

SIXTH ANNUAL

INTERNATIONAL ADR (ALTERNATIVE DISPUTE RESOLUTION) MOOTING COMPETITION

5–9 JULY 2016

HONG KONG

# MEMORANDUM *for* RESPONDENT

---

CLAIMANT

RESPONDENT

**Albas Watchstraps Mfg Co Ltd**

**Gamma Celltech Co Ltd**

241 Nathan Drive

17 Rodeo Lane

Yanyu City

Mulaba

Yanyu

Wulaba

---

**TEAM 750**



## TABLE OF CONTENTS

<b>Table of Definitions .....</b>	<b>i</b>
<b>Table of Authorities .....</b>	<b>iv</b>
<b>I The Tribunal does not have jurisdiction to hear the Claims .....</b>	<b>1</b>
<b>A The Claimant did not commence arbitration within the contractual time period .....</b>	<b>1</b>
<b>B The Tribunal only has jurisdiction to hear ‘disputes concerning payment’ .....</b>	<b>1</b>
i The Parties intentionally drafted the Arbitration Agreement to be specific .....	2
ii The pro-arbitration approach does not apply to the scope of the Arbitration Agreement .....	2
<b>II The CISG does not apply to the Contracts .....</b>	<b>3</b>
<b>III The Claimant is responsible for the lack of Insurance under Contract One .....</b>	<b>4</b>
<b>A The Claimant agreed to purchase Insurance .....</b>	<b>4</b>
<b>B Trade usage dictates that the Claimant is responsible for purchasing insurance .....</b>	<b>5</b>
<b>IV The Prototypes were late .....</b>	<b>6</b>
<b>A The Prototypes were delivered after the due date .....</b>	<b>6</b>
<b>B The Respondent did not accept late delivery of the Prototypes .....</b>	<b>6</b>
<b>V The Final Goods do not conform to Contract Two .....</b>	<b>8</b>
<b>A The Final Goods are not fit for purpose .....</b>	<b>8</b>
<b>B The sale of the Final Goods was not a sale by sample .....</b>	<b>8</b>
<b>C The Final Goods are not hand-made .....</b>	<b>9</b>
<b>D The Respondent gave notice of non-conformity within a reasonable time .....</b>	<b>9</b>
<b>VI The Respondent is entitled to a refund under Contract One and is not obliged to pay the Balance of Contract two .....</b>	<b>11</b>
<b>A The Claimant did not deliver any goods under Contract One .....</b>	<b>11</b>
<b>B The payment of the balance under Contract One was conditional on the Claimant delivering conforming goods under Contract Two .....</b>	<b>11</b>
<b>C The Claimant fundamentally breached Contract Two by delivering non-conforming goods .....</b>	<b>12</b>
<b>D The Respondent avoided Contract Two within a reasonable time .....</b>	<b>13</b>

## TABLE OF DEFINITIONS

Application for Arbitration	The Claimant's application for arbitration [Problem, 1–4]
Arbitration Agreement	Article 19(a) of the Contracts
CIETAC Rules	Chinese International Economic and Trade Arbitration Commission Rules
CISG	United Nations Convention on Contracts for the International Sale of Goods
Claimant	Albas Watchstraps Manufacturing Co Ltd
Claims	The claims set out in paragraph 1 of the request for relief in the Application for Arbitration and paragraph 10 of the Statement of the Defense. [Problem, 4, 16]
Clarifications	Request for Clarifications
Contract One	The Sale and Purchase Agreement concluded between the Parties on 23 July 2014 [Problem, 6–7]
Contract Two	The Sale and Purchase Agreement concluded between the Parties on 7 November 2014 [Problem, 11–12]

Contracts	Contract One and Contract Two, collectively [Problem, 6–7, 11–12]
DDP	Delivery Duty Paid
Deposit One	USD\$3,000,000 paid by the Respondent for under article 4 of Contract One
Dispute	Dispute between the Parties on issues outlined in Procedural Order No 1, part 4 [Problem, 20]
Final Goods	Watchstraps purchased by the Respondent under Contract Two
Goods	Watchstraps purchased by the Respondent under Contract One
ICC	International Chamber of Commerce
Incoterms	International Commercial Terms 2010
Insurance	Any potential insurance purchased for the Goods
Lost Goods	The watchstraps that were lost at sea on 28 October 2014 [Problem, 10]
Parties	The Claimant and the Respondent, collectively

Pre-Arbitration Procedure	The requirement under article 19(a) of the Contracts for disputes concerning payment to be resolved amicably between the Parties [Problem, 7, 12]
Problem	The Sixth International ADR (Alternative Dispute Resolution) Mooting Competition, Moot Problem 2016
Prototypes	The prototypes referred to in article 5 of Contract One [Problem, 6]
Respondent	Gamma Celltech Co Ltd
Statement of Defense	The Respondent's statement of defense [Problem, 14–16]
The Dispute Resolution Clause	Article 19 of the Contracts [Problem 7, 12]
Tribunal, the	Tribunal located in CIETAC Arbitration Centre Hong Kong constituted on 5–9 July 2016
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	United Nations Commission on the International Trade Law Model Law

**TABLE OF AUTHORITIES**

<b>Index of Legal Sources</b>		
<b>Cited As</b>	<b>Full Citation</b>	<b>Cited At</b>
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, S.Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3	[11], [15], [18], [22], [23], [25], [28], [30], [32], [34], [38], [39], [41]
Incoterms	INCOTERMS®2010 (ICC Publication No 715E, 2010)	[13], [19]

## Index of Books

Cited As	Full Citation	Cited At
Bianca/Bonnell	Cesare Massimo Bianca and Michael Joachim Bonnell, <i>Commentary on the International Sales Law: The 1980 Vienna Sales Convention</i> (Giuffre, 1987)	[22], [28], [30]
Born	Gary B Born, <i>International Commercial Arbitration</i> (Kluwer Law International, 2 <sup>nd</sup> ed, 2014)	[2], [3], [7], [9]
Bridge	Michael Bridge, <i>International Sale of Goods</i> (Oxford University Press, 2007)	[11]
Enderlein/ Maskow	Fritz Enderlein and Dietrich Maskow, <i>International Sales Law</i> (Oceana Publications, 1992)	[23]
Ferreri	Sylvia Ferreri, ‘Remarks Concerning the Implementation of the CISG by the Courts (the Seller’s Performance and Article 35)’ (2006) 25 <i>Journal of Law and Commerce</i>	[15], [39]
Fuller	Graham Fuller, <i>Purchasing Contracts: A Practical Guide</i> (Spiro Press, 2 <sup>nd</sup> ed, 2010)	[19]
Gilles/Moens	Peter Gilles and Gabriel Moens, <i>International Trade &amp; Business Policy &amp; Law</i> (Cavendish Publishing, 2000)	[19]

Honnold	John Honnold, <i>Uniform Law for International Sales Under the 1980 United Nations Convention</i> (Kluwer Law International, 3 <sup>rd</sup> ed, 1999)	[25]
Kröll/Mistelis/ Perales	Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas, <i>UN Convention on Contracts for the International Sale of Goods (CISG)</i> (C H Beck, 2011)	[11], [15], [19], [22], [25], [28], [30], [34], [39], [43]
Ramberg	Jan Ramberg, <i>ICC Guide to Incoterms®2010</i> (ICC, 2011)	[19]
Rana/Sanson	Rashda Rana and Michelle Sanson, <i>International Commercial Arbitration</i> (Thomson Reuters, 2011)	[3]
Redfern/Hunter	Nigel Blackaby and Constantine Partasides, <i>Redfern and Hunter on International Arbitration</i> (Oxford University Press, 5 <sup>th</sup> ed, 2009)	[2]
Rose	Francis D Rose, <i>Marine Insurance: Law and Practice</i> (Informa UK Ltd, 2 <sup>nd</sup> ed, 2012)	[17]
Schlechtriem/ Schwenzer	Ingeborg Schwenzer (ed), Peter Schlechtriem and Ingeborg Schwenzer, <i>Commentary on the UN Convention on the International Sale of Goods (CISG)</i> (Oxford University Press, 4 <sup>th</sup> ed, 2016)	[11], [17], [18], [19], [28], [32], [34], [43]

UNCITRAL Digest	UNCITRAL, <i>UNCITRAL: Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods</i> (2012)	[11], [22]
--------------------	--	------------

## Index of Journals

Cited As	Full Citation	Cited At
Andersen	Camilla Baasch Anderson, ‘Comparative Analysis Between the Provisions of the CISG Regarding Notice Requirements (Arts 39 & 26) and the Counterpart Provisions of the UNIDROIT Principles and the PECL’ (2004) <i>Pace Law School Institute of International Commercial Law</i>	[34]
Bijl	Maartje Bijl, ‘Fundamental Breach in Documentary Sales Contracts: The Doctrine of Strict Compliance With the Underlying Sales Contract’ (2009) 1 <i>European Journal of Contract Law</i> 19	[41]
Felemegas	John Felemegas, ‘Comparison Between Provisions of the CISG (Article 20) and the Counterpart Provisions of the Principles of European Contract Law’ (2002) <i>Institute of International Commercial Law</i>	[22]
Gabriel	Henry Gabriel, ‘International Chamber of Commerce Incoterms 2000: A Guide to Their Terms and Usage’ (2001) 5 <i>Vindobona Journal of International Commercial Law &amp; Arbitration</i> 41	[19]

Lookofsky	Joseph Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' (2005) <i>Pace Law School Institute of International Commercial Law</i>	[25], [30]
Magnus	Ulrich Magnus, 'The Remedy of Avoidance of Contract Under CISG- General Remarks and Special Cases' (2006) 25 <i>Journal of Law and Commerce</i> 423	[41]

<b>Index of Other Sources</b>		
<b>Cited As</b>	<b>Full Citation</b>	<b>Cited At</b>
A Dictionary of Modern Legal Usage	Bryan A Garner, <i>A Dictionary of Modern Legal Usage</i> (Oxford University Press, 2 <sup>nd</sup> ed, 1995)	[4]
Australian Law Dictionary	Trischa Mann (ed), <i>Australian Law Dictionary</i> (Oxford University Press, 2 <sup>nd</sup> ed, 2013)	[4]
Black's Law Dictionary	Bryan A Garner (ed), <i>Black's Law Dictionary</i> (West Group, 9 <sup>th</sup> ed, 2009)	[4]
CIETAC Model Arbitration Clause	CIETAC, <i>Model Arbitration Clause</i> (2013) China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre < <a href="http://www.cietachk.org/portal/mainPage.do?pagePath=\en_US\modelClause">http://www.cietachk.org/portal/mainPage.do?pagePath=\en_US\modelClause</a> >	[8]
CISG Advisory Council Opinion No 5	CISG Advisory Council, Opinion No 5, 'The Buyers Right to Avoid Contract in Case of Non-conforming Goods or Documents' (7 May 2015)	[41]
Merriam-Webster Dictionary	Merriam-Webster (Merriam-Webster, 8 May 2011) < <a href="http://www.merriam-webster.com/dictionary/">http://www.merriam-webster.com/dictionary/</a> >	[17]

Oxford Dictionary	Oxford Dictionaries (Oxford University Press, 2016) < <a href="http://www.oxforddictionaries.com/">http://www.oxforddictionaries.com/</a> >	[17]
----------------------	--	------

<b>Index of Cases</b>		
<b>Cited As</b>	<b>Full Citation</b>	<b>Cited At</b>
<b>Austria</b>		
<i>Auto Case</i>	<i>Auto Case</i> , Linz Oberlandesgericht [Linz Appellate Court] 23 January 2006 [6 R 160/05z]	[11]
<i>Gasoline and Gas Oil Case</i>	<i>Gasoline and Gas Oil Case</i> , Oberster Gerichtshof [Austrian Supreme Court] 22 October 2001 [1 Ob 77/01g]	[11]
<i>Intel Pentium Computer Parts Case</i>	<i>Intel Pentium Computer Parts Case</i> , Oberster Gerichtshof [Austrian Supreme Court] 5 July 2001 [6 Ob 117/01a]	[43]
<i>Propane Case</i>	<i>Propane Case</i> , Oberster Gerichtshof [Austrian Supreme Court] 6 February 1996 [10 Ob 518/95]	[43]
<i>Timber Case</i>	<i>Timber Case</i> , Oberster Gerichtshof [Austrian Supreme Court] 15 October 1998 [2 Ob 191/98x]	[18], [19]
<i>Wood Case</i>	<i>Wood Case</i> , Oberster Gerichtshof [Austrian Supreme Court] 21 March 2000 [10 Ob 344/99g]	[18], [19]

<b>Belgium</b>		
<i>Bruggen v Top Deuren</i>	<i>Bruggen Deuren BVBA v Top Deuren VOF</i> , Rechtbank van Koophandel Hasselt [Hasselt Commercial Court] 15 February 2006 [AR 05/4177]	[31]
<b>France</b>		
<i>Marques Roque Joachim v Manin Riviere</i>	<i>Marques Roque Joachim v Manin Riviere</i> , Cour d'appel Grenoble [Grenoble Court of Appeal] 26 April 1995 [93/4879]	[28]
<b>Germany</b>		
<i>Automobile Case</i>	<i>Automobile Case</i> , Stuttgart Oberlandesgericht [Stuttgart Appellate Court] 31 March 2008 [6 U 220/07]	[43]
<i>Designer Clothes Case</i>	<i>Designer Clothes Case</i> , Köln Oberlandesgericht [Cologne Appellate Court] 14 October 2002 [16 U 77/01]	[43]
<i>Fat for Frying Case</i>	<i>Fat for Frying Case</i> , Kiel Landgericht [Kiel District Court] 27 July 2004 [16 O 83/04]	[11]
<i>Globes Case</i>	<i>Globes Case</i> , München Landgericht [Munich District Court] 27 February 2002 [5HKO3936/00]	[32]
<i>Key Press Machine Case</i>	<i>Key Press Machine Case</i> , Bundesgerichtshof [German Federal Supreme Court] 15 February 1995 [VIII ZR 18/94]	[43]

<i>Machine for Producing Hygienic Tissues Case</i>	<i>Machine for Producing Hygienic Tissues Case</i> , Bundesgerichtshof [German Federal Supreme Court] 3 November 1999 [VIII ZR 287/98]	[34]
<i>Shoes Case</i>	<i>Shoes Case</i> , Berlin Landgericht [Berlin District Court] 15 September 1994 [52 S 247/94]	[43]
<i>Textiles Case</i>	<i>Textiles Case</i> , Hamburg Landgericht [Hamburg District Court] 26 September 1990 [5 O 543/88]	[25]
<b>Hong Kong</b>		
<i>China Merchant v JGC</i>	<i>China Merchant Heavy Industry Corporation Ltd v JGC Corporation</i> [2001] HKCA 248	[2]
<i>Tommy v Li Fung</i>	<i>Tommy C P SZE and Co v Li and Fung (Trading Ltd)</i> [2002] HKCFI 682	[2]
<b>Poland</b>		
<i>Shoe Leather Case</i>	<i>Shoe Leather Case</i> , Poland Supreme Court 11 May 2007 [V CSK 456/06]	[22]
<b>Singapore</b>		
<i>Insigma v Alstom</i>	<i>Insigma Technology Co Ltd v Alstom Technology Ltd</i> [2009] 3 SLR 936	[7]

<b>Switzerland</b>		
<i>Blood Infusion Devices Case</i>	<i>Blood Infusion Devices Case</i> , Kantons Luzern Obergericht [Luzern Appellate Court] 8 January 1997 [11 95 123/357]	[34]
<i>CNC Machine Case</i>	<i>CNC Machine Case</i> , Kantongericht [Wallis Appellate Court] 21 February 2005 [C1 04 162]	[43]
<i>Packaging Machine Case</i>	<i>Packaging Machine Case</i> , Bundesgerichtshof [Swiss Federal Supreme Court] 18 May 2009 [4A_68/2009]	[43]
<b>United Kingdom</b>		
<i>Barclays v Nylon</i>	<i>Barclays Bank plc v Nylon Capital LLP</i> [2011] EWCA Civ 826	[9]
<i>Metalfer v Pan Ocean Shipping</i>	<i>Metalfer Corporation v Pan Ocean Shipping Corporation Ltd</i> [1977] CLC 1574	[2]
<b>United States of America</b>		
<i>Fabry's v IFT</i>	<i>Fabry's SRL v IFT International Inc</i> (SD D NY, No 02 Civ 9855SAS, 21 May 2003) slip op 1	[9]
<i>Karnette v Wolpoff</i>	<i>Karnette v Wolpoff &amp; Abrahamson, LLP</i> 444 F Supp 2d 640 (ED Va, 2006)	[7]

<p><i>Mitsubishi Motors v Soler</i></p>	<p><i>Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc</i>, 473 US 614 (1985)</p>	<p>[7]</p>
<p><i>Negrin v Kalina</i></p>	<p>Negrin v Kalina (SD D NY, No 09 Civ 6234 LGS KNF, 17 December 2013) slip op 1</p>	<p>[9]</p>

<b>Index of Arbitral Awards</b>		
<b>Cited As</b>	<b>Full Citation</b>	<b>Cited At</b>
<b>ICC</b>		
<i>Coke Case</i>	<i>Coke Case</i> , Court of Arbitration of the ICC June 1999 [9187]	[43]
<i>Glass Commodities Case</i>	<i>Glass Commodities Case</i> , Court of Arbitration of the ICC September 1997 [8962]	[34]
<i>ICC 7929</i>	Interim award in ICC Case No 7929, XXV Y B Comm Arb 312 (2000)	[7]
<b>Permanent Court of Arbitration</b>		
<i>Reineccius v Bank for International Settlements</i>	Partial Award in <i>Reineccius v Bank for International Settlements</i> , ICGJ 375, Permanent Court Arbitration (2002)	[7]

## **I THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE CLAIMS**

1 The Tribunal does not have jurisdiction to hear the Claims because: (A) the Claimant did not commence arbitration within the contractual time period. Alternatively, if the Tribunal does have jurisdiction: (B) the Tribunal only has jurisdiction to hear ‘disputes concerning payment’.

### **A The Claimant did not commence arbitration within the contractual time period**

2 When a contract provides for arbitration and litigation, and the claimant fails to commence arbitration within the contractual time period, the claimant will be barred from pursuing that claim in arbitration.<sup>1</sup>

3 The Arbitration Agreement provides that arbitration must commence within 14 days of the dispute.<sup>2</sup> A dispute occurs when parties disagree on law or fact.<sup>3</sup> On 27 February 2015, the Parties disagreed on payment under the Contracts.<sup>4</sup> The Parties did not attempt to amicably resolve the Disputes. The Claimant submitted the Application for Arbitration on 18 November 2015.<sup>5</sup> This was 264 days after the Disputes arose.

### **B The Tribunal only has jurisdiction to hear ‘disputes concerning payment’**

4 The Arbitration Agreement provides that either party may submit ‘disputes concerning payment’ to arbitration.<sup>6</sup> ‘Payment’ means ‘consideration for the supply of anything’<sup>7</sup> or the ‘[p]erformance of an obligation by the delivery of money’.<sup>8</sup>

5 The Claimant’s Claim for liquidated damages, being a claim for payment of the balance of Contract Two in consideration for the Final Goods, is the only Claim for consideration for the

---

<sup>1</sup> Born, 942; Redfern/Hunter, 243–4 [409]; *Tommy v Li Fung*, 12 [28.5]; *Metalfer v Pan Ocean Shipping*, 1576–8; *China Merchant v JGC*.

<sup>2</sup> Problem, 7, 12.

<sup>3</sup> Born, 1347; Rana/Sanson, 49.

<sup>4</sup> Problem, 13, 18.

<sup>5</sup> *Ibid* 1.

<sup>6</sup> *Ibid* 7, 12.

<sup>7</sup> Australian Law Dictionary, ‘payment’.

<sup>8</sup> Black’s Law Dictionary, ‘payment’; A Dictionary of Modern Legal Usage, ‘pay; pay up’.

supply of anything or the performance of an obligation by the delivery of money. The other Claims will, if proven, only result in damages for breach of contract.

6 The Tribunal can only hear disputes concerning payment because: (i) the Parties intentionally drafted the Arbitration Agreement to be specific; and, (ii) the pro-arbitration approach does not apply to the scope of the Arbitration Agreement.

*i The Parties intentionally drafted the Arbitration Agreement to be specific*

7 A tribunal should interpret an arbitration agreement to give effect to parties' intentions.<sup>9</sup> A specific clause will always prevail over a general clause.<sup>10</sup> This is because specific clauses are deemed to reflect parties' intentions.<sup>11</sup>

8 The Arbitration Agreement provides that either party may submit 'disputes concerning payment' to arbitration.<sup>12</sup> CIETAC's Model Arbitration Clause provides that either party may submit 'any dispute' to arbitration.<sup>13</sup> The Parties have incorporated the majority of the Model Clause, but have intentionally changed 'any dispute' to 'disputes concerning payment'.<sup>14</sup>

*ii The pro-arbitration approach does not apply to the scope of the Arbitration Agreement*

9 A tribunal will not take a broad interpretation of, or pro-arbitration approach to, a clause that requires specific disputes to be resolved in arbitration and others in litigation.<sup>15</sup> Instead, such a clause will be interpreted narrowly.<sup>16</sup>

10 The Dispute Resolution Clause provides that the Parties may resolve 'disputes concerning payment' in arbitration and other disputes in litigation.

---

<sup>9</sup> Born, 1321; *Insignia v Alstom* [30] [33]; *Mitsubishi Motors v Soler*, 626; ICC 7929, 317.

<sup>10</sup> Born, 1322; *Reineccius v Bank for International Settlements*, 130.

<sup>11</sup> Born, 1322; *Karnette v Wolpoff*, 645–6.

<sup>12</sup> Problem, 7, 12.

<sup>13</sup> CIETAC Model Arbitration Clause.

<sup>14</sup> Problem, 7, 12.

<sup>15</sup> Born, 1340–1; *Negrin v Kalina*, 11–13; *Fabry's v IFT*, 5; *Barclays v Nylon*, [28].

<sup>16</sup> *Negrin v Kalina*, 11–13; See, Born, 1340–1.

## II THE CISG DOES NOT APPLY TO THE CONTRACTS

- 11 The CISG applies to international sale of goods contracts between parties in different countries if they are party to the CISG.<sup>17</sup> Parties can exclude the application of the CISG<sup>18</sup> implicitly if their intention is clear and real.<sup>19</sup> If parties provide that a country's *domestic* laws will govern a contract, it will be considered a clear intention to opt-out of the CISG.<sup>20</sup> Further, if parties state a certain law applies exclusively, they will implicitly opt-out of the CISG.<sup>21</sup>
- 12 The Contracts specify that they 'shall be governed by the national law of Wulaba. All other applicable laws are excluded.'<sup>22</sup> The Parties opted out of the CISG by: first, specifying the national laws of a country; and, second, excluding all other applicable laws.

---

<sup>17</sup> CISG, art 1(1)(a); Schlechtriem/Schwenzer, 28–9; Kröll/Mistelis/Perales, 23–4 [8]–[9].

<sup>18</sup> CISG, art 6.

<sup>19</sup> Ibid; Schlechtriem/Schwenzer, 102 [3]; Kröll/Mistelis/Perales, 99 [1]; Bridge, 540 [11.42]; UNCITRAL Digest, 33–4 [9]; *Gasoline and Gas Oil Case*.

<sup>20</sup> UNCITRAL Digest, 34 [11]; *Auto Case*; *Fat for Frying Case*; *Leather Textile Wear Case*.

<sup>21</sup> UNCITRAL Digest, 34 [11].

<sup>22</sup> Problem, 7, 12.

### III THE CLAIMANT IS RESPONSIBLE FOR THE LACK OF INSURANCE UNDER CONTRACT ONE

13 Neither Contract One<sup>23</sup> nor the Incoterms DDP oblige either party to purchase Insurance.<sup>24</sup> The Claimant is responsible for the lack of Insurance under Contract One because: (A) the Claimant agreed to purchase Insurance; and, in any event, (B) trade usage dictates that the Claimant is responsible for purchasing insurance.

#### A The Claimant agreed to purchase Insurance

14 The Claimant agreed to purchase Insurance because it agreed to bear ‘all related costs’. Insurance is a ‘related cost’.

15 A tribunal can imply a term into a contract based on parties’ statements.<sup>25</sup> A tribunal must interpret a party’s statements according to that party’s intent or the understanding of a reasonable person in the other party’s position.<sup>26</sup> The other party must have known or ‘could not have been unaware’ of the first party’s intent.<sup>27</sup> An ambiguous term will be construed against the party that incorporates it into the contract.<sup>28</sup>

16 In pre-contractual negotiations, the Claimant stated that it would bear ‘all related costs’.<sup>29</sup> The Claimant increased the price of Contract One on that basis.<sup>30</sup> The Respondent could not have been unaware of the Claimant’s intent to contractually agree to bear ‘all related costs’.

17 Contract One does not define ‘related costs’.<sup>31</sup> The ordinary meaning of ‘related’ is ambiguous<sup>32</sup> and must be construed against the Claimant. Additionally, insurance will be ‘usual’ when the mode of transport or nature of the goods is such that a reasonable businessperson would take out

---

<sup>23</sup> Problem, 6, 7.

<sup>24</sup> INCOTERMS, DDP A3(b), B3(b).

<sup>25</sup> Gillette/Walt, 240–1; Ferreri, [6].

<sup>26</sup> CISG, arts 8(1), 8(2); Kröll/Mistelis/Perales, 143 [1].

<sup>27</sup> CISG, art 8(1); Kröll/Mistelis/Perales, 143 [1].

<sup>28</sup> Kröll/Mistelis/Perales, 150 [24].

<sup>29</sup> Problem, 3.

<sup>30</sup> Ibid.

<sup>31</sup> See, *ibid* 6–7, 11–12.

<sup>32</sup> Merriam-Webster Dictionary, ‘related’; Oxford Dictionary, ‘related’.

insurance.<sup>33</sup> Transporting goods by sea presents numerous risks.<sup>34</sup> The Claimant was obliged to ship the Goods by sea.<sup>35</sup> The value of the Lost Goods was USD15,000,000.<sup>36</sup> A reasonable person would understand ‘all related costs’ to include Insurance.

## **B Trade usage dictates that the Claimant is responsible for purchasing insurance**

- 18 Parties to a contract are bound by any trade usage of which they knew or ought to have known.<sup>37</sup> A trade usage is one that is widely known and regularly observed by parties in a particular industry.<sup>38</sup>
- 19 Contract One incorporates the Incoterms DDP.<sup>39</sup> DDP is widely known as the Incoterms rule that delegates the most responsibility to the seller.<sup>40</sup> Trade usage dictates that the party which bears the transport costs is responsible for purchasing insurance.<sup>41</sup> Under DDP, the seller bears all transport costs.<sup>42</sup>

---

<sup>33</sup> Schlechtriem/Schwenzer, 568 [29].

<sup>34</sup> Rose, ch 1 [1.1].

<sup>35</sup> Problem, 7.

<sup>36</sup> Ibid 6.

<sup>37</sup> CISG, art 9.

<sup>38</sup> CISG, art 9(2); Schlechtriem/Schwenzer, 189 [17]; *Timber Case*; *Wood Case*.

<sup>39</sup> Problem, 6.

<sup>40</sup> Ramberg, 149; Kröll/Mistelis/Perales, 402 [36]; Gilles/Moens, 126; Fuller, 204; Gabriel, 41, 71.

<sup>41</sup> Schlechtriem/Schwenzer, 568 [29]; *Timber Case*; *Wood Case*.

<sup>42</sup> INCOTERMS, DDP A6.

#### **IV THE PROTOTYPES WERE LATE**

21 The Prototypes were late because: (A) the Prototypes were delivered after the due date; and, (B) the Respondent did not acquiesce to late delivery.

##### **A The Prototypes were delivered after the due date**

22 The CISG does not establish when a contractual time period will begin and end.<sup>43</sup> A tribunal must fill any gap in the CISG first by having recourse to a general principle upon which the CISG is based.<sup>44</sup> A tribunal may establish a general principle by making an analogy with a provision of the CISG.<sup>45</sup>

23 Article 20(1) provides that the period of time for acceptance of an offer begins when the offer is sent.<sup>46</sup> A tribunal can draw the analogy that any contractual time period begins at the moment of a triggering event. This is because the purpose of Article 20 is to create a uniform way of establishing when a time period begins.<sup>47</sup>

24 Contract One provides that the Prototypes must be delivered within 14 days of the Respondent paying Deposit One.<sup>48</sup> When the Respondent paid Deposit One on 31 July 2014, it triggered the time period. Accordingly, the Respondent only had until 13 August 2014 to deliver the Prototypes. The Prototypes were delivered on 15 August 2014<sup>49</sup> and were late.

##### **B The Respondent did not accept late delivery of the Prototypes**

25 Parties may modify a contract by agreement.<sup>50</sup> An agreement can be evidenced by behavior of the parties.<sup>51</sup> Silence alone does not amount to acceptance.<sup>52</sup> A party must unequivocally intend to be bound upon any offer it accepts.<sup>53</sup>

---

<sup>43</sup> Felemegas, 4.

<sup>44</sup> CISG, art 7(2); Kröll/Mistelis/Perales, 134 [53]; Bianca/Bonnell, 74 [2.3]; *Equipment Case*; *Glass Chaton Case*.

<sup>45</sup> UNCITRAL Digest, 43 [11]; Brandner, 1; *Shoe Leather Case*.

<sup>46</sup> CISG, art 20(1).

<sup>47</sup> Enderlein/Maskow, 101 [1].

<sup>48</sup> Problem, 6.

<sup>49</sup> Ibid 9.

<sup>50</sup> CISG, art 29(1); *Textiles Case*.

<sup>51</sup> Kröll/Mistelis/Perales, 385 [8].

26 On receipt of the Prototypes, the Respondent did not react to their delay. There is no evidence to suggest that the Respondent intended to be bound by a new delivery date.

---

<sup>52</sup> CISG, art 18(1).

<sup>53</sup> Lookofsky, 65 [101]; Honnold, 152, 187.

## V THE FINAL GOODS DO NOT CONFORM TO CONTRACT TWO

27 The Final Goods do not conform to Contract Two because: (A) the Final Goods are not fit for purpose; and, (B) the sale of the Final Goods was not a sale by sample. In any event: (C) the Final Goods are not hand-made. Further: (D) the Respondent gave notice of non-conformity within a reasonable time.

### A The Final Goods are not fit for purpose

28 A seller must deliver goods that conform to the contractual description.<sup>54</sup> The goods must be fit for the particular purpose that a buyer expressly or implicitly makes known to the seller.<sup>55</sup> A particular purpose can be evidenced in a contract or through parties' communication.<sup>56</sup>

29 The Contracts expressly state that the watchstraps must fit the Cherry watchcase.<sup>57</sup> During negotiations, the Respondent informed the Claimant that it intended to supply Cherry customers with watchstraps.<sup>58</sup> Subsequently, the Respondent sent the Claimant a Cherry watchcase with the intention for the Claimant to manufacture the Final Goods to fit the watchcase.<sup>59</sup> The Final Goods did not fit the watchcase.<sup>60</sup>

### B The sale of the Final Goods was not a sale by sample

30 The CISG provides that when a seller holds out a sample to a buyer, the goods must possess the qualities of that sample.<sup>61</sup> However, this provision does not apply when parties have agreed otherwise.<sup>62</sup> A contract is an agreement between parties.<sup>63</sup> A tribunal must interpret a party's

---

<sup>54</sup> CISG, art 35(1); Honnold, 253.

<sup>55</sup> CISG, art 35(2)(b); Bianca/Bonnell, 274 [2.5.3].

<sup>56</sup> CISG, arts 35(1), 35(2)(b); Schlechtriem/Schwenzer, 595 [7]; Kröll/Mistelis/Perales, 518–19 [109]–[13]; See, *Marques Roque Joachin v Manin Riviere*.

<sup>57</sup> Problem, 11.

<sup>58</sup> Ibid 5.

<sup>59</sup> Ibid 15, 17.

<sup>60</sup> Ibid 18.

<sup>61</sup> CISG, art 35(2)(c).

<sup>62</sup> Ibid art 35(2).

<sup>63</sup> Bianca/Bonnell, 271 [2.1]; Lookofsky, 100 [5].

statements according to that party's intent or the understanding of a reasonable person in the other party's position.<sup>64</sup>

31 The Parties entered into the Contracts, which provided for the quantity, price, quality, and size of the goods.<sup>65</sup> The Claimant sent the Respondent the Prototypes as a mere representation of the type of product the Claimant offers.<sup>66</sup> The Prototypes were not intended to replace the descriptive characteristics that both Parties agreed to in the Contracts. A reasonable person would consider that the Respondent did not intend to contract on the basis of a sample when it had already entered in a detailed contract.

### **C The Final Goods are not hand-made**

32 Even if the sale of the Final Goods was by sample, the Final Goods were not hand-made. When parties have agreed otherwise, a trade usage will not be implied into their contract.<sup>67</sup> A sale by sample creates contractual obligations.<sup>68</sup>

33 Business custom dictates that watchstraps are machine-manufactured. However, if the Tribunal finds that there was a sale by sample, the hand-made quality of the sample becomes a contractual agreement. The Final Goods were not hand-made.<sup>69</sup>

### **D The Respondent gave notice of non-conformity within a reasonable time**

34 A buyer is obliged to notify a seller of a lack of conformity within a reasonable time after a defect is, or ought to have been, discovered.<sup>70</sup> Generally, one month is a reasonable period of time to provide notice of lack of conformity.<sup>71</sup> This period will be extended when a defect is difficult to

---

<sup>64</sup> CISG, art 8; Kröll/Mistelis/Perales, 143 [1].

<sup>65</sup> Problem, 6.

<sup>66</sup> Problem, 8; See, Gillette/Walt, 236–7; *Bruggen v Top Deuren*.

<sup>67</sup> CISG, art 9(2).

<sup>68</sup> Schlechtriem/Schwenzer, 609 [26]; *Globes Case*.

<sup>69</sup> Problem, 18.

<sup>70</sup> CISG, art 39(1).

<sup>71</sup> Schlechtriem/Schwenzer, 663 [17]; Kröll/Mistelis/Perales, 615 [81]; Andersen, [6]; *Glass Commodities Case*; *Blood Infusion Devices Case*.

discover.<sup>72</sup> When a party has to seek expert opinion, the period begins after the party has received that opinion.<sup>73</sup>

35 The Respondent received the Final Goods on 29 January 2015.<sup>74</sup> In order for the Respondent to identify that the Final Goods did not conform, it had to take a sample to its distributor.<sup>75</sup> The one-month period started at the moment the distributor discovered the incorrect sizing. On 27 February 2015, the Respondent notified the Claimant of the non-conformity.<sup>76</sup> The Respondent took, at most, 29 days to notify the Claimant.

---

<sup>72</sup> Kröll/Mistelis/Perales, 605 [39]; *Machine for Producing Hygienic Tissues Case*.

<sup>73</sup> *Machine for Producing Hygienic Tissues Case*.

<sup>74</sup> Problem, 16.

<sup>75</sup> Ibid 18.

<sup>76</sup> Ibid.

**VI THE RESPONDENT IS ENTITLED TO A REFUND UNDER CONTRACT ONE AND IS NOT OBLIGED TO PAY THE BALANCE OF CONTRACT TWO**

36 The Respondent is entitled to a refund under Contract One because: (A) the Claimant did not deliver any Goods to the Respondent under Contract One; and, (B) the payment of the balance under Contract One was conditional on the Claimant delivering conforming goods under Contract Two.

37 The Respondent is not obliged to pay the balance of Contract Two because: (C) the Claimant fundamentally breached Contract Two; and, (D) the Respondent avoided Contract Two within a reasonable time.

**A The Claimant did not deliver any goods under Contract One**

38 A buyer must pay the price for goods in accordance with the contract and the CISG.<sup>77</sup> Contract One obliged the Respondent to pay the balance of Contract One within 14 days after receipt of the Goods.<sup>78</sup> The Claimant did not deliver any Goods to the Respondent under Contract One.<sup>79</sup>

**B The payment of the balance under Contract One was conditional on the Claimant delivering conforming goods under Contract Two**

39 A tribunal can imply a term into a contract based on parties' statements.<sup>80</sup> A tribunal must interpret a party's statements according to that party's intent or the understanding of a reasonable person in the other party's position.<sup>81</sup> A tribunal may only interpret a party's statements according to its intent if the other party knew or 'could not have been unaware' of the first party's intent.<sup>82</sup>

---

<sup>77</sup> CISG, art 53.

<sup>78</sup> Problem, 6.

<sup>79</sup> Ibid 10.

<sup>80</sup> Gillette/Walt, 240–1; Ferreri, [6].

<sup>81</sup> CISG, arts 8(1), 8(2); Kröll/Mistelis/Perales, 143 [1].

<sup>82</sup> CISG, art 8(1); Kröll/Mistelis/Perales, 143 [1].

40 The Claimant offered to replace the Lost Goods and, as a result, the Respondent paid the balance of Contract One.<sup>83</sup> Subsequently, the Parties entered into Contract Two.<sup>84</sup> A reasonable person would understand that the Respondent only agreed to pay the balance of Contract One on the condition that the Claimant would provide goods. This arrangement became an implied term of Contract Two. The Claimant did not provide goods in accordance with Contract Two.<sup>85</sup>

**C The Claimant fundamentally breached Contract Two by delivering non-conforming goods**

41 A buyer may avoid a contract if a seller delivers non-conforming goods that amount to a fundamental breach.<sup>86</sup> A fundamental breach occurs when the innocent party is substantially deprived of its entitlements under a contract.<sup>87</sup> The breaching party must have foreseen, or a reasonable person must have been able to foresee, the detriment.<sup>88</sup> Substantial detriment occurs when a contract's purpose is endangered and subsequently the innocent party loses interest in the contract.<sup>89</sup> A party will have foreseen detriment when the contract provides that the goods will have certain features.<sup>90</sup>

42 The Respondent only entered into the Contracts in order to receive watchstraps to fit a Cherry watchcase.<sup>91</sup> They did this in order to supply Cherry customers with replacement watchstraps.<sup>92</sup> Additionally, the Claimant knew that the watchstraps had to fit the Cherry watchcase.<sup>93</sup>

---

<sup>83</sup> Problem, 4, 16.

<sup>84</sup> Ibid 11.

<sup>85</sup> Ibid 18.

<sup>86</sup> CISG, arts 49(1)(a), 51(2)(a).

<sup>87</sup> Ibid art 25.

<sup>88</sup> Ibid.

<sup>89</sup> Bijl, 27; Magnus, 424-5.

<sup>90</sup> CISG Advisory Council Opinion No 5, [4.2].

<sup>91</sup> Problem, 3, 5, 15, 17; Clarification, 21.

<sup>92</sup> Clarification, 21.

<sup>93</sup> Problem, 6, 11.

## **D The Respondent avoided Contract Two within a reasonable time**

- 43 A party seeking to avoid a contract must give notice of avoidance to the breaching party.<sup>94</sup> The notice must make clear that the injured party is no longer prepared to perform its contractual duties as a result of the other party's breach.<sup>95</sup> Notice of avoidance must be made within a reasonable time.<sup>96</sup> At minimum, a period of one month is reasonable.<sup>97</sup>
- 44 On 29 January 2015, the Respondent received the Final Goods which did not conform to Contract Two. On 27 February 2015, the Respondent informed the Claimant that it would not pay for the Final Goods and demanded a refund of Contract One. 29 days is within one month and a reasonable time.

---

<sup>94</sup> Kröll/Mistelis/Perales, 352 [1].

<sup>95</sup> Ibid 334–4 [4]; *Intel Pentium Computer Parts Case*; *Designer Clothes Case*; *Propane Case*; *Shoes Case*.

<sup>96</sup> Schlechtriem/Schwenzer, 1047 [15]; Kröll/Mistelis/Perales, 357 [12]; *Intel Pentium Computer Parts Case*.

<sup>97</sup> Kröll/Mistelis/Perales, 744 [77]; *Packaging Machine Case*; *Automobile Case*; *Key Press Machine Case*; *Coke Case*; *CNC Machine Case*.