THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG-AUGUST 2011

MEMORANDUM FOR CLAIMANT

TEAM NUMBER: 678

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

ADR Clause	Alternative Disputes Resolution Clause
CIETAC	China International Economic and Trade Arbitration Commission
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PICC	UNIDROIT Principles of International Commercial Contracts of 2004
UNCITRAL	United Nations Convention on International Trade Law
Ego	Federal Republic of Ego
Id	Federal Republic of Id
M.O.U	Memorandum of Understanding
P.C.I.J	Permanent Court of International Justice

INDEX OF CASES AND AWARDS

SUMMARY OF FACT

Claimant, Flour Mill Incorporated located in the Republic of Id (Id) is a company which purchases wheat for its productions from the Island of Oz. In 2008, his supplier could not fulfill his contract due to drought.

Respondent, Freud Exporting, located in the Federal Republic of Ego through its M.D, Mr. Sigmund made an agreement with CLAIMANT in the Island of Sun in January, 2009. The agreement was for the supply of wheat for a period of three years with further two year extensions if the parties agree.

There are two ports in Ego. The main port with all modern loading facilities and the second smaller port used to be the major grain export harbour of Ego and is subject to flood tides, silting and Pirates activities. The RESPONDENT does not ship grain via the smaller port.

RESPONDENT achieved success in the first shipment but the containers were marked in Ego language contrary to the agreement in the MOU.

On 27 March, 2009 the government privatized the main port and thus, RESPONDENT cannot export grain out of the main port of Ego. RESPONDENT therefore cancelled the contract.

ARGUMENTS

1.0 THE TRIBUNAL HAS JURISDICTION AS PARTIES ARE BOUND BY THE ARBITRATION AGREEMENT.

The tribunal has jurisdiction as the RESPONDENT is bound by the valid arbitration agreement between the parties and cannot therefore challenge its validity. A classical definition of an Arbitration agreement is herein instructive

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement"[1].

1.1 THE PARTIES ARE BOUND BY THE VALID ARBITRATION AGREEMENT.

As contained in the memorandum of understanding between the parties, the ADR clause is to be activated whenever any dispute arises in relation to the agreement.[2]

1.2 THE CLAIMANT FULFILLED THE PRE-ARBITRAL AGREEMENT

The ADR clause contains three (3) dispute resolution mechanics which are to be exhausted independently and sequentially. The first being the meeting of chief executive officers of both parties in good faith so as to resolve whatever disputes that exists. A careful perusal of the letter sent by the RESPONDENT to CLAIMANT on the 10th of May, 2009[3] clearly shows that parties satisfied the condition precedent but as negotiations did not crystalize, the CLAIMANT resultantly initiated the next phase which is the arbitration proceedings to be governed by CIETAC rules.[4]

1.3 THE CIETAC RULES IS VALID AND BINDING ON THE PARTIES

The ADR clause expressly provides that disputes shall be settled by arbitration in accordance with the CIETAC rules.[5] The CIETAC rules provides thus;

"*Where the parties agree to refer their disputes to arbitration under those rules without providing the name of an arbitration institution, they shall be deemed to have agreed to refer the disputes to arbitration by CIETAC"*[6]

[1] Article 7 of the UNCITRAL Model Law 2006
[2] Exhibit 5
[3] Exhibit 13
[4] Exhibit 14
[5] Exhibit 5
[6] Art 4:3 of P.I.C.C

In essence, the proposition of RESPONDENT contained in Exhibit 15, challenging the jurisdiction of CIETAC is of no moment in law. Hence, upon applicability of CIETAC rules, there is no basis for RESPONDENT'S insistence on the seat of Arbitration being the island of Ego as CIETAC rule provides that

"Where the parties have not agreed on the place of arbitration, the place of arbitration shall be the domicile of the CIETAC or its Sub-Commission"[7].

No mutual agreement as regards the seat of arbitration in the M.O.U signed by parties.

1.4 COMPETENCE OF THE ARBITRAL TRIBUNAL TO RULE ON ITS JURISDICTION

Assuming but not conceding that the RESPONDENT'S challenge of CIETAC'S jurisdiction is allowed, a crucial power conferred on the arbitrator, mostly as a general principle of International Arbitration Law or at times by the parties, is the one that enables him to determine its own jurisdiction.[8] This is recognized as the doctrine of **Kompetenz-Kompetenz**[9] of the arbitrator. This is in conformity with the first sentence of Article 16 of the Model Law of UNCITRAL (2006):

"The Arbitral Tribunal may rule on its own jurisdiction including any objection with respect to the existence or validity of the arbitration agreement"

The history of this principle is ostensibly as old as the evolution of arbitration itself. It arose in the BETSEY CASE[10] of 1797 in what may be considered the dawn of modern international arbitration. This was one of the cases submissions to the mixed commission set up under Article 7 of the Jay Treaty of 1794 with regards to the disputes between Britain and the United States. The question that arose was whether the commission had the power to determine its jurisdiction. Lord Grenville suggested that the opinion of the then Lord Chancellor, Lord LOUGHBOROUGH should be sought.in reply, Lord Chancellor considered as "absurd" "the doubt respecting the authority of the commissioner to settle their own jurisdiction" and he went further to declare that "*they must necessarily decide upon cases being within or without their competency*".

This same view was echoed in 1928 in advisory opinion NO. 16 of the P.C.I.J in the matter of the interpretation of the Greco-Turkish Agreement wherein it was observed that:

---

[7] Art 31(2) of CIETAC Arbitration Rules

[8] Sanders "ICC Congress",No.3,p. 74.Chang, "General Principles of Law as applied by International courts and Tribunals"p.275

[9] The term "**Kompetenz-Kompetenz"** (as explained by Prof. Peter Schlosser, "Arbitration International" Vol 8,Nr. 2, 1992,p.1993 is taken from German Legal selling, it means something very difficult from what it stands for in the mind of many non-German Legal writers.

[10] International Adj. M.S., P.179.

"*As a general rule, anybody possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction"*[11]

It is evident that this principle has been sustained by terms and implications of Arbitration Conventions, rules and by case laws.

Flowing from the afore-stated, contesting the jurisdiction of CIETAC by the RESPONDENT does not prevent the tribunal from entertaining the case and the CIETAC rules also provide that;

"*The CIETAC shall have the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case…"*[12]

By extension, Article 6(4) states thus:

"*The arbitration shall proceed notwithstanding an objection to the arbitration agreement and/or jurisdiction over the arbitration case"*

A combined reading of article 6(1) and (4) clearly empowers the tribunal to determine its jurisdiction vis-à-vis the validity of the arbitration agreement. Hence, the challenge of the CIETAC jurisdiction is of no effect whatsoever and therefore cannot stand in law.

1.5 VALIDITY AND SUPREMACY OF THE TWO (2) ADR CLAUSES

The MOU expressly states the agreement of the parties and any other allusion to the contrary cannot override an express agreement between the parties. The **ADR** clause to which the RESPONDENTS give credence cannot override that which is contained in the MOU. However, in accordance with the **CONTRA PREFERENTUM** rule, the RESPONDENT cannot rely on its own ADR Clause on the internet. It states**:**
If contract terms supplied by one party are unclear, an interpretation against that party is preferred.[13]

CONCLUSION ON JURISDICTION

The tribunal should exercise jurisdiction over the disputes as parties are bound by the arbitration agreement and the parties satisfied the pre-Arbitral requirement.

2.0 **RESPONDENT'S BREACH OF CONTRACT BY NOT SUPPLYING GRAINS OUT OF THE SECOND PORT OF EGO.**

[11] (1928),B.16,P.20
[12] Art 6(1) of CIETAC Arbitration Rules

[13] Art 4.6 of the PICC

The understanding between the parties is to the effect that supply of grains can be from either of the two ports. By implication, the RESPONDENT was in express breach of the agreement by not supplying out of the second port of Ego.

2.1 **REFUSED SHIPMENT FROM SECOND PORT OF EGO WAS A FUNDAMENTAL BREACH.**

It is trite law that preliminary negotiations which influenced the contract agreement cannot be disregarded in event of a breach of contract. Art 4.3 of the P.I.C.C states that

"*In applying Article 4.1 and 4.2, regards shall be had to all circumstances including*

(a) Preliminary negotiations between the parties…"

In accordance with this principle, the exchange of correspondence between the CLAIMANT and RESPONDENT before the MOU was drawn up is of essence and must be factored in as part of the contract terms in any circumstance.

The CLAIMANT in paragraph IV of the correspondence sent to the RESPONDENT [14] stated that *"it does not matter to us which of the two ports in ego you will be using for the shipment of the grains …"* the RESPONDENT in its reply via fax, stated in the first paragraph and I quote:

"*In response to your letter, we acknowledge that we can supply your required quality as per your letter of January 10, 2009".*[15]

This is in tandem with the provisions of Article 4.2 of PICC which provides thus:

"(1) the statements and other conduct of a party shall be interpreted according to the party's intention if the other party knew or could not have been unaware of that intention…"

Applying this to the instant case, it is evident that the RESPONDENT was aware of the CLAIMANTS intent to receive shipment from either ports, which is fundamental to the CLAIMANTS decision to draw up a MOU and the RESPONDENT did not, neither at the preliminary stage of negotiation nor in the MOU state that it could not have shipped the requested goods through the second port of Ego. However, Art 6.2.1 of PICC explains the rule on observance of contracts between parties thus:

"Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship".

[14] Exhibit 1
[15] Exhibit 3

2.2 **RESPONDENT FAILED TO SATISFY THE BEST EFFORTS RULE**

On the authority of Article 5.1.4 (2) of the PICC which reads;

" *(2)to the extent that the obligation of a party involves a duty of best effort in the performance of an activity, the party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances"*

Invariably, the second paragraph of this Article imposes a duty of best effort, which would have been satisfied by the RESPONDENT if they had painstakingly purchased the main port or at least informed the CLAIMANT of this development considering the foreseeable harm inherent in a loss of the bid.

Therefore, the understanding between the parties imposes a duty to achieve specific result on the RESPONDENT which is basically to supply grains and assuming but not conceding that the duty to achieve a specific result could not have been discharged, hence, the duty of best efforts must be satisfied.

3.0 **BREACH OF CONTRACT DUE TO THE DELIVERY OF GRAIN WHICH DID NOT MATCH THE QUALITY REQUIREMENTS**

A cursory look at the fact of the case, specifically paragraph 1 of the CLAIMANT'S letter which reads;

"…the average protein quality must be 11.5%. In other words, we need to mix 13% with 12% and 10.5%wheat to arrive at an average of 11.5%, a higher average is acceptable but a lower one is not"[16]

It is however evident that the quality required of the grains was stated by CLAIMANT in the initial correspondence addressed to RESPONDENT which resultantly informed the drawing up of the MOU.

3.1 **NON-MATCH OF GRAINS TO QUALITY REQUIRED AMOUNTS TO NON-PERFORMANCE.**

Non- performance as defined under Article 7.1.1 means: "*the failure by a party to perform any of its obligations under the contract, including defective performance or late performance".*

Therefore, the last shipment contained wheat with a protein level of 11% as against the agreed 11.5% protein quality amounts to non-match of grains to the quality requirements, which in effect is equivalent to non-performance.

[16] Exhibit 1

3.2 THE NON-MATCH OF GRAINS TO QUALITY REQUIRED AFFORDS THE CLAIMANT A RIGHT TO TERMINATE

Paragraph two(2) of the CLAIMANT'S letter[17] emphatically stressed the need for the quality of the grains to meet the 11.5% protein content and stating the adverse effect a reduction in quality would occasion.

Therefore, relying on Article 7.3.1, a party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to fundamental non-performance.

3.3 NON-PERFORMANCE AS A VALID GROUND FOR TERMINATION OF CONTRACT.

Stemming from the above, upon establishing that the RESPONDENT'S act amounts to non-performance, it is the argument of the CLAIMANT that the requirement to give notice of termination as contained in Art 7.3.2 of PICC was adequately satisfied as the RESPONDENT received notice indicating CLAIMANTS intent to terminate the contract due to the unwillingness of the RESPONDENT to fulfill the two year contract, which falls within the reasonable time anticipated by Article 7.3.2(2) of PICC

4.0 WRONG LABELING OF CONTAINER IS SUBSTANTIAL BREACH OF CONTRACT

A careful perusal of the MOU shows that labeling of containers was an explicit agreement between parties and containers are to be marked in English only, in the following words:

"*Wheat for human consumption property of Peng Corporation"*[18]

It is therefore the contention of claimant that the wrong labeling of container is a substantial breach of an express agreement of the parties as Article 1.7 of the UNIDROIT principles espouses each party to act in accordance with good faith and fair dealing in international trade.

4.1 RESPONDENTS BREACH BY WRONG LABELING OF CONTAINERS OCCASIONED HARDSHIP ON CLAIMANT

The hardship occasioned by the wrong label of containers was immediately expressed by the claimant in the letter following receipt of first shipment of goods and the CLAIMANT stated the challenges of unloading the goods and the pecuniary loss on translation which ought to have been done by the RESPONDENT.

[17] Exhibit 1
[18] See Memorandum of Understanding. *[Exhibit 4]*

However, the second shipment also witnessed a similar breach with greater cost on the CLAIMANT.[19]

Stemming from the above, it is crystal clear that there is a breach of an express agreement which has occasioned hardship on the claimant. Assuming but not conceding that there are certain local legislations which do not allow the translation, the RESPONDENTS is in breach of Art 3.2.5 of PICC therefore amounting to fraudulent non-disclosure of circumstances.

4.2 CLAIMS FOR DAMAGES AGAINST RESPONDENT FOR WRONG LABELING

As evident in the correspondence of the claimant on the 30th of March 2009, the claimant requested for contribution from the RESPONDENT to mitigate the hardship occasioned by the RESPONDENT'S breach.[20] Therefore, Art 7.4.1 gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these principles. In essence, the CLAIMANT is entitled to full compensation for loss suffered (damnum emergens), as a result of non-performance. For example, the expenses incurred for translation, and the consequent loss of profit (Incrum cessans) or gain deprived.

CONCLUSION ON SUBSTANTIVE SUIT

In the light of the above, it is the submission of the CLAIMANT that the RESPONDENT is liable for damages for not supplying out of the second port, wrong labeling of the goods and non-match of the grain to the quality required. Therefore, RESPONDENT breached its obligation under the contract.[21]

RELIEF SOUGHT

Claimant respectfully requests that the Arbitral Tribunal find that:

1) The Tribunal has jurisdiction as RESPONDENT is bound by the Arbitration Agreement

A) CIETAC rule is valid and binding on parties

B) The Arbitral Tribunal can rule on its jurisdiction

C) The ADR Clause contained in the MOU takes precedence over the Internet ADR Clause

[19] Exhibit 8
[20] Exhibit 8
[21] Levitt v Islamic Republic of Iran-U.S.CL. Trib.Rep 191, 209-10(1987), Sapphire Int. Petroleum Ltd v National Iranian Oil Company (1967).

2) RESPONDENT breached the contract by not supplying out of Second Port of Ego and therefore liable for damages.

3) RESPONDENT pay damages for delivery of grains which did not match the quality requirements

4) RESPONDENT pay damages to the CLAIMANT for wrong labeling.

……..

For Peng Importing Corporation.