

MEMORANDUM FOR CLAIMANT

On Behalf of:

Albas Watchstraps Mfg. Co. Ltd

241 Nathan Drive

Yanyu City, Yanyu

CLAIMANT

Against:

Gamma Celltech Co. Ltd.

17 Rodeo Lane

Mulaba, Wulaba

RESPONDENT

TEAM NO. 955 C

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List of Abbreviations

Abbreviation	Content
<i>Art.</i>	Article
<i>Dispute Resolution Clause</i>	Article 19 of the Sale and Purchase Agreements (both 1 and 2) concluded by the Parties
<i>Arbitration Centre</i>	China International Economic and Trade Arbitration Commission Hong Kong Sub-Commission
<i>CIETAC</i>	China International Economic and Trade Arbitration Commission
<i>CIETAC Rules</i>	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules
<i>CISG</i>	United Nations Convention on Contracts for the International Sale of Goods 1980
<i>Claimant</i>	Albas Watchstraps Mfg. Co. Ltd
<i>PO2</i>	Procedural order 2

<i>No.</i>	Number
<i>P.</i>	Page
<i>Para</i>	Paragraph
<i>Parties</i>	Albas Watchstraps Mfg. Co. Ltd and Gamma Celltech Co. Ltd
<i>Respondent</i>	Gamma Celltech Co. Ltd
<i>SoC</i>	Statement of Claim – Claimants statement of facts
<i>SoD</i>	Statement of Defence – Respondents statement of facts
<i>Sec.</i>	Section
<i>Sub.</i>	Subsection
<i>Tribunal</i>	The three member panel convened to preside over the matter in dispute between the Parties.
<i>S&P</i>	Sale and Purchase Agreement No. 1

<i>CE</i>	Claimant's Exhibit
<i>RE</i>	Respondent's Exhibit
<i>S&P 2</i>	Sale and Purchase Agreement No. 2
<i>Contracts</i>	S&P and S&P 2

Tables of Authority

Articles

Cited As	Content	Pin Point
<i>Deak</i>	<i>Computation of Time in International Law</i> , Francis Deak http://www.heinonline.org.ezproxy.ecu.edu.au/HOL/Page?handle=hein.journals/ajil20&div=35&start_page=502&collection=journals&set_as_cursor=3&men_tab=srchresults	513
<i>Ramberg</i>	<i>ICC Guide to Incoterms 2010 – Understanding and practical use</i> , Jan Ramberg	25
<i>Coetzee</i>	<i>The Interplay Between Incoterms and the CISG</i> , Juana Coetzee	10-11
<i>Schieds</i>	SchiedsVZ 2007	55

Books

Cited As	Content	Pin Point
<i>Davies</i>	Benjamin G Davis, Pathological Clauses -- Frederic Eisemann's Still Vital Criteria, 7 Arb Int'l 365 (1991)	366
<i>Felemegas</i>	John Felemegas, An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law, Cambridge University Press, 2007	42, 168
<i>Huber & Mullis</i>	Peter Huber & Alastair Mullis, The CISG: A new Textbook for Students and Practitioners (2007) European Law Publication	60
<i>Gaillard & Savage</i>	Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International	649
<i>Drago & Zoccolillo</i>		

Cases

Cited As	Content	Pin Point
<i>Kaplan</i>	<i>Kaplan v First Options of Chicago Inc</i> 19 F3d 1503 (3rd Cir. 1994) 1512	1512
<i>Anzen Limited</i>	<i>Anzen Limited v Hermes One Limited [2016]</i> <i>UKPC 1, 16</i>	16
<i>China State Construction</i>	<i>China State Construction Engineering Corporation Guangdong Branch v Madiford Ltd [1992] 1 HKC 325</i>	325
<i>Asante Technologies</i>	<i>Asante Technologies, Inc v PMC-Sierra, Inc.,</i> U.S. Federal District Court for the Northern District of California, 39 July 2001	
<i>Easom Automation Systems</i>	<i>Easom Automation Systems, Inc. v Thyssenkrupp Fabco, Corp.</i> U.S. Federal District Court, Eastern District Michigan, 28 September 2007	
<i>Chicago Prime Case</i>	<i>Chicago Prime Packers Inc, v Northam Food Trading Co,</i> 408 F.3d 894 (7th Cir. 2005)	

<p><i>New Zealand</i></p> <p><i>Mussel Case</i></p>		
	<p>Supreme Court of Western Australia, Australia, 17 January 2003 (Ginza Pty. Ltd. v. Vista Corporation Pty. Ltd.); Landgericht Coburg, Germany, 12 December 2006</p>	
	<p>Oberlandesgericht Dusseldorf 2 July 1993</p>	

Conventions/Legislation/Rules

Cited As	Content	Pin Point
<i>CIETAC Rules</i>	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules	Article 6(1)
<i>UNCITRAL Model Law</i>	UNCITRAL Model Law International Commercial Arbitration 2006?	Article 16(1)
<i>Vienna Convention</i>	Vienna Convention Law on the Law of Treaties 1969	
<i>UNIDROIT Principles</i>	UNIDROIT Principles of International Commercial Contracts 2010	Article 1.1(1)
<i>NY Convention</i>	United Nations Conference on International Commercial Arbitration: Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958	Article III(3)

Internet Sources

Cited As	Content	Pin Point
<i>Trans-Lex Principles</i>	http://www.trans-lex.org/968902	Para 2
	http://www.cisg.law.pace.edu/cisg/biblio/enderlein1.html#i <u>d.</u>	
<i>Drago & Zoccolillo</i>	Thomas J. Drago, Esq & Alan F. Zoccolillo, Esq, Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts (2002) Pace Law School Institute of International Commercial Law http://www.cisg.law.pace.edu/cisg/biblio/zoccolillo1.html	

Argument

1. *Claimant* is seeking orders with respect to Procedural matters, inclusive of the jurisdiction of the *Tribunal* and applicability of the *CISG* as the governing law. Further, *Claimant* is seeking orders with respect to substantive issues, namely insurance, payment for goods and any interest payable.

Procedural Issues

The *Tribunal* has jurisdiction to deal with the payment claims raised by *Claimant*?

2. *Claimant* seeks orders for a payment claim, and the *Tribunal* has jurisdiction to make such orders under the *Dispute Resolution Clause* in the *Contracts* entered into by the *Parties* refers disputes relating to payment claims to *CIETAC*.
3. Article 73(1) *CIETAC Rules* establishes that the Hong Kong *Arbitration Centre* can accept and administer arbitration cases such as in these facts. Under its own rules, the *Tribunal* will have power to determine its own jurisdiction [*Art. 6 (1) CIETAC Rules*].
4. The *Tribunal* will have jurisdiction where parties have referenced the arbitral panel along with its equivalent arbitration rules in the arbitration clause, notwithstanding more than one arbitration clause may exist [*SchiedsVZ 2007, p. 55*].

5. The *Dispute Resolution Clause* specifically refers to *CIETAC* as the relevant *Arbitration Centre* and the *CIETAC Rules* as its equivalent law. On this basis, *Claimant* submits the *Tribunal* may apply its jurisdiction on this matter.
6. *Art. 6(5) CIETAC Rules* provides that arbitration shall proceed notwithstanding an objection to the arbitration agreement or jurisdiction over the arbitration case. This is further supported by *Art. 75 CIETAC Rules*, whereby the *Tribunal* shall have the power to determine the existence and validity of the arbitration agreement and its jurisdiction over the case.
7. In considering whether the intended scope of the *Dispute Resolution Clause* allows the *Tribunal* to invoke its jurisdiction the *Tribunal* should have regard to the presumption of *in favorem* [Kaplan, 1512]. The presumption provides that when interpreting the arbitration agreement the *Tribunal* is to construe it in good faith and in a way that upholds its validity. This approach is favoured in the current international climate, which is based on the understanding that dispute settlement by international arbitral tribunals has the same value and standing as adjudication before a domestic court [Trans-Lex Principles, para 2].
8. The *Tribunal* should invoke its jurisdiction to deal with the payment claims for the following reasons: (A) *Parties* intended to submit their disputes to arbitration; (B) Pre-Arbitral procedures have been fulfilled; and (C) The *Dispute Resolution Clause* is valid and operative.

9. In the alternate, if the *Tribunal* does not find the above applicable, it may have reference to the parties' intention to arbitrate [Art. 16(1) *UNCITRAL Model Law*] and the validity of the arbitration clause in determining its jurisdiction.

Parties intended to submit their disputes to arbitration

10. In invoking jurisdiction for *Claimant's* demands for payment, the *Tribunal* should have regard of the following:

11. The *Parties* have shown their intent to arbitrate by including the *Dispute Resolution Clause*, which reads:

“Dispute Resolution: (a) disputes concerning payments shall be resolved amicably between the parties. Failure to reach resolution, either party may submit the dispute to the China International Economic and Trade Arbitration Commission Hong Kong Sub-Commission (Arbitration Centre) for arbitration which shall be conducted in accordance with CIETAC's rules. The arbitral award is final and binding upon both parties, and shall take place in Hong Kong, China.”

12. Further, *Respondent's* expressed intention to arbitrate; as evidenced by *Respondent's* lawyers drafting the *Dispute Resolution Clause* [PO2 para 13].

Pre-Arbitral procedures have been fulfilled

13. The *Dispute Resolution Clause* allowed for a 14 day period to resolve any disputes amicably. Should the 14 day period expire without amicable resolution, the *Parties* are then entitled to enforce the *Dispute Resolution Clause*. Over eight months have passed sufficiently meeting the requisite for pre-arbitral procedures.

The Arbitral clause is valid and operative

14. *Claimant* denies *Respondent's* objection towards the jurisdiction of the *Tribunal* and asserts that there was no consensus to arbitrate and that there is more than one subsection within the *Dispute Resolution Clause* [SoD para 3].

15. *Claimant* asserts that the *Dispute Resolution Clause* must be characterised, as a Multilateral Option Clause or Pathological Clause. *Claimant* accepts there are two further options, (b) and (c) within the *Dispute Resolution Clause* available to the *Parties*. By seeking to arbitrate under option (a) *Claimant* successfully invokes the *Tribunal's* jurisdiction, as it is part of a Multilateral Option Clause.

Multilateral Option Clause

16. A Multilateral Option Clause exists where there are multiple options to settle disputes under an agreement, such as in this case. Fundamentally underlying such an agreement are the principles of party autonomy [*Art 1.1(1) UNIDROIT Principles*], particularly regarding an intention to arbitrate by both parties [*Gaillard & Savage pg*

649]. There need not be a consensus to arbitrate, merely a party's election to do so. When one party gives effect to an arbitration clause the other party must arbitrate.

17. If the other party instead attempts to litigate under the option clause, Courts will commonly stay the litigation to give precedence to the intended arbitration clause in respect of the parties' intentions and as to not override the role of *Tribunals* in international arbitration [Anzen Limited, 16].

18. Hong Kong law applies this principle [China State Construction, 325]. Thus, if *Respondent* attempts to submit their case to the Hong Kong Courts under paragraph (b) of the *Dispute Resolution Clause*, Hong Kong Courts will read the word 'may' in paragraph (a) of the *Dispute Resolution Clause* as 'shall', binding *Respondent* to the arbitration agreement and staying any litigation [China State Construction, 325].

19. While *Claimant* retains that *CIETAC Rules* apply, should *Respondent* rely on paragraph (c) of the *Dispute Resolution Clause*, *Claimant* submits that the applicable laws of New York include the *NY Convention*. This provides that, at the request of one of the parties, the Court shall refer the parties to arbitration so long as the arbitration agreement is valid [NY Convention Art. III (3)].

20. *Claimant* submits that the *Dispute Resolution Clause* is a valid clause. As submitted above *Claimant* has invoked the clause and therefore, the *Tribunal* should invoke its jurisdiction over this dispute.

Pathological Arbitration Clause

21. Alternatively, if *Respondent* relies on the *Dispute Resolution Clause* as being a pathological clause, where an arbitration agreement contains a defect thus disrupting the process of arbitration, the Parties have still evinced a clear intention to settle dispute by arbitration.

22. A pathological arbitration clause is one that lacks at least one the four essential elements of a healthy arbitration clause [Davis, 366]. In this case, the contentious issue is whether the *Dispute Resolution Clause* provides a means of resolving a dispute over the choice between arbitration rules, arbitral seats, or refers to both arbitral tribunals and national courts.

23. It is *Claimant's* position that the *Tribunal* should give effect to the intention of the Parties to arbitrate, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars, so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention not result in an arbitration that is not within the contemplation of either party.

24. Furthermore, *Claimant* brings the *Tribunal's* attention to the *Contracts* entered into by the *Parties*, where both *Parties* accepted the *Dispute Resolution Clause* providing mutual intention of the *Parties* to arbitrate in the event of a dispute.

The CISG governs the claims arising under the Contracts

25. Art. 1(1)(a) CISG provides that the CISG applies to contracts for the sale of goods between parties whose places of business are in different states. It is undisputed that the Parties are Contracting States to CISG, and Parties place of business are in different States [*SoC para 15*].
26. Should the Parties feel that CISG alone does not suffice, they are then entitled to rely on the *UNIDROIT Principles* and the *VIENNA Convention* [*PO2 para 9*].
27. Art. 6 CISG respects party autonomy by allowing parties who desire not to submit their commercial relationships to contractual law provided by the CISG. To exclude the application of the CISG, entirely or in part, parties must expressly state so in the contract, to the effect of: “the CISG is not applicable” [*Drago & Zoccolillo; Huber & Mullis, p. 60*].
28. However, the lack of an express exclusion as above does not determine the non-applicability of the CISG if it can be shown that the parties impliedly intended to exclude its application [*Asante Technologies*].
29. Implied intention by parties to exclude the CISG’s application is generally determinable where the law of a Non-Contracting State has been chosen as the governing law [*Oberlandesgericht Dusseldorf 2 July 1993*]. Alternatively, choosing a

Contracting State's governing law has strong implications that the CISG shall apply as part of the law of that State [*Huber & Mullis*].

30. *Claimant* asserts that no express exclusion of the CISG is found in the *Contracts*.

Should *Respondent* seek to rely on *Art. 20* of the *Contracts* [*S&P para 20; S&P2 para 20*] as implied exclusion of the *CISG*, *Claimant* maintains that Wulaba is a contracting State to the *CISG* [*SoC Para 15*] and the selection, therefore, includes the applicability of the *CISG* as part of Wulaba law.

31. Should *Respondent* rely on implying that *Art. 20* references exclusion of the *CISG* by application of international norms under *Art. 7 CISG* *Claimant* provides that there is disparity and contention between various authors. The *Parties* have not only selected a contracting State but have further not chosen that the domestic law of Wulaba specifically [*Felemegas, p 42*].

32. Further, it is *Claimant's* position that Wulaba not ratifying the *CISG* into national law only shows intention for the *CISG* to specifically apply to contracts for the international sale of goods.

Substantive Issues

Lack of Insurance coverage in the first transaction

33. The delivery of the watch straps is to be governed by the 2010 Incoterm DDP (Delivered Duty Paid) [*Contracts*, Art. 3]. This term places the maximum possible obligation upon the seller; the seller is responsible for delivery of the goods which occurs when the goods are placed at the disposal of the buyer [Ramberg, 25].
34. Incoterms are not to be interpreted as displacing the application of the rules contained within the *CISG* [Coetzee, 10]. Thus, interpreting the insurance gap in the DDP Incoterm in the *Parties' Contracts* can have reference to the *CISG* and the rules there that apply to the passing of risk [Coetzee, 10].
35. Additionally, when DDP is entered into a contract it is to be formatted in a particular fashion: DDP (insert named place of destination) the Incoterms 2010 rules. The term was not outlined in this manner for the *Contracts* between the *Parties*.
36. Therefore, the *CISG* can be applied, specifically *Arts. 31 and 67 CISG*. Art. 31 *CISG* limits the delivery obligation of the seller to handing goods over to the first carrier where a particular delivery destination has not been specified. Further, *Art. 67 CISG* stipulates that when a delivery destination is not specified the passing of risk to the buyer occurs at the time the goods are handed over to the first carrier.

37. Additionally, *Art. 32(3) CISG* also outlines the responsibility of *Claimant* with respect to insurance as the matter was not addressed in the *Contracts*. That is, the only obligation of *Claimant* was to provide any and all information to *Respondent*, if requested, to enable *Respondent* to effect such insurance.
38. *Claimant* also asserts that insurance is not a cost that they agreed to cover under the *Contracts*. During the discussions between the Parties, *Claimant* did state that they “would bear all related costs...” [SoD para 7] however, this statement was limited by a number of factors.
39. First, following that statement *Claimant* listed import duty and VAT. *Claimant* submits this was an exhaustive list of costs they would bear.
40. Secondly, Ramberg lists the four main categories of costs relating to Incoterms. Insurance is one of the cost categories but only applies in relation to contracts that incorporate the CIF or CIP terms.
41. Further, *Claimant* states that as the risk passed to the *Respondent*, any damage or loss suffered does not discharge *Respondent* from paying the price of the *S&P* [*Art. 66 CISG*].

Timing of delivery of prototype

42. Regarding the timely delivery of the prototypes, *Claimant* denies *Respondent's* allegations of a breach [RE No.2] and states that delivery was made within the fourteen days specified under S&P [Art 5]. *Claimant* acknowledges that *Respondent's* deposit was received on 31 July 2014 [SoC para 7] and that *Respondent* received the prototypes on 15 August 2014 [CE No. 4].
43. It is *Claimant's* position that the *CISG* is the governing law of the *Contracts* [SoC para 14] and as the *Contracts* provides for delivery within a fixed period of time, that the relevant provision is *Art. 33(b) CISG*. This states that *Claimant*, as the seller, may at any time within the fourteen days deliver the prototypes. Since the *CISG* lacks specific provisions regarding computation of time, reliance has been placed on expert authority.
44. *Claimant* will rely on Professor Fritz Enderleins' report which provides that computation of time under *Art. 33(b) CISG* is determinable by reference to the circumstances of the case. This interpretation reflects common but necessary business flexibilities, such as convenience and preparation of delivery by a seller. It is *Claimant's* position that the circumstances of this case favour itself as the seller. *Claimant's* normal business of making watch straps is distinguishable due to hand making these prototypes and doing so with extreme caution so as not to damage the one Cherry Watchcase [CE No. 7]. Further, *Respondents* acceptance of the prototypes [CE No. 4] solidifies that the circumstances favour *Claimant's* selection of time, which is inclusive of 15 August 2014.

45. Alternatively, if the *Tribunal* finds in favour of *Respondent* on this issue, *Respondent's* acceptance will amount to acquiescence of any breach. Furthermore, if the *Tribunal* finds that the governing law is the common law applied in Wulaba [PO2 para 23], *Claimant* will rely on common law principles which state that time within which an act is to be completed shall be done excluding the first day and including the last [Deak, 513], therefore effecting timely delivery of the prototypes on the 15 August 2014.

Conformity of Goods

46. *Claimant* rejects *Respondent's* allegations that the watch straps did not conform to the *Contracts* between the *Parties*.
47. Art. 35(1) CISG provides that the seller must deliver goods that are of the quantity and description of the *Contract*. There are three sub-parts under Art. 35(2) CISG, of which Art. 35(2)(a) CISG is compulsory, rather than Art. 35(2)(b) and (c) CISG which are triggered on certain factual requisites [Linne]. *Claimant's* position is that the goods conform as per Art. 35(2)(a) CISG. *Respondent* has the onus of providing notice to *Claimant* that there is lack of conformity [Chicago Prime Case].
48. The general assumption under Art. 35(2)(a) CISG is that conformity of goods is satisfied where the goods are fit for their ordinary use and are capable of being resold [Felemegas, p 168]. The *New Zealand Mussel Case*, the broad proposition of merchantable quality extends so far as to goods conforming to a contract where they can be sold in the seller's State but not the buyer's. This has been affirmed in the common law *Ginza Case* where it was established that conformity requires goods to

be of ‘average quality’, ‘marketable quality’ or ‘reasonable quality’ [Supreme Court of Western Australia, Australia, 17 January 2003 (*Ginza Pty. Ltd. v. Vista Corporation Pty. Ltd.*); Landgericht Coburg, Germany, 12 December 2006]. Further, Art. 5.1.6 *UNIDROIT Principles* provides “where the quality of performance is neither fixed by, nor determinable from, the contract of parties bound to render a performance of a quality that is reasonable and not less than average in the circumstances”.

49. In line with the above, *Claimant* asserts that *Respondent* is still able to sell the watch straps as they are still of merchantable quality and fit for purpose. Further, under Art. 35(2)(c) *CISG*, *Claimant* provided prototypes which were used as the model base for the conformity of the goods. These prototypes were accepted by *Respondent*.

50. Should *Respondent* rely on Art. 35(2)(b) *CISG*, *Claimant* contends that it is unreasonable for *Respondent* to rely on *Claimant’s* skill in determining conformity of the goods after the delivery of the prototypes, which is an obligation of *Respondent* under *CISG* [Art. 38 *CISG*]. *Claimant* acknowledges reliance on its skill to manufacture the watch straps is reasonable; however *Respondent* accepted the prototypes and therefore it is unreasonable for *Respondent* to off-load its completed obligation to check conformity of the final goods on *Claimant*.

51. In the event *Respondent* relies on Art. 35(3) *CISG*, *Claimant* is of the position that it was reasonable for *Respondent* to check conformity of goods when the prototypes were delivered. This is shown by *Respondent’s* actions of taking the final watch straps to their biggest distributor in an attempt to enter into a subsequent and separate sale and purchase agreement, however that distributor immediately noticed the alleged defects for *Respondent*.

Payment of money under the transactions

52. *Claimant* acknowledges receipt of payment in full for S&P, and contends that payment for S&P 2 should be made in full.
53. *Claimant* contends that it did not breach any of the requirements of the Contracts, and therefore Respondent is obliged to pay the moneys under the transaction as per Art. 53, 54 and 59 CISG.
54. In any case should the Respondent reject or refuse to pay, *Claimant* contends that the monies will then be recoverable under Art. 74 CISG, as the buyer would have breached its obligations.
55. Further, *Claimant* requests any interest on the outstanding payment to be paid without prejudice as per Art. 78 CISG.

Request for Relief

1. *Claimant* hereby submits that the Tribunal finds in favour of the *Claimant*:
 - a. Liquidated damages in the sum of USD 9.6 million;
 - b. Respondent to pay all costs of the arbitration, including *Claimant* expenses for legal representation, the arbitration fee paid to CIETAC and the additional expenses of the arbitration; and
 - c. Respondent pay *Claimant* interest on the amounts set forth in items 1 and 2 above, from the date *Claimant* made those expenditures to the date of payment by Respondent.