THE 6TH INTERNATIONAL ADR

(ALTERNATE DISPUTE RESOLUTION) MOOTING COMPETITION

5 – 9 JULY 2016

HONG KONG

MEMORANDUM FOR THE CLAIMANT

TEAM 153

ON BEHALF OF:

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INDEX OF ABBREVIATIONS

Art/ Arts	Article/ Articles
Agreements	Sale and Purchase Agreements No.1 & 2
Cl. Ex.	Claimant Exhibit
Rs. Ex.	Respondent Exhibit
Sec/Ss	Section/Sections
Para	Paragraph
CIF	Cost Insurance and Freight
CIP	Carriage and Insurance Paid
DDP	Delivery Duty Paid
ICC	International Chamber of Commerce
ADR	Alternate Dispute Resolution
INCOTERMS	International Commercial Terms
NYC	New York Convention
CISG	Convention on International Sale of Goods
FAA	Federal Arbitration Act
HKO	Hong Kong Arbitration Ordinance
SGA	English Sale of Goods Act
CIETAC	China International Economic and Trade Arbitration Commission
UNCITRAL	United Nations Commission on International Trade Law

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STATEMENT OF FACTS

- Albas Watchstraps Mfg. Co. Ltd (Claimant) is one of the leading manufacturers and exporters of leather watchstraps in Yanyu since 1973.

- On 28th May 2014 The Claimant received letter from Gama Celltech Co. Ltd (Respondent) requesting for prototypes of watchstraps with soft Yanyu Leather together with Price List.

- On 17th July 2014 the Respondent sent (one) Cherry Watchcase to Claimant as a sample for size.

- On 23rd July 2014 lengthy negotiations took place between Claimant and Respondent and the Sale and Purchase Agreement No.1 was concluded. Through oral negotiations the Claimant offered the delivery of goods (watchstraps) DDP Incoterms 2010.

- On 31st July 2014 the Respondent made the initial deposit of USD 3 million.

- On 14th August 2014 a handmade prototype was sent to the Respondent for approval.

- On 15th August 2014 the prototype was approved and certain modifications were made to the Sale and Purchase Agreement No.1.

- On 10th October 2014 the Claimant arranged the shipment for the watchstraps.

- On 28th October 2014 a letter was received from the Shipping Company that the watchstraps were lost at sea directing to claim insurance for the watchstraps lost therein. The Claimant forwarded the same letter to Respondent to claim insurance.

- On 7th November 2014 the Sale and Purchase Agreement No.2 was concluded by both parties after the Respondent accepted responsibility and made full payment for the lost goods.

- On 29th December 2014 the second shipment took place of the fresh stock of watchstraps with the Claimant undertaking to purchase insurance.

- On 27th February 2015 the Respondent receives the goods and refuses to pay balance amount due and demands refund of the discharged Agreement No.1, alleging that the goods are not in conformity. The very same day the Claimant wrote a letter requesting payment as the workers needed to be paid off.

- On 18th November 2015 Claimant moves application to CIETAC for Dispute Resolution through Arbitration at Hong Kong Sub –Commission.

ARGUMENTS ON JURISDICTION

I. THE HON'BLE TRIBUNAL'S JURISDICTION TO HEAR THE PRESENT PAYMENTS CLAIM

1. The Respondent has raised a preliminary challenge to this Hon'ble Tribunal's jurisdiction on the ground that there is no "consensus to arbitrate". The Claimant squarely rejects these contentions for the following reasons:

A. Parties Are Bound By Valid Arbitration Agreement I.E. Clause 19.

2. Arbitration statues in England, Japan, Honk Kong and other developed jurisdictions provide for the presumptive validity of International Arbitration agreement *(Born 573).*

3. A valid arbitration agreement must fulfil the ingredients of a valid contract and of Art. 1, Art.3 and Art. 5 of CIETAC, Art. II of NYC and Sec. 19 of HKO which is based on Art. 7 of Model Law, the most important being in writing signed by the parties to refer the dispute to arbitration. Art. 19 of the Agreements has fulfilled all the aforementioned requirements.

4. The Respondent further contends that Art. 19 (a) of the Agreement no. 2 is not the entire dispute resolution clause. The latter shows that the Respondent is not disputing the existence of the clause and hence the question of consensus doesn't arise.

5. Art. 19 of the Agreement no.2 *(Cl. Ex. 6)* is the Arbitration Agreement. It is the primary source of Tribunal's authority. The dispute in question relates to 'payments'

as is mentioned in clause (a) and not disputes as is interpreted in sub-clause (b) which would invoke the jurisdiction of Hong Kong Courts.

6. "Payment" is a delivery of money or its equivalent in either specific property or services by one person from whom it is due to another person to whom it is due *(Black's Law 648-649).*

7. In *Paul Smith ltd*, one of the clause of contract provided that any dispute "shall be adjudicated upon" under the ICC Rules of Arbitration, while another clause provided that the "Courts of England shall have exclusive jurisdiction". The court reached the sensible conclusion that the reference to English Courts was only a designation of the Courts with supervisory jurisdiction (to appoint and remove arbitrator and entertain actions to set aside awards) thereby giving full effect to the unhappily worded arbitration clause.

B. Tribunal Is Authorised To Determine Its Own Jurisdiction-Pursuant To:

i) Law of Seat

ii) Doctrine of Severability

iii) Doctrine of *Kompetenz- Kompetenz.*

i) Law of Seat

8. Art. 74 of the CIETAC rules states that *unless otherwise agreed by the parties, an arbitration administered by CIETAC Hong Kong will be deemed to have its seat in Hong Kong and will be governed by the law of arbitration in Hong Kong and the arbitral award shall be Hong Kong award*. In this regard the law refers to laws of state of New York as agreed by the parties. The laws of State New York i.e.

(presumably) the FAA should be the proper law of arbitration as chosen by the parties. However sub clause 19(c) creates a split approach which would be detrimental to the interest of both the parties.

9. In *Beyond*, The court went to say that if the parties intended jurisdiction to be split they should have used clear language to that effect. It further held that the use of word "shall" was intended to be permissive and not mandatory. This has to be considered as it is clear from the intention of the Respondent that he did not have any preference to any dispute resolution forum and that the Respondent always liked to keep his options open which is why his lawyers drafted clause 19(b) and (c).

10. The law governing arbitration proceedings is the law chosen by the parties or in the absence of agreement the law of the country, in which the arbitration is held *(Dicey & Morris/Bansal 19).*

11. The Claimant further contends that since sub clause (c) is not certain as to which laws of the state of New York would apply in interpretation of the agreement, the laws of state of Hong Kong i.e. Law of Seat: the HKO which modelled upon Model Law *[ARI (HK), Note by the Secretary General];* should be invoked on the principle of *favorem validatis (Born 503)* as if the FAA should apply it would rule out the Doctrine of *Kompetenz- Kompetenz (First Option of Chicago).*

12. The sub clause a, b and c should be read *ut res margis valeat quam pareat* in order to ascertain the parties objective intentions and *contra proferentum (Born 1064-65).* In *SOERNI* French SC rendered a decision confirming its position that the existence and validity of an arbitration agreement should be determined primarily in light of the common intent of the parties. Many U.S federal courts have held that parties'

agreement to use institutional rules that incorporate the principle of Competence-Competence satisfies the first option test laid in Chicago vs. Kaplan *(Oracle America).*

ii) Doctrine of Severability

13. Sec. 34 of the HKO which is drawn from Art. 16 of Model Law emphasises that the Tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the Arbitration Agreement. For that purpose an arbitration clause which forms a part of the contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

iii) Doctrine of *Kompetenz- Kompetenz*

14. "One thing nevertheless remains clear... which is that the *"Kompetenz- Kompetenz"* belongs to the Arbitral Tribunal. This is one of the most basic principles of International Commercial arbitration..." *(ICC 6515 and 6516), (Born 853).*

15. Sec. 34 of the HKO, drawn from Article 16 of Model Law provides that the Tribunal can decide on its own jurisdiction under the Doctrine of *Kompetenz- Kompetenz (Blackaby/ Partasides Para 5.99).*

16. Though the CIETAC rules are opposed to general principles of *Kompetenz-Kompetenz*, CIETAC's power to decide on jurisdictional question may be delegated to the Arbitral Tribunal, which is done so *(Art. 75, Sturini & Hui).* The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards *(KB vs. S. and Others).*

C. Claimant Is Not Under Mandatory Obligation To Fulfil Pre-Arbitration Requirement

17. The Claimant sent a letter dated 27th February 2015 and since the Respondent didn't reply within reasonable time of 14 days, so also from the appearance of the previous letter wherein the Respondent has spoken of his lawyers raised an indication that the Respondent is likely to go to court instead of resolving the dispute amicably. *(Rs. Ex. 2 Para 5)*

18. Clause 19 of the Agreements emphasises on 'amicable resolution' which is not binding. Cases concerning conciliation, mediation and negotiation in good faith are all of explanatory value as international jurisprudence considers them each comparable non binding forms of ADR. Many Courts will uphold the validity of agreements to negotiate only where there is reasonably clear set of substantive and procedural requirements against which a party's negotiating efforts can be meaningfully measured. Absent such guidelines courts from both civil and common law jurisdictions have frequently held that particular agreements to negotiate the resolution of disputes are inherently uncertain and indefinite and therefore invalid *(Smutney/ Triantafiloiu 231) (ICC 8445).*

19. Clause 19 contained no express undertaking by the parties to exclude the jurisdiction of Tribunal in case of failure to resolve dispute amicably. The general approach of Tribunal is that 'conciliation remains entirely optional, accept where the parties have agreed to the contrary' *(ICC 8073).* Further the use of term 'may' may sometimes mean 'shall' *(Advanced Law Lexicon 1210).*

D. Should The Tribunal Consider Pre-Arbitration Condition Unfulfilled, It Should Not Close Arbitral Proceedings But Instead Allow Parties To Fulfil The Requirement.

20. Clauses requiring efforts to reach an amicable settlement, before commencing arbitration are primarily expressions of intentions and should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of dispute *(Smutney/ Triantafiloiu 234).* Non- compliance with the pre- arbitration requisite will not render the Arbitration Agreement invalid.

21. It would also not be in the parties' interest to close these proceedings as the Tribunal would have to be re-constituted if the conciliation is unsuccessful which would be again a costly affair. Instead the Tribunal can refer the parties to Arbitration under Art.47 of CIETAC rules and in accordance of Sec. 33 of the HKO.

22. The Tribunal should however consider further conciliation futile and proceed to hear the merits as in *Gao Haiyan* the court observed that in relation to Med-Arb, although there is nothing inherently wrong in the process, there is always a danger of bias *(Sturini & Hui).*

ARGUMENT ON MERITS

II. CISG GOVERNS THE CLAIM ARISING UNDER THE SALE AND PURCHASE AGREEMENT NO.1 AND SALE AND PURCHASE AND PURCHASE AGREEMENT NO. 2.

23. Article 20 to the Agreements specifies that the contract shall be governed by national law of Wulaba. Art. 20 is uncertain as to what is the national law of Wulaba. Further Yanyu and Wulaba are signatories to CISG 2006 and 2007 respectively. The national law of Wulaba is an alter ego of the SGA 1979, but the Claimant strongly contends that the parties intended by their conduct that the CISG should govern the contract on the following grounds:

A. Contract is Covered under the Scope of CISG

24. The CISG becomes the federal treaty of the Contracting States. The CISG automatically applies to contracts for the sale of goods between parties whose places of business are in different signatory countries unless the parties expressly opt-out of the convention. *[CISG Art 1(a) and 6] (BP Oil Int'l Ltd).*

B. Implied Conduct of Seller and Buyer

25. The very fact that the Respondent agreed to DDP Incoterms 2010 shows that there was an implied consent that the provisions of CISG Art. 8 and 9 would apply and that the default delivery provisions in Arts. 30 through 34, Article 60, and Articles 66 through 69 would not apply with respect to sellers and buyers duty. Adoption of an Incoterms definition as part of the parties' agreement is one way the parties could

derogate from or add to the CISG's default provision. Trade terms are not covered by the SGA and are defined in terms of mercantile customs and usages *(Coetzee).*

26. Commodity Traders tend to exclude the CISG, Incoterms and other International Conventions by specifically excluding these in many of the standard form of contracts in favour of retaining the certainty of English International Sales Law. Referring to Incoterms in a contract does not mean that the CISG is to be excluded anymore than a reference to Incoterms would exclude the national laws of a country *(Winsor).*

27. In *BP Oil Int'l Ltd* the choice-of-law clause in the parties' contract, which provided as follows: "Jurisdiction: Laws of the Republic of Ecuador." Because the CISG is part of the law of Ecuador, the Fifth Circuit held the choice of law clause had the effect of choosing the CISG, and that the CISG therefore govern the dispute. In so holding, the Court reasoned that an "affirmative opt-out requirement promotes uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG." If such terms are used or the contract provides specifically for delivery the provisions of CISG will be modified or excluded. *(Burnett/ Batt 19).*

III. CISG PROVISIONS HAVE BEEN INVOKED ON ACCOUNT OF THE FOLLOWING:

i) Lack of Insurance Coverage in First Transaction

28. Art. 31 of CISG provide for the duty of the Seller i.e. The Claimant with respect to delivery of goods. If the contract of Sale involves carriage of goods and seller is not bound to hand them over at a particular place the risk passes to buyer passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer

in accordance with the contract of sale. *(St. Paul Guardian Insurance Co.) (Pizza Cartons)*

29. Art.32 (3) leaves a possibility that the seller is not bound to effect insurance and that it is the buyers duty to request about such information. Further with and exception to CIF and CIP terms, DDP Incoterms places no obligation on the seller or buyer to provide for insurance *(A.3 of DDP Incoterms 2010).*

ii) Timing of Delivery of Prototype

30. The Respondent contends that the Claimant delayed in delivering the Prototypes according to the Agreements 1 (Art. 5). The Claimant did fulfil his obligation of providing the prototypes within 14 days from the date of deposit i.e. 31st July 2015. The delivery took place on 14th August 2015 *(Cl.Ex.3).* The Claimant thus fulfilled his obligations under Art. 33 of CISG and done so reasonably.

31. "Within" when used relative to time it has been defined variously as meaning anytime before, at or before, at the end of, before the expiration, not beyond, not exceeding not later than *(Mitra's 901).*

32. Moreover if the Respondent considered this delay to be a fundamental breach of contract he should have avoided the same under Art. 26 of CISG which he didn't do so, on the contrary the Respondent further modified the contract and requested to commence with the mass production *(Cl.Ex.4).*

iii) Non- Conformity of Goods

33. The Claimant has also fulfilled his obligation under Art. 35 with respect to the quantity, quality and description as required by the Agreements.

34. Conformity to a model provided by the buyer has to be judged in a reasonable manner *(Belgium A.R./05/2945).* It does not require that the goods be perfect or flawless, unless perfection is required for the goods to fulfil their ordinary purposes *(Belgium A.R./06/1347).*

35. That further the buyer was well aware that the mass production of watchstraps would be machine made and not handmade as the Claimant highlighted the fact that they would invest in the tooling after receiving customer's (Respondent's) approval. This also was the customary practice of the Claimant's business for the last 30 years. Moreover if the Claimant had to produce handmade goods, the cost of watchstrap would be double. Thus the Respondent knew or could not be unaware of such lack of conformity and hence he has no right to lack of conformity under Art 35 (2) (b).

36. That further in *Delphic Wholesalers* it was held that lack of conformity excluded in the absence of adequate proof thereof, which is so in this case as the Respondent provided only 1 Cherry Watchcase to match with.

iv) Payment of Money under Transactions

37. Loss or damage to goods doesn't discharge the buyer from his obligation to pay the price, unless the loss or damage is due to the omission of the seller (Art 65 of CISG).

38. With regards to payment of money under Agreement No. 1, the Respondent has discharged the previous contract and a new Agreement 2 was concluded hence should be estopped from seeking relief with respect to any payment made under the Agreement No.1 as the Tribunal has jurisdiction to hear only the present claims out of Agreement No.2.

39. That further the question of damages would arise only in case of fundamental breach/ terminations or avoidance (by way of notice under Art 26 of CISG) of the contract which is not so in this case.

40. That further Tribunal has authority to hear only payment claim with respect to the Agreement No.2 and hence the Respondents request for relief with respect to development of website costs well as loss of profit be turned down as it doesn't amount to 'payments'. Further the contract is still in force and the Respondent has suffered no loss. The seller's risk of being liable for the buyer's damages beyond the value of the goods is alleviated by Art. 79 *(Erauw).*

REQUEST FOR RELIEF

Claimant respectfully requests that the Arbitral Tribunal find that:

i) The Tribunal has jurisdiction as the Respondent is bound by a valid arbitration agreement.

ii) The Claimant be entitled to liquidated damages to the sum of USD 9.6 million

iii) Respondent to pay all costs of the arbitration, including Claimant's expenses for legal representation, the arbitration fee paid to CIETAC, and the additional expenses of the arbitration as set out in Art. 52, CIETAC Arbitration Rules

iv) Respondent to pay Claimant interest on the amount set forth in terms 1 and 2 above, from the date Claimant made those expenditures to the date of payment by GCT.