THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG: AUGUST 2011

MEMORANDUM FOR CLAIMANT

TEAM NUMBER 933

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ARGUMENTS

1. CIETAC HAS JURISDICTION TO DETERMINE THIS DISPUTE.

1.1 THE PARTIES ARE BOUND BY THE VALID ARBITRATION AGREEMENT

1.1.1 The Parties properly incorporated the ADR Clause into the Contract.

Claimant and Respondent included a valid arbitration clause in the Memorandum of Understanding. The Arbitration Clause is sufficiently definite to confer jurisdiction on the Tribunal. The Parties agree that any disputes arising out of or in relation to the contract including counter claims may be initially settled by arbitration in accordance with the CIETAC rules [Exhibit 5]. The parties are bound by CIETAC jurisdiction since they have consented to its jurisdiction.

1.1.2 CIETAC jurisdiction was the original intent of both the parties.

The ADR clause on MOU includes CIETAC rules to be abided by in case the dispute has to be submitted to the arbitration proceeding. The appointment of arbitrators by Claimant and Respondent has also been further explained in the clause in accordance with the CIETAC rules. [CIETAC Article 20] Therefore, The ADR clause included CIETAC and provision concurrently on the mutual consent of the parties, which shows their open intent to be governed by it. Furthermore, Arbitral tribunals can rule on their own jurisdiction under the doctrine of Kompetenz/Kompetenz [Blackaby/Partasides para 5.99]

1. 2. PRE-CONDITIONS TO ARBITRATION WERE PROPERLY FULLFILLED

1. 2.1 The intent of the parties was to ensure an attempt at amicable resolution

The dispute resolution clause indicates that parties intended to resolve in good faith. As stated in Exhibit 5, [a]ny dispute, in relation to this agreement must be resolved in good faith by both CEO of both companies. [Exhibit 5, ADR Clause]. Respondent agreeing to activate the ADR clause by sending their CEO for the discussion affirms to the amicable resolution. The provision of amicable resolution is a pre-condition for the Arbitration to proceed in between the parties for dispute submission. [Exhibit 5, ADR Clause] After the CEO's meetings were conducted [Exhibit 13,14]the arbitration proceeding are to be initiated as the pre condition to it was fulfilled.

1. 2.2 The Jurisdiction to CIETAC was agreed by Respondent

Respondent, at the time of activating ADR clause impliedly agreed to the CIETAC jurisdiction. Exhibit 5 in ADR clause explicitly mentions the pre condition for the arbitration proceeding, as being a resolution done on good faith by the CEO's of both parties. Respondent, activating the ADR clause [Exhibit 13] has given contention to the continuation of the ADR clause, which also includes the arbitration proceeding according to the CIETAC rules. When the R made that offer on May 10, 2009, by activating the ADR clause with arrangement of meetings of CEO's of both companies, the arbitration agreement included in it became effective. Hence, the jurisdiction to the CIETAC was agreed upon by the Freud exporting when initiating the ADR clause.

1.2.3. The seat of arbitration shall not be Ego

The seat of arbitration has to be neutral to the parties in dispute.[Loukas 569, 570; Paul 578] Also, the place of arbitration has to have a relation with the contractual relation. In this dispute, the relation with the contract can be only found with three nations, Island of Sun, Ego & Id. Since Sun is not a party to NY convention the place of arbitration has to be in among the disputed parties.[Nicholas 451]

When selecting arbitration rules and specifying a particular place of arbitration, it is important that the parties understand the implications and effect that decision will have on the arbitration proceedings. Also, when selecting the place of arbitration, it is important to consider the question of how an arbitral award made in that place will be enforced.[Michael 26] If Ego is chosen as a place of arbitration, the award, enforcement and effect of the decision will be affected. Ego since, breached the contract and is under the obligation to pay damages, the place of arbitration and the procedure has possibility of not doing justice.[Alan n45]

2. THE RESPONDENTS BREACHED THE CONTRACT BY NOT SUPPLYING GRAIN OUT OF THE SECOND PORT OF EGO.

The respo**nded** breached the contract not only by not supplying through the second port but also by not attempting to win the bid in order to be able to supply through the first port. . Modification or termination of contract without agreement can be admitted only when in conformity with the terms of the contract **[PICC Article 1.3]** but that was not the case.

2.1 THE RESPONDENT HAD THE OBLIGATION TO SUPPLY THROUGH THE SECOND PORT IN EGO.

The contractual obligation of the Respondent explicitly mentioned in the MOU was to supply the required quantity of the wheat to the Claimant irrespective of the port of supply. The memorandum had permitted the respondent to supply through any port of Ego they may choose to. The claimant also had agreed to send their ship to any of the port. Thus when the respondent was unable to supply through the first port, they should have used the second port for supplying.

2.2 IT WAS POSSIBLE FOR THE RESPONDENT TO SUPPLY THROUGH THE SECOND PORT.

The second port had the grain loading facilities in order for the Respondent to supply through it. Even if there was might have been threat of pirates in the second port and other security problems, the Ego navy has been providing the security. Further, the fact that the small port is subject to floods has no any influence on exporting as other exporters were exporting form that port [Clarification no 7] and the respondent has not shown any reasonable cause why they cannot do the same.

2.3 THE DEFENSE OF HARDSHIP DOES NOT EXCUSE NON PERFORMANCE.

In case of hardship the disadvantaged party is not entitled to declare termination but has to request the tribunal to do so, and only after that party has requested renegotiation and renegotiation has failed [Shareholders' Agreement(2000)]. In case of hardship the disadvantaged party is entitled to request renegotiations [**PICC** 6.2.3(1) ; México

(CAM)] and hardship does not give a ground for termination without a request for renegotiation. However, Claimant did not request renegotiation.

2.4 THE RESPONDENT CANNOT RELY ON FORCE MAJURE FOR NON PERFORMANCE

Claimant cannot rely on the doctrine of force majeure to terminate the agreement because:

2.4.1 The impediment was reasonably foreseeable

Claimant could have reasonably foreseen the impediment caused by the loss of bidding. A promisor is responsible for impediments outside his sphere of control if he ought to have taken them into account when entering the contract [Schlechtriem 817].The tender regarding the permission to export from the second port was already there when the parties entered into contract and thus it could have been reasonably foreseen by the parties that they might not win the tender.

2.4.2 Claimant could have overcome the impediment

Claimant could still have performed its obligations under the contract. Even an impediment that a promisor could not have reasonably foreseen will not exempt performance if performance is still possible and reasonable [Schlechtriem 817]. A promisor is expected to overcome an impediment even when this results in a greatly increased cost or even a business loss [Schlechtriem 817; Nuova Award]. An impediment will not relieve a promisor of performance if overcoming the impediment is both reasonable and possible.[Schlechtriem 817]

If the loss of the auction be taken as an impediment to the performance of contract, the Respondent could have overcome it by paying more in the auction. The impediment thus cannot be said to have been beyond the control of the Respondent.

2.4.3 Claimant did not give Respondent sufficient notice.

Claimant never communicated notice of force majeure to Respondent. The promisor must communicate notice of force majeure to the promisee after the promisor knows of the impediment [PICC Official Comment 774]. Claimant purported to terminate the Agreement without first informing Respondent of the impediment. The Respondent could have consulted the Claimant before the holding of the auction or at least could have notified the Claimant about the same. The Respondent could even have asked the Claimant for financial assistance to win the auction.

2.5 THE RESPONDENT DID NOT USE BEST EFFORT TO PERFORM THE CONTRACT.

Parties are bound to use best efforts in the performance of the contract as would be used by a reasonable person of the same kind in the same circumstances [PICC Art 5.1.4(2)]. The respondent did nothing to attempt to win the bid. The auction price was well below average wheat prices and hence the respondents would still have made a profit if they had had increased their bid. Furthermore if they would have informed us of the auction we might have been able to assist and come to an arrangement.

3. THE RESPONDENT HAS BREACHED THE CONTRACT DUE TO DELIVERY OF GRAIN WHICH DID NOT MATCH THE QUALITY REQUIREMEMNT.

The Respondent had the obligation for supplying the mentioned quality of goods to the Claimant as the requirement of the quality was an implied term of the contract and that the Claimant had reasonably relied on this understanding to their detriment.

3.1 THE REQUIREMENT OF QUALITY WAS IMPLIED IN THE CONTARCT.

The contractual obligations of the parties may be expressed or implied. [PICC Article 5.1.1]. Also, The quality may be “expressly or impliedly determined by the contract”[COESTER-WALTJEN , 638]Though not mentioned in the memorandum of understanding, the obligation regarding the quality was implied from the prior conversation of the parties. Not mentioning the merger clause shows the intention of the parties to agree to supplement the terms of the agreement by evidence of prior statements. [PICC Article 2.1.17].

The Claimant from the beginning had been mentioning about the required quality of the wheat. Also through the first exhibit when making an offer to the Respondent, the Claimant has included the requirement of the quality of the wheat. The respondent not contending to the quality requirement shows that there was an implied acceptance. [L'Aiglon] Further, also immediately after the initial shipments, the Claimant had been reminding the Respondent about the standard of the quality. With regard to the quality of the goods, “reasonable expectations are to be taken into account”. (Netherlands Arbitration Institute para 117)

RESPONDENT is obliged under unilateral declaration made by the Claimant regarding the communication of their intention regarding the quality. [Article 3.20 of UNIDRIOT].

In the letter CLAIMANT had mentioned that the average quality of goods must be 11.5%, a higher average is acceptable but a lower one is not [Claimant's Exhibit no. 1] which clearly shows that the Claimant had intended the quality standard to be binding. **.** Statements and other unilateral acts such as inter alia the statements of intent made by parties either in the course of the formation or performance of a contract do not need to be in any particular form to be relevant.

3.2 THE CLAIMANT REASONABLY ACTED IN RELIANCE OF THE UNDERSTANDING TO THEIR DETRIMENT

A responsibility is imposed on a party not to occasion detriment to another party by acting inconsistently with an understanding concerning their contractual relationship which it has caused that other party to have and upon which that other party has reasonably acted in reliance. [commentary page 21] However the Respondent acted inconsistently with the understanding it caused the Claimant to have regarding the quality.

3.2.1 Respondent caused an understanding on the Claimant.

Non contending with the quality requirement consistently talked about by the Claimant, the Respondent caused the Claimant to reasonably believe that the quality requirement has been accepted .When the Claimant made an offer to the Respondent through Exhibit 1, the claimant had clearly mentioned the requirement of the quality. Accordingly, when the offer was accepted by the Respondent without denying to comply with the quality term, through Exhibit 3, it created a reasonable understanding on the part of the Claimant

that the offer was accepted in all terms. The understanding may result, for example, from a representation made, from conduct, or from silence when a party would reasonably expect the other to speak to correct a known error or misunderstanding that was being relied upon. [PICC Official Comment] .

3.2.2 Respondent acted inconsistent to the understanding to the Claimants' detriment.

While making the Claimant believe that they would supply the wheat with protein content of 11.5 % as asked by the Claimant, the Respondent failed to do so. This failure to act consistently with an understanding caused on the Claimant was to the detriment of the Claimant. The Claimant in exhibit 8 mentions that due to unacceptable protein content, they were forced to reduce the price of the wheat which was detrimental to their economy. Further, while making initial conversations, the Claimant had clearly mentioned that competition in Id was rather fierce and hence they looked for a reliable supplier. This gave the Respondent enough reason to believe that their acting inconsistently with the understanding of the claimant would be detrimental to the Claimant.

3.3 ALTERNATIVELY, EVEN IF THE QUALITY REQUIREMENT WAS NOT IMPLIED, THE RESPONDENT DID NOT SUPPLY THE AVERAGE QUALITY.

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.[PICC Article 5.1.6] This average quality is determined according to the circumstances .The Respondent however has not supplied even the

average quality. The Claimant had informed the Respondent that [Exhibit 8] the wheat with protein quality towards lower 11.5 % was not acceptable by the customers and the Claimant had to drop the prices. Even with this knowledge the Respondent, in their next shipping supplied wheat with even lesser protein i.e 11%. Thus, the wheat with protein content of 11% was below the average on account of the unacceptability by the customers the wheat with higher protein content.

Further, When the parties at issue do not negotiate quality requirements it is the seller's responsibility to provide for the quality. (Honnold, p. 255; Bianca, p. 272; Schlechtriem, p. 278 – 279; Lookofsky, p. 44). The seller must meet the buyer's reasonable expectation of quality based on price and other circumstances. (Bianca, p. 272; Lookofsky, p. 44; Beijing Light v. Conell; NAI, 15.10.2002; Poikela, p. 38; Kritzer, p. 233; Amran v. Tesa.

4. RESPONDENT IS LIABLE FOR THE BREACH OF THE CONTRACT FOR THE WRONG LABELING ON THE CONTAINERS .

4.1 THE ACT OF THE RESPONDENT WAS AGAINST THE MOUSIGNED BY THE PARTIES.

The parties had signed the MOU according to which containers must be marked in the English language. But, respondent supplied the containers marked in Ego language due to which the applicants had trouble unloading it due to Customs Regulation (Exhibit 6, 8). A contract validly entered into is binding upon the parties (PICC Article 1.3).

Thus, the respondent did not comply with the explicitly written terms of contract by not supplying the labeling in the language written in the Memorandum of Understanding. Thus, the labeling on the containers was a breach of contract by the Respondent.

5. THE RESPONDENTS CANNOT CLAIM COUNTERCLAIM BUT ONLY ASK FOR SETOFF.

5.1 COUNTERCLAIMS AND SET OFF ARE TWO DIFFERENT THINGS.

Set-off, or compensation as termed in civil law jurisdictions, may generally be defined as

"[a] defendant's counter demand against the plaintiff, arising out of a transaction independent of the plaintiff's claim" [Black's Law Dictionary, 1404]. As opposed to a

set-off, a counterclaim is a separate claim, which "must still be decided upon by the

arbitrators when the original claim is withdrawn or settled" [Pellonpää/ Caron, 348].

5.2 THE APPLICANTS WOULD PAY FOR THE LAST SHIPMENT.

The applicants would like to submit that since there was a supply of the grains, though of unacceptable quality, the applicants would be paying not for the counterclaim but for the set off to the Freud Company for the last shipment.

6. CLAIMANT IS ENTITLED TO GET DAMAGE FROM THE RESPONDENT.

The Party breaching the contractual obligation is liable to pay the damages when the harm was reasonably certain [PICC Article 7.4.3] and foreseeable [PICC Article 7.4.4]. The uncertainly of harm relates to those harms which may not have occurred or which may never occur. Harms other than this are certain. What was foreseeable is to be determined by reference to the time of the conclusion of the contract and with reference to reasonable person test. [PICC Commentary pg 239]

Aggrieved party entitled to full compensation for harm suffered as result of other party's non-performance [Mexican Grower(2006)]. Even if notice of termination is effective, notifying party is liable for damages [Latin-American Distributor(2001)].

The port was already put in tender when the Respondent concluded the contract with the Claimant and if the Respondent will not win it, it would no more be able to export through the port. This could be foreseeable be predicted by the Respondent. Regarding the Quality, the Claimant had mentioned that the competition was fierce and that a quality below the required level was unaccepted and also that they had to drop the price because of the quality. Thus when the Respondent supplied the wheat with low quality, the Respondent could foresee that they would suffer harm because of this.

REQUEST FOR RELIEF

Claimant respectfully requests the Tribunal to find that:

1. The Tribunal has jurisdiction to hear this dispute.

2. Respondent breached the contract by not supplying grain.

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

4. Respondent breached the contract due to wrong labeling on the containers.

5. Applicant is entitled to receive damage for the breach.