MEMORANDUM

FOR

GAMMA CELLTECH. CO. LTD.

RESPONDENT

THE

INTERNATIONAL

ADR MOOTING COMPETITION

HONG KONG

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TEAM NUMBER: 724 R

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United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 15]

[Cited as Official Records]

Michael G. Bridge

The Sale of Goods, Oxford University Press, 1998

[Cited as: Bridge]

Ole Lando

Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) Reproduced with permission of Dott. A Giuffrè Editore, S.p.A.

[Cited as: Lando]

Mercédeh Azeredo da Silveira

Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation, Kluwer Law International 2014

[Cited as: Silveira]

Hardinge Stanley Giffard Earl of Halsbury, Butterworths Asia (Firm)

Halsbury's Laws of Hong Kong, Second Edition, LexisNexis Butterworths, 2011

[Cited as: Halsbury's]

Joseph Lookofsky

Understanding the CISG, Fourth (Worldwide) Edition, Kluwer Law International 2012

[Cited as: Lookofsky]

Enderlein&Maskow

International Sales Law, United Nations Convention on Contracts for the International Sale of Goods -- Convention on the Limitation Period in the International Sale of Goods, Commentary, 1992

[Cited as: Enderlein&Maskow]

Index of Legal Sources

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]

Court Case

Australia

Hannaford v Australian Farmlink Pty Ltd,SAD 251 of 2005

[Cited as Hannaford Case]

Netherlands

Adex International Ltd. v. First International Computer Europe B.V,C0401754

[Cited as Adex Case]

Germany

GERMANY Oberlandesgericht Zweibrücken 26 July 2002,2 U 27/01German case

citations do not identify parties to proceedings

[Cited as Ober Case]

USA

Amco Ukrservice v. Am. Meter Co., 312 F.Supp.2d 681, 686 (E.D.Pa.2004).

[Cited as Amco Case]

Frigaliment Importing v. BNS International, 190 F.Supp. 166

[Cited as: Frigaliment Case]

Alta Berkeley VI C.V. v. Omneon, Inc. 41 A.3d 381 Del.Supr.

[Cite as: Alta Berkeley VI C.V. v. Omneon, Inc.]

Ashwood Capital, Inc. v OTG Mgt., Inc. 99 A.D.3d 1, 948 N.Y.S.2d 292 N.Y.A.D. 1 Dept.

[Cite as: Ashwood Capital, Inc. v OTG Mgt.]

UK

Wimble, Sons & Co. v. Rosenberg & Sons [1913] 3 KB 743

[Cited as: Wimble Case]

Hastie v. Campbell, (1857) 19 D. 557

[Cited as: Hastie Case]

Arnot v. Stewart, (1817) 5 Dow, App. Cas. 274.

[Cited as: Arnot Case]

James Miller & Partners Ltd v. Whitworth Street Estates Ltd [1970] A.C. 572

[Cited as: James Case]

The Queen v. Peters, (1885-86) L.R. 16 Q.B.D. 636

[Cited as: Peters Case]

Marquis Camden v Inland Revenue Commissioners, [1914] 1 K.B. 641

[Cited as: Camden Case]

Alewyn and Another v. Pryor and Another, 171 E.R. 1065

[Cited as: Alewyn Case]

Germany

Bundesgerichtshof (Germon Supreme Court), 2 March 2005, UNILEX

[Cited as: Bundesgerichtshof Case]

Arbitral Awards

Italy

Ad hoc Arbitral Tribunal- Florence

Società X v. Società Y.

[Cited as Società Case]

China

CIETAC

2005/09/16

Wool and Wooltop

Database Docket Number: CISG/2005/15

http://cisgw3.law.pace.edu/cases/050916c1.html

[Cite as: CIETAC 200515]

Issue 1: The Tribunal does not have 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. The tribunal does not have jurisdiction to deal with the payment claims.

1.1. The tribunal should give deference to the language used when dealing with sophisticated parties

The laws of the State of New York requires that in interpreting the clause, the tribunal should read the contract as a whole, and 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, Inc.*] Moreover, it requires the tribunal to give deference to the language used when dealing with sophisticated parties. "According to well-established rules of contract interpretation, 'when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.' We apply this rule with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople. In such cases, 'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.'" [*Ashwood Capital, Inc. v OTG Mgt., Inc.*]

1.2. As consequence, there is no valid arbitration agreement and the RESPONDENT refuses to agree to arbitrate

Applying these rules to the interpretation of Art. 19, it should be noticed that the second sentence of 19 (c) provides that "any disputes shall be submitted to the courts in the State of New York", which reflects that the parties' submission to the New York Court. In contrast, dispute resolution agreements in 19 (a) and (b) are permissive

rather than mandatory. Thus according to the apparent arbitration agreement in article 19 (a), a party “may submit” a dispute to be arbitrated, despite the express submission to the New York Court’s jurisdiction in clause 19 (c). But there is no obligation on the other party to accede to the invitation to arbitrate. If the other party agrees to arbitrate, the acquiescence will override clause 19 (c) and arbitration can then follow the procedure in clause 19 (a). Otherwise, clause 19 (c) governs.

However, the RESPONDENT here does not agree to arbitrate, thus the tribunal does not have jurisdiction in this case.

Issue 2:CISG is not the governing law of the claim arising under the Sale and Purchase Agreement and the Sale and Purchase Agreement no.2.

1.The tribunal could decide the applicable law according to Article 49.(2) of CIETAC rules,then Wulaba law,not CISG,will apply.

1.1.HK is not a contracting party to CISG.

China has not made the declaration under Article 93(1) of CISG concerning HK’s relation to CISG,so HK is not a contracting party[*Hannaford Case*].

1.2.Even if HK is a contracting party to CISG,the tribunal in HK does not have the obligation like the court in HK to perform the international obligation under CISG.

The tribunal have private nature,and its jurisdiction and power is derived from

parties' arbitration agreement,which is different from the court whose jurisdiction and power is derived from the mandate of public authority.So the tribunal does not have the obligation to perform the international obligation of HK under CISG,namely,not to apply CISG.

1.3.Even if the tribunal does have the obligation,Article 49.2 is not the rule of international private of law.

Article 49.2 is published by CIETAC,and is a part of arbitration rules.This two elements make it different from the rules of private international law.There is no cases established that CISG shall prevail over arbitration rules.So the tribunal could still decide the applicable should be Wulaba law not CISG according Article 49.2.

2.Even if the convention shall prevail over Article 49.(2) of CIETEC Rules when tribunal decide the applicable,CISG still does not apply.

2.1.As for Article 1.(1).a

2.1.1.Article 1.(1).a only can constitute the application of CISG when there is not a choice of law clause.

When the requirements of Article 1.(1).a is met, The CISG applies where the contract is silent as to choice of law[*Amco Case*].The existence of a choice of law clause the effect to prevent CISG's application under Article 1.(1).a.

2.1.2.Even if the requirements of Article 1.(1).a are met,the party has exclude the CISG through clause 20.

First,CISG can be excluded implicitly,and a choice of law of the one contracting state amounts to an implicit exclusion of CISG[*Società Case*],at least when the parties refer to the "exclusive" applicability of the law of a Contracting State[*Adex Case*].Also,the main reason that the above circumstances can not constitute an exclusion is that CISG is a part of the law of the Contracting State whose law the parties chose[*Ober Case*].But in this case,CISG is not a part of Wulaba law,so its reasonable that that clause 20 exclude CISG.

Also,in this case,parties did not mention CISG neither in contract nor during negotiation,but agreed to use DDP of Incoterms 2010.Under DDP,the passing of risks is not compatible with CISG,which means parties' intention to exclude CISG .

In summary,CISG has been excluded.

2.2.As for Article 1.(1).b

2.2.1.Article 1.(1).b is not applicable in this case.

Article 1.(1).b is not applicable when both parties have their business of places in different contracting states according to the legislative history:In Contracting States the Convention can also be applicable -- by virtue of article 1(1)(b) -- where only one (or neither) party has its relevant place of business in a Contracting State, as long as the rules of private international law lead to the law of a Contracting State.[*Official Records]*.

2.2.2.Even if Article 1.(1).b is applicable,the CISG is still not applicable because reasoning stated in 2.1.2.

Issue 3A: CLAIMANT was obliged to procure insurance and related information in the first transaction.

1. CLAIMANT had obligation to procure insurance in the first transaction.

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

According to DDP (Incoterms 2010) B3 (b), the buyer 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 buyer, RESPONDENT had no obligation to procure insurance in the first transaction.

1.2. According to the written contract, RESPONDENT had no obligation to procure insurance.

Unless the contract provides otherwise, the buyer 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.

Thus RESPONDENT was not obliged to spend extra money to procure insurance.

1.3. CLAIMANT had obligation to procure insurance according to the negotiation.

1.3.1. The "negotiation" was part of the contract.

According to Art. 11 of CISG, a contract of sale need not be evidenced by writing as to form.

CLIMANT had agreed to be responsible for all related costs before both parties concluded Sale and Purchase Agreement No.1 on 23 July.

Thus the "negotiation" should be part of the sale contract with binding force on both parties.

1.3.2. "All related cost" promised by CLIMANT in the negotiation included insurance policy.

"All related cost" meant that RESPONDENT need not cover any expenses other than the payment for goods, which is $15,000,000 in all according to Sale and Purchase Agreement.

So absolutely insurance policy should also be covered by CLAIMANT.

1.3.3. Even if the negotiation was not part of the contract, it should be used to interpret the written contract.

According to Art.8(1) of CISG, statements made by a party should be interpreted according to his intent. According to Art.8(3) of CISG and legal precedents, negotiations are part of the consideration when interpreting the intent of a party [Frigaliment Case, DiMatteo 247].

CLIMANT had agreed to cover all related costs and offer DDP because RESPONDENT had no experience with watchstraps transaction. And such intent to ease RESPONDENT's burden should be considered.

In order to further benefit RESPONDENT, payment for goods in Art.3 of Sale and Purchase Agreement should include the insurance policy procured by CLAIMANT. CLAIMANT was estopped from buck-passing.

1.3. CLAIMANT but not RESPONDENT had insurable interest in the lost goods.

The assured must have interest in the matter insured at the time of the loss though he need not be interested when the insurance is effected. If the assured has no interest at the time of the loss, he cannot acquire any interest [Yang - Internatioinal 295]. Insurable interest includes risk [Yang - Internatioinal 292]. According to DDP (Incoterms 2010) A5, The seller bears all risks of loss until the goods have been delivered to the buyer.

On one hand, when the watchstraps were lost at sea, they had not been delivered

to RESPONDENT, so CLAIMANT bore the risk of them and had insurable interest in them.

On the other hand, not until the goods were delivered to the buyer did the risk transfer to the buyer under DDP (Incoterms 2010) and Art. 67(1) CISG. So RESPONDENT had no risk or any other insurable interest in the goods on ship [Yang – Internatioinal 297].

Thus CLAIMANT but not RESPONDENT had insurable interest in the lost watchstraps and should have procured insurance for them.

2. Even if RESPONDENT was obliged to procure insurance in the first transaction, CLAIMANT should bear the loss of watchstraps.

Pursuant to Art. 32(2) and (3) of CISG, seller was obligated to arrange the transport of the cargo and to notify the buyer to arrange for the insurance [CIETAC 200515]. In some trades, usage will oblige the seller to give such information to the buyer even without the latter's request [Lando 259]. Art. 66 of CISG tends to allocate risks of loss or damage to the party which could more readily contract insurance [Silveira 210 fn791]. The seller is to give such notice, with such details, to the buyer as may be necessary to effect insurance of the goods during sea transit [Wimble Case]. The seller must at least send a notice with the ship's name, otherwise his nonfeasance constitutes breach of contract [Lando 259] and he will on pain of being liable for the loss of the goods [Hastie Case, Arnot Case, Wimble Case, Bridge 118].

However, CLAIMANT even did not tell the RESPONDENT that CLAIMANT had put the goods on a ship for RESPONDENT, let alone other information about the ship including the name of the ship, which further indicates that it was impossible for RESPONDENT to procure insurance.

Thus CLAIMANT should bear the loss of the lost watchstraps for breach of contract.

Issue 3B: Belayed prototype constituted a fundamental breach.

1. The prototype received on 15 August was belayed.

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

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].

The content of "provide" is not clear and subject to interpretation and needs to be interpreted with the help of an authoritative dictionary.

In Shorter Oxford English Dictionary (fifth edition), "provide" means "prepare; get ready; make available". However, the word "send" means that the word "transmission" is next employed [Wimble Case]. Transmission also takes time and mere sending won't make the prototype available to the RESPONDENT.

Moreover, only the time of receiving the letter of credit is the time that is meaningful and regulated by the deadline. Because the price of watchstraps would fluctuate according to the time RESPONDENT entered the market. Only when RESPONDENT received the accurate prototype, can he fulfill further obligation of the contract, which means the prototype should be delivered to RESPONDENT as soon as possible. Thus the deadline is for the time of receiving the prototype rather than issuing it.

1.2. The last day for performance was 13 August.

Both CISG and PICC are silent on the counting of days up to a deadline of a period of time under contract.

In addition, other article of CISG could provide further support of this counting method. Art. 20 (1) of CISG provides that a period of time for acceptance fixed by the offeror begins to run from the moment the offer is dispatched by telegram or letter, which indicates the time start to run since the triggering event. Art. 2.1.8 of PICC, also provides the same.

In this case, the triggering event is the time that CLAIMANT received the deposit (31 July). Thus the time for CLAIMANT's obligation to perform should start from then, and the due time should be 14 August.

Moreover, according to Art. 8(1) of CISG, statements made by a party are to be interpreted according to his intent known to both parties.

Since RESPONDENT yearned for entering the watchstrap market as soon as possible and CLAIMANT also knew that RESPONDENT had informed all his customers about the new line, RESPONDENT intended to receive the prototype as soon as possible.

Thus the triggering event should be counted in. In the other words, the last day for performance was 13 August but not 14 August.

2. The performance of CLAIMANT constituted a fundamental breach based on which RESPONDENT has the right to avoid the contract.

According to Art 64 (1)(a) of CISG, The seller may declare the contract avoided if the failure by the buyer to perform any of his obligations constitutes fundamental breach of contract. Art 25 of CISG provides what constitute fundamental breach. As a further supplement, Art 7.3.1 (2)(a) and (b) of PICC provides that a delay in performance may amount to a fundamental breach if time was of the essence under the contract. Time should be considered to be of essence by implication [Yang – Construction 605, Halsbury's 115.298].

In an agreement "for the delivery of goods on arrival, to be delivered with all convenient speed, but not to exceed a given day," the arrival in time for delivery by that day is a condition precedent; and if they do not so arrive, the agreement is null [Alewyn Case].

Since the delivery of the prototype was a requirement for RESPONDENT to proceed his business and enter the novel market, the time of delivery of prototype was as important as that of goods. Therefore, CLAIMANT'S late payment constituted a

fundamental breach and RESPONDENT was entitled to avoid the contract because time is of the essence in commodity trade in such a novel market.

Isuue 3C: The final products provided by Claimant constituted inconformity under CISG Article 35.

1. **In accordance with the contract, the size of the final products must fit into the watchcase of Cherry Brand.**

In accordance with the contract, the size of the watchcase must be fit for the 'customer's watchcase [Article2(1)(g)]. It is not only interpreted as the Respondent's watchcase, but also infered as the Cherry's watchcase, which has been shown to the Claimant with carefulness [*Respondent's Exhibit No. 1*]. Besides, in sales between merchants, resale is an ordinary use, so a CISG buyer who purchases for resale is entitled to expect goods resalable in the ordinary course of business[Bundesgerichtshof Case]. What constitutes ' resalable' will depend upon the reasonable expectations of the ultimate purchasers. [Lookofsky,73] Therefore, the size of the watchstraps must fit into the final buyer, Cherry Brand. But the final products failed to do that and they were inconformity with the contract [*Respondent's Exhibit No. 2*]

2. **Claimant did violate Article 35(2)(b) of CISG because of the off-sized product.**

When the buyer's purpose is ' made known,' the seller assumes an implied obligation under Article 35(2)(b) that the goods will be 'fit' for that particular purpose, provided the buyer, at the time of contracting, reasonably relies on the seller's skill and judgement in this respect[Lookofsky, 75]. Respondent's purpose was clear that the final products must fit into Cherry Brand, proved by previous negotiation and the conduct of sending the Cherry Brand watchcase to Claimant. And Claimant was one of the leading manufacturers and exporters of leather watchstraps. Therefore, Respondent's reliance on Claimant to produce well-sized and high-quality products was reasonable.

3. **When the size of prototype conflicted with the contract, contractual agreements had priority.**

Even if the description of the size of goods in the contract and the model did not conform to each other, it may not be deduced, from the fact that without a description in the contract the model replaces an agreement.[*Enderlein&Maskow,* 147]. The contractual agreements shall have priority over the sample and bind the Claimant.

4. **Claimant did violate Article 35(2)(c) of CISG because the quality of final products differed from the prototype.**

Prototype is a model of the final product that is able to do eveything that the finished product will do. [Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.] And the quality of the final product must conform to that of the prototype, or it constitutes inconformity. [CISG Article 35(2)(c)] As the seller, the claimant failed to produce as to the quality standard of the prototype and the fianl products were not handsome, thus violating Article 35(2)(c).

Issue 3D:The Claimant return:a)the sum of USD 17.4 for the payments made to Albas;b)the sum of USD 10 thousand for the development of the website costs;c)the sum of USD 20 million for loss of profits.

As discussed hereinbefore, it is the CLAIMANT was obliged to procure insurance and related information in the first transaction. Moreover, Belayed prototype constituted a fundamental breach.Further, the final products provided by Claimant constituted inconformity under CISG Article 35. Thus, the Claimant should pay the money claimed above.