THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG – AUGUST 2011

Memorandum for Respondent

Team 889

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INDEX OF ABBREVIATIONS

Ⅱ	paragraph of Problem
CIETAC	China international economic trade arbitration committee
HKIAC	Hong Kong International Arbitration Center
ICC	International Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law

INDEX OF AUTHORITIES

Vogenauer, Stefan Kleinheisterkamp, Jan	Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) OXFORD University Press 2009 (Cited as: Vogenauer)

INDEX OF CASES AND AWARDS

Dutch Supreme Court of Dutch

Sint Maarten Veterinary Hospital N.V. vs.

Animal Hospital of the Netherlands Antilles N.V

ICC Arbitral Award 1999

ICC case no 9479

Citation: http://www.unilex.info/case.cfm?id=68

Statement of facts:

Mr.Charles Peng is the managing director of a flour mill incorporated and located in the Republic of Id (Id). He used to purchase his wheat from the Island of Oz (Oz) but Oz suffered severe drought conditions in 2008. He then found Freud Exporting (Freud) on the internet which is located in the Federal Republic of Ego (Ego).

On January 10,2009, Mr. Peng sent an email to Freud Exporting express ing his interest in buying wheat from Freud and describing the quality of wheat that he would accept. Peng got the reply from Freud on January 15 in which Feng committed to supplying the requested quantity of wheat to Peng.

On January 30, 2009, the parties executed a Memorandum of Understanding (MOU), which provided that the Claimant would purchases, 1,200,000 metric tones of wheat , the packing language would be English and the shipping would be FOB out of any port in Ego. The MOU also included price, the duration and an Alternative Dispute Resolution Clause.

On March 3, 2009, the Claimant sent an email to Respondent to mention

that the quality of wheat supplied, while at the lower end close to 11.5% was still acceptable, but the language marked the containers in Ego language was not in English .

On March 6,2009, the Respondent replied that they would endeavor to put English labels onto the containers but was unsure whether the Customs would allow this. With regard to the quality, the Respondent said that, as known in the trade, Ego, on the whole, produces wheat with a protein content of 12% down to 10%, hence the lower end of the requirements.

On March 28, the Respondent told the Claimant that they could not export grain to overseas suppliers out of the main port due to a losing bid and they were now forced to cancel the contract.

On March 30, 2009, the Claimant complained that they had paid another $5,000 for translation and a penalty of $10,000 for a second infringement and that the low quality of wheat made them lose profit.

On March 31, 2009, the Claimant expressed that they did not care whether the shipment would be early. And then, on April 5, 2009, the Respondent replied that they would ship what they had so at least the

month of April is covered; they had also contracted the grain handling authority and tried to convince them to take over the contract but they refused. The Respondent had performed according to the contract, so should not support Claimant's judgment of having the shipment called early. The Respondent's financial loss was not due to his own actions.

On April 30, 2009, the Claimant received the last shipment but the quality of wheat was not sufficient. The second harbour of Ego is still open to all shipping. However, the Claimant agreed to terminate the contract as soon as he finalises the discussions with the new supplier.

On May 10, 2009, the Respondent replied that the MOU is the written contract, which did not specify the required quality and it was the Claimant who shifted to a new supplier and thereby breached the contract. Respondent wanted to invoke the ADR clause to solve the dispute.

On May 20, 2009, the Claimant initiated arbitration proceeding in Id and claimed that the Respondent breached the contract by not supplying grain, and also by failing to satisfy the quality requirement.

On May 25, 2009, the Respondent gave the response that they did not breach the contract given the impossibility of supply and did not breach

the quality requirement, either, as they supplied consistently with grain of protein level of 11.5%. In addition, signage in Ego can only be done in Ego language due to customs legislation and normally importers would change the signing in the bonded warehouse. Respondent also lodged a counterclaim against the Claimant that the Claimant did not pay for the last shipment. Finally, Respondent contested CIETAC's jurisdiction as (i) arbitration clause is applicable, and (ii) in the alternative, the seat of arbitration would be Ego.

ARGUMENTS

Ⅰ THE TRIBUNAL HAS NO JURISDICTION

1This tribunal has no jurisdiction. The two parties Peng Importing Corporation (Peng) and Freud Exporting (Freud) are bound by the valid arbitration clause and the **Memorandum of Understanding Exhibit 5** which is regarded as a written contract. (1.1) Claimant agreed to the arbitration clause on the internet as first arbitration clause which is applicable as to the seat of arbitration. (1.2) Claimant has not fulfilled the pre-arbitral requirements. (1.3) In the alternative, the seat of arbitration would be Ego.

(1.1)The claimant agreed to the arbitration clause through the internet, and this clause is relevant as to the seat of arbitration. The claimant agreed on the dispute resolution clause on the internet in the first letter. Exhibit 1.According to the arbitration clause, the seat of arbitration is not CIETAC but Hong Kong. Although the arbitration clause in the **Memorandum of Understanding Exhibit 5** states that “any disputes in relation to this agreement must be resolved in good faith by both CEO companies, failing that 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”, the seat of arbitration has not been amended. The two parties only changed the rules of arbitration not the seat.

(1.2) Claimant does not fulfilled the pre-arbitral requirements. The arbitration clause in Exhibit 5 states that" Any disputes in relation to this agreement must be resolved in good faith by both Chief Executive Officers of both companies. So before arbitration ,the dispute shall be resolved in good faith by both CEO of both companies Until now ,the parties have only held one meeting and we do still have opportunity to resolve the problem in good faith by meeting and negotiation. Therefore, it is too early to seek arbitration.

(1.3) The parties have both adopted the UNCITRAL Model Law On International Commercial Arbitration. The Model Law applies the common convenience principle to decide the seat of arbitration. The current dispute is most closely related to the port, which is located at Ego. The most important evidence exists in Ego. Therefore, the most convenient seat for arbitration would be Ego.

2Nevertheless, we have received the relevant documentation from CIETAC'S secretariat, and we contest the jurisdiction of CIETAC as to the jurisdiction of our counterclaim, our point of view is as same as the argument above.

CONCLUSION ON JURISDICTION

3This tribunal has no jurisdiction over the dispute. (1.1) Claimant agreed

to the arbitration clause on the internet as first arbitration clause which is applicable as to the seat of arbitration. (1.2) Claimant has not fulfilled the pre-arbitral requirements. (1.3) In the alternative, the seat of arbitration would be Ego.

Ⅱ. Only the Memorandum of Understanding (MOU) is the contract between Claimant and Respondent.

In this case, there is no named formal written contract between both parties. However, according to Article 1.2 and 2.1.13 of UNIDROIT Principles, there is indeed a contract between them. In our view, we take the MOU as the contract.

According to Article 1.2 of UNIDROIT Principles “nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form.” So that, the UNIDROIT Principles has no requirement of the form of contract. On Jan 10, 2009, the Claimant wrote a letter to the Respondent to express the intent of cooperation which is an invitation of offer. And then, the Respondent gave the response that the quality can be met and the other details would be discussed later. After both parties had met in the Island of Sun , the MOU was signed which included the main factors of contract. The Respondent

also implemented the written contract in good faith.

In *Sint Maarten Veterinary Hospital N.V. vs. Animal Hospital of the Netherlands Antilles N.V* case, the negotiations were leading to a letter of intent. Later on the parties laid down a so-called “Earnest Money Agreement”. The parties worked out various concepts, but their negotiations never led to an agreement. Subsequently one of the parties brought an action against the other before the Dutch Supreme Court claiming damages for the expenses it incurred as a result of the negotiations which ultimately ended without positive result. In its decision the Dutch Supreme Court held that “the parties probably intended to be bound only by the terms laid down in writing referred to in Article 2.13 [Art. 2.1.13 of the 2004 edition] of the UNIDROIT Principles, according to which where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a specific form, no contract is concluded before agreement is reached on those matters or in that form.” In this case, Claimant and Respondent have gotten the agreement on the matter of quantities, delivery schedule, packaging, shipping, price, payment and duration in the written form of MOU. Therefore, according to the principle and the previous case, Respondent argues that the MOU is a binding contract between both parties.

Ⅲ. The Respondent did not breach the contract

On 30 April, 2009, Claimant expressed that the contract can be terminated as soon as the Claimant finalised his discussions with his new supplier, Respondent did not breach the contract on the following alternate grounds: (3.1)stoppage of supply due to impossibility; (3.2) satisfaction of the quality requirement; (3.3) language labelling on the containers is mandatory in domestic law.

3.1 stoppage of supply due to the impossibility

In the contract, according to the duration clause, the Respondent should supply the wheat for a period of three years. However, in the course of performance , the Respondent met with hardship which was that the main port was privatized by the government and supplying through the main port was impossible. According to Art 6.2.1 of the UNIDROIT Principles " Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship." There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the

conclusion of the contract;(b) …(c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party. In this case, the main port is privatised by the government for tender and the Respondent tried his effort to bid, however, Respondent lost the bid unfortunately, which become known after the conclusion of the contract. Winning the bid and getting the right to ship from the main port is beyond the control of the Respondent and the risk of the events was not assumed by the Respondent. Therefore, due to the hardship, stopping the supply of wheat to Claimant has legal excuse. In the case 9479 of UNIDROIT, the Arbitral Tribunal stated that "a subsequent evolution of the legislative context of a contract does not constitute hardship when it does not destroy the balance of the parties' respective obligations." This means that if the subsequent events destroy the balance of the parties, the hardship is established. In this case, after the main port was privatised, the Respondent had no other choice but to use the second port to export the wheat which had the risk of pirates , the facilities are so poor that it can not support the export and the cost was increasing incredibly which can destroy the balance of the two parties. In fact, it made the Respondent fail to export wheat from Ego to Id and the equilibrium of the contract was destroyed. So, the Respondent is no longer bound to perform its supply obligation any more. Furthermore, according to Art 7.2.2 " where a party who owns an obligation other than

one to pay money does not perform, the other party may require performance, unless (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive.” Since the cost of the second port is too expensive, the Claimant can not require the Respondent to perform.

3.2 satisfy the quality requirement

The Claimant’s claim that the grain delivered by Respondent did not match the quality requirements has no contractual authority. In the MOU, there were no quality articles. The quality was confirmed by the conduct of performance. In the letter of March 3, 2009, the Claimant said that the quality at the lower end close to 11.5% was acceptable. And in the reply of Respondent on March 6,2009, the Respondent stated that “ It is known in this trade in Ego-we on the whole-produce wheat with a protein content of 12% down to 10% hence the lower end of your requirements but as you said still of excellent quality.” Thus, the quality of wheat is between 12% and 10% which is not fixed.

Furthermore, Art 5.1.6 of the UNIDROIT Principles states that “ where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is

reasonable and not less than average in the circumstances.” In this case, the written contract (MOU) as discussed above has no specific article stipulating the quality and in practice what Respondent has supplied satisfied the average quality and had a reasonable quality.

A. The wheat is of average quality: “This average quality is determined according to the circumstances, which normally means that which is available on the relevant market at the time of performance”. In this case, on the whole, in Ego, the wheat produced with a protein content of 12% down to 10% is average. What the Respondent had supplied was within the 11.5% even some at the lower end close to 11.5% range. Even the last shipment of wheat with a protein level of 11% was still within the average.

B. The wheat supplied has reasonable quality: reasonableness is intended to prevent a party from claiming that it has performed adequately if it has rendered an “average” performance in a market where the average quality is most unsatisfactory. So that, to determine the reasonableness there are two factors that one should take into account: whether the performance rendered is on the average level and whether the average quality is most unsatisfactory. In this case, what the Respondent had supplied was within the scope of average. And this quality was quite acceptable and can

satisfy the purpose of the contract.

3.3 Language labeling on the containers is regulated by law

The Respondent acknowledged that in the MOU there is an article which stipulated that “ containers marked in English only”. However, according to the Article1.4 of UNIDROIT Principles “ Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.” And in Ego, the Customs has mandatory regulations that the labels onto the containers must be in the Ego language. That is to say to mark the container in English at the conclusion of the contract is impossible. According to the Art 3.3 of UNIDROIT Principles “ the mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.” So that, the contract was still available in spite of the packaging article. Additionally, according to the Art 7.2.2 of UNIDROIT Principles “where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless the performance is impossible in law or in fact.” That is to say that if the performance is impossible in law or in fact, the other party can not require the performance. In this case, as was analyzed above, to mark the containers

in English is impossible in law and in fact, so that ,the Claimant can not require the Respondent to do so.

Ⅳ. Respondent Counterclaim

4.1 the Claimant breached the contract

In the letter of April 30, 2009, the Claimant said that they were in discussion with another supplier and wanted to terminate the contract with Respondent within the contractual period which means that the Claimant is breach. According to the Art7.3.1 " A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance", the Claimant has no right to terminate the contract.

4.2 Claimant has not paid for the last shipment.

According to the Claimant's requirement, the Respondent supplied the last shipment of wheat in April, however, until now the claimant has not paid since receiving the wheat. According to Art 7.2.1 " where a party who is obliged to pay money does not do so, the other party may require payment". We counterclaim for the payment of the last shipment.

CONCLUSION ON SUBSTANTIVE ISSUE

The Tribunal should find that the MOU is the written contract. The Respondent did not breach the contract, meanwhile, the Claimant broken the contract by termination the contract and default the payment of the last ship.

RELIEF REQUESTED

Respondent respectfully requests that the Arbitral Tribunal find that

-This tribunal has no jurisdiction over the dispute.

(1.1) Claimant agreed to the arbitration clause on the internet as first arbitration clause which is applicable as to the seat of arbitration.

(1.2) Claimant has not fulfilled the pre-arbitral requirements

(1.3) In the alternative, the seat of arbitration would be Ego.

-the MOU is the contract and the Respondent did not breach the contract

(a) stoppage of supply due to the impossibility

(b) satisfy the quality requirement

(c) Language labeling on the containers is regulated by law

Consequently, Respondent respectfully requests the Arbitral Tribunal to order Claimant:

-to pay the last shipment of wheat

For Freud Exporting.

(signed)_____, 1 July 2011