THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG-AUGUST 2011

# MEMORANDUM FOR RESPONDENT

| On behalf of: | Against: |
| --- | --- |
| Peng Importing Corporation | Freud Exporting |

## Team Number:763

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## INDEX OF ABBREVIATIONS

| | |
|---|---|
| ***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)** |
| ***UNIDROIT*** | **International Institute for the Unification of Private Law** |
| ***PICC*** | **UNIDROIT Principles of International Commercial Contracts of 2004** |
| ***FOB*** | **Free on Board** |
| **¶** | **Number of Exhibit** |
| ***§*** | **UNIDROIT Principles of International Commercial Contracts of 2004** |
| ***Incoterms2000*** | **International Rules for the Interpretation of Trade Terms** |
| ***HKIAC*** | **Hong Kong International Arbitration Centre** |
| ***CISG*** | **United Nations Convention on Contracts for the International Sale of Goods** |
| ***ICC*** | **The International Chamber of Commerce** |
| ***AAA*** | **American Arbitration Association** |
| ***SCC*** | **The Arbitration Institute of the Stockholm Chamber of Commerce** |
| ***ALPRC*** | **Arbitration Law of People's Republic of China** |

## INDEX OF AUTHORITIES

| | |
|---|---|
| ***DiMatteo, Larry A.*** | **The Law of International Contracting, Kluwer Law International, the Hague, 2000**<br>**(Cited: DiMatteo)**<br>**(para:14** |
| ***Fouchard / Gaillard/Goldman*** | **On International Commercial Arbitration, Kluwer Law International, the Netherlands, 2001**<br>**(Cited: Fouchard)**<br>**(para:14)** |
| ***Stefan Vogenauer and Jan Kleinheisterkamp (eds.)*** | **Commentary on the UNIDROIT Principles of International Commercial Contracts , (New York, Oxford University Press: 2009**<br>**(Cited: Stefan)**<br>**(paras:18,23,246,26,27,32,37)** |
| ***Schlechtriem/Schwenzer/Stroll/Gruber*** | **Commentary on the UN Convention on the International er Goods(CISG)(2nd(English)end,2005)**<br>**(Cited: Schlechtriem)**<br>**(para:27)** |
| ***Christoph Brunner*** | **Force Majeure and Hardship Under General Contract Principles: Exemption for Non-performance in International Arbitration (Netherlands: Kluwer Law International: 2009),**<br>**(Cited: Christoph)**<br>**(paras:30,36)** |

## INDEX OF CASES AND AWARDS

### CASES

**(para:30)**

| | |
|---|---|
| ***BGH*** | **Claimant v.Respondent**<br>**Bundesgerichtshof(German Federal Supreme Court)**<br>**8 JUL 2003**<br>**(Cited: BGH)**<br>**(para:5)** |
| ***Winstar*** | **United States v. Winstar Corp.,**<br>**518 U.S. 839 (1996)**<br>**(Para:30)**<br>**(Cited:Winstar)** |
| ***US corporation.*** | **American Trading Production Corporation v. Shell International Marine**<br>**453 F.2d 939.**<br>**(Cited: US corporation)**<br>**(para:32)** |

**AWARDS**

**ICC** **Buyer(Yugoslavia) v. Seller(Germany) 1983**

**Award No.4392**

**(Cited: Award No.4392)**

**(para:5)**

**Piaintiff v.Defendant (1974)**

**Award No. 1238**

**(Cited: Award No. 1238)**

**(para:5)**

**ICC** **Brunner 158, ICC**

**Case No. 2763,**

**Date: award of 25.06.1980,**

**(Cited: Award No. 2763)**

**(para:31)**

## STATEMENT OF FACTS

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

On January 15, 2009, Respondent wrote back to Claimant guaranteeing the required quantity as per the letter of January 10, 2009. In January 2009, the two parties signed Memorandum of Understanding ("MOU"), under which Respondent sold Claimant wheat of 1200,000 metric tons in all and 100,000 tons monthly.

After the first shipment Claimant found it acceptable on March 3, 2009. On March 6, 2009, Respondent argued in Ego they could only produce wheat with a protein content of 12% down to 10%, hence the lower end of Claimant's requirements but still of excellent quality.

On March 27, 2009, the Ego government held an auction of the exclusive right to export from the main port unexpectedly. Although as one of the top 5 domestic tenders, Respondent still failed. On April 5, 2009, Respondent failed to persuade the grain handling authority to take over the contract.

On May, 20, 2009, the two parties had a negotiation in Loby city, but failed. On May25, 2009, Respondent received relevant documentation from CIETEC's secretariat. Respondent retorted upon Claimant's claims

## ARGUMENTS

## Ⅰ. CIETAC HAS NO JURISDICTION OVER THE DISPUTE

1. CIETAC has no jurisdiction as: (1.1) no arbitration institution was appointed; (1.2) the parties' agreement on constitution of arbitral tribunal was inconsistent with CIETAC rules and Arbitration Law of PRC ;( 1.3) alternatively, the seat of arbitration would be Ego.

### 1.1 NO ARBITRATION INSTITUTION WAS APPOINTED

#### (A) Respondent's dispute resolution clause is an arbitration agreement

2. An arbitration agreement can be a standardized provision calling for arbitration of any future dispute relating to the contract [Gary, 53]. Respondent's dispute resolution clause is applicable as: first, it is in writing though posted on Internet. [UML, Art7]; secondly, the parties agreed on the clause by electronic communication[**¶2**], which fitted definition of arbitration agreement [UML，Art. 7].

#### (B) ADR clause in MOU is a supplement and amendment

3. However, the parties then concluded MOU, of which the ADR clause provided

CIETAC rules and specified arbitrators' appointment and mediation [**¶5**], while Respondent's arbitration clause was much simpler [**¶2**]. By that, ADR Clause constitutes a substantial amendment and supplement to Respondent's arbitration clause.

**(C) CIETAC cannot be presumed to have jurisdiction**

4. Respondent's arbitration clause provided disputes must be resolved by HKIAC Arbitration rules [**¶2**]. By contrast, ADR clause provided disputes "may be" settled by CIETAC Rules without appointing the arbitration institution [**¶5**]. This change indicates the parties did not definitely agree on CIETAC rules, thus CIETAC was not certain to have jurisdiction.

5. As the two arbitration agreements contain no arbitration institution, the parties' intent to choose CIETAC cannot be arbitrarily presumed. Accordingly, the Tribunal should follow the clearly expressed mutual intentions. [BGH; AWARD NO.4392; AWARD NO.1238; BERGLIN, P.68].

6. Additionally, most of the standard model arbitration clauses adopt the term "shall be" and expressly nominate the arbitration institution [ICC Arbitration Model Clauses, SCC Arbitration Model Clauses, HKIAC Arbitration Model Clauses].

**1.2 THE PARTIES' AGREEMENT ON CONSTITUTION OF ARBITRAL TRIBUNAL IS INCONSISTENT WITH CIETAC RULES AND ARBITRATION LAW OF PRC**

7 While choosing CIETAC rules, the parties also agreed the chairman would be appointed by the two party appointed arbitrators [**¶5**].The agreement doesn't correspond with the appointment of chairman in CIETAC rules and Arbitration Law of PRC that the presiding arbitrator shall be jointly appointed by the parties or appointed by the Chairman of CIETAC upon the parties' joint authorization, which is compulsory [CIETAC rules Art.22.2; Arbitration Law of PRC Art.31].

8 Though the parties shall be deemed to have agreed to arbitrate by CIETAC where they choose CIETAC rules without nominating an institution [CIETAC rules Art.4.3], it cannot be concluded that CIETAC has jurisdiction as the constitution of tribunal the parties approved cannot be enforced by CIETAC. The parties' intent to choose CIETAC was not definite.

## 1.3 ALTERNATIVELY, THE SEAT OF ARBITRATION WOULD BE EGO

9 In ADR Clause, no seat of arbitration was appointed [¶5]. The Tribunal should refer to UNCITRAL Model Law adopted by both parties' states while determining this issue [UMLArt.20]. The seat of arbitration would be Ego as: first, Ego adopted UNCITRAL Model Law. Second, Ego adopted the New York Convention which is convenient for the enforcement of arbitral awards. Third, Ego, Respondent's domicile and the location of subject-matter and proximity of evidence, has the most significant relationship with the contract [In'l Ar. P143].

# CONCLUSION ON JURISDICTION

10. The tribunal has no jurisdiction over the case.

# SUBSTANTIVE ISSUES

# □. RESPONDENT DID NOT BREACH THE CONTRACT

## 2. 2 RESPONDENT'S DELIVERY WAS IN ACCORDANCE WITH QUALITY REQUIREMENTS.

11 Respondent's delivery was in accordance with quality requirements for: (A) there were no quality requirements in the contract and (B) no quality requirements can be found by way of interpretation and(C) Respondent's performance met the reasonable quality requirements stemming from Art.5.1.6.

### (A) There were no quality requirements in the contract

12 By accepting only quantity requirements and being silent to the other substantial terms, Respondent's reply contained modifications materially altered the terms of the offer and constituted a counter-offer [§2.1.6& §2.1.11]. MOU, the written contract between the two parties, had no quality requirements [**¶5**].

### (B) No quality requirements can be found by way of interpretation

13 Preliminary negotiation and conduct subsequent to the conclusion of the contract shall be taken into consideration while interpreting the contract [§4.3]. Respondent's silence to quality requirements in the offer and the absence of

discussion about it during the preliminary negotiation mean that no agreement about quality requirements concluded and Respondent shall not be bound by the quality requirements in the offer[§2.1.6;Stefan 264]. Furthermore Claimant accepted the first shipment as a subsequent conduct to the conclusion of the contract revealed Claimant's acceptance to Respondent's performance.

14 Alternatively, it would have been Claimant's duty to make the terms of quality requirements clear in the contract as it was the supplier of the terms, but he failed, which lead to an interpretation against him[ §4.6; Fouchard, 479; Berger,.551; BHLJ,.131; DiMatteo, 202; Mastrobuono; Société (FR)].

**(C) RESPONDENT'S performance matched reasonable quality requirements stemming from Art. 5.1.6**

15 As quality requirements were neither fixed by, nor determinable from the contract, Respondent would render a performance of a quality that is reasonable in the circumstances [§5.1.6].

**(□) *The reasonable quality of performance was to supply wheat with protein content of 11.5%.***

16 Reasonable quality depends on the circumstances, and can only be at or higher than average quality which is to be determined objectively by taking into account the quality provided in transactions of the same kind and the circumstances of the specific case including an assessment of what is available on the relevant market at the time of performance [Stefan, 556].

17 Considering the quality of wheat in Ego, quality requirements in the original offer and the gap between them [**¶7, ¶1**], the reasonable quality of performance was supplying wheat with protein content of 11.5%, higher than the average quality in Ego, also the average percentage required by Claimant. And Respondent's first two shipments matched the requirement.

**(□)** ***Reasonable quality of performance of the third shipment was average quality***

18 The reasonableness standard of the third shipment was changed to deliver what Respondent had which matched average quality as the circumstances changed, and if Respondent provides average quality as the minimum threshold, there is performance [Stefan, 556]. The third shipment of wheat, with a protein level of 11%, met the minimum threshold, and constituted a qualified performance.

## 2. 3 RESPONDENT'S SIGNAGE IN EGO LANGUANGE COMPLIED WITH EGO LAW AS WELL AS INTERNATIONAL PRACTICES

19 Respondent complied with Ego law as well as international practices by marking the containers in Ego language: (A) To mark the containers in national language in international trade is mandatory in Ego law; (B)FOB term exempts the seller to clear the goods for importation with changing the signage included; (C)Alternatively, Claimant and Respondent shall share the damages.

**(A) To mark the containers in national language in international trade is mandatory in ego law**

20 Nothing in PICC shall restrict the application of mandatory rules, whether of national, international of supranational origin, which are applicable in accordance with the relevant rules of private international law[§1.4]. Therefore, Respondent is bound not only by contract but also by Ego's mandatory rules forbidding English signage

21 Additionally, according to international common practice, containers must be marked in national language referring to the language of the country where products locate. Thus, Respondent had to mark the containers in Ego language in order to clear the customs

**(B) FOB term exempts the seller to clear the goods for importation with changing the signage included.**

**22** INCOTERM 2000, the FOB term requires the seller to clear the goods for export [Incoterms 2000, FOB]. The buyer must pay where applicable, duties, taxes and other charges as well as the costs of carrying out customs formalities payable upon import of the goods and for their transit through any country [Incoterms 2000, FOB B6]. Therefore it is Claimant; the importer who has already controlled wheat should change the signage in the bonded warehouse.

**(C) Alternatively, Claimant and Respondent shall share the damages**

23 The customs legislation as a mandatory rule prevails over PICC governing law of the contract [§1.4and Comment 3].The packaging clause was invalid for violating the mandatory rule, and Respondent has no obligation to mark

containers in English. Since Claimant had been negligent for not knowing the relevant customs legislation before the conclusion of contract, the harm is due in part to omission of Claimant, and both Claimant and Respondent shall take responsibility for the damages so incurred [ § .7.4.7, Stefan, 485].

24 Alternatively, Claimant and Respondent's common mistake relating to the laws gives each party a right to avoid the clause [ § .3.4, 3.5(1) (a); Stefan, 417]. Whether goods can be exported out of the country successfully, or whether Claimant can receive the goods successfully would be seriously affected by the customs legislation, thus Claimant should have pay enough attention to the legislation, but failed. Claimant ought to have known the mistake that leads to reduction in damages, which means damages, should be shared between both parties. [Stefan, 485].

## 2.4 CLAIMANT'S LIABILITY FOR NON-PERFORMANCE IS EXCUSED FOR FORCE MAJEURE AND THE CONTINUING SUPPLYING OBLIGATION IS DISCHARGED FOR HARDSHIP.

25 Based on *Force Majeure* [§7.1.7], Respondent is entitled to be excused because: (A) the auction was beyond Respondent's sphere of risk; (B) additionally, the impediment was unforeseeable; and (C) the consequences of the impediment was unavoidable; (D) ultimately, Respondent's refusal to export from the second port is in accordance with good faith; and (E) therefore, Respondent's continuing supplying obligation shall be discharged for hardship

**(A) The auction was beyond Respondent's control.**

26 *Force Majeure* is applicable when the parties have not themselves allocated risks in their contract [Stefan, 768]. Therefore, Art 7.1.7 (1) determines the reasons causing non-performance that qualify as Force Majeure and can thus excuse the obligor[Stefan, 770].

27 In all exhibits, there is no specific agreement regarding the allocation of risk in case of privatization. Where the parties have not allocated the risk, the 'sphere of risk' is congruent with the 'sphere of control' [Stefan, 771]. Therefore, regards have to be had with the 'sphere of control'. The government export quota control is beyond Respondent's control, just as export and import bans and closing of traffic routes [Stefan 773; Schlechtriem Art 79 14].Hence, the privatization is beyond Respondent's sphere of risk.

(B) **Additionally, the impediment is unforeseeable.**

**(□) *Respondent has made its best efforts but failed*.**

28 The obligor has a pre-contractual duty of best efforts to anticipate all possible risks of unavoidable or insurmountable obstacles to performance [Stefan, 771] .Therefore, should Respondent have made its best efforts, it should not be required to achieve more foresee-ability.

29 Respondent has made its efforts in the tender. This can be shown by its top 5 position in the domestic tender [**¶9**] .By such efforts, it was confident that it would win the tender. After almost 5 silent months, the government put the port in auction overnight [**¶9**], which is totally out of Respondent's expectation. Therefore, Respondent has made its best efforts to foresee but failed.

**(□) *Alternatively, Respondent is not obliged to foresee the risk in a specific period.***

30 Whether a generally foreseeable risk is specifically foreseeable in a case shall be based on the consideration of the specific situations [Christoph, 156]. The specific test is to consider first how likely the occurrence of the event in question was and, second, whether its occurrence, based on past experience, was of such reasonable likelihood that the obligor should not merely foresee the risk but, because of the degree of its likelihood, the obligor should have guarded against it. [Opera,Winstar, Cliffstar]

31 Though Respondent may have realized the risk of privatization in late 2008 before the conclusion of the contract, in January 2009, the foreseeable degree of likelihood of the occurrence of export prohibition was not sufficiently important so as to compel it to assume the risk. Namely, even if the likelihood of export prohibition is "generally" foreseeable, like earthquake, [Award No. 2763] , a reasonable person in the same circumstances may not reasonably be expected to guard against the "specific risk" of earthquake or export prohibition in 2009, giving that the time of performance is only one year.

**(C) The consequence of the impediment is unavoidable.**

32 The fact that an unforeseeable event causes performance to be significantly more onerous is relevant in determining whether the non-performing party can be excused [Stefan, 773]. Even if efforts are still needed to overcome the impediment [US corporation] regardless of the increased cost of performance, the limit of the efforts should be as high as hardship, which requires a fundamental alteration of the equilibrium of the contract [Stefan, 774; USA, UCC 2-615 Comment 4].

33 To export wheat from the second port will fundamentally alter the equilibrium of the contract. Respondent has never tried the smaller port before. The wharf facilities at the port, which are import to a grain port, are not as good as those of the main port [Clarification, para.5]. It will cost Respondent much to adapt to new inconvenient facilities. Additionally, the second port itself is subject to flood tides and occasional silting, which is against the general requirements of a grain port as being deep and floodless. Furthermore, on occasions pirates operate in the area and one or two ships, were boarded and held for ransom. Even though the Ego navy is patrolling the area, it can not diminish the problem [Background, para.2].

(D) **Respondent's refusal to use the second port is in accordance with good faith.**

34 "Good faith and fair dealing" is a fundamental idea underlying the Principles [§ 1.7, Comment 1]. This principle requires parties not to act against the originally intended results [§1.7, Comment 2] of the contract when exercising its contractual rights. The intended results of Claimant are to make profits through reselling the grain imported from Freud. However, if Respondent exported the grain from the second port, the results would be at great stake to be achieved.

35 The FOB term provides the seller must bear all risks of loss of or damage to the goods until such time as they have passed the ship's rail at the named port of shipment [Incoterms2000 FOB, A5]. Therefore, should there be any pirates board on Claimant's nominated ship or difficulties for berthing because of the tides and silting, Claimant shall suffer from the loss so incurred. As a good faith dealer, Respondent is not willing to engage Claimant in such loss only to exercise its legitimate right.

(E) **Respondent's continuing supplying obligation is discharged for hardship.**

36 The individual requirements of the hardship and force majeure exemptions are in principle identical. The hardship test does not have any additional "element" which would not be covered by the force majeure excuse; it is only more specific and narrower in its scope [Christoph, 397]. As demonstrated above, the Force Majeure excuse is satisfied. The loading equipment and the wharf facilities at the second port are not as good as those of the main port .The onerous burden occurring from exporting from the second harbor is so large that it is disproportionate to the original allocation of risks. Upon failure to reach agreement after negotiation within a reasonable time [¶13.14; §6.2.3(3)], either party may resort to the court. Thus, the Tribunal shall terminate the contract if it finds hardship.

## Ⅲ.RESPONDENT LODGED A COUNTERCLAIM FOR THE UNPAID LAST SHIPMENT

37 If the obligor provides average quality which is the minimum threshold there is performance [Stefan, 556]. On March 28,2009, Respondent lost right to export from the main port, resulting in hardship in exporting wheat. In one week's time, the grain handling authority would take over. Respondent told Claimant the changing circumstances and provided what they have stored for the April shipment, for the benefits of Claimant [**¶9**]. Even facing great difficulty, Respondent still provided wheat with protein level of 11%, which is the medium protein quality in Ego. Therefore, the third shipment, with a protein level of 11%, met the minimum threshold, and constituted a performance of the contract. Where

Claimant who is obliged to pay money does not do so, the other party may require payment [§7.2.1].

## RELIEF REQUESTED

38 Claimant respectfully requests the Tribunal to find that:

(A) CIETAC should not exercise the jurisdiction of the dispute.

(B) Respondent did not breach the contract.

( i ) Respondent's delivery was in accordance with the quality requirement.

( ii ) Respondent's signage in Ego language complied with Ego law as well as international practices

(iii) Claimant's liability for non-performance is excused for and the continuing supplying obligation is discharged for hardship

39 Consequently, Respondent respectfully requests the Arbitral Tribunal to order RESPONDENT:

(A) To pay the last shipment.

(B) To pay the cost of arbitration