THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG – AUGUST 2011

MEMORANDUM FOR RESPONDENT

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
ICSID	International Center for the Settlement of Investment Disputes
Id	Republic of Id
HKIAC	Hong Kong International Arbitration Centre
MOU	Memorandum of Understanding
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
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)].
UNDP	United Nations Development Program, "Shipping and INCOTERMS" Citation: [UNDP Page]; e.g. [UNDP 38]
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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World Bank International Centre for the Settlement of Investment Disputes

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Name: Joseph Charles Lemire v. Ukraine

Date: 00.00.2010

Cited as: Lemire

Australia

Court: Federal Court of Australia

Name: Hannaford v. Australian Farmlink Pty Ltd.

Date: 24.10.2008

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Cited as: Hannaford

Belgium

Court: Cour de Cassation

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Court: King's Bench Division

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Date: 25.04.1950

Cited as: Windschuegl

STATEMENT OF FACTS

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

By letter dated **January 10, 2009**, Mr. Peng, director of CLAIMANT Peng Importing, asked Mr. Freud, chief executive officer of RESPONDENT Freud Exporting, whether RESPONDENT could provide CLAIMANT with a monthly supply of wheat. CLAIMANT stated that it had no problems agreeing with the arbitration clause on RESPONDENT's website.

In **late January**, Peng and Freud formalized a wheat supply contract in a Memorandum of Understanding ("MOU") drafted on the Island of the Sun.

RESPONDENT sent the first wheat shipment, which arrived on **February 22, 2009**. CLAIMANT objected to the containers marked in the Ego language. RESPONDENT stated that it would endeavor to use English labels on the next shipment.

RESPONDENT sent the second shipment, which arrived on **March 18, 2009**. The containers were again marked in the Ego language. All of the wheat delivered had an 11.5% protein content.

On **March 28, 2009**, RESPONDENT informed CLAIMANT that RESPONDENT was unable to export grain out of Ego's main port. 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.

CLAIMANT replied by email on **March 31, 2009**, that April's shipment should be delivered anyway. RESPONDENT sent the third wheat shipment, which had an 11% average protein content.

On **April 30, 2009**, CLAIMANT informed RESPONDENT that it was looking to cover the contract with another supplier. In response, RESPONDENT called for CEO negotiations under the MOU's ADR clause. The negotiations were unsuccessful, and on **May 20, 2009**, CLAIMANT initiated arbitration proceedings against FREUD in Id.

ARGUMENTS

I. THE TRIBUNAL HAS NO JURISDICTION OVER THIS CASE

1. This tribunal has no jurisdiction over the present case for the following reasons: **(1.1)** Both parties agreed to the arbitration clause of Freud Exporting; **(1.2)** the ADR clause in the MOU is invalid.

1.1 THE PARTIES AGREED TO THE ARBITRATION CLAUSE OF FREUD EXPORTING

2. A valid arbitration clause is generally an agreement in writing, dealing with related disputes, where parties have a legal relationship, in a subject matter that can be arbitrated [*Redfern/Hunter 88*]. RESPONDENT had a valid arbitration clause posted on the Internet listing the HKIAC as the arbitral authority and Hong Kong as the arbitration seat [*Exhibit 2*].

3. The Arbitration Clause deals with disputes in relation to a legal commercial relationship [*Exhibit 2*]. The definition of "in writing" in the UNCITRAL Model Law "is met by an electronic communication . . . accessible [and] useable for subsequent reference" [*UNCITRAL 7(4)*]. The Arbitration Clause is electronic and accessible. It is therefore in writing.

4. CLAIMANT agreed to the Arbitration Clause by letter ("We have also seen your dispute resolution . . . and we have no problems **agreeing** to that") [*Exhibit 1 ¶4*]. Both parties have therefore agreed to the Arbitration Clause in writing.

1.2 THE ADR CLAUSE IN THE MOU IS INVALID

A) The ADR Clause does not state an arbitral institution or a seat of arbitration

5. An arbitration clause that does not describe important elements such as the seat of arbitration or the arbitral institution can be found invalid. Courts such as the Wuxi Chinese People's Court have annulled awards for failing to specify an arbitral institution [*Judgment of September 2004*].

6. The ADR Clause states that CIETAC rules are to be used but does not describe an institution or seat of arbitration. This can make an arbitral award unenforceable because the arbitration clause was incomplete.

B) Incorporation of CIETAC rules makes the arbitration clause contradictory and is against the underlying intent of the parties

7. CIETAC Rules state that where parties agree to arbitrate "under these Rules without providing the name of an arbitration institution, they shall be deemed to have agreed to refer the dispute to arbitration by the CIETAC" [*CIETAC 4(3)*]. Additionally, where no seat of arbitration is designated, "the place of arbitration shall be the domicile of the CIETAC or its Sub-Commission" [*CIETAC 31(2)*].

8. CIETAC is based in Beijing and has Sub-Commissions in Shenzhen and Shanghai [*CIETAC 2(7)*]. The ADR Clause therefore requires holding arbitration in one of these areas. However, the parties did not commit to arbitral proceedings in these cities. CLAIMANT has

filed for arbitration in Id. RESPONDENT had agreed to arbitration in Hong Kong or, in the alternative, in Ego. The ADR Clause thus contradicts the intent of the parties.

9. Courts have rejected arbitration clauses where "contradiction is flagrant" [*Gaillard 270*]. The ADR Clause in the MOU is contradictory and unenforceable, and the original Arbitration Clause should be used instead.

CONCLUSION ON JURISDICTION

10. CIETAC does not have jurisdiction in Id over this case.

II. RESPONDENT CONFORMED TO QUALITY REQUIREMENTS

11. The parties agreed to 10-12% protein wheat, which is the standard in Ego. **(2.1)** This is a standard term that is incorporated in the final agreement because CLAIMANT expressly agreed to it. **(2.2)** Even absent standard terms, the Parties are bound by trade usage. **(2.3)** CLAIMANT's quality requirements were made during preliminary negotiations, which are extinguished upon signing the MOU.

2.1 THE STANDARD TERMS WERE INCORPORATED IN THE AGREEMENT

12. The parties agreed to 10-12% protein rather than a mix averaging 11.5%. CLAIMANT admitted that RESPONDENT's website indicated the protein quality in Ego [*Exhibit 1*]. CLAIMANT expressly accepted these terms, stating that they were within his "acceptable

range of 13%-10.5%" [*Id*.] The quality noted are standard terms, which have legal effect even if they are separate from the final contract [*UNIDROIT 2.1.19(2) Comment 2*].

2.2 PARTIES ARE BOUND BY TRADE USAGE OF 10-12% PROTEIN

13. It is widely known that Ego exports wheat with 10-12% protein [*Exhibit 7*]. The parties are bound by this trade practice [*Hannaford*]. Under UNIDROIT 1.9(2), parties are bound by usage that is 1) regularly observed in international trade, 2) widely known, and 3) not unreasonable in the case. "International trade" does not preclude local usage if they are regularly observed with foreign customers [*UNIDROIT 1.9 Illustration 3*]. Nothing in the facts suggested these two conditions did not exist. CLAIMANT was aware of this practice [*Exhibit 1*]. It is not unreasonable to ship 10-12% protein wheat if CLAIMANT agreed to it.

14. The shipments in February, March, and April are consistent with RESPONDENT's claim that 10-12% protein was the agreed quality. The first shipment is consistent with RESPONDENT's claim since a mix of different grades of wheat were used within the 10-12% range, which could average around 11.5% but would be on the lower end of 11.5% [*Exhibit 7*]. The second and third shipments, pure 11.5% and 11% mixes respectively, are also consistent with a 10-12% protein agreement.

2.3 CLAIMANT'S REQUIREMENTS WERE MADE DURING PRELIMINARY NEGOTIATIONS AND WERE EXTINGUISHED BY THE MOU

15. CLAIMANT's statement of his quality requirements on 10 January were part of preliminary negotiations [*Exhibit 1*]. RESPONDENT's reply letter clearly expressed the desire to

"discuss **all** matters" in person on the Island of Sun [*Exhibit 15*]. CLAIMANT cannot allege acceptance of an offer made during preliminary negotiations after signing the MOU in January.

16. In order for an offer to be valid, it must be definite and indicate the offeror's intention to be bound when accepted [*UNIDROIT Art. 2.1.2*]. The other party must have been or should have been aware of offeror's intention to be bound [*Vogenauer 225*]. Offers made during preliminary negotiations lack this requisite intention to be bound. The other party has no indication whether the offeror still wishes to be bound to an offer that the parties did not agree to incorporate in the final contract. Thus, CLAIMANT's offer made during preliminary negotiations was extinguished upon signing the MOU.

III. RESPONDENT DID NOT BREACH THE CONTRACT BECAUSE IT WAS EXCUSED FROM FURTHER PERFORMANCE

17. RESPONDENT was excused from additional shipping for the following reasons: **(2.1)** Inability to use the main port in Ego was *force majeure*; in the alternative, **(2.2)** it was hardship.

3.1 RESPONDENT COULD NOT SHIP GRAIN BECAUSE OF FORCE MAJEURE

18. *Force majeure* must be beyond a party's control and unexpected [*UNIDROIT 7.1.7 (1)*]. The damages caused are borne by "the party to whom the risk has passed" due to the contract [*Caviar case*]. It excuses "the non-performing party from liability in damages" [*UNIDROIT*

7.1.7 Comment 2]. Cancellation of the contract is not dependent on acceptance of the non-performing party's termination. A party cannot insist on performance that is impossible.

19. On March 27, 2009 the Ego government sold the right to transport grain out of the main port in an auction [*Exhibit 9*]. Another party won the bid and RESPONDENT could not use the main port. Although the auction was announced in late 2008, the outcomes of auctions are beyond the control of individual bidders. RESPONDENT could not guarantee that it would win the rights to the port.

20. RESPONDENT could not be reasonably expected to foresee how high the winning bid would be. The auction resulting in the loss of RESPONDENT's access to the port was therefore *force majeure* and excuses RESPONDENT from further performance.

21. RESPONDENT properly gave notice to CLAIMANT regarding his inability to perform on 28 March [*Exhibit 9*]. RESPONDENT is therefore not liable for subsequent shipments. The April shipment was a courtesy for the CLAIMANT's benefit. RESPONDENT had notified CLAIMANT that he would send whatever was available in stock [*Exhibit 13*].

3.2 ALTERNATIVELY, LOSS OF THE MAIN PORT WAS HARDSHIP

22. Hardship exists where events "fundamentally alter the equilibrium of the contract" by increasing cost or diminishing performance value [*UNIDROIT 6.2.2*]. These events allow affected parties to request renegotiations [*Article 6.2.3, Steel Tubes case*].

23. After RESPONDENT lost the auction, it could no longer ship out of its normal port. It had

not used the smaller port before because the loading equipment and wharf facilities are inferior [*Clarification 5*]. The smaller port was also sometimes affected by flood tides, silting, and pirates [*Background 2*]. This port was therefore less reliable and would increase uncertainty and costs. Therefore, losing the main port was hardship for RESPONDENT.

24. RESPONDENT had the right to request renegotiations. It continued to follow its obligations according to UNIDROIT Principles Article 6.2.1 and sent the April shipment of wheat. However CLAIMANT negotiated with another supplier before renegotiation or termination of the contract [*Exhibit 12*]. This prevented renegotiation after the hardship from taking place. RESPONDENT was therefore excused from further performance.

IV. RESPONDENT DID NOT BREACH CONTRACT BY NOT PROVIDING ENGLISH-LANGUAGE SIGNAGE

25. RESPONDENT did not breach the contract by not providing English-language signage for the following reasons: **(4.1)** the MOU did not obligate RESPONDENT to provide English-language signage; **(4.2)** the "packaging" clause is likely invalid; and **(4.3)** RESPONDENT had no additional duty to seek public permission.

4.1 MOU DID NOT OBLIGATE REPONDENT TO PROVIDE ENGLISH-LANGUAGE SIGNAGE

26. If the common intention of a contract cannot be established, the contract should be interpreted "according to the meaning that reasonable persons . . . would give to it" under similar circumstances [*UNIDROIT 4.1*]. The MOU does not expressly assign either party the

responsibility of providing English-language signage, nor is it clearly implied from the MOU alone.

27. When interpreting intent, the court should consider preliminary negotiations, post-contract conduct, established practices, the nature and purpose of the contract, standard trade terminology, and usages [*UNIDROIT 4.3*]. Several of these factors indicate that parties intended CLAIMANT to provide English-language signage.

28. CLAIMANT offered, in both preliminary negotiations and the MOU, to provide ships needed to transport the wheat [*Exhibits 1, 5*]. This suggests CLAIMANT intended to be responsible for shipping the wheat, which includes providing packaging. Authorities such as the ICSID have held that interpretation of contracts should consider party intentions indicated in preliminary negotiations [*Lemire*].

29. The MOU requests packaging in English, a language native to CLAIMANT but not to RESPONDENT [*Exhibit 5*]. This further indicates that the parties intended to obligate CLAIMANT.

30. Parties are bound by usages and practices widely known and regularly observed in their particular trade [*UNIDROIT 1.9*]. There was a widely known custom that importers take responsibility for re-labeling Ego goods in bonded warehouses [*Exhibit 15*]. Such warehouses are often rented out, so CLAIMANT's lack of "storing facilities" would not preclude the application of this custom [*Exhibit 1*].

31. "FOB" is an INCOTERM meaning "Free on Board," a widely known usage that identifies the buyer as responsible for any documents needed to export goods out of a named port [*UNDP 38*]. The MOU states "FOB out of any port in Ego," suggesting that CLAIMANT is responsible for Ego export documents, including labeling.

4.2 THE MOU "PACKAGING" CLAUSE IS LIKELY INVALID

32. Parties are free to contract under UNIDROIT, but may not contract in a way that contravenes mandatory national rules [*UNIDROIT 1.4, 3.3(1) Comment 1*]. The "packaging" clause requires English labeling contradicting Ego law, and is thus invalid.

33. Where the refusal of public permission affects the validity of certain terms of the contract, those terms are void [*UNIDROIT 6.1.17 Comment 2*]. The Ego government's refusal of permission to export using English labels thereby voids the "packaging" clause.

4.3 RESPONDENT HAD NO ADDITIONAL DUTY TO SEEK PUBLIC PERMISSION

34. Where only one party has its place of business in a state requiring public permission, that party is responsible for seeking permission only where the contract does not otherwise assign that responsibility [*UNIDROIT 6.1.14 Comment 3c*]. The contract, appropriately interpreted, assigns "packaging" responsibility to CLAIMANT. This is reinforced by the MOU's use of the FOB term, placing responsibility for export documents on CLAIMANT. Even if RESPONDENT had an initial duty to seek public permission, courts have held that permission duties may be excused where a party can show by clear evidence that seeking

permission would have had no effect [*Windschuegl*]. There was a widespread custom that Ego did not allow English-language labeling, suggesting any permission attempts by RESPONDENT would have been ineffective.

CONCLUSION ON LABELING DUTY

35. RESPONDENT was under no obligation to provide English-language labeling, therefore RESPONDENT's non-provision of such labeling is not a breach of contract.

V. DAMAGES

5.1 RESPONDENT IS ENTITLED TO COMPENSATION FOR THE APRIL 2009 SHIPMENT

36. RESPONDENT provided goods in response to CLAIMANT's request [*Exhibits 10-11*]. CLAIMANT never provided payment [*Exhibit 15*]. RESPONDENT is therefore entitled to all overdue payment, in the form of compensatory damages [*UNIDROIT 7.2.1*].

5.2 RESPONDENT IS EXCUSED FROM PAYING DAMAGES TO CLAIMANT

37. Assuming but not conceding that non-performance of the labels requirement occurred, CLAIMANT is not entitled to damages for harm due to non-performance because any non-performance was excused under the UNIDROIT Principles [*UNIDROIT 7.1.7 Comment 2*]. Thus, CLAIMANT may not recover for injuries sustained from the alleged non-performance.

VI. REQUEST FOR RELIEF

38. RESPONDENT respectfully requests the tribunal to find that:

1. The tribunal should not exercise jurisdiction over the dispute;

2. RESPONDENT did not breach the contract;

3. RESPONDENT is not liable for any damages;

4. CLAIMANT is liable for damages to RESPONDENT; and

5. RESPONDENT should be awarded the costs of the arbitration.