SIXTH ANNUAL INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION MOOTING COMPETITION

5 JULY – 10 JULY 2016

HONG KONG

In the matter of:

Albas Watchstraps Mfg. Co. Ltd.

CLAIMANT

v.

Gamma Celltech Co. Ltd.

RESPONDENT

MEMORANDUM FOR RESPONDENT

Team No. 463 R

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INDEX OF AUTHORITIES

TREATIES, CONVENTIONS AND RULES

Abbreviation	Citation	Paragraphs
CISG	Convention on Contracts for International sale of Goods, Vienna, 11 April 1980 Entered into force 1 January 1988 1489 UNTS 3	11, 16, 18, 19, 20, 24, 26
HKIAC Rules	HONG KONG International Arbitration Centre (HKIAC) Administered Arbitration Rules 2013	7
ICC Rules	International Chamber of Commerce (ICC) Arbitration Rules 2012 and Mediation Rules 2014	7
Incoterms Rules	International Chamber of Commerce (ICC) Incoterms® 2010: ICC Rules for the Use of Domestic and International Trade Terms ICC Publication No. 715E, 2010	14, 24
Model Law	United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (with amendments as adopted in 2006) 21 June 1985	11
Sale of Goods Act	Parliament of the United Kingdom An Act to Consolidate the Law Relating to the Sale of	13

	Goods c 54, 6 December 1979	
SCC Rules	Arbitration Rules of the Arbitration of the Stockholm Chamber of Commerce (SCC) 2010	7
UNIDROIT Principles	International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts 2010	16, 22

BOOKS / ARTICLES

Abbreviation	**Citation**	**Paragraph**
Bianca/Knapp/Bonell	Knapp, Victor; Bianca, C.M; Bonell, Micheal J. *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* Milan: Giuffrè, 1987	19, 20
Black's	Garner, Bryan A. (ed.) *Black's Law Dictionary,* 10th Edn. Thomson West, 2014	3, 17
Blackaby/Partasides/Redfern/Hunter	Blackaby, Nigel; Partasides, Constantine; Redfern, Alan; Hunter, Martin *Redfern and Hunter on International Commercial*	7, 11

	Arbitration, 5th Edn. New York: Oxford University Press, 2009	
Born	Born, Gary B. *International Commercial Arbitration* Kluwer Law International, 2009	2, 4, 5, 11
Born 2nd	Born, Gary B. *International Commercial Arbitration,* 2nd Edn. Kluwer Law International, 2014	3, 8
Buydaert	Buydaert, Michiel "The Passing of Risk in the International Sale of Goods: A comparison between the CISG and the INCOTERMS" April 1, 2014 Available at: <http://cisgw3.law.pace.edu/cisg/biblio/buydaert.html>	14
Ehrenzweig	Ehrenzweig, Albert A. "Adhesion Contracts in the Conflict of Laws" Columbia Law Review, Volume 53, No. 8 (1953)	13
Gabriel	Gabriel, Henry "International Chamber of Commerce Incoterms 2000: A Guide to Their Terms and Usage, Vindobona Journal of International Commercial Law & Arbitration (2001)"	14

	5 Vindobona Journal of International Commercial Law & Arbitration (2001)	
Honnold	Honnold, John O. *Uniform Law for International Sales under 1980 United Convention*, 3rd Edn. The Hague: Kluwer Law International, 1999	14
Lookofsky	Lookofsky, J. "The 1980 United Nations Convention on Contracts for the International Sale of Goods" in Blanpain, R. ; Herbots, J. (eds.) *International Encyclopaedia of Laws – Contracts* The Hague: Kluwer Law International, 2000	21
OED	*Concise Oxford English Dictionary: Main edition*, 12th Edn. Oxford University Press, 2011	7, 16
Pound	Pound, Roscoe "Liberty of Contract" The Yale Law Journal, Volume 18 (1909)	13
Schlechtriem/Schwenzer	Schlechtriem, Peter; Schwenzer, Ingeborg (ed.) *Commentary on the UN Convention of the International*	19, 20, 24, 26

	Sale of Goods(CISG),2nd Edn. Oxford: Oxford University Press, 2010	
Tetley	Tetley, William "Waybills, The Modern Contract of Carriage of Goods by Sea" Journal of Maritime Law and Commerce, Volume 14, No. 4 (1983)	13

CASES AND ARBITRAL AWARDS

Abbreviation	Content	Paragraph
CIETAC (PRC)		
Heliotropin case	*Heliotropin case* Award of 10 July 1993 Case No. CISG/1993/09	19
Switzerland		
Fruit and Vegetables Case	*Fruit and Vegetables Case* Handelsgericht [Commercial Court] Aargau, Switzerland Decision of 26 November 2008 Case Reference HOR.2006.79 / AC / tv	16
United States		
Herrera	*Herrera v. Beydoun*	10

	California Supreme Court February 2, 2004, Decided Case Reference S111998	
Howsam	*Howsam v. Dean Witter Reynolds* United States Supreme Court Decision of 10 December 2002 Case Reference No. 01-800	5
Opals	*Opals on Ice Lingerie v. Body Lines Inc.* United States Courts of Appeal, Second District Decision of 24 February 2003 Case Reference No. 02-7392	8
St. Paul Guardian	*St. Paul Guardian Ins. Co. v. Neuromed Med. Sys.* United States Courts of Appeal, Second District Decision of 20 December 2002 Case Reference Nos. 02-6095 (L), 02-6103	11

INDEX OF ABBREVIATIONS

Abbreviation	**Content**
¶	Paragraph
AfA	Application for Arbitration
Agreement No.1	Sale and Purchase Agreement signed on 23 July 2014
Agreement No.2	Sale and Purchase Agreement signed on 7 November 2014
Art.	Article
Cl. Ex.	Claimant's Exhibit
CIETAC	China International Economic & Trade Arbitration Commission
CLAIMANT	Albas Watchstraps Mfg. Co. Ltd.
Clarifications	Request for Clarifications
ICC	International Chamber of Commerce
Incoterms 2010	International Commercial Terms 2010
Model Clauses	CIETAC Model Arbitration Clauses
No.	Number
p.	Page
Parties	CLAIMANT and RESPONDENT
Res. Ex.	Respondent's Exhibit
RESPONDENT	Gamma Celltech Co. Ltd.
SoD	Statement of Defense

The Tribunal	Arbitral Tribunal Case No. M2016/15 of CIETAC

ARGUMENTS

I. THE TRIBUNAL HAS NO JURISDICTION TO DECIDE CLAIMANT'S PAYMENT CLAIMS.

1. The Tribunal has no jurisdiction to hear this dispute because: **[A]** any dispute concerning the interpretation of Art. 19 shall be submitted to the courts in the State of New York; **[B]** Art. 19 is void as it is internally contradictory; and **[C]** even if Art. 19 is not void, Art. 19(a) is not an express obligation to arbitrate.

A. Any dispute concerning the interpretation of Art. 19 shall be submitted to the courts of the State of New York.

1. Disputes concerning the interpretation of Art. 19 exist and thus Parties are required to submit this dispute to the courts of the State of New York.

2. Disputes concerning the interpretation of Art. 19 do exist. Pursuant to the principle of giving effect to all parts of Parties' agreement, the Tribunal should render the terms consistent with one another [*Born p. 1065 note 26*]. Art. 19(c) provides that "the clause would be interpreted in accordance with the laws of the State of New York, and any disputes shall be submitted to the courts in the State of New York." "Disputes" here refers to disputes concerning the interpretation of Art. 19.

3. The word "shall" means "be required to," which drafters typically intend and courts typically uphold to be mandatory [*Black's, "shall"*]. A number of ICC Tribunals have concluded that, "when a word expressing obligation, such as is used in connection with

amicable dispute resolution techniques, such provision is binding upon the parties" [*Born 2nd p.925 note 1550*].

2. Party autonomy to choose the laws of the State of New York to govern the arbitration agreement should be respected

4. Applying the separability presumption, the arbitration agreement generally can be governed by a different law from that applicable to the parties' underlying contract [*Born pp. 353-355*]. Parties agreed that Art. 19 "would be interpreted in accordance with the laws of the State of New York." [*Cl. Ex. No. 6 Art. 19(c)*] Without further objection, laws of the State of New York should govern Art. 19.

3. Settlement of disputes concerning the interpretation of Art. 19 is entitled to judicial review instead of arbitration

5. Even if the Tribunal has the power to determine its own jurisdiction, the Tribunal should introduce disputes to judicial review. These disputes involve the interpretation of Art. 19 and the existence of a consensus to arbitrate. Such "gateway dispute about whether the parties are bound by a given arbitration clause is for judicial determination" [*Howsam ¶¶83-84; Born pp.925-928*].

6. As stated above, such disputes can only be submitted to courts of the State of New York, instead of the Tribunal. Therefore, the Tribunal has no jurisdiction before the settlement of these disputes.

B. Art. 19(a) is not mandatory, thus RESPONDENT is not obliged to arbitrate

7. Art. 19(a) does not create a mandatory obligation to arbitrate. It provides that "either party may submit the dispute to the CIETAC Hong Kong Sub-Commission…" [*Cl. Ex. No.6*]. Parties used the word "may" to imply that submission to arbitration is a choice and not an obligation. The word "may" is consistently defined as "expressing a possibility" [*OED, "may"*]. Model arbitration clauses use the word "shall" [*Model Clauses; HKIAC Rules 2; ICC Rules 3; SCC Rules 2*]. The choice to derogate from the model clause indicates that Parties did not want arbitration to be their sole recourse.

C. There is no consensus to arbitrate.

1. Art. 19 is void since Art. 19(a) contradicts Art. 19(b).

8. Arbitration cannot be effectively set where a clause may be too vague or perhaps other terms in the contract contradict the parties' intention to arbitrate [*Born 2nd p. 286*]. Referring to two clearly different forums can demonstrate a lack of the meeting of the minds to arbitrate [*Opals*]. Moreover, a court will void an arbitration agreement if such uncertainty makes it difficult to make sense of it [*Blackaby/Partasides/Redfern/Hunter p.146*].

9. Reading Art. 19(a) in conjunction with Art. 19(b), Art. 19 demonstrates a lack of a consensus to arbitrate. Art. 19(a) provides that disputes may be submitted to CIETAC while Art. 19(b) provides that they may be submitted to the Hong Kong courts. This complete contradiction renders Art. 19 void for lack of consensus to arbitrate. With no valid arbitration agreement, the Tribunal has no jurisdiction to hear the dispute.

2. There is no oral agreement

10. Since the contracting parties reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should be excluded when interpreting that writing, as the parties had decided to ultimately leave them out of the contract [*Herrera*]. In this case, Parties entered into Agreements Nos. 1 & 2, superseding any oral agreement. As a result, there is no oral agreement. Therefore, there is no consensus to arbitrate.

II. THE CONTRACT SHALL BE GOVERNED BY THE NATIONAL LAW OF WULABA AND ANY OTHER LAW IS EXCLUDED

A. Art. 20 is a valid choice-of-law clause of Parties' autonomy

11. Parties are free to choose governing laws and rules in their arbitration agreements [*Blackaby/Partasides/Redfern/Hunter p.195*], and this autonomy to select the substantive law is a general principle of international law [*Born p.2153 note218*]. CISG Art. 6 also confirms that the parties may exclude the application of this Convention. By setting forth the intent to opt out of the CISG unequivocally along with choosing the governing law, CISG can be excluded [*St. Paul Guardian*]. Model Law requires that "the arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute" [*Model Law Art. 33(1)*].

12. Art. 20 stipulated that "[t]he contract shall be governed by the national law of Wulaba and all other applicable laws are excluded." The Tribunal should thus apply the national law of Wulaba and exclude any other law, including CISG.

B. Art. 20 is not substantively unfair.

13. The party autonomy to stipulation of choice of law is protected if it doesn't impose restraints on the weak and necessitous part or defeat the very end of liberty [*Pound*]. The national law of Wulaba is an alter ego of the Sale of Goods Act [*Clarifications ¶11*], which has been in effect since 1980. It has influenced many countries and reflects the trend of modern commerce [*Tetley*]. Therefore, application of Wulaba law is substantially fair to Parties. Contract which is concluded by equal parties who have equal part in the choice of law stipulations should be respected [*Ehrenzweig*].

III. RESPONDENT HAS THE RIGHT TO DEMAND A REFUND UNDER THE TWO AGREEMENTS AND CLAIMANT IS NOT ENTITLED TO THE BALANCE OF AGREEMENT NO. 2.

A. CLAIMANT is responsible for the damages in the first transaction.

14. DDP (Incoterms 2010) imposes no obligation on either side to contract for insurance [*Incoterms rules pp.69-73 Arts. A3 & B3*]. In addition, it states that the seller must bear all risks of loss of or damage to the goods until they have been delivered at the disposal of the buyer, which means the seller bears the risk when the goods are at sea [*Incoterms rules pp.69-73 Arts. A5 & B5*]. If the parties had intended to exclude the seller from the obligations concerning bearing the risks, it shall be reflected explicitly in the contract of sale [*Gabriel pp. 41-73*]. Besides, if parties explicitly refer to an Incoterm in the contract concerning the passing of risk, since it is an expression of agreement, it prevails over the CISG rule [*Honnold p.363; Buydaert*].

15. "DDP" in Agreement No.1 is the expression of the consensus of Parties [*Cl. Ex. No. 6 Art. 3; SoD* ¶7*; AfA* ¶*6*]. Therefore, RESPONDENT bears no obligation to buy insurance under the contract. With no contract of insurance made, DDP's rule of risk passing is applicable, meaning that CLAIMANT bears the risk of the watchstraps being transported at sea. Therefore, the loss of watchstraps at sea as noticed on 28 October 2014 is CLAIMANT's responsibility [*Cl. Ex. No. 5; AfA* ¶¶*9-10*].

B. CLAIMANT's late delivery of the prototype breached the contract.

1. Parties stipulated the time of delivery in Agreement No.1.

16. Concerning the interpretation of contracts, CISG Art. 8 provides that, if there is no subjective intent of Parties, objective interpretation should be applied, with considerations given to all relevant circumstances [*Fruit and Vegetables Case*]. UNIDROIT Principles Art. 43(d) and (e) further indicate that "the nature and purpose of the contract" and "the meaning commonly given to terms and expressions in the trade concerned" should be considered as relevant circumstances. "Provide" is widely defined as "to supply (something) for use; to make available" [*OED, "provide"*].

17. Although the provision "the Seller will provide a prototype for approval within 14 days from receipt of deposit" [*Cl. Ex. No. 2 Art. 5 ¶1*] appeared under the title "shipment" which means send or deliver to carrier for transportation [*Black's, "ship (vb.)"*], Parties used "provide" instead of "ship" to distinguish this performance and denote that CLAIMANT should make the prototype available for use rather than merely ship it. In addition, this provision's purpose was to enable RESPONDENT to assess the prototype; and the

prototype can only be "made available" and "supplied for use" after RESPONDENT has received them. Therefore, this provision should be interpreted as "CLAIMANT will breach Agreement No. 1 unless RESPONDENT receives the prototypes within 14 days from receipt of deposit".

2. CLAIMANT failed to deliver prototypes within the set time period.

18. CISG Art. 33(b) provides that a seller must deliver the goods "if a period of time is fixed by or determinable from the contract, at any time within that period". As the deposit was made on 31 July [*AfA ¶7*], regardless of how this period is computed, the prototype should not be delivered later than 14 August. RESPONDENT, however, received the prototypes only on 15 August, constituting a breach of the contract by CLAIMANT.

C. The watchstraps CLAIMANT delivered failed to conform to the requirements of Agreement No. 2.

1. The delivered watchstraps were inconsistent with the sample provided by CLAIMANT.

19. Under CISG Art. 35(2)(c), when a seller "holds out" goods as a sample to a buyer; the goods must possess "the qualities" of the sample [*Schlechtriem/Schwenzer p.423*]. In this case, CLAIMANT provided soft prototypes that appeared handmade, and RESPONDENT approved the prototypes [*Cl. Ex. Nos. 3&4*]. Since a sample "is a factual description and, therefore, a contractual way to determine the kind and quality of the goods the buyer is entitled to", the final goods should be consistent with it [*Bianca/Knapp/Bonell p.275*]. The final goods, however, neither appeared handmade, nor are soft as the prototypes [*Res. Ex.*

No.2]. Since CLAIMANT delivered goods of inferior quality, it breached CISG Art. 35 [*Heliotropin case*].

2. The purpose of the goods was made expressly and impliedly known to CLAIMANT and the goods were not fit for this purpose; RESPONDENT also reasonably relied on CLAIMANT's skill and judgment.

20. CISG Art. 35(2)(b) states that goods do not conform to the contract unless they are "fit for the purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where circumstances show that the buyer did not rely, or it was unreasonable for him to rely, on the seller's skills and judgments". When the purpose is made known to the seller, the buyer generally relies on the seller's skills and judgments in order to have goods fit for such a purpose [*Bianca/Knapp/Bonell p.274*], especially when the seller is an expert or professional in the field where the buyer intends to use the goods [*Schlechtriem/Schwenzer p.422*]. Besides, concerning non-conformity, Art. 35(2)(b) should take priority over Art. 35(2)(c) when a "seller confirms the goods are fit for a particular purpose" and his skill and judgement are relied on, and "the buyer is unable to check this by reference to the sample or model" [*Schlechtriem/Schwenzer p.424*].

21. In this case, CLAIMANT is a leading manufacturer and exporter in the industry with more than 40 years of experience [*AfA ¶1*]. RESPONDENT, conversely, is new to the industry [*Clarifications ¶¶45 & 46*]. Thus, CLAIMANT was relied on under Art. 35(2)(b). Second, during pre-contractual negotiations, RESPONDENT had informed CLAIMANT of the purpose and necessary qualities of the watchstraps [*Cl. Ex. No.1 & Res. Ex. No.1*], so

CLAIMANT in entering into the contract impliedly assumed an obligation that the goods would be fit for such a purpose [*Lookofsky p.92*]. Since RESPONDENT could not examine the conformity because the only watchcase was in CLAIMANT's possession, in light of the above facts, Art. 35(2)(c) should not be applied. Therefore, CLAIMANT is obligated to produce watchstraps fitting the Cherry Watch. "The watchstraps[, however,] did not fit Cherry's watchcase," [*SoD* ¶9], which rendered CLAIMANT in violation of Art. 35(2)(b).

D. RESPONDENT is entitled to USD 15 million under Agreement No.1 and USD 9.6 million under Agreement No. 2; and CLAIMANT is not entitled to the balance of Agreement No. 2.

1. The payment of USD 12 million was based on the condition of receiving qualified goods.

22. According to UNIDROIT Principles Art. 4.3, a contract shall be interpreted according to the circumstances, which include preliminary negotiations between parties and the conduct of parties subsequent to contract's conclusion.

23. In this case, Agreement No. 1's balance payment followed a series of negotiation between Parties, providing the basis for interpreting the goal of the payment. First, RESPONDENT once requested Agreement No. 1's deposit be transferred to Agreement No. 2 [*Clarification* ¶*53*], indicating that RESPONDENT did not offer to bear the first transaction's loss. Second, only upon receipt of the balance payment would CLAIMANT enter into Agreement No. 2 and Parties did so after its receipt [*SoD* ¶*8; Clarification* ¶*53*]. Thus, the balance payment became a condition precedent for formalizing and fulfilling Agreement

No. 2. In other words, this payment was based on the condition of receiving qualified goods under Agreement No. 2.

2. Due to the distribution of risk, RESPONDENT can demand a refund of the first transaction's payment of USD 15 million.

24. According to Art. 36(1) CISG, the seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer. The time at which the risk passes, moreover, can be determined by parties' commercial usage [*Schlechtriem/Schwenzer p.435*]. DDP, on which both Parties agreed, provides that the risk passes to the buyer when the goods are delivered at the agreed destination [*Incoterms rules pp.69-73 Arts. A5 & B5*].

25. In this case, the risk had not been transferred to RESPONDENT at the time when the goods were lost, nor did Parties change the distribution of risk afterwards. Therefore, CLAIMANT bears the loss. RESPONDENT had no obligation to pay CLAIMANT the deposit and balance payment. As a result, Respondent can demand a refund of Agreement No. 1's payment of USD 15 million.

3. Due to fundamental breach, RESPONDENT can demand a refund of the second transaction's deposit of USD 2.4 million, website costs of USD 10 thousand, and loss of profits of USD 20 million.

26. Art. 25 CISG stipulates that a fundamental breach occurs when one party has an obligation, the detriment is important, and this importance is foreseeable [*Schlechtriem/Schwenzer pp.285-290*]. Under CISG Art. 51(2), the buyer can declare the contract void in its entirety when there is a fundamental breach, and Art. 74 entitles one party the right of demanding

damages consisting of a sum equal to the loss from the other party which breaches the contract. The promisee has a right to be fully compensated for all disadvantages suffered as a result of the breach. Thus, the compensation must satisfy not only the promisee's expectation interest, but also reliance interest [*Schlechtriem/Schwenzer p.746*]. Besides direct losses, the damages also include loss of foreseeable profits if the promisor knew such result was likely to occur [*Schlechtriem/Schwenzer p.767*].

27. In this case, CLAIMANT had the obligation of manufacturing qualified watchstraps. The non-conformity of size made the whole 5,000,000 watchstraps useless, affecting RESPONDENT's entering into this commercial field. As a result, the core goal of signing this agreement could not be fulfilled. Specifically, RESPONDENT sent CLAIMANT a unique watchcase and asked it to "manufacture watchstraps fitting to the case" at the very beginning of transactions [*Cl. Ex. No.1*]. Based on this demand, CLAIMANT should have known the importance of this detriment. As a result, the non-conformity of goods is a fundamental breach, and RESPONDENT has the right to declare the avoidance of the contract. Since the contract is voided, RESPONDENT does not have to pay the balance payment, and can also demand a refund of Agreement No. 2's deposit.

28. RESPONDENT, as a trader launching an accessories business, planned to advertise and resell the watchstraps for profit [*Cl. Ex. No.1; AfA ¶2*]. RESPONDENT would only do this under the reasonable expectation and reliance of CLAIMANT's full performance. RESPONDENT paid USD 10 thousand to create a promotional website [*SoD ¶8*]. Due to CLAIMANT's fundamental breach, however, the website was for naught. In addition,

RESPONDENT suffered lost profits equals to USD 20 million. Since CLAIMANT knew that RESPONDENT wanted to “enter this novel market” of Cherry Watch accessories [*Cl. Ex. No.1*], it could foresee the necessary marketing costs and lost profits. Thus, based on Article 74, CLAIMANT is responsible to compensate RESPONDENT for these losses.

REQUESTS FOR RELIEF

For the foregoing reasons, RESPONDENT humbly requests this Tribunal to find that:

I. The Tribunal has no jurisdiction over the payment claims raised by CLAIMANT;

II. CISG does not govern the claims arising under the Sale and Purchase Agreement and the Sale and Purchase Agreement No. 2; and

III. If the Tribunal has jurisdiction over this dispute, and CISG governs this case, RESPONDENT is entitled to the sum of USD 17.4 million for the payments made to CLAIMANT, the sum of USD 10 thousand for the development of the website costs, as well as the sum of USD 20 million for loss of profits.