

Background information

1. Mr. Charles Peng is the managing director of a flour mill incorporated and also located in the Republic of Id (Id). He normally purchased all his requirements of wheat from the Island of Oz (Oz). Due to severe drought conditions in 2008 his normal supplier notified him that he could not fulfil his contract for the foreseeable future. Mr. Peng, therefore, looked for another supplier (Freud Exporting) which he found on the internet. The company is located in the Federal Republic of Ego (Ego). The managing director, Mr. Sigmund Freud in an initial phone call guaranteed that he could fulfil all the requirements of Mr. Peng.
2. There are two ports in Ego. The main port which is located on the East side of the country has all the modern loading facilities. The second smaller port is located on the West side of the country and has grain loading facilities. As a matter of fact it used to be the major grain export harbour of Ego. According to newspaper reports this port is smaller and is subject to flood tides and occasional silting. Furthermore, on occasions Pirates operate in the area and one or two ships, mainly oil tankers, were boarded and held for ransom. The Ego navy is patrolling the area which has kept the problem to a minimum.
3. In the past the grain handling facilities in the main harbour were owned by the government and anybody could use the facility by paying the relevant fees. Exports were moving unhindered through the port. About a year ago the government decided to privatise the grain handling facilities in the main harbour by putting the facility up for tender. The aim was that only one company was allowed to export grain hence guaranteeing an export quota set by the government.
4. The government was not happy with the tender prices and therefore organised an auction by inviting the top tenderers to attend. Mr. Freud was the losing bidder at the auction. The result is that he cannot export grain out of the main port of Ego.
5. Both countries Id and Ego are common law countries and both have adopted the *UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006)* as well as the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention). Furthermore, the *UNIDROIT Principles of International Commercial Contracts 2004* (The UNIDROIT Principles) have the force of law in all countries involved in the scenario.
6. All the relevant facts are contained in the attached documents. There are no other facts known as both parties delivered all the documents on the issue. The Kingdom of the Island of Sun is a civil law country and has also adopted the UNCITRAL Model

Law on International Commercial Arbitration and The UNIDROIT Principles into its Civil Code but not the New York Convention.

Exhibit 1. By letter

Peng Importing Corporation

Memory Drive

LobeCity

ID

January 10, 2009

Freud Exporting

Coach Drive

Braincity

Ego,

Dear Mr S.Freud,

I have found your company on the internet and it notes that you export grain grown exclusively in Ego specifically wheat. Our normal supplier in Oz cannot supply for at least one if not two years due to drought conditions. I have also noted that the 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%. The average protein quality must be 11.5%. In other words we need to mix 13% with 12% and 10.5% protein wheat to arrive at an average of 11.5%, a higher average is acceptable but a lower one is not.

We are a flour mill and supply mainly bakeries in Id. Competition is rather fierce and hence we look for a reliable supplier.

We anticipate that we require 100,000 metric tonnes per month to be landed no later than the 20th day of each month at our port Lobe City, ID (+ or – 2 days). This is important as we do not have storing facilities and once we unload the grain we need to mill it and ship it directly to our customers. Also we have no facility to mix grain hence the shipment must conform to an average of 11.5% protein content.

It does not matter to us which of the two ports in Ego you will be using for the shipment of the grain. We can supply ships for both ports. We have also seen your dispute resolution clause on the internet and we have no problems agreeing to that.

We look forward to a reply within 5 days as we have other suppliers in mind and would like to have this matter settled within 2 to 4 weeks.

Yours truly,

Mr C. Peng

Exhibit 2

As found on the internet by Mr Peng

Reproduction of Arbitration clause of Exporting

Any disputes in relation to the quality of the supplied grain and any disputes as to shipping must be resolved by mediation using the Draft Hong Kong Code of Conduct for Mediators. Failing that disputes must be resolved by three arbitrators using the HKIAC Arbitration rules. The Seat of Arbitration will be Hong Kong. An arbitrator serving on the panel may also act as a mediator.

Exhibit 3 by fax

Freud Exporting

Coach Drive

Braincity

Ego,

January 15, 2009

Peng Importing Corporation

Memory Drive

LobeCity

ID

Dear Mr. Peng

In response to your letter we acknowledge that we can supply your required quantity as per your letter of January 10, 2009. I am, however, just going on holidays on the Island of Sun for 4 weeks as this is our slow season. I would suggest that you and your wife should be our guest for this weekend and we can discuss all matters immediately.

Looking forward to seeing you in the Island of Sun. By the way please call me Sigmund. I prefer a less formal style. I hope you do not mind if I call you Charles.

Let me know.

Sigmund

Exhibit 4 by letter

Peng Importing Corporation

Memory Drive

LobeCity

ID

January 30, 2009

Freud Exporting

Coach Drive

Braincity

Ego.

Dear Sigmund,

Many thanks for the wonderful time we had with you and your wife. It was much appreciated. I must say the wines were absolutely outstanding so was the nice present you gave to my wife.

I have shown the signed memorandum of understanding which we drew up together to our purchasing manager and he is very happy with it. As we are a small company I show him all correspondence for comments.

If anything changes I will let you know, I look forward to a successful business relationship with you.

Charles

Exhibit 5

Memorandum of Understanding

Purchaser: Peng Importing Corporation

Seller: Freud Exporting

Goods: Wheat

Quantities: 1,200,000 metric tones.

Delivery schedule: 10,000 tones to be landed no later than the 20th day of each month (+ or – 2 days).

Packaging: containers marked in English only “Wheat for human consumption property of Peng Corporation”

Shipping : FOB out of any Port in Ego. Nomination of ship by Purchaser.

Price: Closing spot price at New York commodities exchange on day of receipt of wheat

Payment: L/C

Duration: The supply of wheat is for a period of three years with further two year extensions if the parties agree. This is contingent on the availability of the correct quality of wheat in Ego.

ADR Clause: Any disputes in relation to this agreement must be resolved in good faith by both Chief Executive Officers of both 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. Three arbitrators will be appointed, one by each side and the two party appointed arbitrators will appoint the third arbitrator who will be the chair person. Should the arbitral panel conclude that there is still a possibility that mediation will be successful it has the authority to send the parties to a compulsory mediation using the draft Hong Kong Code of Conduct for Mediators.

Governing Law: This contract is subject to the UNIDROIT Principles of International Commercial Contracts 2004.

Language: English

Signed

Peng & Freud

Exhibit 6 by letter

Peng Importing Corporation

Memory Drive

LobeCity

ID

March 3, 2009

Freud Exporting

Coach Drive

Braincity

Ego .

Dear Sigmund,

We have received the first shipment of wheat on the 22nd of February and have supplied the flour to our customers. They have tested the flour as it is customary. It was within the 11.5% average range but most of the wheat supplied was at the lower end close to 11.5%. It was still acceptable.

However, you marked the containers in Ego language and we had trouble unloading it due to Customs regulations. We paid the required translation costs of \$5000. Please note that we agreed that the containers must be marked in English.

Looking forward to the next consignment. We would appreciate a delivery date of the 18th of March as the price of wheat is rather volatile. It gives us time to adjust our margins.

Charles

Exhibit 7 by letter

Freud Exporting

Coach Drive

Braincity

Ego,

March 6, 2009

Peng Importing Corporation

Memory Drive

LobeCity

ID

Dear Charles

We will endeavour to put English labels onto the containers but I am not sure whether our Customs allows us to do so. Will let you know. I am surprised that you made a comment re the quality. It is known in this trade that 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.

We will endeavour to get the shipment to you by the 18th.

Sigmund

Exhibit 8 by letter

Peng Importing Corporation

Memory Drive

Lobe City

ID

March 30, 2009

Freud Exporting

Coach Drive

Braincity

Ego .

Dear Sigmund,

We received the shipment but again the markings on the container were in the Ego language. We again had to pay the customs fee of \$5000 plus a penalty of \$10,000 as this is the second infringement. Furthermore all the wheat in this shipment had a protein content of 11.5% only which led to some complaints from my customers and I had to drop the prices. As I told you our market is very tight and any deviation will lead to bakeries shifting to other suppliers. We have not lost any yet but make sure we have a mix of grains with required protein levels. As I indicated this is the minimum our customers will tolerate. Furthermore as you know the spot price collapsed after March 18 which meant that we actually incurred a loss whereas you made a handsome profit.

We would like to suggest that you contribute an amount which we can agree on to offset some of our losses. Let me know.

Charles

Exhibit 9 (by fax)

Freud Exporting

Coach Drive

Braincity

Ego,

March 28, 2009

Peng Importing Corporation

Memory Drive

Lobe City

ID

Dear Charles

I have bad news. The right to transport grain out of our main port were put to tender in late 2008. The government invited the top 5 domestic tenders to participate in an auction which took place yesterday. Unfortunately we were the losing bidder and hence we cannot export grain to overseas suppliers out of the main port.

We now can only supply to the grain handling authority. All this came to light yesterday. As a consequence I am unfortunately forced to cancel the contract. I am truly sorry. We cannot even supply your April shipment as the grain handling authority takes over in one week's time. This means that we only have a five day window of opportunity to send you the wheat but you would receive the shipment too early.

Sigmund

Exhibit 10

By Email

March 31, 2009

Sigmund,

I do not care whether we have the shipment early as I cannot imagine what would happen to my business if I would not supply my customers this month. I will think what can be done and I would appreciate a response from you urgently. One of the losing bidders told us that the auction price is well below average wheat prices and hence you would still have made a profit if you would have increased your bid. Furthermore if you would have informed us of the auction we might have been able to assist and come to an arrangement seeing that we still have nearly two years on the contract.

I anticipate that you can look at other options to maintain our contractual relationship

Charles

Exhibit 11

By E-mail

Freud Exporting

Coach Drive

Braincity

Ego,

April 5, 2009

Peng Importing Corporation

Memory Drive

Lobe City

ID

Dear Charles

We will ship what we have so at least this month is covered. However I cannot see any other viable alternative but to cancel the contract which I know is regrettable. There is nothing I can do to save the situation. I trust you understand this. I have 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.

In relation to the spot price we regret to inform you that as we have performed to your and the contracts requirements we do not see that we should support your bad judgment of having the shipment called early. You gambled on the spot price being low but it turned out differently. Your financial loss was not our making. Sorry.

Sigmund

Exhibit 12 by letter

Peng Importing Corporation

Memory Drive

Lobe City

ID

April 30, 2009

Freud Exporting

Coach Drive

Braincity

Ego .

Dear Mr Freud,

We received the shipment. We are disappointed as it only contained wheat with a protein level of 11% which was not sufficient We looked into the situation in Ego and found out that your second harbour is still open to all shipping and hence it is not impossible for you to supply us in future with wheat pursuant to our contract. Please advise urgently.

We are in discussion with another supplier but as you are adamant that you think we cannot fulfil a two year contract let us minimise the damage and as soon as we have finalised our discussions with our new supplier we agree that our contract can be terminated after we calculate the possible damages which accrue to us.

Yours truly,

Mr Peng.

Exhibit 13 by letter

Freud Exporting

Coach Drive

Braincity

Ego,

May 10, 2009

Peng Importing Corporation

Memory Drive

Lobe City

ID

Dear Mr Peng

We suggest you look at the memorandum of understanding which we take as being the written contract between us. It does not specify the required quality. Furthermore we told you that we will send you what we have on stock and that is exactly what we have done.

As you are shifting to a new supplier we must state that it is you who is breaching the contract and not us.

Seeing that we have problems in relation to our contract we are activating the ADR clause and will send our CEO to Id for discussions. He is travelling to Superego and has a stopover in Lobe City for a day namely April 20, 2010. We have booked the conference room at the airport. If you have problems with these arrangements let us know.

Yours truly,

S. Freud.

Exhibit 14 by letter

Peng Importing Corporation

Memory Drive

Lobe City

ID

May 20, 2009

Freud Exporting

Coach Drive

Braincity

Ego .

Dear Mr Freud,

I am sorry to note that our negotiations at the airport were not successful and we therefore will initiate arbitration proceeding against you in Id.

In summary (and not limited to) our claims will be:

1. You breached the contract by not supplying grain out of the second port of Ego.
2. Breach of contract due to the delivery of grain which did not match the quality requirements.
3. Claim for Damages due to wrong labelling on the containers which is also a breach of our contract.

Yours truly,

Mr Peng.

Exhibit 15 by letter

Freud Exporting

Coach Drive

Braincity

Ego

May 25, 2009

Peng Importing Corporation

Memory Drive

Lobe City

ID

Dear Mr Peng

We have received the relevant documentation from CIETAC's secretariat. Our response can be summarised as follows (and not limited to):

1. We did not breach the contract due to impossibility of supply and have not breached the quality requirement as we supplied you consistently with grain of a protein level of 11.5%.
2. We also note that you should have known that signage in Ego can only be done in our language pursuant to customs legislation and that normally importers change the signing in the bonded warehouse.
3. We also lodge a counterclaim as you have not paid us for the last shipment.
4. We also contest the jurisdiction of CIETAC as first our arbitration clause is applicable and secondly in the alternative the seat of arbitration would be Ego.

Yours truly,

S. Freud