MEMORANDUM

FOR

ALBAS WATCHSTRAPS MFG. CO. LTD.

CLAIMANT

THE
INTERNATIONAL
ADR MOOTING COMPETITION
HONG KONG
JULY 5-9, 2016

TEAM NUMBER: 724 C

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[Abbreviated as: CIETAC Arbitration Rules]

Hong Kong Arbitration Ordinance

[Referred as: Hong Kong Arbitration Ordinance]

United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980, UN Doc. No. A/Conf. 9 7/18 (Annex 1) 1980

[Abbreviated as: CISG]

UNIDROIT Principles of International Commercial Contracts 2010

[Abbreviated as: PICC]

Argument

Issue 1: The Tribunal has jurisdiction to deal with the payment claims raised by the claimant.

According to article 19 of the Sales and Purchase Agreement, this article shall be interpreted in accordance with the laws of the State of New York. [Claimant's Exhibit No.2]

1.1. The Tribunal should read the contract as a whole and should avoid to interpret any provision so as to render it superfluous or meaningless.

According to the laws of the New York State, in interpreting the clause, the Tribunal should read the contract as a whole. Moreover, provisions and terms should not be interpreted so as to render any provision or term superfluous or meaningless. [*Alta Berkeley VI C.V. v. Omneon*]

1.2. The Tribunal should read the contract in the way that terms of the contract should be "harmonized" and read in context.

Further, the terms of the contract should be "harmonized" and read in context. "When interpreting a contract, a court must give effect to all of the terms of the instrument and read it in a way that, if possible, reconciles all of its provisions. That is, a court will prefer an interpretation that harmonizes the provisions in a contract as opposed to one that creates an inconsistency or surplusage." [*GRT, Inc. v. Marathon*

GTF Tech., Ltd.]

1.3. As consequence, the second sentence of Art. 19 (c) shall be construed as permissive rather than mandatory

The second sentence of Art. 19. (c) seems to indicate that all disputes shall be submitted to the courts in the State of New York ("and any disputes shall be submitted to the courts in the State of New York"). If such interpretation is accepted by the Tribunal, the rest two provisions of this article would be rendered as meaningless and thus offends against the canon of construction hereinbefore that, as much as possible, the Tribunal is to make sense of a contract as a whole and reconcile all of its provisions. "But in English the word "shall" can have a permissive (as opposed to mandatory) sense." [*Beyond the Network, Limited v. Vectone Limited*] To avoid such interpretation it should follow that the word "shall" in clause 11.2 cannot be mandatory.

1.4. Combined with the pro-arbitration public policy, the Tribunal shall have jurisdiction over the payment claims.

The well-established pro-arbitration rule in the laws of the State of New York, in light of which the Tribunal should seek an interpretation that honors the parties' decision to resolve disputes by arbitration, permits an arbitration clause to remain in effect. [*Severstal U.S. Holdings, LLC v. RG Steel, LLC.*] If 19. (c) is interpreted as mentioned above, then disputes concerning the payments could be dealt with by the Hong Kong courts, the New York Courts, or in the alternative, by way of arbitration under clause 19 (a).

Given that Art. 19 (a) provides that either party may submit the dispute to CIETAC

Hong Kong Sub-Commission, a valid arbitration agreement shall be deemed as existing between both parties. Thus the Tribunal shall have jurisdiction over the payment claims raised by the Claimant in the event that one of the parties decided to give notice of arbitration as our present case.

2. The Tribunal has jurisdiction over all the payment claims, i.e. all the items in the request for relief requested by the CLAIMANT.

In light of the context, the payment apparently refers to the payment for the goods. The liquidated damages in the sum of USD 9.6 million claimed by the CLAIMANT is the payment the RESPONDENT owes to the CLAIMANT, thus such dispute is within the scope of "disputes concerning payments", thus is within the jurisdiction of the Tribunal.

As to the request that the CLAIMANT requests the RESPONDENT to pay all costs of the arbitration. As the place of arbitration is Hong Kong, the Hong Kong Arbitration Ordinance is also applicable. Section 74 (3) of this law provides the Tribunal the power to allocate the arbitration costs.

Moreover, the Section 79 of Hong Kong Arbitration Ordinance also provides that the Tribunal has power to award interest. [Hong Kong Arbitration Ordinance, Section 79]

Issue 2: The claim arising under the Sale and Purchase Agreement and the Sale and Purchase Agreement no.2 shall be governed by CISG

1. The convention shall prevail over Article 49. (2) of CIETEC Rules when Tribunal decide the applicable law to substantial agreement.

1.1. The convention shall prevail over rules of private international law of the forum.

Where CISG are in force or the country where the court seated is the contracting state to CISG, courts must determine whether CISG apply before resorting to private international law rules at all when there is a international sale of goods contract,for it's court's obligation to apply CISG to perform its country's international obligation, and the Convention is more specific insofar as its sphere of application is more limited and leads directly to a substantive solution, whereas resort to private international law requires a two-step approach[*H2O Case*]and[*Caroline-Guide, 237*]

1.2. By analogy, the convention shall prevail over Article 49. (2) of CIETEC Rules 2015 in this case.

1.2.1. CISG extends to HK

According to Article 93(4) CISG, China as a contracting states does not makes declaration under Article 93(1), the convention is to extend to all territorial units of China including HK [*CNA Case*].So the court in HK shall apply CISG when deciding applicable law when there is a dispute relating to international sale of goods contract.

1.2.2. The Tribunal in HK should perform the international obligation under CISG.

The Tribunal should do the same to discharge HK's international obligation even if the Tribunal have some private nature compared to the Court, to respect the international commercial practice and international convention **[***Han-Review,278***].**

1.2.3. Article 49.2 is essentially a type of rule of private international law.

Under Article 49.2 of CIETAC rules, party autonomy is admitted as a subjective connecting factors, which is a kind of rules of private international law. So, the convention shall prevail.

2. According to CISG, CISG shall apply to the claim according to Article 1. (1). a

2.1. All the requirements under Article 1. (1). a are satisfied.

In this case, the contract is between parties having relevant places of business in different Contracting States.

The Claimant sold watchstraps the Respondent, which is considered as a sale of goods contract. Even if the watchstraps need to be manufactured when the contract concluded, it still falls under the definition of CISG according to Article 3. (1).

2.2. The parties have not excluded the application of CISG.

2.2.1. The exclusion of CISG must be express.

CISG cannot be excluded implicitly, for there is no express support for this view in the language of the Convention [*Forestal Case***],** which will promote the application of CISG and prevent the possibilities where the court or Tribunal concludes to exclude CISG under insufficient proof.

Express exclusion means there must be clause stating that CISG does not apply. So it is not enough when parties choose law of contracting state as the applicable law [*Germany 9 Case*] and **[***Mint Case*]

Other applicable law in this case does not expressly point out CISG, so it does not meet the express standard.

2.2.2. Even if the convention can be excluded implicitly, the exclusion should be clear.

In this case, the exclusion of CISG cannot be drawn from clause 20, Even if the national law of Wulaba does not include CISG, for it does not point out the specific area of the Wulaba law, such as the contact law of Wulaba. This clause can be interpreted that CISG will govern questions concerning matters governed by CISG, and Wulaba law is only identified to govern the gaps of CISG [*BP Case*], namely the the matters governed by but not expressly settled under CISG and matters not governed by CISG. This interpretation is compatible with Article 7 of CISG.

Issue 3. a: The RESPONDENT was obliged to procure insurance in the first transaction.

1. CLAIMANT had no obligation to procure insurance in the first transaction.

1.1. CLAIMANT had no obligation to procure insurance under DDP.

According to DDP (Incoterms 2010) A3 (b), the seller has no obligation to the buyer to procure insurance. According to Incoterms 2000 Introduction No. 10, "no obligation" means that one party does not owe an obligation to the other.

Thus, as the seller, CLAIMANT had no obligation to procure insurance in the first transaction.

1.2. CLAIMANT had no obligation to procure insurance under the contract (No.1).

1.2.1. Obligations of CLAIMANT should come from the written contract but not the oral agreements.

According to the parol evidence rule, the construction of the contract should be limited to the written agreement subjectively, and parol evidence like negotiation record shall be excluded [Yang – Construction 348, Carmichael Case, Nema Case].

CLAIMANT's promise to cover "all related costs" only existed in the pre-contract negotiation.

The above-mentioned promise should be excluded when interpreting the contract and it cannot give rise to CLAIMANT's obligation to procure insurance in the first transaction.

1.2.2. According to Sale and Purchase Agreement No.1, CLAIMANT had no obligation to procure insurance.

Unless the contract provides otherwise, or the buyer requests the seller to procure

insurance, the seller has no duty to procure insurance [Lando 259, Schlechtriem / Doralt 65].

Throughout the Sale and Purchase Agreement No.1, there is no stipulation about insurance.

So CLAIMANT was not obliged to spend extra money to procure insurance for RESPONDENT's sake.

1.2.3. Even if the oral agreements were used to interpret the contract, "all related costs" did not include insurance.

Under DDP (Incoterms 2010) A10, the seller should bear related costs at the buyer's request.

CLAIMANT covered related costs including import duty and VAT. And the RESPONDENT did not request for insurance policy.

Thus, "all related costs" should exclude insurance policy.

1.2.4. Even if "all related costs" included insurance, the parol evidence contradicted with the written contract and should be excluded for 8999.

Both the parol evidence rule and the doctrine of integration prevent the oral agreement from altering the written contract [BMM Case, Brown Case].

CLAIMANT's promise on the "all related costs" including insurance policy was an oral agreement which contradicted with the Sale and Purchase Agreement No.1, which did not require CLAIMANT to procure insurance.

So only the written contract which did not require CLAIMANT to procure insurance remained in force.

1.3. The CLAIMANT had no obligation to procure insurance under trade usage.

According to usage, the buyer can cover his interest by appropriate description by a floating policy right after the payment, which has long been done and is in fact very general [Wimble Case]. And the seller is not obliged to insure the goods during carriage without the contract obligation or chosen terms like CIF [Enderlein 150].

As the buyer, RESPONDENT should have procured insurance under trade usage with his deposit as insurable interest [Yang – Internatioinal 292].

2. CLAIMANT had no obligation to provide related information for the RESPONDENT to procure insurance.

According to Art. 32(3) CISG and DDP (Incoterms 2010) A3 (b), the seller must provide information for the buyer to enable him to procure insurance when and only when requested [Schlechtriem - Seller 6-11, Fleet Case].

RESPONDENT had never requested for any related information.

So CLAIMANT had no obligation to provide related information.

3. Even if CLAIMANT had obligation to provide related information, CLAIMANT had already provided it through the contract.

According to legal precedents, the sales contract itself can provide sufficient notice for the buyer to procure floating policy [Wimble Case].

RESPONDENT had signed the Sale and Purchase Agreement No.1 on 23 July 2014 [Claimant's Exhibit No.2].

So CLAIMANT had given sufficient related information and there was no obligation upon the CLAIMANT to give further information.

Issue 3. b: CLAIMANT provided the prototype in due time.

1. CLAIMANT fulfilled his obligation to provide a prototype within 14 days from receipt of deposit.

1.1. "Provide" means "send" in the contract.

1.1.1. "Provide" means "send" from the ordinary meaning of the term.

It is a well-known rule for the courts to interpret contract terms in their ordinary sense with the help of authoritative dictionaries [Yang – Construction 17, Peters Case, Camden Case].

In Shorter Oxford English Dictionary (fifth edition), "provide" means "prepare; get

ready; make available", which is similar to the meaning of "send" but not "deliver".

1.1.2. The meaning of "provide" should be interpreted against RESPONDENT.

Under Art. 4.6 PICC, if contract terms supplied by one party are unclear, an interpretation against that party is preferred.

The RESPONDENT supplied the Sale and Purchase Agreement in which the meaning of "provide" was unclear. The later the deadline for prototype was, the more unfavorable the contract was to the RESPONDENT.

Therefore, "provide" should be interpreted as "send" instead of "deliver".

1.2. The last day for performance was 14 August 2014.

1.2.1. The meaning of "within 14 days" should be interpreted against RESPONDENT.

As mentioned before, the later the deadline for prototype was, the more unfavorable the contract was to the RESPONDENT.

Therefore, the 14-day-long period starts to run the day after the triggering day. In the other word, the last day for CLAIMANT to send the prototype was 14 August.

1.2.3. In the light of the whole contract, "within 14 days" included the 14th day.

According to Art. 4.4 PICC, and legal precedents [Frigaliment Case], terms shall be interpreted in the whole contract.

In Art. 19(a) of Sale and Purchase Agreement, parties use the clear expression of "not to exceed 14 days".

In the light of the whole contract, "within 14 days" should be interpreted as "not to exceed 14 days", which means "within 14 days" include the 14th day, 14 August.

1.2.4. Judging from cases, the 14-day-long period starts to run the day after the triggering day.

The triggering event, i.e. the day when the deposit was received, should not be calculated, and the midnight of the last day is the due time to perform [Weekes Case,

Afovos Case].

Thus CLAIMANT's performance period did not run out until 1 August, the day after CLAIMANT received the deposit.

Therefore, CLAIMANT performed in due time 14 days later, on 14 August.

2. Even if CLAIMANT delayed in providing the prototype, the breach was not fundamental.

2.1. Time was not of essence and delay could not constitute a fundamental breach.

As per Art. 25 CISG, courts have found that deviation from description of goods' origin in the market is not a fundamental breach [Cobalt Case]. This indicates whether a reach is fundamental should be analyzed following a case-by-case approach. Moreover, time is not of essence unless the parties expressly stipulate [Yang – Construction 604].

Both parties had never stipulated strict compliance rule on time.

Thus, even if CLAIMANT delayed, it was not a fundamental breach.

2.2. Even if time was of essence, RESPONDENT's sequent conduct showed that the delay was a fundamental breach.

According to Art. 8(3) of CISG, any subsequent conduct of the parties should be taken into consideration when determining the intent of a party. According to Art. 1.8 of PICC, a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.

On 15 August 2014, the Respondent received the prototype and expressed his approval by e-mail [Claimant's Exhibit No.4]. RESPONDENT did not complain about fundamental breach at that time and CLAIMANT relied on RESPONDENT's approval to go on with production.

With RESPONDENT's approval as sequent conduct, CLAIMANT had every reason to believe that he had not delay. Even if CLAIMANT delayed, the delay did not constitute fundamental breach.

Issue 3. c: The quality and size of the final products provided by Claimant conformed with the contract.

1. The Respondent's Exhibit No. 1 must be excluded from interpreting the contract's purpose.

According to the subjective intension rule, previous negotiations of the parties and their declarations of subjective intent are excluded [*Bloomfield Case*]. Such evidence is unhelpful because at that stage there is no consensus of the parties to appeal to and only the final document records a consensus [*Prenn Case*]. As the Respondent's Exhibit No. 1 only indicates unilateral intent of the Respondent before the final conclusion of the contract, it should be excluded from proving that the watchstraps must fit the Cherry Brand's watchcase.

2. Respondent could not claim inconformity of the size of final products because the size of the final products corresponded to the prototype that had been inspected.

Article 35(2)(c) provides that the goods are in accordance with the contract if they correspond to the sample or model, even if the buyer recognised defects when examining the sample or model or could not have been unaware of such defects [Schwenzer in Schlechtriem, 287]. Even if the size had been contracted as the standard of Cherry Brand, the respondent approved the off-size prototype and could not have been unaware of this defect. Since the size of the fianl products corresponded to the prototype, Respondent could not claim inconformity of the size of final products.

3. The 'manufacture' in the contract text should be interpreted as machine made.

Article 2 of the contract imposes the obligation on the Seller to arrange for the

manufacture of leather watchstraps. The word 'manufacture' has diverse meanings. The products, whether from the direct action of the human hand or by the employment of machinery, are now commonly designated as "manufactured." [*Carlin Case*]. As to ***Contra Proferentem*** rule, where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who drafts the contract [Henry,285]. The lawyers of Respondent drafted the Purchase Agreement No. 1, so the meaning of the 'manufacture' should be interpreted as machinery manufature method against the willingness of Respondent and the final machine made products conform with the contract.

4. There was no explicit agreement that the size or the appearance of the fianl products must correspond to the prototype.

As to the Article 35(2)(c) of CISG, one court has indicated that the goods must conform to a model only if there is an express agreement that the the goods will do so. [52 S 247/94] A sample only has binding effect where the parties actually agreed so. *Herber&Czerwenka, 207*]. It is not expressly indicated by the contract that final products must be as handmade as, nor as handsome as, the prototype. And making machine made watchstraps is consistent with the business custom [*Clarificartion Question71*].

5. Claimant was not liable for inconformity within Respondent's expectation.

Besides, after receiving the prototype, Respondent asked the Claimant to start the 'mass production'[*Claimant's Exhibit No.4*], which was generally contrasted with craft production. [*Production Methods, BBC GCSE Bitesize, retrieved 2012-10-26*] The seller is not liable for defects the buyer should reasonably expect [*Blanca &Bonell,* 279]. Therefore, Claimant was not liable for machine made final product, which was the result of mass production, within Respondent's expectation.

Issue. 3.d: The RESPONDENT shall pay the CLAIMANT 80% of payment agreed in Art. 4 of Sale and Purchase Agreement No.2.

In conclusion, it is the RESPONDENT was obliged to procure insurance in the first transaction, and CLAIMANT provided the prototype in due time, and the quality and size of the final products provided by Claimant conformed with the contract, thus the RESPONDENT shall pay the 80% of payment agreed in Art. 4 of Sale and Purchase Agreement No.2. to fulfill its contract obligation.