
**SECOND ANNUAL
INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION
MOOT COMPETITION**

MEMORANDUM FOR CLAIMANT

On behalf of:

Peng Importing Corporation

Against:

Freud Exporting Corporation

TEAM NO. 391

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INDEX OF ABBREVIATIONS

Abbreviation	Citation
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Clause	ADR Clause in Exhibit 5
CLAIMANT	Peng Importing Corporation
FOB	Free On Board
HKIAC	Hong Kong International Arbitration Centre
HKIAC Clause	Reproduction of Arbitration Clause of Exporting in Exhibit 2
MoU	Memorandum of Understanding
Parties	CLAIMANT and RESPONDENT
PICC	UNIDROIT Principles of International Commercial

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Contracts, 2004

RESPONDENT Freud Exporting Corporation

INDEX OF AUTHORITIES

Abbreviation	Citation	Cited in
Conventions, Laws and Rules		
<i>CIETAC rules</i>	CIETAC Arbitration Rules	1, 2, 15
<i>CISG</i>	United Nations Convention On Contracts For the International Sale of Goods (1980)	12
<i>New York Convention</i>	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958	1
<i>Off Cmt</i>	Official Comment to the PICC (UNIDROIT, 2004)	3
<i>PICC</i>	UNIDROIT Principles of International Commercial Contracts, 2004	3-13
Books, Articles and Restatements		
<i>Brunner,</i> pp.160, 168, 332, 340, 344,	Brunner, C., <i>Force Majeure and Hardship under General Contract Principle</i> , Wolters Kluwer 2009	6, 7, 9

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CAM Award Centro de Arbitraje de Mexico, Arbitral Award, 30 **9**
November 2006

Corte Award Corte arbitrale nazionale ed internazionale di Milano, **5**
Arbitral Award, March 2008

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<i>Costa Rican Award</i>	Arbitration Centre of the Costa Rican Chamber of Commerce, Arbitral Award, 1 June 2003	5
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<i>Lausanne Award</i>	Arbitration Court of the Lausanne Chamber of Commerce and Industry, 25 January 2002	10
<i>Soufflet Negoce S.A.</i>	<i>Soufflet Negoce S.A. v Bunge S.A.</i> [2010] EWCA Civ 1102	12
<i>V. Pérez Vargas-D. Pérez Umana</i>	Arbitration Centre of the Costa Rican Chamber of Commerce, [2006] ULR 181	5

ARGUMENTS ON JURISDICTION

I. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE UNDER CIETAC RULES

The Tribunal has jurisdiction to hear this dispute because: (A) the CIETAC Clause is *the* valid arbitration agreement between the Parties; (B) the pre-arbitral requirement is satisfied; and (C) RESPONDENT rejected the HKIAC Clause.

A. The CIETAC Clause is *the* valid arbitration agreement between the Parties

(a) The CIETAC Clause is independent from the rest of the MoU

According to the principle of separability [*Redfern/Hunter* p.116], an arbitration clause in a contract is considered to be separate from the rest of the contract [*Mistelis* p.521]. Therefore, the CIETAC Clause, albeit contained in the MoU, should be treated as independent and separate from the rest of the MoU. The validity of the CIETAC Clause is not affected by any modification, rescission, termination, invalidity, ineffectiveness, revocation or non-existence of the underlying sales contract between the Parties [Article 5(4) *CIETAC rules*].

(b) Parties negotiated, agreed and signed on the CIETAC Clause

Parties negotiated in the Island of Sun where they drew up the CIETAC Clause together [Exhibit 4]. In particular, Parties agreed and signed on the CIETAC Clause [Exhibit 5], which satisfied all the requirements of a valid arbitration agreement [Article 5(3) *CIETAC rules*; Article II(2) *New York Convention*].

(c) Parties intended to resolve any dispute under the CIETAC rules

Parties intended to submit ‘any dispute...including counterclaims ...by arbitration in accordance with the CIETAC rules’ [Exhibit 5]. Once Parties agreed to arbitration under *CIETAC rules*, they are deemed to have agreed to refer their disputes to arbitration administered by CIETAC [Article 4(3) *CIETAC rules*].

As CIETAC was satisfied that an arbitration agreement providing for arbitration at CIETAC did exist [Exhibit 15], this tribunal already had *prima facie* jurisdiction over the dispute [Article 6(2) *CIETAC rules*]. Thus, the arbitration should proceed according to *CIETAC rules* [Article 6(4) *CIETAC rules*]. The burden is on RESPONDENT to object to CIETAC and establish that this tribunal does not have jurisdiction [Article 6(2) *CIETAC rules*].

B. The pre-arbitral requirement is satisfied

The CIETAC Clause requires that ‘any disputes in relation to the agreement must be resolved in good faith by both Chief Executive Officers of both companies’ before submitting to CIETAC arbitration [Exhibit 5]. By sending its CEO to Id to negotiate with CLAIMANT on May 20, 2009 [Clarification 17], RESPONDENT effectively activated the CIETAC Clause on May 10, 2009 [Exhibit 13]. Although the negotiation was unsuccessful [Exhibit 14], the pre-arbitral requirement was satisfied. Thus, Parties should proceed to CIETAC arbitration.

C. The HKIAC Clause is not operative

(a) The HKIAC Clause was not sufficiently definite

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The HKIAC Clause advertised on RESPONDENT's website was a mere invitation to offer [Exhibit 2]. It is not sufficiently definite [Article 2.1.2 *Off Cmt 1 PICC*] because it does not specify which of the arbitration rules of the HKIAC would apply. HKIAC arbitration can be conducted under the UNCITRAL Arbitration Rules, the HKIAC Administrated Arbitration Rules or any other HKIAC rules.

(b) The HKIAC Clause does not indicate any intention of RESPONDENT to be bound

HKIAC Clause does not indicate any intention of RESPONDENT to be bound by it upon acceptance [Article 2.1.2 *Illustration 2 PICC*]. In fact, RESPONDENT rejected the HKIAC Clause by conduct [Article 2.1.11(1) *PICC*]. RESPONDENT invited CLAIMANT to further negotiate the contract in Island of Sun [Exhibit 3]. As a result of the negotiation, RESPONDENT rejected the HKIAC Clause by agreeing and signing on the CIETAC Clause contained in the MoU [Exhibit 5].

(c) The HKIAC Clause is contrary to Parties' common intention

It is Parties' common intention to submit *all* disputes to CIETAC arbitration [Exhibit 5]. The HKIAC Clause, on the other hand would lead to artificial 'fragmentation of their disputes' [*Film Finance*] and cause further delays and waste of time and cost. Therefore, the tribunal should adopt a pragmatic approach [*Fiona Trust*] to resolve all disputes under the CIETAC Clause.

CONCLUSION ON JURISDICTION

This tribunal has jurisdiction over the dispute and should proceed to hear the merits.

ARGUMENTS ON THE MERITS

**II. RESPONDENT BREACHED THE CONTRACT BY NOT SUPPLYING
WHEAT OUT OF ANY PORT**

RESPONDENT breached the contract by not supplying wheat out of any port because: (A) RESPONDENT is obliged to ship out of any port and it breached the contract by failing to do so; (B) RESPONDENT's non-performance cannot be excused on the ground of impossibility of supply out of the main port; and (C) RESPONDENT's non-performance cannot be excused on the ground of impossibility of supply out of the second port.

**A. RESPONDENT is obliged to ship out of any port and it breached the
contract by failing to do so**

(a) RESPONDENT breached an express term of the contract

It is an express term of the contract that RESPONDENT should supply wheat out of any port in Ego for three years from February 2009 to February 2012 [Exhibit 5]. RESPONDENT has failed to ship out of any port since April 30, 2009 [Exhibit 12]. This is a fundamental non-performance of its main obligation [Articles 7.1.1, 7.3.1 PICC].

(b) RESPONDENT breached the duty of good faith and the duty to cooperate

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PICC imposes on RESPONDENT a mandatory duty of good faith [Article 1.7 *PICC*] and a duty to cooperate with CLAIMANT [Article 5.1.3 *PICC*]. RESPONDENT did not use its best efforts to continue to ship from the main port; neither did RESPONDENT try to use the second port [Clarification 5; *Costa Rican Award*]. Further, *PICC* requires that RESPONDENT should cooperate with CLAIMANT by shipping from the second port, especially after RESPONDENT failed to ship from the main port [*Vogenaue/Kleinheisterkamp*, p.542; *Corte Award*]. Thus, RESPONDENT breached the duty of good faith and duty to cooperate.

(c) Further and alternatively, RESPONDENT breached the duty of best efforts to obtain permission to export

PICC imposes on RESPONDENT a duty of best efforts to obtain any public permission affecting its performance [Article 6.1.14 *PICC*]. RESPONDENT failed to take necessary measures to obtain the right to export [*V. Pérez Vargas - D. Pérez Umana*, p.183]. RESPONDENT did not use its best efforts to bid a higher price to secure the right to export. The bidding price was well below average wheat prices and RESPONDENT would still have made a profit if it had increased its bid [Exhibit 10].

B. RESPONDENT's non-performance cannot be excused on the ground of impossibility of supply out of the main port

RESPONDENT's non-performance cannot be excused on the ground of impossibility of supply out of the main port, because: (a) RESPONDENT's non-performance was due to its losing the bid which was not an impediment beyond its control; (b) alternatively,

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RESPONDENT did foresee and had taken into account the Ego government's privatization at the time of the conclusion of the contract; and (c) further and alternatively, RESPONDENT could have avoided and overcome the consequences of losing the bid [Article 7.1.7 PICC].

(a) RESPONDENT's non-performance was due to its losing the bid which was not an impediment beyond its control

To rely on impossibility of supply, RESPONDENT must first establish that its non-performance was 'due to an impediment beyond its control' [Article 7.1.7(1) PICC; Brunner, p.340]. RESPONDENT's non-performance was due to its losing the bid for the right to export from the main port. RESPONDENT was invited to participate in the bidding [Background ¶3] and had control over its bidding price. RESPONDENT 'would still have made a profit if increasing its bid' because the auction price was 'well below average wheat prices' [Exhibit 10].

(b) Alternatively, RESPONDENT did foresee and had taken into account the Ego government's privatization of the main port at the time of the conclusion of the contract

The right to transport wheat out of the main port was put to tender in late 2008 [Background ¶¶3, 4, Exhibit 9]. RESPONDENT could reasonably be expected to foresee or have taken the Ego government's privatization into account when it entered into the contract with CLAIMANT in 2009 [Exhibit 1; Brunner p.160; Bulgarian Arbitral

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Award]. Further, RESPONDENT could reasonably be expected to foresee the consequences of its losing the bid [Article 7.1.7 PICC].

(c) Further and alternatively, RESPONDENT could have avoided and overcome the consequences of losing the bid

RESPONDENT was one of the top five domestic tenders and had the capability to win the bid [Exhibit 9]. RESPONDENT could have avoided losing the bid by increasing its bidding price [Article 7.1.7(1) PICC]. Moreover, RESPONDENT could have avoided losing the bid by entering into arrangements with CLAIMANT [Exhibit 10; *Brunner* p.485]. RESPONDENT breached the duty of good faith and the duty to cooperate [Articles 1.7, 5.1.3 PICC] by failing to disclose the existence of the bidding to CLAIMANT.

RESPONDENT could also have overcome the consequences of losing the bid [Article 7.1.7(1) PICC]. Although RESPONDENT contacted the wheat handling authority, it failed to reach an arrangement to continue supplying out of the main port to CLAIMANT [Exhibit 11]. RESPONDENT could and should have negotiated with the winning bidder and attempted to persuade it to take over the contract. More importantly, RESPONDENT could have overcome the consequences by shipping wheat out of the second port [Exhibit 12]. Having lost the bid due to its own actions, RESPONDENT was under a duty of good faith and a duty to cooperate to seek whatever substitute arrangements and other means to continue the supply of wheat to CLAIMANT [*Brunner*, p.332].

C. RESPONDENT's non-performance cannot be excused on the ground of impossibility of supply out of the second port

RESPONDENT's non-performance cannot be excused on the ground of impossibility of supply out of the second port, because: (a) there was no impediment that prevented RESPONDENT from shipping out of the second port; (b) alternatively, RESPONDENT knew the situation of the second port at the time of the conclusion of the contract; and (c) RESPONDENT failed to give any notice to CLAIMANT.

(a) There was no impediment that prevented RESPONDENT from shipping out of the second port

Whatever prevented RESPONDENT from shipping out of the main port did not prevent it from shipping out of the second port. The second port is still open to all shipping; hence, it is not impossible for RESPONDENT to supply wheat out of the second port [Exhibit 12, Clarification 7]. RESPONDENT's obligation to ship out of the second port cannot be excused on the ground of inconvenience [Background ¶2, Clarification 5; Article 7.1.7(1) *PICC*].

(b) Alternatively, RESPONDENT knew the situation of the second port at the time of the conclusion of the contract

Knowing the situation of the second port, RESPONDENT explicitly agreed to ship 'out of any port in Ego' including the second port [Background ¶3, Exhibit 5]. The situation of the second port has not been changed since RESPONDENT entered into the contract.

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RESPONDENT had foreseen the situation of the second port at the time of the conclusion of the contract. It is reasonable to expect that RESPONDENT will ship out of the second port. RESPONDENT breached the duty of good faith and the duty to cooperate by failing to ship out of the second port, especially after it lost the right to ship from the main port [Articles 1.7, 5.1.3 *PICC*].

(c) RESPONDENT failed to give any notice to CLAIMANT

RESPONDENT failed to serve any notice on or give any explanation to CLAIMANT about any impediment or its effect on RESPONDENT's ability to supply out of the second port [Exhibit 12; *Brunner* p.344; *CAM Award*]. Under *PICC*, even if RESPONDENT could establish all the conditions set out in (a) and (b) above, RESPONDENT could not be excused on the ground of impossibility of supply, because it failed and continues to fail to give an effective notice [Article 7.1.7(3) *PICC*].

Moreover, RESPONDENT also breached the duty of good faith and the duty to cooperate by not giving notice or any explanation of its non-performance to CLAIMANT [Articles 1.7, 5.1.3 *PICC*]. RESPONDENT 'cannot rely on *self-induced*' impossibility of supply [*Brunner*, p.168].

III. RESPONDENT BREACHED THE CONTRACT BY SUPPLYING NON-COMFORMING GOODS

A. RESPONDENT is obliged to supply wheat with specific quality requirements

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CLAIMANT contracted for two specific quality requirements [Exhibit 1]: (1) the average protein of the wheat must be at least 11.5%; (2) there must be a mix of 13% with 12% and 10.5% protein wheat. RESPONDENT accepted these specific quality requirements as the ‘correct quality’ stated in the MoU [Article 2.1.6(1) *PICC*], failing any of which is a non-performance [Article 7.1.1 *PICC*].

Further and alternatively, RESPONDENT accepted the above quality requirements by conduct [Article 2.1.6(3) *PICC*]. RESPONDENT had never questioned those quality requirements. Instead, RESPONDENT confirmed their understanding and acceptance of the quality requirements by supplying conforming wheat in its first shipment [Exhibit 6; Article 4.3 *PICC*; *Lausanne Award*]. CLAIMANT reiterated the agreed quality requirements after receiving the first shipment [Exhibit 6]. RESPONDENT did not object [Exhibit 7]. Further, CLAIMANT stressed that any deviation from the agreed quality requirements would not be accepted [Exhibit 8]. Again, RESPONDENT did not object [Exhibit 9]. Only after RESPONDENT decided to cancel the contract [Exhibit 11], did it raise the objection to the quality requirements for the very first time [Exhibit 13].

B. RESPONDENT breached the contract by supplying non-conforming wheat in the second shipment

The second shipment did not conform because it failed to satisfy the quality requirement of a mix of 13% with 12% and 10.5% protein wheat [Exhibit 8]. RESPONDENT’s second shipment was a defective performance, which constituted a non-performance of

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the contract [Article 7.1.1 *PICC*; *Vogenauer/Kleinheisterkamp*, p.734]. As a result, CLAIMANT had to drop the prices [Exhibit 8]. RESPONDENT is liable for damages as a result of its breach regarding the second shipment [Article 7.4.1 *PICC*].

C. RESPONDENT breached the contract by supplying non-conforming wheat in the third shipment

The third shipment contained wheat with a protein level of 11% only [Exhibit 12]. It did not satisfy any of the quality requirements and constituted a non-performance [Article 7.1.1 *PICC*]. Moreover, having been warned of the non-conformity in the second shipment [Exhibit 8], RESPONDENT again shipped non-conforming wheat in the third shipment. RESPONDENT breached the duty of good faith and the duty to cooperate in the third shipment [*Vogenauer/Kleinheisterkamp*, p.169]. RESPONDENT is liable for damages as a result of its breach regarding the third shipment [Article 7.4.1 *PICC*].

IV. RESPONDENT BREACHED THE CONTRACT BY FAILING TO MARK THE CONTAINERS IN ENGLISH

A. RESPONDENT is obliged to mark the containers in English

RESPONDENT is obliged to mark the containers in English because: (a) RESPONDENT has the duty to mark the containers in English under the MoU; (b) further and

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alternatively, RESPONDENT has the duty to package the wheat according to CLAIMANT's requirement under the FOB term.

(a) RESPONDENT has the duty to mark the containers in English under the MoU

The MoU provides 'Packaging: containers marked in English' [Exhibit 5]. It is Parties' common intention that marking containers in English is part of RESPONDENT's packaging obligation [Article 4.1(1) *PICC*]. Reasonable persons of the same kind as Parties in the same circumstances would expect RESPONDENT, the seller, to package the wheat according to the contractual requirements as set out in the MoU [Article 4.1(2) *PICC*]. The *CISG* states, for example, 'the seller must deliver goods which are packaged in the manner required by the contract' [Article 35(1) *CISG*].

(b) Further and alternatively, RESPONDENT has the duty to package the wheat according to CLAIMANT's requirement under the FOB term

Parties agreed on the FOB shipping term [Exhibit 5]. International shipments typically use "FOB" as defined by *INCOTERMS* standards [*INCOTERMS (Preambles)*]. According to *INCOTERMS*, a FOB seller must provide in its own expense packaging, which is required for the transport of the goods [A9 FOB *INCOTERMS*; *Soufflet Negoce S.A.*].

B. RESPONDENT breached the contract by failing to mark any of the containers in English

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RESPONDENT's failure to mark any of the containers in English is a non-performance [Article 7.1.1 *PICC*]. As a result of RESPONDENT's breach of contract, CLAIMANT paid the translation cost of \$5,000 for the first shipment [Exhibit 6] and customs fee of \$5,000 plus a penalty of \$10,000 for the second shipment [Exhibit 8]. Therefore, CLAIMANT is entitled to damages [Article 7.4.1 *PICC*].

C. Further and alternatively, RESPONDENT breached the duty of good faith and the duty to cooperate by failing to correct the wrong markings in the second and third shipments

PICC imposes on RESPONDENT a mandatory duty of good faith and a duty to cooperate throughout 'all phases of the life of a contractual relationship' [Vogenauer/Kleinheisterkamp, p.169]. CLAIMANT notified RESPONDENT about the consequence of RESPONDENT's failure to mark the first shipment in English [Exhibit 6]. Having agreed to endeavour to mark the containers in English [Exhibit 7], RESPONDENT repeatedly failed to mark the containers in English for the second and third shipments [Exhibits 8, 14]. A reasonable person of the same kind in the same circumstances would at least attempt to mark the containers in both English and the Ego language [Article 5.1.4(2) *PICC*; Vogenauer/Kleinheisterkamp, p.545].

Further, RESPONDENT failed to give any notice of its failure to mark the containers in English before shipping the second and the third shipments. Had RESPONDENT notified CLAIMANT in advance, CLAIMANT could have made necessary arrangement to avoid

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the second and third infringements. RESPONDENT consistently breached its duty of good faith and the duty to cooperate with CLAIMANT [Articles 1.7, 5.1.3 *PICC*].

REQUEST FOR RELIEF

CLAIMANT respectfully requests the tribunal to find that:

- 1) The Tribunal has jurisdiction to hear this dispute under the *CIETAC rules*;
- 2) RESPONDENT breached the contract by not supplying wheat out of any port;
- 3) RESPONDENT breached the contract by supplying non-conforming wheat; and
- 4) RESPONDENT breached the contract by failing to mark the containers in English.