

**THE SECOND INTERNATIONAL ADR MOOTING COMPETITION**

**HONG KONG - AUGUST 2011**

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**MEMORANDUM FOR CLAIMANT**

**Team Number: 429**

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## LIST OF ABBREVIATIONS

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\$	Dollar
AC	Appeal Cases (L.R)
ADR	Alternative Dispute Resolution
All E.R	All England Reporter
ALR	Australian Law Reports
Art.	Article
BLR	Business Law Review
&	And
Co	Company
Con. LR	Construction Law Reports
Ed	Edition
FCA	Federal Court of Australia
Inc	Incorporation
Ltd	Limited
MoU	Memorandum of Understanding
PICC	UNIDROIT Principles of International Commercial Contracts of 2004
QB	Queens Bench

Rep.	Reports
UML	UNCITRAL Model Law on International Commercial Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v.	versus
WLR	Weekly Law Reports
Ch	Chapter
CEO	Chief Executive Officer
ARB	Arbitration
ICSID	International Centre for Settlement of Investment Disputes

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*Bakri Navigation Co Ltd v. Owners of ship "Golden Glory" Glorious Shipping SA* [1991] 217 ALR 152, 169.

*Baron v. Sunderland Corporation* [1966] 1 All E.R. 349.

*Bolton v. Mahadeva* [1972] 2 All ER 1322.

*Cutter v. Powell* (1795) 101 All ER 573.

*Hobbs Padgett & Co (Reinsurance) Ltd v. JC Kirkland Ltd* [1969] Lloyd's Rep. 547.

*Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

*Incitec Ltd v. Alkimos Shipping Corporation* [2004] 206 ALR 558.

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*Mathind Ltd v. E Turner & sons Ltd* [1986] 23 Con LR.

*Société Franco Tunisienned'Armement v. Sidermar S.P.A.* [1960] 3 W.L.R. 701.

*Sumitomo Australia Ltd v. Alkimos Shipping Corporation* [2004] FCA 698.

*Sumpter v. Hedges* [1898] 1 QB 673.

*Tritonia Shipping Inc v. South Nelson Forest Products Corporation* [1966] Lloyd's Rep. 114.

*Tsakiroglou & Co Ltd v. Noble Thorl GmbH* [1962] AC 93.

## ARGUMENTS

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### ISSUE 1: THE TRIBUNAL HAS JURISDICTION AS RESPONDENT IS BOUND BY THE ADR CLAUSE

1. The tribunal has jurisdiction as the Respondent is bound by the ADR Clause: (1.1) the Parties are bound by the valid ADR Clause; (1.2) the Parties have mutually agreed to arbitrate any dispute by virtue of the ADR Clause; (1.3) the preconditions to arbitration have been fulfilled; and (1.4) the arbitration clause of exporting is superseded by the subsequent agreement between the Parties.

#### 1.1 THE PARTIES ARE BOUND BY THE VALID ADR CLAUSE

2. An arbitration agreement must be in writing<sup>1</sup> by the parties<sup>2</sup>, it however need not be detailed. In *Tritonia Shipping Inc v. South Nelson Forest Products Corporation*<sup>3</sup>, it was ruled that the phrase “settled by arbitration in London” was enough to constitute a valid arbitration agreement.
3. The Tribunal has jurisdiction over the dispute where there is a valid arbitration agreement which is in the form of an arbitration clause<sup>4</sup> which evidences that the arbitration agreement is valid and binding towards the parties.<sup>5</sup> Further, the Tribunal can arbitrate in commercial disputes where there is a valid arbitration agreement.<sup>6</sup>

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<sup>1</sup> Art. 7(2) of the UML on Arbitration; *Mathind Ltd v. E Turner & sons Ltd* [1986] 23 Con LR; *Aughton v. Kent* [1991] 57 BLR 1.

<sup>2</sup> Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, (3rd ed., 2003), Sweet & Maxwell, London, at 3-43.

<sup>3</sup> [1966] Lloyd’s Rep. 114.

<sup>4</sup> Art. II.2 of the NYC; Art. 7 of the UML on Arbitration.

<sup>5</sup> *Hobbs Padget & Co. (Reinsurance) Ltd v. JC Kirkland Ltd* [1969] Lloyd’s Rep. 537 at 549.

<sup>6</sup> Ambrose, *London Maritime Arbitration*, 2nd Ed. (London: Informa, 2003), 19.



4. The ADR clause of the MoU<sup>7</sup> evidences both parties' consent in written form as an arbitration agreement that would be enforceable in the event of any dispute arising between the Parties.
5. Thus, the ADR clause is a valid and binding arbitration agreement.

### **1.2 THE PARTIES HAVE MUTUALLY AGREED TO ARBITRATE ANY DISPUTE BY VIRTUE OF THE ADR CLAUSE**

6. "Mutuality" is necessary in an arbitration clause<sup>8</sup> as it refers to a meeting of the minds of both parties to designate arbitration as the method of dispute settlement. Such an accord and subsequent bilateral reference reflects the mutual intention to arbitrate.<sup>9</sup>
7. Each party has autonomy to select both the law and forum to resolve their disputes<sup>10</sup> since it is a core and backbone of arbitration.<sup>11</sup> In the present matter, the parties have mutually agreed to resolve any disputes on the basis of the ADR Clause evidenced in the MoU.

### **1.3 THE PRECONDITIONS TO ARBITRATION HAS BEEN FULFILLED.**

8. The ADR Clause in the MoU states that: "Any disputes in relation to this agreement must be resolved in good faith by both CEOs of both companies..." The use of the word "must" reflects its compulsory nature, thereby making it imperative for the parties to first resort to good faith negotiations in case of any dispute. It is only upon the failure of such negotiations that the parties can resort to arbitration.<sup>12</sup> In the instant case, this requirement was fulfilled upon the failure of the negotiations between the CEOs of both the companies held at the airport in Lobe City on May 20, 2009.

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<sup>7</sup> Problem, Exhibit 5, Page 8.

<sup>8</sup> *Baron v. Sunderland Corporation* [1966] 1 All E.R. 349.

<sup>9</sup> Enid A. Marshall, *Gill: The Law of Arbitration*, Sweet & Maxwell, London, 4th ed., 2001, Page 18.

<sup>10</sup> Peter Nygh, *Autonomy in International Contracts* (Oxford, Clarendon Press 1999) ch 1: Peter Nygh wrote "triumph of autonomy" as giving the parties broad powers to select both the law and forum to resolve disputes.

<sup>11</sup> Okuma Kazutake, Professor of Law, Seinan Gakuin University Law School, *Arbitration and Party Autonomy*.

<sup>12</sup> Problem, Exhibit 5, Page 8, ADR Clause, MoU.

**1.4 THE ARBITRATION CLAUSE OF EXPORTING IS SUPERSEDED BY THE SUBSEQUENT AGREEMENT BETWEEN THE PARTIES.**

9. In *Incitec Ltd v. Alkimos Shipping Corporation*<sup>13</sup>, it was held that as the parties had agreed on exclusive jurisdiction, they had accordingly agreed to replace the original arbitration clause.

10. The ADR Clause is contained in the MoU which was signed by both the Parties. Hence, the arbitration clause if exporting<sup>14</sup> becomes inoperative due to a subsequent agreement between the parties.<sup>15</sup>

**ISSUE 2: THE RESPONDENT HAS BREACHED THE CONTRACT BY NOT SUPPLYING GRAIN OUT OF THE SECOND PORT OF EGO**

11. The Respondent had breached the contract by not supplying grain out of the second port of Ego: (2.1) the Respondent cannot claim impossibility as the alleged frustrating event was within reasonable contemplation; and (2.2) the Respondent had the option to use the second port to supply grain.

**2.1 THE RESPONDENT CANNOT CLAIM IMPOSSIBILITY AS THE ALLEGED FRUSTRATING EVENT WAS WITHIN REASONABLE CONTEMPLATION**

12. In the present case, the Government of Ego decided to privatize the grain handling facilities in the main harbour by putting the facility up for tender about a year ago in 2008. Being one of the bidders, the Respondent could have reasonably foreseen that in the event of losing the bid, he would not be able to export grain out of the main port of Ego.

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<sup>13</sup> [2004] 206 ALR 558; *Sumitomo Australia Ltd v. Alkimos Shipping Corporation* [2004] FCA 698.

<sup>14</sup> Problem, Exhibit 2, Page 5.

<sup>15</sup> *Bakri Navigation Co Ltd v. Owners of ship "Golden Glory" Glorious Shipping SA.* [1991] 217 ALR 152, 169.

13. Anson's<sup>16</sup> describes the essence of foreseen events and explains that in many cases of frustration, reference is made to the occurrence of an "unforeseen" or "unexpected" or "uncontemplated" event and it may be argued that the parties must be taken to have assumed the risk of an event which was present in their minds at the time of contract being entered into.
14. Therefore, the Respondent cannot claim impossibility as it was well within his reasonable contemplation that if he lost the bid, he would no longer be able to export grain out of the main port. Reliance can also be placed on the observation of Pearson J. in the case of *Société Franco Tunisienned' Armement v. Sidermar S.P.A*<sup>17</sup>, wherein he held that if parties knew of closure of canal then frustration cannot apply because they failed to make express provision for it, and if the parties can foresee all such possibilities then such a term will not be implied. Therefore, frustration cannot be pleaded.
15. Moreover, under Art. 5.1.3 (PICC), the Respondent's duty of cooperation might even include further duties of disclosure, such as drawing the attention of the other party to an apparent oversight concerning its rights under the contract. It is also reasonable to expect a party to share peculiar and highly relevant information that is, in the circumstances of a case, which may not be accessible to the other party. Thus, the Respondent should have intimated the Claimant of its participation in the auction.

## **2.2 THE RESPONDENT HAD THE OPTION TO USE THE SECOND PORT TO SUPPLY GRAIN**

16. It was clearly provided in the MoU that the grains could be shipped out of any port of Ego, thereby clearly indicating that the Claimant did not specify any particular port for shipping out the consignment.

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<sup>16</sup> J. Beatson, *Anson' Law of Contract*, Oxford University Press, 28<sup>th</sup> Ed, 2002.

<sup>17</sup> [1960] 3 W.L.R. 701.

17. According to Art. 6.2.1 (PICC), the mere fact that the performance of the contract has become onerous for one of the parties does not relieve that party from fulfilling its obligations. It simply gives that party a right to request for renegotiations with the other party.<sup>18</sup> Once the Respondent came to know that he could no longer export grain from the main port, he did not attempt to renegotiate the terms with the Claimant. Nonetheless, the second port was still open for export.

18. Moreover, reliance can be also placed on the case of *Tsakiroglou & Co Ltd v. Noble Thorl GmbH*<sup>19</sup> wherein the House of Lords refused to imply a term into the contract that the goods should be shipped via the Suez Canal only and held that the contract had not been frustrated. Although the alternative route via the Cape of Hope involved a change in the method of performance, it did not amount to a fundamental change from that which had been agreed. Viscount Simmonds was of the view that it does not automatically follow that, because one term of a contract, for example, that the goods shall be carried by a particular route, becomes impossible of performance, the whole contract is thereby abrogated. Nor does it follow, because as a matter of construction a term cannot be implied, that the contract may not be frustrated by events. It hardly needs reasserting that an increase of expense is not a ground of frustration.

19. Therefore, the Respondent was obligated to use the second port for exporting grains.

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<sup>18</sup> Art. 6.2.3 (PICC).

<sup>19</sup> [1962] AC 93.

### **ISSUE 3: BREACH OF CONTRACT DUE TO DELIVERY OF GRAIN NOT MATCHING QUALITY REQUIREMENTS**

20. The Respondent has breached the contract on the grounds that (3.1) quality is an implied term of the MoU; and (3.2) the last consignment of wheat supplied was below the acceptable quality required by the Claimant.

#### **3.1 THE QUALITY REQUIREMENT IS AN IMPLIED TERM OF THE CONTRACT.**

21. As is evident from Exhibit 1, the Claimant had been emphatic that the grains must match the quality requirements of a minimum of 11.5% protein content from the very beginning. A higher average was acceptable but anything lower was not. More importantly, the Claimant did not possess storing or mixing facilities and consequently, would mill and ship the consignment of wheat received directly to his customers. Hence, it made it imperative for the Respondent to match the quality requirements.

22. On reading Exhibit 3 in the light of Article 1.8 (PICC), it is contended that the Respondent had acknowledged and accepted the specifications put forth by the Claimant and is precluded from acting inconsistently on the understanding it caused the Claimant to have with respect to the transaction. The only reason the Claimant had gone ahead and entered into a contract with the Respondent was that the latter had assured supply of the required quality to the former.

23. In the light of the above, it is contended that the quality requirements is an implied term of the contract. Where the parties to a contract, either through forgetfulness or bad drafting, fail to incorporate into the contract, terms which, had they adverted to the situation, they would have certainly inserted to complete the contract, Courts may

imply such terms as are required to effectuate that result.<sup>20</sup> The Courts are also prepared to imply a term if it was so obviously a stipulation in the agreement that it goes without saying that the parties must have intended it to form part of their contract.<sup>21</sup>

24. Furthermore, in conformity with Articles 4.1, 4.2 and 4.3 (PICC), it is clear that in addition to the obligations expressly indicated in the MoU, there were other obligations which, though not stated in the MoU, had been agreed upon by the parties during the negotiations leading to the MoU and the contract ought to be interpreted in accordance with the common intention of the parties and that to this effect, regard was to be had, among others, to the preliminary negotiations.<sup>22</sup> Hence, the quality requirements, being an integral part of the initial negotiations between the two parties in the present case, ought to be taken into consideration.

25. Contracts for the sale of goods are of such everyday occurrence, and are commonly made with so little consideration of the exact legal results which the parties would desire to produce by it, that if their rights and obligations were to be determined only by what they say or do when they make the contract, their reasonable expectations would often be defeated.

26. Art. 5.1.2 (PICC) provides for implied obligations and accepts those stemming from the nature and purpose of the contract and reasonableness amongst others, which goes on to validate the claim on the part of the Claimant, that the Respondent had an implied obligation to match the quality requirements at all times.

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<sup>20</sup> J. Beatson, *Anson's Law of Contract*, Oxford University Press, 28<sup>th</sup> Ed, 2002, at Page 145.

<sup>21</sup> *Luxor (Eastborne) Ltd. v. Cooper* [1941] A.C. 108.

<sup>22</sup> (ICSID) No ARB/06/18; IIC 424 (2010).

### **3.2 THE LAST CONSIGNMENT OF WHEAT SUPPLIED WAS BELOW THE ACCEPTABLE QUALITY REQUIRED BY THE CLAIMANT**

27. The Respondent has failed to consistently match the quality requirements and is in breach of the contract. The last shipment sent by him contained wheat with a protein content of only 11% which was insufficient and unacceptable to the Claimant. The consignment prior to that also resulted in the Claimant undergoing a loss owing to complaints from his customers.

28. The quality of the grains is an integral aspect of the transaction and in its absence, the contract would be rendered futile and hence, it is essential to acknowledge the same in order to keep the contract alive.

### **ISSUE 4: CLAIM FOR DAMAGES OWING TO WRONG LABELLING ON THE CONTAINERS WHICH IS ALSO A BREACH OF THE CONTRACT**

#### **4.1 IT IS A BREACH OF WARRANTY**

29. As stated in Exhibit 5 (MoU), the labels on the containers had been agreed to be marked in English only. However, the Respondent did not follow the aforementioned stipulation and as a consequence, the Claimant had to pay translation costs amounting to \$5000 and subsequently the same with the addition of a penalty of \$10,000 as it was the second infringement. Despite having brought this to the notice of the Respondent, he did not take any measures to change the language to English. This is a breach of warranty. Hence, the Claimant is entitled to claim damages for the same.<sup>23</sup>

#### **4.2 THE MoU IS BINDING**

30. In conformity with Article 1.9(1) (PICC), the practice which had been agreed upon by the parties was labelling the goods in English and hence, the Respondent is bound to follow it since the MoU is binding on both parties.

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<sup>23</sup> *Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

### 4.3 FULL KNOWLEDGE OF THE SITUATION

31. As has been mentioned in Exhibit 7, if the customs regulations of the Respondent country did not permit them to undertake labelling in any other language other than their own, they ought to have informed the Claimant prior to conclusion of the contract. Moreover, the Respondent was fully aware that the Claimant did not possess any form of storing facilities and hence, cannot expect him to make the changes on his own. Therefore, the Respondent is entitled to pay the damages as it is clear case of non performance.<sup>24</sup>

## ISSUE 5: NO PAYMENT FOR LAST SHIPMENT ACCRUES ON PART OF THE CLAIMANT

### 5.1 SHODDY PERFORMANCE BY THE RESPONDENT

32. In accordance with the rationale of Article 5.1.6 (PICC), the supplier is bound to provide goods of an average quality, and can, under no circumstances, deliver goods of an inferior quality. This average quality is determined **according to the circumstances**, and relevant factors such as the **specific qualifications for which the performing party was chosen** are to be taken into consideration.

33. The Claimant had beyond reasonable doubt, emphasized on the importance of his quality requirements.<sup>25</sup> He had made it absolutely clear regarding his need to maintain quality in a fiercely competitive market.<sup>26</sup> When the protein content was merely at the lower end of 11.5%, the Claimant had been forced to field complaints from his customers and lower his prices. The Respondent had been notified of the same. Consequently, it was only logical to infer that the supply of wheat with protein content not matching the Claimant's quality requirements would only have a

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<sup>24</sup> Article 3.4 (PICC).

<sup>25</sup> Problem, Exhibit 1, Page 3.

<sup>26</sup> Problem, Exhibit 1, 8 and 10.



disastrous effect on his business, affecting the profits, customers and more importantly, his credibility in the market.

34. A party who does not perform satisfactorily is not entitled to payment.<sup>27</sup> Thus, it is clear that there was shoddy performance on the part of the Respondent and does not deserve any payment for the same, as the Claimant did not receive exactly what he had contracted for and additionally, had to undergo losses owing to the Respondent. In *Bolton v. Mahadeva*<sup>28</sup>, the Plaintiff completed only part of the work contracted for, and the Court of Appeal held that he could recover nothing.

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<sup>27</sup> *Cutter v. Powell* (1795) 101 All ER 573; *Sumpter v. Hedges* [1898] 1 QB 673.

<sup>28</sup> [1972] 2 All ER 1322.

## **RELIEF REQUESTED**

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35. The Claimant respectfully requests that the Arbitral Tribunal find that:

- I. The Tribunal has jurisdiction as the Respondent is bound by the ADR Clause;
- II. The Respondent has breached the contract:
  - by not supplying grain out of the second port of Ego;
  - due to delivery of grain not matching quality requirements;
  - by wrong labelling on the containers.
- III. The Respondent is liable to pay damages for the wrong labelling;
- IV. No payment for last shipment accrues on part of the Claimant.