THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG - AUGUST 2011

MEMORANDUM

FOR RESPONDENT

Team Number: 678

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INDEX OF TERMS AND ABBREVIATIONS

BI	Background Information
Ex	Exhibit
¶	Paragraph of Problem
§	Article of UNIDROIT Principles of International Commercial Contracts of 2004
Agreement	Distribution Agreement
Art	Article
Arts	Articles
Clar.	Clarifications of the Moot Problem
Clause	Clause of the Distribution Agreement
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985)
PICC	UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2004)
UNCITRAL	United Nations Commission on International Trade Law

INDEX OF ARBITRAL AWARDS AND JUDICIAL DECISIONS

Date: 14.01.2010

Country: International Centre for Settlement of Investment Disputes (ICSID)

Number: No ARB/06/18; IIC 424 (2010)

Court: International Centre for Settlement of Investment Disputes (ICSID)

Parties: Joseph Charles Lemire v Ukraine

Citation: http://www.unilex.info/case.cfm?id=1533

Country: Arbitral Award

Number: IIC 421 (2010)

Court: Ad hoc Arbitration, The Hague

Parties: Chevron Corporation &Texaco Petroleum Corporation v. Ecuador

Citation: http://www.unilex.info/case.cfm?id=1534

Date: 01.12.1996

Country: Arbitral Award

Number: A-1795/51

Court: Camera Arbitrale Nazionale ed Internazionale di Milano

Parties: Unknown

Citation: http://www.unilex.info/case.cfm?id=622

Date: 00.03.1998

Country: Arbitral Award

Number: 9029

Court: ICC International Court of Arbitration, Rome

Parties: Unknown

Citation: http://www.unilex.info/case.cfm?id=660

Date: 00.03.1998

Country: Arbitral Award

Number: 9029

Court: ICC International Court of Arbitration, Rome

Parties: Unknown

Citation: http://www.unilex.info/case.cfm?id=660

Date: 00.10.2000

Country: Arbitral Award

Number: 10022

Court: ICC International Court of Arbitration

Parties: Unknown

Citation: http://www.unilex.info/case.cfm?id=695

Date: 00.00.2007

Country: Arbitral Award

Number:

Court: China International Economic and Trade Arbitration Commission

Parties: Unknown

Citation: http://www.unilex.info/case.cfm?id=1208

TEXT

John Honnold *Uniform Law for International Sales* (3ed, Kluwer Law International, The Hague, 1999) Article 79 para 423.4

Christoph Brunner *Force Majeure and Hardship Under General Contract Principles: Exemption of Non-Performance in International Arbitration* (Kluwer Law International, The Hague, 2009) 167.

SUMMARY OF FACT

Claimant, Flour Mill Incorporation 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 MD, 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 the modern loading facilities and the second smaller port used to be the major grain export harbour of Ego but is smaller and is subject to flood tides, silting and Pirates activities. The Respondent does not make 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

ARGUMENTS ON JURISDICTION

I. THIS TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THIS DISPUTE

This Tribunal does not have jurisdiction to hear this dispute because: **(a)** the ADR clause in the MoU is inoperative and uncertain; **(a)** the CIETAC does not have jurisdiction to hear this dispute and in the alternative, the seat of arbitration would be Ego; **(c)** in any event, the pre-arbitral requirement under the Model Law and the Agreement has not been met.

(a) THE ADR CLAUSE IN THE MOU IS INOPERATIVE BECAUSE IT IS UNCERTAIN

The ADR Clause in the MoU is inoperative because when read in conjunction with the arbitration clause on the internet[1] it is uncertain. The two clauses contradict each other. A court will void an arbitration agreement if the uncertainty is such that it is difficult to make sense of it[2]. Recognition and enforcement of an award may be refused if the "said agreement is not valid under the law to which the parties have subjected it"[3]. The arbitration clause on Respondent's website provides that the law applying is the **Draft Hong Kong Code of Conduct for Mediators** and the **HKIAC Arbitration Rules**. Whereas, the applicable law in the MoU is the

[1] Exhibit 2

[2] *Blackaby* 145, 146

[3] §II (3) *NYC*

CIETAC rules. This flat contradiction in terms renders the ADR clause void for uncertainty and Respondent arbitration clause is applicable.

(b) THE CEITAC DOES NOT HAVE JURISDICTION AND THE ALTERNATIVE SEAT OF ARBITRATION IS EGO

Thus, with no valid arbitration agreement in the MOU, this Tribunal has no jurisdiction to hear the dispute. A court shall only refer parties to arbitration where the agreement is valid.[4] Since the CEITAC does not have jurisdiction to hear this dispute because the agreement is void, the Respondent's arbitration clause becomes effective. Thus, the Seat of Arbitration is Ego.

Again, the choice of law clause amounted to an implied negative choice of any municipal legal system by the parties and the most appropriate approach was to submit the settlement agreement to the rules of international law, and within these, to have particular regard to the UNIDROIT Principles.[5]

(c) CLAIMANT'S PRE-ARBITRAL REQUIREMENT UNDER THE MODEL LAW AND THE AGREEMENT HAS NOT BEEN MET.

In the alternative, assuming but not conceding that the original arbitration clause on the Respondent's website does not apply, still this panel cannot assume jurisdiction because there are two rules guiding this transaction and Respondent has a right to challenge the jurisdiction of the Tribunal under the modified agreement even if original arbitration agreement is invalid. If

[4] Art. 8(1) *UNCITRAL*

[5] *Joseph Charles Lemire v Ukraine*

agreement invalid or incapable of being performed, the court shall not refer the parties to arbitration[6].

Claimant did not request to be referred to arbitration**.** Claimant should submit requests not later than when submitting its first statement on the substance of the dispute.[7] However, CLAIMANT did not request to be referred to arbitration.

Even if the arbitration agreement is valid, Claimant did not fulfill its pre-arbitral requirements. Parties have contractual obligations to prior co-operative conflict resolution. Even though Claimant attempted to resolve the dispute with Respondent, it was not in good faith and there were other alternative measures to resolve the dispute outside the meeting at Id such as conciliation, modification of agreement, etc. Claimant hid the truth and did not do anything in good faith because he was discussing with another supplier. It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.[8] A party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.[9]

In the applicable case, Claimant had been negotiating with a new supplier and this prevented him from resolving the dispute with Respondent and thus broke off negotiations in bad faith.[10] Therefore, Claimant is liable for losses caused.

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[6] Model Law Art. 8(1); New York Convention Art II.3

[7] Model Law Art.8(1)

[8] §2.1.15(3) *UNIDROIT*

[9] §2.1.15(2) *UNIDROIT*

[10] Ex. 14

CONCLUSION ON JURISDICTION

That this Tribunal has no jurisdiction as the preconditions to arbitration are not fulfilled. That the forum convenience is Ego.

ARGUMENTS ON MERIT

I. IMMPOSIBILITY OF SUPPLY DOES NOT AMOUNT TO BREACH OF AGREEMENT

(a) Respondent did not breach the agreement because failure to ship was due to impossibility of supply.

Supply of grain became impossible when the government privatized the main port in Ego. Respondent has never and does not use the smaller port in the ordinary course of his business. Thus, privatization brought hardship to the performance of the agreement and Respondent is excused.

Furthermore, the privatization of the main port was not foreseeable by Respondent at the time of making the contract. Even if foreseeable, Respondent never contemplated that it would lose in the auction sale.

(b) Flood tides and silting at the smaller port excuse respondent's non-performance.

The second port is smaller, subject to flood tides and silting[11]; these excuse RESPONDENT'S non-performance. Respondent never contemplated at the time of entering the contract that it would use the smaller port in performing the contract.

[11] Para. 2 BI

(c) The acts of sea pirates excuse respondent's non-performance

Furthermore, the activities of pirates made it impossible for Respondent to supply the grain via the smaller port.[12] The Respondent has never used the smaller port and thus it was not in his usual course of business to ship grain via the smaller port.

The risk involved in exporting wheat via the smaller port is enormous due to pirates' activities. Respondent cannot bear this risk evident in the name of doing business.

Even if the Ego Navy patrols the port, its support cannot be guaranteed for business transactions.

(d) The Respondent's losing bid in the Auction amounts to *force majeure*

The occurrence of events that fundamentally alters the equilibrium of a contract amounts to hardship based on the fact that the events are beyond the control of the disadvantaged party.[13]

Hardship may be invoked if the alteration of the contractual equilibrium is due to an event the risk of which was not assumed by the disadvantaged party and if such an event takes place after the conclusion of contract.[14]

[12] Para. 2 Ex.

[13] §6.2.2(c) *UNIDROIT*

[14] http://www.unilex.info/case.cfm?id=660

It also occurs where there is a supervening change in the law causing fundamental alteration of contract equilibrium.[15]

Respondent's failure at the auction was beyond its control and this fundamentally alters the equilibrium of the contract. This is a government policy as to management of its ports and thus unforeseeable. The performance of the contract became excessively onerous because an increase in cost of performance is evident. This is the threshold of hardship.[16]

Non-performance by a party is excused if that party proves that the non-performance was beyond its control.[17] The Respondent is relieved from its obligation to pay damages.[18]

This Tribunal may terminate the contract at a date and on terms to be fixed, or adapt the contract with a view to restoring its equilibrium in accordance with the *UNIDROIT* [19]
Where there is hardship, distribution is between the parties in a just and equitable manner of the losses and gains resulting from unforeseeable event.[20]

(e) Respondent cannot be liable for unforeseeable harm

[15] §6.2.1-6.2.3 *UNIDROIT*

[16] *Honnold* p. 423.4

[17] §7.1.7 *UNIDROIT*

[18] *Brunner*, p. 345-346

[19] §6.2.2(4)(b) *UNIDROIT*

[20] *Chevron Corporation &Texaco Petroleum Corporation v. Ecuador*

A non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.[21]

Assuming but not conceding that the Respondent is liable for damages, damages cannot stand because Respondent could not have foreseen the government's privatization of the grain facility neither could he have foreseen the possibility of his lost bid in the auction sale. Compensation is limited to foreseeable harm arising out of non-performance.[22]

II. THE VARIATION IN PROTEIN CONTENT CONTRARY TO CLAIMANT'S REQUEST OF 11.5% PROTEIN SPECIFICATION IS NOT A BREACH OF CONTRACT.

The MoU being the written contract between the Claimant and the Respondent does not specify any protein quality level. Therefore, Respondent is not bound by the 11.5% protein specification of Claimant and thus does not constitute a breach of contract.

In the alternative, a party is prevented from terminating the contract after leading the other party to believe it would tolerate that party's breach.[23] CLAIMANT took no notice of RESPONDENT's mail dated 5th April stating ***"WE WILL SHIP WHAT WE HAVE SO AT***

[21] §7.4.4 *UNIDROIT*

[22] http://www.unilex.info/case.cfm?id=622

[23] §1.8 *UNIDROIT*

LEAST THIS MONTH IS COVERED". In reliance of this silence, Respondent continued its business. If CLAIMANT had responded to that mail immediately or within a reasonable time before shipment RESPONDENT would have found new business partner to buy up the grain at 11% protein and would not have wasted time and resources shipping the grain. As a consequence, CLAIMANT is prevented by *estoppel* to terminate the Agreement.

It is trite *mercantoria law* that notice may be given by any means appropriate to the circumstances and effective when it reaches the person to whom it is given; and includes communication of intention.[24]

In the instant case, notice of the available grain was duly given to Claimant.[25]

(b) Variation in protein content contrary to Claimant's 11.5% protein specification is not a fundamental non-performance.

A party may terminate the agreement where the failure of the other party to perform an obligation under the agreement amounts to a fundamental non-performance.[26] Even if the failure was not due to interference by Claimant, it was not a fundamental non-performance.

[24] §1.10(1),(2),(3),(4) *UNIDROIT*

[25] Ex. 9

[26] §7.3.1(1) *UNIDROIT*

In determining whether a failure amounts to a fundamental non-performance, regard shall be had to whether the non-performance is intentional or reckless[27], substantially deprives the aggrieved party of what it was entitled to expect under the contract, etc.

From the fact of this case, the variation neither was neither intentional, reckless nor deprives the Claimant of benefit of the contract since the grain would further be mixed with grain of protein content of 13%.[28]

(c) Variation in the protein content was within the acceptable range of 10.5% to 13%

It is evident from the fact of this case that the variation in the protein content was not intentional or reckless and does not substantially deprived Claimant of benefit in the contract since the said grain was within the acceptable range of 10.5% to 13%. Thus, it was not a fundamental non-performance.

Agreement, based on Respondent's failure for one year which was even attributable to Claimant, indicates that Claimant acted in bad faith.

III. THE MARKINGS ON THE CONTAINER IN EGO LANGUAGE WAS IN ACCORDANCE WITH *LEX MERCATORIA*

[27] §7.3.1(2)(c) *UNIDROIT*

[28] Ex.1

UNIDROIT allows the application of mandatory national rules.[29] The principles are to be considered an "authoritative source of knowledge of international trade usages".[30] Therefore, the marking of the containers in Ego language is in accordance with *lex mercatoria.*

Again, parties are bound by a usage that is widely known to and regularly observed in international trade.[31] The markings in Ego language is a usage that is widely known and Claimant ought to have taken notice. Signage in Ego language is pursuant to a mandatory customs legislation and the *PICC* supports this view.

(a) Importers are responsible for changing the sign in bonded warehouse as a custom.

Importers are responsible for changing the sign in bonded warehouse as a trade usage and arbitral tribunals are to take into account “relevant trade usages”.[32]

UNIDROIT principles qualified as usages applicable to the extent that the issues at stake are not covered by the applicable domestic law.[33] In the instant case, national law covers the labeling of

[29] §1.4 *UNIDROIT*

[30] http://www.unilex.info/case.cfm?id=66

[31] §1.9 (2) *UNIDROIT*

[32] Art.17 ICC Rules of Arbitration; http://www.unilex.info/case.cfm?id=695

[33] http://www.unilex.info/case.cfm?id=1208

containers in Ego language and importers are therefore responsible for changing signs by trade usages.

IV. A COUTERCLAIM FOR UNPAID SHIPMENT AND GENERAL DAMAGES TO RESPONDENT.

Even if the agreement is terminated, a claim for damages is not affected by termination[34]. Aggrieved party entitled to full compensation for harm suffered as result of other party's non-performance[35]. Even if notice of termination is effective, notifying party is liable for damages[36].

Therefore, CLAIMANT is liable for a counterclaim from the last shipment.

[34] §7.3.5(2) *UNIDROIT*

[35] *Mexican Grower(2006*

[36] *Latin-American Distributor(2001*

REQUEST FOR RELIEF

RESPONDENT respectfully requests the tribunal to find that:

1. This tribunal should not exercise or assume jurisdiction over this dispute;

2. CLAIMANT should perform its obligation to pay for the last shipment;

3. CLAIMANT unlawfully terminated its Agreement with RESPONDENT.

4. CLAIMANT is liable for damages to Respondent;

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