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 CLAIMANT

Team No. 463 C

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INDEX OF AUTHORITIES

TREATIES, CONVENTIONS AND RULES

Abbreviation	Citation	Paragraphs
Arbitration Ordinance	Hong Kong Arbitration Ordinance L.N. 38 of 2011	2
CIETAC Rules	CIETAC Arbitration Rules Effective as of January 1, 2015	2
CISG	Convention on Contracts for International sale of Goods, Vienna, 11 April 1980 Entered into force 1 January 1988 1489 UNTS 3	10, 15, 17, 19, 23, 28, 31, 33
FAA	United States Congress Federal Arbitration Act Entered into force 1 January 1926	6
Incoterms Rules	International Chamber of Commerce (ICC) Incoterms® 2010: ICC Rules for the Use of Domestic and Interna-tional Trade Terms, ICC Publication No. 715E, 2010	22
PECL	The Principles of European Contract Law 2002	15

UNIDROIT Principles	International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts 2010	15

BOOKS / ARTICLES

Abbreviation	Citation	Paragraphs
Blackaby/Partasides/Redfern/Hunter	Blackaby, Nigel; Partasides, Constantine; Redfern, Alan; Hunter, Martin *Redfern and Hunter on International Commercial Arbitration*, 5th Edn. New York: Oxford University Press, 2009	2
Born	Born, Gary B. *International Commercial Arbitration* Kluwer Law International, 2009	2, 6, 8
Digest	United Nations Commission On International Trade Law "2012 UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods" Available at: <http://www.uncitral.org/uncitral/en/case_law/digests.ht	17

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Introduction to PECL	The Commission on European Contract Law "Introduction to the Principles of European Contract Law" Available at: <http://www.cisg.law.pace.edu/cisg/text/peclcomments.html>	15
Lando/Beale/Author	Ole Lando & Hugh Beale eds. Principles of European Contract Law: Parts I and II Kluwer Law International, 2000	15
OED	*Concise Oxford English Dictionary: Main edition*, 12th Edn. Oxford University Press, 2011	30
Schlechtriem/Schwenzer	Schlechtriem, Peter; Schwenzer, Ingeborg (ed.) *Commentary on the UN Convention of the International Sale of Goods(CISG)*, 2nd Edn. Oxford: Oxford University Press, 2010	23, 28, 31

CASES AND ARBITRAL AWARDS

Abbreviation	Content	Paragraphs
Iran-United State Claims Tribunal		
Tehran	*Procedural Order, Foremost Tehran, Inc. v. The Government of Iran* Case Reference No. 37 & 231, 3 Iran-US Cl. Trib. Rep. 361	13
Spain		
Machine case	*Machine for repair of bricks case* Audiencia Provincial de Navarra sección 3ª [Appellate Court Navarra] Decision of 27 December 2007 Case Reference No. CISG-online 1798	10
Motors case	*Waukesha Engine Division/Dresser Industrial Products B.V. v. Ceramica Utzubar* Audiencia Provincial de Navarra, Sección 3 [Appellate Court Navarra] Decision of 22 September 2003 Case Reference No. CLOUT case 547	10

Switzerland		
X v. Y	*X._____ Ltd. v. Y._____ GmbH* Supreme Court Decision of 9 February 2009 4A_672/2012	13
United States		
Chiarella	*Chiarella v. Vetta Sports* United States District Court, Southern District of New York Decision of 7 October 1994 Case Reference No. 94 Civ. 5933 (PKL)	6
Howsam	*Howsam v. Dean Witter Reynolds, Inc.* United States Supreme Court Decision of 10 December 2002 Case Reference No. 01-800	2
Internet East	*Internet East, Inc. v. Duro Communs., Inc.* North Carolina Court of Appeals Decision of 23 August 2001 Case Reference No. COA00-1154	8

McKee	*McKee v. Home Buyers Warranty Corp. II* United States Court of Appeals, Fifth Circuit Decision of 27 February 1995 Case Reference No. 94-30153	6
Montauk	*Montauk Oil Transp. Corp. v. Steamship Mut. Underwriting Ass'n (Bermuda)* United States Court of Appeals, Second Circuit Decision of 22 March 1996 Case Reference No. 95-7722	8
St. Lawrence	*St. Lawrence Explosives Corp. v. Worthy Bros. Pipeline Corp* United States Court of Appeals, Second Circuit Decision of 17 April 1997 Case Reference No. 96-7745	6

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
CIETAC	China International Economic & Trade Arbitration Commission
Clarifications	Request for Clarifications
CLAIMANT	Albas Watchstraps Mfg. Co. Ltd.
Cl. Ex.	Claimant's Exhibit
ICC	International Chamber of Commerce
Incoterms 2010	International Commercial Terms 2010
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Parties	CLAIMANT and RESPONDENT
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RESPONDENT	Gamma Celltech Co. Ltd.
Res. Ex.	Respondent's Exhibit
SoD	Statement of Defense
the Tribunal	Arbitral Tribunal Case No. M2016/15 of CIETAC

ARGUMENTS

I. THE TRIBUNAL HAS JURISDICTION TO DECIDE CLAIMANT'S PAYMENT CLAIMS.

1. The Tribunal has jurisdiction to hear this dispute because: **[A]** the Tribunal is authorized to determine its own jurisdiction; **[B]** Art. 19(a) in Agreement Nos. 1 & 2 is a valid arbitration agreement; and **[C]** Art. 19 as a whole gives preference to arbitration.

A. The Tribunal is authorized to determine its own jurisdiction.

2. Art. 19(c) provides that "any disputes shall be submitted to the courts in the State of New York." The word "disputes" refers to disputes concerning the interpretation of the clause. According to "competence-competence" doctrine, an arbitral tribunal has the power to decide upon its own jurisdiction [*Blackaby/Partasides/Redfern/Hunter p. 347*], which is also recognized by *lex arbitri* in Hong Kong and institutional rules of CIETAC [*Arbitration Ordinance Art. 34; CIETAC Rules Art. 6.1*]. U.S. law also confirms that arbitrators presumptively have competence-competence regarding their own jurisdiction [*Born p. 925*], and disputes concerning indefinite arbitration agreements should be determined by the arbitrators [*Born p.679; Howsam*]. Therefore, disputes concerning the interpretation of the clause can be determined by the Tribunal instead New York State Courts.

B. Art. 19(a) is a valid arbitration agreement.

1. The disputes concerning payments in Art. 19(a) include the disputes submitted to the Tribunal.

3. The scope of Art.19(a) in Agreement No. 2 includes "disputes concerning payments". Damages of USD 9.6 million is 80% of Agreement No. 2's payment which RESPONDENT refused to pay [*AfA Request for Relief ¶1; Cl. Ex. No. 6*]. Therefore, the dispute falls within the scope of "disputes concerning payments".

2. Parties demonstrated their intention to submit their disputes to arbitration by signing Art. 19(a).

4. Parties demonstrated their intent to arbitrate in Art. 19(a), which states that following unsuccessful negotiations, "either party may submit the dispute … for arbitration." [*Cl. Ex. No. 6*]

5. CLAIMANT proposed to arbitrate and RESPONDENT agreed [*Clarifications ¶13*]. By signing this arbitration agreement, Parties intended for either party to have recourse to arbitration. Therefore, CLAIMANT can submit the dispute to the Tribunal.

3. Art. 19(a) constitutes a mandatory obligation to arbitrate disputes concerning payment.

6. Optional arbitration agreements consider arbitration as an alternative or optional means, but do not require mandatory submission of future disputes to arbitration [*Born p. 687*]. Courts have generally concluded that if optional provisions constitute compulsory arbitration agreements and permit either party to commence arbitration, it is mandatory [*Born p. 687; McKee*]. Because it would make little or no commercial sense to agree in an entirely non-mandatory provision [*Born p. 687*]. Under FAA, an agreement that "either party may submit the dispute to arbitration" triggers mandatory arbitration [*Chiarella; St.*

Lawrence]. Therefore, Art. 19(a), stating that either party may submit the dispute to CIETAC, is mandatory.

C. As an internally contradictory agreement, Art. 19 as a whole gives preference to arbitration.

1. Art. 19(a) serves as a clause governing specific disputes and should be preferred.

7. Art. 19(a) specifically refers to disputes concerning payments while Art. 19(b) refers to all disputes. As a result, if disputes concerning payments can be introduced to either arbitration or litigation without priority, the emphasis stressed on "disputes concerning payment" would be meaningless; for such disputes would be resolved in the same way with others. This dispute falls within the scope of disputes concerning payments and thus should be resolved by Art. 19(a) first.

2. Internally contradictory agreements should be interpreted in favor of arbitration.

8. Parties agreed for the laws of the State of New York to govern the interpretation of Art. 19. U.S. courts have repeatedly held that a "New York Suable Clause" or "service of suit clause" does not conflict with or override an arbitration agreement [*Born p. 684; Montauk*]. Moreover, the court selection clause will be triggered "only when a court is needed to intervene for matters arising from arbitration and when parties have agreed to take a dispute to court instead of arbitration" [*Internet East*]. This result is also accepted by other national and international decisions and awards, in which the reference to national court proceedings is narrowly interpreted to include review of the award or judicial assistance [*Born p. 686*]. Therefore, preference should be given to arbitration.

9. In this instance, Art. 19 provides for arbitration in both sub-Art.(a) and (b), and litigation in sub-Art.(b), constituting an internally contradictory agreement. Therefore, Art. 19 should be interpreted in favor of arbitration.

II. CISG SHOULD GOVERN THE CLAIMS ARISING UNDER AGREEMENT NOS. 1 & 2.

A. Art. 20 is invalid because RESPONDENT's misrepresentation violated the principle of good faith.

10. Questions which are not expressly settled in CISG are to be settled in conformity with the general principle on which it is based [CISG Art. 7]. The jurisdictional clause is invalid pursuant to the principle of good faith in Art. 7 CISG because "this principle indicates that a contract shall provide for its content in a manner the parties would reasonably expect" [*Machine case*]. Another court hold that the content of a contract should be as anticipated by the parties of reasonable expectation because of the same article [*Motors case*].

11. In this case, CLAIMANT lacks legal expertise and therefore relied on RESPONDENT's interpretation of Art. 20 in Agreement Nos.1&2. RESPONDENT interpreted it as a standard term that would not affect CLAIMANT; however, the application of Wulaba's national law compelled CLAIMANT to face an unfamiliar legal system. [*Clarifications ¶23&30*]

12. Art. 20 therefore is invalid because of misrepresentation. The interpretation of the purpose of Art. 20 gave CLAIMANT a reasonable expectation to apply CISG governing the

contract, as Parties have not opted out of the CISG [*Clarifications ¶37; AfA ¶14*]. The principle of good faith would be undermined if, as RESPONDENT claims, the clause applying Wulaba law is applied.

B. The application of Wulaba's national law would result in an inequality.

13. The parties' rights to equal treatment is a "fundamental principle of justice." [*Tehran*], and the parties "must be subject to the same procedural rules and afforded the same procedural rights and opportunities" [*X v. Y*]. Yanyu is a civil law system while Wulaba is a common law system [*Clarifications ¶23*]. CLAIMANT intended to apply CISG to govern the trade with RESPONDENT according to its previous international trade experience. The application of Wulaba law sets it on unfamiliar ground. Therefore, application of the national law of Wulaba would impair CLAIMANT's right of equal treatment.

III. CLAIMANT IS ENTITLED TO THE BALANCE OF AGREEMENT NO. 2, AND RESPONDENT IS NOT ENTITLED TO ANY REFUND UNDER EITHER AGREEMENT.

A. The prototype's delivery time did not invoke a remedy.

14. The prototype's delivery did not breach the first agreement. **[1]** This agreement set a period of time including 14th August, and **[2]** CLAIMANT delivered the prototype on time. **[3]** Even if there is a breach, no remedy can be resorted to since there is no loss.

1. <u>The period of time set by Parties includes 14th August.</u>

15. The seller must deliver the goods "if a period of time is fixed by or determinable from the contract, at any time within that period" [*CISG Art. 33 (b)*]. While CISG and UNIDROIT Principles do not provide specific rules for general computation of a time period, PECL, restating part of CISG [*Introduction to PECL*], provides that "periods of time expressed in days […] shall begin at 00.00 on the next day and shall end at 24.00 on the last day of the period." [*PECL Art. 1:304 (3)*] This rule is uncontroversial and can be found in many legal systems [*Lando/Beale/Author p. 134*].

16. Agreement No. 1 Art. 5 provides that "the Seller will provide a prototype for approval within 14 days from receipt of deposit" [*Cl. Ex. No. 2*]. As the deposit was made on July 31 [*AfA ¶7*], the period of time should be, excluding that day, from 1st to 14th August, including both ends.

2. <u>CLAIMANT delivered the prototype on time.</u>

17. According to CISG Art. 8, if the parties express no subjective intent, the interpretation of contracts should consider an objective interpretation, with due considerations given to all relevant circumstances [*Digest, Art. 8*]. UNIDROIT Principle Art. 4.4 further provides that "the whole contract or statement in which [terms and expressions] appear" is one of the considerations.

18. With no special subjective intent concerning Agreement No. 1 Art. 5, "provide" should be interpreted objectively, considering the wording of the entire article [*Cl. Ex. No. 2*]. The title of Art. 5 was "shipment" instead of "delivery", and its second clause sets only the time of sending out the goods. So "provide" here should also mean "send" instead of "arrive".

This interpretation is also reasonable since CLAIMANT cannot predict the time in transit of the prototypes. Therefore, CLAIMANT did not breach the contract by sending the prototype on 14th August [*Cl. Ex. No. 3*].

3. No remedy can be resorted to even if there is a breach of contract.

19. In case of breach of contract, the buyer can claim the damage which must be a consequence of the breach, and foreseeable by the party in breach [*CISG Art.45&74*].

20. RESPONDENT received the prototypes "with thanks" [*Cl. Ex. No. 4*]. More importantly, CLAIMANT shipped the first batch of watchstraps on 10th October, within 60 days from 14th August [*AfA ¶9*]. Therefore, the claimed late-by-one-day delivery of the prototype [*Res. Ex. No. 2*] resulted in no loss to RESPONDENT, nor could CLAIMANT reasonably foresee any consequential damages. In fact, RESPONDENT did not note this alleged delay until almost after six months. Given there is no loss, there is no remedy.

B. RESPONDENT took responsibility for the first transaction and therefore cannot demand a refund.

21. RESPONDENT cannot demand a refund of the deposit and balance of the first transaction, because **[1]** CLAIMANT was not obligated to buy insurance despite using DDP (Incoterms); and **[2]** afterwards, Parties changed the distribution of risk, and by paying the balance RESPONDENT agreed to take the responsibility.

1. CLAIMANT was not obligated to buy insurance.

22. DDP, used by Parties in Agreement No.1, imposes no obligation to contract for insurance on either side [*Incoterms Rules pp. 69-73, Art. A3 & B3*]. According to the division of costs provided by DDP, the seller only bears the cost of carriage, including customs formalities, duties, taxes and other charges payable upon export and import [*Incoterms Rules pp. 69-73, Art. A6*]. Besides, the price arising from CLAIMANT's additional obligation under DDP only included import duty, VAT and CLAIMANT's profit [*Clarifications ¶18*], which also excluded the existence of the cost of insurance. Therefore, although CLAIMANT agreed to be responsible for "all related costs," [*SoD ¶7; AfA ¶6*] its objective intention did not include the insurance fee. Without a clear stipulation in the contract, Parties reached no agreement concerning insurance [*AfA ¶10*]. Thus, no obligation to buy insurance was born by CLAIMANT.

2. RESPONDENT took the responsibility of the damage by paying USD 12 million, the balance of Agreement No. 1.

23. According to CISG Art. 66, loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price. This article indicates that paying the price is a way of bearing the loss of goods [*Schlechtriem/Schwenzer p. 679*].

24. In this case, Parties had reached an agreement that RESPONDENT would pay USD 12 million to Albas before they moved on to the next transaction [*Cl. Ex. No.7*]. According to DDP, it was not RESPONDENT's duty to bear the risk. It, however, paid this amount while knowing that the goods were lost. Therefore, this payment can be interpreted as change of risk distribution: RESPONDENT agreed to assume responsibility.

25. RESPONDENT may argue that the payment was a condition of Agreement No. 2 (instead of assuming responsibility). Agreement No. 2, however, is a standalone and separate transaction to Agreement No. 1 [*Clarifications* ¶*20*]. Neither the title nor the provisions of Agreement No. 2 reference Agreement No. 1 or otherwise relate the two Agreements. At the same time, the duties and rights of Parties in Agreement No. 2 were based on reciprocity [*Cl. Ex. No. 6*]. The payment of this amount of money was not mentioned in Agreement No. 2. Besides, RESPONDENT itself also admitted that this amount of money was given in respect of the first payment [*Res. Ex. No. 2*]. Therefore, Agreement No. 1 and Agreement No. 2 are two separate and independent contracts. There is no evidence that the payment was for other use or connected to any conditions.

26. In conclusion, RESPONDENT, by paying the balance, chose to take the responsibility for the first transaction's loss. It cannot now demand a refund.

C. CLAIMANT has performed its obligations under Agreement No. 2; and RESPONDENT must pay CLAIMANT another USD 9.6 million.

27. The claimed non-conformity between prototypes and goods did not breach the contract, since **[1]** machine making and inconsistence of softness do not constitute non-conformity under industry practice, and **[2]** CISG Art. 80 excuses CLAIMANT from any such size discrepancy. Therefore, **[3]** RESPONDENT should pay the outstanding balance of Agreement No. 2.

1. The difference between prototypes and mass-produced goods did not constitute a breach of the contract.

28. CISG Art. 35(2)(c) provides that, when the seller has "held out to the buyer a model", the final product must possess the qualities of the model to conform with the contract. A model, however, may represent only part of the good's features, and the exact qualities the model serves to illustrate and that the goods must possess are to be determined based on the contract [*Schlechtriem/Schwenzer p. 423*]. Interpretation of the contract should be based on principles established in CISG Art. 8, that is, the intention of the party and a reasonable person standard considering the relevant circumstances of the case.

29. In this case, RESPONDENT did not request hand-made production or a specific level of softness [*Clarifications ¶45*], and Agreement No.1 did not stipulate these two qualities [*Cl. Ex. No. 2 Art. 2*]. Besides, RESPONDENT's email amendments to the agreement concerned only stitching [*Cl. Ex. No. 4*]. Therefore, hand-made production and a specific level of softness of the model were not features required of the goods. CLAIMANT provided a hand-made prototype based on industry usage, with no intention of all the goods being hand-made [*Cl. Ex. No. 7 ¶1*]. CLAIMANT also could not mass-produce watchstraps of the exact same softness as the model [*Clarifications ¶26*]. The long-time successful transactions without disputes concerning machine-made or softness during 20 years [*Clarifications ¶26*] indicates that these differences between prototypes and goods are industry practice widely accepted by clients. Consequently, the goods were conforming.

30. Furthermore, after approving the prototypes RESPONDENT also demanded CLAIMANT to "start the mass production" [*Cl. Ex. No. 4 ¶5*]. According to multiple dictionaries, the word "mass production" refers to producing a large amount of goods by machines [*OED*

"mass production"]. In addition, CLAIMANT was obligated to produce a large number of goods in a short period of time at a low price [*Cl. Ex. Nos. 2 & 6*], and it should be evident to a reasonable person that the goods can only be machine made. Therefore, CLAIMANT is not obligated to mass-produce hand-made watchstraps of the same softness as the prototypes.

2. Because RESPONDENT approved the prototype, CLAIMANT is not responsible for the watchstrap size.

31. According to Art. 80 of CISG, a promisor is exempted from his contractual obligations for impediments to performance caused by matters falling within the promisee's sphere [*Schlechtriem/Schwenzer p. 838*].

32. Although RESPONDENT demanded CLAIMANT to manufacture watchstraps that could fit into the watchcase [*Res. Ex. No. 1*], RESPONDENT did not check whether the prototypes had the right size and approved the mass production [*Cl. Ex. No. 4*]. The size of the goods, which CLAIMANT finally delivered, was the same as the prototypes that RESPONDENT approved [*Clarifications ¶58*]. Therefore, RESPONDENT's omission of duty of care resulted in the production of goods that could not fit into the watchcases.

3. CLAIMANT has the right to claim USD 9.6 million as damage, and does not have to return the deposit of USD 2.4 million.

33. CISG Art. 53 requires the buyer to pay the price for the goods as demanded by the contract. CISG Art. 62 further entitles the seller the right of requiring the buyer to pay the price.

34. According to the Agreement No. 2, RESPONDENT should pay 20% of the price as deposit, which is USD 2.4 million before the production, and 80% of the price, which is USD 9.6 million, within 14 days from receipt of the goods [*Cl. Ex. No. 6*]. CLAIMANT sent the goods according to the demand in Agreement No. 2 on time [*AfA ¶12*]. However, RESPONDENT did not fulfill the remaining part of the payment obligation within 14 days from the receipt of such goods [*AfA ¶13*].

35. RESPONDENT may argue that CLAIMANT breached the contract so the second transaction was voided. However, RESPONDENT only expressed its dissatisfaction of the goods approximately one month after their receipt [*Cl. Ex. No. 7*], exceeding the period of time for payment. And as stated above, the machine making and degree of softness are not breaches, and the discrepancy in the size of the watchstraps was not CLAIMANT's responsibility. So CLAIMANT did perform its obligations, and there was no fundamental breach. Consequently, RESPONDENT should fulfill its obligation of payment by paying Claimant the balance fee of Agreement No. 2.

REQUESTS FOR RELIEF

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

I. The Tribunal has full jurisdiction over the payment claims raised by CLAIMANT;

II. CISG governs the claims arising under the Sale and Purchase Agreement and the Sale and Purchase Agreement No. 2; and

III. CLAIMANT is entitled to damages in the sum of USD 9.6 million.