SECOND ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOT COMPETITION

MEMORANDUM FOR RESPONDENT

On behalf of:	**Against:**
Freud Exporting Corporation	**Peng Importing Corporation**

TEAM NO. 391

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INDEX OF ABBREVIATIONS

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 Med-Arb Clause	Reproduction of Arbitration Clause of Exporting in Exhibit 2
MoU	Memorandum of Understanding
Parties	CLAIMANT and RESPONDENT
RESPONDENT	Freud Exporting Corporation

INDEX OF AUTHORITIES

Abbreviation	Citation	Cited in
Conventions, Laws and Rules		
HKIAC Rules	Hong Kong International Arbitration Centre Arbitration Rules	
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006	
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention)	
PICC	UNIDROIT Principles of International Commercial Contracts, 2004	
FOB INCOTERMS 2000	International Chamber of Commerce (ICC) Guide to International Commerical Terms INCOTERMS 2000 (FOB)	

Books, Articles and Websites

Brunner, pp.133, 160,165, 213, 342	Brunner, C., *Force Majeure and Hardship under General Contract Principle*, Wolters Kluwer 2009
Casada/O'Brien	Casada, M.E. and O'Brien, K.L., '1998 ASAE International Meeting', *American Society of Agricultural Engineers* Vol. 19(2): 203–209
Lew/Mistelis/Kröll p.129	Lew, J.D., Mistelis, L.A., Kröll, S.M., *Comparative International Commercial Arbitration*, The Hague: Kluwer Law International 2003
Miao/Hennessy	Miao Ruiqing and Hennessy, D.A, 'Economic Value of Information: Wheat Protein Measurement', *Agricultural & Applied Economics Association's 2011 AAEA & NAREA Joint Annual Meeting*, Pittsburgh, Pennsylvania, July 24-26, 2011
Redfern/Hunter, p.116	Redfern, et al, *Redfern and Hunter on International Arbitration*, Oxford University Press, 2009
Vogenauer/ Kleinheisterkamp, pp.204, 207, 498	Vogenauer, S., Kleinheisterkamp, J., *Commentary on the UNIDROIT Principles of International Commercial Contract (PICC)*, Oxford University Press 2009
Miller/Jentz, pp.270-272	Miller, R.L, Gaylord A.J, *Fundamentals of Business Law: Excerpted Cases*, 2nd edition, South-Western, Cengage Learning 2009

Cases and Arbitral Awards

ARGUMENTS ON JURISDICTION

I. THE TRIBUNAL HAS NO JURISIDICTION OVER THE DISPUTE

The Tribunal has no jurisdiction over the dispute because: (A) the CIETAC Clause does not apply but the HKIAC Med-Arb Clause does; (B) the pre-arbitral mandatory mediation has not been conducted; and (C) alternatively, conflicting arbitration rules are void and Parties should resort to *ad hoc* arbitration with the seat of arbitration in Ego.

A. The CIETAC Clause does not apply but the HKIAC Med-Arb Clause does

(a) The HKIAC Med-Arb Clause is a valid and independent arbitration agreement

The HKIAC Med-Arb Clause, although published on RESPONDENT's website [Exhibit 2], constitutes an offer [*Miller/Jentz*, pp.270-272]. It is sufficiently definite as it designates Hong Kong as the seat of arbitration [Exhibit 2]. It also indicates RESPONDENT's intention to be bound upon acceptance [Article 2.1.2 *PICC*]. The offer was accepted by CLAIMANT in writing [Exhibit 1]. Upon CLAIMANT's acceptance of the HKIAC Med-Arb Clause, a valid arbitration agreement was formed [Article 2.1.1 *PICC*]. Further, the HKIAC Clause also satisfies the form requirement of a valid arbitration agreement [Article II *NYC*; Article 7 *Model Law*].

According to the doctrine of separability, an arbitration agreement is independent from the rest of the contract [*Lew/Mistelis/Kröll*, pp.135-138; *ICC Award 8938*]. The HKIAC Med-Arb Clause is in the form of a separate agreement by way of exchange of letters and electronic communications [Article II *NYC*; Article 7 *Model Law*]. Any disputes over the existence, validity or terms of the underlying sales contract would not affect the validity of the HKIAC Med-Arb Clause [*Redfern/Hunter*, p.116].

(b) The HKIAC Med-Arb Clause applies to the current dispute

(i) The HKIAC Med-Arb Clause must apply to disputes in relation to quality and shipping

The HKIAC Med-Arb Clause provides that '[a]ny disputes in relation to the quality… and… shipping must be resolved … using the HKIAC Arbitration rules' [Exhibit 2]. The word "*must*" imposes a mandatory obligation on both Parties. By contrast, the CIETAC Clause adopts the word "*may*" [Exhibit 5], which indicates only an option to arbitrate under CIETAC rules. By adopting the word "*may*", Parties have explicitly deviated from the recommended CIETAC model arbitration clause. Therefore the common intention of the Parties is not to use CIETAC rules as the sole arbitration rules [Article 4.1 *PICC*].

Further, the optional CIETAC Clause cannot apply to the current dispute regarding quality and shipping. The two arbitration clauses must be interpreted as a whole [Article 4.4 *PICC*], and interpreted in a way that can give effect to both clauses [Article 4.5 *PICC*].The existence of a prior agreement on HKIAC Med-Arb Clause has carved out those disputes over shipping and quality. Therefore, Parties intended to

submit those disputes regarding quality and shipping exclusively to arbitration at the HKIAC [Exhibit 2].

(ii) The current dispute is in relation to quality and shipping

Parties disputed on (1) whether RESPONDENT could continue shipping wheat out of Ego; (2) whether the quality of the wheat supplied by RESPONDENT is conforming to the contract; and (3) whether RESPONDENT has an obligation to label the shipment in English [Exhibits 14, 15]. All of these issues are in relation to quality and shipping. Thus, the HKIAC Med-Arb must apply to the current dispute.

B. The pre-arbitral mandatory mediation has not been conducted

The HKIAC Med-Arb Clause imposes a pre-arbitral obligation to resolve any disputes through mediation [Exhibit 2]. Since the pre-arbitral mandatory mediation has not been conducted yet, the arbitration agreement should not be activated [*Him Portland LLC*].

C. Alternatively, conflicting arbitration rules are void and Parties should resort to *ad hoc* arbitration with the seat of arbitration in Ego

(a) Alternatively, conflicting arbitration rules are void

If the tribunal finds that the HKIAC rules and the CIETAC rules are in direct conflict with each other and they should be void due to uncertainty [*Lew/Mistelis/Kröll*,

p.154], RESPONDENT's alternative position is that the Parties are deemed to have no agreement on arbitration rules.

(b) Parties should resort to ad hoc arbitration with the seat of arbitration in Ego

Even if the HKIAC rules and CIETAC rules are rendered void due to conflicting provisions, Parties' common intention to resort to arbitration is clear and certain [Exhibits 1, 2, 5; *Fiona Trust*]. In the absence of agreed arbitration rules, Parties should resort to *ad hoc* arbitration [*Lucky-Goldstar International (HK) Ltd*]. Thus, RESPONDENT's alternative position is that the tribunal should proceed as an *ad hoc* arbitration.

Further, the seat of the *ad hoc* arbitration would be Ego. Ego is a *Model Law* jurisdiction [Background ¶5]. According to the *Model Law*, in the absence of Parties' agreement, the place of arbitration should be determined by the arbitral tribunal [Article 20(1) *Model Law*]. In the case at issue, the shipments took place in Ego and the dispute concerns the conditions of the ports in Ego. Having regard to the circumstances of the case, including the convenience of hearing the witness and experts for the wheat trade in Ego [Article 20(1) *Model Law*], RESPONDENT submits that the seat of arbitration should be Ego.

CONCLUSION TO JURISDICTION

The tribunal has no jurisdiction over the dispute.

ARGUMENTS ON THE MERITS

II. RESPONDENT'S NON-PERFORMANCE IS EXCUSED ON THE GROUND OF FORCE MAJEURE

RESPONDENT's non-performance is excused on the ground of force majeure because: (A) the Ego government's prohibition of exporting was an impediment beyond RESPONDENT's control; (B) the impediment was unforeseeable; and (C) overcoming the impediment would be an unreasonable burden on RESPONDENT; and (D) RESPONDENT had given prompt and effective notice to CLAIMANT.

A. The Ego government's prohibition was an impediment beyond RESPONDENT's control

RESPONDENT's non-performance is excused because there was an impediment that prevented its performance [Art 7.1.7 *PICC*]. The Ego government's prohibition of RESPONDENT from exporting wheat was an impediment because it was an external event and it was outside of RESPONDENT's control [Art 7.1.7(1) *PICC*; *Brunner*, p.133].

It was the Ego government that prohibited RESPONDENT from exporting wheat out of any port in Ego [Background ¶3]. RESPONDENT could not continue supplying to CLAIMANT because the Ego government compelled RESPONDENT to supply wheat only to the grain handling authority [Exhibit 9]. The impossibility of supply was outside the control of RESPONDENT from an objective perspective [*Congimex*

Companhia General].

B. The impediment was unforeseeable

RESPONDENT did not foresee the Ego government's prohibition of RESPONDENT from exporting out of any port. In late 2008, when the right to transport wheat out of the main port was put to tender, RESPONDENT was one of the top five domestic tenders [Exhibit 9]. Thus, at the time of the conclusion of the contract in early 2009, RESPONDENT reasonably believed that it could fulfill its contractual obligations [Article 7.1.7(1) *PICC*; *Brunner,* p.160]. The fact that RESPONDENT could only supply to the grain handling authority came to light on 27 March 2009 [Exhibit 9]. RESPONDENT could not reasonably be expected to foresee the impossibility of supply due to the Ego government's prohibition of RESPONDENT from exporting out of any port in Ego.

C. The impediment could not reasonably be expected to be avoided or overcome

The Ego government wanted to allow only one company to export grain, in order to guarantee an export quota [Background ¶3]. The Ego government's prohibition of RESPONDENT from exporting wheat out of any port was unavoidable. RESPONDENT can only supply to the grain handling authority [Exhibit 9]. RESPONDENT had used its best effort in good faith by approaching the grain handling authority [*Brunner*, p.165], but they refused to take over the contract [Exhibit 11]. It was impossible for RESPONDENT to arrange a substitute

performance and the impediment to performance was insurmountable [*International Paper*]. RESPONDENT would only be able to continue shipping at the price of going against the Ego government's prohibition, to overcome which would be excessively onerous and unreasonable [*Brunner*, pp.165, 213].

D. RESPONDENT gave prompt and effective notice to CLAIMANT

RESPONDENT gave notice to CLAIMANT on 28 March2009, the day immediately after the Ego government's prohibition was revealed to RESPONDENT [Exhibit 9]. RESPONDENT gave notice of the Ego government's prohibition and the effect on its ability to perform. The notice served by RESPONDENT was prompt and effective [Article 7.1.7 *PICC*; Brunner p.342]. Therefore, RESPONDENT can rely on impossibility of supply to excuse its non-performance.

III. RESPONDENT HAD CONSISTENTLY SUPPLIED CONFORMING WHEAT

RESPONDENT did not breach the quality requirement because: (A) CLAIMANT's quality requirement was not accepted by RESPONDENT; (B) alternatively, CLAIMANT's interpretation of 'correct quality' in the MoU was unreasonable; and (C) RESPONDENT had consistently supplied conforming wheat for all the three shipments.

A. CLAIMANT's quality requirement was not accepted by RESPONDENT

The quality requirement in Exhibit 1 was not an offer because it was not sufficiently definite [Article 2.1.2 *PICC*]. Although CLAIMANT stated it needed to mix 13% with 12% and 10.5% protein wheat to arrive at an average of 11.5% protein, it did not specify how to mix wheat of those protein contents [Exhibit 1]. Moreover, there are unlimited formulas for mixing wheat with different protein levels to reach an average of 11.5% protein. Thus, CLAIMANT's the quality requirement was too vague and uncertain to amount to a valid offer.

Alternatively, RESPONDENT had not accepted CLAIMANT's quality requirement. Silence or inactivity does not amount to acceptance [Article 2.1.6(1) *PICC*]. In replying to CLAIMANT's letter [Exhibit 1], RESPONDENT only assented to the 'required quantity' [Exhibit 3]. Parties did not specify any quality requirement in the MoU [Exhibit 5].

B. Alternatively, CLAIMANT's interpretation of 'correct quality' in the MoU was unreasonable

CLAIMANT's interpretation of 'correct quality' referred to in the MoU was unreasonable because: (a) CLAIMANT's interpretation was contrary to Parties' common intention; and (b) alternatively, CLAIMANT's interpretation was objectively unreasonable.

(a) CLAIMANT's interpretation was contrary to Parties' common intention

The 'correct quality' should be interpreted in accordance with the common intention of Parties [Article 4.1(1) *PICC*; *ICC Award 8223*]. In determining Parties' common intention, all the circumstances, including preliminary negotiation, should be taken into account [Article 4.3 *PICC*; *Vogenauer/Kleinheisterkamp*, p.498]. The preliminary negotiation showed that RESPONDENT agreed only to the "*quantity*", but left the issue of *quality* open for further negotiation in the Island of Sun [Exhibit 3; Article 4.3 *PICC*].

(b) Alternatively, CLAIMANT's interpretation was objectively unreasonable

In the absence of any common intention, the 'correct quality' should be interpreted according to 'the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances' [Article 4.1(2) *PICC*; *Reardon-Smith Line Ltd*]. There are unlimited ways of mixing wheat of different protein to reach an average of 11.5% protein. CLAIMANT's asserted requirement of mixing 13% with 12% and 10.5% was a mere example. Even if CLAIMANT indicated that it needed to mix the above three particular protein wheat, it failed to specify the exact formula of mixing the wheat [Exhibit 1]. A reasonable person in the same circumstances would not consider itself to be bound by the vague and uncertain quality requirement.

Therefore, the 'correct quality' in the MoU should refer to the only agreed quality requirement that the average protein level of the wheat must be at least 11.5% [Exhibit 1]. RESPONDENT's subsequent conduct of consistently supplying wheat

with an average of 11.5% protein further supported this interpretation [Article 4.3(c) *PICC*].

C. RESPONDENT had consistently supplied conforming wheat in all the three shipments

RESPONDENT did not breach the quality requirement because: (a) RESPONDENT consistently supplied wheat with an average of 11.5% protein in all the three shipments; (b) alternatively, CLAIMANT had accepted all the three shipments; and (c) further and alternatively, CLAIMANT could not act inconsistently.

(a) RESPONDENT consistently supplied wheat with an average of 11.5% protein in all the three shipments

RESPONDENT consistently supplied wheat with an average of 11.5% protein in all the three shipments, although CLAIMANT suggested that the average protein contents of the wheat supplied in the three shipments varied [Exhibits 6, 8, 12].

It is unclear whether CLAIMANT adopted the same protein measuring method as RESPONDENT. Differences in protein measurements contribute to measurement inconsistencies. Generally, a variation between +/- 0.74% is expected [*U.S. International Trade Commission; Casada/O'Brien; Miao/Hennessy*].

Even if CLAIMANT adopted the same protein measuring method as RESPONDENT, the deviation of 0.5% in the third shipment was not only still within CLAIMANT's

acceptable range [Exhibit 1] but also should be considered reasonable in the wheat trade [Article 1.9 *PICC*]. Therefore, according to this usage, RESPONDENT did consistently supply wheat with an average of 11.5% protein in all the three shipments.

(b) Alternatively, CLAIMANT had accepted all the three shipments

In any event, CLAIMANT accepted that the first two shipments both contained wheat with an average of 11.5% protein and did not reject them [Exhibits 6, 8]. Instead, CLAIMANT confirmed the first shipment as "acceptable" [Exhibit 6]. As to the second shipment, since Parties agreed on the spot price, RESPONDENT suffered no loss [Exhibit 8; *U.S. Wheat Associates Price Reports*]. Further, CLAIMANT did not reject the third shipment. Although CLAIMANT expressed its disappointment [Exhibit 12], it did not state any unequivocal rejection or give any notice of rejection to RESPONDENT [Article 1.10 *PICC*; *Vogenauer/Kleinheisterkamp,* pp. 204, 207]. Therefore, CLAIMANT is deemed to have accepted all the three shipments.

(c) Further and alternatively, CLAIMANT could not act inconsistently due to the principle of estoppel

(i) CLAIMANT caused RESPONDENT to believe that it had supplied conforming wheat

CLAIMANT could not act inconsistently with an understanding that it caused RESPONDENT to have in regard of the quality requirement [Article 1.8 *PICC*; *Vogenauer/Kleinheisterkamp,* p.186]. CLAIMANT caused RESPONDENT to believe

that CLAIMANT had consistently accepted wheat with an average of 11.5% protein only. Having accepted the first two shipments, CLAIMANT could not reject the wheat with the same quality for the third shipment.

(ii) RESPONDENT had acted in reliance to its detriment

RESPONDENT acted reasonably by shipping the wheat with the same quality in the third shipment, in reliance on the understanding that CLAIMANT accepted the first two shipments [Exhibit 11].

Alternatively, CLAIMANT caused RESPONDENT to believe that RESPONDENT had to ship to CLAIMANT 'what they have' on stock as soon as possible [Exhibit 11]. RESPONDENT acted in reliance to its detriment by sending the third shipment [Article 1.8 *PICC*]. CLAIMANT could not act inconsistently to reject the third shipment.

IV. RESPONDENT DID NOT BREACH THE CONTRACT BY NOT LABELLING THE CONTAINERS IN ENGLISH

RESPONDENT did not breach the contract by not labelling the containers in English because: (A) RESPONDENT had no duty to label the containers in English; (B) CLAIMANT was liable for all the expenses relating to import under the FOB term; (C) further and alternatively, CLAIMANT failed the duty to mitigate the harm.

A. RESPONDENT had no duty to label the containers in English

As the MoU did not stipulate that it was RESPONDENT's duty to label the containers in English [Exhibit 5], RESPONDENT did not have a contractual obligation to label the containers in English. On interpretation [Article 4.1 *PICC*], CLAIMANT has the duty to label the containers with 'property of Peng Corporation' [Exhibit 5]. CLAIMANT should have known that signage in Ego can only be done in Ego language pursuant to customs legislation and that normally importers change the signage in the bonded warehouse [Exhibit 15].

Further, under the FOB term, RESPONDENT, the seller's obligation ended when the wheat passed the ship's rail at the named port of shipment in Ego [A5 *FOB INCOTERMS 2000*]. CLAIMANT, the buyer, must bear all risks of loss of or damage to the goods from the time of transfer of risks [B5 *FOB INCOTERMS 2000*] in Ego.

B. CLAIMANT was liable for all the expenses relating to import under the FOB term

Under the FOB term, CLAIMANT, the buyer, is responsible for the import clearance and bear any costs and risks in connection with it [B2 *FOB INCOTERMS 2000*]. CLAIMANT must pay all costs relating to the goods from the time they have passed the ship's rail at the named port of shipment [B6 *FOB INCOTERMS 2000*]. All the expenses and costs occurred at the port of destination in Id are born by CLAIMANT [A6 *FOB INCOTERMS 2000*]. Therefore, CLAIMANT is obliged to bear the

translation costs of $5000, the customs fee of $5000 plus a penalty of $10, 000 as result of its infringements of the importing customs regulations in Id [Exhibits 6, 8].

C. Further and alternatively, RESPONDENT failed the duty to mitigate the harm

Further and alternatively, CLAIMANT is under a duty to mitigate its own loss [Article 7.4.8 *PICC*] CLAIMANT behaved passively and failed to take reasonable steps to avoid or reduce its loss. CLAIMANT could have changed the labels in the bonded warehouse to meet the customs legislations in Id [Exhibit 15]. RESPONDENT is not liable for harm suffered by CLAIMANT to the extent that the harm could have been reduced by the reasonable steps taken by CLAIMANT [Article 7.4.8 *PICC*].

V. COUNTERCLAIM: CLAIMANT IS LIABLE FOR THE PAYMENT OF THE LAST SHIPMENT

CLAIMANT failed to pay the last shipment to date [Exhibit 15]. This is a non-performance of its main contractual obligation [Article 7.1.1 *PICC*]. CLAIMANT is obliged to pay the closing spot price at the New York commodities exchange on day of receipt of wheat [Exhibit 5]. As CLAIMANT had received conforming wheat, RESPONDENT is entitled to the payment for the last shipment and the interests accrued [Article7.2.1 *PICC*].

REQUEST FOR RELIEF

RESPONDENT respectfully requests the tribunal to find that:

1) The tribunal has no jurisdiction over the dispute; and in the alternative the seat of arbitration would be Ego;
2) RESPONDENT's non-performance can be excused on the ground of impossibility of supply;
3) RESPONDENT consistently supplied conforming wheat in all the three shipments;
4) RESPONDENT had no obligation to label the containers in English;
5) CLAIMANT is liable for the payment of the last shipment.