INTERNATIONAL ADR MOOTING COMPETITION
HONG KONG

Memorandum for Claimant

Peng Importing Co.

Team Number: 364

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STATEMENT OF FACTS

Peng Importing Corp. ("Claimant") is a flour mill incorporated and located in the Republic of Id. Mr. Charles Peng is the managing director of Peng Importing Corp. Freud Exporting ("Respondent") is an exporting company located in the Federal Republic of Ego. Mr. Sigmund Freud is the managing director of Freud Exporting.

On **10 January 2009**, Claimant contacted Respondent via letter hoping to negotiate a supply contract for 100,000 metric tons per month of wheat, with an average protein quality content not less than 11.5%, to be delivered no later than the 20th day of each month at Lobe City, Id (+/- 2 days) (Exhibit 1). Claimant also stated that ships could be supplied to either port in Ego to fulfill the contract and that the dispute resolution provision located on Freud Exporting's website was acceptable (Exhibit 2).

On **15 January 2009**, Respondent acknowledged that it would supply the required quantity, in accordance with the **10 January 2009** letter sent by Claimant (Exhibit 3).

In late **January 2009**, Claimant and Respondent met, drafted, and executed a Memorandum of Understanding ("MOU") denoting the agreed upon terms of the supply arrangement, which specified quantity, delivery schedule, shipping, price and duration of the arrangement (Exhibit 5). The document specified that shipping would be out of "any port in Ego," that the containers would be marked in English only, and contained an Alternative Dispute Resolution ("ADR") clause which stated that any dispute in relation to the agreement would be resolved in good faith by both Chief Executive Officers. Failing that, any dispute arising out of or in relation to the

agreement would be settled by arbitration in accordance with the China International Economic and Trade Arbitration Commission ("CIETAC") rules.

On **22 February 2009**, Claimant received the first shipment of wheat from Respondent in containers marked in Ego language, which resulted in a $5,000 translation charge to Claimant. Claimant communicated this issue to Respondent via a letter (Exhibit 6) on **3 March 2009** reiterating that, as per the agreement, the containers should have been marked in English. Claimant also stated that while the wheat was above 11.5% quality, it was very close to the agreement's minimum acceptable quality. Finally, Claimant also asked that the next month's shipment be delivered on **18March 2009**.

On **6 March 2009**, Respondent informed Claimant via letter (Exhibit 7) that it would place labels onto containers in English if customs allowed and that the March shipment would be delivered by **18 March 2009** (*See* Exhibit 7). Respondent further acknowledged and referenced Claimants requirement for 11.5% quality wheat (*See* Exhibit 7).

On **30 March 2009**, Claimant sent Respondent a letter (Exhibit 8) stating that it had received the last shipment by **18 March 2009** and that the containers were still marked in Ego language, which had resulted in an additional $5,000 fee, as well as a $10,000 fine to the Claimant. Claimant also stated that the protein quality content of the shipment was only 11.5% and hence Claimant was forced to sell the wheat at a discount. Claimant also realized a loss from the shipment since the spot market price collapsed after **18 March 2009**. Claimant asked for Respondent to contribute to the loss incurred as a result of the fall in spot price in wheat markets

and the lower quality of wheat.

On **28 March 2009**, Respondent informed Claimant via fax (Exhibit 9) that in late 2008, the government of Ego had put to tender the right to transport grain out of the main port, and that Respondent was the losing bidder in an auction for those rights. Respondent stated definitively that he would be canceling the contract with the Claimant immediately and would not be able to fill the April wheat shipment (Exhibit 9).

On **31 March 2009**, Claimant informed Respondent via email that despite the inability of Respondent to ship out of Ego's main port, Claimant still expected Respondent to pursue other means to maintain the contractual relationship, as two years were still left on the contract. In addition, Claimant asked Respondent to deliver the April shipment early (Exhibit 10).

On **5 April 2009**, Respondent informed Claimant via email that it would ship April's wheat and that it still would be canceling the contract due to an inability to ship the wheat out of Ego's main port (Exhibit 11). Respondent also stated that it would not be providing Claimant with any relief due to the drop in spot price since Claimant had explicitly requested the shipment be delivered on **18 March 2009** (Exhibit 11).

On **30 April 2009**, Claimant informed Respondent via letter (Exhibit 12) that it had received the April shipment but that the protein quality content of the wheat in the shipment was only 11%. Claimant also informed Respondent that a second port on Ego was still available for Respondent to ship from in accordance with the original agreement. Claimant further stated that it was in

discussion with another supplier to mitigate damages and would finalize terms with the supplier if Respondent could not fulfill the terms of the agreement (Exhibit 12).

On **10 May 2009**, Respondent informed Claimant via letter that it had sent the only available wheat and that the MOU did not specify any particular quality. Respondent then invoked the ADR clause of the MOU and scheduled a meeting of the CEOs (Exhibit 13).

On **20 May 2009**, Respondent and Claimant sought negotiations to resolve their dispute at the airport in Lobe City, Id. These negotiations were unsuccessful. Later that day, Claimant informed Respondent via letter that Claimant would initiate arbitration proceedings against Respondent in Id for 1) a breach of contract for failure to supply grain from the second port of Ego, 2) breach of contract due to a failure to deliver grain matching the quality requirements, and 3) breach of contract and claim for damages due to wrong labeling on the containers (Exhibit 14).

On **25 May 2009**, Respondent replied to Claimant via letter (Exhibit 15) and stated that 1) Respondent did not breach contract due to impossibility of supply and did not breach the quality requirement, 2) Respondent did not breach due to wrong labeling since it was the duty of the importer to change the labeling, 3) Claimant still owed Respondent for the last shipment of grain and 4) Hong Kong International Arbitration Centre ("HKIAC") rules should govern arbitration and that the alternative seat of arbitration should be Ego (Exhibit 15).

ARGUMENTS

I. CIETAC HAS EXPRESS JURISDICTION AS THE PARTIES ARE BOUND BY THE ADR CLAUSE WITHIN THE MOU.

Both parties are signatories to the MOU, which contains an express ADR clause (*See* Exhibit 5). The express ADR clause provides that arbitration shall take place in accordance with CIETAC rules if the Chief Executive Officers fail to resolve any dispute regarding the agreement (*Ibid.*).

1.1 The Parties Fulfilled the Pre-Arbitral Requirements

The ADR clause states that “any disputes in relation to this agreement must be resolved in good faith by both Chief Executive Officers of both companies” (Exhibit 5). The parties met at the Lobe City Airport Conference Room on 20 April 2010and sought to resolve the dispute in good faith, but could not come to an agreement (Exhibit 13; Exhibit 14). The ADR further specifies that “failing that, 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” (Exhibit 5). In addition to Respondent’s signature on the MOU, Respondent’s actions in compliance with the pre-arbitral section of the ADR clause further demonstrate its validity.

1.2 HKIAC Does Not Have Jurisdiction Over This Dispute

The valid MOU supersedes any language on Freud Exporting’s website.

II. RESPONDENT BREACHED HIS CONTRACTUAL OBLIGATION

2.1 Respondent Improperly Terminated the Contract by Failing to Export From the Second Port

Under Unidroit Principles of International Commercial Contracts ("PICC"), an obligor's non-performance may be excused if, and only if, it satisfies two conditions (PICC §7.1.7(1)). First, the non-performing party must prove that its failure to perform was due to an impediment *beyond its control* (*Ibid.*). Second, it must prove that it was *not reasonable* for the party to have taken the impediment into account at the time of the formation of the contract (*Ibid.*).

In our case, Respondent had a monthly obligation to supply 100,000 tons of grain to Claimant for three years (Exhibit 5). However, after its second shipment, Respondent notified Claimant that it could no longer deliver the grains because it had lost the bid for the right to ship from the main port of Ego (Exhibit 9). Claimant and Respondent had, however, agreed to ship from "*any* port in Ego" not just the main port (Exhibit 5).

Respondent's failure to supply the grains may not be excused because it does not satisfy the two conditions in PICC §7.17.1 to claim a *force majeure* defense, namely 1) impediment beyond control 2) and not reasonably foreseeable. The impediment, not being able to ship from the main port, was due to Respondent losing the bid for the right to ship from the main port. Respondent had full control over the bidding price so if it had increased its bid, it could have won the auction while still profiting (Exhibit 10). Moreover, not being able to ship from the main port was

reasonably foreseeable because Ego's government had decided to privatize the main port and had put up the port for tender months before the conclusion of the MOU (*See* Background Information/Stipulated Facts).

In addition, Respondent could, and should, have shipped out of the second port, as provided in the contract (Exhibit 5). In either case, an increase in cost cannot be a defense to non-performance.

Assuming, arguendo, that Respondent claims a *force majeure* defense under PICC §7.1.7(3), the party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew, or ought to have known, of the impediment, it is liable for damages resulting from such non-receipt. Respondent knew about the government's intention to privatize the port well in advance, and as such, his disclosure was not at all timely.

Therefore, Freud's formal and unilateral canceling of the contract on 28 March 2009 was an improper breach (*See* Exhibit 9).

2.2 Respondent Breached His Quality Obligation

Respondent did not merely contract to make 'best efforts' at supplying wheat, but rather for specific performance with regard to the quality of wheat delivered. This promise for a specific result is evident in that the parties supplied one, and *only one,* caveat to Respondent's performance: "contingent on the availability of the correct quality of wheat in Ego" (Exhibit 5,

Duration Section). This caveat, and the explicit mention of a "*correct* quality" of wheat, is evidence that the parties intended for the contract to be for a specific quality of wheat. It also shows that the parties considered what situations Respondent would be released from its specific obligation to supply Claimant with said wheat, thereby specifically excluding all other releases (besides those included in the PICC to which the parties agreed to be bound). By committing to specific performance, Respondent committed to either perform the contract itself, find another provider who is able to perform for it, or pay Claimant for Respondent's breach of contract. However, even if Respondent was only responsible for making best efforts, Respondent has not made them. Respondent's failure to exert best efforts is most apparent in its failure to place a higher bid in the auction for use of Port 1, even though placing a higher bid would still have left him with a profitable use of Port 1. When Respondent chose to neglect best efforts in bidding on Port 1, he assumed the risk of loss associated with this decision – a risk it specifically contracted for in the MOU, which states that Respondent would export out of "any port in Ego" (*See* Exhibit 5, Shipping Clause).

Respondent has failed to meet his contractual obligation to provide Claimant with a mix of wheat of 11.5% average protein content. Aside from the MOU's Duration Clause, it is clear from the parties' communications that they had previously reached an agreement on a quality term (Exhibit 6; Exhibit 7). Such evidence can be a useful interpretation tool and its submission is permissible under PICC §2.1.17 since the MOU was clearly not a full embodiment of the contract's terms as it left out the quality of wheat sought and did not declare itself to be a comprehensive final agreement. Claimant's 10 January 2009 letter makes clear that any wheat falling below this quality-level would be unacceptable (*See* Exhibit 1; *see also* Exhibit 8 (stating

"as I told you" and referring to 11.5% as "the minimum our customers will tolerate."); *see also* Exhibit 6 (Claimant's 3 March 2009 letter, specifically stating Respondent's 22 February 2009 shipment was within the acceptable 11.5% average range)). Furthermore, Respondent's own 6 March 2009 letter recognizes Claimant's 11.5% requirement, referring to his 11.5% shipment as "the lower end of your requirements" (*See* Exhibit 7). Thus, though the parties failed to document the quality requirement, Respondent had either a clear unwritten agreement, or at the very least an implied obligation, to ensure its wheat met these quality expectations. Based upon these prior dealings and shipments to Claimant, it was apparent that Respondent knew the importance of providing Claimant with a mix of grains of at least an 11.5% average quality. Thus, Respondent's last shipment, with an average quality of only 11%, knowingly breached his obligation to supply Claimant with wheat of 11.5% quality. While Respondent might allege such a minimal deviation is reasonable under the circumstances, Respondent was aware of Claimant's quality needs and had specifically requested this earlier delivery date, which Claimant accepted as a means to minimize the damages associated with Respondent's improper termination of the contract.

2.3 Respondent Failed to Properly Label Containers

Respondent expressly agreed to label the containers in English (*See* Exhibit 5). Furthermore, Respondent specifically acknowledged this obligation, stating that it would endeavor to label the containers in English (*See* Exhibit 7).

III. FAILURE TO PAY - COUNTERCLAIM

Regarding damages, Claimant will deduct the market value of Respondent's shipment of wheat from the damages owed for Respondent's breach of the contract.

Request for Relief

Claimant respectfully requests relief from the Tribunal based upon the following claims:

1. Breach of contract by not supplying grain out of the second port of Ego. Under PICC § 3.18, a chance and time to cure were given, and Claimant is entitled to damages resulting from Respondent's lack of willingness to do so.

2. Breach of contract due to the delivery of grain which did not match the quality requirements. As a non-conforming party, Respondent will have to pay whatever losses Claimant incurred in having to reduce the price for his customers. Under PICC § 7.4.2 (1), the aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.

3. Breach of contract for Damages due to wrong labeling on the containers. Claimant seeks any and all costs resulting from the failure to properly label as per the MOU.