THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG – AUGUST 2011

MEMORANDUM FOR CLAIMANT

TEAM NUMBER: 521

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INDEX OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CEO	Chief Executive Officer
CIETAC	China International Economic and Trade Arbitration Commission
Clause	Clause of Agreement
Ego	Federal Republic of Ego
ICC	International Chamber of Commerce
Id	Republic of Id
HKIAC	Hong Kong International Arbitration Centre
MOU	Memorandum of Understanding
SAR	Special Administrative Region
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

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CIETAC Rules	CIETAC Arbitration Rules Citation: [CIETAC Article]; e.g. [CIETAC 4(3)].
UNIDROIT	UNIDROIT Principles of International Commercial Contracts of 2004 Citation: [UNIDROIT Article]; e.g. [UNIDROIT 1.9(2)].
UNCITRAL Model Law on Arbitration	UNCITRAL Model Law on International Commercial Arbitration Citation: [UNCITRAL Article]; e.g. [UNCITRAL 7(4)].

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Available at: Born, Gary, *International Commercial Arbitration*, p. 645

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STATEMENT OF FACTS

Peng Importing Corporation ("**CLAIMANT**") is a flour mill located in the Republic of Id. Freud Exporting ("**RESPONDENT**") is a wheat supplier located in the Federal Republic of Ego.

January 10, 2009: Mr. Peng, managing director of CLAIMANT Peng Importing, inquired of Mr. Freud, chief executive officer of RESPONDENT Freud Exporting, whether RESPONDENT could provide CLAIMANT with a monthly supply of wheat. CLAIMANT requested that the wheat contain a mixture of protein levels with no less than an 11.5% average protein content.

Late January: Peng and Freud formalized a wheat supply contract in a Memorandum of Understanding. The MOU required that delivery containers be marked in English and that disputes be mediated under the Draft Hong Kong Code or arbitrated in Hong Kong under the CIETAC Rules.

February 22, 2009: The first wheat shipment arrived, in containers marked in the Ego language, forcing CLAIMANT to pay $5,000 in translation costs. RESPONDENT told CLAIMANT it would endeavor to use English labels on the next shipment.

March 18, 2009: The second shipment arrived, in containers again marked in the Ego language, and CLAIMANT incurred $15,000 in translation costs and customs penalties. All wheat delivered had 11.5% protein content, forcing CLAIMANT to lower prices to appease angered customers.

March 28, 2009: RESPONDENT informed CLAIMANT that RESPONDENT had lost its ability to export grain out of Ego's main port and would have to cancel the contract.

RESPONDENT also stated that it would not be able to send the April delivery as required by the MOU, as the shipment would arrive too early.

March 31, 2009: CLAIMANT requested that April's shipment be delivered anyway and that the parties should work to save the contract. The third wheat shipment arrived, but the wheat had an 11% average protein content.

April 30, 2009: CLAIMANT informed RESPONDENT that CLAIMANT was attempting to cover the contract with another supplier. In response, RESPONDENT called for CEO negotiations, which were not successful.

May 20, 2009: CLAIMANT initiated arbitration proceedings against RESPONDENT in Id.

ARGUMENTS

I. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE

1. This tribunal has jurisdiction over the dispute between CLAIMANT and RESPONDENT: **(1.1)** CLAIMANT did not agree to the Arbitration Clause of Freud Exporting; **(1.2)** the ADR clause in the MOU is valid and applies.

1.1 CLAIMANT DID NOT AGREE TO RESPONDENT'S ARBITRATION CLAUSE

2. Consent is vital to arbitration agreements. Clear and "unambiguously demonstrable" evidence is required to show an agreement existed [*ICC 7453*].

3. Regarding RESPONDENT's Arbitration Clause on the Internet, Peng stated, "[W]e have no problems agreeing to that" [*Exhibit 1* ¶*4*]. However, CLAIMANT did not expressly accept the clause as part of the contract. It is not an unambiguous agreement.

4. Even if Peng agreed to the Arbitration Clause, CLAIMANT and RESPONDENT officially wrote and signed the ADR Clause in the MOU together [*Exhibit 5*]. Freud thus agreed to use the ADR Clause instead of the Arbitration Clause.

1.2 THE ADR CLAUSE IS VALID AND APPLIES

A) The parties chose the CIETAC Rules and submitted to CIETAC's jurisdiction

5. Parties are free to choose governing laws and rules in their arbitration agreements [*Redfern/Hunter 195*]. Under the UNCITRAL Model Law, "parties are free to agree on the procedure to be followed" [*UNCITRAL 19(2)*].

6. CLAIMANT and RESPONDENT freely chose the CIETAC Rules. Additionally, where parties agree to use the Rules without specifying an arbitration institution, "they shall be deemed to have agreed to refer their dispute to arbitration by the CIETAC" [*CIETAC 4(3)*]. By signing the MOU, both parties agreed to the CIETAC's jurisdiction.

B) Arbitration clauses are valid even where they do not state every procedural aspect

7. The ADR Clause did not specify a seat of arbitration or an institution. However, commentators generally agree that stating the seat and institution is not required for a valid clause [*Born 659*]. An arbitral council has the power to determine whether it has jurisdiction using the doctrine of competence-competence. Courts such as the Hong Kong Supreme Court have upheld clauses not specifying a seat as long as the parties' intention was followed [*Lucky-Goldstar*].

8. By agreeing to use CIETAC, the parties showed an intention to accept CIETAC as the authority. Both parties also accepted the Draft Hong Kong Code of Conduct for Mediators [*Exhibit 5*], showing that Hong Kong should be the seat of arbitration and mediation. An

enforcement challenge will not stand.

CONCLUSION ON JURISDICTION

9. CIETAC has jurisdiction because the ADR Clause is valid as written.

II. RESPONDENT WRONGFULLY TERMINATED CONTRACT

10. RESPONDENT is liable for wrongfully terminating the contract. **(2.1)** Neither *force majeure* nor hardship excuses RESPONDENT's non-performance. (**2.2**) Alternatively, CLAIMANT could terminate the contract under anticipatory breach and fundamental non-performance.

2.1 RESPONDENT CANNOT BE EXCUSED FROM NONPERFORMANCE

A) RESPONDENT had a duty to obtain permission to use the main port

11. Use of the main port requires public permission under Ego law. RESPONDENT is from Ego and must take "measures necessary to obtain the permission" [*UNIDROIT 6.1.14*]. RESPONDENT has the duty to disclose the existence of the requirement for public permission [*UNIDROIT 6.1.14 Comment 2*] and to "exhaust available local remedies to obtain the permission" [*Comment 4*].

12. Ego's government decided to permit only one company to export grain from the main port. RESPONDENT failed to take measures necessary to win the auction. RESPONDENT could have increased its bid, especially since the auction price was "well below average wheat

prices" [*Exhibit 10*]. The party that must obtain permission has the duty to bear all expenses incurred [*UNIDROIT 6.1.15*]. RESPONDENT thus failed to obtain necessary permission.

B) Loss of the main port was not *force majeure*

13. *Force majeure* impediments are beyond control and unexpected [*UNIDROIT 7.1.7 (1)*]. RESPONDENT told CLAIMANT that rights to use the main port "were put to tender in late 2008" [*Exhibit 9*]. RESPONDENT was aware it could lose access to the port before the auction on March 27, 2009. Maintaining rights to the port was a financial obligation that RESPONDENT could control by increasing its bid. Failure to perform financial obligations cannot be excused [*Chinese Goods*].

14. In the MOU, RESPONDENT agreed to ship "out of **any** Port in Ego" [*Exhibit 5*]. Unless an event affected both ports, RESPONDENT could expect to ship from either port. RESPONDENT was aware that the smaller port existed and had grain-loading facilities and protection from the Ego navy [*Background ¶2*].

15. Loss of the main port therefore is not *force majeure*, since RESPONDENT was aware of and in control of the situation. RESPONDENT had no excuse for canceling the contract.

C) Inability to use the main port was not hardship

16. Hardship occurs when an event "fundamentally alters the equilibrium of the contract" by raising costs [*UNIDROIT 6.2.2*]. The disadvantaged party could not have reasonably foreseen or controlled the event and did not assume the risk [*Id.*]. Assumption of risk can be

inferred from the nature of the contract and prevent a party from invoking hardship [*Mexican Growers*]. An affected party "is entitled to request renegotiations" but not "to withhold performance" [*UNIDROIT 6.2.3*].

17. As previously discussed, RESPONDENT was aware of the auction and had control over bidding. RESPONDENT had contracted to ship out of any Ego port, therefore assuming the risk of port closures. Foreseeable inability to use the main port is therefore not hardship because it does not fundamentally change the contract. Even if hardship existed, RESPONDENT should have requested renegotiations. RESPONDENT instead decided to "cancel the contract" [*Exhibit 9*]. RESPONDENT therefore has no excuse for non-performance.

2.2 ALTERNATIVELY, CLAIMANT COULD TERMINATE THE CONTRACT

A) CLAIMANT could terminate under anticipatory breach

18. "Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract" [*UNIDROIT 7.3.3*]. Despite CLAIMANT's effort to avoid cancellation, RESPONDENT insisted that performance was impossible [*Exhibits 9-11*]. Therefore, it was clear to CLAIMANT that the May shipment would not deliver. Non-delivery of the shipment is fundamental non-performance, as it would materially jeopardize CLAIMANT's business in a highly competitive environment [*Exhibit 3*]. Therefore, CLAIMANT had the right to terminate the contract in anticipation of RESPONDENT's breach.

B) CLAIMANT could terminate even if RESPONDENT's non-performance is excused

19. "[A] party who has not received performance will as a rule be entitled to terminate the contract whether or not the non-performance is excused" [*UNIDROIT 7.1.1 Comment 1*]. Further, "an aggrieved party may terminate the contract only if the non-performance of the other party is 'fundamental,' i.e. material and not merely of minor importance" [*UNIDROIT 7.3.1 Comment 2*]. Even if RESPONDENT can claim *force majeure* or hardship, CLAIMANT would still have the right to terminate the contract. Non-performance of wheat delivery would be fundamental as CLAIMANT would be unable to supply its customers.

III. RESPONDENT FAILED TO CONFORM TO QUALITY REQUIREMENTS

20. CLAIMANT described quality requirements for its grain imports. **(3.1)** RESPONDENT accepted CLAIMANT's quality requirements. **(3.2)** RESPONDENT's shipments failed to conform. **(3.3)** Alternatively, even if the parties had not agreed to the requirements, quality is an essential term of the contract.

3.1 PARTIES AGREED TO CLAIMANT'S QUALITY REQUIREMENTS

21. The parties' conduct and correspondence demonstrate agreement that the quality of the wheat delivered was to be a *mix* of protein averaging at least 11.5%. As the MOU does not contain a merger clause [*Exhibit 5*], extrinsic evidence is admissible to determine whether the parties agreed on additional terms.

22. Statements made by an offeree indicating assent to an offer constitute acceptance [*UNIDROIT 2.1.6(1)*]. CLAIMANT indicated its need for a minimum average protein quality of 11.5% and that different qualities of wheat would have to be mixed in order to arrive at that quality [*Exhibit 1*]. Further, CLAIMANT disclosed that it did not have mixing facilities and therefore RESPONDENT must ship pre-mixed wheat [*Exhibit 1*].

23. RESPONDENT accepted these terms both explicitly and via performance when it sent the first shipment [*Vogenauer 263*]. CLAIMANT noted that the shipment was "within the 11.5% average range," indicating that RESPONDENT had pre-mixed the wheat to arrive at the average quality [*Exhibit 6*]. RESPONDENT then explicitly acknowledged CLAIMANT's requirements, referring to "protein content of 12% down to 10% hence **the lower end of your requirements**" [*Exhibit 7*].

3.2 RESPONDENT BREACHED THE AGREEMENT BY FAILING TO MEET CLAIMANT'S QUALITY REQUIREMENTS IN MARCH AND APRIL

24. The March shipment, which contained only 11.5% protein rather than a mix [*Exhibit 8*] was sufficient to constitute a breach of contract under UNIDROIT 7.1.1, where non-performance is defined as any failure by a party to perform its obligations under the contract, including defective performance and late performance [*African case*]. As a result of non-conformity of protein quality, CLAIMANT had to lower prices [*Exhibit 8*].

25. The April shipment, with protein content of only 11%, was also sufficient to constitute breach of contract. A contract "can only be . . . terminated in accordance with its terms or **by agreement**" [*UNIDROIT 1.3*; *Vogenauer 126*]. The contract was not officially terminated

until 30 April when CLAIMANT agreed to the termination [*Id.*]. The April shipment therefore occurred before CLAIMANT agreed to termination of the contract [*Exhibit 12*].

26. Furthermore, CLAIMANT did not waive the quality requirements for the April shipment. CLAIMANT waived only the shipping date requirement but neither party discussed quality issues [*Exhibits 9-11*]. RESPONDENT claims it only agreed to ship whatever was available on stock, but CLAIMANT never expressly agreed to RESPONDENT's modification [*Exhibit 11*]. In absence of such an agreement, RESPONDENT is obligated to perform under the default terms of the contract [*UNIDROIT 1.3*].

3.3 IF THERE WAS NO AGREEMENT, CLAIMANT'S QUALITY REQUIREMENT SHOULD STILL HAVE BEEN SUPPLIED

27. Protein quality is essential to pricing and therefore is a necessary term of the contract. If the tribunal does not find an agreement, then it should supply CLAIMANT's quality requirements as the necessary term. The tribunal may supply such a term by considering the intention of the parties, purpose of the contract, fair dealing and reasonableness [*UNIDROIT 4.8(1)(2)*].

28. CLAIMANT's correspondence and RESPONDENT's performance made clear the intention of the parties to supply a protein quality averaging 11.5%. CLAIMANT repeatedly informed RESPONDENT of the importance of wheat quality, as it operates in a competitive market [*Exhibits 1, 8*]. Any other average would undermine CLAIMANT's purpose for entering the contract.

IV. RESPONDENT BREACHED CONTRACT BY NOT PROVIDING ENGLISH-LANGUAGE SIGNAGE

29. RESPONDENT breached the contract by not providing English-language signage for the following reasons: **(4.1)** RESPONDENT was under a duty to provide the signage; **(4.2)** RESPONDENT's non-performance of that duty is not excusable.

4.1 RESPONDENT WAS UNDER DUTY TO PROVIDE ENGLISH-LANGUAGE LABELING AND SEEK PUBLIC PERMISSION TO DO SO

30. If the common intention of a contract cannot be established, the contract should be interpreted according to the meaning that reasonable parties similar to the contracting parties would assign to it under similar circumstances [*UNIDROIT 4.1; Case 11880*]. The MOU neither expressly indicates nor clearly implies which party is responsible for providing English-language signage.

31. When interpreting party intent, the court should consider preliminary negotiations, post-contract conduct, established practices, standard trade terminology, and usages [*UNIDROIT 4.3*].

32. During preliminary negotiations, CLAIMANT established that it did not have access to "storing facilities," suggesting it could not perform import-side labeling that requires the use of a bonded warehouse [*Exhibit 1*].

33. CLAIMANT complained when RESPONDENT did not provide English labeling, suggesting it believed the signage was the RESPONDENT's responsibility [*Exhibits 6, 8*]. RESPONDENT has never contradicted this belief.

34. An established course of dealing between parties can constitute a common basis of understanding on which party intentions could be interpreted [*ICC 9117*]. RESPONDENT assumed responsibility for providing signage by saying it would "endeavor to put English labels onto the containers" [*Exhibit 7*]. That the CLAIMANT did not complain of customs fees after the third shipment suggests the containers were properly labeled, confirming a practice of RESPONDENT responsibility [*Exhibit 12*].

35. Parties are bound by common usages and practices [*UNIDROIT 1.9*]. RESPONDENT said it was "not sure" if Ego prohibited English-language signage, suggesting that usage was not common. Parties are obliged to seek permission even where only "reasonable efforts" are promised, so long as commercial interests are not at risk [*UBH*; *P&O*]. RESPONDENT never claimed that seeking public permission sacrificed its commercial interests.

36. Where State-mandated public permission affects the validity of a contract and only one party has its place of business in that State, that party is responsible for seeking permission [*UNIDROIT 6.1.14*]. The validity of the "packaging" clause depended on Ego allowance of English labels and RESPONDENT was the only party located in Ego, so RESPONDENT was responsible for seeking permission.

4.2 RESPONDENT BREACHED CONTRACT BY NOT PERFORMING DUTIES

37. Parties must perform their obligations in installments when it is known that the other party needs it [*UNIDROIT 6.1.2 Comment*]. The MOU clearly establishes monthly performance, and RESPONDENT should have known that CLAIMANT needed packaging on a monthly basis.

38. Non-performance occurs when a party fails to perform its obligations on time [*UNIDROIT 7.1.1*]. RESPONDENT did not provide English-language signage in February or April. Therefore, RESPONDENT did not perform its duty and breached the contract.

39. Initial impossibility does not invalidate a contract [*UNIDROIT 3.3*]. Where impossibility results from a legal prohibition, the contract remains valid if the prohibition only impedes performance [*UNIDROIT 3.1.3 Comment 1*]. The Ego signage ban only impeded performance of the MOU, so the rules of non-performance still apply.

40. A party under duty to seek public permission must do so without undue delay [*UNIDROIT 6.1.15*]. RESPONDENT became obligated to seek permission when the contract was finalized in January, but did not do so until March and did not provide any excuse for the delay [*Exhibits 4, 7*].

V. CLAIMANT IS ENTITLED TO DAMAGES

41. CLAIMANT is entitled to full compensation for the harm it suffered as a result of RESPONDENT's non-performance of both the packaging and protein quality requirements

of the agreement [*Exhibits 5-6; UNIDROIT 7.4.2*]. **(5.1)** The harm was foreseeable. (**5.2**) CLAIMANT's damages exceed RESPONDENT's alleged damages.

5.1 CLAIMANT IS ENTITLED TO DAMAGES FOR FORESEEABLE HARM SUFFERED DUE TO RESPONDENT'S BREACH OF THE CONTRACT

42. RESPONDENT is liable for the harm resulting from non-performance that was reasonably foreseeable at the time of the contract [*UNIDROIT 7.4.4*]. It was foreseeable at the time of contracting that CLAIMANT would lose customers if the wheat failed to be of sufficient protein quality [*Exhibit 1; German Cheese*].

43. It was also foreseeable that translation costs would arise if the labels were not printed in the language of the land [*Exhibit 6*]. Additionally, before exporting to an Id client, RESPONDENT ought to have acted with normal diligence and familiarized itself with publicly available Id Customs regulations [*UNIDROIT 7.4.4 Comment*]. RESPONDENT should have thus foreseen that additional expense would accrue from continued violation of label language requirements [*Exhibit 8*].

44. Therefore, RESPONDENT must remedy harm sustained as a result of its non-performance and pay damages to CLAIMANT.

5.2 CLAIMANT'S DAMAGES EXCEED RESPONDENT'S ALLEGED DAMAGES

45. Anticipating RESPONDENT's allegation that CLAIMANT owes RESPONDENT payment for the April 2009 shipment, CLAIMANT answers that nonpayment is excusable because RESPONDENT had already breached the contract. RESPONDENT's premature breach of the contract by failing to provide conforming goods relieves CLAIMANT from obligation to pay the contract price. Thus, no damages are due to RESPONDENT.

46. Additionally, by refusing to ship out of the smaller Ego port, RESPONDENT failed to properly mitigate its own loss and damages [*Exhibit 9; UNIDROIT 7.4.8*].

47. CLAIMANT may therefore rely on RESPONDENT's failure to deliver conforming and properly labeled goods as the primary factor in the tribunal's calculation of damages to be awarded.

VI. REQUEST FOR RELIEF

48. CLAIMANT respectfully requests the tribunal to find that:

    1. The tribunal has jurisdiction over the dispute;

    2. RESPONDENT breached the contract;

    3. RESPONDENT is liable for damages to CLAIMANT; and

    4. CLAIMANT should be awarded the costs of the arbitration.