

THE SECOND INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG - AUGUST 2011

MEMORANDUM FOR RESPONDENT

Team Number: 429

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
All E.R	All England Reporter
Art	Article
CIETAC	China International Economic and Trade Arbitration Commission.
CLR	Commonwealth Law Reports
Co	Company
Ed	Edition
HKC	Hong Kong Cases
HKIAC	Hong Kong International Arbitration Centre
HKLR	Hong Kong Law Reports
ICC	International Chamber of Commerce
Inc	Incorporation
MoU	Memorandum of Understanding
p.	Page
PICC	UNIDROIT Principles of International Commercial Contracts of 2004
QB	Queens Bench
SCC	Stockholm Chamber of Commerce
SR (NSW)	The State Reports (New South Wales)
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v.	Versus
WLR	Weekly Law Reports

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Canadian National Railway Co. v. Lovat Tunnel Equipment Inc., (1999), 174 D.L.R. (4th) 385.

China State Construction Engineering Corp. Guangdong Branch v. Madiford Ltd [1992] 1 HKC 320.

Codelfa Constructions Pty Ltd v. State Railway Authority (NSW) (1982) 149 CLR 337.

Grandeur Electrical Company Limited v. Cheung Kee Fung Cheung Construction Company Limited [2006] 4 HKC 42.

Guangdong Agriculture Company Limited v. Conagra International (Far East) Limited[1993] 1 HKLR 113.

Heimann v. Commonwealth of Australia (1938) 38 SR(NSW) 691.

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

Sumpter v. Hedge [1898] 1 QB 673.

The Moorcock case (1889) 14 P.D. 64.

Thorn Security (Hong Kong) Limited v. Cheung Kee Fung Cheung Construction Company Limited [2005] 1 HKC 252.

ARGUMENTS

ISSUE 1: THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE PRESENT DISPUTE

1. The Tribunal does not have jurisdiction to hear the present dispute because: (1.1) the ADR Clause does not create an express obligation to arbitrate; (1.2) the ADR Clause is a pathological clause; and (1.3) the Claimant agreed to the arbitration clause of exporting.

1.1 THE ADR CLAUSE DOES NOT CREATE AN EXPRESS OBLIGATION TO ARBITRATE

2. The ADR Clause¹ does not confer an express obligation upon the parties to settle their disputes through arbitration. It provides 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...”[emphasis added]. The use of the word *may* by the Parties implies that the submission of a dispute arising between them to arbitration is a mere choice and not an obligation.
3. The word *may* is consistently defined as “expressing a possibility”² while the word *shall* is commonly defined along the lines of “expressing intention or expectation”³ and “expressing a strong command or assertion rather than a wish.”⁴ Further, even the Model arbitration clauses use the word *shall*.⁵
4. Thus, the ADR Clause makes the submission of the disputes to arbitration optional.

¹ Problem, Exhibit 5, Page 8.

² *The Oxford English Dictionary*, Oxford, Oxford University Press: 1989, 2nd ed., Page 501.

³ *Macquarie Dictionary*, Sydney, Macquarie Dictionary Publishers: 2009, 5th ed., Page 1512.

⁴ *Australian Concise Oxford Dictionary*, Victoria, Oxford University Press: 2009, 5th ed., Page 1318.

⁵ HKIAC Rules 2; ICC Rules 3; SCC Rules 2.

1.2 THE ADR CLAUSE IS A PATHOLOGICAL CLAUSE

5. Arbitration clauses can be pathological for a variety of reasons. The principal defects found in arbitration clauses are those of inconsistency, uncertainty and inoperability.⁶ An arbitration clause with equivocation as to whether binding arbitration is intended is considered to be a pathological clause.⁷
6. Uncertainty can arise when the arbitration clause makes the submission of disputes to arbitration optional, for instance: “[t]he parties *may* refer any dispute to arbitration”;⁸ or “The Contractor or Sub-contractor, by serving a written Notice to Refer to Arbitration within the time limits set out in (a) [...] of this sub-clause, *may* require the dispute to be referred to arbitration [...]”;⁹ or “[...] disputes *can* be submitted to the adjuster for arbitration”.¹⁰
7. Therefore, the use of the word *may* in the ADR Clause reflects the uncertainty about the binding nature of arbitration.

1.3 THE CLAIMANT AGREED TO THE ARBITRATION CLAUSE OF EXPORTING

8. The Claimant agreed to the arbitration clause of exporting¹¹ as seen by him on the internet.¹²

⁶ Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 4th ed, 2004), p 196.

⁷R. Doak Bishop King & Spalding, *A PRACTICAL GUIDE FOR DRAFTING INTERNATIONAL ARBITRATION CLAUSES*, See <http://www.kslaw.com/library/pdf/bishop9.pdf>.

⁸ Considered by the Court of Appeal of Ontario in *Canadian National Railway Co. v. Lovat Tunnel Equipment Inc.*, See also the High Court of Hong Kong case in *China State Construction Engineering Corp. Guangdong Branch v. Madiford Ltd* [1992] 1 HKC 320.

⁹ Considered by the Court of Appeal of Hong Kong in *Thorn Security (Hong Kong) Limited v. Cheung Kee Fung Cheung Construction Company Limited* [2005] 1 HKC 252; *Grandeur Electrical Company Limited v. Cheung Kee Fung Cheung Construction Company Limited* [2006] 4 HKC 42.

¹⁰ Considered by the High Court of Hong Kong in *Guangdong Agriculture Company Limited v. Conagra International (Far East) Limited* [1993] 1 HKLR 113.

¹¹ Problem, Exhibit 2, Page 5.

¹² Problem, Exhibit 1, Page 3.

9. The arbitration clause of exporting clearly provides that “Any disputes in relation to the quality of the supplied grain and any disputes as to shipping must be resolved by mediation using the Draft Hong Kong Code of Conduct for Mediators. Failing that disputes must be resolved by three arbitrators using the HKIAC Arbitration rules. The Seat of Arbitration will be Hong Kong. An arbitrator serving on the panel may also act as a mediator.”
10. Thus, as the ADR Clause is pathological, the aforementioned clause becomes operative.

ISSUE 2: THE SUPPLY OF GRAIN THROUGH THE MAIN PORT BECAME IMPOSSIBLE

11. The supply of grain through the main port became impossible: (2.1) due to Government intervention which was beyond the Respondent’s control; (2.2) foreseeability of the event cannot prevent the Respondent from claiming impossibility; and (2.3) the Respondent could not have used the second port to supply grain.

2.1 DUE TO GOVERNMENT INTERVENTION WHICH WAS BEYOND THE RESPONDENT’S CONTROL

12. According to Art. 7.1.7 (PICC), non performance is excused if the impediment is beyond one’s control and its consequences cannot be avoided.
13. In the present case, the Government’s decision to privatize the main port was the impediment which was beyond the control of the Respondent.
14. Despite the event being outside the scope of its control, the Respondent made its best efforts to avoid the consequences of the aforesaid event. This can be clearly evinced from the fact that the Respondent was amongst the top 5 bidders. Furthermore, even

after losing the bid, the Respondent made sincere efforts to convince the grain handling authority to take over the contract.

2.2 FORESEEABILITY OF THE EVENT CANNOT PREVENT THE RESPONDENT FROM CLAIMING IMPOSSIBILITY

15. The fact that the parties at the time of contracting actually foresaw the possibility of the event or new circumstances in question does not necessarily prevent the doctrine of frustration from applying. Just like an unforeseen event will not necessarily lead to frustration of contract, similarly a foreseen event will not necessarily prevent the doctrine from applying.¹³

16. Thus, the foreseeability of the Government's plan to privatize the main port does not hinder the application of the doctrine of frustration of the contract.

2.3 THE RESPONDENT COULD NOT HAVE USED THE SECOND PORT TO SUPPLY GRAIN

17. The second port was smaller and subject to flood tides and occasional silting. Furthermore, on occasions Pirates operated in the area and one or two ships, mainly oil tankers were boarded and held for ransom.

18. Thus, it can be reasonably inferred that supplying grain through the second port would have demanded more time, which was not possible as the Claimant continuously insisted on the timely arrival of the consignment.

19. Therefore, the supply of grain through the second port would not only have rendered the performance of the contract onerous but rather impossible. A similar observation was given in *Société Franco Tunisienne d'Armement v. Sidermar S.P.A.*¹⁴, wherein supply through alternative route was considered so circuitous, unnatural and different in number of respects from the main usual customary route that it was regarded

¹³ H.G Beale, *Chitty on Contracts*, Sweet & Maxwell Limited, London, 1999, 28th ed., Page 1198, 1199.

¹⁴ [1960] 3 W.L.R. 701.

fundamentally different for the present purpose. The contract was held to have been frustrated.

20. Consequently, in the light of Art.7.1.7(4) (PICC), the Respondent was justified in rescinding the contract.

ISSUE 3: NO BREACH OF QUALITY REQUIREMENT & CONSISTENT SUPPLY OF GRAIN WITH 11.5% PROTEIN CONTENT

3.1. NO BREACH AS THE MoU DOES NOT SPECIFY QUALITY REQUIREMENT

21. There is no breach on the part of the Respondent with regards to the quality of the wheat supplied fundamentally on the grounds that the MoU that is taken to be the written contract between the two parties has no specifications pertaining to the quality of the wheat to be supplied.

22. Terms are implied into a contract not where it would be reasonable to do so but **only** where it is necessary to give business efficacy to the contract. Hence, in the present case, while it may seem to be reasonable to assume that the quality clause may be read into the contract, it is not an imperative, without which the contract would be rendered incomplete or futile. Courts have, from time to time, emphasized on the same.¹⁵

23. Moreover, while there was mention of the quality of the grain to be supplied prior to conclusion of the contract, prior negotiations, in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations, they are not receivable. Such statements and actions reveal the terms of

¹⁵ *Heimann v. Commonwealth of Australia* (1938) 38 SR (NSW) 691; the *Moorcock* case (1889) 14 P.D. 64.

the contract which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself.¹⁶

24. Expectations raised during the negotiations of the agreement must be reflected in the text of the agreement. The fact that an obligation has been discussed, or even orally agreed to during the negotiations, is not enough. Only if the obligation has been recorded in the agreement, can its scope be construed in accordance with the expectations of the parties during the negotiations.

3.2 CONSISTENT SUPPLY OF GRAIN WITH 11.5% PROTEIN CONTENT

24. The Respondent has consistently supplied to the Claimant wheat of excellent quality with protein content of 11.5% and the same has been deemed to be acceptable by the Claimant.¹⁷

3.3 NOTICE ABOUT LAST CONSIGNMENT GIVEN TO CLAIMANT

25. As has been stated earlier, the Respondent supplied to the Claimant the best quality wheat available in Ego consistently apart from the last consignment. As per Exhibits 9, 10 and 11, the Respondent had informed the Claimant of his inability to supply wheat from then on, but upon the insistence of the Claimant, agreed to supply one last consignment of whatever they had in stock.
26. Thus, the Claimant was in the know of the possibility that the Respondent may not be able to supply wheat matching his quality requirements. The Claimant had acknowledged the same.
27. The Respondent sent the last consignment at the behest of the Claimant only and hence, the latter's right to reject the same stands waived.

¹⁶ *Codelfa Constructions Pty Ltd v. State Railway Authority (NSW)* (1982) 149 CLR 337.

¹⁷ Problem, Exhibits 6, 7 and 8.

ISSUE 4: THE CLAIMANT OUGHT TO HAVE KNOWN OF THE CUSTOMS REGULATIONS IN EGO AND IMPORTERS USUALLY CHANGE SIGNS IN THEIR OWN BONDED WAREHOUSE.

28. The customs regulations of Ego do not allow the Respondent to carry out labeling in any other language other than their own. Hence, it is impossible for him to violate the same and fulfill the Claimant's requirements. It was the responsibility of the Claimant to have known of the same.

29. Moreover, the usual practice was that importers changed the signs in their own bonded warehouse only.

ISSUE 5: CLAIMANT HAS NOT MADE THE PAYMENT FOR THE LAST SHIPMENT

30. It must be noted in the present case and others¹⁸ that a party cannot make an uncovenanted profit after obtaining a part of what the other had promised to perform without having to pay anything.

31. A party is bound to render a performance of a quality that is reasonable and **not less than average in the circumstances**.¹⁹ The Respondent had brought to the notice of the Claimant his inability to supply²⁰ and agreed to deliver what he had, upon the insistence of the Claimant.²¹ As a consequence, the Claimant was obligated to make payment for the same.

32. In the present case, although the Respondent had only partially fulfilled his obligation to supply 11.5% protein content wheat, it may be possible to infer from the changed circumstances, a fresh agreement by parties for the last shipment, that payment shall be made on the part of the Claimant for the goods supplied.

¹⁸ *Sumpter v. Hedge* [1898] 1 QB 673 ; *Bolton v. Mahadeva* [1972] 2 All ER 1322

¹⁹ Art 5.1.6 (PICC)

²⁰ Problem, Exhibit 9, Page 12.

²¹ Problem, Exhibit 11, Page 14.

33. In accordance with the comments of Collins LJ in *Sumpter v. Hedges*²² that the circumstances must be such as to give the option to the Claimant to accept or reject the benefit of the work done on the part of the Respondent. However, the Claimant did accept the last shipment and there were no signs on his part that he had rejected the same. This makes him all the more obligated to make the payment for the same.

²² *Ibid* at 1.

RELIEF REQUESTED

34. The Respondent respectfully requests that the Arbitral Tribunal find that:

- I. The tribunal does not have jurisdiction to hear the present dispute;
- II. The supply of grain through the main port became impossible;
- III. The Respondent has not breached the quality requirement;
- IV. The Claimant has not made the payment for the last shipment and hence is liable to make the same.