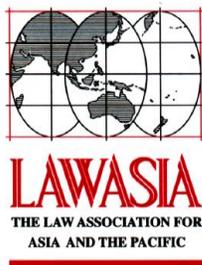




9th **LAWASIA** International Moot

FURTHER CLARIFICATIONS TO THE MOOT PROBLEM



FURTHER CLARIFICATIONS

A. The Parties

Mae Sot

1. When was the last maintenance performed on the equipment in the factory?
A. Unknown – all maintenance records were destroyed in the fire.
2. Were Mae Sot's workers legally employed?
A. There have been unsubstantiated (not proven) rumours that many lacked documentation allowing them to work in Thailand.
3. How long have the victims been in the employment of Mae Sot?
A. Unknown – all employment records were destroyed in the fire but it seems reasonable to assume that some had only worked there for a few weeks while others had worked there for several years.

Speer Shirts

1. Does Spear Shirts have a Company Code of Conduct, or has it made any announcements to commit to labour standards in their supply chain?
A. No
2. Does Mr. Baydon, Vice President of Purchasing in Spear Shirt Inc., have the authority to decide which companies manufacture Spear Shirts products?
A. Yes
3. Does Mr. Baydon report to the President of Spear Shirt Inc. or directly to the Board of Directors?
A. To the President.
4. Did Mr. Baydon forward Theodore (Snowy) Snowden's e-mail to the President or the directors of Spear Shirt Inc.?
A. To the President.
5. Does Spear Shirt Inc. buy products from any other manufacturer in or around Mae Sot?
A. No

The Victims

1. Are there any reports regarding the extent of injuries suffered by the victims?
A. No reports are available.
2. Were the injuries suffered common among the surviving victims?

- A. Virtually all victims suffered burns – 1st to 3rd degree - to some part of their body – most commonly their feet and hands. Many also suffered permanent damage to their respiratory system.
3. Were any claims made by the victims or their families against other shirt companies which purchased shirts from Mae Sot?
- A. No.

B. The Relationship between Spear Shirts and Mae Sot Clothing (contract, communications, inspections, etc)

1. Does Mae Sot clothing Inc. attach the Spear Shirt Inc. logo on the products ordered by Spear Shirt?
- A. Yes (There is no label or other indication on the shirts indicating they were manufactured by Mae Sot.)
2. Have Spear Shirts or Mae Sot modified any part of Spear Shirts Standard Purchase Order (Standard Terms and Conditions) in writing?
- A. No.
3. Since Mae Sot Clothing Ltd. has been supplying Spear Shirt for many years, does it carry a supply of finished products for Spear Shirt Inc. or does it begin producing shirts for Spear Shirts only upon receiving the individual orders from Spear Shirt Inc.?
- A. Mae Sot frequently produces excess shirts for Spear Shirts (more than required to fulfil the Purchase Order) in the event some of them are rejected by its quality control inspectors or returned by Spear Shirts. This practice sometimes results in Mae Sot having some shirts in stock which are available to fill the next Spear Shirt order ... but rarely in excess of 10% of the next order.
4. How long does it take from the receipt of Spear Shirt’s Standard Purchase Order for Mae Sot Clothing Ltd. to finish and ship the shirts?
- A. It depends on the size of the order - generally 45-60 days but an “Expedited Order” can be shipped within 14 days.

C. Applicable Law

1. There have been several requests regarding the applicable law – also referred to as “Proper Law” to be used in resolving the various legal issues presented in the Problem and the Clarifications. An example (emphasis added) follows:

In the moot problem, it is stated that arbitration as agreed to be held “...in accordance with the Kuala Lumpur Regional Centre for Arbitration (herein KLRCA) Rules.” However, in the clarification section, it stated that the arbitration will be “...under the supervision of the Thai Arbitration Institute.” This lead to a confusion as to which arbitration rules to be followed because both carries a significant role in which it determines what governing law should be used to resolve the dispute. Under Article 35(1) of the KLRCA, it stated that “The arbitral tribunal shall apply the rules of law designated by the PARTIES as applicable to the substance of the dispute. Failing such designation by the parties, the

arbitral TRIBUNAL shall apply the law which it determines to be appropriate.” Whereas under the Thai Arbitration Institute, it explicitly stated under section 34 “...that, unless the governing law is otherwise agreed by the parties, the arbitral tribunal shall settle the dispute in accordance with THAI LAWS. Where there is a conflict of laws, the tribunal must apply the law as determined by the conflicts of laws principles.”

Hence, our main concern is which governing law to the dispute settlement is agreed by the parties?

A: This “dispute settlement agreement” should be understood to mean that although the arbitration will be physically held in Thailand, the parties – as they are unquestionably free to do in private commercial arbitration – have agreed to conduct the arbitration under the Kuala Lumpur Regional Centre for Arbitration (herein KLRCA) Rules ... **its procedural rules.**

But, as pointed out above, that doesn’t answer the question regarding the law to be used in resolving the underlying dispute between the parties. However, while the Team making the above Request seems to believe there is a fundamental conflict between the Thai and KLRCA Rules regarding the selection of the governing law, the Rules seem quite similar:

- **THAI “applicable law” rule:** “unless the governing law is otherwise agreed by the parties, the arbitral tribunal shall settle the dispute in accordance with THAI LAWS. Where there is a conflict of laws [as there clearly is in this Problem], the tribunal must apply the law as determined by the conflicts of laws principles.”
- **KLRCA “applicable law” rule:** Failing a designation by the parties of the applicable law), the arbitral Tribunal shall apply the law which it determines to be appropriate.”

While the terminology used in the two Arbitration Rules is not identical, the meaning seems to be the same:

- (1) the parties are free to select the applicable law to apply in the resolution of the dispute but
- (2) if they do not, the Arbitral Tribunal shall apply the most appropriate one using general conflict of laws/proper law principles.

But that brings us to one of the most important and potentially one of the most difficult issues to resolve in multi-national litigation:¹ which (substantive) law should be used by the court or Arbitral Tribunal to determine the rights and obligations of the parties.

But this is NOT an academic or hypothetical question where you might decide which is the “better” (more appropriate) law to apply in a given situation. You are an advocate with a responsibility to present arguments most likely to insure that your client prevails in this dispute.

¹ The author believes that the ability to deal with the possible use of different – and potentially conflicting laws - is a necessary “skill” for those engaged in multinational litigation. And that “Moot Court Problems” present a unique opportunity to develop such skills.

Thus your challenge is to:

(a) Determine which law (i.e., the law of which country²) is **most favorable** (makes it easier for your client to prevail) and then convince the Arbitral Tribunal to use it; and/or

(b) Determine which law is *most unfavorable* (makes it easier for your opponent to prevail) and then convince the Arbitral Tribunal NOT to use it.

D. Other Requests

1. Was there is arbitration agreement between Spear Shirts and claimants (the victims and their families)?
 - A. The NGO currently representing the victims and their families agreed to resolve the claims by arbitration, primarily in hopes that it would minimize delay in the resolution of this matter and result in a more expeditious payment to the victims and/or their families. A fifteen member committee composed of victims (9 members) and family members of diseased workers (6 members) was selected by the two groups to serve as their representatives. Subsequently thirteen of the members of the committee signed (under oath) a statement giving the NGO “full authority” to represent the victims and their families in their dispute with Spear Shirts.

The propriety and validity of this agreement has not been challenged and is not properly reviewable in this arbitration.

2. Can Claimants demand compensation for damages from Snowden and Baydon in place of - or in addition to - the claims against Spear Shirts?
 - A. They could seek compensation from either or both individuals although the legal basis for such claims are unclear and the possibility of obtaining a substantial financial recovery from either seems remote. It is NOT an issue before this arbitral tribunal at this time.
3. Does The International Collective in Support of Textile Workers (ICSTW) represent all the victims and their families?
 - A. It is attempting to do so ... but the victims and families may have the right to be represented by counsel of their choice or to decline to participate in this proceeding.

No requests to do so have been made or are expected.

² The most obvious ones would seem to be: Thailand (venue for the arbitration and place where the factory was located), Myanmar (residence of most of the victims), India (headquarters of the NGO representing the victims) and the United States (Spear Shirt has its principle place of business in Los Angeles, California).

4. Does Speer Shirts consistently use the ‘Speer Shirts Standard Purchase Order’ form?
 - A. Yes, it is standard company policy.

E. Clarifications of prior Clarifications

1. Re Clarification (1st Set) B-3, do those suggestions include the company management, particularly the working condition and workers’ welfare or they are mere suggestions on the production of garments?
 - A. They primarily deal with production deadlines and quality control.
2. Re Clarification (1st Set) B-4, did Speer Shirts officers or employees pay any other visits to Mae Sot Clothing Ltd, or make any attempt to determine the working conditions at the Mae Sot factory.
 - A. No.
3. Re Clarification C-1 (The Arbitration), from the wordings of the arbitration agreement, the KLRCA Rules were not mentioned. Did the parties subsequently agreed on the procedural rules?
 - A. The Problem states that the parties agreed “to submit this dispute to binding arbitration in Bangkok in accordance with the KLRCA Arbitration Rules.”)

F. Unanswered Requests (some examples)

1. Is the town of Mae Sot astride the border so that part of it is in Thailand and part in Myanmar or is the town wholly in Thailand along the border that separates Thailand from Myanmar?
 - A. Mae Sot is a real place – its location can be ascertained by each team.
2. How far is the famous Aquamarine Resort from the town of Mae Sot and Mae Sot Clothing Ltd.?
 - A. Questionable relevancy.

G. Corrections

1. Errors: “Speer Shirts” has been sometimes erroneously used when referring to “Spear Shirts.” The correct name is Spear Shirts.
2. The ‘Buyer’s purchase order(s) (Paragraph 1 line 5) is the same document as the ‘Speer Shirts Standard Purchase Order.’”