THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG-AUGUST 2011

MEMORANDUM FOR CLAIMANT

On behalf of:	**Against:**
Peng Importing Corporation	**Freud Exporting**

Team Number: 763

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INDEX OF ABBREVIATIONS

NY Convention	**United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards(1958)**
CIETAC	**China International Economic and Trade Arbitration Commission**
Ego	**Federal Republic of Ego**
MOU	**Memorandum of Understanding**
UNCITRAL	**United Nations Commission on International Trade Law**
Id	**Republic of Id**
UML	**UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006)**
UNDROIT	**International Institute for the Unification of Private Law**
ICC	**International Chamber of Commerce**
Para/Paras	**Paragraph/Paragraphs**
Off Cmt	**Official Comment to the PICC(UNIDOIT,2004)**
PICC	**UNIDROIT Principles of International Commercial Contracts of 2004**
FOB	**Free on Board**
Incoterms2000	**International Rules for the Interpretation of Trade Terms**

§	**Article of PICC**
¶	**Exhibit**
RCL	**Restatement (Second) Conflict of Laws 1971**

INDEX OF AUTHORITIES

	Goods(CISG)(2nd (English)edn,2005)
	(Cited: Schlechtriem/Schwenzer)
	(Para:32)
Joseph Lookofsky	***The 1980 United Nations Convention on Contracts for the International Sale of Goods*****, from Published in J. Herbots editor / R. Blanpain general editor,** ***International Encyclopaedia of Laws - Contracts*****, Suppl. 29 (December 2000) 1-192. Reproduced with permission of the publisher Kluwer Law International, The Hague.**
	(Para:36)
Honnold	**John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed. (1999). Reproduced with permission of the publisher,Kluwer Law International, The Hague**
	(Para:33)

INDEX OF CASES AND AWARDS

Rainwater	**Rainwater v. National Home Insurance Inc. [1991] 994 F. 2d 190 (Para.5)**
AWARD NO. 8486	**ICC International Court of Arbitration, Arbitral Award September 1996, ICC Case NO. 8486 (Para:28)**
AWARD NO.9479	**ICC International Court of Arbitration, Arbitral Award February 1999,ICC case NO.9479 February 1999 (Para:28)**
AWARD NO.435	**the Arbitration Court attached to the Bulgarian Chamber of Commerce and Industry, Arbitral Award April 1996,case NO.435 (Para:32)**

STATEMENT OF FACTS

Peng Importing Corporation (Claimant), a flour mill, is a company incorporated and located in the Republic of Id, managed by Charles Peng. Freud Exporting (Respondent), a wheat supplier, is a company located in the Federal Republic of Ego, managed by Sigmund Freud.

On January 10, 2009, Claimant wrote Respondent a letter with requirements of wheat and delivery schedule. **In January 2009**, on the Island of Sun Claimant and Respondent signed Memorandum of Understanding, a three-year contract with further two-year extensions if the parties agree, under which Respondent sold Claimant wheat of 100,000 tones monthly with containers marked in English only.

On February 22, 2009, Claimant received the first shipment with containers marked in Ego language which cost Claimant extra $5000. Furthermore, the wheat was tested within 11.5% average range, most close to the lower end as Claimant complained on **March 3, 2009**.

Respondent replied **On March 6, 2009**, promising it would endeavor to mark the containers in English and admitting that the protein content was at the lower end of requirements.

Nonetheless, the second shipment arrived with containers still marked in Ego language, leading to $5000 fee and $10,000 penalty. Moreover, the protein content of all the wheat in this shipment was 11.5% only, arising in complaints from Claimant's customers thus Claimant had to drop the price. Therefore Claimant suggested Respondent contribute an amount to offset some losses on **March 30, 2009**.

On March 27, 2009, Respondent lost the right to export from the main harbor, because of privatization of handling facilities which Respondent had known **in late 2008**, but hadn't informed Claimant until **March 28, 2009**.

On April 5, 2009, Respondent noted that it had to cancel the contract. **On April 30, 2009**, Claimant received the last shipment of wheat with a protein level of 11%.

The two parties failed the negotiation in Lobe City **on May 20, 2009**. Thereafter, Claimant initiated arbitration proceeding against Respondent.

ARGUMENTS

Ⅰ. CIETAC HAS JURISDICTION OVER THE DISPUTE

1. CIETAC has jurisdiction as: (1.1) the parties are bound by the ADR clause; (1.2) the parties agreed to settle the dispute by arbitration in accordance with CIETAC rules.

1.1 THE PARTIES ARE BOUND BY THE ADR CLAUSE

(A) The ADR clause is binding upon the parties.

2. The foundation of international arbitrations are mostly international arbitration agreements [Born 53] .The ADR Clause in MOU, a writing confirmation of the parties' common intention, is consistent with the definition of arbitration agreement [UMLArt.7; NY Convention Art.2] . When the parties didn't chose the law applicable to their arbitration agreement, the law governing the parties' underlying contract should be applied [RCLArt.218;Dicey&Morris 573-79;*Tunisienne*] . No evidence shows that ADR clause, part of MOU, was

concluded by any parties' mistake, fraud, threat or gross disparity[§ 3.5, § 3.8 , § 3.9 , § 3.10]. Hence, the ADR clause is valid and binding upon both parties.

(B) The arbitration clause of Respondent is not applicable.

3. The arbitration clause of Respondent is a standard term, while ADR clause is an arbitration agreement reflecting both parties' common intention. Thus, the latter prevails[§ 2.1.21]. Moreover, Respondent's arbitration clause was supplied and amended by the valid ADR clause. Consequently, the former is not applicable.

1.2 THE PARTIES AGREED TO SETTLE THE DISPUTE BY ARBITRATION IN ACCORDANCE WITH THE CIETAC RULES

(A) The parties agreed to arbitrate.

4. ADR clause clearly provided that "any dispute…initially settled by arbitration" [¶ 5] .And while contesting the jurisdiction of CIETAC, Respondent didn't refuse arbitration as a dispute resolution. It means that the parties agreed to resolve the dispute by arbitration.

(B) The parties agreed to arbitrate according to CIETAC.

5. When the parties choose no other arbitration rules but CIETAC rules in the ADR clause[¶5], they were deemed to have incorporated CIETAC rules into their agreement [*Diemaco;Silvester*] . Though adopting the term "may be" settled by arbitration, the ADR clause incorporating CIETAC Rules shall be interpreted "mandatory" [*Bonnot; Rainwater*] .Therefore, CIETAC rules shall be applied.

(C) The parties are deemed to have agreed to refer the dispute to arbitration by the CIETAC.

6. The parties agreed to arbitrate under CIETAC rules without providing the name of an arbitration institution [¶5] . As CIETAC rules shall be applied, the parties shall be deemed to have agreed to refer the dispute to arbitration by the CIETAC [CIETAC Art.4.3] .

CONCLUSION ON JURISDICTION

7. The Tribunal should exercise jurisdiction over the dispute.

SUBSTANTIVE ISSUES

Ⅱ. RESPONDENT BREACHED THE CONTRACT

2.1 RESPONDENT'S PERFORMANCE DID NOT MATCH QUALITY REQUIREMENTS

8. The Respondent breached the contract because: (A) there were quality requirements in the contract; (B) the wheat provided didn't meet the quality requirements, and (C)Respondent didn't fulfill the duty of best effort.

(A) There were quality requirements in the contract

(ⅰ) The letter with quality requirements was part of the contract

9. As a form of writing, the letter with quality requirements which were substantially important terms was part of the contract [§1.11]. And Respondent

should be bound by the quality requirements.

(ii) Alternatively, there were quality requirements by the way of interpretation

10. While interpreting MOU which is the written contract [¶13], Regard should be had to relevant circumstances including preliminary negotiations between the parties[§ 4.3(a)] and the conduct subsequent to the conclusion of the contract[§ 4.3(c)].

11. In preliminary negotiation, Claimant expressed and emphasized clearly quality requirements including mixture of specific constituents and average protein content[¶ 1].Knowing the importance of quality requirements, Respondent, however, didn't object it, thus quality requirements can be found by contractual interpretation.

12. The first shipment as a conduct subsequent to the conclusion of contract met the average protein content requirement[¶6],indicating Respondent's intent to comply with Claimant's requirements.

(iii) Alternatively, quality requirements is an implied obligation to Respondent

13. Implied obligation stems from good faith [§ 5.1.2(c)]. During the negotiation, Respondent had never informed Claimant of the lower quality of the wheat in Ego [¶7]. On the ground of good faith [§ 5.1.2(c)], Respondent is obliged to

supply wheat satisfying Claimant's requirements.

14. Furthermore, implied obligation can be derived from the purpose of the contract[§ 5.1.2(a)], to purchase wheat for reselling. Given the fierce competition in Id, a reliable supplier was needed [¶1]. Thus the respondent should perform its obligation according to quality requirements consistently.

(B) The wheat provided didn't meet the quality requirements

15. Respondent should have supplied wheat consistent with quality requirements [§ 1.3] but the first shipment' didn't match certain protein level requirement, the second violated mixture requirement and the third didn't match the average protein level requirement[¶¶¶6, 7, 12].Thus Respondent breached its obligation.

(C) Respondent didn't fulfill the duty of best effort

16. Respondent also breached Art. 5.1.4 in the third shipment. What Respondent lose was the right to export not the right to purchase wheat, which means it couldn't just supply what he had [¶11].

2.2 RESPONDENT LABELLED INCONSISTENGLY WITH THE CONTRACT

17. Respondent's wrong labeling breached the contract for:(A)it was Respondent who undertook the obligation of marking goods;(B)MOU provided that containers should be marked in English only; and (C)the mandatory customs legislation constituted no excuse for Respondent's non-performance, therefore (D)Claimant is entitled to claim damages due to wrong labeling.

(A)It was Respondent who undertook the obligation of marking goods

18. Both parties have mutually agreed to use FOB [¶5]. Therefore, it was Respondent's responsibility to appropriately mark and package goods at its own expense in conformity with the contract. [A9, Inconterms2000].Besides, Respondent expressed its willingness to change the wrong label[¶7], which indicated its intent to bear the obligation of marking goods.

19. Respondent said Claimant should have known that normally importers change the signing in the bonded warehouse [¶15]. If that's true, Respondent shouldn't have taken responsibilities of marking at the very beginning in normal circumstances. However, Respondent said it would endeavor to put English labels on the containers [¶7],contradictory to its assertion. Therefore, we can conclude that the international practice mentioned does not exist at all

(B) The containers should be marked in English only

20. As clearly written in the packaging clause [¶5], which binded on the parties [§ 1.3], Respondent should mark the containers in English only.

(C) The customs legislation is not an excuse for non-performance

21. As an Exporting Company located in Ego[¶1], Respondent could reasonably be expected to have known domestic customs legislation at the time of the conclusion of contract, and Claimant can reasonably relied on this. Also, no evidence shows that the customs legislation was passed after the conclusion of the contract. In conclusion, Respondent can not be excused in light of good faith

and fair dealing [§ 1.7].

(D) Claimant has a right to claim damages due to wrong labeling

22. Any non-performance gives the aggrieved party a right to damages. It is enough for the aggrieved party simply to prove the non-performance, i.e. that it has not received what it was promised. [Off Cmt1 to § 7.4.1]. In this case, Claimant had never received wheat marked in English, which simply indicated the non-performance of Respondent and Claimant totally paid $20.000 for customs fee and penalty. Therefore, we claim a total damage of $20.000 for wrong labeling.

2.3 RESPONDENT IS LIABLE FOR UNLAWFULLY TERMINATING THE CONTRACT

23. Respondent is liable for unlawfully terminating the contract because: (A) Respondent's termination breached MOU; (B) Respondent cannot rely on hardship to excuse the breach ; (C) Respondent is not entitled to rely on Force Majeure; (D) Respondent did not act in accordance with good faith.

(A) Respondent's termination breached MOU

24. Respondent argued that they could do nothing to save the situation. [¶11] However, the second port is available[Clarification,para.7],thus Respondent's refusal to use it breached MOU .

(ⅰ) Respondent failed to achieve the specific result required by the MOU

25. To determine what kind of duty involved, Regard should be had to circumstances surrounding the formation of the contract[§ 5.1.5].Particularly, the seller's obligation to deliver the property is the duty to achieve a specific result [Brunner 73]. Besides, the degree of risk of meeting the delivery requirements was not high because at least there was one well-functioned port with Ego navy patrolling to guarantee smooth exports [¶9, § 5.1.5(c)].Therefore, Respondent who should supply 100,000 tones of wheat monthly within one year will be under a duty to achieve a specific result. According to Art.5.1.4, Respondent was bound to achieve the result prescribed in MOU [¶5], but failed.

(ii) Alternatively, Respondent failed its duty of best efforts

26. If the Tribunal finds that Respondent was bound by a duty of best efforts, Respondent has still failed its duty. To the extent that an obligation of a party involves a duty of best efforts, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances. [§ 5.1.4(2)]. Respondent failed its duty of best efforts because any reasonable person know the second port was available, but Respondent declined it without due reasons. [¶9].

(iii) Alternatively, Respondent violated the implied terms

27. An implied term can be found when the contract includes a sufficiently specific and comprehensive indication as to how the parties would have dealt with a particular event. Respondent had an implied obligation to use the second harbor

when accidents happened [§ 4.8, § 5.1.1, § 5.1.2],because parties agreed on FOB out of *any* port [¶5]which indicated ports can substitute for each other if accidents occur to another. Therefore, Respondent's refusal to use the second port violated its implied obligation.

(iv) Respondent is not entitled to rely on Hardship

28. The general duty for a contractual party is to perform and Hardship relief is very much the exceptional one [§ 6.2.1;*AWARD NO.8486;AWARD NO.9479*; *US Corporation*].Because the second port wass available, the prohibition of exporting from the main port was not onerous enough to invoke Hardship.

29. Even if exporting from the second port is burdensome enough, Hardship cannot be relied on either. Hardship is invoked where accidents fundamentally alter the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished. [§ 6.2.2]. An increase in the cost of performance must be capable of objective measurement; a mere change in the personal opinion of Respondent is irrelevant. [Off Cmt2b to § 6.2.2] Therefore, the exporting prohibition from the main harbor does not constitute Hardship, because no evidence shows that the cost of performance would increase or the value of the performance received would diminish if use the second harbor.

(B) Respondent is not entitled to rely on Force Majeure

(i) The risk was allocated to Respondent

30. Force Majeure offers a default rule on the allocation of risk between the parties [§ 7.1.7(1);Vogenauer/Kleinheisterkamp 768]. It means that this rule is only applicable insofar as the parties have not allocated risks themselves in their contract [Vogenauer/Kleinheisterkamp 768] .As mentioned in A (3), via implied terms, the risk of breakdown of the main port has been allocated to Respondent. Therefore, there is no ground for Respondent to invoke Force Majeure.

(ii) Alternatively, there is no impediment

31. A party to a contract may be excused from performing its obligations if there exists an impediment which prevents performance [§ 7.1.7]. An impediment is simply the event which is the cause for non-performance [Vogenauer/Kleinheisterkamp 771]. However, the causal link between the event and the non-performance would be of little interest if the event's effect on performance could have been avoided or surmounted by alternative means [Vogenauer/Kleinheisterkamp 771]. There is no Force Majeure if a road is blocked by a landslide but an alternative route still allows delivery [Vogenauer/Kleinheisterkamp 771]. In this case, there is still a second port available [¶15], so the causal link between unavailability of the main port and non-performance is cut off. Therefore, there is no impediment.

(iii) Alternatively, Respondent is responsible for the foreseeable impediment

32. In late 2008, Respondent participated in the tender [¶9],so as a reasonable person

of the same kind in the same circumstances, it should have anticipated the risk of being forbidden to export from the main harbor during negotiations in early 2009 [¶9; *AWARD NO.435*]. A promisor will still be responsible for impediments outside of his sphere of control if he ought to have taken them into account when entering into the contract [§ 7.1.7(1); Schlechtriem/Schwenzer 817].Thus, Respondent is responsible for the foreseeable impediment.

(iv) Alternatively, Respondent could have avoided or overcome the impediment

33. In order to rely on Force Majeure, the non-performing party needs to prove that it was not able to avoid or overcome the impediment [§ 7.1.7; Honnold 483] . However, the impediment in the present case is avoidable if Respondent had increased its bid and/or asked for Claimant's assistance[¶9].First, the auction price was below average price. Had Respondent increased its bid, it would have won [¶15] . Second, had Respondent informed Claimant timely of the situation, Claimant's assistance would have helped avoid the impediment.

(C) Respondent did not act in accordance with good faith

34. Parties' behavior must conform to good faith and fair dealing throughout the life of the contract [Off Cmt1 to § 1.7] . Respondent did not act in accordance with good faith because:

(i) Respondent acted inconsistently

35. Respondent had the responsibility not to occasion detriment to Claimant by acting

inconsistently with an understanding concerning their contractual relationship which it has caused Claimant to have and upon which Claimant has reasonably acted in reliance [Off Cmt1 to § 1.8] .

36. Respondent acted inconsistently by entering into the contract with the knowledge of the auction. Should Respondent be silent on this hazard to the contractual relationship, it would be obliged to perform with rare exceptions [Lookofsky 162]. However, Respondent refused further performance, which contravened its earlier warranty of performance.

(ii) Respondent did not take necessary measures to win the auction

37. Where the law of a State requires a public permission affecting the performance of a contract, the party who has its business in that State is obliged to take necessary measures to obtain the permission. [§ 6.1.14] Public permission shall include all permission requirements of a public nature, particularly trade policies [Off Cmt1(a) to § 6.1.14].

38. The auction falls into the scope of public permission because the privatization is a trade policy, whose aim is to guarantee an export quota. Thus, Respondent should have taken necessary measures, including increasing the price or seeking for help. Alternatively, where Respondent lost the bid despite of all necessary measures, as a good faith party, it should export grain from the other port instead of complaining the trade policy [Off Cmt2 to § 6.1.17].

(iii) Respondent failed to cooperate with Claimant

39. A contract is a common project where the parties must cooperate [Off Cmt to § 5.1.3].Where there is a situation materially affecting the performance of the contract, the parties shall cooperate to ensure the performance, if such co-operation may reasonably be expected for the performance of the parties' obligations [§ 5.1.3].

40. The auction was a situation that can materially affect the performance. Therefore, Claimant was entitled to rely on Respondent's information of its situations. Furthermore, as failing the auction can seriously jeopardize Claimant's future business, Claimant was entitled to interfere into the situation, or to assist Respondent to win the auction.

RELIEF REQUESTED

41. Claimant respectfully requests the Tribunal to find that:

(A)CIETAC has jurisdiction to hear this dispute.

(B)Respondent breached the contract due to:

(i) Respondent's performance did not match the quality requirements;

(ii) Respondent labeled inconsistently with the contract; and

(iii) Respondent is liable for unlawfully terminating the contract

42. Consequently, Claimant respectfully requests Tribunal to order Respondent:

(A) To pay damages;

(B) To pay loss of profit; and

(C) To pay the costs of arbitration