SIXTH ANNUAL INTERNATIONAL

ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

5-9 JULY 2016

HONG KONG

In the matter of:

Albas Watchstraps Manufacturing Co. Ltd.

v.

Gamma Celltech Co. Ltd.

MEMORANDUM FOR RESPONDENT

Team No. 115

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LIST OF ABBREVIATIONS

$	United States Dollars
&	And
A.C.	Appeals Cases
A.D.	American Decisions
ADR	Alternate Dispute Resolution
Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission
CISG	Convention on International Sale of Goods
Cl.	Claimant
Co.	Company
d.	Division

DDP	Delivery Duty Paid
Ex.	Exhibit
GmbH	Gesellschaft mit beschränkter Haftung
F.L.C.	Family Law Cases
H.K.E.C.	Hong Kong Electronic Cases
ICC	International Chamber of Commerce
Inc.	Incorporated
L.Ed	Lawyers Edition
LLP	Limited Liability Partnership
Ltd.	Limited
N.Y.S.	New York State
No.	Number

p.	Page
Pty	Proprietary Company
S&P	Sale and Purchase agreement
v.	Versus

LIST OF AUTHORITIES

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Australia	Aiton Australia Pty Ltd. v. Transfield Pty Ltd., (1999) 153 F.L.R. 236 at 245. *Cited as*: **Aiton v. Transfield**
Austria	Austria 8 November 2005 Supreme Court *Cited as:* **Recycling machine**
Belgium	*Brugen Deuren BVBA v. Top Deuren VOF* 2006 *Cited as:* **Brugen v. Deuren**
England	Walford v. Miles, [1992] 2 A.C. 128 *Cited as:* **Walford v. Miles**
	Phillips v. Lamdin [1949] 2 K.B. 33]; *Cited as:* **Phillips v. Lamdin**
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Germany	1996 *Cited as:* **Germany Printing system and software case**

	2000 *Cited as:* **Pizza Cartons**
Hong Kong	Hyundai Engineering and Construction CO. v. Vigour Ltd. [2004] H.K.E.C. 444 *Cited as:* **Hyundai**
ICC	ICC Case No. 8547/1999 *Cites as:* **ICC Case No. 8547/1999**
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New Zealand	Calibre Financial Services Limited v. Mortgage Administration Services (Calibre) Limited Case No. CA538/2012 *Cited as:* **Calibre Financial Services Limited v. Mortgage Administration Services (Calibre) Limited**

Russia	Gorpischecombinat "Livensky" v. SECOMITA di Pier Georgio Pavan, 2000 *Cited as:* **Livensky v. Georgio**
Spain	2011 *Cited as:* **Coffee case**
United States	God's Battalion of Prayer Pentecostal Church Inc. v. Miele Assocs.,LPP 6NY3d 371(2006) *Cited as:* **God's Battalion**
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American Biophysics v. Dunois marine Specialties *Cited as:* **American Biophysics Case**

Legal Instruments

CIETAC	China International Economic Trade Association Commission Rules *Cited as:* **CIETAC**
Hong Kong	Hong Kong Arbitration Ordinance, 2015 *Cited as:* **Hong Kong Arbitration Ordinance, 2015**
ICC	International Chamber of Commerce Rules, 2012 *Cited as:* **ICC Rules**
International Institute for Unification of Private Law	UNIDROIT Principles of International Commercial Contracts *Cited as:* UNIDROIT Principles
UNCITRAL	UNCITRAL Model Law, 1985 *Cited as:* **UNCITRAL**
United Nations	United Nations Convention on Contracts for the International Sale of Goods, 2010 *Cited as:* **CISG**
	The New York Arbitration Convention on the Recognition of Enforcements of Foreign Arbitral Award, New York, 1958 *Cited as:* **New York Convention**

STATEMENT OF FACTS

The parties to the Contract are Albas Watchstraps Mfg. Co. Ltd. (CLAIMANT) and Gamma Celltech Co. Ltd. (RESPONDENT).

CLAIMANT is a company based in Yanyu since 1973. It sells its watchstraps to various importers and watch producers all over the world.

RESPONDENT is a company based in Wulaba, established in 2002. It has been considered to be one of the fastest growing traders of smart mobile phone accessories.

23.07.2014 Earlier during the year, RESPONDENT approached CLAIMANT with regards to the purchase of leather watchstraps for the Cherry Watch, belonging to the Cherry Brand. Subsequently, a Sale and Purchase agreement was concluded by the Parties.

Note:

It was agreed on by the Parties that due to RESPONDENT'S inexperience in the field, CLAIMANT offered the DDP Incoterms and the goods at an increased 50% price and agreed to be responsible for all related costs.

31.07.2014 RESPONDENT paid a deposit of USD 3 million to CLAIMANT.

14.08.2014 As agreed between the parties, CLAIMANT sent an approval prototype for the RESPONDENT to confirm in order to start manufacturing – a standard procedure regularly followed by CLAIMANT. RESPONDENT approved the prototype and CLAIMANT, thus, invested in the necessary production tools.

10.10.2014 CLAIMANT, as agreed between the parties, arranged for the watchstraps to be shipped by sea.

28.10.2014 CLAIMANT received a notice from the shipping company stating that the goods were lost at sea and due to this, CLAIMANT sent a letter to RESPONDENT informing them about the same so RESPONDENTS could claim compensation from the insurance company for the same. However, RESPONDENT informed CLAIMANT that as per the decided terms of the agreement, CLAIMANT was responsible for all related costs, including insurance of the goods.

07.11.2014 Subsequently, CLAIMANT offered a replacement shipment, provided RESPONDENT agreed to make full payment of the lost goods. The Parties thus signed a second Sale and Purchase agreement at a discounted rate this time.

29.12.2014 Upon receiving the balance payment for the initial Sale and Purchase Agreement and a deposit for the new Sale and Purchase Agreement, CLAIMANT managed to arrange for the watchstraps to be shipped at the earliest on the above mentioned

date.

27.02.2015 CLAIMANT received a letter from RESPONDENT refusing to pay the balance amount as it was not satisfied with the quality of the watchstraps. Furthermore, RESPONDENT also demanded a refund on the initial payment as it was a conditional payment for the right replacement transaction.

18.11.2015 CLAIMANT made an application for arbitration praying for liquidated damages in the sum of USD 9.6 million before the China International Economic and Trade Arbitration Commission.

ARGUMENTS ADVANCED

I. The Tribunal does not have jurisdiction to deal with the payment claims raised by CLAIMANT.

1. It is respectfully submitted that this Tribunal does not have jurisdiction to adjudicate the claims raised by CLAIMANT under the arbitration clause contained in the Sale and Purchase Agreement No. 2 [*CL. EX. 6*]. The *lex arbitri* governing the arbitration is the Law of Hong Kong, which is also the seat of the arbitration. [*ARTICLE 74, CIETAC RULES*]

2. With respect to the jurisdiction of this tribunal RESPONDENTS submissions are **(A)** the arbitration agreement is not valid, **(B)** that this Tribunal has no competence to declare the agreement valid and **(C)** the claims raised by CLAIMANT are not payment claims

A. The arbitration agreement is not valid.

3. Since, an arbitration under the agreement is optional there exists no obligation to arbitrate and hence consensus to arbitrate. Under the laws of New York, which have been made applicable for interpretation of the arbitration clause, a party cannot be compelled to arbitrate unless the evidence establishes a clear, explicit and unequivocal agreement to resolve disputes through arbitration. [*GOD'S BATTALION; NEISLOSS*] In the present case there is no consensus between the parties to arbitrate and hence they are under no obligation to compulsorily submit their disputes to

arbitration. This makes the arbitration agreement for RESPONDENT unenforceable for want of consensus.

4. RESPONDENT further submits that the parties have given Hong Kong courts the jurisdiction to settle all disputes arising out of or in connection with the agreement. Thus there is overlapping of jurisdiction as the parties can opt between litigation and arbitration. The same is not valid under the laws of the State of New York as the parties are not required to arbitrate if the arbitration agreement gives them the option to arbitrate or to litigate [*RICCARDI*]

B. The tribunal has no competence to declare the arbitration agreement valid.

5. This Tribunal has no jurisdiction to arbitrate the dispute on the following two grounds **i)** Only the New York Courts can decide the validity of the Arbitration Agreement and **ii)** the arbitration proceedings are premature:

i) Only the New York Courts can determine the validity of the Arbitration Agreement.

6. Under New York law, the question whether the parties agreed to arbitrate is to be decided by the court unless the parties have exclusively conferred such power on the tribunal. [*SMITH BARNEY; FIRST OPTIONS*]. In the present case the parties have submitted all disputes relating to the dispute resolution clause to the courts of State of New York and have only given the tribunal the authority to deal with payment disputes, if any. Thus only the courts of State of New York have the jurisdiction to uphold the validity of the arbitration agreement and not this Tribunal.

ii) The arbitration proceedings are premature.

7. RESPONDENT submits that the parties are bound to settle payment dispute amicably, if they so qualify as such, within 14 days before the submission of the disputes to arbitration. The word 'shall' used in the first paragraph signal the intention of the parties to make an attempt to resolve the dispute through their representatives, a mandatory condition precedent to initiating arbitral proceedings [*SCHENEVUS; ICC AWARD 9977*]. When such multi-tiered dispute resolution clauses clearly designate a time at which the parties are to resolve their dispute amicably comes to an end, courts have held them to be strictly enforceable and devoid of uncertainty [*AITON V. TRANSFIELD*]. The above position was affirmed by the English courts wherein it was held that "for the court to decline to enforce reference to ADR on the grounds of instristic uncertainty would be to fly in the face of public policy"[*WALFORD V. MILES*]. This stand has been affirmed by the courts in Hong Kong wherein the failure to specify a detailed procedure for settling disputes amicably, before the commencement of arbitration, was not held to be unenforceable or uncertain [*HYUNDAI*]

C. The claim raised by CLAIMANT is not a payment claim.

8. The claim raised by CLAIMANT is not a payment claim based on the following two grounds i) the dispute between the parties is not a payment dispute and ii) the claimant has no right to liquidated damages.

i) The dispute between the parties is not a payment dispute.

9. The RESPONDENT submits that the claims raised by CLAIMANT are not payment claims but instead involve questions of breach of contract. RESPONDENT had the right to stop payment because of non-conformity of the goods irrespective of the degree of non-conformity. The degree of non-conformity is in dispute in the present case and the same cannot be termed as a payment dispute. [*ICC CASE NO. 8547/1999*] The subject of such a claim is not only a claim for payment, but rather the determination of the validity of existence of the claim. [CHRISTOPH LIEBSCHER*¶9-17*]

ii) CLAIMANT has no right to liquidated damages.

10. In fact, it is RESPONDENTS case that CLAIMANT is claiming $9.6 million by way of liquidated damages. A party is only entitled to liquidated damages when the contract allows and quantifies the same in case of a breach. RESPONDENT would like to point out that CLAIMANT has no right to liquidated damages as the contract does not give CLAIMANT any right to liquidated damages and the same is not a payment claim. [*ICC CASE NO. 14667/2011*]

II. The CISG does not govern the claims arising out of the Sale and Purchase agreement No. 1 and Sale and Purchase agreement No. 2.

11. Article 20 of the Sale and Purchase agreements [*CL. EX. 2 & 6*] envisages for application of the national law of Wulaba and further states clearly that all other applicable laws are to be excluded. **[A]** Therefore there is an express exclusion of CISG by the parties **[B]** and any 'reasonable person' in the shoes of RESPONDENT would have believed that the governing law is the national law of Wulaba only.

A. There is an express exclusion of CISG by the parties.

12. The non-mandatory nature of the CISG is the major theme of the convention. Party autonomy is a principle enshrined under the CISG and the parties to a contract can choose to "opt out" of CISG if they so desire [*FERRARI I, p. 86; PRINTING SYSTEM CASE*]. The source of this autonomy is contained in Art. 6 of the CISG which states that "*the parties may exclude the application of the Convention or, subject to Article 12, derogate from or vary the effects of any of its provisions*".

13. It is pertinent to further state that It has been held that CISG governs sales contracts where the parties have places of business in different nations, the nations are CISG signatories, and only if the contract does not contain a choice of law provision [*AMERICAN BIOPHYSICS CASE*].

14. RESPONDENTS submit that the parties have expressly excluded the application of CISG. Article 20 of the Sale and Purchase agreements [*CL. EX. 2 & 6*] clearly stipulates for the use of the national law of Wulaba and to make the true intent of the party clear, it states, *"All other applicable laws are to be excluded"*. As party autonomy is the underlying principle of the CISG, it is very clear that the parties have expressly "opted out" of the convention and therefore excluded the application of CISG by providing the national law clause all together.

B. Any 'reasonable person' in the shoes of the RESPONDENT would have believed that governing law was the national law of Wulaba.

15. Art. 8 (2) lays down a test, according to which the conduct of CLAIMANT is to be interpreted according to the understanding of a reasonable person in the shoes of RESPONDENT [*HONNOLD, ¶. 107*]. This reasonable person refers to a person with the same technical skills, linguistic background, and knowledge of prior dealings and past negotiations that took place between the parties [*FARNSWORTH, P. 98*].

16. The fact that the Sale and Purchase agreements have been drawn up by CLAIMANT is not disputed. A reasonable or prudent man could believe from the Sale and Purchase agreement that the parties have clearly "opted out" of the CISG by inserting Article 20 under which, it clearly states that the national law of Wulaba is be applied and all other applicable laws are to be excluded. The choice of law clause under Article 20 is an express exclusion of the CISG by the parties and therefore should direct this Tribunal to apply the national law of Wulaba only.

III. Assuming CISG applies, its provisions been invoked on the account of:

A. Lack of insurance cover in the first transaction.

17. INCOTERMS DDP doesn't impose any obligation on RESPONDENT to purchase insurance [*JAN RAMBERG*]. Under DDP CLAIMANT has an obligation to deliver the goods and risk passes to RESPONDENT only when the goods have been placed at his disposal at the agreed place of delivery [*PIZZA CARTONS*] for which CLAIMANT should have purchased insurance as he has a duty to deliver the goods at CLAIMANTS place of business.

18. Furthermore Article 8 of CISG speaks of the intent of the parties [*COFFEE CASE*] and it's clear from the exhibits that RESPONDENT didn't want to be surprised with any additional costs and even paid an additional cost on the delivery of goods by way of increased price. Hence it's an implied that CLAIMANT bears the costs of insurance as he promised to bear all costs involved in transporting the goods.

B. Timing of delivery of prototype.

19. The sale and purchase agreement states that the prototypes should be provided within 14 days period. RESPONDENT had made the payment on 31st July and the goods were received on the 15th of August, thereby causing a delay, as RESPONDENT should have received it on 14th August.

20. When time limit is stipulated and even if time is not the essence of contract, a party can claim for damages from a breach of contract [*PHILLIPS V. LAMDIN; RAINERI V. MILES; KIM LEWISON PP.15.12-15.13*]. Hence CLAIMANT is liable for a breach for late delivery for prototype.

C. Non-conformity of goods.

21. RESPONDENT further submits that CLAIMANT goods only conform to the contract, if they are of the prescribed quality, quantity and are of the same descriptions that are required by the contract [*LIVENSKY V. GEORGIO*] and to the satisfaction of the RESPONDENT [*COKE CASE*] for which CLAIMANT is liable as the goods were not of the same description as the size of prescribed in the S&P and the final goods were different.

22. Its further submitted that goods don't conform to the contract unless they are fit for any particular purpose expressly or impliedly made known to CLAIMANT [*TEEVEE TUNES, INC. ET AL V. GERHARD SCHUBERT GMBH*] and that is to sell as replacement watchstrap for the Cherry watches.

23. Furthermore CLAIMANT will also be liable if the goods don't conform to the sample held out to the RESPONDENT [*BRUGEN V. DEUREN*] as he has created an understanding under Article 8 CISG that the goods will conform to the sample and the goods didn't not even conform to the sample as they weren't as soft nor did they look handmade and hence CLAIMANT is liable for delivering non conforming goods.

D. Payment of money under the transaction.

24. There are 2 sale and purchase and agreements entered into by the parties. With regards to the 1st transaction according to Article 58(3) of the CISG RESPONDENT is to pay for the price of the goods only after the examination of the goods. In the first transaction RESPONDENT didn't have an opportunity to examine the goods as they were lost in transit and hence the seller is liable to refund the entire USD 15,000,000 for the 1st transaction.

25. RESPONDENT entered into agreement No.2 because the price seemed attractive and RESPONDENT had already secured some orders based on the prototypes provided by the sellers. However since the goods didn't not conform to the contract, its amounts to a improper performance for which the buyer isn't under an obligation to pay the price [*RECYCLING MACHINE; SCHWENZER, HACHEM, CHRISTOPHER; ICC CASE NO. 8547*]

IV. RESPONDENT'S counterclaim compensation stands valid.

26. It is respectfully submitted before this Hon'ble Tribunal that **[A]** counter claim (b) and (c) by RESPONDENT stands valid on the grounds Loss caused due to the delay in the first shipment. **[B]** Costs in direct relation to CLAIMANT'S production error RESPONDENT's have a right to raise counter claim in defense [*CIETAC ARTICLE 16*].

A. Counterclaim (b) by RESPONDENT stands valid, as there is a direct connection between the stipulated cost and the production error by CLAIMANT.

27. Counterclaim (b) by RESPONDENT is for the costs incurred in the development of the respondents website for the purpose of marketing the product, the same has direct connection with the present dispute.

28. RESPONDENTS invested in the marketing of the watchstraps on the assurance that the final product matches with the prototype. RESPONDENTS incurred a loss as the negligence of CLAIMANT would implode and the product of RESPONDENT would not gain the foreseen profits.

29. Any claims, demands and cause of action connected directly or indirectly to the agreement not limited to the claims or issues shall be put forth to the aggrieved parties. The incentive for RESPONDENT to create the website was in direct relation to the stipulated production by CLAIMANT as per the guidelines of RESPONDENT. [*YACHTS AMERICA, INC.; THOMAS BRUCE WILSON V. THE UNITED STATES*.].

30. There is a limitation to the directly connected costs, the costs can properly be described as having been incurred in connection with the stipulated dispute point irrespective of the kind of connection. The website development cost being the marketing cost of RESPONDENT is directly connected to the agreement by CLAIMANT to deliver the precise watchstraps. [*CALIBRE FINANCIAL SERVICES LIMITED V. MORTGAGE ADMINISTRATION SERVICES (CALIBRE) LIMITED*].

B. Counterclaim (c) by RESPONDENT claiming compensation for loss of profits is a valid demand against CLAIMANT.

31. RESPONDENTS submits they had to deal with the extra cost of the first lost shipment along with the initial 20% cost of the second shipment. All the above mentioned costs would subtract the scope of profit for RESPONDENT as the net cost of the product would rise due to these additional costs.

32. CLAIMANT had agreed to deliver the product without any additional prices, but to RESPONDENTS' surprise CLAIMANTS' did not insure the goods, in turn RESPONDENTS were made to pay reluctantly for the lost shipment, which would have been recovered by insurance. [*CL EX 2 & 6, ART. 3*].

33. In the present dispute there is breach of agreement by CLAIMANT with regard to delay in the first shipment and production error of the second shipment, thus giving a

reasonable measure to see the certainty of the losses incurred. Thus this claim is a valid demand. [*TWIN DISC, INC. V. BIG BUD TRACTOR, INC*].

REQUEST FOR RELIEF

In light of the arguments advanced, RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal does not have jurisdiction to deal with claims raised by CLAIMANT;
2. CISG does not govern the claims arising under Sale and Purchase agreement No.1 and Sale and Purchase agreement No. 2;
3. CLAIMANT is liable to pay $17.4 million to RESPONDENT for payments made
4. CLAIMANT is liable to pay $10,000 to RESPONDENT for website development cost;
5. CLAIMANT is liable to pay $20 million to RESPONDENT for loss of profits.