THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG – AUGUST 2011

Memorandum for Claimant

Team 889

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STATEMENT OF FACTS

Peng Importing Corporation (“Claimant”), whose manager is Mr. Charles Peng, is a company located in the Republic of Id, which purchases its wheat.

Freud Exporting (“Respondent”) is a company located in the Federal Republic of Ego (Ego), with Mr. Sigmund Freud is the managing director.

On 10th January 2009, the Claimant sent an offer to the Respondent, covering that the goods quality requirements be in an acceptable range of 13% to 10.5% and the average protein quality must be 11.5%, not the lower but the higher is acceptable.

On 15th January 2009, the Respondent answered the Claimant，acknowledged that they could supply the required quantity as per the Claimant’s letter of 10th January 2009.

The Claimant and Respondent then signed a memorandum of Understanding on the Island of Sun, under which the two parties

made an agreement about
Packaging, Shipping, Price, Payment, Duration，ADR Clause, Governing law, Language.

On 22nd February, Claimant received the first shipment of wheat within but at the lower end close to the 11.5% average range, while the containers marked in Ego language not English as required in the MOU, which caused trouble unloading it and $5000 costs for translation. And the Claimant required the second shipment of the 18th March, and the Respondent agreed on the letter of March 6th.

Claimant received the second shipment with markings in Ego, which led to their loss of $15,000. The wheat with a protein content of 11.5% caused a price drop. Additionally, the spot prices collapsed. Claimant indicated that they had a mix of grains with required protein levels and 11.5% was the minimum that would be tolerated. Claimant required the Respondent to contribute a little to offset some losses.

The Respondent wrote to cancel the contract for their loss in the bidder of the main port. After negotiation, the Respondent

agreed to ship what they had in April, insisting on the cancellation of the contract and refused to offset losses.

The Claimant found the shipment of April only contained wheat with a protein level of 11% which was not sufficient, and the second harbor of Ego still available. The Claimant hoped to continue the contractual relationship, but agreed to terminate the contract until they finalized their discussions with a new supplier and calculation of the damages.

The Respondent insisted that the memo did not specify the required quality, and they would send what they had on stock. They stated the Claimant breached the contract for their shift to a newer supplier and activated the ADR clause.

ARGUMENTS

I. CIETAC HAS JURISDICTION AS WRITTEN IN THE ARBITRATION AGREEMENT

1. The CIETAC has the jurisdiction over the arbitration according to: (1.1) the CIETAC Arbitration Rules. In addition, (1.2) the CIETAC Rules, the UNCITRAL Model Law on

International Commercial Arbitration and the common law doctrine of competence-competence provide CIETAC the power to determine its jurisdiction over the arbitration case.

1.1 JURISDICTION CONFERRED BY THE CIETAC RULES

2. Under Article 4 (3) of the CIETAC Arbitration Rules, “where the parties agree to refer their disputes to arbitration under these Rules without providing the name of an arbitration institution, they shall be deemed to have agreed to refer the dispute to arbitration by the CIETAC.” Under the ADR Clause of the Memorandum of Understanding in Exhibit 5, the “dispute arising out of or in relation to the contract …may be initially settled by arbitration in accordance with the CIETAC rules”. By adopting the CIETAC rules, the parties automatically agree on the jurisdiction of CIETAC.

1.2 THE POWER OF CIETAC OVER ITS JURISDICTION

3. Under Article 6(1) of the CIETAC Arbitration Rules, CIETAC shall have the power to determine its jurisdiction

over an arbitration case.

4. Under Article 16 (1) of the UNCITRAL Model Law on International Commercial Arbitration, “the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.”

5. In *Fiona Trust & Holding Corporation v Yuri Privalov & 17 Ors* [2007] UKHL, the UK House of Lords decided that the tribunal had the jurisdiction to decide its jurisdiction over the validity of the arbitration agreement instead of the court. By the same token, the CIETAC should also have the competence to decide its jurisdiction over the issue.

1.3 The defendant’s arbitration clause is not applicable and EGO can’t be the seat of arbitration.

6. As shown in Exhibit 1, Exhibit 2 and 3, in the first offer of the Claimant on 10th January and acceptance of the defendant on 15th January, the two parties reached an agreement of the arbitration clause through correspondence via the internet.

However the two parties later made a new agreement regarding an ADR clause in the written MOU, which stated very clearly that if mediation failed “any dispute arising out of or in relation to the contract including counter claims may be initially settled by arbitration in accordance with the CIETAC rules”. So the defendant’s arbitration clause is not applicable anymore. And as mentioned above, the adoption of the CIETAC rules granted the jurisdiction of the CIETAC. Neither Hong Kong nor Ego can enjoy the jurisdiction over the disputes involved in the case.

Conclusion on jurisdiction

7. Under Article 4(3) of the CIETAC Rules, the CIETAC undoubtedly has the jurisdiction to hear the case. In addition, it also has the power to decide on its jurisdiction based on the authorities listed in (1.2).

II. The Agreement has been legitimately terminated by Claimant

8.On 20th May 2009, after unsuccessful negotiations, the Claimant formally informed the Respondent that it initiated an

arbitration proceeding in Id, on the ground that: (1)the Respondent failed to supply grain out of the second port of Ego after the main one was unavailable. (2)the Respondent′s delivery of the grain did not match the quality.(3) the Respondent ‘s wrong labeling on the containers.

2.1 Valid contract relationship existed between the two parties, and quality clause has been formed.

9. When it comes to the formation of a contractual relationship, in the case Ponderosa Assets v L.P [2008] USA, OPIC first looked to whether or not a contract had actually been formed between those two parties. In doing so, OPIC quoted Article 2.1.1 of the UNIDROIT Principles, stating that a contract can be formed “by the acceptance of an offer.” OPIC also quoted Article 2.1.1, according to which a contract can be formed by “conduct of the parties that is sufficient to show agreement.” OPIC concluded that from 1992 until 2000 the conduct of each of the parties conformed to the terms of the agreement, thus indicating that it was their common intention to be bound by the terms of the licensing agreement.

10.Under Article 2.1.1 of the UNIDROIT Principles, there exists

valid contract relationship between the Claimant and the Respondent, which includes Memorandum of Understanding (MOU) and other mutual understandings shown by exchanged email, letters, etc.

11. A contract can be formed by offer and acceptance. Although there is no clause about the quality of the wheat in the MOU, yet in Exhibit 1 the Claimant stated that the average protein quality must be 11.5% and in Exhibit 3 the Respondent acknowledged that he can supply the required quantity. Therefore, the quality clause has been formed by offer and acceptance and became part of their contract.

2.2 The Respondent has breached the contract in the following aspects:

(A) The Respondent breached the shipping clause by not using the second port of Ego to ship the wheat

12. In the MOU, the shipping clause is “FOB out of any port in Ego”. There are two ports in Ego which are the main port and the second port. And in Exhibit 1, the Claimant stated that it

does not matter which of the two ports in Ego the Respondent will be using for the shipment of the grain.

（i）It was the Respondent's fault to lose in the auction

13. It was the Respondent's responsibility to choose the proper port. The main port, which is located on the East side of the country, has all of the modern loading facilities. And the performance of the contract was finished out of the main port. To keep the right to transport grain out of the main port was necessary. But the Respondent did not inform the Claimant of the auction, the Claimant might have been able to assist and come to an arrangement to avoid the loss. The auction price was well below average wheat prices, and Respondent should have increased the bid which would still provide a profit for him.

(ii) Loss of the auction was not because of Force Majeure or hardship

14. Loss at the auction was totally the Respondent’s fault, which is not force majeure nor hardship. Under Article 7.1.7 of the UNIDROIT Principles, the force majeure “(1) Non-performance

by a party is excused if that party proves that the nonperformance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract. (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such nonreceipt. (4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due". As mentioned, the loss of auction was not because of the Force majeure.

15. In ICC Case 8486 (1996)the Arbitral Tribunal stressed the exceptional character of hardship which required a fundamental alteration in the original contractual equilibrium, not a mere increase in the cost of performance as in the instant case. In

confirmation of this conclusion, the Arbitral Tribunal referred not only to Art. 6.258 of the new Dutch Civil Code, which was the applicable law, but also to Art. 6.2.1 of the UNIDROIT Principles. The reference to the latter was justified by the argument that in applying Dutch law in an international context, attention should be given to the prevailing view in the field of international commercial contracts.

The exceptional character of hardship required a fundamental alteration in the original contractual equilibrium. Although the main port can no longer be used, the second port is still available. Therefore this can’t be taken as a hardship and can’t be an active defense for the Respondent.

(iii) The second port was still available but the Respondent failed to transport out of it

16. According to the shipping clause, any port of EGO would be satisfactory. So when the Respondent can’t use the main port any longer, the second port was still an option. The Respondent may argue that the second port is not quite safe and rather old. But we believe that since the Ego navy is patrolling this area, the second port can be used as the shipping port. Under the Article 7.1.7 of the UNIDROIT Principles, the Respondent

could not claim force majeure or hardship as a reason for not providing from the second port. Both parties should perform the contract in good faith in order to realize the aim of contract. There is possibility for the Respondent to keep on performing the contract, but he failed to do so. Therefore, we think that the Respondent has breached the contract in this aspect.

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(B) The Respondent breached the quality requirement agreed by both parties

(i). Both parties have formed the quality clause of 11.5% protein requirement by offer and acceptance

18. A contract can be formed by offer and acceptance. In Exhibit 1 the Claimant required that the average protein quality must be 11.5%. Furthermore, the Claimant added that the competition in the flour mill industry is rather fierce. Therefore, the 11.5%

protein quality is very important to the Claimant and to achieve the aim of contract. In Exhibit 3 the Respondent acknowledged that he can supply the required quantity. Therefore, the quality clause has been formed by offer and acceptance and became part of their contract.

(ii) The Respondent has breached the quality clause by providing the wheat with a protein level below 11.5%

19. In Exhibit 12, the Claimant found the wheat with a protein level of 11%, which breached the quality requirement. The loss of profit and customers should be compensated by the Respondent.

(C) The Respondent breached the language requirement for the packaging.

(i) Respondent was required to label the package in English as expressly stated in the MOU

20. In the MOU, the packaging clause states “containers marked in English only…” And due to the Respondent labeling

the containers in Ego language, the Claimant was fined whenever he uploaded the wheat. The Respondent may argue that according to the customs regulation in Ego, he had no choice but to label the containers in Ego language. We think if the Respondent had to label the containers in Ego language, he should have noticed us in advance and discussed the assumption of translation fees.

21. Although it's required by Ego customs that exporters can only label the package in Ego language, yet this can't be a effective defense for the Respondent

22. As a specialized exporting company, the Respondent should be familiar with relevant domestic regulations about the packaging language. The Respondent agreed to label the packages in English. Therefore, the Respondent should bear the responsibility of the fines.

Conclusion:

Based on the contract, including the MOU and other mutual understandings shown by email, the Respondent has breached the contract obligation of shipping, quality and packaging.

Therefore, the Respondent should be liable for all losses caused by the breach.

Request for Relief:

1. The Respondent breached the contract by not supplying grain out of the second port of Ego;

2. The Respondent breached the contract due to the delivery of grain which did not match the quality requirements;

3. Claim for damages due to wrong labeling on the containers which is also a breach of our contract.