

**SIXTH INTERNATIONAL
ALTERNATIVE DISPUTE RESOLUTION
MOOTING COMPETITION
5 JULY - 9 JULY 2015
HONG KONG**

**ON BEHALF OF
RESPONDENT**

Gamma Celltech Co. Ltd.

17 Rodeo Lane, Mulaba,
Wulaba

**AGAINST
CLAIMANT**

Albas Watchstraps Mfg.
Co. Ltd.

241 Nathan Drive, Yanyu
City, Yanyu

MEMORANDUM FOR RESPONDENT

Team No. 204 R

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List of Abbreviations

Abbreviations	Contents
¶	Paragraph
<i>AfA</i>	Application for Arbitration
<i>Art.</i>	Article
<i>CE</i>	Claimant's Exhibit
<i>CIETAC</i>	China International Economic and Trade Arbitration Commission
<i>CIETAC Rules</i>	China International Economic and Trade Arbitration Commission Arbitration Rules

Abbreviations	Contents
<i>CISG</i>	Convention of International Sale of Goods
CLAIMANT	Albas Watchstraps Mfg. Co. Ltd.
<i>DDP</i>	Delivery Duty Paid
e.g.	<i>exempli gratia</i> (for the sake of example)
et seq.	<i>et sequens</i> (and the following)
<i>HKO</i>	Hong Kong Observatory

Abbreviations	Contents
INCOTERMS	International Commercial Terms
<i>LLC</i>	Limited Liability Company
<i>No.</i>	Number
<i>P.</i>	Page
PARTIES	Albas Watchstraps Mfg. Co. Ltd. and Gamma Celltech Co. Ltd.

Abbreviations	Contents
<i>RE</i>	Respondent's Exhibit
RESPONDENT	Gamma Celltech Co. Ltd.
<i>SoD</i>	Statement of Defense
<i>SPA</i>	Sale and Purchase Agreement
USD	United States Dollar

Abbreviations	Contents
v.	Versus

Table of Authorities

RULES AND LAWS

CISG	United Nations Convention on Contracts for the International Sales of Goods, Vienna, 1 April 1980
ICC Rules	ICC Arbitration Rules, Paris, 1 January 2012

BOOKS

Cited As	Content	Citing Paragraph
Lorenz	Alexander Lorenz, Fundamental Breach under the CISG, Dislanken, Germany/Canterbury, England (1998)	16
Butler	Peter Schlechtriem and Petra Butler, UN Law on International Sales; The UN convention on the International Sales of Goods, Springer (2009)	19

Cited As	Content	Citing Paragraph
Born & Scekic	Gary Born and Marija Ščekić, Pre-Arbitration Procedural Requirements ‘A Dismal Swamp’ (2015)	1
Jimenez – Figueres	Jimenez – Figueres, Multi-Tiered Dispute Resolution Clause in ICC Arbitration (2003)	4
Paulsson	Jan Paulsson, Jurisdiction and Admissibility, in Global Reflection on International Law, Commerce and Dispute Resolution Liber Amicorum in Honour of Robert Briner, ICC Publishing(2005)	5

Cited As	Content	Citing Paragraph
Schwenzer/Fountoulakis/D imsey	Ingeborg Schwenzer, Christiana Fountoulakis, Mariel Dimsey, International Sales Law: A guide to the CISG	7

JOURNAL ARTICLES

Cited As	Content	Citing Paragraph
Jones	Doug Jones, Dealing with Multi-tiered Dispute Resolution Process, 75 Arbitration 188(2009)	5

Cited As	Content	Citing Paragraph
Kayali	<p>Didem Kayali,</p> <p><i>Enforceability of Multi-tiered Dispute Resolution Clauses</i>, 27</p> <p>Journal Of International Arbitration 551(2010)</p>	5
<i>Drago & Zoccolillo</i>	<p>Thomas J. Drago, Esq. and Alan F. Zoccolillo, Esq,</p> <p><i>Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts</i>,</p> <p>(May 2002)</p>	7

CASES

Cited As	Content	Citing Paragraph
ICC Case no 10256	ICC Court of Arbitration of the International Chamber of Commerce 10256	4
ICC Case no 9977	Court of Arbitration of the International Chamber of Commerce 9977	4
Asante Case	United States Asante Technologies, Inc v. PMC – Sierra, Inc. C 01-20230JW 27 July 2001	7

Cited As	Content	Citing Paragraph
American Mint LLC v. GOSoftware, Inc	American Mint LLC, Goede Beteiligungsgesellschaft, and Michael Goede v. GOSoftware, Inc. Civ.A. 1:05-CV-650 6 January 2006 China	7
Souvenir Coin Case	CLOUT abstract No. 998 CIETAC proceeding 2000 CISG/2000/17	19
Germany		
Used Car Case 1996	Oberlandesgericht Köln, Germany No. 22 U 4/96 21 May 1996	39

Arguments

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO ADJUDICATE THE PAYMENT CLAIMS.

1. Amicable resolution [p.7,SPA,Art.19] is a mandatory condition that requires good faith negotiation before commencing arbitration [Born & Scekic,p.277]. Since claimant bypassed the amicable settlement and directly proceeded to arbitration, Tribunal does not have jurisdiction to adjudicate the payment claim.

A. THE AMICABLE RESOLUTION PROVISION IN THE DISPUTE RESOLUTION CLAUSE IS A MANDATORY CONDITION FOR ARBITRATION

3. Amicable resolution provision [p.7,SPA,Art.19] is a prerequisite condition, since the language demonstrates the mandatory nature of firstly settling disputes amicably. “*Disputes concerning payments shall be resolved amicably between the parties.*” [p.7,SPA,Art.19]
4. The contract reflects the intention of **PARTIES**. If the contract uses the word ‘may’, then **PARTIES** intends to have a non-mandatory amicable dispute settlement [ICC Case no. 10256]. Tribunal considered the use of the word ‘shall’ as an indication that the parties wanted mandatory and enforceable pre-arbitration mechanisms as a communication between the parties in conflict. [ICC Case no. 9977, Jimenez-Figueroa, p.84-85]. This suggests that if disputes arise, it shall be settled amicably prior to arbitration.

B. CLAIMANT’S FAILURE TO COMPLY WITH AMICABLE SETTLEMENT PROVISION LEADS TO THE LACK OF JURISDICTION

5. **CLAIMANT’S** failure to comply with the amicable settlement provision affects jurisdiction [*Paulsson, p.616*]. **CLAIMANT’S** failure to attempt reaching amicable resolution excludes **RESPONDENT’S** consent to proceed into arbitration. “*When signing the multi-tier dispute resolution clause, parties expected the tribunal to refuse to resolve the dispute before conducting an amicable settlement*” [*Kayali, p.559*]. The Tribunal should refuse to adjudicate the dispute since **RESPONDENT** have no consensus for arbitration. Commencing arbitration prior to reaching amicable resolution eliminates the essence of the two-tiered clause, e.g. cost reduction and better business relationship [*Jones, p.188-189*]. The Tribunal has no jurisdiction because of the violation of the precedent condition.
6. **RESPONDENT** have no consensus to arbitrate since parties never attempted to resolve amicably. Thus, the Tribunal does not have jurisdiction over the dispute.

II. CISG DOES NOT GOVERN THE SPA 1&2

7. *CISG* does not govern the claims arising under the *SPA* 1 and 2 since the national law of Wulaba governs, and the *CISG* has been opted out. *Art. 6 CISG* stipulates that “*The parties may exclude the application of this Convention [...]*”. Even if *Art.1(1)(a) CISG* applies, *CISG* may not apply if the parties either expressly or implicitly opt out of its application [*American Mint LLC v. GOSoftware, Inc*]. Choice of law which specifies the national

law of a country amounts to an implicit and effective exclusion of the *CISG* [Drago & Zoccolillo, ¶ 16]. Additionally, an exclusion of *CISG* can be assumed when the parties refer to the specific domestic law of a contracting state to the *CISG* [Asante case; Schwenger/Fountoulakis/Dimsey, p.40 et seq]. *CISG* is meant to uniform rules of international sales [Preamble of *CISG*], however it requires the consent of parties to be applicable. If the parties refer to a law other than *CISG*, it is then not applicable.

8. *Art.20 SPA* states “*The contract shall be governed by the national law of Wulaba. All other applicable laws are excluded*” [p.7,SPA,Art.20]. This choice of law implicitly excludes the applicability of *CISG* since the clause specifies that national law of Wulaba will apply. National law of a member state will prevail and *CISG* will be excluded because otherwise the parties’ choice of law could be rendered meaningless [Compare Neumayer/Ming, Art 6 No 6, p.89 et seq]. Despite Yanyu and Wulaba being parties to *CISG*, their choice of law is the national law of Wulaba.
9. **PARTIES** had implicitly excluded *CISG* and is therefore not applicable to govern the dispute between **PARTIES**.

III. CLAIMANT HAD BREACHED ITS OBLIGATIONS

10. **CLAIMANT** had breached its obligations since [A] **CLAIMANT** failed to provide adequate insurance coverage, [B] **CLAIMANT** failed to deliver the prototypes within the time frame, and [C] **CLAIMANT** delivered goods that are lack of conformity. Therefore, [D] **RESPONDENT** is not obliged to pay the balance payment until **CLAIMANT** sends the correct goods.

**A. CLAIMANT FAILED TO PROVIDE ADEQUATE INSURANCE
COVERAGE**

11. **CLAIMANT** had breached its obligation in providing the required insurance for the carriage of goods as stipulated in INCOTERMS *DDP*, “*Seller assumes all the risks and costs of transport and pays import customs/duty.*” [*Universal Cargo*]. Moreover, **CLAIMANT** has agreed to be responsible for all related costs [*p.5, AfA, no.6*]. No insurance was in affect by **CLAIMANT**, despite insurance being included as part of INCOTERMS *DDP*, **CLAIMANT** is therefore obliged to provide the required insurance.
12. *Art.32(3) CISG* provides that if the seller is not bound by the contract to procure the insurance, he must provide the buyer with all available information necessary to enable him to effect such insurance. However, seller may be required to give such information without the request of buyer, by virtue of usage [*draft counterpart of CISG Art.9*]. Seller did not give any information regarding the insurance coverage to buyer. Therefore, **CLAIMANT** failed to fulfill their obligation in providing the necessary information in order to effect insurance.

**B. CLAIMANT FAILED TO DELIVER THE PROTOTYPES
WITHIN THE TIME FRAME**

13. **CLAIMANT** has failed to deliver the prototype *within* the agreed 14 days of time frame [*p.7, SPA, Art.5*]. “*Within*” means the days between 14 days. 14 days from the deposit would be on 13 August 2014. However, the prototype was sent on 14 August 2014, which meant that it was a day pass the deadline of delivering the prototype. Meanwhile, “*Provide*” means that

the buyer is able to use the goods, therefore it can be interpreted that on 14th August 2014, the goods can already be used by the buyer.

14. Failing to deliver the prototype within the time frame brings disadvantages to **RESPONDENT** since the goods must be shipped by sea within 60 days from the receipt of the Buyer's approval of the prototype. Therefore, the later time prototype is sent, the longer buyer could utilize the goods.

C. CLAIMANT DELIVERED GOODS THAT ARE LACK OF CONFORMITY

15. **CLAIMANT** delivered goods which did not conform to the description in the *SPA*. Conformity refers to the goods which are of the quantity, quality, and description required by the contract [*CISG Art.35*]. Whilst, the goods delivered are lack of conformity regarding their quality.
16. Goods are conformed when it fulfils four standards: fit for ordinary purpose, fit for a particular purpose, resembles a model, packaged in an adequate way. [*CISG Art.35(2)*]. "If the seller does not comply with one of these requirements he is in breach of the contract" [*Lorenz, ¶7. Art.35(2) CISG*]. *Art.35(2) CISG* talks about the elements of lack of conformity. However, the elements that constitute would be regarding the quality of the goods which consists of points a, b and c of *Art.35(2) CISG*.
17. **RESPONDENT** has provided a sample of the watchcase for **CLAIMANT** to check the prototype. However, the prototypes do not fit the watchcases, and the mass production of the goods was made on the basis of the approved prototype. Since the prototype itself did not fit the watchcases, so does the

rest of the goods [p.15,SoD,No.6]. Moreover, the intention of giving a sample of the watchcase to CLAIMANT, is for CLAIMANT to check the prototype to it, there is no other reason to send a sample which was difficult to obtain.

18. Goods delivered by CLAIMANT lacks conformity due to the following three reasons: [i] the watchstraps was not fit for ordinary use [ii] the watchstraps was not fit for the particular purpose and [iii] the watchstraps delivered by CLAIMANT did not possess the same qualities of the provided prototype.

-i- THE WATCHSTRAPS WERE NOT FIT FOR ORDINARY PURPOSE

19. CLAIMANT violated Art.35(2)(a) CISG as the watchstraps were unsuitable for their ordinary purpose. “The ordinary purpose of goods might be determined by whether or not the goods are supposed to be consumed by the buyer such as parts. The ordinary purpose, might be determinable depending on whether the goods are supposed to be consumed by the buyer, e.g parts, or to be used by the buyer (e.g machines), or whether the goods are supposed to be sold on”[Butler, p.115 ¶136]. The goods were used as a part of the final good. As the ends of the watchstraps do not fit into the watchcases, they could not be used as the parts of the watches. Therefore, watchstraps delivered by CLAIMANT were not fit for the ordinary purpose.

ii. THE WATCHSTRAPS WERE NOT FIT FOR THE PARTICULAR PURPOSE

20. The watchstraps were not fit for the particular purpose. “Purpose can derive from the buyer’s individual circumstances and the way in which the goods will be used.”[*Butler, p.117¶138*]. Individual circumstances are the way of production of the goods to ensure that they are fit in size and fit into the watchcases. The seller has to deliver goods for a purpose other than the purpose for which they would ordinarily be used if that purpose was expressly or impliedly made known to the seller at the time of the conclusion of the contract. [*CISG Art.35(2)(b)*].
21. **CLAIMANT** is obliged to deliver goods that complies with the standards concluded in the contract between parties [*CISG Art.35(2)(b)*]. In this case, watch straps delivered by **CLAIMANT** do not fit the original purpose of usual watchstraps. *SPA 2* sets out the size of watchstraps to fit the customer’s watchcase, which means, **RESPONDENT** relied on **CLAIMANT**’s measurement of size knowledge as a prudent manufacturer of leather watchstraps. **CLAIMANT** should notice the irregularity in the size of goods, causing watchstraps to not fit into the watchcases.
22. Omitted to check the conformity between the prototypes and the watchcase is not **RESPONDENT**’s fault since **RESPONDENT** had relied on **CLAIMANT**’s skill and judgment, because of its history and reputation [*CE No.1*]. Hence **RESPONDENT** submits that **CLAIMANT** should have

known the degree of fitness of the watchstraps ordered as required under the contract. |

Commented [1]:
Sentences do not working

23. Therefore, **CLAIMANT** is responsible with regards to the unfitness of the watchstraps for the particular purpose since **RESPONDENT** had relied on **CLAIMANT** to make the watchstraps.

iii. THE WATCHSTRAPS CLAIMANT DELIVERED DID NOT POSSESS THE QUALITIES OF THE PROTOTYPE

24. Seller, in this case **CLAIMANT**, breached the contract by delivering goods that are not in conformity to the prototypes [*CISG Art.35(2)(c)*]. Goods needed to conform to all of the characteristics of the prototype [*Case No.8 HKO24667/93; p.18,RE,No.2; p.8,Clarifications,No.51*]. The goods delivered by **CLAIMANT** did not possess the quality of the prototypes, as the goods were not as soft and had too much glue.

D. RESPONDENT IS NOT OBLIGED TO PAY THE BALANCE PAYMENT UNTIL CLAIMANT SENT THE CORRECT GOODS.

25. **CLAIMANT** should deliver the correct watchstraps first before **RESPONDENT** pay the balance payment. Buyer is not obliged to pay the balance payment since [i] buyer is unaware of such lack of conformity, [ii] even if the Tribunal find the risk has passed, **CLAIMANT** is still liable, [iii] buyer has right to rely on lack of conformity, [iv] even if Tribunal finds that seller is not liable of lack of conformity, seller is not entitled to rely on *Art.39 CISG*, [v] buyer may require performance by seller to deliver

substitute goods, [vi] even if buyer may not ask for substitution, it may require remedy from the seller.

-i. RESPONDENT IS UNAWARE OF SUCH LACK OF CONFORMITY

26. Seller is liable for any lack of conformity of the goods if at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity [*CISG Art.35(3)*]. CLAIMANT should have known the degree of fitness of goods since RESPONDENT is unaware there would be such lack of conformity. Considering that RESPONDENT are not producers of the watchcases, but are traders [*p.3, AfA No.2*] of smart mobile phones, RESPONDENT has no watchcases in hand and was not possible to check the size of the prototype.

ii. EVEN IF THE RISK HAS ALREADY PASSED, CLAIMANT IS STILL LIABLE

27. Seller is still liable for lack of conformity which exists at the time when risk passes to the buyer, even though the lack of conformity becomes apparent only after that time [*CISG Art.36(1)*]. Seller is liable for lack of conformity which occurs due to a breach of his obligations [*CISG Art.36(2)*].
28. The risk has passed to RESPONDENT since goods has been received on 29th January 2015. Moreover, the lack of conformity occurs due to the seller's breach of obligation in their production process. Therefore, seller is liable for any lack of conformity occurring even if the risk has passed, and constitutes as a breach of his obligation.

**iii. RESPONDENT HAS THE RIGHT TO RELY ON A LACK
OF CONFORMITY OF THE WATCHSTRAPS**

29. **RESPONDENT** has the right to rely on a lack of conformity of the watchstraps. Buyer has the right to rely on lack of conformity if they give notice within a reasonable time [*CISG Art.39(1)*] The buyer give notice to the seller within a period of 2 years from the date on which the goods handed over to the buyer [*CISG Art.39(2)*].
30. Here, **RESPONDENT** gave notice to **CLAIMANT** specifying the nature of lack of conformity in which they acted inconsistently with *Art.35 CISG*. The buyer loses rights to rely on the lack of conformity if buyer does not notify the sellers in regards to it, in the reasonable time [*CISG Art.39(1)*]. However, in regards to *Art.39(2) CISG*, **RESPONDENT** gave notice within the two year time frame, which is in 29 days. Hence, **RESPONDENT** has the right to rely on a lack of conformity.

**iii.iv. CLAIMANT IS NOT ENTITLED TO RELY ON ART.
39 CISG**

31. Alternatively, even if the Tribunal finds that seller is not liable for any lack of conformity, **CLAIMANT** is not entitled to rely on *Art.39 CISG*. As stipulated in *Art.40 CISG* seller is not entitled to rely on *Art.39 CISG* if the lack of conformity relates to fact which he knew and which did not disclose to the buyer. As stated in above, **CLAIMANT** knew and is aware of the lack of conformity since **RESPONDENT** rely on **CLAIMANT's** skill and judgment. **CLAIMANT** is not entitled to rely on *Art.39 CISG*.

~~iv.v.~~ **CLAIMANT IS REQUIRED TO DELIVER
SUBSTITUTE GOODS**

~~31-32.~~ **CLAIMANT** is required to deliver the substitute goods. Buyer may require delivery of substitute goods if the lack of conformity constitutes fundamental breach and the request is made within a reasonable time [*CISG Art.46(2)*].

~~32-33.~~ The lack of conformity constitutes a fundamental breach since the entire goods cannot be used [*Souvenir Coin Case*]. This proves that if some of the goods were sellable, there would not be a breach. However, if otherwise, it is considered as a fundamental breach. Pursuant to *Art.25 CISG*, the breach of the contract led **RESPONDENT** to be deprived of what is entitled to him in the contract. The watchstraps are not in conformity as required in the contract, for **RESPONDENT** to sell the goods to their clients who have already put in orders [*p.4, Clarifications, No.25*].

~~iv.vi.~~ **EVEN IF CLAIMANT REFUSES TO DELIVER
SUBSTITUTE GOODS, SELLER IS OBLIGED TO REPAIR
THE GOODS**

~~33-34.~~ Buyer is provided with a right to demand repair if the delivered goods do not conform to a contract [*CISG Art.35*]. As stipulated in *Art.46(3) CISG*, even if the goods do not conform to the contract, “*the buyer may require the seller to remedy the lack of conformity by repair [...]*”.

~~34-35.~~ **CLAIMANT** has not delivered the correct goods as they do not conform to the prototypes and are unusable [*p.18, RE, No.2*]. **CLAIMANT** is

responsible to repair the goods and send it to **RESPONDENT**, to make the balance payment.

IV. CLAIMANT HAS TO PAY FOR THE COMPENSATIONS DUE TO THE BREACH OF ITS OBLIGATIONS

~~35-36.~~ **CLAIMANT** is obliged to pay the compensation as requested by **RESPONDENT**. **RESPONDENT** may claim damages as provided in *Art.74-77 CISG* as **CLAIMANT** failed to perform its obligations under the contract [*CISG Art.45(1)(b)*]. Here, **[A] CLAIMANT** breached its contractual obligations under the *SPA*. **[B]** The website cost is a consequence of the breach. Therefore, **RESPONDENT** may ask for the compensations.

A. CLAIMANT HAS BREACHED ITS CONTRACTUAL OBLIGATION

~~36-37.~~ **CLAIMANT** has breach its obligation, regarding the late delivery of the prototype, and the non-conformity of the goods that have been shipped. **RESPONDENT** is allowed to claim the compensation from **CLAIMANT** [*CISG Art.45(1)(b)*]. The compensation includes the sum of USD 20 million for loss of profits USD 17.4 million for the payments made to Albas.

B. THE WEBSITE COST IS A CONSEQUENCE OF THE BREACH THAT HAS BEEN DONE BY CLAIMANT

~~37-38.~~ The website cost is an investment made by **RESPONDENT** in hopes that it would catch attention of potential customers, and the cost was to be

covered by the profit that was supposed to be attained through the sales of the watches. As **CLAIMANT** failed to deliver the proper goods, the website cost constitutes as a further loss by **RESPONDENT** and should be covered in the compensation claim.

38-39. **RESPONDENT** has already secured some orders [p.4, Clarifications, No.25] from their clients, and these orders are based on the images on the website. The images were taken by professional photographers and the website itself is very costly. The profit from potential buyers of the watchstraps could cover the cost of the development of the website. Since the goods cannot be sold, the website cost should also be part of the compensation from **CLAIMANT**.

39-40. *“Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach[...][CISG Art.74].* The loss suffered by **RESPONDENT** is to be bore by **CLAIMANT** due to the lack of conformity in the production of goods. **CLAIMANT** is a well-established manufacturer of leather watchstraps, and could not have been unaware of the inconformity of the goods during the production, as there was a sample of the watchcase given for the use of fitting [Used Car Case 1996], hence, **CLAIMANT** should bear the loss of profit that has been attained by **RESPONDENT**.

Request of Relief

RESPONDENT hereby submits that the Tribunal Should Render the Award in Favor of **RESPONDENT** that:

- A. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO ADJUDICATE THE PAYMENT CLAIMS.**
- B. CISG DOES NOT GOVERN THE SPA 1&2**
- C. CLAIMANT HAD BREACHED ITS OBLIGATIONS**
- D. CLAIMANT HAS TO PAY FOR THE COMPENSATIONS DUE TO THE BREACH OF ITS OBLIGATIONS**