SECOND ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOT COMPETITION

MEMORANDUM FOR RESPONDENT

TEAM 772

RESPONDENT

Freud Exporting
Coach Drive
Braincity
EGO

CLAIMANT

Peng Importing Company
Memory Drive
Lobe City
ID

CONTENTS

INDEX OF AUTHORITIES

RULES, COMMENTARY AND CONVENTIONS

CIETAC Rules	China International Economic And Trade Arbitration Commission Arbitration Rules 2005.
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules 2008.
HKIAC Website	Hong Kong International Arbitration Centre – "About the HKIAC" Accessed 30 June 2011: http://www.hkiac.org/show_content.php?article_id=5
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.
PICC Official Commentary	Official Commentary of the UNIDROIT Principles of International Commercial Contracts 2004.

CASES

Mutual Life Ins. Co. v Hill	*Mutual Life Ins. Co. v Hill* (1904) 193 US 551.
Terrell v Mabie Todd	*Terrell v Mabie Todd & Co Ltd* (1952) 69 RPC 234.
Star Shipping	*Star Shipping AS v China Nat'l Foreign Trade Trans. Corp.* [1993] 2 Lloyd's Rep. 445.

DEFINITIONS

CLAIMANT	Charles Peng, managing director of Peng Importing Corporation.
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 RESPONDENT will argue:

I. *CIETAC Rules* do not apply; and

II. The Tribunal does not have jurisdiction to hear the dispute; and

III. RESPONDENT did not breach the packaging clause; and

IV. RESPONDENT is unable to export from the smaller port; and

V. RESPONDENT did not breach the alleged minimum protein level; and

VI. CLAIMANT breached its obligations by failing to pay for the last shipment.

ARGUMENTS ON JURISDICTION

I. *CIETAC Rules* do not apply

1. *CIETAC Rules* do not apply because the Internet clause is the operative dispute resolution clause. Clauses which address a matter in detail will take precedence over clauses that address a matter in general terms [*Mutual Life Ins. Co. v Hill*].

2. The Internet clause applies to disputes regarding 'quality' and 'shipping' [*Exhibit* 2]. The MOU ADR clause refers broadly to any disputes in relation to the Agreement [*Exhibit* 5]. The Internet clause is tailored to an Agreement for the export of grain, while the MOU ADR clause refers to disputes generally.

3. The choice of the arbitral seat is usually made by the parties and is fundamental as it has very significant legal consequences [*Born* 1679; *Star Shipping Case*]. When determining an arbitral seat the parties may consider characteristics such as accession to the *New York Convention,* neutrality, availability of judicial assistance, convenience and cost [*Born* 1680-1685]. The Internet clause identifies Hong Kong as the arbitral seat, while the MOU ADR clause does not identify a seat. The Internet clause is the operative dispute resolution clause because it is more specific than the MOU ADR clause.

II. The Tribunal does not have jurisdiction to hear the dispute

4. The Tribunal does not have jurisdiction to hear the dispute because: **(A)** the agreed arbitral seat is Hong Kong; and **(B)** alternatively, the arbitral seat is Ego.

A. The agreed arbitral seat is Hong Kong

5. The agreed arbitral seat is Hong Kong because: **(i)** Parties agreed on the arbitral seat; and **(ii)** Hong Kong is a neutral third country.

(i) Parties agreed on the arbitral seat

6. RESPONDENT submits *HKIAC Rules* apply. *HKIAC Rules* dictate how the arbitral seat is determined: "[t]he seat of arbitration shall be Hong Kong… unless the parties have expressly agreed otherwise [Article 15 *HKIAC Rules*]. In this case, the Parties have expressly agreed that "[t]he Seat of Arbitration will be Hong Kong" [*Exhibit* 2].

7. Alternatively, *CIETAC Rules* state that where the parties have agreed on the place of arbitration in writing, the parties' agreement shall prevail [Article 31 *CIETAC Rules*]. The Parties previously agreed on the arbitral seat [*Exhibit* 1].

8. In the event that the Internet clause is inoperative, the arbitral seat remains in Hong Kong because the parties have previously agreed on the matter.

(ii) Hong Kong is a neutral third country

9. "[P]arties frequently insist that the arbitral seat be 'neutral' - that is, not the home jurisdiction of either party". This principle prevents inconvenience and unfamiliarity to one party [*Born* 72-74, 1685].

10. Hong Kong is a neutral third country with an established legal system, which supports arbitration and has adopted the *New York Convention* [*HKIAC Website*]. To have the arbitral seat in either Party's home state would unnecessarily benefit one party to the detriment of the other. The experience and neutrality of the legal systems in Id or Ego is irrelevant because they are sufficiently hostile by virtue of their connection to each party. It is therefore in the interests of Parties to have the neutral place of Hong Kong hold the seat of arbitration.

B. Alternatively, the arbitral seat is Ego

11. 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 any other relevant factors [Maniruzzman 202].

12. The Agreement was performed in Ego because the grain was produced and exported from Ego [*Exhibit* 5]. The Internet clause was created in Ego [*Exhibit* 2]. The dispute resolution clause was activated in Ego [*Exhibit* 13]. RESPONDENT previously travelled to Id for preliminary negotiations. It is therefore, reasonable for CLAIMANT travel to Ego for arbitration proceedings [*Exhibit* 13].

ARGUMENTS ON MERITS

PART ONE: RESPONSE TO CLAIMS

III. RESPONDENT did not breach the packaging clause

13. RESPONDENT did not breach the packaging clause because the clause is invalid.

14. *PICC* does not restrict the mandatory rules, which are applicable in accordance with the relevant rules of private international law [Article 1.4 *PICC*]. Where a party does not perform an obligation, the other party may require performance, unless performance is impossible in law or in fact [Article 7.2.2 *PICC*].

15. Customs legislation prevents RESPONDENT labelling the packages in languages other than the Ego language [*Exhibit* 15]. If the packaging clause is enforced, the performance will be impossible in law.

16. CLAIMANT is considered to have constructive knowledge of the relevant facts if, in the circumstances and with its knowledge, CLAIMANT reasonably ought to have known of the relevant facts [*Vogenauer* 1060]. As an experienced importer, CLAIMANT had constructive knowledge of the applicable customs legislation. When CLAIMANT raised concerns regarding the labelling, RESPONDENT advised it was unsure whether Ego customs legislations permitted English labelling [*Exhibit* 7]. A reasonable person in CLAIMANT'S position would have researched this issue.

17. The packaging clause is invalid and can be severed without affecting the object of the Agreement. Instead, the parties are bound by a usage that is widely known and regularly observed in their trade [*Chitty* 1205 – 1208, Article 1.9 (2) *PICC*]. CLAIMANT should change labelling in the bonded warehouse as per normal practice [*Exhibit* 15].

IV. RESPONDENT is unable export from the smaller port

18. RESPONDENT is unable to export from the smaller port because: **(A)** the doctrine of *force majeure* applies; and **(B)** alternatively, RESPONDENT fulfilled its duty of best effort.

A. The doctrine of *force majeure* applies

19. The doctrine of *force majeure* automatically discharges the agreement and excuses the obligor from future performance [*Chitty* 98; *Graw* 387]. To prove *force majeure,* RESPONDENT must show that non-performance was due to an impediment beyond its control and it could not reasonably be expected to have considered the impediment or avoid or overcome its consequences. [Article 7.1.7 (1) *PICC*].

20. In regards to the unavailability of the main port, the doctrine of *force majeure* applies because: **(i)** the impediment was beyond RESPONDENT'S control; **(ii)** the impediment was not reasonably foreseeable; **(iii)** RESPONDENT could not have overcome the impediment; and **(iv)** RESPONDENT promptly notified CLAIMANT of the impediment.

(i) The impediment was beyond RESPONDENT'S control

21. Government measures such as import and export bans are typical instances of *force majeure* [*Vogenauer* 773]. The Ego government privatised the grain handling facilities in the main harbour [*Exhibit* 9]. This decision was beyond RESPONDENT'S control.

(ii) The impediment was not reasonably foreseeable

22. RESPONDENT could not have reasonably foreseen that it would be unable to export from the main port during the term of the Agreement. There is no evidence to suggest RESPONDENT believed it would lose the tender and the subsequent auction *before* the Agreement term expired.

(iii) RESPONDENT could not have overcome the impediment

23. RESPONDENT could not have used the smaller port because the facilities and loading equipment are "not as good" as those of the main port [*Clarifications* 5]. The smaller port is also subject to silting and flooding [*Background* 2]. This would prevent RESPONDENT from using the smaller port and overcoming the impediment.

(iv) RESPONDENT promptly notified CLAIMANT of the impediment

24. The party that fails to perform must give prompt notice to the other party of the impediment and its effect on its ability to perform [Article 7.1.7 (3) *PICC*]. The promisor must communicate notice of *force majeure* to the promisee *after* the promisor knows of the impediment [emphasis added] [*PICC Office Comment* 774].

25. RESPONDENT gave notice of the impediment and the effect on its ability to perform the day after the auction was lost [*Exhibit* 9]. RESPONDENT sent this notification by fax which CLAIMANT would have received immediately. This was prompt notice of the impediment.

B. Alternatively, RESPONDENT fulfilled its duty of best effort

26. A party has a duty of best effort in ensuring it fulfils a contract. 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 obligation but does not have to act against its own commercial interests [*Vogenauer* 551; *Terrell v Mabie Todd*].

27. RESPONDENT contacted the grain handling authority to convince them to take over the Agreement but they refused [*Exhibit* 11]. RESPONDENT would be acting against its commercial interests if it exported from the smaller port, as it would affect its business if it were unable to export due to flooding and silting.

V. RESPONDENT did not breach the alleged minimum protein level

28. RESPONDENT did not breach the alleged minimum protein level because: **(A)** the minimum protein level was not a term of the Agreement; and **(B)** RESPONDENT supplied a reasonable quality of grain.

A. The minimum protein level was not a term of the Agreement

29. The minimum protein level was not a term of the Agreement because: **(i)** there was no common intention between the Parties; **(ii)** the reference to the 'correct' quality is ambiguous; and **(iii)** in any event, it was impossible for RESPONDENT to provide CLAIMANT'S requested minimum protein level.

(i) There was no common intention between the Parties

30. A contract is interpreted according to the common intention of the parties and if that intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the circumstances [Article 4.1 *PICC*].

31. RESPONDENT never expressly or implicitly agreed to CLAIMANT'S desired 11.5% minimum protein level [*Exhibit* 1]. There was no common intention in relation to the minimum protein level. CLAIMANT'S purchasing manager checked the Agreement and made no objections or comments about the omission of a wheat quality clause [*Exhibit* 4]. A reasonable trader in the same circumstances would have included the term in the MOU. There was no common intention between the parties to provide wheat with a minimum protein level of 11.5%

(ii) Alternatively, the reference to the 'correct' quality is ambiguous

32. An Agreement may lack contractual force because it is so vague or uncertain that no definite meaning can be given to it without adding further terms [*Chitty* 223]. An Agreement must be definite and certain before it is enforced [*Graw* 74].

33. The duration clause in the MOU refers to the supply of wheat being contingent on the "…availability of the *correct* quality of wheat in Ego" [emphasis added] [*Exhibit* 5]. The word 'correct' is not defined in the MOU. The clause is uncertain and ambiguous as it could include the following possible interpretations:

- The protein level Ego can produce, being between 10% to 12% [*Exhibit* 7];
- A mixture of grains with a minimum average protein level of 11.5% [*Exhibit* 1]; or
- An unmixed average protein quality of 11.5% [*Exhibit* 1].

34. The reference to the 'correct' quality cannot be enforceable because it is so vague or uncertain that no definite meaning can be given to it without adding further terms. This term should be severed.

(iii) In any event, it was impossible for RESPONDENT to provide CLAIMANT'S requested minimum protein level

35. Where a party does not perform an obligation, the other party may require performance, unless performance is impossible in law or in fact [Article 7.2.2 *PICC*].

36. CLAIMANT knew that it is impossible for RESPONDENT to supply a mix of 10.5%, 12% and 13% as Ego's wheat protein content ranges from 10% to 12% [*Exhibit* 7]. CLAIMANT knew of this limitation, yet continued its relationship with RESPONDENT.

B. RESPONDENT supplied a reasonable quality of grain

37. Where the quality of performance is neither fixed by, nor determinable from the contract, a party is bound to supply a quality that is reasonable and not less than average in the circumstances [Article 5.1.6 *PICC*]. Average quality is to be determined objectively with regards to circumstances of the case, including an assessment of what is available on the relevant market [*PICC Official Commentary* 136].

38. Ego can only produce wheat with protein levels of between 10% and 12% [*Exhibit* 7]. This means that an average quality would be 11%. RESPONDENT never provided grain with an average protein level of less than 11%. RESPONDENT has always provided CLAIMANT with wheat that is ‘not less than average in the circumstances’. Even if a higher proportion of the 12% protein level wheat was used it would still not fulfil CLAIMANT’S requirement.

PART TWO: CLAIMS AGAINST CLAIMANT

VI. CLAIMANT breached its obligations by not paying for the last shipment

39. Where a party who is obliged to pay money does not do so, the other party may require payment [Article 7.2.1 *PICC*]. CLAIMANT is required to pay for the shipment of wheat using the closing spot price at New York commodities exchange on day of receipt of wheat [*Exhibit* 5]. As RESPONDENT has provided the wheat in accordance with its contractual obligations, CLAIMANT is required to pay for the final shipment.

40. Non-performance is defined as failure by a party to perform any of its obligations under the contract, including defective performance or late performance [Article 7.1.1 *PICC*]. The aggrieved party may withhold performance pending cure [Article 7.1.4 *PICC*]. CLAIMANT is obliged to pay as RESPONDENT did not provide defective or late performance.

REQUEST FOR RELIEF

RESPONDENT respectfully requests that the Tribunal order that:

1. The Tribunal does not have jurisdiction to hear this dispute;
2. RESPONDENT did not breach the packaging clause;
3. RESPONDENT did not breach the alleged minimum protein level;
4. RESPONDENT could not use the smaller port as a result of *force majeure*;
5. RESPONDENT fulfilled its duty of best efforts; and
6. CLAIMANT breached its obligations by not paying for the last shipment.

RESPONDENT respectfully requests the Tribunal to award damages for:

1. the cost of the final shipment; and
2. breach of Agreement; and
3. the costs of arbitration; and
4. interest on these damages.