SECOND ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOT COMPETITION

MEMORANDUM FOR RESPONDENT

On behalf of:	Against:
Mr. Sigmund Freud	**Mr. Charles Peng**
(Freud Exporting)	**(Peng Importing Corporation)**

TEAM NUMBER: 556

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TABLE OF AUTHORITIES

Abbreviations

MOU	Memorandum of Understanding
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BK	Background Information

Treaties, Conventions and Laws

ML (model law)	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
CIETAC rules	China International Economic and Trade Arbitration Commission, CIETAC Arbitration Rules
PICC	UNIDROIT Principles of International Commercial Contracts, 2004
Off Cmt	Official Comment of PICC
UT	United's tariff

Commentary

M. Hunter — A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, 2004

Margaret — The Principles and Practice of International Commercial Arbitration, Margaret L.Moses, pp9.

Award

Russia — date:22.12.2008, Arbitral Award ,Number: 83/2008, Court: International Court of Arbitration of the Chamber of Industry and Commerce of the Russia Federation, Parties: Unknown , Citation: http://www.unilex.info/case.cfm?id=1477

Cases

Empresa — Empresa Nacional de Telecomunicaciounes v IBM de Colombia S.A.

Seaboard — Seaboard Lumber Co. v. U.S. 308 F.3d 1283 C.A.Fed., 2002.

STATEMENT OF FACTS

Respondent Freud Exporting is a wheat supplier located in the Federal Republic of Ego. CLAIMANT Peng importing corporation located in the Republic of Id is a company dealing with flour mill importing.

On **10th January 2009**, claimant sent a letter to respondent to invite respondent to establish a business relationship about exporting grain. In the letter, claimant simply introduced their requirement about the transaction and agrees to respondent's Reproduction of Arbitration clause of Exporting on the internet.

On **15th January 2009**, respondent replied the letter and invited the Peng's going on holidays on the Island of Sun for 4 weeks. Meanwhile, respondent and claimant could discuss all matters. During the holidays, respondent and claimant signed the memorandum of understanding.

On **3rd March 2009**, claimant sent a letter to respondent. In the letter, claimant accepted the first shipment of wheat on **22nd February 2009**, and expressed that they were looking forward to the next consignment and appreciate a delivery date of **18th March 2009**. Claimant also complained about the containers in Ego language.

On **6th March 2009**, respondent replied the letter from claimant and stated that it would endeavor to put English labels onto the containers but respondent was not sure whether the Customs allows it to do so. Also, respondent introduce the wheat production in Ego and confirmed that claimant said the quality meeting the lower end of its requirements was still excellent.

On **28th March 2009**, respondent could no longer transport grain out the main port because it was the losing bidder in auction. Hence, it could only supply to the grain

handling authority. As a consequence it unfortunately forced to cancel the contract.

On **5th April 2009**, Respondent would ship what they have so at least this month was covered. However it could not see any other viable alternative but to cancel the contract. There is nothing respondent could do to save the situation. It had contacted the grain handling authority and tried to convince them to take over the contract but failed.

On **30th April 2009**, claimant sent a letter to respondent. In the letter, claimant informed respondent that they were in discussion with another supplier.

On **10th May 2009**, respondent replied to claimant by letter. In the letter, respondent pointed out that claimant's shifting to a new supplier was a breach of contract. And respondent informed claimant that they would send their CEO to Id for discussion.

ARGUMENT ON JURISDICTION

I. CIETAC HAS NO JURISDICTION OVER THIS DISPUTE

CIETAC has no jurisdiction over this dispute, because **(A)** Arbitration Clause on the Internet is applicable; and **(B)** The preconditions to arbitration have not been fulfilled by CLAIMANT; and **(C)** Arbitration Clause on the Internet leads to *AD HOC* Arbitration

A. Arbitration Clause on the Internet is applicable

Arbitration Clause on the Internet is applicable because **1.** Arbitration Clause on the Internet is a part of Contract; and **2.** ADR Clause in MOU is only the modification to Arbitration Clause on the Internet.

1. Arbitration clause on the Internet is a part of Contract

PICC provides that a contract validly entered into is binding upon the parties [Article 1.3 of PICC]. As CLAIMANT had seen RESPONDENT's dispute resolution clause on the Internet and CLAIMANT had no problems agreeing to that [E1], which constituted a part of Contract and illustrated the consensus of being bound by the arbitration clause on the Internet and process. Hence, CLAIMANT and RESPONDENT had the obligation to abide by Arbitration Clause on the Internet.

2. ADR Clause in MOU is only the modification to Arbitration Clause on the Internet

PICC provides that if a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract con-

tains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy [Article 2.1.12 of PICC]. However, ADR Clause in MOU only stipulated the applying rule of CIETAC rules as the arbitral rule to disputes but no agreement on Seat of Arbitration or arbitral institution, which does not materially alter the former arbitration agreement of Contract. Hence, ADR Clause in MOU only becomes an additional part of Contact and the modification to Arbitration clause on the Internet

Furthermore, by comparing Arbitration Clause on internet with ADR clause in MOU, it is clear and reasonable to deduce that CLAIMANT and RESPONDENT both agreed only to alter the arbitral rule because the solo distinctiveness and difference between the two arbitration clause is the applying arbitration rule—from HKIAC Arbitration rules to CIETAC rules and the other parts still remain the same, including Seat of Arbitration and process. Hence, the discrepancy obviously shows the intention only to alter the Arbitral rule and others are remained by CLAIMANT and RESPONDENT.

B. The preconditions to arbitration have not been fulfilled by CLAIMANT

The preconditions to arbitration have not been fulfilled because the parties shall resolve the dispute by mediation first. The Arbitration Clause on the Internet provides that 'Any disputes …must be resolved by mediation…' Failing that disputes must be resolved by three arbitrators…' Hence, the CLAIMANT cannot go for arbitration until CLAIMANT and RESPONDANT failed in mediation. [Empresa]

C. Arbitration Clause on the Internet leads to *AD HOC* Arbitration

An *ad hoc* arbitration is one which is conducted pursuit to rule agreed by the parties themselves or laid down by the arbitral tribunal and there is no administering institution [M. Hunter P40] [Margaret P9]. Clearly, RESPONDENT and CLAIMANT both

selected arbitral rule and Seat of Arbitration while they did not agree on any arbitral institution. Moreover, by applying CIETAC Rule, no arbitral institution can be decided. Hence, the intention of processing *Ad Hoc* Arbitration by both parties is obvious and CIETAC, as an arbitral institution, is ruled out.

II. SEAT OF ARBITRATION SHALL NOT BE IN ID

The Seat of Arbitration shall not be in ID, because: **(A)** Seat of Arbitration shall be in Hong Kong; and **(B)** Alternatively, Seat of Arbitration should be in Ego.

A. Seat of Arbitration shall be in Hong Kong

The parties are free to agree on the place of arbitration [Article 20 of ML]. As both parties agreed on the Seat of Arbitration of Hong Kong in the Arbitration clause of Exporting on the Internet and the MOU did not make further modification on the Seat of Arbitration, it should have legal binding force on both CLAIMANT and RESPONDENT. Hence, the Seat of Arbitration shall not be in Id.

B. Alternatively, Seat of Arbitration should be in Ego

Model law provides that 'If failing to agree on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties' [Article 20(1) of ML]. So even if CLAIMANT disagreed to arbitrate in Hong Kong, RESPONDENT kindly and friendly proposed that Seat of Arbitration should be in Ego because of Ego's closest connection with the dispute.

III. CONCLUSION ON JURISDICTION

In conclusion, the jurisdiction of CIETAC is problematic as first our arbitration clause

is applicable and Seat of Arbitration shall not be in Id.

ARGUMENT ON THE MERITS

I. RESPONDENT FULFILLED THE CONTRACT AND WAS NOT LIABLE FOR THE ENSUING DAMAGES

RESPONDENT fulfilled the contract and was not liable for the ensuing damages, because **(A)** No contract was concluded between the two parties until MOU was signed; and **(B)** The wheat supplied was in conformity of the contract; and **(C)** RESPONDENT's non-performance was excused by *force majeure.*

A. No contract was concluded between the two parties until MOU was signed

No contract was concluded between the two parties until MOU was signed, because **1.** No contract was formed before MOU was signed; and **2.** MOU was a contract with binding force.

1. No contract was formed before MOU was signed

A contract may be concluded either by the acceptance of an offer or by conducts of the parties that are sufficient to show agreement [Article 2.1.1 of PICC]. The article provides only two manners of formation of the contract, by offer and acceptance, or conduct sufficient to show agreement.

Firstly, towards the offer, there was no acceptance showed in the writing documents because CLAIMANT made a so-called offer on quality and quantity about wheat at letters [E1], however, in reply of the offer, RESPONDENT left issues to be dealt with in the latter negotiation [E3].

Secondly, RESPONDENT made no conduct with the intention to conclude a contract. In addition, silence or inactivity does not in itself amount to acceptance [Article 2.1.6(1) of PICC]. Therefore, there was no conduct sufficient to show agreement.

2. MOU was a contract with binding force

The process of signing the MOU was a conduct. A contract may be concluded either by the acceptance of an offer or by the conduct of the parties that is sufficient to show agreement [Article 2.1.1 of PICC]. In order to determine whether there is sufficient evidence of the parties' intention to be bound by a contract, their conduct has to be interpreted in accordance with the criteria set forth in Art.4.1 et seq [Off Cmt 2.1.1]. A contract shall be interpreted according to the common intention of the parties [Article 4.1(1) of PICC]. The two articles above mean that if there is common intention to be bound by a contract showed in a conduct, the conduct is sufficient to conclude a contract."…the arbitral tribunal ascertains the true common intention of the parties taking into account negotiations and correspondence prior to the contract , the practice established in mutual relations of the parties, the customs of commerce, the subsequent conduct of the parties. Upon this the arbitral tribunal takes into account the customs effective now in international trade , which are set forth in Articles 2.1.1, 4.1, 4.2, 4.3 of the UNIDROIT Principles of International Commercial Contracts of 2004…" [Russia] Applied here, with referring to previous letters, the conduct of signing the MOU by both CLAIMANT and RESPONDENT was sufficient to show the common intention to conclude the contract. So, the contract was concluded in MOU, which had binding force in this case.

B. The wheat supplied was in conformity with the contract

The wheat supplied was in conformity with the contract, because **1.** RESPONDENT did not breach quality requirement of MOU; and **2.** RESPONDENT did not breach the labeling clause; and **3.** RESPONDENT's cease of supply was excused by *force*

majeure.

1. RESPONDENT did not breach quality requirement of MOU

RESPONDENT did not breach quality agreement of MOU, because: **(a)** RESPONDENT achieved the specific result; and **(b)** Alternatively, in any event RESPONDENT met its obligation of good faith and fair dealing.

a. RESPONDENT achieved the specific result

If the Tribunal finds that MOU imposes a duty to perform a specific result, the RESPONDENT fulfilled this duty. To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result [Article 5.1.4(1) of PICC]. Where the quality of performance is neither fixed by, nor determinable from the contract, a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances [Article 5.1.6 of PICC]. The duration part of MOU provided that the extension of contract was contingent on the availability of the correct quality of wheat in Ego, which showed that quality of wheat in Ego's standard was reasonable and not less than average in the circumstances [E5]. This provided that CLAIMANT agreed with using the Ego quality as the 'correct' standard. Moreover, CLAIMANT confessed that RESPONDENT had already offered grain with the average protein quality above 11.5% for the first two times and 11% at the third time, which all met the standard in Ego. Therefore, RESPONDENT fulfilled its duty to perform a specific result.

b. Alternatively, in any event RESPONDENT met its obligation of good faith and fair dealing

To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by

a reasonable person of the same kind in the same circumstances [Article 5.1.4(2) of PICC]. RESPONDENT fulfilled its duty of best efforts in that RESPONDENT supplied the wheat above the average quality standard in Ego [E6, E8] and informed CLAIMANT to get wheat right after RESPONDENT knowing the impossibility of supplying wheat [E11]. Moreover, when required by CLAIMANT to change the delivery date to 18th of March [E6], RESPONDENT also tried its hard to meet the duty of good faith and fair dealing.

2. RESPONDENT did not breach the labeling clause

RESPONDENT did not breach the labeling clause, because: **(a)** The customs legislation in Ego prevails; and **(b)** CLAIMANT was bound by usage in international trade

a. The customs legislation in Ego prevails

The labeling clause was in conflict with customs legislation in Ego, the mandatory rules, which only allowed signage in the language of Ego [E15]. Since nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origins, which are applicable in accordance with the relevant rules of private international law [Article 1.4 of PICC], the customs legislation in Ego prevails.

b. CLAIMANT was bound by usage in international trade

The additional cost of translation could be avoided because CLAIMANT should follow usage. The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned [Article 1.9 of PICC]. It is a common trade practice that normally importers change the signing and language in the bonded warehouse [E15]. CLAIMANT's failure to recognize the usage resulted in an additional cost. So, RESPONDENT should not be liable for

damages.

3. RESPONDENT's cease of supply was excused by *force majeure*

RESPONDENT's cease of supply was excused by *force majeure*, because: **(a)** RESPONDENT's cease of supply resulted from government policy; and **(b)** government policy is considered as *force majeure*; and **(c)** *force majeure* can excuse the liability for damages; and **(d)** RESPONDENT had informed CLAIMANT the situation.

a. RESPONDENT's cease of supply resulted from government policy

RESPONDENT's cease of supply was caused by the auction of the government of Ego, which was government policy. According to that policy, the grain handling authority would take over the main port in a week and RESPONDENT could not export grain to overseas suppliers out of the main port [BK 3, 4, E9].

In addition, RESPONDENT was always willing to keep the contract [E9 & E11]. RESPONDENT had tried its best to maintain the contract but failed. RESPONDENT took part in the auction but lost on the bid [E9]. Besides, RESPONDENT tried to convince the grain handling authority to take over the contract but was refused [E11].

b. Government policy is considered as *force majeure*

Force majeure is an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences [Article 7.1.7(1) of PICC]. Government policy, foreign exchange control for instance, is *force majeure* [Off Cmt 7.1.7 (1)] [See Section 11 of UC]. Here the act of the government is not the fiscal or monetary policy decisions and therefore is not excluded as *force majeure* [Seaboard]. Therefore, government policy can be considered as *force majeure*.

c. *Force majeure* can excuse liability of damages

Non-performance by a party is excused if that party proves that the non-performance was due to *force majeure* [Article 7.1.7 (1) of PICC]. Damages can only be got without situation where non-performance is excused under these Principles [Article 7.4.1 of PICC]. With reasons above, RESPONDENT's non-performance could be excused and CLAIMANT could not get compensation.

d. RESPONDENT had informed CLAIMANT the situation

The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform [Article 7.1.7(3) of PICC]. Here RESPONDENT informed CLAIMANT the situation on March 28, 2009 [E9] and CLAIMANT got the notice [E10]. RESPONDENT had done that and communicated with CLAIMANT promptly with good faith.

II. CLAIMANT SHOULD FULFILL THE OBLIGATION OF PAYMENT

CLAIMANT had the contractual obligation of payment every month by L/C [E5]. CLAIMANT failed to do this while RESPONDENT had shipped the third consignment of goods [E12]. Therefore CLAIMANT constituted breach of contract.

III. CONCLUSION ON MERITS

In conclusion, RESPONDENT fulfilled the contract and was not liable for the ensuing damages, while CLAIMANT should fulfill the obligation of payment.

REQUEST FOR RELIEF

CLAIMANT respectfully requests the Tribunal to find that:

1. CIETAC has no jurisdiction over this dispute and Seat of Arbitration shall not be in Id.

2. RESPONDENT fulfilled the contract and was not liable for the ensuing damages.

3. CLAIMANT should fulfill the obligation of payment.