SECOND ANNUAL
INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION
MOOT COMPETITION

MEMORANDA FOR RESPONDENT

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

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TABLE OF ABBREVIATIONS

UNCITRAL	United Nation Commission on International Trade Law
PICC	Principles of International Commercial Contracts
CIETAC	China International Economic and Trade Arbitration Commission
HKIAC	Hong Kong International Arbitration Centre
Art.	Article
Ex.	Exhibit
Cl.	Clarifications
para.	Paragraph

TABLE OF AUTHORITIES

Primary Sources

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JURISDICTION

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CASE

A. The binding Dispute Resolution Clause between the parties is the Arbitration Clause posted by RESPONDENT on the Internet

1. RESPONDENT Arbitration Clause is a valid Arbitration Agreement

RESPONDENT Arbitration Clause embodies all the criteria of a valid arbitration agreement as required by Article 7 of UNCITRAL Model Law. According to Article 7(4), posting the clause on the internet so that its content is accessible and useable for subsequent reference meets the requirement for the agreement to be in writing. Signatures of the parties are no longer required [*note*, para.19].

Arbitral agreement as defined by Article II, paragraph 2 of the New York Convention is also interpreted widely to recognize the widening use of electronic commerce [*Recommendation*].

Also, RESPONDENT Arbitration Clause is a contract under standard terms, drafted in advance for general and repeated use [*Comm*, p.66]. As CLAIMANT expressly referred to the standard terms and expressly consented to the provision in Exhibit 1, RESPONDENT Arbitration Clause became a binding part of the Contract.

2. ADR Clause in Memorandum of Understanding [hereinafter MOU] is ineffective and cannot supersede RESPONDENT Arbitration Clause

According to PICC Article 2.1.1, the Contract had already been formed when RESPONDENT accepted CLAIMANT's offer on January 15, 2009. Forms are not a contractual requirement [*PICC* Art. 1.2], and MOU is merely a confirmation of the Contract. Therefore, terms of the Contract stand as they have initially been agreed upon, and if additional or different terms appear in a mere confirmation document that alter

the Contract, such discrepancies should be disregarded. Similarly, according to PICC Article 2.1.12, if a party sends a confirmation of a concluded contract that contains terms that materially alter the contract, such terms are rejected. Addition of an arbitration clause is given as an example of such a "material" modification [*Comm*, p.53].

Because ADR Clause in a mere confirmation document contradicts the concluded terms of the Contract − *inter alia*, the incorporated internet Arbitration Clause − it does not prevail.

3. Even if the MOU were a merger clause with a valid ADR clause, disputes regarding the quality of grain may only be resolved under RESPONDENT Arbitration Clause

The scope of the ADR Clause in the MOU is expressly limited to "disputes in relation to this agreement [*Ex.* 5]". However MOU itself does not address the quality requirement for the wheat. If MOU were considered a merger clause, the terms for quality would not be considered as part of the Contract, and the ADR Clause would not cover disputes arising from quality issues. On the other hand, RESPONDENT's Arbitration Clause covers "any disputes in relation to the quality… and shipping [*Ex.* 2]" Therefore; CLAIMANT's allegations regarding the quality of wheat should apply the latter agreement.

B. Consequently, current Tribunal, constituted under CIETAC rules does not have jurisdiction over the Case

Current Tribunal is constituted in accordance with the CIETAC rules [*CIETAC Arbitration Rules*, Art. 4.3]. As MOU Arbitration Clause that calls for application of CIETAC rules is void, current Tribunal has been constituted without legal grounds and

does not have jurisdiction over the Case.

C. RESPONDENT Arbitration Clause requires that parties submit their dispute to mediation prior to arbitration

According to RESPONDENT Arbitration Clause, disputes are subject to mandatory mediation prior to arbitration. Therefore, this Case must be submitted to mediation using the Draft Hong Kong Code of Conduct for Mediators. Only upon failure of this procedure can it be submitted for arbitration using the HKIAC Arbitration rules.

MERITS

II. RESPONDENT did not breach the Contract due to impossibility of supply

A. The Contract was rightfully terminated due to *force majeure*

1. Privatization of the main port constitute an 'impediment beyond RESPONDENT's control'

Government measures, such as closing of traffic routes and exchange controls is mentioned as typical example of *force majeure* [*Vogenauer*, p.773]. The fact that the impediment was beyond RESPONDENT's control is defined by the satisfaction of the following two conditions [*Ex.* 9].

a. Event not reasonably foreseeable

When the Contract was being concluded, the right to transport grain out of main port had recently been put to tender, of which RESPONDENT was among the top 5 tenderers [*Ex*. 9]. However, the government later changed the method of sales to an auction. Plans for the auction had not yet been announced at that time, and RESPONDENT's loss of the right could not have been reasonably foreseen.

b. Impediment not reasonably avoidable or surmountable

CLAIMANT could argue that if RESPONDENT had increased its bid or requested assistance from CLAIMANT, RESPONDENT could have won [*Ex*. 10]. However, PICC does not demand the obligor to employ efforts for achieving the result due beyond the point of economic reasonableness [*Vogenauer*, p.771].

RESPONDENT is a small company [*Ex*. 4] with limited financial means. Therefore, RESPONDENT's bid in the auction must be considered a business call reflecting RESPONDENT's financial capacity. In sum, as long as RESPONDENT participated in the auction in good faith, the intrinsic risks involved in the results of an auction cannot be attributed to RESPONDENT.

c. PICC rules on public permission do not apply to this case

PICC rules on public permission may not be applicable, as participating in an auction to purchase government facilities does not qualify as public permission. "Privatization," by its very definition of transferring governmental function to the private sector [*Britannica*], cannot be encompassed as acquiring public permission.

2. RESPONDENT gave timely notice of *force majeure* [*PICC* Article 7.1.7(3)]

RESPONDENT gave notice of force majeure according to PICC Article 1.10 [Vogenauer, p. 774] to CLAIMANT. RESPONDENT immediately informed CLAIMANT of the loss of the right to transport grain out of the main port and its impeding effect on RESPONDENT's ability to perform future shipments the day after the auction [Ex. 9].

3. Therefore, CLAIMANT cannot claim damages for non-performance

Because RESPONDENT's performance was impeded by *force majeure*, RESPONDENT is fully shielded from liability for damages arising from non-performance. Moreover, RESPONDENT retains the right to terminate the Contract

under PICC Article 7.1.7(4) [*Vogenauer*, p. 775].

B. Use of the second port is not part of the Contract

1. Place of performance is determinable from the Contract to be the main port

When possible, place of performance is fixed by, or determined from the Contract [*PICC* Art. 6.1.6(1)]. RESPONDENT's obligation to perform FOB shipment takes place on the ship nominated by CLAIMANT [*Ex*. 5] at the named port of shipment [*Incoterms 2000*, p.93].

In the process of concluding the Contract, CLAIMANT stated that "It does not matter to us [CLAIMANT] which of the two ports in Ego you [RESPONDENT] will be using for the shipment." Therefore, the contractual stipulation can be interpreted to have given RESPONDENT the discretion to choose the Port of choice [*Vogenauer*, p.647].

2. Default rule on place of performance

Default rule in PICC Article 6.1.6 (1) (b) provides that RESPONDENT is to perform at its own place of business. RESPONDENT's "place of business" would be the main port, as it is the place which has the closest connection to the Contract and all previous performances [*PICC* Art. 1.11].

C. Even if the second port were an option, the Contract must be terminated due to hardship

1. Inability to use main port constitutes 'hardship'

Privatization of the main port is a phenomenon of 'hardship' as acknowledged by PICC Article 6.22, on following grounds:

Shipping through the second port substantially increases the cost of RESPONDENT's performance. Under FOB term in the MOU [*Ex*. 5], RESPONDENT bears all costs and risks of damage to goods before the goods pass the ship's rail [Incoterms 2000].

Therefore, the increased costs rising from using inferior loading equipment and wharf facilities fall upon RESPONDENT.

Announcement of the auction and the resulting loss of main port access occurred after concluding the Contract [*PICC* Art. 6.2.2(a)]. The results of the auction were not foreseeable and could not reasonably have been taken into account by RESPONDENT [*PICC* Art. 6.2.2(b)], and beyond the control of RESPONDENT [*PICC* Art. 6.2.2(c)]. There are no circumstances that suggest that RESPONDENT assumed the risks of an imposed change in ports [*PICC* Art. 6.2.2(d)].

Therefore, RESPONDENT is entitled to invoke hardship with respect to the two remaining years [*Comm*, p.187] of the life of the Contract.

2. Termination is the viable option in terms of equity

Following PICC Article 6.2.3(1), RESPONDENT notified the CLAIMANT of the above circumstances without undue delay and requested renegotiations in the form of contract termination. RESPONDENT conducted the renegotiation process in good faith [*Comm*, p.190], by trying to convince the grain handling authority to take over the Contract and by supplying wheat to the last possible day. RESPONDENT found no viable alternative but to cancel the Contract [*Ex.* 11], and in *Exhibit 12*, the CLAIMANT also agreed that the Contract be terminated. Therefore, it can be said that as the result of renegotiation, the parties reached a binding agreement to terminate the Contract.

III. RESPONDENT FULFILLED ITS OBLIGATIONS STIPULATED IN THE CONTRACT

A. RESPONDENT obligation to mark containers only in English is impossible *ab initio* as the signage in Ego can only be done in Ego language and it is against domestic law to label containers in English

PICC article 7. 2. 2 provides that one party may not require the other's performance when the performance is impossible in law. Marking of export cargo in Ego can only be done in Ego language pursuant to Ego customs legislation [*Ex. 15*]. Therefore, packaging clause in the contract which imposes obligation on RESPONDENT to mark container in English is requiring a performance impossible in Ego domestic law. Consequently, CLAIMANT may not insist on the clause being valid and oblige RESPONDENT to mark container in English. However impossibility does not nullify a contract; other remedies may be available to the aggrieved party [*Comm*, p.211].

B. Packaging clauses is invalid through illegality

A contract must be capable of recognition by the law, not prohibited by the law. This means that certain agreements will not qualify as valid contracts, if they contravene the law. Illegality avoids a contract *ab initio* if the making of the contract is expressly or impliedly prohibited by statute [*Fridman*, p.338~340]. Consequently, CLAIMANT may not insist on the clause being valid and oblige RESPONDENT to mark container in English.

C. RESPONDENT is not liable for the CLAIMANT's damage caused by labeling in Ego language

Marking container in English is impossible in law, also prohibited; hence the packaging clause is invalid. Nonetheless, invalidity of the packaging clause does not affect the validity of the Contract as a whole, thus the Contract is still valid. However, as the packaging clause invalid through illegality, RESPONDENT's labeling in Ego language is not non-performance.

Even if packaging clause is still valid and RESPONDENT may be held liable, RESPONDENT had no foreseeability. According to PICC Article 7.4.4, the non-

performing party is liable only for harm which it foresaw or could have foreseen at the time of the conclusion of contract. Not all the benefits of which the aggrieved party is deprived fall within the scope of the contract and the non-performing party must not be saddled with compensation for harm which it could never have foreseen at the time of the conclusion of the contract and against the risk of which it could not have taken out insurance [*Comm*, p.238]

In international trade, containers being exported from Ego are marked in Ego language and usually importers change the marking in the bonded warehouse. RESPONDENT reasonably expected CLAIMANT to change the signing in CLAIMANT's cost, in CLAIMANT's bonded warehouse.

D. Both parties made the mistake of inserting a clause which imposes obligation impossible in law in the Contract; hence, RESPONDENT may partially avoid the Contract

1. RESPONDENT may partially avoid the contract as both sides made the common mistake relating to law, namely domestic customs legislation of Ego

Common law recognizes a distinction between mistakes of fact and mistakes of law and the latter would not always render a contract void or voidable: that is as everyone was presumed to know the law, ignorance of law was neither excuse not defense [*Fridman*, p. 258]. PICC equates a mistake relating to facts with a mistake relating to law. Identical legal treatment of the two types of mistake seems justified in view of the increasing complexity of modern legal systems [*Comm*, p.98].

According to PICC Article 3. 5.(1)(a), if the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms and the other party made the same mistake, a

party may avoid the contract.

Moreover, PICC Article 3.16 stipulates that where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless it is unreasonable to uphold the remaining contract; hence, RESPONDENT may partially avoid the contract and make the marking clause void.

2. Even if the Contract been partially avoided and RESPONDENT ought to have known of the ground for avoidance, RESPONDENT's liability is reduced

RESPONDENT ought to have known of the ground for avoidance hence is liable for the damages [*PICC*, Art. 3.18]. Where the harm is due in part to an act of the aggrieved party the amount of damages shall be reduced to the extent that these factors have contributed to the harm [*PICC*, Art. 7.4.7].

CLAIMANT has made the same mistake relating to law, therefore it would be unjust for CLAIMANT to obtain full compensation for harm for which it has itself been partly responsible [*Comm*, p.424]. Therefore, the amount of damages should be reduced [*PICC*, Art. 7.4.7].

E. Even if packaging clause is valid and RESPONDENT is liable for CLAIMANT's damages, RESPONDENT does not have the obligation to pay for the penalty CLAIMANT was burdened with

According to PICC Article 7.4.8, the non-performing party has a duty to mitigate harm. Any harm which the aggrieved party could have avoided by taking reasonable steps will not be compensated [*Comm*, p.244]. RESPONDENT has notified that the signage could not be done in English and CLAIMANT should have taken a reasonable step to mitigate the harm CLAIMANT was well aware of. Hence, RESPONDENT may only be liable for the customs fee and not for the penalty.

IV. RESPODENT IS ENTITLED TO THE PAYMENT OF THE LAST SHIPMENT

A. Last shipment containing wheat with a protein level of 11% is not a non-performance. Therefore, CLAIMANT should pay for the last shipment as required in the Contract

B. Quality of wheat was not specified in the Contract

If there is no specification of the quality of performance in a contract, a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances [*PICC*, Art. 5.1.6]. RESPONDENT has supplied wheat with a protein level of 11% [*Ex. 12*] and that is above the average quality of wheat produced in Ego As RESPONDENT supplied wheat with a quality that is reasonable and not less than average, CLAIMANT is obliged to pay for RESPONDENT's performance.

C. Even according to CLAIMANT invitation of offer, RESPONDENT provided wheat within CLAIMANT's acceptable range of protein level

1. According to the *Exhibit 1,* which can be regarded as an invitation of offer , CLAIMANT's acceptable range of grain quality was a protein level within 13 ~ 10.5 %

CLAIMANT stated in the *Exhibit 1*, which could be regarded as an invitation of offer, that "protein quality of Ego grain as quoted on the internet, though not superior to the one in OZ is still within our acceptable range of 13% to 10. 5%." Even if what is said on invitation of offer may be considered as an implied condition, RESPONDENT is only obliged to supply wheat with protein level in an acceptable range of 13% to 10. 5%

2. RESPONDENT provided a grain with a protein level of 11% in last shipment, within the acceptable range per required by CLAIMANT

RESPONDENT provided wheat within CLAIMANT's acceptable range of protein level

and failure to provide wheat with an average protein level of 11. 5% - which did not form a part of the Contract in any case - was due to CLAIMANT's request for the early shipment. RESPONDENT did not breach the Contract concerning quality of last shipment; hence CLAIMANT should pay for the last shipment.

D. The Contract was terminated on March 28. 2009; hence RESPONDENT had no obligation to supply grain after that date. CLAIMANT was unjustly enriched at RESPONDENT's expense by last shipment

1. RESPONDENT had no obligation to supply grain after the termination of the Contract, which was March 28. 2009

2. CLAIMANT, unjustly enriched by the last shipment, must make restitution for the reasonable value of benefits that have been unfairly received and retained

Unjust enrichment is an equitable doctrine applied in the absence of a contract and used to prevent one person from being unjustly enriched at another's expense. [*Apache Corp. v. MDU Resources Group*]. The essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value [*Telesaurus VPC, LLC v. Power*, *Allaire v. Benton*].

CLAIMANT was enriched at RESPONDENT's impoverishment, and there is a connection between them. RESPONDENT was not obliged to supply any more wheat but did in CLAIMANT's request. And there is no remedy provided by the law for the restitution. Therefore, CLAIMANT, unjustly enriched by the last shipment, must make restitution for the reasonable value of benefits that have been unfairly received and retained and therefore must pay for the last shipment.

REQUEST FOR RELIEF

RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal does not have jurisdiction to this Case

2. RESPONDENT did not breach the Contract due to impossibility of supply.

3. RESPONDENT fulfilled their obligation regarding labeling.

4. CLAIMANT has an obligation to pay for the last shipment.

(2,997 words)