INTERNATIONAL ADR MOOTING COMPETITION
HONG KONG

Memorandum for Respondent

Freud Exporting Co.

Team Number: 364

August 2011

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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 in order to negotiate a supply contract for 100,000 metric tons per month of wheat, with an average protein quality content of 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 one of the two ports in Ego to fulfill the contract and that the dispute resolution clause 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). Respondent's letter did not, however, make any reference to quality.

In late **January 2009**, Claimant and Respondent met, drafted, and executed a Memorandum of Understanding (MOU). The MOU comprehensively denoted the final terms of the supply arrangement, specifically excluding any quality requirements (Exhibit 5).

On **3 March 2009**, Claimant confirmed receipt of the first shipment of wheat, acknowledged the acceptability of its quality, requested that English labels be placed on future shipments, and requested that the next month's shipment be delivered on **March 18** (Exhibit 6).

On **6 March 2009**, Respondent informed Claimant via letter that it would deliver the March shipment by the 18th, as requested, and place English labels onto containers if customs allowed (Exhibit 7).

On **30 March 2009**, Claimant confirmed receipt of the March shipment and confirmed that Respondent had supplied wheat of the agreed upon 11.5% quality (though Claimant noted it sold the wheat at a reduced price). Claimant noted that it had experienced a loss from the shipment since the spot market price collapsed after **March 18th** and asked Respondent to contribute to compensating Claimant for this loss.

On **28 March 2009**, Respondent informed Claimant via fax that the government had decided to privatize Ego's main port, which Respondent used for shipping, and that Respondent had lost the right to transport from the port, making it impossible for Respondent to use the port. Consequently, Respondent was forced to cancel the contract and would not be able to ship the April wheat shipment on the usual delivery date. However, Respondent, still making best efforts, volunteered to ship Claimant available wheat immediately, if Claimant so desired (Exhibit 9).

On **31 March 2009**, Claimant informed Respondent via email that it refused to let Claimant out of the contract and requested that Respondent deliver the April shipment early (Exhibit 10).

On **5 April 2009**, Respondent informed Claimant via email that it would ship available wheat ("what we have") and repeated that government privatization of the port made it impossible for Respondent to continue executing the contract (*See* Exhibit 11). Respondent also stated that it would not compensate Claimant for the drop in spot price, since Claimant had explicitly requested the March 18 shipment date (Exhibit 11).

On **30 April 2009**, Claimant informed Respondent via letter that it had received the April shipment, but complained that the protein quality content of the wheat in the shipment was only 11%. Furthermore, Claimant continued to insist that Respondent maintain the contractual relationship, but expressed that Claimant was already in discussions with another supplier (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 a required quality (Exhibit 13).

On **20 May 2009**, Respondent and Claimant participated in negotiations to resolve their dispute at the airport in Lobe City, Id, which were unsuccessful. Later that day, Claimant informed Respondent via letter that Claimant would initiate arbitration proceedings against Respondent in Id for 1) 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 responded to Claimant via letter 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) that the seat of arbitration should be Ego (Exhibit 15).

ARGUMENTS

I. HKIAC HAS JURISDICTION OVER THE DISPUTE

Respondent's website contains an Arbitration Clause, which Claimant agreed to via letter (Exhibit 1). This Arbitration Clause designates Hong Kong International Arbitration Centre ("HKIAC") rules as the guidelines for any dispute regarding the *quality* of wheat or as to *shipping* (emphasis added). The MOU does not mention any specific quality terms and hence the ADR clause of the MOU does not apply to the current disputes regarding 1) quality and 2) possibility of shipment. For this reason, HKIAC rules, not the China International Economic and Trade Arbitration Commission ("CIETAC") rules mentioned in the MOU, govern the current dispute.

1.1 Even if CIETAC has jurisdiction, the venue for arbitration should not be Id

In the event that CIETAC has jurisdiction over the current dispute, the venue for arbitration should not be Id since the language of the ADR clause of the MOU does not specify a venue for Arbitration. CIETAC Arbitration Rules state that when the parties have not agreed on the place of arbitration the venue for the arbitration should be the domicile of CIETAC or its Sub-Commission, which is *not* Id (*See* CIETAC Arbitration Rules Article 31).

II. CLAIMANT, NOT RESPONDENT, BREACHED THE CONTRACT

2.1. Respondent Met the Quality Obligations and is Due Full Compensation

Respondent agreed to use its best efforts to provide Claimant with quality Ego wheat. Respondent did not contract to provide any specific quality of wheat. The MOU does not

require, and the parties' correspondence does not reflect, any set quality requirement. As noted in a letter from Respondent to Claimant dated **6 March 2009** (Exhibit 7), Ego traditionally has wheat of a protein content ranging from ten to twelve percent, and Respondent's supplied wheat was actually at the higher end of the spectrum. Had Respondent been contracting for specific quality, there obviously would have been a provision stating that, if the quality of Ego wheat was unacceptable, Respondent would have to cure with adequate wheat from elsewhere. The absence of such a clause is telling. Moreover, in the absence of a material term, such as quality, Unidroit Principles of International Commercial Contracts ("PICC") insert a term "appropriate to the circumstances" (*See* PICC §4.8(1)). Specifically, where a quality term is omitted, PICC requires that performance be both reasonable and not below average (*See* PICC §5.1.6). From the written communication between the parties, it is clear that Respondent consistently exercised his best efforts to provide Claimant with high quality wheat of at least an average protein content of 11.5% (*See* Exhibit 7). Furthermore, Claimant has never alleged, nor does the record reflect, that Respondent has ever provided below average quality grain. Moreover, even if 11.5% average protein quality wheat was required, Respondent met this requirement in all but the latest shipment, whose unique circumstances would reduce any quality expectations (*See* PICC §§4.8(1), 5.1.6).

Since the appropriateness of a term is based upon surrounding circumstances, the exceptional exigencies of this last shipment must be considered (*See* PICC §5.1.2). In light of the impossibility of Respondent's use of the main Ego port and Claimant requesting a much earlier delivery date, a lower quality shipment was only reasonable, particularly one with such a small deviation of .5%. Claimant does not suggest, nor is there any evidence to support the assertion,

that Respondent supplying 11% average protein content wheat was below average or an unreasonable quality of wheat. Respondent told Claimant well in advance of shipment that, in light of the situation, he would ship "what we have." The very fact that Claimant accepted and used the shipment is prima facie evidence that it was acceptable, at least under the circumstances. Accordingly, Respondent has not breached any quality obligations. Claimant, on the other hand, in failing to pay for the last shipment, breached his contractual obligation to pay Respondent for all shipments.

2.2 Impossibility Excuses Respondent from Performing beyond the April 2009 Shipment. When there is an impediment beyond a party's control and it is not reasonable for the party to have taken the impediment into account at the time of the conclusion of the contract, that party may be excused from its non-performance (PICC §7.17.1). Reasonably foreseeable events are those that a contracting party experienced in the past from its course of a long-standing activity in certain sectors or industries (Centro de Arbitraje de Mexico, 30 November 2006). For example, a party in the agricultural industry should foresee meteorological phenomenon that it has experienced in past dealings (*Ibid*.).

Here, it was impossible for Respondent to ship the grains because the government privatized the grain handling facilities in the main port allowing only *one* company, who won the auction, to export grain from the port. Respondent exercised its best efforts to meet the requirements in the contract by bidding in the auction for the main port. Unfortunately, Respondent lost the bid. However, Respondent could not have controlled the results of the auction because it is not possible to predict how the other companies would bid. In addition, there is no evidence that

Respondent's bidding price was unreasonable or low. In fact, before the government decided to auction the rights, they had put them to tender, and Respondent's offer had been among the top five tenders in the nation (Exhibit 9). Thus, the impediment was indubitably beyond Respondent's control.

Moreover, it would have been impractical and financially impossible for Respondent to ship from the smaller port. Obviously, competition for usage would be uncharacteristically high as all other losing bidders would suddenly be vying for use of the smaller port. In addition, the loading equipment and the wharf facilities at the small port are of demonstrably lower quality than those of the main port (*See* Clarifications).

2.3 Claimant was Responsible for Labeling the Containers in English

Respondent claims that under the MOU, the contract was deliberately vague as to who was required to mark the containers (Exhibit 5). The MOU explicitly provides that the containers be "marked in English only," and does not mention who is responsible for actually marking the containers.

Under PICC §4.8(b), when a contract omits a term, the parties will then be bound by good faith and usage requirements. Usages and practices, as defined in PICC §1.9(2), are things widely known and regularly observed in international trade by parties in a particular trade, except where the application of such a usage would be unreasonable. Here, Respondent and Claimant are both international dealers in wheat, and it would not be unreasonable to expect Claimant to affix the

English labels, as evidenced by the fact that a) Customs does not even *allow* for Respondent to affix English labels and b) all other merchants in this industry typically follow that practice.

REQUEST FOR RELIEF

Respondent respectfully requests that the Tribunal find:

1. HKIAC has jurisdiction over the dispute, and the venue of arbitration should not be Id.

2. The claim should be dismissed and Claimant should pay Respondent for the last shipment.