SIXTH INTERNATIONAL

ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

5 JULY – 9 JULY 2016

HONG KONG

MEMORANDUM FOR RESPONDENT

Team No. 392 R

ON BEHALF OF	**AGAINST**
GAMMA CELLTECH CO. LTD.	ALBAS WATCHSTRAPS MFG. CO. LTD.
17 RODEO LANE MULABA WULABA	241 NATHAN DRIVE YANYU CITY YANYU
RESPONDENT	**CLAIMANT**

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Abbreviation	Full Title
CISG	United Nations Convention on Contracts for the International Sale of Goods (2010)
CIETAC Rule	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules (2015)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
NY State Law	New York State Law

LIST OF ABBREVIATIONS

Abbreviation	Word/Phrase
¶(¶)	Paragraph(s)
AfA	Application of Arbitration
Art.	Article
Agreement No.1	A Sale and Purchase Agreement concluded by Albas Watchstraps Mfg. Co. Ltd and Gamma Celltech Co. Ltd. on 23 July 2014
Agreement No.2	A Sale and Purchase Agreement concluded by Albas Watchstraps Mfg. Co. Ltd and Gamma Celltech Co. Ltd. on 7 November 2014
Agreements	Agreement No.1 and Agreement No.2
CLAIMANT	Claimant in this arbitration, Albas Watchstraps Mfg. Co. Ltd., based in Yanyu.
Clarifications	Request for Clarifications
CL's Req.Ref.	CLAIMANT's Request for Relief (Can be found at p.4 of the record)
CIETAC	China International Economic and Trade Arbitration Commission
Exh.C	Claimant's Exhibit Number
Exh.R	Respondent's Exhibit Number
K	thousand(s)
M	million
PARTIES	Albas Watchstraps Mfg. Co. Ltd. & Gamma Celltech Co. Ltd.

Abbreviation	Word/Phrase
p.	Page
PO1	Procedural Order Number 1
RESPONDENT	Respondent in this arbitration, Gamma Celltech Co. Ltd. , based in Wulaba
Res.Memo	Memorandum for RESPONDENT
SoD	Statement of Defense
the Tribunal	Ms. Felicity Chan, Dr. Anne Descartes and Mr. Martin Mayfair
$	United States dollar

A. The Tribunal does not have jurisdiction over the payment claims raised by the CLAIMANT

1 The Tribunal does not have jurisdiction over the claim since **[I]** the dispute resolution clause cannot show PARTIES' intention to arbitrate; **[II]** alternatively, CLAIMANT failed to comply with the mandatory condition precedent to arbitration.

I. The Dispute Resolution Clause cannot show PARTIES' intention to arbitrate

2 Parties has the fundamental right to a court's decision about the merits of its dispute [First Options Case], which can only be waived by effective arbitration agreement.

3 In the present case, the intention to arbitrate is not clear, because **[a]** the mandatory forum selection clause prevails over the non-mandatory arbitration clause and **[b]** were the arbitration clause mandatory, the internal contradiction in the dispute resolution clause makes the arbitration agreement pathological.

a. The mandatory forum selection clause Art.19(c) of Agreement-No.2 prevails over the non-mandatory arbitration clause Art.19(a) of Agreement-No.2

4 The dispute resolution clause should be interpreted in accordance with New York law *[Exh.C6,Art.19(c)]*. The court should give effect to all of the language used by the parties and avoid an interpretation that would leave contractual clauses meaningless. Although first

sentence of Art.19(a) of Agreement-No.2 requires the party to resolve the disputes amicably, the provision does not *per se* make the arbitration clause mandatory. It should be read in conjunction with second sentences of Art.19(a), which strongly suggests the non-mandatory nature of arbitration clause. The second sentence of Art.19(c) provides that either party may submit the dispute to CIETAC in Hong Kong, when the parties failed to reach an amicable resolution. The term "may" express the permissive nature where one party has the right to do something *[Florida Case]*. Furthermore, Art.19(b) of Agreement-No.2 reiterates that PARTIES retain the possibility to resort to the court in Hong Kong. In contrast to the arbitration clause, the wording of Art. 19(c) of Agreement-No.2 imposed a definite obligation on the parties to resort to the court in Sate of New York.

5 In short, the arbitration clause is non-mandatory and forum selection clause is mandatory. When mandatory forum selection clause coexists with non-mandatory arbitration clause, the former prevails the latter. In *M/S Case*, the judge found that using “may” makes the arbitration clause non-mandatory while using “shall” makes the forum selection clause mandatory. The judge found that “[i]n case arbitration is sought by one party to the dispute, the other parties had an option, whether to agree for resolution by arbitration or not and the party seeking arbitration could not compel the other party to go through the process of arbitration.”

6 In conclusion, PARTIES still can arbitrate if RESPONDENT agrees to do so. However, since

arbitration was only optional, RESPONDENT is not compelled to agree. This is the intention of RESPONDENT which wants to keep its option open *[Clarifications¶13]*; that is, the option between litigation and arbitration. As RESPONDENT denies to arbitrate and there is no consensus between PARTIES, the Tribunal shall not have jurisdiction to deal with the current dispute.

b. Alternatively, the internal contradiction in the dispute resolution clause would make the arbitration clause pathological

7 If the Tribunal were to hold that Art.19(a) of Agreement-No.2 mandates PARTIES to arbitrate, RESPONDENT submits that this interpretation would cause internal contradiction, which renders parties intention ambiguous and thus the invalidates the whole dispute resolution clause.

8 A valid arbitration agreement should confer exclusive jurisdiction to an arbitral tribunal and exclude any state court's jurisdiction *[Born,p.1252]*. Consequently, the coexistence of mandatory arbitration clause and mandatory forum selection clause would inevitably make the arbitration clause pathological *[Fouchard,N488,FN133; Frignaini,p.564]* since party will necessarily breach one when they choose to follow the other. If the Tribunal interprets Art.19(a) of Agreement-No.2 as mandatory, this would cause the arbitration clause pathological and thus defeats the Tribunal's jurisdiction.

9 CLAIMANT might allege that the contradiction could be reconciled by taking the forum

selection clause as a conferral of supervisory jurisdiction of courts *[Paul Smith Case]*. Respondent is aware of there are some cases adopting such interpretation. However, none of them are applicable to the case at hand. The selected litigation forums in these cases were identical to the selected arbitration seats so that the courts can have supervisory power over the arbitral tribunals respectively. Once the court selected and the seat of arbitration are different, the courts will have difficulties, if not impossible, to supervise arbitral tribunal as the parties are said to whish *[Indian Oil Case]*. The courts of the state of New York, the selected litigation forum, cannot have supervisory jurisdiction over the arbitral tribunal seated in Hong Kong. Hence, the pathological arbitration clause still cannot be cured by interpretation.

II. Alternatively, CLAIMANT failed to comply with the mandatory condition precedent to arbitration

10 Even if the Tribunal regards PARTIES may pursue to arbitration, the CIETAC still should reject the jurisdiction, since CLAIMANT failed to fulfill the mandatory condition to arbitration provided in Art.19(a) of Agreement-No.2.

11 According to Art.19(a) of Agreement-No.2, the parties are entitled to arbitration, when they fail to reach an amicable resolution within a reasonable time, which is 14 days. The condition precedent shows the parties' consent to arbitrate is contingent on the fulfillment of the pre-conditions *[Paulsson,p.616]*. Furthermore, to establish pre-arbitration procedure as a mandatory condition, regard must be given to the wording of the clause *[Berger,p.3;*

Born,p.841]. In the present case, the first sentence of Art.19(a) obligate PARTIES to solve the disputes amicably. Read with second sentence of Art.19(a), the 14-day period appear to be part of obligation of amicable dispute resolution. In addition, the agreements on the period for amicable dispute resolution were recognized enforceable *[Trading Agency Case]*, which implies the agreement *per se* is mandatory. Therefore, pre-arbitration procedure is mandatory so PARTIES must try to resolve the dispute amicably before proceeding to arbitration.

12 In the present case, inconsistent with the wording of Art.19(a), CLAIMANT did not even try to solve the dispute amicably. The dispute arose when RESPONDENT received the non-conforming goods and informed CLAIMANT. Instead of seeking further negotiation, CLAIMANT rejected to cure and still asked for the balance payment [*Exh.R2; Exh.C7*]. Without any communication, the next thing RESPONDENT heard from CLAIMANT was the commencement of arbitration.

13 Given that CLAIMANT submitted to arbitration without any action regarding disputes resolution prior to arbitration, the non-compliance with the mandatory procedural requirement defeats the Tribunal's jurisdiction *[Berger,p.6; Born,p.841; Webster/Buhler,p71]*.

B. CISG does not govern the claims arising under Agreement-No.2

14 Party autonomy is one of the guiding principles of conflicts resolution theory *[Mandery,p.25]*.

Art.6 CISG allows parties to opt out the application of CISG based on parties' intentions despite fulfilling all the requirements under Art.1 CISG *[Huber/Mullis,p66]*.

15 PARTIES have opted out CISG through the choice of law clause under Agreement-No.2 since **[I]** the national law of Wulaba does not include CISG and **[II]** PARTIES did have the intention to opt out CISG. Consequently, CISG does not govern the claims arising under Agreement-No.2.

I. The national law of Wulaba does not include CISG

16 The choice of law provision under Agreement-No.2 reads, "[t]he contract shall be governed by the national law of Wulaba. All other applicable laws are excluded." CISG is not included in the national law of Wulaba because CISG has not been the source or incorporated into the national law of Wulaba *[Clarifications¶¶8,12]*. Besides, by specifically referring to "the national law", it spells out PARTIES' intention to include "only" the law of a national context and exclude CISG *[Ceramique Culinaire Case; CLOUT_92]*.

II. PARTIES did have the intention to opt out CISG

17 According to Art.8(1)(2) CISG, when determining the intention of parties, both objective and subjective intentions should be taken into consideration. *[CISG-AC_Op_No.16; Schlechtriem/Schwenzer/Schmid,Art.8¶11]*.

18 In the present case, RESPONDENT's lawyers proposed the insertion of the choice of law provision to avoid unfamiliar laws being applied *[Clarifications¶30]*, which is why the

language of the second part of the choice of law provision explicitly stressed that such "other applicable law", i.e., all international conventions and laws of other states, shall be excluded under Agreement-No.2.

19 CLAIMANT had read the choice of law provision before signing Agreements *[Clarifications¶30]*, which could be reasonably inferred as showing consensus.

C. Through invoking the provisions of CISG, RESPONDENT is entitled to the full amount of $17.4M under Agreements on account of the following:

I. Lack of insurance under Agreement-No.1

20 CLAIMANT shall be responsible for insurance under Agreement-No.1 because **[a]** CLAIMANT is responsible for all related costs including insurance; and that **[b]** the shipment term 'DDP' did not excuse CLAIMANT from effecting insurance.

a. CLAIMANT is responsible for all related costs which include insurance based on Art.32(2) CISG

21 According to Art.32(2) CISG, if a seller is bound to arrange for carriage of goods, it must make necessary contracts relevant to it. Insurance coverage is deemed necessary if the value of the goods exceeds the legal or contractual limitations of shipment liability by a considerable amount. *[Schlechtriem/Schwenzer/Widmer,Art.32¶26]*.

22 In the present case, CLAIMANT is responsible for carriage while the shipping company would not be liable for any damage, loss or late delivery *[Incoterms-2010,DDP,A3(a); Clarifications¶14]*. That is, the value of the goods (15M) exceeds the limitations of liability (zero) significantly, therefore CLAIMANT was obliged to effect insurance under Agreement-No.1.

b. The shipment term 'DDP' did not excuse CLAIMANT from effecting insurance which is necessary for carriage

23 CLAIMANT may argue that the obligation to effect insurance has already been excluded by choosing DDP as the shipment term. However, DDP is a default rule that one may modify it by mutual agreement *[Schlechtriem/Schwenzer/Schmidt-Kessel,Art.8¶64]*. PARTIES had agreed specifically that CLAIMANT should bear all related cost *[AfA¶6]*, including insurance. Hence, the shipment term 'DDP' does not excuse CLAIMANT from its obligation to effect insurance.

II. Timing of delivery of prototype under Agreement-No.1

24 Under Art.33(b) CISG, the seller must deliver the goods within the period of time fixed by the contract *[CISG-Digest,Art.33¶2]*. According to Art.5 of Agreement-No.1, the period of time begins from receiving the deposit *[Exh.C2]*, namely 31/7/2014; and due on 13/8/2014. Furthermore, PARTIES have drafted the shipment term to govern the delivery of goods and prototypes under Art.5 of Agreement-No.1, which indicated the intention of PARTIES to set

the obligations of delivering prototypes same as that applied to the goods *[AfA¶6; Exh.C2]*.

25 Under DDP, CLAIMANT's delivery obligation is to deliver the goods to RESPONDENT's office *[Incoterms-2010,DDP,A4; Clarifications¶1]*. RESPONDENT received the prototypes on 15/8/2014, which was two days after the agreed due date *[Exh.C4; Clarifications¶42]*; such delay has constituted a breach of Agreement-No.1.

III. Non-conformity of goods under Agreement-No.2

26 CLAIMANT's failure to provide conforming goods under Agreement-No.2 amounts to a fundamental under Art.35 and Art.25 CISG since **[a]** The size of goods did not conform with Agreement-No.2 and the particular purpose under Art.35(1) and Art.35(2)(b) CISG; and that **[b]** the quality of goods did not conform with the models based on Art.35(2)(c) CISG, **[c]** the non-conformity of goods amounts to a fundamental breach under Art.25 CISG. Furthermore, **[d]** CLAIMANT could not claim for non-liability based on Art.39(1) CISG.

a. The size of goods did not conform with Agreement-No.2 and the particular purpose under Art.35(1) and Art.35(2)(b) CISG

27 Art.35(1) CISG obliges the seller to deliver goods which are of the quantity, quality and description required by the contract. According to Art.2 of Agreement-No.2, the goods need to fit into the Cherry watchcase provided by RESPONDENT *[Exh.R1]*. Besides, Art.35(2)(b) CISG obliges the seller to deliver goods fit for particular purpose which has been expressly or impliedly made know to it at the time of conclusion of the contract

[Schlechtriem/Schwenzer,Art.35¶¶19,24; CISG-Digest,Art.35¶11]. The particular purpose for the watchstraps to fit the Cherry watchcase has been revealed expressly to CLAIMANT during the negotiation and the conclusion of Agreements *[AfA¶4; Exh.C1; Exh.R1]*.

28 However, the watchstraps provided by CLAITMANT do not fit the Cherry watchcase *[Clarifications¶41]*, which constituted non-conformity of goods and did not meet the particular purpose.

29 CLAIMANT may contest that they have relied on RESPONDENT's approval of the prototypes. However, the provision of prototype was for RESPONDENT to get a clue of what the actual goods would be like in details that were not explicitly agreed in the contract. *[Schlechtriem/Schwenzer,Art.35¶25]* For the requirements that were expressly provided in Agreements, the size of the watchstraps was not subject to RESPONDENT's approval *[ExhC1,2,6]*. Therefore, the goods did not meet the particular purpose of Agreement-No.2 and constituted non-conformity.

b. The quality of goods did not conform with the models under Art.35(2)(c) CISG

30 Art.35(2)(c) CISG obliges the seller to deliver the goods which possess the same quality as displaying by the model, and it could become the agreed standard for the contract *[Schlechtriem/Schwenzer,Art.35¶25; CISG-Digest,Art.35¶13]*. Such required quality applies to matters not expressly stated in Agreements, such as the handmade quality. However, the

goods did not conform with the quality as displayed by the prototypes *[ExhR2]*.

c. Non-conformity of goods amounts to a fundamental breach under Art.25 CISG

31 Under Art.25 CISG, a breach of contract is fundamental if it results in serious detriment to the aggrieved party *[CISG-online-1433]* and frustrates the purpose of the contract *[CISG-online-2057]*. The non-conformity of the watchstraps resulted in such detriment because REPSONDENT had expected to resell them which fit with the Cherry watchcases whereas the non-conformity in size frustrated such purpose.

d. CLAIMANT could not claim for non-liability based on Art.39(1) CISG

32 Art.39(1) requires the buyer to give notice within a reasonable time after it could discover the non-conformity of goods. Giving notice within one month is generally considered reasonable *[CISG-Digest,Art.39¶24; Schlechtriem/Schwenzer,Art.39¶17; CLOUT_240; CISG-online-2019]*.

33 RESPONDENT received the watchstraps on 26/01/2015 *[Clarifications¶50]* and sent the notice of non-conformity to CLAIMANT on 27/02/2015 *[Exh.R2]*. RESPONDENT fulfilled its notice obligation within reasonable time therefore did not lose its rights based on Art.39(1).

IV. Payment of money under the transactions

34 RESPONDENT is entitled to $17.4M payments made to CLAIMANT including **[a] $**15M under Agreement-No.1 and **[b] $**2.4M deposit under Agreement-No.2.

a. RESPONDENT is entitled to $15M under Agreement-No.1 pursuant to Art. 49 and 81(2) CISG

35 Pursuant to Art.49(1)(a), the seller's fundamental breach entitles buyers to avoid the contract *[CISG-online-798]* and claim for restitution as a result of avoidance based on Art.81(2) CISG *[CISG-online-180]*.

36 Non-delivery has always been considered a fundamental breach under Art.25 CISG *[ICC_No.9978; CLOUT_313; Schlechtriem/Schwenzer,Art.25¶37]*. CLAIMANT never fulfilled delivery duty since the watchstraps of Agreement-No.1 were lost *[AfA¶10; Exh.R1; Exh.C5]*.

37 Furthermore, CLAIMANT failed to effect insurance, nor had it delivered the prototypes in time, such cumulation of violations makes a fundamental breach more probable *[CISG-Digest,Art.25¶11]*.

38 CLAIMANT omitted to shift the risk to the shipping company or an insurance company. The lost of watchstraps before the passing of risk discharged RESPONDENT's payment obligation according to Art.66 CISG *[CLOUT_338; CLOUT_317]*. The only reason why RESPONDENT did not avoid Agreement-No.1 immediately and even paid $12M balance payment was because RESPONDENT urgently needed the watchstraps *[Exh.C1; SoD¶8; Clarifications¶53]*. However, CLAIMANT failed to provide conforming watchstraps *[Exh.R2; Clarifications¶51]*, which makes the avoidance of Agreement-No.1 necessary and

justifiable.

b. RESPONDENT is entitled to $2.4M and is not obligated to pay $9.6M balance payment under Agreement-No.2.

39 **[i]** RESPONDENT is entitled to avoid Agreement-No.2 and claim for $2.4M refund under Art.49 and Art.81(2) CISG. Alternatively, **[ii.]** RESPONDENT is entitled to the refund under Art.50 CISG.

i. RESPONDENT is entitled to avoid Agreement-No.2 and claim for the refund of $2.4M under Art.49 and Art.81(2) CISG

40 As stated, RESPONDENT has the right to avoid Agreement-No.2 since CLAIMANT committed fundamental breach by delivering non-conforming goods. In addition, RESPONDENT had timely avoided Agreement-No.2 according to Art.49(2)(b)(i) and Art.26 CISG *[Exh.R2]*. RESPONDENT can claim restitution for $2.4M deposit and is not obligated to make $9.6M balance payment based on Art.81 CISG.

ii. RESPONDENT is entitled to the refund based on Art. 50 CISG

41 Art.50 CISG provides for the remedy of price reduction when goods do not conform to the contract *[Schlechtriem/Schwenzer/Müller-Chen,Art.50¶2]*. And if the delivered goods are without any value and useless, the price can be reduced to zero

[Schlechtriem/Schwenzer/Müller-Chen,Art.50¶13; CLOUT_938; CLOUT_724].

42 In the present case, the watchstraps became useless because they were customized goods and could not meet the particular purpose to fit into the Cherry watchcase, the defect has caused the goods to be valueless as they cannot be resold. Therefore, RESPONDENT is entitled to full amount of price reduction pursuant to Art.50 CISG.

D. RESPONDENT is entitled to $20.01M damages

43 Based on Art.45(1)(b) and Art.74 CISG, RESPONDENT is entitled to **[I]** $10K reliance loss and **[II]** $20M loss of profits.

I. RESPONDENT is entitled to $10K in reliance loss

44 The reliance losses, incurred for reliance on the contract and lost its purpose through the breach, are recoverable under Art.74 CISG *[CLOUT_541; Sheet iron rolls case; Saidov,p.42; SS commentary Art.74¶3,10; Liu,p.440]*. Relying on CLAIMANT's due performance of the Agreements, RESPONDENT spent $10K to launch new website and arrange photoshoots for the prototypes *[Clarifications¶¶25,39]*, which had been wasted since CLAIMANT failed to deliver the watchstraps required by Agreements therefore shall be deemed recoverable under Art.74 CISG.

II. RESPONDENT is entitled to $20M in loss of profits based on Art.74 CISG

45 Under Art.74 CISG, loss of profits caused by breach are recoverable if they have reasonable

certainty and can be foreseen by the breaching party *[CISG-AC_Op_No.6,¶3; CLOUT_138; CLOUT_214; CLOUT_476]*. RESPONDENT's loss of profits is foreseeable and within reasonable certainty since CLAIMANT knew that the watchstraps were for reselling *[Exh.C1]* whereas RESPONDENT had already received some orders. Accordingly, RESPONDENT is entitled to $20M in loss of profits pursuant to Art.74 CISG

REQUEST FOR RELIEF

RESPONDENT hereby submits that the Tribunal Should Render in Favor of RESPONDENT:

1. **The Tribunal Does Not Have Full Jurisdiction over the Payment Claims Raised by CLAIMANT.**
2. **The CISG Does Not Govern the Claims under Both Agreements.**
3. **RESPONDENT Is Entitled to USD 17.4M Refund and USD 20.01M as Damages.**
4. **CLAIMANT Is Not Entitled to the Payment USD 9.6M Under Agreement No.2.**