SECOND ANNUAL
INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION
MOOT COMPETITION

MEMORANDA FOR CLAIMANT

On Behalf of	**Against**
Peng Importing Corporation	Freud Exporting
Memory Drive	Coach Drive
LobeCity	Braincity
ID	Ego
"CLAIMANT"	**"RESPONDENT"**

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TABLE OF ABBREVIATIONS

PICC	Principles of International Commercial Contracts
CIETAC	China International Economic and Trade Arbitration Commission
Art.	Article
Ex.	Exhibit
Cl.	Clarifications
para.	Paragraph

TABLE OF AUTHORITIES

Primary Sources

UNIDROIT Principles of International Commercial Contracts 2004
(Cited: *PICC*)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards
(Cited: New York Convention)

China International Economic and Trade Arbitration Commission Arbitration Rules
(Cited: *CIETAC Arbitration Rules*)

Secondary Sources

Alan Redfern and Nigel Blackaby, Redfern and Hunter on International Arbitration, Oxford University Press, 5th edition
(Cited: *Redfern*)

Ewan McKendrick, Contract Law: Text, Cases, and Materials, Oxford University Press, 4th edition
(Cited: *Mckendrick*)

Official Comments on Articles of the UNIDROIT Principles of International Commercial Contracts, 2004
(Cited: *Comm*)

Stefan Vogenauer and Jan Kleinheisterkamp, Commentary on the UNIDROIT principles of international commercial contracts (PICC), Oxford University Press
(Cited: *Vogenauer*)

JURISDICTION

I. THE TRIBUNAL CONSTITUTED UNDER CIETAC RULES HAS JURISDICTION

A. The ADR Clause included in Memorandum of Understanding [*Ex.* 5, hereinafter MOU] is the binding Arbitration Agreement between the parties

The ADR Clause in MOU [*Ex*. 5] satisfies the conditions of a valid Arbitration Agreement since it was a written agreement concluded by the parties as required by UNCITRAL Model Law, Article 7(2). Furthermore, a valid arbitration "agreement" in writing shall include an arbitration clause in a contract or an arbitration agreement, signed by the parties [*New York Convention, Art. II(2)*]; such signature may be found in the MOU [*Ex*. 5].

Moreover, such valid arbitration agreement requires "agreement" and the MOU is the only Contract that both parties have agreed on. RESPONDENT also referred the MOU as the Contract [*Ex*. 9], indicating that such understanding was mutually shared by both parties.

The MOU was the only existing written arbitration agreement; that is, the MOU is the finalized Contract between the parties complete with dispute resolution clause, in the form of the ADR Clause [*Ex*. 5]. Hence, the ADR clause is the only enforceable Arbitration Agreement.

B. RESPONDENT notice on the internet website [*Ex.* 2] may not have binding force as the parties have expressly agreed on a different Arbitration Agreement

1. RESPONDENT notice may not have binding force since it was not included in the MOU

RESPONDENT arbitration clause on the internet [*Ex*. 2] lacks the conditions as an arbitration agreement since its terms were not "agreed" by the parties as required by

UNCITRAL Model Law Article 7; on the other hand such agreement may be found in the MOU, the finalized Contract [*Ex*. 5].

2. RESPONDENT failed to object the terms of the MOU

Where a party takes part in an arbitration proceeding without denying the existence of an arbitration agreement, what has been called an 'implied consent' to arbitration may be sufficient [*Redfern*, p.91]. After finalization of the MOU, RESPONDENT did not object the finalized Arbitration Agreement, in particular the ADR clause. Hence, the ADR clause shall be interpreted as there was an 'implied consent' to Arbitration Agreement between both parties.

C. Even if there was an Arbitration Agreement between the parties prior to the MOU, such agreement has been superseded by the ADR Clause in the MOU.

Even if there was an Arbitration Agreement between the parties prior to the MOU [*Ex*. 1, 2], any such agreement has been superseded by the ADR Clause. In case of conflict between a standard form and a term which is not a standard term the latter prevails [*PICC*, Art.2.1.21]. Whenever the parties specifically negotiate and agree on particular provision of their contract, such provisions will prevail over conflicting provisions contained in the standard terms since they are more likely to reflect the intention of the parties in the given case [*Comm,* p.70]. Both parties agreed on the ADR clause of the MOU after their prior supposed arbitration agreement [*Ex*. 5]. In addition, to decide whether there was a certain agreement, the sufficient evidence of agreement is required to reach the conclusion that the agreement is valid and binding [*McKendrick*, p.135]. In this sense, as the MOU finalized the contents of the Contract, any prior arbitration agreement − if existed − has had been superseded by the ADR Clause of the MOU.

D. The ADR clause in the MOU fulfills the conditions of Arbitration Agreement under CIETAC rules; Current Tribunal has been constituted lawfully under the ADR Clause in the MOU pursuant to CIETAC rules

CIETAC rules define an arbitration agreement as an arbitration clause in a contract concluded between the parties [*CIETAC Arbitration rules*, Art 5.2]. Hence, the ADR clause included in the MOU − the finalized Contract − fulfilled the conditions of Arbitration Agreement under CIETAC rules. Whereas the Arbitration clause posted online by RESPONDENT failed to satisfy the requirement

CIETAC rules Article 4.3 provides that if no arbitration institution is designated by the arbitration agreement, the CIETAC shall be referred; Current Tribunal has been constituted in conformity with such provisions of the CIETAC rules.

E. In any case, the fact that RESPONDENT followed the procedure of the ADR Clause supports that RESPONDENT admitted the Tribunal has jurisdiction over this arbitration

A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment [*PICC,* Art.1.8]. RESPONDENT observed the procedures stipulated in the ADR Clause; CEOs of the parties have negotiated to resolve the dispute as required by the ADR Clause [*Ex*. 13, 14]; RESPONDENT activated the ADR Clause by its own conducts [*Ex*. 13]. Therefore, it is clear that RESPONDENT caused CLAIMANT to believe that RESPONDENT considered the ADR Clause as the binding arbitration agreement; consequently, RESPONDENT's objection on jurisdiction is contrary to its own conduct.

MERITS

II. RESPONDENT MATERIALLY BREACHED THE CONTRACT BY FAILURE TO PERFORM THE OBLIGATION TO SUPPLY WHEAT

A. RESPONDENT failed to perform its obligation to deliver wheat

RESPONDENT has an obligation to deliver wheat to CLAIMANT per the MOU [*Ex*. 5]. However, RESPONDENT failed to deliver wheat from the second port while there was the possibility to deliver on time**.** RESPONDENT opted for termination as RESPONDENT failed to win the bid on the main port [*Ex*. 9]. However, RESPONDENT's attempt to terminate the Contract is unlawful because RESPONDENT could have relied on the second port [*Background information*, para. 1]. Hence, RESPONDENT still had an obligation to deliver grain from the second port, but failed to do so.

B. RESPONDENT failed to notify CLAIMANT on the bidding of the main port facilities; hence any difficulties arising from the non-availability of the main port facilities may only to attributed to RESPONDENT

1. If RESPONDENT notified the auction, CLAIMANT would have taken action

The governing law states "Each party shall bear the costs of performance of its obligations" [*PICC*, Art 6.1.11], and the costs may include application for a permission [*Comm*, p.167]. Thus, if RESPONDENT had notified on the auction, CLAIMANT was willing to bear the costs necessary, as CLAIMANT had intention to support RESPONDENT [*Ex*. 10].

2. RESPONDENT has an obligation to notify CLAIMANT on the bidding of main port facilities in good faith

RESPONDENT should have notified CLAIMANT on the auction, as CLAIMANT had clear intentions to assist. Moreover, RESPONDENT had an obligation to notify under pre-contractual good faith [*Comm*, p.172] because the tender notice on the main port of Ego preceded the Contract [*Background Information,* para.3, 4]. If usage of main port facility was crucial to the performance − as RESPONDENT attempt to terminate the Contract suggests − RESPONDENT was obliged to notify the existence of the auction during the negotiation in good faith.

3. RESPONDENT has an obligation to take the necessary measures for winning the auction under PICC Art.6.1.14(b)

PICC Article 6.1.14 (b) provides that party whose performance requires permission shall take the necessary measures. The range of interpreting 'public permission' is not a limited one and includes such procedures as government auctions [*Comm*, p.171]. However, RESPONDENT failed to take the necessary measures for winning the auction by not increasing their bid [*Ex*. 10]. Therefore, RESPONDENT is liable for such non-performance.

C. RESPONDENT may not advance claims of a *force majeure* event, as there was no extraordinary event or circumstance beyond the control of RESPONDENT

RESPONDENT's non-performance was not due to an impediment beyond their control [*PICC*, Art. 7.1.7(1)]. A *force majeure* event is an event occurred beyond a party's control [*PICC*, Art. 7.1.7(1)]. RESPONDENT's losing of the auction was not an event which occurred beyond their control as the auction price bid was well below average wheat price [*Ex*. 10].

Moreover, the bidding was not an extraordinary event since the government had

previously notified on the tender and auction [*Background Information*, para.3, 4]. Thus, the auction was a foreseeable circumstance to RESPONDENT, and RESPONDENT had reasonable time to prepare. Hence, RESPONDENT's non-performance was not caused by a *force majeure* event.

D. RESPONDENT non-performance was not in good faith and RESPONDENT unlawfully terminated contract.

One, RESPONDENT failed to deliver grain after losing the auction, although it was possible to ship the grain on the second port as the MOU stipulated that the grain be shipped out of "any" port of Ego [*Ex*. 5]. Two, RESPONDENT may have won the auction, if necessary measures were duly taken in good faith. Three, RESPONDENT failed to notify the auction to CLAIMANT, in breach of the obligation to act in good faith at the pre-contractual level. In sum, RESPONDENT conduct was not in good faith.

CLAIMANT attempted to continue the Contract [*Ex*. 10]. However, RESPONDENT's fundamental breach of the Contract made this impossible, and consequently CLAIMANT lawfully terminated the Contract under PICC Article 7.3.1 (1) which provides that a party may terminate the contract where the failure of other party to perform an obligation under the contract amounts to a fundamental non-performance.

III. THE DELIVERY OF GRAIN NOT MATCHING THE REQUIRED QUALITY CONSTITUTES A BREACH OF THE CONTRACT

A. The quality of wheat was understood as a fundamental part of the Contract

1. The first letter sent by CLAIMANT was an 'offer' regarding the quality of wheat

A proposal for concluding a contract which is sufficiently definite and indicates the

intention of the offeror to be bound in case of acceptance constitutes an offer [*PICC* Art. 2.1.2]. In the first letter, CLAIMANT sent to RESPONDENT [*Ex*. 1], CLAIMANT explained the importance of the protein quality and strictly required an average of at least 11.5%. The fact that this proposal is i) sufficiently definite to be concluded by a mere acceptance, ii) contains the intention to be bound in the event of acceptance, iii) addressed to one specific person makes it an offer rather than an opening of negotiation [*Comm*, p.36]. Therefore Exhibit 1 contains an offer regarding the protein quality of the wheat.

2. RESPONDENT signing the MOU is an acceptance regarding the quality of wheat

A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance [*PICC* Art. 2.1.6]. For there to be an acceptance the offeree must indicate assent to the offer [*Comm*, p.43]. The conduct of inviting CLAIMANT to the Island of Such with the Acceptance of the quantity, as opposed to invitation without mentioning any possibility of agreement can be inferred as acceptance by conduct.

3. RESPONDENT failed in a counter-offer

A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer [*PICC* Art. 2.1.11(1)]. Exhibit 3 shows no such modification. The signed MOU includes additions which were concluded jointly; hence the MOU is not a counter-offer which affects the existence of the meeting of minds on the terms already agreed upon. The terms that CLAIMANT required in the first letter were all included into the MOU without modification. Hence no counter-offer invalidating the initial offer exists.

4. The agreement on the quality of wheat was finalized at the time of the signing of the MOU

A contract is not required to be made in or evidenced by a particular form [*PICC* Art. 1.2]. Therefore the mere fact that the quality of wheat was not in written form cannot be deemed as evidence of it not being agreed upon. A contract shall be interpreted according to the common intention of the parties [*PICC* Art. 4.1(1)]. If such 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 same circumstances [*PICC* Art. 4.1(2)]. In establishing common intention or reasonableness, regard is to be had to all relevant circumstances of the case, the most important of which are listed in PICC Article 4.3. [*Comm*, p.119].

Exhibits 1, 3 and 4 may be considered as preliminary negotiations. Exhibit 1 is a statement that CLAIMANT will only do business with a supplier that can fulfill all requirements, especially protein quality and delivery date. This may be inferred from the intended purpose of the Contract expressed in the letter; to supply their clients which are mostly bakeries. Exhibit 3 shows RESPONDENT's intention to accept the offer and form a binding contract. In Exhibit 4, CLAIMANT stated 'If anything changes, will let you know', which implies the mutual agreement that the MOU is binding unless changes were made.

When supplying an omitted term, certain factors shall be regarded [*PICC* Art. 4.8.]. Taking the factors listed in PICC Article 4.8 into account, the agreement on the quality of wheat should be supplied.

5. Alternatively, RESPONDENT made an acceptance regarding the quality of wheat subsequent to the signing of the MOU

A contract may be concluded either by acceptance of an offer or by a conduct of the parties that is sufficient to show agreement [*PICC* Art. 2.1.1]. In Exhibit 7, RESPONDENT mentioned 'the lower end of your requirements'. This was the response to CLAIMANT's complaint regarding the protein quality. The fact that there was no referral on whether the quality of wheat was a part of the Contract is itself a conduct that shows agreement to CLAIMANT's requirement to an 11.5% average. Hence an agreement on the protein quality of the wheat was concluded at the time Exhibit 7 reached CLAIMANT.

B. CLAIMANT can terminate the Contract on the ground of RESPONDENT's fundamental non-performance

1. The existence of an agreement concerning the quality of wheat imposes on RESPONDENT an obligation to achieve a specific result

As the mutual agreement was for RESPONDENT to deliver wheat with a protein level of at least 11.5%, RESPONDENT is obligated to deliver wheat with the required quality. This is not a duty of best efforts, but a distinct duty to achieve a specific result.

2. Breach of the obligation to achieve a specific result is itself non-performance

RESPONDENT delivered wheat with a lower protein level than 11.5%, therefore breached their obligation to deliver wheat with more than 11.5% of protein. This is a non-performance of the Contract.

C. Alternatively, RESPONDENT is showing inconsistent behavior if RESPONDENT asserts that the quality was not a requirement in the Contract

RESPONDENT caused the other party, CLAIMANT, to believe they will deliver the required quality. Throughout the exchange of letters and the signing of the MOU, RESPONDENT caused CLAIMANT to understand that there has been a contract about

the quality of wheat. Any reasonable person in the same circumstance would have understood alike.

A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment [*PICC* Art. 1.8]. Inconsistent behavior constitutes a breach of duty the law has imposed on each party. Therefore CLAIMANT can demand remedies based on violation of the law.

IV. RESPONDENT BREACHED THE CONTRACT BY NOT LABELLING THE CONTAINERS IN ENGLISH

A. RESPONDENT failed to perform its obligation to label in English

A contract is not required to be made in or evidenced by a particular form [*PICC* Art. 1.2]. The MOU was drawn up and signed together by the parties. After the signing of the MOU the first shipment was sent. This implies the two parties deemed the MOU as a written and binding contract. The MOU imposes on RESPONDENT an obligation to label in English, therefore RESPONDENT failed to perform its contractual obligation.

Furthermore, there were no legitimate modifications as to the labelling language. A binding contract can only be modified in accordance with its terms or by agreement or as otherwise provided in these principals [*PICC* Art. 1.3]. The MOU does not provide such a channel to modification. Nor were there any agreements on modification, the Contract is valid as it is written. The mere notification of the Ego customs legislation is not a legitimate modification.

B. RESPONDENT's failure to label in English constitutes non-performance

Non-performance includes defective performance [*PICC* Art. 7.1.1]. The object of the Contract was to deliver a certain amount of wheat, with a certain quality, in a certain

period of time, with labelling in a certain language. The failure to deliver wheat with the aforementioned factors constitutes a defective performance. Failure to label in English constitutes defective performance, hence non-performance.

C. RESPONDENT may not avoid the Contract for mistake relating to law

The mistaken party may not avoid the contract if (a) it was grossly negligent in committing the mistake [*PICC* Art. 3.5(2)]. This is to maintain fairness [*Comm*, p. 101]. Insufficient research of relevant domestic legislation can be deemed as gross negligence.

D. Notifying CLAIMANT of the legal complications regarding the labelling before the second shipment, is an additional obligation of the RESPONDENT

RESPONDENT took on the obligation to look into the legislation and notify CLAIMANT. RESPONDENT explicitly stated that they will 'endeavour to put English labels' although 'not sure whether customs allow to do so' [*Ex. 7*]. This is a direct notification that RESPONDENT will undertake the duty to investigate the relevant legislation. Alternatively, this obligation is an implied one stemming from good faith and fair dealing.

As RESPONDENT failed to notify CLAIMANT of the possibility of English labelling, RESPONDENT failed to perform this obligation. Failure of this constitutes non-performance of this additional obligation as well as defective performance of the Contract.

REQUEST FOR RELIEF

CLAIMANT respectfully requests the Tribunal to find that:

1. The Tribunal has jurisdiction to hear this dispute.

2. RESPONDENT materially breached the Contract.

3. CLAIMANT lawfully terminated the Agreement with RESPONDENT.

(**2922 words**)