

**SIXTH ANNUAL
INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION
MOOTING COMPETITION**

MEMORANDUM FOR THE CLAIMANT

ON BEHALF OF CLAIMANT

Albas Watchstraps Mfg. Co. Ltd.

241 Nathan Drive,
Yanyu City,
Yanyu

AGAINST RESPONDENT

Gamma Celltech Co. Ltd

17 Rodeo Lane,
Mulaba,
Wulaba

Team 446

MEMORANDUM FOR CLAIMANT

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INDEX OF ABBREVIATIONS

¶ / ¶¶	Paragraph / paragraphs
And	&
Art./Arts.	Article/Articles
Claimant	Albas Watchstraps Mfg. Co. Ltd
Clarification	The Sixth International Alternative Dispute Resolution Mooting Competition Clarification
Cl. Ex.	Claimant's Exhibit
CIETAC	China International Economic and Trade Arbitration Commission
CISG	The United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
DDP	Incoterms 2010 Delivery Duty Paid
ed(s)	Editor(s) <i>or</i> Edition(s)
ECCTL	European Convention on the Calculation of Time-Limits
et. al.	and others
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006
Moot Problem	The Sixth International Alternative Dispute Resolution Mooting Competition Moot Problem 2016
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
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Parties	Claimant and Respondent collectively
Req. Arb.	Request for Arbitration
Respondent	Gamma Celltech Co. Ltd
Res. Ex.	Respondent's Exhibit
S&PA(I)	Sale and Purchase Agreement I
S&PA(II)	Sale and Purchase Agreement II
SGA	English Sale of Goods Act 1979
Tribunal	Arbitral Tribunal
UN	United Nations
UNCITRAL	United National Commission on International Trade Law
UNIDROIT	The UNIDROIT Principles of International Commercial Contracts
USD	United States Dollars

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INDEX OF LEGAL SOURCES

CITED AS	FULL CITATION	CITED AT
Arb. Ord	Arbitration Ordinance (Cap 609)	¶ 3
CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules effective as of 1 January 2015	¶¶ 3, 4
CISG	The United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980	¶¶ 16-17, 19-32, 37-38, 49, 52-55
Directive 1999	Directive 1999/44/EC of the European Parliament	¶ 29
ECCTL	European Convention on the Calculation of Time-Limits	¶ 40
SGA	English Sale of Goods Act 1979	¶ 29
UNIDROIT	International Institute for the Unification of Private Law	¶¶ 42, 51

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CITED AS	FULL CITATION	CITED AT
Born	Gary B Born, <i>International Commercial Arbitration</i> (Kluwer Law International, 2nd ed, 2014)	¶13
Consumer Protection	Consumer Protection (The Sale and Supply of Goods to Consumers Regulations 2002), 2002 SI 2002/3045	¶29
Ferrari (2004)	Franco Ferrari, Harry Flechtner, Ronald A. Brand (eds), <i>The Draft UNCITRAL Digest and Beyond : Cases, Analysis and Unresolved Issues in the U.N. Sales Convention : Papers of the Pittsburgh Conference Organized by the Center for International Legal Education (CILE)</i> (Thomson Sweet & Maxwell, 2004)	¶¶22, 29, 40
Ferrari (2012)	Franco Ferrari, <i>Contracts for the International Sale of Goods</i> (first published, Martinus Nijhoff Publishers 2012)	¶¶22, 29
Kroll et. al	Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas (eds), <i>UN Convention on Contracts for the International Sale of Goods (CISG) : Commentary</i> (Beck/Hart 2011)	¶¶24, 28
Oxford	‘Provide’, Julia Elliot (ed), <i>Oxford Large Print Dictionary</i> (first published 1999, Oxford 2002)	¶39
Schlechtriem/ Schwenzer (2005)	Peter Schlechtriem and Ingeborg Schwenzer (2005), <i>Commentary on the UN Convention on the International Sale of Goods (CISG)</i> , (first published 1998, Oxford 2005)	¶¶23, 24, 26
Schwenzer (2010)	Ingeborg Schwenzer (ed), <i>Commentary on the UN Convention on the International Sale of Goods (CISG)</i> , (Oxford, 2010)	¶¶20, 25, 28
Schwenzer (2006)	Ingeborg Schwenzer, ‘The Noble Month (Articles 38, 39 CISG): The Story Behind the Scenery’, (2006) VII <i>European Journal of Law Reform</i> 353	¶49

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Spagnolo	Lisa Spagnolo, <i>CISG Exclusion and Legal Efficiency</i> (Wolters Kluwer Law & Business 2014) 273	¶30
Troiano	Stefano Troiano, 'The CISG's Impact on EU Legislation', (2008) 6 IHR 221, 223	¶29
Winship	Winship, 'Changing Contract Practices in the Light of the United Nations Convention: A Guide for Practitioners' (1995) 29 International Lawyers, 525	¶22
UNCITRAL Digest	UNCITRAL, <i>UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods</i> (12th edn, United Nations 2012)	¶¶24, 28
UNCITRAL Secretariat's Commentary	UNCITRAL Secretariat's Commentary, 'Commentary on the 1978 Draft Convention on Secretariat's Commentary on Article 5', <i>United Nations Conference on Contracts for the International Sale of Goods</i> (1979) < http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-06.html > accessed 10 June 2016	¶19

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INDEX OF CASES

CITED AS	FULL CITATION	CITED AT
<i>Auto Case</i>	<i>Auto Case</i> , Oberlandesgericht [Appellate Court] Linz, 23 January 2006, CISG-online 1377	¶30
<i>BP Oil</i>	<i>BP Oil International v. Empresa Estatal Petroleos de Ecuador</i> , U.S. Court of Appeals (5th Circuit) [federal appellate court], 11 June 2003, CISG-online 730	¶19
<i>Bruggen</i>	<i>Bruggen Deuren BVBA v Top Deuren VOF</i> , Rechtbank van Koophandel [Commercial Court] Hasselt, 19 April 2006, CISG-Online 1389	¶54
<i>Clothing Case</i>	<i>Clothing Case</i> , Court of Arbitration of the International Chamber of Commerce, January 1997, ICC Arbitration Case No. 8786	¶37
<i>ICC Case No 6276</i>	‘Partial Award in ICC Case No 6276’ (2003) [11] 14(1) <i>ICC International Court of Arbitration Bulletin</i> 76	¶13
<i>White v Kampner</i>	<i>White v Kampner</i> , 229 Conn. 465 (1994)	¶10
<i>William Co</i>	<i>William Co v Chu Kong Agency Co Ltd</i> [1995] 2 HKLR 139 [14]	¶8

I. JURISDICTION TO THE TRIBUNAL

1. The Tribunal has jurisdiction to hear the disputes because (A) there is a valid arbitration agreement and (B) there is no pre-condition for arbitration.

A. Valid arbitration agreement

2. S&PA(II), Art.19(a), same with its correspondent in S&PA(I), states clearly that

'...either party may submit the [disputes concerning payments] to [CIETAC] Hong Kong Sub-Commission (Arbitration Center) for arbitration...'¹
3. There is no dispute that CIETAC Rules govern the procedures of the arbitration as agreed by the parties. By agreeing to arbitrate in Hong Kong, the parties deemed the Arb. Ord, which adopts Model Law, to be applied as the procedural law of the arbitration. The choice of substantive law stated in S&PA(II), Art.20 should thus have no effect on the Tribunal's jurisdiction.
4. The validity of arbitration agreement is presumed. Respondent who resists the

¹ Moot Problem, P.7, Cl. Ex. No.2, Art.19(a); P.12, Cl. Ex. No.6, Art.19(a).

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enforcement should bear the burden to rebut it under **Model Law, Art.8.**

5. **CIETAC Rules, Art.5²** emphasises two elements for a valid arbitration agreement.

First, it should be in writing to show certainty.³ Second, by the word ‘agreement’, there should be mutual consent between the parties.

6. Certainty is satisfied by the unequivocal wordings in S&PA(II), Art.19(a). Such level of details, including the place of seat, the language, the effect of the arbitral award and the governing rules, renders Art.19(a) a clear and certain arbitration agreement.

7. The Parties’ mutual consent to arbitrate can be clearly seen from the fact that they incorporated Art.19(a) into S&PA(I) after their oral agreement made on 23 July 2014.⁴

In drafting S&PA(II), while amending other clauses, the parties willfully kept the entire Art.19(a). If they had not intended to arbitrate, they would have withdrawn Art.19(a) in S&PA(II).

² Arb. Ord., s 19; Model Law Art 7.

³ CIETAC Rules, Art.5(1).

⁴ Clarification No. 13 [1].

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8. Although Art.19(b) and Art.19(c) might provide the election to litigation, these options do not render Art.19(a) unintended. These ‘split clauses’ provide the parties a choice and once a party has made his choice, the choice is binding.⁵ They are enforceable and are considered a sufficiently clear submission to arbitration.⁶

Therefore, once Claimant made the choice to arbitrate, Respondent cannot revoke it.

9. Satisfying both requirements, the presumption of the validity of Art.19(a) as an arbitration agreement is not rebutted.

B. No pre-condition for arbitration

10. A pre-arbitration procedural provision is to be held unenforceable for uncertainty and vagueness in absence of any definition and details of the designated resolution, such as the manner and the specified number of sessions.⁷

11. Art.19(a) is insufficient to impose clear obligation to amicable resolution before

⁵ *William Co v Chu Kong Agency Co Ltd.*

⁶ *ibid.*

⁷ *White v Kampner*, 479.

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arbitration especially when no definition of 'amicable resolution' is ever provided.

There is no specification to indicate the manner of how the disputes can be resolved amicably, whether in negotiation or conciliation, and the representation of respective parties. Therefore, Claimant is entitled to submit their disputes to arbitration directly as long as no settlement between the Parties is reached within 14 days after the disputes arose.

12. Even if Art.19(a) imposed an obligation to negotiate, the Parties had fulfilled the duties.

13. Negotiation does not require the parties to compromise or change their positions.⁸

Instead, negotiation is no more than exchange of ideas about the disputes. Where there was little hope of reaching an agreement, even a short-lasting exchange of views was held suffice.⁹

⁸ Born, 933.

⁹ ICC Case No 6276,79.

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14. The requirement of negotiation was satisfied through the exchange of emails on 27 February 2015.¹⁰ Little supports are there that the Parties did not communicate with each other before the arbitration notice. Given that they had extremely different expectations and there was very little chance of a compromise, the exchange of views already satisfied the condition precedent to negotiate.

15. All in all, the Tribunal has jurisdiction to hear the disputes.

II. CISG GOVERNS THE CLAIMS ARISING UNDER S&PA(I) AND (II)

16. Claimant submits that CISG governs the claims arising under S&PA(I) and (II) because (A) the Parties have not *expressly* opted out of CISG, or alternatively (B) the Parties have not *implicitly* opted out of CISG.

17. The prerequisites for the applicability of CISG is not disputed.¹¹

18. The Parties agreed on the choice of law in S&PA(I)¹² and S&PA(II)¹³, Art.20, which is

¹⁰ Moot Problem, P.13, Cl. Ex. No.7; P.18, Res. Ex. No.2.

¹¹ Moot Problem, P.15, [5].

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indisputably incorporated with the Parties' acknowledgement.¹⁴

A. No express exclusion

19. Under **CISG, Art.6**, contracting parties have the right to exclude CISG expressly.¹⁵

The exclusion should be in clear language which expressly states the choice of applicable substantive law and that CISG does not apply.¹⁶

20. Art.20 reads 'The contract shall be governed by the national law of Wulaba. All other applicable laws are excluded.' There is no explicit mentioning of the exclusion of CISG¹⁷ or other relevant terms.¹⁸ Therefore, the Parties have not expressly opted out of CISG.

¹² Moot Problem, P.7, Cl. Ex. No 2.

¹³ Moot Problem, P.12, Cl. Ex. No 6.

¹⁴ Moot Problem, P.4, [15].

¹⁵ UNCITRAL Secretariat's Commentary.

¹⁶ *BP Oil*.

¹⁷ UNCITRAL, 33, [7]; *Vegetable Fat Case*.

¹⁸ Schwenger (2010), 111, [17].

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B. No implicit exclusion

21. Parties have not opted out of CISG implicitly because (1) implicit exclusion is not allowed; (2) if allowed, there is no implicit exclusion.

(1) Implicit exclusion is not allowed

22. Parties cannot exclude CISG implicitly.¹⁹ First, the possibility of an implicit exclusion was not retained by the drafters of CISG because its inclusion in CISG's 'direct predecessor', **ULIS, Art.3** had been heavily criticized.²⁰ Second, only express exclusion can guarantee the uniform application of CISG and consequently ensure its success.²¹ Thirdly, Since the requirement of express exclusion of CISG gives more certainty to the contracting parties and overcomes the scholarly discrepancies,²² CISG should not be excluded implicitly.

¹⁹ Ferrari (2012).

²⁰ Ferrari (2004), 119.

²¹ Borisova [8]

²² Winship.

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(2) If allowed, S&PA (I) and (II) Art.20 do not constitutes an implicit exclusion

23. Generally, a ‘certain’ or ‘real’ tangible intent is necessary.²³

24. When the parties choose the law of a Contracting State to govern their contract without making any reference to CISG in their contract, the situation is less clear.²⁴ This is a matter of interpretation of the relevant contractual clause under CISG, Art.8 which may result in a reading excluding CISG.²⁵ Claimant submits that CISG has not been excluded under (i) CISG, Art.8(1), and (ii) CISG, Art.8(2).

(i) CISG, Art.8(1)

25. Under **CISG, Art.8(1)**, the contract is interpreted according to the subjective and real intent of the parties, if it is known or could not have been unaware of by the other party. **CISG, Art.8(3)** supplemented that consideration should be given to all relevant circumstances, such as negotiations between the parties.²⁶

²³ Honnold,107-108, [77].

²⁴ UNCITRAL Digest, 34, para.11; Kroll et.al., 104-106.

²⁵ Schlechtriem/ Schwenger (2005), 91, [14].

²⁶ Schwenger (2010), 124, [31].

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26. Art.20 was inserted by Respondent's lawyer in order not to be surprised by having unknown or unfamiliar law applicable to the agreement.²⁷ Claimant submits that, first, CISG is not 'unknown or unfamiliar law'. Second, Respondent's intention not to be surprised by having unknown or unfamiliar law applicable to the agreement was not known or could not have been aware of, which is generally understood to require a greater degree of carelessness,²⁸ by Claimant given that this was its first dealing with Respondent. The intent was not communicated because Claimant despite signing the Agreements still did not understand the purpose of Art.20.²⁹ Therefore, the Parties had no clear and real subjective intent to exclude CISG.

(ii) CISG, Art.8(2)

27. Since **CISG, Art.8(1)** does not apply, **CISG, Art.8(2)** provides that the adjudicator will need to determine whether a clear inference arises from the words and/or conduct of the parties to the effect that they intended to exclude CISG, in the sense that these would be reasonably understood as manifesting such an intent.³⁰

²⁷ Clarification No.30.

²⁸ Schwenger (2005), 118, [16].

²⁹ Clarification No.30.

³⁰ CISG, Art.8(2)

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28. Art.20 reads ‘The contract shall be governed by the national law of Wulaba. All other applicable laws are excluded.’³¹ In general practice, by choosing the law of a contracting state to CISG without further specifications as part of that law, it does not exclude the applicability of CISG.³² The rationale is that CISG forms an integral part of the national law of that state and is the specific law to be applied for international sales.³³ Although the national law of Wulaba does not incorporate CISG,³⁴ it should include both the domestic law of Wulaba and CISG. Therefore, the Parties should be reasonably understood as evincing no intent to opt out pursuant to **Art.8(2) CISG**.

29. Only a minority view supports that ‘the indication of the law of a Contracting State ought to amount to an implicit exclusion of the CISG because otherwise the indication of the parties would have no practical meaning.’³⁵ Such view is untenable since the application of CISG does not make the national law irrelevant.³⁶ The domestic law of

³¹ Moot Problem, P.7, Cl. Ex. No 2; P.12, Cl. Ex. No 6.

³² Schwenzer (2010) 110, [16].

³³ Kroll et. al., 105, [18]; UNCITRAL Digest, 34, [11]

³⁴ Clarification No.9

³⁵ Ferrari (2012), 165.

³⁶ Ferrari (2004), 124.

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Wulaba is an *alter ego* of SGA.³⁷ Looking at the history of SGA, Directive 1999 forms part of SGA,³⁸ while Directive 1999 resembles CISG.³⁹ Still, SGA is different to CISG as CISG only plays a part in SGA. The domestic law of Wulaba therefore is not overlapping with CISG and is applicable to issues not governed by CISG. Hence, the Parties' designation of 'national law of Wulaba' as the governing law is still meaningful.

30. If evidence supported divergent interpretations regarding intent of both exclusion and non-exclusion of CISG, authorities support the view that when balancing competing inferences pursuant to Art. 8 CISG, in the absence of a clear intent to exclude, parties should be reasonably understood as not evincing intent to opt out pursuant to Art. 8(2).⁴⁰ The burden is on parties to make their choice of law plain enough that it would be reasonably understood as bearing the purpose of exclusion.⁴¹

31. In a nutshell, Claimant respectfully submits that CISG should govern the claims arising

³⁷ Clarification No.11

³⁸ Consumer Protection.

³⁹ Troiano, 223.

⁴⁰ Spagnolo, 273.

⁴¹ *Auto Case*.

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from S&PA(I) and (II) since the Parties have not opted out of CISG, neither expressly, nor impliedly. The Tribunal should not be too readily to infer an intent to exclude CISG.

III. INSURANCE

A. No obligation to buy insurance

32. The Parties expressly agreed to applying DDP to S&PA(I) and are thus bound by DDP by virtue of **CISG, Art.9**. In **DDP, Arts.A10 and B10**, there is no legal obligation imposed on either party to purchase insurance.

33. S&PA(I) did not *expressly* oblige Claimant to purchase insurance. Although Claimant agreed to be responsible for ‘all related costs’ during oral negotiation,⁴² it is not part of a contract. If the oral negotiation were part of S&PA(I), the term ‘related costs’ does not include insurance since no information about the scope nor extensiveness of the insurance was provided by Respondent.

34. There is also no *implied* term in S&PA(I) for Claimant to purchase insurance. If there

⁴²Moot Problem, P.3, [6].

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were, Respondent would have supplied Claimant with the necessary information for insurance. There is no evidence of the trade practice requiring the seller to purchase insurance.

35. Therefore, Claimant had no legal obligation to buy insurance.

IV. TIMELY DELIVERY OF PROTOTYPE

36. Under S&PA(I), Art.5, Claimant will provide a prototype for approval within 14 days from receipt of deposit. Respondent paid the deposit on 31 July 2014⁴³ and Claimant provided the prototypes on 14 August 2014.⁴⁴

A. Article 33 is not applicable

37. Prototypes do not fall under the category of 'goods' but rather another category of its own.⁴⁵ Goods should be something capable of being used by the end user. Therefore, **CISG, Art.33** with regard to delivery of 'goods' does not apply.

⁴³ Moot Problem, 3, [7].

⁴⁴ Moot Problem, 8, Cl. Ex. No.3.

⁴⁵ *Clothing Case*.

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B. 'Provide' within 14 days

38. If prototypes were regarded as goods and CISG, Art.33 applied; there was no late delivery of the prototypes.

39. In S&PA(I), Art. 5, the definition of 'provide' was not mentioned. It is submitted that 'provide' is defined as 'supply or make available to'.⁴⁶

40. There is no dispute that Claimant received the deposit from Respondent on 31 July 2014. To fulfil his obligation, Claimant has to only *provide* prototypes within 14 days. There was no warranty Respondent has to *receive* the prototypes within 14 days. **ECCTL, Art.3(1)** provides that time-limits expressed in days, shall run from the *dies a quo* at midnight to the *dies ad quem* at midnight when calculating time. The 14th day is included for the purpose of 'within'.⁴⁷ As there is no time difference between the Parties,⁴⁸ the 14-day period started from 00:00 of 1 August 2014 to 24:00 of 14 August 2014.

⁴⁶ Oxford, 876.

⁴⁷ Ferrari (2004), 622.

⁴⁸ Clarification No.73(b).

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41. Therefore, Claimant has fulfilled his obligation to provide prototypes by courier on 14 August 2014 regardless of receipt by Respondent.

C. No Fundamental Breach

42. Even if a delay in delivery was found, time is not of essence in the current delivery of prototypes. Respondent only planned to introduce the watchstraps in December⁴⁹ and expected customers to purchase their watchstraps 6-8 months after its launch.⁵⁰ Under **CISG, Art. 33** and **UNIDROIT, Art.6.1.1**, the delay falls within a reasonable time.

43. The delay of delivery does not go into the root of S&PA(I), there was no fundamental breach under **CISG, Art.25**.

V. CONFORMITY OF GOODS

44. The goods conformed with the prototypes. There is no independent evidence to indicate that there is non-conformity.

⁴⁹ Clarification No.54.

⁵⁰ Moot Problem, P.5, Cl. Ex. No.1, [1].

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A. Handmade

45. Claimant told Respondent that the goods would be produced by mass production⁵¹ and Respondent acknowledged the means of mass production.⁵² No requirement was stated in S&PA(II) that the watchstraps were to be handmade.

46. It is common in the industry and reasonable that products of mass production with the use of machinery would differ from actual handmade prototypes.⁵³ Samples are given to provide an approximate description of the goods, slight differences can be tolerated.⁵⁴ If the handmade characteristic was an essential condition of the goods manufactured, Respondent should have so stated explicitly in S&PA(II).

B. Softness

47. No reference in S&PA(II) was made to the specific softness of the leather watchstraps.

The only requirement stated was that it has to be manufactured by Yanyu's soft

⁵¹ Moot Problem, P.8, Cl. Ex. No.3.

⁵² Moot Problem, P.9, Cl. Ex. No.4.

⁵³ Clarification No.26.

⁵⁴ *Bruggen*.

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leather.⁵⁵ Claimant only needed to make sure that the watchstraps conformed with the prototype and that the leather used was from Yanyu. The watchstraps conformed with the prototypes and the contractual requirements.

C. Size

48. The watchstraps were made in accordance to the size of prototypes, which were approved by Respondent.⁵⁶ Since Respondent delayed in notifying Claimant that the watchstraps did not fit the Cherry watchcases, Respondent thereupon lost the right to rely on non-conformity.

49. **CISG, Art.39(1)** provides that the buyer must notify the seller of any non-conformity within a reasonable time when the defect ought to be discovered by them. Respondent received the watchstraps on 26 January 2015,⁵⁷ and examined some watchstraps of each carton thereon.⁵⁸ Respondent did not notify Claimant of the alleged

⁵⁵ Moot Problem, P.5, Cl. Ex. No.1.

⁵⁶ Moot Problem, P.9, Cl. Ex. No.4.

⁵⁷ Clarification No.50.

⁵⁸ Clarification No.19.

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non-conformity of watchstraps until 27 February 2015,⁵⁹ which is deemed unreasonable.⁶⁰

50. The lengthy period before the communication of the non-conformity was unjustifiable.

Respondent has no grounds to avoid S&PA(II).

VI. PAYMENT UNDER TRANSACTION

A. S&PA(I)

51. S&PA(II) had been concluded to replace S&PA(I) on the basis that Respondent accepted responsibility and made full payment of the lost goods.⁶¹ The obligations under S&PA(I) were discharged by consent thereon. According to **UNIDROIT, Art.1.8**, Respondent cannot act inconsistently now to ask for the refund.

52. By virtue of **CISG, Art.79(2)**, Claimant is not liable for the fact that Respondent was unable to receive the goods because the loss at sea was due to the failure by the carrier

⁵⁹ Moot Problem, P.18, Res. Ex. No.2.

⁶⁰ Schwenzer (2006).

⁶¹ Moot Problem, P.4, [11].

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Claimant engaged to perform the shipment and such failure was due to an impediment beyond his control.

B. S&PA(II)

53. By fulfilling his contractual obligations, Claimant is entitled to the balance payment of USD9.6M for S&PA(II). Referring to para49, it is clear that Respondent has already conducted examinations and accepted the watchstraps.

54. Now that Respondent's payment is still in arrears, Claimant is entitled to interest on it under **CISG, Art.78**.

55. If the Tribunal found a breach by Claimant for non-conformity of watchstraps, Respondent failed to make reasonable efforts to mitigate the loss as required **CISG, Art.77**. Claimant would be entitled to claim a reduction in the damages.

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VII. REQUEST FOR RELIEF

Claimant respectfully asks the Tribunal to adjudge and declare that:

1. The Tribunal has jurisdiction to hear the Disputes;
2. CISG should apply and govern S&PA(I)& S&PA(II);
3. Respondent bore the obligation to purchase insurance;
4. The delivery of prototypes by Claimant was not late;
5. There is no fundamental breach by Claimant and the goods did conform;
6. Respondent took an unreasonably long time to communicate the alleged non-conformity;
7. Respondent cannot go back on their consent to request refund for S&PA(I);
8. Respondent is not entitled to the refund of USD2.4M under S&PA(II).

Claimant respectfully requests the Tribunal to award to Claimant:

9. Liquidated damages in the sum of USD9.6M under S&PA(II);
10. Respondent pay all costs of the arbitration, including Claimant's legal expenses, the arbitration fee paid to CIETAC, and the additional expenses of the arbitration as set out in CIETAC Rules, Art.52;
11. Interest set forth in items 9 and 10 above, from the date Claimant made those expenditures to the date of payment by Respondent.

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Respectfully Submitted

Counsel for the Claimant