SECOND ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOT COMPETITION

MEMORANDUM FOR CLAIMANT

TEAM 772

CLAIMANT	**RESPONDENT**
Peng Importing Company Memory Drive Lobe City ID	Freud Exporting Coach Drive Braincity EGO

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INDEX OF AUTHORITIES

University Press Inc., 2009.

Maniruzzaman A.F.M. Maniruzzaman, "International Commercial Arbitration: The Conflict of Laws Issues in Determining the Applicable Substantiative Law in the Context of Investment" (1993) *Netherlands International Law Review* 201

CONVENTIONS, COMMENTARY, LEGISLATION AND RULES

CIETAC Rules China International Economic And Trade Arbitration Commission Arbitration Rules 2005.

HKIAC Rules Hong Kong International Arbitration Centre Administered Arbitration Rules 2008.

Model Law UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006).

New York Convention Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

PICC	UNIDROIT Principles of International Commercial Contracts 2004.
US UCC	*United States Uniform Commercial Code* 1952 (USA).

CASES

Butler Machine Tool v Ex-cell-O	*Butler Machine Tool Co Ltd v Ex-cell-O Corp (England) Ltd* [1979] 1 WLR 401.
Terrell v Mabie Todd	*Terrell v Mabie Todd & Co Ltd* (1952) 69 RPC 234.
Tsakiroglou v Noblee Thorl	*Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93.
United Group Rail Services v Rail Corporation	*United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177.
Walton Harvey v Walker and Homfrays	*Walton Harvey Ltd v Walker and Homfrays Ltd* [1913] 1 Ch 274.

CLAIMANT	Charles Peng, managing director of Peng Importing Corporation.

DEFINITIONS

RESPONDENT	Sigmund Freud, managing director of Freud Exporting.
The Agreement	The Agreement as contained in the Memorandum of Understanding.
Background	Moot Problem Background Information.
Clarification	Moot Problem Clarifications.
The Dispute	Refers to the dispute between CLAIMANT and RESPONDENT regarding alleged breach of agreement and counterclaims.
Ego	Federal Republic of Ego.
Exhibit	Moot Problem Exhibit.
Id	Republic of Id.
Internet clause	Reproduction of Arbitration Clause of Exporting; *Exhibit* 2.
MOU	Memorandum of Understanding; *Exhibit* 5.
MOU ADR clause	Alternative Dispute Resolution Clause as found in the Memorandum Of Understanding; *Exhibit* 5.
Parties	CLAIMANT and RESPONDENT.

STATEMENT OF FACTS

Early 2009	In initial phone call RESPONDENT guarantees it could fulfil all CLAIMANT'S requirements.
10 January 2009	CLAIMANT asks whether RESPONDENT can provide required wheat. CLAIMANT agrees to Internet clause.
15 January 2009	RESPONDENT confirms it can supply required quantity.
Late January 2009	Parties conclude MOU (includes packaging clause, shipping clause, ADR clause and is subject to *PICC*).
22 February 2009	First shipment delivered. Average wheat quality is 11.5%. Containers not labelled in English. CLAIMANT pays $5,000 translation fee.
3 March 2009	CLAIMANT advises of translation fees.
6 March 2009	RESPONDENT unsure whether customs permits English labelling. Advises Ego produces wheat with protein levels of 10% - 12%.
18 March 2009	Second shipment not labelled in English. CLAIMANT pays $5,000 translation fee and $10,000 penalty. CLAIMANT decreases prices due to lower protein content.
28 March 2009	RESPONDENT advises it lost auction and cannot export from main port.
30 March 2009	CLAIMANT requests compensation for fees.
31 March 2009	CLAIMANT advises it would have assisted with bid and

	RESPONDENT could have increased bid.
5 April 2009	RESPONDENT advises that grain handling authority will not take over agreement.
30 April 2009	CLAIMANT advises new shipment had protein level of 11% and RESPONDENT can still supply via second port.
10 May 2009	RESPONDENT suggests discussing dispute in Id.
20 May 2009	CLAIMANT confirms negotiations have failed and arbitration will be initiated in Id. Claims listed.
25 May 2009	RESPONDENT lists counter claims.

SUMMARY OF SUBMISSIONS

Based on the facts CLAIMANT will argue:

I. *CIETAC Rules* apply; and

II. The arbitral seat is Id; and

III. RESPONDENT failed to correctly label the containers; and

IV. RESPONDENT did not attempt to export from the smaller port; and

V. CLAIMANT is not required to pay for the last shipment; and

VI. The Agreement should be terminated.

ARGUMENT ON JURISDICTION

I. *CIETAC Rules* apply

1. *CIETAC Rules* apply because: **(A)** the MOU ADR clause is the operative dispute resolution clause; and **(B)** the arbitration has been listed with CIETAC.

A. The MOU ADR clause is the operative dispute resolution clause

2. The MOU ADR clause is the operative dispute resolution clause because: **(i)** the MOU ADR clause supplanted the Internet clause; and **(ii)** RESPONDENT waived reliance on the Internet clause.

(i) The MOU ADR clause supplanted the Internet clause

3. Where the parties agree to two inconsistent terms, the latter will prevail. [*Butler Machine Tool v Ex-cell-O*].

4. The Internet clause is inconsistent with the MOU ADR clause. The MOU ADR clause was expressly agreed upon after the Internet clause [*Exhibit* 1 and 4]. The MOU ADR clause is the operative dispute resolution clause, therefore *CIETAC Rules* apply.

(ii) RESPONDENT waived reliance on the Internet clause

5. An arbitral tribunal is entitled to draw an inference that a party has waived its rights from its conduct [*Chitty* 1470].

6. RESPONDENT considered the MOU to be the “written contract” between Parties and advised it was “activating the ADR clause” [*Exhibit* 13]. The MOU dispute resolution clause was titled ‘ADR clause’. RESPONDENT made no references to pre-contractual negotiations. It is clear

from the facts that RESPONDENT was referring to the MOU ADR clause and waiving reliance on the Internet clause.

B. The arbitration has already been listed with CIETAC

7. CLAIMANT initiated arbitration proceedings with CIETAC in late May 2009 [*Exhibit* 15]. CIETAC subsequently provided RESPONDENT with the 'relevant documentation' [*Exhibit* 15]. Ceasing CIETAC proceedings and initiating arbitration pursuant to the *HKIAC Rules* will unnecessarily delay the dispute resolution process and will likely increase the Parties' cost. In the interest of Parties, the arbitration should continue using *CIETAC Rules*.

II. The arbitral seat is Id

8. The Tribunal has jurisdiction to hear the dispute, however the arbitral seat is Id because: **(A)** Id has the closest connecting factors; **(B)** alternatively, CIETAC can determine the arbitral seat; and **(C)** in any event, Parties have not met the preconditions to arbitrate.

A. Id has the closest connecting factors

9. In the absence of an express agreement, the arbitral seat may be determined by considering which location has the strongest connection to the performance of the Agreement. The strongest connection is determined by considering a variety of factors, including the place of performance and the nationality or domicile of the debtor [*Maniruzzaman* 202].

10. Id is the place of performance because the shipments were delivered to Lobe City, located in Id [*Exhibit* 1]. CLAIMANT'S place of business is Lobe City, Id. The ships were supplied by CLAIMANT from Id [*Exhibit* 5]. RESPONDENT'S CEO travelled to Id to discuss the dispute [*Exhibit* 13] and CLAIMANT initiated arbitration proceedings in Id [*Exhibit* 14].

11. Id has the strongest connection to the performance of the Agreement. The arbitral seat should be Id.

B. Alternatively, CIETAC can determine the arbitral seat

12. Where the parties have not agreed on the place of arbitration, it shall be the domicile of CIETAC or its Sub-Commission [Article 31 *CIETAC Rules*].

13. The MOU ADR clause does not contain an express agreement as to the arbitral seat. The MOU ADR clause states that any disputes "may be… settled by arbitration in accordance with the CIETAC rules" [*Exhibit* 5]. Parties are not obliged to determine the arbitral seat because *CIETAC Rules* apply and provide appropriate locations.

C. In any event, Parties have not met the preconditions to arbitration

14. In the event that the Internet clause applies, Parties have not met the preconditions to arbitration. Pursuant to the Internet clause, Parties are not entitled to arbitrate until they have attempted mediation. Parties negotiated but did not take part in mediation [*Exhibit* 14].

ARGUMENT ON MERITS

PART ONE: CLAIMS AGAINST RESPONDENT

III. RESPONDENT breached the Agreement

15. RESPONDENT breached the Agreement because: **(A)** RESPONDENT did not attempt to export from the smaller port; **(B)** RESPONDENT failed to correctly label the containers; and/or **(C)** RESPONDENT delivered wheat with an insufficient protein level.

A. RESPONDENT did not attempt to export from the smaller port

16. RESPONDENT did not attempt to export from the smaller port and in doing so: **(i)** RESPONDENT acted inconsistently with the Agreement; **(ii)** RESPONDENT did not fulfil its duty of best effort; and **(iii)** in any event, RESPONDENT did not act in good faith.

(i) RESPONDENT acted inconsistently with the Agreement

17. A party cannot act inconsistently with an understanding it has caused the other party to have if the other party has reasonably acted in reliance on the understanding, to its detriment [Article 1.8 *PICC*].

18. The MOU shipping clause referred to "FOB out of *any* port in Ego" [emphasis added] [*Exhibit* 5]. CLAIMANT reasonably relied on the assumption that RESPONDENT could ship from any port. This reliance caused CLAIMANT detriment as CLAIMANT could not receive shipment. CLAIMANT'S attempt to mitigate by sourcing an alternate supplier may not prevent all

detriment. CLAIMANT'S failure to supply its clients would cause detriment to CLAIMANT'S earnings and reputation [*Exhibit* 8 and 10].

(ii) RESPONDENT did not fulfil its duty of best effort

19. A party has a duty of best effort in ensuring a contract is fulfilled. The 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) *PICC; Vogenauer* 549]. The obligor is bound to make every reasonable effort to perform its obligations but does not have to act against its own commercial interests [*Vogenauer* 551; *Terrell v Mabie Todd*].

20. RESPONDENT was able to export out of the smaller port as it was in use by other exporters and open to all shipping [*Exhibit* 12; *Clarification* 7]. There is no evidence to suggest RESPONDENT investigated or attempted to use the smaller port, or that its commercial interests would be abrogated [*Clarifications* 5].

21. RESPONDENT did not fulfil its duty of best effort in performing its obligations.

(iii) In any event, RESPONDENT did not act in good faith

22. Each party must act in good faith and fair dealing in international trade [Article 1.7 *PICC*]. Good faith is determined objectively but is undefined as it is universally recognised [*Vogenauer* 171-172]. A definition of good faith depends on the context, however it is considered to connote an honest and genuine commitment to a task and an observance of reasonable commercial standards of fair dealing in the trade [*United Group Rail Services v Rail Corporation*; Section 2-103(1)(b) *US UCC*]. The purpose of good faith is to enforce community standards of decency, fairness and reasonableness in commercial transactions [*Vogenauer* 171-172].

23. To satisfy the good faith requirement, a reasonable person would have attempted all reasonable alternatives, such as exporting from the smaller port. As RESPONDENT did not attempt any alternatives, it did not act in good faith.

B. RESPONDENT failed to correctly label the containers

24. The MOU packaging clause states the containers are to be marked in English only, with the term "[w]heat for human consumption property of Peng Corporation" [*Exhibit* 5].

25. By not labelling the shipment in English, RESPONDENT breached the packaging clause on 22 February 2009 and 18 March 2009 [*Exhibit* 7 and 8].

26. RESPONDENT advised of a potential labelling problem *after* the Agreement was concluded [emphasis added] [*Exhibit* 7]. As an experienced exporter, RESPONDENT should have known of this requirement and its importance, yet it did not inform CLAIMANT. RESPONDENT stated in its final letter that, pursuant to customs legislation, labelling can only be in the Ego language and importers normally change the labelling in a bonded warehouse [*Exhibit* 15]. RESPONDENT did not notify CLAIMANT in good faith and has breached the packing clause.

C. RESPONDENT breached the minimum protein level requirement

27. RESPONDENT breached the minimum protein level requirement as: **(i)** the minimum protein level is part of the Agreement; and **(ii)** RESPONDENT did not comply with the stipulated minimum protein level**.**

(i) The minimum protein level is part of the Agreement

28. Unless there is common intention, a contract shall be interpreted according to the meaning that reasonable persons would give to it in the circumstances [Article 4.1 *PICC*]. The conduct of a party shall be interpreted according to that parties' intention if the other party knew or could not

have been unaware of that intention [Article 4.2 *PICC*]. In determining the common intention regards shall be had to all circumstances [Article 4.3 *PICC*]. If the contract does not contain a clause indicating that the writing completely embodies the agreed terms, it may be interpreted using prior statements or agreements [Article 2.1.17 *PICC*].

29. The MOU duration clause states that the Agreement is "contingent on the availability of the *correct* quality of wheat" [emphasis added] [*Exhibit* 5]. This statement suggests that the 'correct' quality has previously been ascertained. RESPONDENT knew of the importance of CLAIMANT purchasing wheat with a 'correct' minimum protein level of 11.5% [*Exhibit* 1]. RESPONDENT could not have been unaware of CLAIMANT'S intent and made no objections to CLAIMANT'S requirements. The reference to 'correct' quality should be interpreted according to CLAIMANT'S intention.

30. A reasonable person would have assumed that the minimum protein level was part of the Agreement. During the preliminary negotiations, CLAIMANT expressed its intention to have a minimum protein level [*Background* 1; *Exhibit* 1].

31. As there is no clause indicating that all of the terms are contained in the Agreement, a reasonable person in the circumstances would interpret the contract using the prior statements of Parties.

32. This indicates that the minimum protein level is part of the Agreement.

(ii) RESPONDENT did not comply with the stipulated minimum protein level

33. RESPONDENT breached the minimum protein level on two occasions. The first breach occurred when RESPONDENT supplied unmixed grain with a protein level of 11.5%, despite CLAIMANT requiring a mix of grains with protein levels of 10.5%, 12% and 13% to provide an average of 11.5% [*Exhibit* 1 and 8]. The second breach occurred when RESPONDENT supplied grain with a protein level of 11%, which is both lower than the requested average and unmixed [*Exhibit* 12].

PART TWO: RESPONSE TO COUNTER CLAIMS

IV. CLAIMANT is not required to pay for the last shipment

34. CLAIMANT is not required to pay for the last shipment because: **(A)** RESPONDENT defectively performed; and **(B)** CLAIMANT has the right to terminate the Agreement.

A. RESPONDENT defectively performed

35. Non-performance is defined as failure by a party to perform any of its contractual obligations, including defective performance [Article 7.1.1 *PICC*]. The aggrieved party may withhold performance pending cure [Article 7.1.4 (4) *PICC*].

36. The shipment referred to on 30 April 2009 was defective as it had a protein quality of 11%, which was under the required minimum protein level of 11.5% [*Exhibit* 12]. CLAIMANT is not obliged to pay for the defective shipment until RESPONDENT cures the defective performance.

B. CLAIMANT has the right to terminate the Agreement

37. A party may terminate the contract where the failure of the other party to perform a contractual obligation amounts to fundamental non-performance, which cannot be cured [Article 7.3.1 (1) *PICC; Vogenauer* 816]. Fundamental non-performance is material and not merely of minor importance [*PICC Official Comment* 221]. Termination of the contract releases both parties from their obligation to effect and receive future performance [Article 7.3.4 (1) *PICC*].

38. Fundamental non-performance is determined by considering whether the:

- aggrieved party is substantially deprived of what it expected unless the other party did not and could not have reasonably foreseen the result;
- strict compliance of the term is of the essence;
- aggrieved party has reason to believe that it cannot rely on the other party's future performance; and
- non-performing party will suffer disproportionate loss as a result of the preparation of performance if the contract is terminated [Article 7.3.1 (2) *PICC*].

39. RESPONDENT'S refusal to export renders the contract inoperable. The exportation of wheat is of the essence of the Agreement and without it, there is no reason for the Agreement to continue. The non-performance deprived CLAIMANT from any future gain under the Agreement.

40. CLAIMANT reasonably believes RESPONDENT will not perform in the future as RESPONDENT is unwilling to perform now [*Exhibit* 9]. RESPONDENT will not suffer any loss from termination as if the Agreement continued RESPONDENT would still be unwilling to supply. CLAIMANT would suffer great loss because it would fail to provide flour to its clients and subsequently lose profits and reputation. CLAIMANT would also incur costs of seeking a new supplier. CLAIMANT has a right to terminate the contract. Termination releases CLAIMANT from any obligation to pay.

V. The doctrine of *force majeure* does not apply

41. The doctrine of *force majeure* does not apply to the unavailability of the main port. The doctrine of *force majeure* causes the Agreement to be automatically discharged and the obligor to be excused from future performance due to an event beyond its control [*Chitty* 98; *Graw* 387]. RESPONDENT must prove that non-performance was due to an impediment beyond its control and it could not reasonably be expected to have taken the impediment into account or avoid or overcome its consequences [Article 7.1.7 (1) *PICC*].

42. RESPONDENT cannot rely on the doctrine of *force majeure* as: **(A)** the impediment was reasonably foreseeable; **(B)** RESPONDENT could overcome the impediment; and **(C)** RESPONDENT did not give CLAIMANT notice of the impediment.

A. The impediment was reasonably foreseeable

43. The doctrine of *force majeure* will not apply where the impediment should have been foreseen and provided for [*Walton Harvey v Walker and Homfrays*]. The future obligor has a pre-contractual duty of best efforts to anticipate all possible risks of unavoidable or insurmountable obstacles to performance [*Vogenauer* 771].

44. Prior to entering the Agreement, RESPONDENT had knowledge that the main port would be put to tender [*Background* 3*; Exhibit* 9]. As an experienced business operator, RESPONDENT ought to have known that there was an inherent possibility that it may not win the tender. RESPONDENT entered into the contract despite being aware of the risk. RESPONDENT made no provision for the impediment and is not excluded from liability.

B. RESPONDENT could overcome the impediment

45. Where performance has not become 'impossible', merely more onerous, inconvenient or expensive, the doctrine of *force majeure* will not apply [*Tsakiroglou v Noblee Thorl*].

46. RESPONDENT could have overcome the impediment by: **(i)** using the smaller port; or **(ii)** bidding higher at auction.

(i) RESPONDENT could have used the smaller port

47. RESPONDENT has never attempted to export from the smaller port. RESPONDENT was able to export from the smaller port but chose not to.

(ii) RESPONDENT could have bid higher at auction

48. RESPONDENT was the losing bidder at the auction of 27 March 2009 [*Exhibit* 9]. CLAIMANT obtained information indicating the auction price was well below average wheat prices and RESPONDENT would have still made a profit if it increased its bid [*Exhibit* 10]. CLAIMANT was also willing to financially assist RESPONDENT'S bid [*Exhibit* 10]. RESPONDENT could have attempted to overcome the impediment by increasing its bid.

C. RESPONDENT did not give CLAIMANT notice of the impediment.

49. The promisor must communicate notice of *force majeure* to the promisee after the promisor knows of the impediment [*PICC Official Comment* 774].

50. RESPONDENT knew of the potential impediment in late 2008, yet it did not notify CLAIMANT until after the auction concluded on 28 March 2009 [*Background* 3; *Exhibit* 9]. This is not a reasonable time after RESPONDENT knew of the impediment.

REQUEST FOR RELIEF

CLAIMANT respectfully requests the Tribunal to order that:

1. *CIETAC Rules* apply; and
2. The arbitral seat is Id; and
3. RESPONDENT failed to correctly label the containers; and
4. RESPONDENT did not attempt to export from the smaller port; and
5. CLAIMANT is not required to pay for the last shipment; and
6. The Agreement should be terminated and CLAIMANT be awarded damages.

CLAIMANT respectfully requests the Tribunal to award damages for:

1. breach of agreement;
2. loss of profit;
3. the costs of arbitration; and
4. interest on these damages.