ID and Ego are both common law countries adopting the UML and the NYC. Art 1.1of UML {CLOUT Case77/111} and Art.3 of NYC

provides the scope of application. UML applies to international commercial arbitration and the dispute is about a contract for sales and shipping within two parties from Id and Ego. So the dispute fall the scope of application.

2. The arbitration clause exists and valid because it is well established in Art 7.4 of UML {CLOUT Case 740/510/570} (As adopted by the Commission at its thirty-ninth session, in 2006) and NYC interpretation of article VII (1) (which adopted by the United Nations Commission on 7 July 2006) defining the validation of electronic data interchange (EDI). Exhibit 1 and 2 are data message[1] demonstrating Claimant shown his agreement on the arbitration clause respondent put in the internet. Thus, this arbitration clause came into existence on parties` autonomy and met the requirement on formality "Shall be writing."

3. The ADR clause is invalid and null as terms in ADR clause are ambiguous and inoperative. Article 8 of UML {CLOUT case1073} is well settled in this area. **Firstly**, the clause doesn`t definitely rule the resolution at the 1rt sentence here "*Any disputes in relation to this agreement must be resolved in good faith by both Chief Executive Officers of both companies.* "{CLOUT Case 1044/1074} It is inoperative when there are any disputes. What is in good faith and how to resolve the dispute? Different situation has different interpretation. Thus, the clause is inoperative when any disputes arisen because there isn`t any resolution reference providing here for 2 CEOs from both parties. **Secondly,** ADR clause doesn`t compulsory bind the parties to arbitrate after a dispute is arisen. "*Failing that, any dispute …may be initially settled by arbitration in accordance with the CIETAC rules.*" **Thirdly,** the CIETAC Rules are not the compulsory arbitration rules parties engaged. There is no supplementary agreement on the arbitration rule.

[1] Data message: means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy .< UNCITRAL Model Law on International Commercial Arbitration Article 7<4>>

4. This tribunal is composed by the invalid ADR clause, so the arbitral tribunal has no jurisdiction over the dispute. Art 16 of UML provides the tribunal can rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.{CLOT Case 1044/1048}

B. Even if the ADR clause is valid, the pre-arbitral procedures are unfulfilled to commerce arbitration because (1) CLAIMANT failing to act in good faith; and (2) dispute on quality shall be initially settled by mediation under Draft Hong Kong Code of Conduct for Mediators.

First, Art.2A of UML provides that good faith is a general principle {CLOUT 627}. Pursuant to ¶8 ADR clause § 1 " Any disputes in relation to this agreement must be resolved in good faith by both Chief Executive Officers of both companies." ¶1 term6 of the materials states" All the relevant facts are contained in the attached documents. There are no other facts known as both parties delivered all the documents on the issue." No relevant materials and clarification demonstrated that the claimant appointed their CEO to resolve the dispute. CLAIMANT does not resolve the dispute as clause designated. Thus, CLAIMANT hasn`t acted in good faith.

Second, as I mentioned before, the arbitration clause is exist and valid, which settling adoption of mediation by HK Code as a pre-arbitration requirement when dispute in relative of quality. And there is no other supplement. [¶5 § 2 "Any disputes in relation to the quality of the supplied grain and any disputes as to shipping must be resolved by mediation using the Draft Hong Kong Code of Conduct for Mediators."] **Thus**, The disputes in this case are in relation to the quality and shipping, thus as mediation using the Draft HK is compulsory binding by the parties on ¶5 § 2 "must be resolved

by….” The quality of good is one of the dispute yet out of the memorandum of understanding. Thus, the parties should have to commerce a mediation proceeding because the word “must” is mandatory obliged rather than an option. While parties just appointed their CEO negotiate in the airport of ID rather than to mediate. The tribunal shall to close this arbitration procedure to mediation.

II THE ARBITRAL TRIBUNAL IS EMPOWEDED TO DETERMINE THE SEAT OF ARBITRATION REGARDING TO THE CIRCUMSTANCES OF THE CASE

A. Article 16(2) of UML provides the parties to challenge the jurisdiction of tribunal {CLOUT 562}.

B. The seat or place of arbitration is the link or connecting factor to a given procedural order or “lex arbitri[2]” of the state where the “seat” is situated. In accordance with article 20(1){CLOUT 786}, The Art.31(3)of UML {CLOUT 374}established The award shall be deemed to have been made on the seat or place of arbitration.

C. Arbitration clause doesn`t compulsory obligated rule the seat of arbitration as parties use the word “will” to show a possibility rather than coercive. And there is no supplementary clause conducted by two parties on the seat of arbitration. In this scenario, Article 20 of UML grants the arbitral tribunal to determine the seat of arbitration regarding to the circumstances of the case and the convenience of the parties.{689/374/408/786}

D. The place of arbitration is often chosen for reasons of convenience of the parties

[2] lex arbitri: The lex arbitri is a set of mandatory rules of law applicable to the arbitration at the seat of the arbitration- A.Tweedale, K.Tweedale, Arbitration of Commercial Disputes, International and English Law and Practice, Oxford,1stEdition, 2005, Chap. 7.39

and the dispute may have little or no connection with the State where the arbitration legally takes place.

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 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 HAS NOT BREACHED THE CONTRACT

Respondent has not breached the contract as required quality. Firstly, in all the legal documents and corresponding letters between parties concerned have not specified the clause concerning the quality. Respondent has never show the agreement towards the quality standard and the acceptance is not effective. Secondly, Because of the limitation of authority, respondent is not able to supply further goods, which has been notified in the corresponding letter. Respondent has told claimant to send what is on stock and that is what respondent has done. With claimant agreeing on the modification, there is no ground for claimant to support the claim for the quality in the last shipment.

Respondent has not breached the contract by wrongly labeling containers. Firstly, parties concerned have no agreement concerning the situation when failing to mark containers without English due to non-willing reasons. Secondly, due to the custom of Ego, respondent has not been able to mark containers in English. Respondent has endeavored to put English labels onto containers. Thirdly, respondent has fulfilled good faith of informing claimant regarding the anticipatory situation.

V. CLAIMANT BREACHES THE CONTRACT FOR NOT PAYING THE LAST PAYMENT

Parties concerned agreed the way of payment in memorandum of understanding as L/C. Since claimant has received the last shipment and made the comments, respondent has the ground to counter claim for claimant having not fulfill the liability to pay.

REQUEST FOR RELIEF

RESPONDENT respectfully requests the tribunal to find that:

1. RESPONDENT challenge the jurisdiction of arbitral tribunal and CIETAC
2. The seat of arbitration shall be Ego
3. RESPONDENT did not breach the contract because
4. RESPONDENT lodge a counterclaim as CLAIMANT have not paid for the last shipment