

**THE 6th INTERNATIONAL ADR
(ALTERNATIVE DISPUTE RESOLUTION)
MOOTING COMPETITION
5th JULY- 9th JULY 2016
HONGKONG**

ON BEHALF OF
CLAIMANT

AGAINST
RESPONDENT

ALBAS WATCHSTRAPS
MFG.CO.LTD
241 NATHAN DRIVE
YANYU CITY
YANYU

GAMMA CELLTECH
CO.LTD
17 RODEO LANE
MULABA
WULABA

MEMORANDUM FOR CLAIMANT

Team No. 458 C

List of Abbreviations

Abbreviation	Content
<i>AfA</i>	Application for Arbitration
<i>Art.</i>	Article
<i>Art.19</i>	Art. 19 of Sale and Purchase Agreement No. 2
<i>Art.20</i>	Art. 20 of Sale and Purchase Agreement No. 2
<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>	Convention on International Sale of Goods, 1980
CLAIMANT	Albas Watchstraps Mfg. Co. Ltd
<i>Cl. Ex.</i>	Claimant's Exhibit
<i>Inco</i>	Incoterms 2010
<i>No.</i>	Number
<i>Notice</i>	Notice on the Formation of Arbitral Tribunal Case No. M2016/15
<i>NY Convention</i>	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
<i>p.</i>	page
PARTIES	Albas Watchstraps Mfg. Co. Ltd. and Gamma Celltech Co. Ltd.

<i>Res. Ex.</i>	Respondent's Exhibit
RESPONDENT	Gamma Celltech Co. Ltd
the Agreement	Sale and Purchase Agreement between Albas Watchstraps Mfg. Co. Ltd. and Gamma Celltech Co. Ltd.
the Tribunal	Ms. Felicity Chan, Dr. Anne Descartes and Mr. Martin Mayfair
<i>UNCITRAL Model Law</i>	UNCITRAL Model Law on International Arbitration, amended in 2006
<i>UPICC</i>	UNIDROIT Principles of International Commercial Contract 2010

Table of Authority

Cited As	Content	Citing Paragraph
<i>Born</i>	Born, G. B., International Commercial Arbitration in the United States, Commentary and Materials, 2d ed., The Hague: Kluwer Law International, 2001	1, 11
<i>UNCTAD</i>	United Nations Conference on Trade and Development, Dispute Settlement international Commercial Arbitration, 5.2 The Arbitration Agreement, United Nations, 2005, UNCTAD/EDM/Misc.232/Add.39. Available at: http://unctad.org/en/docs/edmmisc232add38_en.pdf	3
<i>Berg II</i>	van den Berg, A. J., The New York Arbitration Convention of 1958: An Overview; available at: http://www.arbitrationicca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf	7
<i>Licensor v. Manufacturer</i>	Licensor and buyer v. Manufacturer Interim Award and Final Award 17 July, 1992	8
<i>Him v. Devito</i>	HIM PORTLAND, LLC v. DEVITO BUILDERS, INC ,317 F.3d 41 United States Court of Appeals, First Circuit No. 02-1955. Heard Dec. 4, 2002. Decided Jan. 17, 2003.	8

<i>International Commercial Arbitration</i>	Gary B. Born, International Commercial Arbitration, Second Edition, Kluwer Law International (2014).	11
<i>ICC Case 3896</i>	International Arbitration in Switzerland, ¶37; ICC Case Award No. 3896, 5314	11
<i>UN Law</i>	UN Law on International Sales	22
<i>CISG Digest</i>	UNCITRAL digest	23
<i>Leonardo Graffi</i>	Leonardo Graffi, LL.M, «Remarks on Trade Usages and Business Practices in International Sales Law»	24
<i>CLOUT case No. 252</i>	Handelsgericht des Kantons Zürich, Switzerland, 21 September 1998 Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V99/892/77/PDF/V9989277.pdf?OpenElement	33
<i>CLOUT case No. 341</i>	Ontario Superior Court of Justice, Canada, 31 August 1999 Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V00/550/47/PDF/V0055047.pdf?OpenElement	34

Table of Content

Argument.....1

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

A. Parties agreed upon the arbitration clause as a part of contract which refers to the Tribunal.....1

B. The arbitration clause is valid.....2

i. The arbitration clause is not null or void.....2

ii. The governance of national law of Wulaba leads to the governance of CISG.....2

iii. The arbitration clause is capable of being performed.....2

C. The dispute raised falls within the scope of the arbitration clause.....2

II. CISG GOVERNS THE CLAIMS ARISING UNDER THE SALE AND PURCHASE AGREEMENT AND THE SALE AND PURCHASE AGREEMENT NO.2.....3

A. Even if the parties exclude the application of other applicable laws in Art. 20 of the contracts, the tribunal can still apply other applicable laws.....3

B. The contracts are within the sphere of application of CISG.....4

i. The governance of national law of Wulaba leads to the governance of CISG.....4

<i>iii. the parties did not exclude the application of CISG.....</i>	5
III. ASSUMING THE CISG DOES APPLY, HAVE ITS PROVISIONS BEEN	
INVOKED ON ACCOUNT OF THE FOLLOWING.....	5
i. LACK OF INSURANCE COVERAGE IN THE FIRST TRANSACTION.....	5
A. CLAIMANT has no obligation to purchase insurance.....	5
<i>i. DDP is binding to each PARTIES</i>	5
<i>ii. Pursuant to DDP, the seller have no obligation to purchase insurance.....</i>	6
B. Insurance policy was not a “related costs” either.....	6
ii. TIMING OF DELIVERY OF PROTOTYPE.....	6
A. CLAIMANT did not breach the contract through delivering the prototype	
lately.....	7
B. If the tribunal thought the time that CLAIMANT deliver the prototype is	
late, CLAIMANT is not liable for it through the Art. 39(1) CISG.....	7
iii. NON- CONFORMITY OF GOODS.....	8
A. Pursuant to Art.35 CISG, the goods in fact are conform.....	8
<i>i. The goods are fit for the purposes for which goods of the same description</i>	
<i>would ordinarily be used.....</i>	8
<i>ii. The present circumstances comply with the situation that it was</i>	
<i>unreasonable for buyer to rely on the seller’s skill and judgment on whether</i>	
<i>the goods are fit for any particular purpose.....</i>	9
<i>iii. The goods posses the qualities which the seller has held out to the buyer as</i>	
<i>a sample or model.....</i>	9

B. Even if Tribunal holds that the goods are unqualified, it should attribute to RESPONDENT'S act and CLAIMANT should not be RESPONSIBLE for it pursuant to Art.80 CISG.....	10
iv. PAYMENT OF MONEY UNDER THE TRANSACTIONS.....	11
A. Disputes arising from the Agreement No.1 were solved.....	11
B. The Agreement No.2 is valid.....	12
C. CLAIMANT has fulfilled its obligation.....	12
D. CLAIMANT has right to claim for balance payment.....	13

ARGUMENT

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

1. Pursuant to *Art.6(1) CIETAC Rules* which this Tribunal was constituted [*Notice*], the Tribunal is competent to determine the existence and validity of an arbitration clause and its jurisdiction over a case [*Born, pp. 855-856*].
2. Accordingly, the Tribunal should declare that it is competent to decide this dispute between **PARTIES** in connection with payment of the Agreement No. 2, because (A) **PARTIES** agreed upon the arbitration clause as a part of contract which refers to the Tribunal, (B) the arbitration clause is valid, (C) the dispute raised falls within the scope of the arbitration clause.

A. PARTIES agreed upon the arbitration clause as a part of contract which refers to the Tribunal.

3. The access permission of an arbitration is related to the issue whether the **PARTIES** consented to arbitration [*UNCTAD, p.15*]. **PARTIES** concluded the Agreement containing terms together with its arbitration clause [*Cl. Ex. No.6*], stating “Disputes concerning payments shall be resolved... ..The arbitration shall be in the English language”, which means the intention of **PARTIES** to submit this specific dispute to the Tribunal. Consequently, the arbitration clause agreed by **PARTIES** governs this case.

B. The arbitration clause is valid.

4. In accordance with *Art.II(3) NY Convention and Art.8(1) UNCITRAL Model Law*, an arbitration clause cannot be (i) null or void; (ii) inoperative or (iii) incapable of being performed.

i. The arbitration clause is not null or void.

5. The literal expression of the arbitration clause is very clear on the institution which is *CIETAC*, the arbitration rules which is *CIETAC Rules*, and the language is English. The seat of arbitration is Hong Kong in accordance with *Art. 74 CIETAC Rules*.

ii. The arbitration clause is operative.

6. Arbitration clause is inoperative when it ceases to have effect, such as expired time and revoked clause. In this case, the arbitration clause does not fulfill the above mentioned conditions and therefore cannot be considered as inoperative.

iii. The arbitration clause is capable of being performed.

7. The words “incapable of being performed” apply to those cases where the arbitration cannot be effectively set into motion [*Berg II, p. 11*]. This can happen for example if **PARTIES** agreed upon arbitrator, who was at the time of the dispute, deceased or unavailable. In this case **CLAIMANT**’s arbitration clause does not fulfill above mentioned conditions and therefore cannot be considered as incapable of being performed.

C. The dispute raised falls within the scope of the arbitration clause.

8. The wording of arbitration clause determines the scope of the Agreement. According to arbitration clause, the phrase “disputes concerning payment” covers all claims flowing from contractual payment obligations. Consequently, the present dispute raised by CLAIMANT falls within the scope of arbitration clause.

II. CISG GOVERNS THE CLAIMS ARISING UNDER THE SALE AND PURCHASE AGREEMENT AND THE SALE AND PURCHASE AGREEMENT NO.2.

9. As for laws governing the contracts, (A) even if PARTIES exclude the governance of other applicable laws contracts, the tribunal can apply other applicable laws, (B) the contracts are within the sphere of applicability.

A. Even if PARTIES exclude the application of other applicable laws in *Art. 20*, the Tribunal can still apply other applicable laws.

10. The choice of law by PARTIES to the substance of the dispute is respected [*Art.28.1 UNCITRAL Model Law*], so the national law of Wulaba governs the contracts.
11. However, what reads above does not mean the exclusion of other laws. The Tribunal shall take into account the usages of the trade applicable to the transactions [*Art.28.4 UNCITRAL Model Law*], “a certain understanding of international trade usages suggests that, in a number of situations, arbitrators are

entitled to add to or even modify the provisions of the law chosen by the parties” [*International Commercial Arbitration p.844*]. Also, the word “usages” in the rules and statutes tacitly authorizes the application of non-national rules of law [*ICC Case. 3896*].

B. The contracts are within the sphere of applicability.

12. Since places of business of the two companies are different countries, which are two contracting states of CISG, the Agreements are inherent in an international character. Therefore, the international character of the contract leads to the governance of CISG [Art.1.1(a) CISG].
13. The Agreements are within the sphere of application of *CISG* because (i) the governance of national law of Wulaba leads to the governance of *CISG*, and (ii) the **PARTIES** did not exclude the application of *CISG*.

i. The governance of national law of Wulaba leads to the governance of CISG.

14. Pursuant to *UNCITRAL Model Law*, the disputes of the contract shall be decided in accordance with the rules of law chosen by the **PARTIES** [Art.28 *UNCITRAL Model Law*], the law of Wulaba governs the Agreements [*Cl.Ex.No.2; Cl.Ex.No.2*], under *Art.1.1(b) CISG*, when the rules of private international law lead to the application of the law of a Contracting State, *CISG* is applicable to the contract when the two **PARTIES**’ places of business are in two different states, so *CISG* is applicable to the contracts.

ii. PARTIES did not exclude the application of CISG.

15. *Art. 20* reads: “All other applicable laws are excluded”, while it did not expressly exclude the application of *CISG*, only in express exclusion of *CISG* can *CISG* be excluded from governing the contracts.

III. ASSUMING THE *CISG* DOES APPLY, HAVE ITS PROVISIONS BEEN INVOKED ON ACCOUNT OF THE FOLLOWING.

i. LACK OF INSURANCE COVERAGE IN THE FIRST TRANSACTION.

20. **(A) CLAIMANT** have no obligation to purchase insurance, **(B) Insurance** policy was not a “related costs” either.

A. CLAIMANT has no obligation to purchase insurance.

21. Since *CISG* is the applicable law in the present case, pursuant to *CISG*, it doesn't regulate issue related to which party has the obligation to purchase insurance.
22. Although *CISG* does not regulate the issue related to lack of insurance coverage, it does show that the **PARTIES** are bound by any usage to which they have agreed. *Art.9(1) CISG* is a manifestation of the autonomy of the **PARTIES** to determine the content of their contract and the formation of the contract [*UN Law, p.59*].

i. DDP is binding to each PARTIES.

23. Pursuant to *Art.9(1) CISG*, this provision describes the extent to which **PARTIES** to an international sales contract governed by *CISG* are bound by usages, as well

as by practices that the **PARTIES** have established between themselves [*CISG Digest*].

24. It is well known that *Inco* may apply to an international sales contract under *Art.9(1) CISG*, if the **PARTIES** have agreed to incorporate them by reference in their agreement [*Leonardo Graffi*]. While, *Art.3* of the Agreement shows that the price is DDP [*Cl. Ex. No.2*]. So, DDP is binding to each **PARTIES**.

ii. Pursuant to DDP, the seller have no obligation to purchase insurance.

25. Although DDP represents the maximum obligation, it doesn't include insurance coverage for the seller [*A3(b) Inco 2010*].

B. Insurance policy was not a “related costs” either.

26. It's true that **CLAIMANT** had agreed to be responsible for all related costs, but **CLAIMANT** had also explained that DDP under *Inco 2010* does not include insurance and that an insurance policy was not a “related costs” **CLAIMANT** assured **RESPONDENT** that all related costs including import duty and VAT. It means that “all related costs” are all those costs under DDP.

ii. TIMING OF DELIVERY OF PROTOTYPE.

27. **CLAIMANT** submitted that (A) **CLAIMANT** did not breached the contract through delivering the prototype lately, (B) If the tribunal thought the time that **CLAIMANT** deliver the prototype is late, **CLAIMANT** is non-lialbe for it through the *Art. 39(1) CISG*.

A. CLAIMANT did not breach the contract through delivering the prototype lately.

28. **RESPONDENT** had argued that **CLAIMANT** were in breach of the Agreement No.1 well before the shipment was lost because its sample was late as per the agreed terms [*Res. Ex. No.2*]. However, the time **CLAIMANT** deliver the prototype is not late, since the first day of the period, “within 14 days”, should be set to the next day after receiving the deposit. And the time that the seller will provide a prototype for approval within 14 days include the 14th day.

B. If the tribunal think the time that CLAIMANT delivered the prototype had been late, CLAIMANT is non-liaible for it through Art. 39(1) CISG.

29. According to *Art.39(1) CISG*, the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. In this case, **RESPONDENT** received the prototype and did not send any notice of the lack of conformity to **CLAIMANT**. Instead, **RESPONDENT** send an e-mail to show its satisfaction of the prototype and even added the amount of the order. [*Cl. Ex. No.4*]

30. In accordance with *Art. 39 (1) CISG*, **RESPONDENT** is liaible for sending the notice of the lack of conformity. If the time that **CLAIMANT** deliver the prototype is late, **RESPONDENT** should have discovered as soon as it received

the prototype. **RESPONDENT** did not claim about the time, however, it claims **CLAIMANT** breach the contract after five months when **CLAIMANT** and **RESPONDENT** have concluded the Agreement No.2. The time has already beyond the reasonable time, so **CLAIMANT** is non-liability for the lately delivering.

iii. NON- CONFORMITY OF GOODS.

31. **CLAIMANT** submits that: (A) pursuant to CISG 35, the goods in fact are conform; (B) even if the Tribunal considered that the goods are unqualified, it should attribute to **RESPONDENT'S** act and **CLAIMANT** should not be responsible for it pursuant to *Art. 80 CISG*.

A. Pursuant to Art. 35 CISG, the goods in fact are conformed with the quality agreed by PARTIES in the Agreement.

32. *Art. 35(2) CISG* states standards for determining whether goods delivered by the seller conform to the contract in terms of type, quantity, quality, and packaging.

i. The goods are fit for the purposes for which goods of the same description would ordinarily be used.

33. The standard of Art. 35(2)(a) requires only that the goods be fit for the purposes for which they are ordinarily used. It does not require that the goods be perfect or flawless [CLOUT case No. 252]. In the present case, as the goods are fit for the ordinary use for being an element of the watch.

ii. The present circumstances comply with the situation that it was unreasonable for buyer to rely on the seller ' s skill and judgment on whether the goods are fit for any particular purpose.

34. The requirements of *Art. 35(2)(b) CISG* do not apply if ‘the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgment. [*CLOUT case No. 341*]. In the present case, **RESPONDENT** argued that the goods are not for the particular use for **RESPONDENT** to sale them to the Cherry Watch distributors. Actually, the goods are the same size as the prototype which approved by the **RESPONDENT** [*Clarifications 58*]. In the event that **RESPONDENT** sent only 1 Cherry watchcase to **CLAIMANT** and asked them to be careful with it [*Cl.Ex.7; Res.Ex.1*]. There was no way for **CLAIMANT** to check prototypes in their factory as well as their office. It should be **RESPONDENT’S** obligation rather than **CLAIMANT’S** to check whether the prototypes can fit the watchcase. That is just the reason why **PARTIES** set the rule of prototypes in the Agreement.

iii. The goods possess the qualities which the seller has held out to the buyer as a sample or model.

35. *Art.35(2)(c) CISG* states that, in order to conform to the contract, goods must “possess the qualities of goods which the seller has held out to the buyer as a sample or model.”**RESPONDENT** has argued that the goods do not correspond with the prototypes. What’s more, the watchstraps are not as soft, nor do they look handmade [*Res.Ex.2*]. However, the main part of the watchstraps are made

of the soft genuine Yanyu leather just the same qualities as the prototypes [Clarification 4] Moreover, one should always remember is that there is no obligation for CLAIMANT to produce the watchstraps in hand-made way since there is no relevant article in the sale and purchase Agreement [Cl.Ex.6].The prototypes were handmade,as it is impossible to make machine -made watchstraps until CLAIMANT have the tooling and they would only invest in the tooling after receiving the customer's approval. If CLAIMANT were to produce hand-made goods,the cost of the watchstraps would be double [Cl.Ex.7]. Thus, it is impossible,unreasonable and irresponsible for CLAIMANT to make the hand-made goods and the goods actually possess the same quality as the prototypes.

36. In conclusion, pursuant to *Art.35 CISG*, the goods provided by the CLAIMANT are conform.

B. Even if the Tribunal holds that the goods are unqualified, it should attribute to RESPONDENT'S act and CLAIMANT should not be responsible for it pursuant to *Art. 80 CISG*.

37. *Art. 80 CISG* strips a party of its right to rely on the other side's failure to perform to the extent that the second party's failure was caused by an "act or omission"of the first party.
38. In the present case, if tribunal holds that the goods are unqualified which actually are not,it should attribute to RESPONDENT'S act that led to the non-conformity

of goods. **RESPONDENT** gave permission to the prototype as well as showed their appreciation to it. The behavior directly led to the non-conformity of the goods since **CLAIMANT** started to mass production in accordance with the prototypes.

39. In conclusion, the goods are of good conformity .It fit the standard agreed by two **PARTIES**. Even if the tribunal holds the opinion that they are non-conformity, it is **RESPONDENT** rather than **CLAIMANT** who should be responsible for it.

iv. PAYMENT OF MONEY UNDER THE TRANSACTIONS.

40. The fact is that the goods relating to the Agreement No.1 were lost at sea, but (A) disputes arising from the Agreement No.1 were solved, (B) the Agreement No.2 is valid, (C) **CLAIMANT** has fulfilled its obligation, (D) **CLAIMANT** has right to claim for balance payment.

A. Disputes arising from the Agreement No.1 were solved.

41. Pursuant to DDP, the risks pass when the goods have been delivered by being placed at disposal of the buyer on the arriving means of transport ready for unloading at the buyer's office. [DDP A4, A5] With the application of *Art.66 CISG*, when the goods are lost at sea, **CLAIMANT** should bear the loss. In solving the issue concerning the loss, **PARTIES** reached an agreement that **CLAIMANT** would give an 80% discount and buy the insurance in Agreement No.2, and **RESPONDENT** would pay the balance payment of Agreement No.1.

42. Since a resolution agreement has been reached, the issues raised in the Agreement No.1 were solved with **PARTIES'** autonomy, which should be respected by the Tribunal.

B. The Agreement No.2 is valid.

43. The Agreement No. 2 was validly entered into with **PARTIES'** autonomy and common intention with good faith [*UPICC, Art.3.1.2*], so that the agreement is supposed to be binding [*UPICC, Art.1.3*].

C. CLAIMANT has fulfilled its obligation.

44. Since the contract is valid and binding upon **PARTIES**, **PARTIES** should perform their obligations respectively [*CISG Art.30&60*], within the time fixed on the contract. [*UPICC, Art. 6.1.1*].

45. In accordance with *Art.30&35 CISG*, **CLAIMANT** has obligation to deliver the goods and deliver goods in conformity with the contract.

46. Firstly, goods were shipped in time and were delivered at the receipt of **RESPONDENT**. **CLAIMANT** shipped goods to **CLAIMANT** on 29th Dec, 2014, while Agreement No.2 was concluded on 7th Nov, 2014 [*p12, Cl. Ex. No.6*], which means **CLAIMANT** shipped good timely as is fixed in the contract. Also, **RESPONDENT** received the goods on 26th, 2016. [Clarification 50]

47. Secondly, even if there are some defects on the goods, **CLAIMANT** is not liable on it, which has been discussed in Issue (c).

D. CLAIMANT has right to claim for balance payment.

48. According to *Art.61(1)&Art.62 CISG*, since **RESPONDENT** failed to complete its balance payment obligation [*Res. Ex. No.2*], **CLAIMANT** is entitled to require **CLAIMANT** to pay. Also, **CLAIMANT** did ask **RESPONDENT** to pay the balance payment after its refusal. [*Cl. Ex. No.7*]
49. From the date **CLAIMANT** wrote to **RESPONDENT** of 27th Feb, 2015, till **CLAIMANT** applied the dispute to arbitration, **RESPONDENT** still had not paid any of the balance payment. As a result, **CLAIMANT** is entitled to claim damages under *Art.74 CISG* on the basis of *Art.61(1)*, which says a sum equal to the loss is included in damages, the balance payment should be paid [*CIETAC No. G20010386, 10 May 2005*].
50. In a nutshell, **CLAIMANT** has right to ask for balance payment.