
SIXTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

MEMORANDUM FOR RESPONDENT

CLAIMANT

RESPONDENT

Albas Watchstraps Mfg. Co. Ltd

Gamma Celltech Co Ltd

241 Nathan Drive, Yanyu City

17 Rodeo Lane, Mulaba

Yanyu

Wulaba

TEAM CODE- 237R

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TABLE OF DEFINITIONS

Agreement(s)	Sale and Purchase Agreement Signed on 23 rd July 2014 and 7 th November 2014, respectively, between the parties
&	And
¶	Paragraph
Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Rules	CIETAC Arbitration Rules effective as of 1 January 2015
CISG	United Nations Convention on Contracts for the International Sale of Goods
Claimant	Albas Watchstraps Manufacturing Co. Ltd, a company incorporated under the laws of Yanyu
Dispute	Dispute between the Parties as set out in Application for Arbitration dated 18 November 2015, Answer and Statement of Defence dated 18 December 2015 and narrowed by procedural Order No.1 dated 14 March 2016
DDP	Delivery Duty Paid, INCOTERMS 2010, Issued by ICC
ICSID	International Centre for the Settlement of Investment Disputes
INCOTERMS Guidelines	INCOTERMS Guidelines 2010, DDP, A3(b)
Model Law	UNCITRAL Model Law with 2006 amendments
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
P.	Page number
Parties	Claimant and Respondent collectively
PCIJ	Permanent Court of International Justice
Respondents	Gamma Celltech Co. Ld., a company incorporated under the laws of Wulaba
Secretariat Commentary	Secretariat Commentary Guide to CISG 1978 Draft
Tribunal	The arbitral tribunal formed on 15 th March, 2016 for the present proceeding
UNCITRAL	United Nations Commission of International Trade Law
USD	United States Dollars
UNCITRAL Model Law	UNCITRAL Model Law with 2006 amendments
UNIDROIT PICC	UNIDRIOT Principles on International Commercial Contracts, 2010

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Index of Legal Sources

CITED AS	FULL CITATION
CEITAC Rules	CIETAC Arbitration Rules effective as of 1 January 2015
CISG	CISG, Vienna, 11 April 1980, S.Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3
Model Law	UNCITRAL Model Law with 2006 amendments

Index of Authorities

CITED AS	FULL CITATION	CITED AT PARAGRAH
Berger	Peter Klaus Berger, <i>International Economic Arbitration</i> (Deventer, Boston, 1993)	[17]
Bianca	Michael Joachim Bianca & Cesare Massimo Bonell, <i>Commentary on the International Sales Law: The 1980 Vienna Sales Convention</i> (Milan, 1987)	[13]
Bonnel	Michael-Joachim Bonell, <i>A New Approach to International Commercial Contracts</i>	[15]

	(The Hague, London, Boston, 1999)	
Born	Gary B Born, <i>International Commercial Arbitration</i> (Kluwer Law International, 2nd ed, 2014)	[6], [9]
Calavros	Constantin Calavros, <i>Das UNCITRAL-Modellgesetz über die international Handelsschiedsgerichtsbarkeit</i> (Bielefeld, 1988)	[17]
Cremades	Bernardo M. Cremades , <i>Multi-tiered Dispute Resolution Clauses</i> (New York: CPR Institute for Dispute Resolution, 2004)	[3]
Czerwenka	G. Beate Czerwenka, <i>Rechtsanwendungsprobleme im internationalen Kaufrecht</i> (Berlin, 1988)	[13]
Dieter	Christoph Martiny & Dieter Reithmann, <i>Internationales Vertragsrecht: Das internationale Privatrecht der Schuldverträge</i> (5th edition, Cologne, 1996)	[13]
Erauw	J. Erauw, <i>Articles 66-70: The Risk Of Loss And Passing It”</i> (Journal Of Law And Commerce 2005-06)	[26]
Ferrari	Franco Ferrari, <i>International Sale of Goods: Applicability and Application of the United Nations Convention on Contracts for the International Sale of Goods</i> (Brussels, 1999)	[13], [20]
Figueres	D.J. Figueres , <i>Multi-Tiered Dispute Resolution Clauses in ICC Arbitration</i> (ICC International Court of Arbitration Bulletin, Vol 14 No	[4]

	1, (2003))	
Fouchard	Gaillard Philippe Fouchard, Emmanuel Goldman & Berthold, <i>International Commercial Arbitration</i> (Kluwer Law International, 1999)	[15]
Gottwald	Peter Gottwald, <i>Internationale Schiedsgerichtsbarkeit-Arbitrage International-International Arbitration</i> (Bielefeld, 1979)	[17]
Janzen	Josef Janzen & Dietmar Alpmann, <i>UN-Kaufrecht</i> (Muenster, 1996)	[13]
Jolles	Alexander Jolles , <i>Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement in Arbitration</i> (4 (2006) 329-338)	[4], [5]
Karollus	Martin Karollus, <i>UN-Kaufrecht: Eine systematische, Darstellung für Studium und Praxis</i> (Vienna, 1991)	[19], [20]
Kropholler	Jan Kropholler, <i>Internationales Privatrecht</i> (Tuebingen, 2001)	[13]
Magnus	Magnus, <i>Staudinger Kommentar</i> , (2005)	[29]
Mann	F.A. Mann, <i>Anmerkung zum BGH Urteil vom</i> (04.12.1985, in: JZ 1986)	[19]
Pryles	Michael Pryles, <i>Multi-Tiered Dispute Resolution Clauses</i> (Journal of International Arbitration, Vol 18 No. 2 2001)	[5]
Roth	P. M. Roth, <i>“The Passing of Risk”</i> (The American Journal Of Comparative Law 1979, 291)	[27]
Saeger	Bamberger/Roth (Eds), <i>Kommentar Zum Burgerlichen</i>	[29]

	Gasetzbuch, 2007	
Schlechtriem	Peter Schlechtriem, <i>Commentary on the UN Convention on the International Sales of Goods (CISG)</i> (2nd edition, Munich, 1998)	[13], [31]
Staudinger	Julius Von Staudinger, <i>Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener UN-Kaufrecht (CISG)</i> (14th edition, Berlin, 1999)	[13]
Valioti	Zoi Valioti, <i>Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods(Vienna 1980) and INCOTERMS 2000</i> (September 2003)	[26]
Vekas	Lajos Vekas, <i>Zum persönlichen und räumlichen, (Anwendungsbereich des UN- Einheitskaufrecht in: IPrax 1987)</i>	[19]

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Arbitral Awards

CITED AS	FULL CITATION	CITED AT PARAGRAH
AD HOC		
<i>Biloune v. Ghana</i>	Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana, 95	[7]

	ILR 183 (1993)	
<i>ICC Case No. 7422</i>	Interim Award in ICC Case No. 7422, 1996	[15]
<i>ICC Case No. 6276</i>	‘Partial Award in ICC Case No 6276’ (2003) 14(1)	[4], [7]
	ICC International Court of Arbitration Bulletin 76	
<i>ICC Case No. 9984</i>	ICC International Court of Arbitration Case No. 9984, 1999	[3]
<i>ICC Case No. 10256</i>	‘Interim Award in ICC Case No 10256’ (2000) 14(1)	[3]
	ICC International Court of Arbitration Bulletin 82	
	<u>Foreign Cases</u>	
	AUSTRALIA	
<i>Elizabeth Bay Case</i>	Elizabeth Bay Developments Pty. Limited v. Boral Building Services Pty. Limited [1995] 36 NSWLR 709	[6]
<i>Hooper Bailie Case</i>	Hooper Bailie Associated Ltd. v. National Group Pty. Ltd. (1992) 28 NSWLR 194	[6]
	HONG KONG	
<i>Hyundai v. Vigour</i>	Hyundai Engineering and Construction Company Ltd v Vigour Ltd [2004] HKCFI 205	[5]
	SWITZERLAND	
<i>Judgment of 6 June 2007</i>	‘Judgment of 6 June 2007’ (2008) 26 ASA Bulletin 87 (Bundesgericht [Swiss Federal Tribunal])	[5]
	UK	
<i>Cable v. IBM</i>	Cable & Wireless plc. v IBM United Kingdom Ltd [2002] 2 All E.R. (Comm.) 1041 (Q.B.)	[9]
<i>Channel v. Balfour</i>	Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] 2 WLR 262	[9]

USA	
<i>Fluor v. Solutia</i>	Fluor Enters Inc v Solutia Inc 147 F Supp 2d 648 (SD Tex 2001) [5]
<i>Portland v. DeVito</i>	HIM Portland, LLC v DeVito Builders, Inc., 317 F.3d 41 (1st Cir. 2003) [9]
<i>Weekly v. Jennings</i>	Weekly Homes Inc. v. Jennings, 936 SW 2d 16 (Tex. App. 1996) [9]
<i>White v. Kampner</i>	White v Kampner, 229 Conn 465 (Conn, 1994) [9]
<u>CISG Cases</u>	
ARBITRAL AWARDS	
<i>CLOUT Case No. 92</i>	Arbitral Tribunal Florence, CLOUT Abstract No. 92 [19] Available at:- http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940419i3.html
<i>ICC Case No.8574</i>	ICC Court Of Arbitration, Award No. 8574 [18] Available at:- http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=13355&x=1
CANADA	
<i>Nova Tool v. London</i>	Ontario Court Of Appeal [35] (Nova Tool V. London Industries) Available at:- http://cisgw3.law.pace.edu/cases/000126c4.html
FRANCE	

<i>Musgrave v. Ceramique</i>	Cour D'appel De Colmar Musgrave Ltd V. Céramique De France S.A. [26.09.1995] Available at:- http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950926f1.html	[19]
<i>CLOUT Case No. 244</i>	Cour D'appel, Paris, France CLOUT Case No. 244 Available at:- http://cisgw3.law.pace.edu/cases/980304f1.html	[23]
GERMANY		
<i>Aschaffenburg</i>	District Court Aschaffenburg Available at:- http://cisgw3.law.pace.edu/cases/060420g1.html	[31]
<i>CLOUT Case No. 340</i>	Oberlandesgericht Oldenburg, Germany CLOUT Case No. 340 Available at:- http://cisgw3.law.pace.edu/cases/980922g1.html	[23]
<i>OLG Hamm</i>	OLG Hamm 11 U 191/94 [09.06.1995] Available at:- http://cisgw3.law.pace.edu/cases/950609g1.html	[18]
<i>OLG Munchen</i>	OLG MÜNCHEN 7 U 4049/84 [18.12.1985] IPRAX 1986, P. 178	[17]

ITALY		
<i>Nuova v. Fondmetal</i>	Tribunale Civile Di Monza Nuova Fucinati S.P.A. V. Fondmetal International A.B. Available at:- http://www.cisg.law.pace.edu/cisg/wais/db/cases2/930114i3.html	[19]
RUSSIA		
<i>Russia 6 June 2000</i>	Arbitration Proceeding 406/1998	[35]
<i>Arbitration</i>	Available at:-	
<i>proceeding 406</i>	http://cisgw3.law.pace.edu/cases/000606r1.html	
SWITZERLAND		
<i>Bundesgericht</i>	Bundesgericht Fcf S.A. V Adriafile Commerciale Available at:- http://cisgw3.law.pace.edu/cases/000915s1.html	[32]

STATEMENT OF FACTS

1. **Albas Watchstraps Mfg. Co. Ltd. (“Albas” or “the Claimant”)** is one of the leading manufacturers and exporters of leather watchstraps in Yanyu since 1973. The Claimant sells its watchstraps to importers of watchstraps and watch producers all over the world, as well as to local distributors in Yanyu.
2. **Gamma Celltech Co. Ltd. (“GCT” or “the Respondent”)**, formed in 2002, is one of the fastest growing traders of smart mobile phones in Wulaba. In 2011 it expanded its product range to include smart mobile phone accessories.
3. The timeline of the Dispute is mentioned below:
 - **23 July 2014:** The parties concluded the Sales and Purchase Agreement where the Claimant would buy certain amount of leather watchstraps for Cherry Watch from the Respondent.
 - **31 July 2014:** The Respondent paid the initial deposits of USD 3 million pursuant to the Sale and Purchase Agreement.
 - **14 August 2014:** The Claimant sent a handmade approval prototype for the Respondent to confirm the order.
 - **15 August 2014:** The Respondent approved the prototype with a slight amendment concerning the stitching colour.
 - **10 October 2014:** The Claimant arranged for the ordered watchstraps to be shipped by the sea.
 - **28 October 2014:** The Claimant received a notice from the shipping Company that the watchstraps were lost at sea.

The Claimant offered to provide a replacement shipment provided the Respondent accepted responsibility and made full payment for the lost goods to which the

Respondent reluctantly proceeded and the Parties entered into a subsequent Sale and Purchase Agreement for the replacement goods.

- **29 December 2014:** After having received the balance payment for the Sale and Purchase Agreement 1 and deposit for the Sale and Purchase Agreement 2, the Claimant managed to arrange for an expedited production and finally shipped the watchstraps on this day.
 - **27 February 2015:** The Claimant received a message from the Respondent claiming that it was not going to make the balance payment, as it was not satisfied with the quality of the watchstraps. A reply was sent by the Claimant in which it was said that the goods were in conformity with the prototype which was approved by the Respondent.
4. There was no reply made to the Claimant to his letter dated 27th February 2014. The claimant didn't get any message from the Respondent for around 9 months and hence finally application for Arbitration was made by the claimant on 18th November 2015 as per Article 19 of the Sale and Purchase Agreement.
 5. In the light of the mentioned facts, the Claimant is asking for the damages due to nonpayment of money by the Respondent, which the Respondent contests on valid grounds.

STATEMENT OF ISSUES

- I.** Does the Tribunal have jurisdiction to deal with the payment claims raised by the Claimant?
- II.** Does the CISG govern the claims arising under the Sale and Purchase Agreement and the Sale and Purchase Agreement no.2
- III.** Assuming that CISG does apply, have its provisions been invoked on account of the following:
 - i. Lack of insurance coverage in the first transaction;
 - ii. Timing of delivery of prototype;
 - iii. Non- conformity of goods;
 - iv. Payment of money under the transaction

WRITTEN SUBMISSION

1. THE TRIBUNAL DOES NOT HAVE THE JURISDICTION TO DEAL WITH THE PAYMENT CLAIMS RAISED BY THE CLAIMANT

1. Pursuant to the principle of kompetenz-kompetenz, the tribunal is competent to determine its jurisdiction over an arbitration case¹.
2. Respondent, however, contests the power of Tribunal to adjudicate the merits of this dispute because the pre-condition to arbitration as stipulated in Art. 19(a)² of the Agreement of ‘amicable resolution of disputes concerning payments’ has not been satisfied and hence, the Tribunal does not have jurisdiction over this dispute.

[I.] Requirement of amicable settlement is a mandatory precondition to arbitration and is enforceable

3. A.19(a) is a standard multi-tier dispute resolution clause that is binding upon both parties. The phrasing of Art. 19(a) of the Agreement indicates that the first tier of dispute resolution is mandatory. Use of the mandatory term shall rather than the permissive may suggests that negotiation is binding³. This implies that the parties intended for the amicable settlement to be mandatory and not optional, as opposed to the latter option of submitting the dispute for arbitration. Hence, the first tier of the dispute resolution clause is a condition for the consent of both parties to arbitrate a dispute.
4. Secondly, negotiation was a clear precondition to arbitration. Furthermore, “*Failure to reach an amicable settlement*” in Art. 19(a) unequivocally establishes a binding

¹ A. 6(1), The CIETAC Rules

² Moot Problem, 7

³ ICC Case No. 10256; ICC Case No. 9984; Cremades, 9.

5. prerequisite to arbitration⁴. It has been held⁵ that the pre-arbitral process which both parties had agreed upon voluntarily were to be interpreted as strictly binding upon both parties and that if a claim does not satisfy the prerequisite of the first and second tiers, the request for arbitration is premature and shall be inadmissible⁶.
6. An arbitral pre-condition will be binding when it is detailed, precise, and sufficiently certain, or has clearly defined and satisfiable requirements⁷. In this regard, the negotiation clause in Art. 19(a) was indicative of the framework to be followed and the stage at which the efforts will be deemed exhausted⁸ as it clearly specified the subject matter and the limit on the time period, therefore, making it precise and enforceable⁹.
7. The Respondent submits that the negotiation clause is not merely a vague “agreement to agree”¹⁰; rather, it is a precise framework to participate in “a process from which cooperation and consent might come”¹¹. Hence, the tribunal should hold it to be an enforceable precondition, non-fulfilment of which does not allow the tribunal to exercise jurisdiction over the substantive dispute¹².

[II.] Claimant did not satisfy the requirement to amicably settle the dispute.

8. With regards to amicable settlement, there is no objective criteria to identify the fulfilment of the same¹³, however the parties must act on good faith and seize every opportunity to settle their dispute in amicable manner¹⁴. This further includes an

⁴ Figueres, 72

⁵ ICC case No. 6276

⁶ Jolles, 333

⁷ *Hyundai v. Vigour*

⁸ Pyles, 81; Jolles, 333

⁹ *Fluor v. Solutia; Judgment of 6 June 2007.*

¹⁰ *Elizabeth Bay Case*

¹¹ *Hooper Bailie Case*

¹² Born, 842

¹³ ICC Case No 6276

¹⁴ *Biloune v. Ghana*

9. obligation to commence negotiation, have some minimum participation in them and not withdraw from it without giving any proper reason¹⁵.
10. In the present case, the Claimant's neither made any attempts to amicably settle the dispute with the Respondent nor did he make any invitation for such amicable settlements to the respondent, before submitting to arbitration.

[III.] Therefore, the Tribunal does not have jurisdiction over this dispute

11. The failure to comply with the procedural requirements in a multi-step dispute resolution clause “constitutes a jurisdictional defect affecting the arbitral proceedings”¹⁶. Unless there is “good cause for departing from them”, parties must strictly comply with the different tiers of dispute resolution¹⁷. Courts require strict compliance with these provisions, especially where parties “intentionally conditioned arbitration upon” other modes of dispute resolution¹⁸, and can determine the issue of arbitrability where the arbitration provision is expressly qualified by an unsatisfied condition precedent that requires parties to first enter into negotiation or consultation¹⁹.
12. The claimant's failure to comply with the procedural requirements of the arbitration agreement constitutes a jurisdictional defect affecting the arbitral proceedings or the arbitration agreement. When a request for Arbitration was premature, and arbitration was dismissed rather than being stayed, because of failure to complete pre-arbitral dispute resolution steps²⁰
13. Therefore, it is submitted that the non compliance with an arbitral precondition is a procedural matter depriving Tribunal of its jurisdiction over the merits of the dispute.

¹⁵ ICC Case No. 7422

¹⁶ Born, 842

¹⁷ *Channel v. Balfour*

¹⁸ *Cable v. IBM; Portland v. DeVito*

¹⁹ *Weekley v. Jennings; White v. Kampner*

²⁰ ICC Case No. 12739

2. CISG DOESN'T GOVERN THE CLAIMS ARISING UNDER THE SALE AND PURCHASE AGREEMENT AND THE SALE AND PURCHASE AGREEMENT NO. 2

14. Art. 20 of the Agreement designates the “national law of Wulaba” as the choice of law²¹. This is a reference to the domestic law of Wulaba and not to the CISG. The interpretation of the choice-of-law clause must be made in light of the fact that it was Claimant’s standard clause and considering that the CISG would have governed the contract even without a choice-of-law clause.

[I.]An interpretation of the choice-of-law clause results in the exclusion of CISG

15. Generally, an exclusion of the CISG can be made impliedly or explicitly²². An implied exclusion is sufficient where the intent of the parties is determinable²³. Hence, Claimant may not assert that in the absence of an explicit exclusion, the CISG was not excluded. Parties intending to exclude a certain law may do so by designating a different law²⁴. In this case, the choice-of-law clause designated is the national law of Wulaba.

16. Further, it has to be taken into consideration that the Art. 20 of the Agreement is Respondent’s standard clause. Although it was unilaterally drafted by RESPONDENT, it was made understood to the Claimant²⁵. When drafting that clause, Claimant had as much time as it required designing a clause that satisfies its function. Hence, it drafted a clause that was unambiguous and therefore did fulfil its function to clearly designate the law governing Claimant’s contracts. Parties have very clearly excluded all the other applicable laws but the National Law of Wulaba, which is to be

²¹ Moot Problem, 7

²² Dieter, 531

²³ Czerwenka, 170; Ferrari, 151; Kropholler, 457; Janzen, 14

²⁴ Schlechtriem, Art.6 at 21; Bianca, Art.6 at 1.2; Staudinger, Art.6 at 30.

²⁵ Clarification No. 30.

17. governing the Contract. If the parties had the intention to make CISG the applicable law, it would not have excluded all the other applicable laws apart from the National Law of Wulaba.
18. Furthermore, in order to subject the contract to the CISG, Claimant did not need to give his consent to such an Agreement that included a choice-of-law clause into the contract. This is because both the parties' domestic conflict-of-laws rules lead to the application of the CISG automatically. Therefore, the only purpose the choice-of-law clause could possibly serve was to exclude the CISG and designate a different law, i.e. the National law of Wulaba. According to the principle *effet utile* or effective interpretation²⁶, one should prefer the interpretation which gives effect to the clause, rather than rendering it useless or nonsensical.²⁷
19. The interpretation of Claimant's standard choice-of-law clause therefore leads to the result that the CISG was excluded. The autonomous National Law of Wulaba applies to the contract instead.

[II.] The characteristics of the CISG and the cases cited by the CLAIMANT do not lead to a different result

20. The international and uniform character of the CISG is of no importance for the interpretation of the clause. According to Art. 28 (1) (1) Model Law²⁸, the parties may choose any law they wish, no matter how inappropriate it appears to be²⁹. In this case, the National law of Wulaba was not even inappropriate as it has always applied to national as well as to international. Hence, the characteristics of the CISG offer no relevant advantages in comparison with the domestic law of Wulaba.

²⁶ Art. 4.4, UNIDROIT Principles

²⁷ Bonell, 134; Fouchard, 250

²⁸ UNCITRAL Model Law

²⁹ *OLG Munchen*; Berger, 491; Calavros, 122; Gottwald, 20

21. In addition, Claimant's allegation that the CISG was not excluded is not supported by the cases it cites. The ICC Award No. 8574³⁰ does not even examine a choice-of-law clause, while the OLG Hamm³¹ decision deals with an exclusion of the CISG through reference to national law during the proceedings, but does not examine a choice-of-law clause either.
22. In accordance with legal doctrine and case law, it has to be held that the reference to the law of a contracting state is an implied exclusion of the CISG³², because everything else would render the intent of the parties useless. Therefore, the reference to the National law of Wulaba is an implied exclusion of the CISG.
23. Even if the Tribunal concludes that the choice of a national law does not by itself result in an implied exclusion of the CISG, Respondent and Claimant still excluded the CISG. The reference made in Respondent's choice-of-law clause specifically excludes all the other applicable laws but the national Law of Wulaba. In case a specific or domestic law of a Contracting State is chosen, e.g. the Commercial Law, the CISG is excluded³³.
24. The result of the interpretation is therefore neither influenced by the case law offered by Claimant nor by the characteristics of the CISG. The domestic law of Wulaba governs the contract.

³⁰ *ICC Case No.8574*

³¹ *OLG Hamm*

³² *CLOUT Case No. 92; Musgrave v. Ceramique; Nuova v. Fondmetal; Karollus, 38; Mann, 647; Vekas, 342*

³³ *Ferrari, 151; Karollus,38*

3. ASSUMING THAT CISG DOES APPLY, THE PROVISIONS OF CISG HAVE BEEN INVOKED ON ACCOUNT OF THE FOLLOWING:

[I.] Lack of insurance coverage in the first transaction is Claimant's liability.

25. Both parties agreed to DDP in the agreement, according to which it is the duty of the claimant to deliver the goods at the agreed place i.e. Respondent's office³⁴.

A. The seller had the obligation to deliver the goods at the agreed place.

26. Art. 30 provides that the seller is obliged to deliver the goods. In the present instance, parties governed by CISG have specified the duty to deliver by using a price-delivery term (DDP), which then prevails over the rules of the Convention.³⁵ Under the term DDP, it has been held that the place of delivery is the buyer's place of business.³⁶

27. The seller must deliver the goods by placing them, at the disposal of the buyer, on the arriving means of transport ready for unloading at the agreed point, if any, at the named place of destination on the agreed date or within the agreed period³⁷. In the present case the Claimant failed to deliver the goods as they were destroyed in transit³⁸.

B. The risk was never passed off to the buyer.

28. Art. 69(2) CISG governs passing of risk if the buyer is bound to take over the goods at a place other than a place of business of the seller. It provides that risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

³⁴ Clarification No. 1

³⁵ *CLOUT Case No. 244*

³⁶ *CLOUT Case No. 340*

³⁷ INCOTERM A4

³⁸ P.10, Moot Problem

29. Also the parties can allocate legal risk by using INCOTERMS rules in their contract.³⁹

In the present case, the parties agreed to DDP, which provides guidelines as to who will cover any physical loss or damage to the goods that is accidental and for which none of the parties is responsible and it only covers the 'price risk'⁴⁰.

30. It is also to be noted that if the goods, perish while being at the seller's risk, not only is the buyer not liable for the price, but the seller may also be liable for damage caused by its non-delivery (e.g. delivery at a higher market price).⁴¹

31. Hence, it can be concluded that since the risk was not passed off to the buyer the seller is liable for all the risks involved in the transit making it the responsibility of the seller to insure the goods.

[III.] Timing of the delivery of prototype

32. There was a clear delay in the delivery of prototype by the Claimants. As per Art.5, the sample was to be provided to the buyer for approval within 14 days of payment of deposit⁴². The payment was made on 31st July 2014⁴³ but the buyer received the sample only on 15th August 2014⁴⁴. Thus the seller is in breach of his contractual obligation to deliver in a timely manner within the relevant time period according to Art.33 CISG.⁴⁵ Art.33 addresses not only the obligation of seller to deliver goods but also indicates with regards to time regarding performance of other obligations resulting from contract.⁴⁶ According to Art.33(b), the delivery time is limited by a

³⁹ Erauw, 181

⁴⁰ Valioti,7.

⁴¹ Roth, 291

⁴² Moot Problem, 7

⁴³ ¶7, Moot Problem, 3

⁴⁴ Moot Problem, 9

⁴⁵ ¶7, Saeger

⁴⁶ ¶3, Magnus

33. final point⁴⁷ which in this case is 14th day after the payment of receipt and the seller did not fulfill its duty that time.

[III.] Non-conformity of goods

A. The goods were non confirming the sales contract.

34. According to Art.35, the seller must deliver goods of the quality, quantity and description required by the contract. The watchstraps delivered were not sized as per the description provided in Agreement 1&2. The size mentioned in the description is to fit costumer's watchcase⁴⁸ but the goods received do not confirm that size. Prima facie evidence of this is that the seller made the prototype and the final goods being unaware of the watchcase⁴⁹.

35. The purpose for which the watchstraps were ordered was to fit into Cherry Watchcase and provide a replacement to the straps of the customers and for the same a sample was sent of the watchcase which was indeed meant to communicate the particular purpose⁵⁰ and the same was specified in the contract terms. No actual knowledge of purpose is required rather it is sufficient that the seller ought to have been aware of the purpose⁵¹.

B. The goods do not conform the prototype sent by the seller

36. The seller sent handmade watchstraps which were really liked by the buyer thus they increased the order of stitched watchstraps to 80% (Claimant Exhibit No.4) and the seller cannot have been unaware of the intent of the buyer⁵². To the buyer's surprise, the goods received were machine made and if there was any trade practice which the seller stated of sending handmade goods as sample for machine made final products,

⁴⁷ ¶4, Saenger

⁴⁸ Art. 2(g), Moot Problem, 6

⁴⁹ Clarification No. 41

⁵⁰ *Aschaffenburg*

⁵¹ ¶138, Schlechtriem

⁵² Art. 8, CISG

37. the buyer being new to this area of trading was unaware of it and was never informed. Therefore, the seller committed a fundamental breach of contract under Art 25 CISG. The breach concerns the essential content of the contract, the goods, and it leads to serious consequences to the economic goal pursued by the buyer and thus a fundamental breach⁵³. The delivery of non conforming goods has led to a fundamental breach as it deprives the buyer of what he is entitled to expect under the contract.⁵⁴

[IV.] Payment of money under the transaction

A. The Claimant is liable for the lost goods and the non-delivery

38. In the instant matter DDP was the mode of payment which was agreed by both the parties. Respondent would have been liable for any kind of insurance after the goods have been received until then it was the claimant's responsibility to look after the carriage and buy the insurance for the goods. The respondent have already received bookings of the watchstraps from its customers by showing them the prototype, so as to get the delivery as soon as possible respondent paid the full amount of the lost goods and asked the claimant to ship a new order.

39. The respondents never received the first order but still paid the full amount of the 1st transaction against the promise of receiving substitute goods but received goods not in conformity to the contract thus the seller cannot claim payment as he is in breach of his contractual obligation.

⁵³ *Bundesgericht*

⁵⁴ CISG Advisory Council Opinion No 5

B. Art. 49(1)(a) of CISG gives the right to the Respondent to avoid the contract in case of non-conformity

40. Article 49(1)(a) when read with Article 25 CISG respondent can avoid the contract as the claimant committed a fundamental breach by delivering non conforming goods.⁵⁵ The respondents paid 20% advance for the 2nd agreement but received non-conforming goods thus he can avoid the contract and be compensated for the damages. The seller thus can't claim the money for the second transaction.

⁵⁵ *Russia 6 June 2000 Arbitration proceeding 406; Nova Tool v. London*

REQUEST FOR RELIEF

In the light of above submission, counsel for Respondent respectfully requests the Tribunal to find that:

- a) The Tribunal does not have jurisdiction to deal with the payment claims raised by the Claimant
- b) CISG does not governs the claims arising under the Sale and Purchase Agreement and the Sale and Purchase Agreement No. 2,
- c) Assuming that CISG does apply, its provisions of CISG have been invoked on account of the following:
 - i. Insurance coverage in the first transaction is the responsibility of the seller;
 - ii. Claimant has not delivered the prototype within the specified time under Article 33;
 - iii. The Claimant delivered goods not confirming to the contract under Article 35;
 - iv. Claimant is not entitled to get the payment for both the transactions under Article 25 and 49;

Respectfully Submitted
Counsel for the Respondent
Sd/-