
SIXTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

MEMORANDUM FOR CLAIMANT

CLAIMANT

RESPONDENT

Albas Watchstraps Mfg. Co. Ltd

Gamma Celltech Co Ltd

241 Nathan Drive, Yanyu City

17 Rodeo Lane, Mulaba

Yanyu

Wulaba

TEAM CODE- 237C

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TABLE OF DEFINITIONS

Agreement(s)/ SPA/SPA2	Sale and Purchase Agreement Signed on 23 rd July 2014 and 7 th November 2014, respectively, between the parties
&	And
¶	Paragraph
Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Rules	CIETAC Arbitration Rules effective as of 1 January 2015
CISG	United Nations Convention on Contracts for the International Sale of Goods
Claimant	Albas Watchstraps Manufacturing Co. Ltd, a company incorporated under the laws of Yanyu
Dispute	Dispute between the Parties as set out in Application for Arbitration dated 18 November 2015, Answer and Statement of Defence dated 18 December 2015 and narrowed by procedural Order No.1 dated 14 March 2016
DDP	Delivery Duty Paid, INCOTERMS 2010, Issued by ICC
ICSID	International Centre for the Settlement of Investment Disputes
INCOTERMS Guidelines	INCOTERMS Guidelines 2010, DDP, A3(b)
Model Law	UNCITRAL Model Law with 2006 amendments
Moot Problem	The Sixth International Alternative Dispute Resolution Mooting Competition Moot Problem 2016
New York	Convention on the Recognition and Enforcement of Foreign Arbitral

Convention/NYC	Awards
P.	Page number
Parties	Claimant and Respondent collectively
PCIJ	Permanent Court of International Justice
Respondents	Gamma Celltech Co. Ltd., a company incorporated under the laws of Wulaba
Secretariat Commentary	Secretariat Commentary Guide to CISG 1978 Draft
Tribunal	The arbitral tribunal formed on 15 th March, 2016 for the present proceeding
UNCITRAL	United Nations Commission of International Trade Law
USD	United States Dollars
UNCITRAL Model Law	UNCITRAL Model Law with 2006 amendments
UNIDROIT PICC	UNIDRIOT Principles on International Commercial Contracts, 2010

TABLE OF AUTHORITIES

Index of Legal Sources

CITED AS	FULL CITATION
CEITAC Rules	CIETAC Arbitration Rules effective as of 1 January 2015
CISG	CISG, Vienna, 11 April 1980, S.Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3
Model Law	UNCITRAL Model Law with 2006 amendments

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CITED AS	FULL CITATION	CITED AT PARAGRAH
A/CONF.97/C.1/SR.3	Report of the UNCITRAL on the summary of discussion of the preliminary Draft, English Session, A/CONF.97/C.1/SR.3, paras. 53-65, <i>reprinted in</i> Official Records 247-248.	[21]
Adam	Adam Newhouse , <i>CISG, A tool for Globalisation(2): American and Japanese Perspective</i>	[34]

Bianca	Bianca, in Bianca-Bonell, <i>Commentary on International Sale of Goods</i> , (3 rd ed, 2009), 51.	[37]
Bonell	V Knapp, 'Arts. 74–77 CISG' in <i>CM Bianca and MJ Bonell (eds)</i> , <i>Commentary on the International Sales Law: The 1980 Vienna Sales Convention</i> (1987)	[20], [39]
Born	Gary B Born, <i>International Commercial Arbitration</i> (Kluwer Law International, 2nd ed, 2014)	[1], [3], [6], [9]
Curran	Vivian Curran, <i>The Interpretive Challenge to Uniformity Review of Les premières applications jurisprudentielles du droit uniforme de la vente internationale by Claude Witz</i> , in: 15 <i>Journal of Law and Commerce</i> (1995)	[24]
Jones	Dough Jones, <i>Dealing with Multi-Tiered Dispute Resolution Process</i> ((2009) 75 Arb. 2)	[5]
Enderlin/Moskow	Fritz Enderlein & Dietrich Maskow, <i>Commentary by Fritz Enderlein & Dietrich Maskow</i> (Oceana Publications, 1992)	[36]
Feltham	Feltham, <i>The United Nations Convention on Contracts for the International Sale of Goods</i> , 1981 <i>J. Bus. L.</i>	[23]
Fouchard/Gaillard/Go ldman	Emmanuel Gaillard and John Savage (eds), <i>Fouchard Gaillard Goldman on International Commercial Arbitration</i> (Kluwer Law International, 1999)	[12]
Gutteridge	Gutteridge, <i>An International Code of the Law of Sale</i> , 14 <i>Brit. Y.B. Int'l L.</i> 75, 82 (1933)	[19]

Hague records	I Hague Conference Records & Documents 33	[19]
Honnold	John.O.Honnold , Uniform Law for International Sales under the 1980 United Nations Convention, 3rd edition (1999) .	[38], [39]
Koneru	Phanesh Koneru, <i>The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles</i> , in: 6 Minnesota Journal of Global Trade (1997)	[24]
Lookofsky	Lookofsky, <i>Understanding the CISG</i> , (2008)	[19], [36]
Magnus	Magnus, <i>Staudinger Kommentar</i> (2005)	[31], [38]
Posch	Willibald Posch, <i>Kommentar, UN-Kaufrecht, in: SCHWIMANN, ABGB-Praxiskommentar, Volume 5</i> , pp. 1011-1057, Wien 1997	[24]
Redfern/Hunter	Nigel Blackaby and Constantine Partasides, <i>Redfern and Hunter on International Arbitration</i> (OUP, 5 th edition, 2009)	[20]
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, 3 rd ed, 2010)	[21], [22], [24], [31], [40]
Tunc	Tunc, <i>The Uniform Law on the International Sale of Goods: A Reply to Professor Nadelmann</i> , 74 Yale L. J. 1409, 1411-1413 (1965)	[20]

UNCITRAL Report	Report of UNCITRAL on the work of its eleventh session, A/33/17, paras. 15-18 (1978), <i>reprinted in</i> [1978] IX Y.B. UNCITRAL	[21]
Witz	Witz/ Salger/ Lorenz, <i>Kommentar</i> (2000)	[31]

Index of Cases

Arbitral Awards

CITED AS	FULL CITATION	CITED AT PARAGRAH
Ad Hoc		
<i>Ad-hoc Case of 4 May 1999</i>	‘Final Award in ad-hoc case of 4 May 1999’ (2000) XXV <i>Yearbook of Commercial Arbitration</i> 13	[3]
CEITAC		
<i>G&M</i>	China July 2006 CIETAC Arbitration proceeding (<i>Granite and marble case</i>)	[36]
<i>Mung bean case</i>	China 22 March 2001 CIETAC Arbitration proceeding (<i>Mung bean case</i>)	[40]
<i>Souvenir</i>	China 2000 CIETAC Arbitration proceeding (<i>Souvenir coins case</i>)	[36], [39]
CLOUT Cases		
<i>CLOUT Abstract no. 1400</i>	CLOUT Abstract no. 1400, SWITZERLAND, Pretore del Distretto Lugano 19 April 2007	[23]
ICC		

<i>Buckwheat</i>	ICC Arbitration Case No. 9773 of 1999	[36]
<i>ICC Case No 6276</i>	‘Partial Award in ICC Case No 6276’ (2003) 14(1) <i>ICC International Court of Arbitration Bulletin 76</i>	[1]
<i>ICC Case No 8445</i>	‘Final Award in ICC Case No 8445’ (2001) XXVI <i>Yearbook of Commercial Arbitration 167</i>	[3]
<i>ICC Case No 10256</i>	‘Interim Award in ICC Case No 10256’ (2000) 14(1) <i>ICC International Court of Arbitration Bulletin 82</i>	[1], [3]
<i>ICC Case No 11490</i>	‘Final Award in ICC Case No 11490’ (2012) <i>XXXVII Yearbook of Commercial Arbitration 32</i>	[3], [5], [9]
<i>Licensor v. Licensee</i>	<i>Licensor (Germany) v. Licensee (France)</i> , (1992) ICC Award No. 6709	[12]
<i>Russia Case</i>	Russia 24 January 2002, Arbitration Proceeding 27/2001, available at. http://cisgw3law.pace.edu/cases/020124rl.html	[28]
<i>Steel Bar Case</i>	ICC Arbitration Case No. 6653 of 26 March 1993	[23]
ICSID		
<i>Biwater</i>	<i>Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania</i> (Award) (ICSID Arbitral Tribunal, Case No ARB/05/22, 24 July 2008)	[5]

<u>Foreign Cases</u>		
France		
<i>CCC</i>	France Chambre Arbitrale de paris case no 9926 of 2007 <i>(chemical compound case)</i>	[37]
<i>Mobile</i>	Germany 29 March 2001 District Court Trier	[38]
<i>Mussels</i>	Germany 8 march 1995 SC (new Zealand Mussels case)	[36]
<i>Memory module case</i>	Germany 12 November 2001 Appellate Court Hamm	[40]
<i>Shoes Case</i>	Germany 1 July 2002 Appellate Court München <i>(Shoes case)</i>	[33]
Hong Kong		
<i>Astel</i>	<i>Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd</i> [1994] HKCFI 276	[5], [9]
<i>Fai v Sui</i>	<i>Fai Tak Engineering Co Ltd v Sui Chong Construction & Engineering Co Ltd</i> [2009] HKDC 141	[5], [9]
<i>Hercules</i>	<i>Hercules Data Comm Co Ltd v Koywa Communications Ltd</i> [2000] HKCFI 71	[9]
<i>Hyundai Case</i>	<i>Hyundai Engineering and Construction Company Ltd v Vigour Ltd</i> [2004] HKCFI 205	[6]
<i>Lucky-Goldstar</i>	<i>Lucky-Goldstar International (H.K.) Limited v. Ng Moo Kee Engineering Limited</i> , (1993) 2 Hong	[10]

	Kong Law Reports 73	
Japan		
<i>X v Y</i>	<i>X v Y</i> [2011] 2116 Hanrei Jiho 64 (Tokyo Koto Saibansho [Tokyo High Court])	[9]
New Zealand		
<i>Marnell.</i>	<i>Marnell Corrao Assoc. Inc. v. Sensation Yachts Ltd.</i> , [2000] 15 PRNZ 608,623 (Auckland High Ct.)	[13]
PCIJ		
<i>Mavrommatis</i>	<i>Mavrommatis Palestine Concessions Case</i> (Greece v UK) (1924) PCIJ (ser A) No 2	[1]
<i>Judgment of 15 March 1999</i>	Judgment of 15 March 1999' (2002) 20 ASA <i>Bulletin</i> 373 (Kassationtgericht Zurich [Zurich Appellate Court])	[5]
Singapore		
<i>Lufthansa Case</i>	<i>International Research Corp PLC -v- Lufthansa Systems Asia Pacific Pte Ltd.</i> [2013] SGCA 55	[6]
Spain		
<i>Madrid</i>	Spain 22 March 2007 Appellate Court Madrid	
<i>Rolled</i>	Spain 3 November 1997 Appellate Court Barcelona (<i>Rolled steel case</i>)	[32]
UK		
<i>Chalbury</i>	<i>Chalbury Mccouat Int'l ltd. v. PG Foils Ltd</i> [2010] EWHC 2050	[13]

<i>Holloway Case</i>	<i>Holloway v Chancery Mead Ltd</i> [2007] EWHC 2495 (TCC)	[6]
<i>Fiona</i>	<i>Fiona Trust & Holding Corp v. Privalov</i> , [2007] UKHL 40	[10]
<i>Mangistaumunaigaz</i>	<i>Mangistaumunaigaz Oil Production Association v. United World Trade Inc.</i> [1995] 1 Lloyd's Law Rep. 617	[12]
<i>Grand Thorton Case</i>	<i>Tang Chung Wah (Aka Alan Tang) and another v Grant Thornton.International Limited and ors</i> [2012] EWHC 3198 (Ch)	[6]
USA		
<i>. Wolf</i>	<i>American Broadcasting Companies v. Wolf</i> , 52 N.Y. 2d394 (1981)	[6]
<i>Central Iron</i>	<i>New York Central Iron Works Company v. United States Radiator Company</i> , 174 N.Y. 331 (1903)	[12]
<i>Colfax v. Local</i>	<i>Colfax Envelope Corp. v. Local No. 458-3M</i> , 20 F.3d 750 (7th Cir. 1994)	
<i>Dalton v .Educational</i>	<i>Dalton v .Educational Testing Service</i> , 87 N.Y.2d 384, 389 (N.Y., 1995)	[12]
<i>Howard v. Frank</i>	<i>Howard Elec. v. Frank Briscoe Co.</i> , 754 F.2d 847 (9th Cir. 1985)	[10]
<i>Solutia Case</i>	<i>Fluor Enters Inc v Solutia Inc</i> 147 F Supp 2d 648 (SD Tex 2001)	[6]
<i>Kowalchuk Case</i>	<i>Kowalchuk v. Stroup</i> , 61 AD 3d 118, 121 (First Dept. 2009)	[15]

<i>Moses v. Mercury</i>	<i>Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.</i> , 460 U.S. 1 (1983)	[10]
<i>Nicaragua v. Standard</i>	<i>Republic of Nicaragua v. Standard Fruit Co.</i> , 937 F.2d 469 (9th Cir. 1991)	[10]
<i>Publicker Industries Case</i>	<i>Publicker Industries v. Union Carbide Corp.</i> , 17 U.C.C Rep. Ser. 989.	[22]
<i>R.G. v. Horn</i>	<i>R.G. Group, Inc. v. Horn and Hardart Co.</i> , 751 F.2d. 69 (2 nd Cir. 1984)	[15]
<i>U. S. v. Horn Case</i>	<i>United States v. Horn</i> , 29 F.3d 754, 759 (1st Cir. 1994).	[22]
<i>White v Kampner</i>	<i>White v Kampner</i> , 229 Conn 465 (Conn, 1994)	[6]
<i>Wood v Lucy</i>	<i>Wood v. Lucy</i> , 222 N.Y. 88 (1917)	[12]
<i>Yankee v. Stein</i>	<i>Yankee Lake Press Association v. Stein</i> , 68 AD 3d. 1603 (Third Dept. 2009)	[15]
<u>CISG Cases</u>		
<i>Asante Case</i>	<i>Asante Technologies v. PMC-Sierra [USA]</i> , U.S. Federal District Court in California, 27 July 2001, CISG Database, Pace University, http://cisgw3.law.pace.edu/cases/010727u1.html	[19]
<i>ICC Case No. 7929</i>	ICC Arbitration Case No. 7929 of 1999, in: CISG Database, Pace University, http://cisgw3.law.pace.edu/cases/999187i1.html	[19]

STATEMENT OF FACTS

1. **Albas Watchstraps Mfg. Co. Ltd. (“Albas” or “the Claimant”)** is one of the leading manufacturers and exporters of leather watchstraps in Yanyu since 1973. The Claimant sells its watchstraps to importers of watchstraps and watch producers all over the world, as well as to local distributors in Yanyu.
2. **Gamma Celltech Co. Ltd. (“GCT” or “the Respondent”)**, formed in 2002, is one of the fastest growing traders of smart mobile phones in Wulaba. In 2011 it expanded its product range to include smart mobile phone accessories.
3. The timeline of the Dispute is mentioned below:
 - **23 July 2014:** The parties concluded the Sales and Purchase Agreement where the Claimant would buy certain amount of leather watchstraps for Cherry Watch from the Respondent.
 - **31 July 2014:** The Respondent paid the initial deposits of USD 3 million pursuant to the Sale and Purchase Agreement.
 - **14 August 2014:** The Claimant sent a handmade approval prototype for the Respondent to confirm the order.
 - **15 August 2014:** The Respondent approved the prototype with a slight amendment concerning the stitching colour.
 - **10 October 2014:** The Claimant arranged for the ordered watchstraps to be shipped by the sea.
 - **28 October 2014:** The Claimant received a notice from the shipping Company that the watchstraps were lost at sea.

The Claimant offered to provide a replacement shipment provided the Respondent accepted responsibility and made full payment for the lost goods to which the

Respondent reluctantly proceeded and the Parties entered into a subsequent Sale and Purchase Agreement for the replacement goods.

- **29 December 2014:** After having received the balance payment for the Sale and Purchase Agreement 1 and deposit for the Sale and Purchase Agreement 2, the Claimant managed to arrange for an expedited production and finally shipped the watchstraps on this day.
 - **27 February 2015:** The Claimant received a message from the Respondent claiming that it was not going to make the balance payment, as it was not satisfied with the quality of the watchstraps. A reply was sent by the Claimant in which it was said that the goods were in conformity with the prototype which was approved by the Respondent.
4. There was no reply made to the Claimant to his letter dated 27th February 2014. The claimant didn't get any message from the Respondent for around 9 months and hence finally application for Arbitration was made by the claimant on 18th November 2015 as per Article 19 of the Sale and Purchase Agreement.
 5. In the light of the mentioned facts, the Claimant is asking for the damages due to nonpayment of money by the Respondent.

STATEMENT OF ISSUES

- I.** Does the Tribunal have jurisdiction to deal with the payment claims raised by the Claimant?
- II.** Does the CISG govern the claims arising under the Sale and Purchase Agreement and the Sale and Purchase Agreement no.2
- III.** Assuming that CISG does apply, have its provisions been invoked on account of the following:
 - i. Lack of insurance coverage in the first transaction;
 - ii. Timing of delivery of prototype;
 - iii. Non- conformity of goods;
 - iv. Payment of money under the transaction

WRITTEN SUBMISSION

1. THE TRIBUNAL HAS JURISDICTION TO DEAL WITH THE PAYMENT CLAIMS RAISED BY THE CLAIMANT

[I.] The Tribunal has jurisdiction to hear the Dispute in light of the requirement to negotiate

1. Amicable settlement requires not more than indicating an availability to exchange views about a dispute and doesn't impose an obligation to compromise or engage in bargaining with party¹.

A. Claimant has satisfied the requirement to negotiate

2. Claimant satisfied the requirement in Art.19(a) because it indicated an availability to exchange views about dispute² by instantly replying to all the allegations made by Respondent³. But Respondent refused to amicably settle the dispute by continuing to withhold the balance payment and by making no replies to Claimant thereafter⁴.
3. Tribunals frequently rely on the asserted futility of negotiations to justify the rejection of jurisdictional objections to a party's claim⁵. Parties are not required to engage in fruitless negotiations or to delay an orderly resolution of the dispute⁶. It was only after 9 months that the Claimant filed for arbitration⁷ as the parties had reached a deadlock.

¹ Born, 932; *Mavrommatis*; ICC Case No. 6276; ICC Case No 10256

² Moot Problem, 18

³ Moot Problem, 13

⁴ Moot Problem, 18

⁵ Born, 933

⁶ ICC Case No 8445; *Case of 4 May 1999*; ICC Case No 10256; ICC Case No 11490

⁷ Moot Problem, 1

4. It must also be noted that Claimant adhered to the time frame of not more than 14 days before filing for arbitration⁸.

[ARGUENDO]

5. Even if, the pre-requirement of negotiation was not complied with, the Respondent cannot challenge the jurisdiction because the non-compliance was due to their fault⁹.

B. Amicable settlement is not a mandatory pre-condition to arbitration

6. An enforceable negotiation agreement must set out parties' obligations with sufficient certainty¹⁰. Sufficient certainty is obtained when clauses specify the number of negotiation sessions required¹¹, or designated negotiation participants¹², or content or form of amicable settlement¹³.
7. Article 19(1) neither specifies the discernible steps that each party is required to take to put the process in place or a sufficiently defined process to be complied with by parties. Therefore, it is not precise and is unenforceable.

[II.] The Tribunal has jurisdiction to hear the dispute

8. Pursuant to the principle of kompetenz-kompetenz, the tribunal is competent to determine its jurisdiction¹⁴.
9. The Tribunal should exercise jurisdiction regardless of the negotiation requirement because it should not deny parties access to adjudicative proceedings on the basis of non-compliance with procedures that, even if enforceable, are

⁸ Art. 19(a), Moot Problem, 12

⁹ *Judgment of 15 March 1999 ; Biwater; ICC case no 11490; Fai v. Sui; Astel- Peiniger v. Argos; Jones*, 191

¹⁰ *Wolf Case; Holloway Case; Hyundai Case; Lufthansa Case*

¹¹ *White v. Kampner*

¹² *Solutia Case*; Born, 919

¹³ *Grand Thorton*

¹⁴ A. 6(1), The CIETAC Rules; Art II(3), NYC

unlikely to resolve the parties' dispute¹⁵. Secondly, a negotiation requirement is regarded as a contractual obligation and not a condition precedent, even when it is mandatory¹⁶. Therefore, a breach of a contractual obligation only entitles the wronged party to damages and not to prevent arbitration¹⁷. Consequently, the Tribunal has the competence and the jurisdiction to hear the Dispute even if the negotiation requirement has not been met¹⁸.

10. Also, Art.19(1) establishes the clear intention of the parties to submit 'disputes concerning payments' to arbitration. Moreover, the clear weight of authority holds that the most minimal indication of parties' intent to arbitrate must be given full effect, especially in international disputes¹⁹.

11. Furthermore, Article 19(3), which provides for the interpretation of the arbitration clause with the laws of the State of New York also assents for Article 19(1) to be binding because of following threefold reasons:

A. Application of good faith

12. An arbitration agreement, as also recognized by New York Courts is to be interpreted according to the principle of good faith²⁰. Applying this principle, an arbitral Tribunal has to investigate the real intent of the parties²¹. When the real intent of the parties can be established by interpretation of the clause, an arbitral Tribunal shall give full effect to it²².

¹⁵ *X v. Y*

¹⁶ Born, 930

¹⁷ *Fai v Sui; Hercules; Astel; ICC Case No 11490*; Born, 930

¹⁸ *Saint Gobain; PTA v. ZTE.; Avex v. Socata*

¹⁹ *Nicaragua; Moses. v. Mercury; Howard v. Frank; Fiona Trust,; Lucky-Goldstar*; Hunter, 193

²⁰ *Dalton v .Educational; Central Iron Case; Wood v. Lucy*

²¹ *Mangistaumunaigaz Case; Licensor v. Licensee*

²² *Amco; Fouchard, 477*

B. Doctrine of effet-utile

13. Doctrine of effect utile prescribes that an arbitration clause is to be interpreted in a manner which gives it effect rather than leaves it devoid of meaning²³.

14. In the instant case, both parties have signed the agreement with A.19(1) providing for arbitration for dispute resolution²⁴. Applying the principle, it can be stated that both the parties intended to submit to arbitration any ‘dispute concerning payments’²⁵.

C. Therefore, the arbitration clause in Article 19(1) is a binding clause

15. In New York, a contract is binding if there is an intent to be bound all the essential terms²⁶. Furthermore, when a party gives reasonable signals that it means to be bound by an agreement that intent of the parties must not be frustrated²⁷.

16. In the instant case, both the parties have signed the agreement containing arbitration clause, therefore, have shown their intention to submit the disputes concerning payments to arbitration.

²³ *Marnell. Case; Chalbury. Case*

²⁴ Art II(2), NYC; Art. 7, Model Law

²⁵ Moot Problem, 12

²⁶ *Kowalchuk Case; Yankee v. Stein*

²⁷ *R.G. v. Horn*

2. CISG GOVERNS THE CLAIMS ARISING UNDER THE SPA AND SPA2.

17. CISG applies to a contract when both parties have their seat of business in Contracting States. In this case, Article 1(1)(a) and 1(1)(b) are applicable as Countries Yanyu and Wulaba are parties to CISG²⁸ and also CISG applies to contracts of sale of goods between parties who have their places of business in different states when rules of PIL lead to the application of the law of Contracting State.

[I.]The Convention is applicable to the contract consistent with Art. 1 (1) CISG

18. In accordance with Art. 1(1) CISG the Convention only applies to contracts of sale of goods between parties whose places of business are in different States. The disputed contract concerns the sale of leather watchstraps, indisputably a sale of goods in the context of the provision. Moreover, Claimant and Respondent have their places of business in Yanyu and Wulaba respectively which are in different states. Exemptions stated in Arts. 1 (2), 2, and 3 (2) CISG are not pertinent to this case. Consequently, CISG is applicable to the contract concerning material aspects (*rationes materiae*) and internationality.

A. The Contractual choice of law by the parties is a rule of conflict as required by Article 1(1) (b) CISG

19. CISG case law confirms that reference in an international contract to the law of a contracting state must imply a reference to CISG, as this is the law governing international sales of goods²⁹. Since CISG applies by default, a choice-of-law

²⁸ Moot Problem, 20

²⁹ *Asante Case; ICC Case No. 7929.*

clause should be interpreted in accordance with Art. 8 CISG³⁰. Under Art. 8(2) CISG statements made by parties are to be interpreted according to the understanding of reasonable person of the same kind in the same circumstances. When the parties agreed to arbitration in Hong Kong,³¹ they agreed on submitting any disputes to an international forum³². The only logical measure would then be to apply an international set of rules.

20. A deviation from the default law must be clear³³. CISG pre-empts the State domestic law in cases where a national law is agreed upon, and the mere expression of a specific applicable national law in an arbitration clause does not constitute the exclusion of the Convention under Art. 6 CISG³⁴.
21. The choice of law of a Contracting State with no reference to CISG is not to be considered an exclusion of CISG per se³⁵. The suggestions in legislative history of CISG included inserting phrase “the application of Convention shall be excluded if the parties have stated that contract is subject to a specific national law and CISG is not applicable³⁶.” It thus becomes apparent that the drafters of CISG were against the possibility of excluding CISG by pointing to a certain legal system.
22. So it must be presumed that parties intended the application of CISG by expressly choosing the law of a Contracting State without further qualifying such choice. This presumption is widely accepted in domestic case law concerning matters of international trade³⁷. The court ruled that “in absence of clear language indicating that both contracting parties intended to opt out of CISG, the court rejects the

³⁰ Lookofsky, 42; Gutteridge, 75 & 82.

³¹ Moot Problem, 7

³² Hague Records, 330.

³³ Tunc, 1409, 1411-1413.

³⁴ ¶ 15-18, Bonell

³⁵ ¶ 22, Schwenger; ¶ 53-65, UNCITRAL Report.

³⁶ A/CONF.97/C.1/SR.3

³⁷ ¶ 138, Schlechtriem,

contention that the choice of law provision precludes the application of CISG”.³⁸

In the case at hand there is no indication that the parties wanted to opt out of CISG.

23. The court stated that “the choice of law without an explicit declaration that the Convention be excluded does not constitute an implicit exclusion.³⁹ It is thus intended in the referral and takes precedence over the no unified law which would otherwise be applicable”.⁴⁰ The courts repeatedly have rejected assertions which called for exclusion based on the choice of law of a Contracting State without expressly excluding CISG. Thus, due to its ambiguous wording, this clause cannot lead to an exclusion of CISG as CISG is itself Wulaban Law⁴¹.

B.No exclusions can be ascertained from the remaining contract

24. The fact that CISG is not derogated by choosing choice of law clause does not completely rule out the possibility of the parties’ intention to exclude CISG. This is not significant for the current arbitration as an implicit exclusion may only be assumed if the corresponding intent of the parties is sufficiently clear. It is the “opting out” rather than the “opting in” system which CISG drafters retained.⁴² So CISG has to be applied if it cannot be established with sufficient clarity that an exclusion of CISG was intended, taking into account the criteria provided by Art. 8 CISG.⁴³ Art. 6 CISG is not meant to be an easy escape clause from CISG⁴⁴, such an intention must be determined objectively according to Art. 8 CISG.⁴⁵

³⁸ *US v. Horn; Publicker Industries Case*

³⁹ *Feltham; CLOUT Abstract no. 1400; Steel Bar Case.*

⁴⁰ *Supra* note. 9

⁴¹ *OLG Frankfurt Case 2000*

⁴² Curran, 184

⁴³ Posch,1011-1057.

⁴⁴ Koneru, 146

⁴⁵ ¶ 18, Art. 6, Schwenzner

25. In this case there has been absolutely no exclusion of CISG explicitly and hence the applicability of CISG via the law of Wulaba pursuant to Article 1(1)(b) pertains.

3. ASSUMING THAT CISG DOES APPLY, THE PROVISIONS OF CISG HAVE BEEN INVOKED ON ACCOUNT OF THE FOLLOWING:

[I.] Lack of insurance coverage in the first transaction

26. Both parties agreed to DDP in the agreement, according to which there is no obligation on the Claimant to insure the cargo when in transit.

27. DDP imposes maximum obligations on the seller but it doesn't include insurance as an obligation⁴⁶. Also there was no specific obligation on the Claimant for insurance coverage in the agreement.

28. Secondly, the seller is bound to deliver the goods in accordance to the contract⁴⁷ and at a particular place of destination only if the contract explicitly says so⁴⁸. In the present case there was no such mention in the agreement regarding the place of delivery⁴⁹.

29. Thirdly, a reference in a contract to trade terms, like INCOTERMS, should not be taken as an exclusion of the Convention. In determining whether parties at any point agreed on delivery of goods at a particular place, due consideration is to be given to the circumstances of the case including the negotiations, any subsequent conduct of the parties⁵⁰. In the present case the Respondent agreed to the

⁴⁶ INCOTERMS A3 (b)

⁴⁷ Art. 30, CISG

⁴⁸ *Russia Case*

⁴⁹ Moot Problem, 8

⁵⁰ Art. 8(3), CISG

application of INCOTERMS as the Respondent was new to the field of business and not to oblige the seller to deliver the goods to a particular destination.

30. Finally, according to CISG in case of contracts involving carriage of goods the risk is transferred to the seller when the goods are put in transit in the first carrier⁵¹. It can be seen from the facts that the goods were safely delivered to the carrier and the appellant transferred the risk to the Respondent along with the liability of insurance.

[II.] Timing of delivery of prototype

A. The prototype was delivered in time pursuant to Art.33CISG.

31. Although, Art.33 addresses only the obligation to deliver goods, it also indicates time period regarding performance of other obligations of the seller.⁵² In terms of Art.33, timely performance only includes the time when the seller puts the goods to transmission⁵³ and the time of arrival of the goods at the destination is irrelevant⁵⁴. The Agreement requires the seller to deliver prototype within 14 days which the seller complied with⁵⁵.

B. Even if the Tribunal decides that there is a delay it can't be held so under Art.47(1) CISG.

32. According to Art 47(1), the buyer may fix additional period of time for performance by the seller of his obligation which the buyer did by tolerating delay which is equivalent to granting of additional time provided in Art.47.⁵⁶

33. The Claimant assert that the late delivery is not a fundamental breach per se.⁵⁷ And the delay of prototype has caused no delay in the final delivery of goods.

⁵¹ Art.67(1),CISG

⁵² ¶3, Magnus.

⁵³ ¶13, Schwenger.

⁵⁴ ¶7, Witz

⁵⁵ Moot Problem, 8

⁵⁶ *Rolled*

⁵⁷ *Shoes Case*

34. Secondly, the equitable principle of estoppels flows directly from the obligation to act in good faith⁵⁸. The principle avoids injustice by preventing a party who does an act on which the other party relies.⁵⁹ The buyer on receiving prototypes never raised any objection to the delay.

[III.] Non-conformity of goods

35. Article 35 CISG has been invoked here and the allegation of non-conformity are rejected.

36. The watchstraps were of the description required by the contract, Art.35(1)CISG. The description stated in Agreement-2 was abided. Prototypes provided by the seller and accepted by the buyer constitute an implicit agreement that the goods are of the same quality as the sample.⁶⁰ When a sample is referred in the contract as in Art.5⁶¹, the characteristics of the sample becomes a contractual term.⁶² The contract may require the seller to send prototype as source of description and the buyer having received the sample doesn't raise any objection, samples are an accurate representation of party's intention as to conformity⁶³. The Claimant follows a practice in cases of customised goods by sending handmade prototype for approval and is valid under Art.9 CISG, these usages prevail over the objective standards imposed by Art.35 CISG.⁶⁴

⁵⁸ Article 7(1), CISG

⁵⁹Adam , 46.

⁶⁰ ¶ 71,74 & 86, Lookofsky; *Mussels I*

⁶¹ Moot Problem, 7

⁶² Enderlein, 112

⁶³ *G&M; Souvenir* .

⁶⁴ *Buckwheat*

A. Even if the Tribunal concluded that a lack of conformity exists, Claimant isn't liable for it.

37. When the prototype provided was examined by the buyer they raised no question as to the non-conformity which excludes seller's liability under Art 35(3) CISG.⁶⁵ Also the prototype provided was handmade not machine made so the buyer can't rely on the apparent qualities he knows in reality not to be present in the goods he is going to buy.⁶⁶

B. Respondent failed to give timely notice pursuant to Art.39 CISG.

38. A buyer who fails to notify within a reasonable time loses its right to all remedies relating to the non-conformity.⁶⁷The Respondents received watchstraps on 29th January'14 and could only inform the Claimants on 27th February'15 which is unreasonable as the defects asserted are of apparent nature.Even in cases of durable goods period of 14 days or less is considered reasonable.⁶⁸

[IV.] Payment of money under the transaction

A. The buyer is obliged to make the payment under the first transaction

39. Here Article 6 of CISG has been invoked which allows the parties to derogate from any of its provisions by adopting provisions in their contract providing solutions different from those in the Convention.⁶⁹The Convention applies only to the extent that no contrary intention of the parties can be established.⁷⁰It does not

⁶⁵ CCC

⁶⁶ Bianca, 51.

⁶⁷ Honnold, 259; *Mobile*

⁶⁸ ¶22, Magnus

⁶⁹.Honnold, 77

⁷⁰ Bonell, Art.74-77

invalidate proscribed contracts and oppressive terms.⁷¹ It was held that agreement to limit liability clause by parties will supersede provisions of CISG⁷². It can be thus concluded that the seller relied on the buyer's promise to make the payment for 1st transaction and then only came to a subsequent Agreement.² Thus the general principle of estoppel applies with the principle of good faith⁷³.

B. Article 53 obliges the buyer to pay due amount of the second transaction.

40. It is obligation of the buyer to take delivery of goods and pay the contract price of the goods. In this case, seller delivered the goods as per Agreement.² hence entitled for balance payment by Respondent as they committed fundamental breach of contract under Art.25 CISG by not paying for goods. Seller's main expectation under any contract is payment of money for the goods he provides to other party⁷⁴ which is denied to the seller in the present case. Article 7(1) of CISG applies not only to interpretative issues but also to the manner in which parties act.⁷⁵ In this case Respondent acted in bad faith by not replying to Claimant's letter⁷⁶, as it was clear that the Claimant had sent confirming goods as per the agreement. Also the prototype was approved by Respondent.

⁷¹ Honnold, 27

⁷² *Souvenir*

⁷³ Art.7(1), CISG

⁷⁴ *Memory Module ; Mung Bean.*

⁷⁵ Schlechtriem, 37.

⁷⁶ Moot Problem, 13

REQUEST FOR RELIEF

In the light of above submission, counsel for Claimant respectfully requests the Tribunal to find that:

- a) The Tribunal has jurisdiction to deal with the payment claims raised by the Claimant
- b) CISG governs the claims arising under the Sale and Purchase Agreement and the Sale and Purchase Agreement No. 2,
- c) The provisions of CISG have been invoked on account of the following:
 - i. Insurance coverage in the first transaction is the burden on the buyer under Article 66;
 - ii. Claimant has done the delivery of prototype within the stipulated time Article 33;
 - iii. The Claimant delivered goods confirming to the contract under Article 25;
 - iv. Claimant is entitled to get the payment for both the transactions Article 6 and 53;

Respectfully Submitted
Counsel for the Claimant

Sd/-