THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG - AUGUST 2011

MEMORANDUM FOR RESPONDENT

Team Number: 933

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
Art.	Article
CEO	Chief Executive Officers
CIETAC	China International Economic and Trade Arbitration Commission
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
NIA	Netherlands Arbitration Institute
Para	Paragraph
PICC	UNIDROIT Principles of International Commercial Contracts of 2004
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

INDEX OF AUTHORITY

Brunner	Christoph Brunner, Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration (Netherlands, Kluwer Law International: 2008).
CIETAC	China International Economic and Trade Arbitration Commission
HKIAC	Honkong International Arbitration Centre
Macquarie	Macquarie 1034; Australian Oxford 2009; Oxford 501
Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1985
NYC	New York Convention, 1958
PICC	UNIDROIT Principles of International Commercial Contracts, 2004.
Schlechtriem	Peter Schlechtriem (ed.), Commentary on the UN Convention on the International Sale of Goods, (Oxford University Press: 1998).

INDEX OF CASES

ARGUMENTS

1. THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION TO HEAR THIS CASE

1.1 CLAIMANTS ENTERED INTO THE CONTRACT BY AGREEING TO THE ARBITRATION CLAUSE OF FREUD EXPORTING.

The Reproduction of Arbitration clause of Respondent in Exhibit 2 provides "…disputes must be resolved by three arbitrators using the HKIAC Arbitration Rules…" The Claimants after reading this clause on the internet expressed that they had no problems agreeing to it.

The Memorandum of Understanding between the parties was signed only after the Claimants had expressed their consent to the HKIAC Arbitration Rules.

Also, the HKIAC Arbitration Rules deal specifically with disputes in relation to the quality of the supplied grain and shipping, both of which are the subject matters of this dispute, whereas CIETAC rules do not deal with specific issues but are inclined towards general issues. Therefore, application of HKIAC Arbitration rules that specifically deal with issues relevant to this dispute is more appropriate in this case than CIETAC rules.

1.2 THE ADR CLAUSE OF THE MEMORANDUM OF UNDERSTANDING IS NOT A MANDATORY ONE.

The ADR Clause of the Memorandum of Understanding is not a mandatory one. It provides that "Any disputes in relation to this agreement must be resolved in good faith by both Chief Executive Officers of both companies…"[emphasis added]. And in case of failure of such an attempt, the Memorandum of Understanding further provides "…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…"[emphasis added].

The word "must" is defined as "to be obliged to; should (expressing necessity)" whereas The word "may" is consistently defined as "expressing a possibility" (Macquarie) 1034; Australian Oxford 2009; Oxford 501].

This clearly shows that the parties in the first half of the ADR clause have used the word "must" as they feel it is obligatory for them to resolve any dispute, in the first place, in good faith, through negotiation and have used "may" in the latter half concerning the arbitration to be done in accordance to CIETAC rules in case of failure of negotiation by the CEOs of the parties because the usage of CIETAC rules is not a compulsion.

The ADR Clause of the Memorandum of Understanding thus does not make it a compulsion for the parties to settle disputes by arbitration in accordance with the CIETAC rules.

1.3 THE DECISION OF THE TRIBUNAL SHALL NOT BE ENFORCEABLE.

The Claimants directly jumped into conclusion that the dispute was to be settled in accordance with the CIETAC rules before initiating arbitration. They did not consult the

Respondents for that matter and decided that the seat of arbitration would be Id. This act of the Claimants is in clear contravention with Art. V (d) of the New York Convention which provides that the Recognition and enforcement of the award made by the arbitral tribunal may be refused if the Respondents can prove that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties.

The decision of the tribunal shall not be enforceable as per Art. V (d) of the New York Convention as the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of both the parties.

Also, the Claimants have failed to abide by the Reproduction of Arbitration clause of the Respondent, according to which disputes must be resolved by using the HKIAC Arbitration Rules.

1.4 THE SEAT OF ARBITRATION SHOULD NOT BE ID .

Both Claimant and Respondent are parties to UNCITRAL. Art. 20 of UNCITRAL provides “the parties are free to agree on the place of arbitration…” Before deciding upon the place for arbitration the parties should agree on the proposed place. But the Claimants without consenting to an agreement regarding the place of arbitration decided that Id would be the place of arbitration asserting the CIETAC jurisdiction. Since the place of arbitration was not decided through mutual agreement of the two parties, Id cannot be declared as the place of arbitration.

1.5 ALTERNATIVELY, THE PLACE OF ARBITRATION WOULD BE EGO

Art. 20 of UNCITRAL and Art. 15.1 of HKIAC Arbitration Rules provide that the place of arbitration shall be decided by both the parties with mutual consent. This condition was not followed by Id. The Claimants without consulting the Respondents claimed that the place of arbitration to be Id.

Ego is the place of performance of the contract and as it is the supplier of flour to Id and the port used for exporting grain is also located in Ego the alternate place of arbitration would be Ego. Both the parties have a say in deciding the place of arbitration and as the Claimants have already put forward Id as theirs.

2. RESPONDENTS HAVE NOT BREACHED THE CONTRACT BY NOT EXPORTING THROUGH THE OTHER PORT.

2.1 THERE IS NO BREACH OF CONTRACT SINCE THERE WAS IMPOSSIBILITY OF SUPPLY THROUGH THE MAIN PORT I.E. THE RESPONDENT CAN RELY ON *FORCE MAJURE*.

2.1.1 The auction and losing of the respondent was an impediment beyond Respondent's control.

A party to a contract may be excused from performing its obligations if there exists an impediment which prevents performance [Art 7.1.7 *PICC*]. Only events external to the promisor can be considered impediments [*Schlechtriem* 814]. The

impediment must be beyond the promisor's control [Art 7.1.7(1) *PICC*]. The promisor's sphere of control is one within which it is objectively possible to ensure performance of the contract by exercising appropriate control [*Schlechtriem* 814].

Mr. Freud became the losing bidder at the auction. Due to which, he cannot export the grain out of the main port since all those exporting facility in the main ports were taken away by the grain handling authorities and no private company could do so (Para 4, and Exhibit 9(by fax), of the fact).

2.1.2 The impediment was unforeseeable by the respondent at the time of making contract.

The impediment was unforeseeable by the respondent at the time of making the contract [Art 7.1.7(1) PICC).The auction took place only after the tender had taken place (Background Information of the fact, Para 4). Thus, the auction was not known to the respondent since the tender at the time of signing the contract was unforeseeable. Thus, the impediment was unforeseeable by the respondent.

2.1.3 Overcoming the impediment would be an unreasonable burden on Respondent.

Respondent cannot be expected to overcome the impediment because the burden would be too unreasonable. Performance will not be reasonable if it becomes excessively more onerous for the promisor to fulfill its obligations [Brunner 213].

In this case, the first port had the auction and the second port had the problems of wharf facilities and loading facilities. Also, exporting through the second port would have unreasonable burden and onerous for the respondent. Also, the smaller port was often subjected to flood tides and occasional silting. Thus there were many chances of risks and also unnecessary expenditure would be on the part of respondent.

2.1.4 There was timely information by Mr. Freud about the impossibility of supply.

As per the fact, Exhibit 9 makes clear that as soon as the Freud Company became the losing bidder, the company informed to its client about the impossibility of supply.

2.2 The Western Port, the only alternative to export, had also problems.

The Western Port was smaller and is subject to flood tides and occasional silting. Also, Pirates operated in the area and one or two ships, mainly oil tankers, were boarded and held for ransom (Para 2 of the Background Information). The loading equipment and the wharf facilities at the second smaller port are not as good as those of the main port (Clarification Number 5).

Since, this port had these problems and the Eastern Port had the problem relating to auction and the losing bidder, there was no other alternative so as to supply the grain.

2.3 The supply was not done for the mutual benefit of both the parties.

Though there was a chance of supplying through another port, Freud Company didn't supply it keeping in view that there would be a further loss for both the parties since that was a risky route. Anything could happen anytime. It has occasional siltings and flood. Also, the loading and wharfing facilities were not so good. Exporting the grain through this port would be risky and expensive for both the parties. So thinking for the mutual benefit of both the parties, the Freud Company didn't supply the grain from this particular port.

Furthermore, there was no intention of the Respondent to breach the contract. They had contacted the grain handling authority and tried to convince them to take over the contract but they refused because they have all the clients they wish to supply (Exhibit 11 of the fact). Respondents had always acted on good faith which is a necessary element for the performance of contract (PICC, Article 1.7).

Thus, the respondents have not breached the contract by not supplying the grain out of the second port of Ego.

3 RESPONDENT HAS NOT BREACHED THE QUALITY REQUIREMENT OF WHEAT.

The respondent has not breached the requirement of quality because there was no such requirement in the memorandum of understanding and also the Respondent has supplied

3.1 THERE WAS NO EXPRESS REQUIREMENT THAT THE WHEAT SHOULD CONFORM TO A CERTAIN QUALITY.

In UNIDROIT Principle of International Commercial Contracts 2004, Article 1.1 has clearly pointed out the parties are free to enter into a contract and to determine its content. Thus as a general principle of contract law, parties are only bound by those conditions to which they expressly consent. By not mentioning the quality requirement in the memorandum of understanding, parties do have chose not to bind themselves from the quality requirement. Thus the supply of grain by the respondent with protein content 11.5 % or 11 % (in the last shipment) cannot be considered as a defective performance.

3.2 THERE WAS NO IMPLIED REQUIREMENT REGARDING THE QUALITY.

The contract between the parties does not impliedly require the respondent to supply any particular quality of wheat. For a term to be implied in a contract there must be a mention in the contract of the inclusion of a particular term or outside sources that specified a standard.[ICC, No. 8213]

The Claimant has never negotiated about the quality requirement with the Respondent. Though in the prior conversation, the respondent had mentioned the quality requirement, it was only a unilateral understanding on their part regarding that. The respondent has never agreed to the quality requirement. In exhibit 3, as a response to the offer of the Claimant, the respondent has only expressly accepted to supply the required quantity and mentions nothing about the quality. Further regarding the quality, the respondent had agreed to supply whatever they had on their stock. [Exhibit 13]. Thus without valid acceptance of the Respondent regarding the quality requirement, it would be established that there was no contract between the parties was concluded vis-a-vis quality.

3.3 THE RESPONDENT HAS SUPPLIED AN AVREAGE QUALITY.

Article 5.1.6 of the UNIDROIT principle mentions 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. 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 a Netherland's arbitration, the arbitrators held that the goods the seller delivered would not achieve average quality if they were *unacceptably low or high*. [(NIA, 15.10.2002). The Netherlands Arbitration Institute]

If the quality pointed out by the Claimant i.e 11.5 % be taken as a standard quality, supplying 11 % is mere a slight deviation in the standard quality which still is within the range of average quality i.e the acceptable range of the Claimant (13 % to 10.5%).

A United States court has found that it should be presumed that businesses never behave irrationally in relation to their profitability. [American Nurses' Assoc. v. Illinois]

4. RESPONDENT IS NOT LIABLE FOR THE BREACH OF THE CONTRACT FOR THE WRONG LABELING ON THE CONTAINERS .

The labeling in Ego language is required by the custom law of Ego which is a mandatory rule to the contract. The UNIDROIT Principle 2004, Article 1.4 has stated that the principles shall not 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. When parties enter into a contract, they not only consent to the terms and conditions mentioned in the contract but also impliedly consent to any mandatory rule that might be applicable. Labeling the containers in Ego was not a choice of the Respondent but a legal requirement by which the Respondent will have to abide.

4.1 RESPONDENT HAS ACTED IN GOOD FAITH.

The Respondent had entered to the contract with good faith regarding the labeling to be done in the English language but it was due to the Ego Customs Regulations, that it could not do so. It was merely a part of unawareness on the part of respondent regarding the custom legislation. Also, the Respondent had endeavored to put English label on the containers but was restricted in doing so by the custom law [Exhibit 7]. Therefore, Respondent is not liable for the damages caused by labeling on the

containers. Further, the mistake on law was not just on the part of the respondent but also on that of the Claimant.

5. APPLICANT IS ACCOUNTABLE FOR THE PAYMENT OF THE LAST SHIPMENT SENT TO PENG IMPORTING CORPORATION

5.1 THE PAYMENT OF THE LAST SHIPMENT HAS NOT BEEN MADE

Respondent fulfilling the contractual obligation sent the shipment to cover the month of April. [Exhibit 11]. The receiving of the shipment by the Freud Exportation has been agreed by the Claimant [Exhibit 12] the term conveyed that transfer of ownership of the pumps took place when the ship arrived. The exporting of the shipment was under the condition of payment through letter of Credit as per the Memorandum of agreement. However, since the contract was breached by the Freud Corporation as they started looking for another supplier [Exhibit 12] and the payment to the last shipment before the breach of contract still remains. Hence, Freud Corporation is liable for the payment of the shipment.

5.2. FREUD CORPORATION HAD THE INTENTION FOR MAKING THE PAYMENT

Freud Corporation agreed to be in contractual relation at the time of receiving the shipment. The intention here lies since the shipment was not returned neither the payment would not be made was mentioned in Exhibit 12. Hence, interpreting the Exhibit in good faith it shows clear intention of the Freud Exporting to make the payment for the last shipping of the grains.

5.3. CLAIMANT IS LIABLE FOR RESPONDENT'S LOSS

Respondent has made a loss of 10,000 tons of grains. The last shipment consisted of the April months' order as the monetary value with regard to the closing spot price at New York commodities exchange on the day of receipt of wheat.[Exhibit 5] The loss of Respondent is huge and the sole liability to bear that loss is on Claimant.

6. NO DAMAGE MAY BE CLAIMED FROM THE RESPONDENT.

The respondent has not breached any of its obligations under the contract. Article7.4.1 provides that any non-performance gives the aggrieved party a right to damages …except where the non-performance is excused under these Principles. The non performance on the part of the Respondent can be excused as explained earlier and thus the Claimant has no right to damage.

Also, the non-performing party is liable only for harm the occurrence of which is reasonably certain [Article 7.4.3] and which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance. [ARTICLE 7.4.4]. The respondent cannot be held liable for the harm suffered by the Claimant on account of the uncertainty and unforeseeability of the harm. The burden of proof to prove certainty and foreseability of harm suffered is on the aggrieved party. [México (CAM)]

REQUEST FOR RELIEF

Respondent respectfully requests the Tribunal to find that:

1. The Tribunal does not have jurisdiction to hear this dispute.
2. The Respondent did not breach the contract due to impossibility of supply.
3. The Respondent has not breached the quality.
4. The Respondent has not breached the labeling requirement.
5. The Claimant has to pay the Respondent for the last shipment.