SIXTH INTERNATIONAL
ALTERNATIVE DISPUTE RESOLUTION
MOOTING COMPETITION
5-9 JULY 2016

CIETAC HONG KONG ARBITRATION CENTRE
UNDER THE CIETAC ARBITRATION RULES (2015)

In the Proceeding Between

ALBAS WATCHSTRAPS MFG. CO. LTD.

(Claimant)

v

GAMMA CELLTECH CO. LTD.

(Respondent)

MEMORANDUM FOR CLAIMANT

TEAM NO. 336 C

LIST OF ABBREVIATIONS

Abbreviation	Full form
Art	Article
Article 19	The dispute resolution clause of the Parties' Sale and Purchase Agreements (can be found at pages 7 and 12 of the record)
Article 20	The governing law clause of the Parties' Sale and Purchase Agreements (can be found at page 7 and 12 of the record)
ch.	chapter
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules
Claimant	Albas Watchstraps Mfg. Co. Ltd
Incoterms DDP	International Chamber of Commerce, Incoterms 2010 DDP
p.	page
pp.	pages
Parties	Albas Watchstraps Mfg. Co. Ltd and Gamma Celltech Co. Ltd.
record	ADR Moot problem 2016
Respondent	Gamma Celltech Co. Ltd
SPA 1	The parties' first Sale and Purchase Agreement (can be found at page 6 of the record)

SPA 2	The parties' second Sale and Purchase Agreement (can be found at page 11 of the record)
The Tribunal	Ms Felicity Chan, Dr. Anne Descartes and Mr. Martin Mayfair (chief)

LIST OF AUTHORITIES

CASES

Abbreviation	**Full citation**
Anzen v Hermes	*Anzen Limited and others v Hermes One Limited (British Virgin Islands)* [2016] UKPC 1
BP Petroleum v Empresa	*B.P. Petroleum International Ltd. V Empresa Estatal Petroleos de Ecuador* (11 June 2003), Circuit Court of Appeals, 5th Circuit (USA), CISG-Online 730 (Pace)
Castel v Toshiba	*Castel Electronics v Toshiba Singapore* [2011] FCAFC 55
CISG-online 187	CISG-online 187, Clout No. 166, Sciedsgericht der Handelskammer Hamburg (21 March 1996)
Delphic v Agrilex	*Delphic Wholesalers (Aust) Pty Ltd v Agrilex Co Limited* [2010] VSC 328
ICC Arb Ct 11333/2002	*ICC Arbitration Case No. 11333 of 2002 (Machine case)*, Yearbook Comm. Arb'n

	XXXI, Albert Jan van den Berg, ed. (Kluwer 2007) 117-126
ICC Ct Arb 7565/1994	International Chamber of Commerce, *Publication No. 7565/1994*, 6 ICC Int'l Ct. of Arb., Bulletin 64, 64-66 (Nov. 1995)
Intra Asia Airlines v Norse Air	*P T Tri-MG Intra Asia Airlines v Norse Air Charter Limited* [2009] SGHC 13
LG Oldenburg	*Clothes case* (27 March 1996), LG Oldenburg, <http://www.unilex.info/case.cfm?id=255>, accessed 5 June 2016.
OLG Hamburg	*Iron molybdenum case* (28 February 1997), Oberlandesgericht Hamburg, UNCITRAL texts (CLOUT), abstract no. 277
OLG München	*Plastic granulate case* (8 February 1995). OLG München, UNCITRAL texts (CLOUT), abstract no. 167
Paul Smith v H & S International	*Paul Smith Limited v H & S International Holding Incorporated* [1991] 2 LL Rep 127
PCCW v Interactive Communications	*PCCW Global Limited (formerly known as Beyond the Network Limited) v Interactive Communications Service Limited (formerly known as Vectone Limited)* CACV 18/2006
Prima Paint v Flood & Conklin	*Prima Paint Corporation v Flood & Conklin Mfg Co* 388 US 395 (1967)
St Paul Guardian Ins	*St. Paul Guardian Insurance Company et al. v. Neuromed Medical Systems & Support et al* (26 March 2002) United States Federal

	District Court, <http://www.unilex.info/case.cfm?id=730>

LEGISLATION

Abbreviation	**Full citation**
CIETAC Rules	*China International Economic and Trade Arbitration Commission Arbitration Rules 2015*
CISG	The United Nations Convention on Contracts for the International Sale of Goods
PRC Arbitration Law	*Arbitration Law 1994* (PRC)

BOOKS

Abbreviation	**Full citation**
Banks	Glen Banks, *New York Contract Law* (Thomson/West 2006)
Born (1996)	Gary Born, *International Civil Litigation in United States Courts* (3rd edn, Kluwer, 1996)
Born (2010)	Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd edn, Kluwer, 2010)
Born (2012)	Gary Born, *International Arbitration: Law and Practice* (Kluwer, 2012)
Briggs	Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford Private

	International Law Series, Oxford University Press, 2008)
Brunet	Edward Brunet and others, *Arbitration Law in America: A Critical Assessment* (Cambridge University Press, 2006)
Eisemann	Frédéric Eisemann,"La clause d'arbitrage pathologique" in Eugenio Minoli, *Commercial Arbitration Essays in Memoriam Eugenio Minoli* (UTET, 1974
Kroll	Stefan Kröll, Loukas Mistrelis, Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (1st edn, Verlag CH Beck oHG, 2011).
Kroll and others	Stefan Kroll and others (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer, 2011)
Leflar/McDougal	Robert Leflar, Luther McDougal III and Robert Felix, *Cases and Materials on American Conflicts Law* (Contemporary Legal Education Series, The Michie Company, 1982)
Morrissey/Graves	Joseph Morrissey and Jack Graves, *International Sales Law and Arbitration: Problems, Cases, and Commentary* (Kluwer, 2008)
Moser/Cheng	Michael Moser and Teresa Cheng, *Hong Kong Arbitration: A User's Guide* (Kluwer, 2004)
Schlechtriem/Schwenzer	Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the*

	International Sale of Goods, (3rd edn, Oxford University Press, 2010).
Schwenzer/Hachem	Ingeborg Schwenzer, Pascal Hachem, Christopher Kee (eds), *Global Sales and Contract Law* (Oxford University Press, 2012)

ARTICLES

Abbreviation	**Full citation**
CISG Advisory Opinion	CISG Advisory Council, *CISG-AC Opinion No. 16, Exclusion of the CISG under Article 6,* Rapporteur: Doctor Lisa Spagnolo, Monash University, Australia (19th meeting, South Africa, 30 May 2014).
Johnson	William P. Johnson, 'Understanding CISG Exclusion' (2011) 59 *Buffalo Law Review* 213
Schroeter	Ulrich Schroeter, 'Freedom of contract: Comparison between provisions of the CISG (Article 6) and counterpart provisions of the Principles of European Contract Law' (2002) Pace Database <http://www.cisg.law.pace.edu/cisg/biblio/schroeter2.html> accessed 5 July 2016

OTHER

Short form	**Full citation**
Leathercouncil	Leather Council, 'Leather Standards And Test Methods' (*Leathercouncil.org*, 2016) <http://www.leathercouncil.org/standards.htm> accessed 9 June 2016
Oxforddictionaries	Oxford Dictionaries, 'Definition of Prototype' (*oxforddictionaries.com*, 2016)

	<http://www.oxforddictionaries.com/definition/english/prototype> accessed 9 June 2016

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A. THE CIETAC HAS COMPETENCE TO DETERMINE ITS JURISDICTION REGARDING PAYMENT CLAIMS.

1. CIETAC has the authority to decide on its jurisdiction over an arbitration case *[Art 20 PRC Arbitration Law; Art 6 CIETAC Rules]*. CIETAC has delegated this authority to the Tribunal [*Art 6 CIETAC Rules*; *record, p. 19*].

B. THE ARBITRATION AGREEMENT IS SEPARABLE AND GOVERNED BY THE LAWS OF THE STATE OF NEW YORK.

2. Arbitration clauses constitute separate agreements and should be considered separately from the underlying contract *[Art 19 PRC Arbitration Law; Art 5 CIETAC Rules; Prima Paint v Flood & Conklin; Paul Smith v H & S International]*.
3. Article 19(c) of SPA 1 and 2 represents an unequivocal agreement by the parties for New York law to govern Article 19. As the arbitration agreement is separable, the choice of New York law to govern the arbitration agreement is not inconsistent with the choice of Wulaban law to govern the underlying contracts *[Art 20 SPA 1]*.

C. ARTICLE 19(A) IS A VALID ARBITRATION AGREEMENT.

4. The validity of Article 19 must be assessed in accordance with the laws of the State of New York. Under New York law, a court's primary role is to give effect to the parties' objective intentions as evidenced by the written contract. That intent is to be discerned from the plain meaning of the words *[Banks, ch 9:3 - 9:4]*.

5. From the plain meaning of 19(a), the parties manifested an objective intention for the tribunal to have jurisdiction over payment disputes.
6. The use of "may" does not indicate a lack of consensus to arbitrate. Either party has the power to stay court proceedings upon insisting on arbitration. 19(a) represents a non-exclusive arbitration clause. The approach of *Anzen v Hermes* demonstrates a similar construction. A non-exclusive arbitration clause was construed to give either party the option of submitting the dispute to arbitration and forcing a stay in proceedings by "making an unequivocal request to that effect".
7. Article 19(b) operates to grant jurisdiction to the courts of Hong Kong where no such election by either party has been made.

D. THE CURRENT DISPUTE FALLS WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT.

8. The Tribunal's jurisdiction extends to disputes "concerning payment". The four issues identified by the Tribunal to be addressed ultimately relate to payment under the transactions, the withholding of payments, and which party is to bear losses suffered as a result of breaches of contract. Each party seeks a purely monetary payment as a remedy. The dispute can therefore rightly be characterized as one concerning payment.

II. THE CISG GOVERNS CLAIMS ARISING UNDER BOTH SALE AND PURCHASE AGREEMENTS

A. THE CISG HAS BEEN EXPRESSLY INCLUDED SPA 1 AND 2.

9. Yanyu and Wulaba are both Contracting States to the CISG *[Art 1(1)(a) CISG]*, thus the CISG applies to SPA 1 and 2 subject to a contrary agreement by the parties *[Schroeter; CISG Advisory Opinion; Schlechtriem/Schwenzer p.103]*.
10. The CISG is not foreign law to a Contracting State *[CISG Advisory Opinion 4.10]*. As such, the CISG is expressly included in the phrase "national law of Wulaba." Had the parties intended to exclude the application of the CISG, the choice of law clause would refer to Wulaban sales or contract law, rather than national law *[Kroll, p.107]*. In *ICC Ct Arb 7565/1994* the Tribunal applied the CISG because it was part of the "laws of Switzerland", and the parties had not elected "Swiss law."
11. A wider reading of the contract confirms that the CISG governs the contract. The parties have designated that any dispute resolution regarding the merits of the case shall take place in Hong Kong, either by arbitration in the State courts. Hong Kong, as a special administrative region of the PRC, is a Contracting State to the CISG *[Schwenzer/Hachem]*. The choice implicitly favours the CISG to govern the contract *[Art 1(b) CISG]*.
12. The choice of Germany as the seat of arbitration amounted to a choice of law in favour of German law, accounting for *Art 1(1)(b) CISG*. *[CISG-online 187]*. As the international

sales law of Hong Kong is the CISG, the parties designate the CISG to apply to the contract *[Schwenzer/Hachem, p. 113]*.

B. IF THE INCLUSION OF THE CISG IS IMPLIED AS THERE HAS BEEN NO EXPRESS EXCLUSION OF THE CISG.

13. Where the law of a Contracting State to the CISG is chosen to govern a contract, it is implied that the CISG applies *[Kroll, p. 106; CISG Advisory Opinion 4.4]*.
14. In *ICC Arb Ct 11333/2002*, the Tribunal held that because the forum state was a contracting state to the CISG, unless the parties had agreed to exclude the CISG, the reference to "French Law" included the CISG.
15. No less than an affirmative declaration opting-out of the CISG can exclude its application *[Art 6 CISG; Johnson pp. 215, 223]*. Such a requirement is necessary for "uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG" *[BP Petroleum v Empresa]*.
16. A strict approach ensures that the objectives of international fair trade and dealing are upheld *[St Paul Guardian Ins]* and that efficiency and certainty in the application of the CISG is promoted *[CISG Advisory Opinion 6]*.
17. The drafters of the CISG overwhelmingly supported this requirement. The *travaux preparatoires* detail that changes proposing that a choice of law clause automatically excludes the CISG were overwhelmingly rejected by a vote of 37 to 3 *[Johnson note 28]*.
18. Finally, the *contra proferentem* rule applies against the Respondent. The Respondent drafted and inserted Article 20 without conveying the purpose of the clause to the

Claimant *[Clarifications, 30]*. The ambiguity in "the national law of Wulaba" must be interpreted against the Respondent.

III. THE CLAIMANT WAS UNDER NO OBLIGATION TO PURCHASE INSURANCE

A. THE CISG DEFERS TO THE CONTRACT ON THE PURCHASE OF INSURANCE

19. The CISG respects the expressly indicated position of the contract.
20. The express inclusion of insurance in SPA 2 demonstrates that SPA 1 did not require the Claimant to purchase insurance *[record, pp. 6-7]*.
21. Where there is an express contractual undertaking, the seller is under a direct obligation to purchase insurance, even if the risk of loss shifts to the buyer in other clauses *[Pace 32]*. No express stipulation is apparent in SPA 1.

B. THE ELECTED STANDARD GOVERNING THE CONTRACT DOES NOT REQUIRE THE CLAIMANT TO PURCHASE INSURANCE

22. The parties' elected for the Incoterms DDP standard to govern the contract *[Art 3 SPA 1]*. Incoterms DDP does not impose an obligation on either the seller or the buyer to purchase insurance *[Incoterms]*.
23. The Claimant made a verbal undertaking to bear all related costs, *[record, p. 3]* however this does not extend to insurance. The Respondent's reliance upon the relative quantum of miscellaneous costs: import duty (10%) and VAT (5%), relative to insurance (0.5%) is of no consequence as to whether it may be deemed a related cost.

24. The only reasonable construction of "related costs" is a construction consistent with the apportionment of costs under Incoterm 2010 DDP. It is impossible to otherwise create a certain definition of "related costs" without recourse to the chosen Incoterm.
25. The Respondent did not request any information necessary to procure insurance. There is no a positive obligation to provide such information in the current situation *[Pace 32]*. As such,, the Claimant was under no obligation to unilaterally provide any information related to insurance.

IV. THERE IS NO BREACH OF A FUNDAMENTAL TERM UNDER ARTICLE 25 OF THE CISG

A. THERE HAS BEEN NO BREACH AS THE PROTOTYPE WAS DELIVERED ON TIME

26. The Claimant undertook to provide a "prototype within 14 days from receipt of deposit" *[Art 5 SPA 1]*. The Claimant received its deposit on 31 July 2014 *[record, p. 3]*. The prototype was dispatched exactly fourteen days afterwards on 14 August 2014. The time of dispatch should be taken as the time in which the prototype was "provided".
27. Moreover, it is unclear precisely when the watchstrap was received. It was received sometime before 3:55 pm on 15 August 2015 *[record, p. 9]*. There is no indication that the prototype was not received within the contractually stipulated timeframe and neither party referenced the timeframe not being met.

B. THE RESPONDENT HAS NOT BEEN SUBSTANTIALLY DEPRIVED OF WHAT HE IS ENTITLED TO EXPECT UNDER THE CONTRACT.

28. A term is deemed fundamental if it results in a detriment which would substantially deprive the other party of what he is entitled to expect under the contract *[Art 25 CISG]*.

29. The Respondent did not indicate that "delivery within a specific time is of special interest" *[OLG Hamburg]*. Language of mild urgency should not be construed as giving rise to a fundamental term *[record, pp. 5,7]*.

30. A minor breach as to time, in the context of a large international transaction will not lead to a fundamental breach giving rise to a right to terminate *[OLG München]*. A one day delay is insufficient to constitute a fundamental breach even in a time-sensitive transaction *[LG Oldenburg]*. There is a general understanding that a seller's breach of the first delivery term, consistent with a desire to ensure the fulfilment of a contract and avoid the costs of contractual avoidance, does not give rise to a fundamental breach.

31. A fifteen hour delay in receiving a prototype provided *ex gratia* has not substantially deprived the Respondent of his expected entitlements under the contract. At most, the minor delay only minimally reduced any potential consideration time. There is no indication that this materially affected the Respondent.

C. ANY SUBSTANTIAL DEPRIVATION WAS NOT FORESEEABLE.

32. A breach will not be fundamental if "the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result" *[Art 25 CISG]*.

33. There is no indication that, objectively, a reasonable purchaser would have construed a 15 hour delay as giving rise to a fundamental breach.

34. Firstly, the watchstrap is a prototype, not a merchantable. There is a lack of essentiality in any time stipulation in relation to the prototype.

35. Secondly, there is no indication that the Respondent indicated specifically that third parties had been promised a certain time for delivery *[Schlechtriem, p.182]*. Any 'sub-buyers' were only informed that a delivery was expectant. There is no indication that a breach has flowed onto any contracts reliant upon the fulfilment of SPA 1.

36. Thirdly, the watchstraps are a timeless article. There is no indication that there was a high degree of seasonality to support the essentiality of the time stipulation.

D. THE RESPONDENT HAS WAIVED ANY RIGHT TO CLAIM A BREACH

37. The Respondent has waived his right to claim remedies flowing from a breach. The Respondent acquiesced to the breach and continued to receive the benefit of the contract. On 15 August 2014 the Respondent accepted the watchstraps and did not raise the delay, this constitutes acquiescence to any alleged breach *[record, p. 9]*.

V. THE GOODS CONFORM TO THE CONTRACT

A. THE GOODS DO NOT FIT THE WATCHCASES DOES NOT INVOKE THE CISG.

38. "Where the circumstances show the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement" then goods cannot be deemed unfit for purpose *[Art 35(2)(b) CISG]*.

39. It was unreasonable for the Respondent to rely on the Claimant's skill and judgement as receipt of the watchcase was never confirmed and confirmation that the prototype had been tested in the watchcase was never communicated.

40. The Respondent made no effort to verify either the receipt of the watchcase or the fit of the prototype in the watchcase. As such, the only reasonable assumption for the Respondent to make was that the prototype may fit the watchcase.

41. Secondly, the CISG refers to a "specialist or expert" manufacturer *[Art 35(2)(b) CISG]*. The Claimant is no such specialist and has not worked with phone-watchcases before.

B. ARTICLE 39(1) OF THE CISG IS INVOKED AS THE BUYER DID NOT GIVE NOTICE OF THE LACK OF CONFORMITY TO THE SELLER

42. Following their approval, models are included as "goods" *[Art 39(1) CISG]*. "If model samples have been agreed, they represent all the goods, and must accordingly be examined and any lack of conformity notified to the seller" *[Schlechtriem/Schwenzer, p. 450]*.

43. The Respondent "ought to have known" of the non-conformity *[Art 39 CISG]*. When a sample, model or prototype, is sent to a buyer specifically for the purpose of assessment "the buyer must examine the goods in an appropriate manner, which takes account of their nature, quantity, packaging, and all other circumstances" *[Schlechtriem/Schwenzer, p. 451]*.
44. At the assessment stage, it is the seller who relies on the buyer's judgment to be accurate. The buyer must disclose recognisable defects to the seller, taking all circumstances into account *[Schlechtriem/Schwenzer, p. 451]*. The Respondent placed particular importance on the fit of the strap to the Cherry Watchcase and it was therefore the Respondent's responsibility to notify the Seller that the strap was the incorrect size.
45. The Respondent failed his duty to appropriately assess the provided prototype. He ought to have checked the prototype against a Cherry watchcase.
46. This lack of conformity does not relate to facts "of which [the Claimant] knew or could not have been unaware and which [the Claimant] did not disclose to the buyer" *[Art 40 CISG]*.
47. "Could not have been unaware" indicates actual knowledge rather than gross negligence. A lack of conformity must be obvious *[Schlechtriem/Schwenzer, p. 478]*. Instead, in this case a "slightly negligent mix-up" has occurred *[Schlechtriem/Schwenzer, p. 478]*.
48. The responsibility of notification of the defect lay with the Respondent.

C. THE CLAIM THAT THE GOODS ARE "NOT AS SOFT AS THE PROTOTYPE, NOR DO THEY LOOK HOMEMADE" DOES NOT INVOKE THE CISG.

49. On their plain meaning, a prototype is different to a sample or model and therefore does not invoke *CISG Art 35*. A sample is an actual specimen of the bulk item. A model does not always display all aspects of the final version. Whereas a prototype is made as the first, not final version of a product *[Oxforddictionaries]*.

50. The prototype is a representation of similar, but not identical, bulk items yet to be manufactured. A variance of the softness of high quality leather is widely recognised in the leather market *[Leathercouncil]*. Furthermore, the Respondent knew tooling was to be used in mass production. There was no reason to rely on either the softness or hand-stitching of the prototype. As such, the prototype cannot be subject to the strict level of conformity required of a sample or model *[Art 35(2)(c) CISG]*.

51. Secondly, the degree of softness of the leather is not stipulated in either SPA, only that the material be "Top material: soft genuine Yanyu Leather" *[Art 2(a) SPA 2]*.

52. The Respondent claims the goods do not feel as soft as the prototype *[record, p. 18]*, however this does not mean that the goods are not soft, nor of a different quality "soft genuine Yanyu leather".

53. Thirdly there is no mention of the products being hand-stitched. The Respondent's assumption that the goods would be hand-stitched was unreasonable as SPA 1 details that the watchstraps will be manufactured *[Art 2 SPA 2]*. By definition, manufacture means to make on a large scale with machinery.

54. Furthermore, SPA 2 cannot be interpreted to provide for the hand-stitching of the goods. The Respondent was aware that the Claimant would be investing in tooling for mass production, following the approval of the prototypes. The method of production was therefore necessarily going to differ between the prototype and the goods.

55. There is no logical interpretation of "tooling" that does not involved machinery. Furthermore, the price of the goods under the contract highlights the impossibility of hand-made products. The Claimant submits that had machinery not been used, the Claimant's obligations under SPA 2 would not have been fulfilled.

VI. PAYMENT OF MONEY UNDER THE TRANSACTIONS

A. THE RESPONDENT IS NOT ENTITLED TO A REFUND OF ANY MONEY PAID UNDER SPA 1.

56. The Respondent accepted responsibility for the lost goods and therefore incurred an obligation to pay the monies under SPA 1. As consideration, the Claimant offered to enter into SPA 2 for the provision of a replacement shipment of the goods *[record, p. 4]*. In this verbal agreement, the Respondent agreed to take full responsibility thereby expressly or impliedly waiving any right to money or compensation under SPA 1 *[Art 29 CISG]*.

57. The verbal agreement created a separate contract that survived notwithstanding the execution of SPA 2. The terms of the verbal agreement are enforceable and did not need

to appear in SPA 2. The verbal agreement was fulfilled as the goods were provided under the second transaction on time and in conformance with the prototype.

58. In any case, agreeing to payment and the associated waiver under SPA 1 was not conditional on the second delivery being made on time or in conformance with the prototype.

B. THE RESPONDENT IS OBLIGED TO MAKE THE BALANCE OF PAYMENT UNDER SPA 2.

59. The Respondent has the obligation to make the balance of payment within 14 days from receipt of the goods *[Art 4 SPA 2; Art 53 CISG]*. The goods were received on 29 January 2015 and payment was due by 12 February 2015 *[record, p. 15]*.

60. The goods were identical in size and softness and thus conform sufficiently with the approved prototypes. Even if the goods were not of identical softness, the Respondent is not relieved from payment under the SPA 2 because a difference in softness does not render the goods unfit for purpose.

61. The fact that the goods were not handmade does not relieve the Respondent of the obligation to pay because it was never explicitly nor implicitly agreed that the goods were to be handmade. Given the low prices, it was unreasonable to expect that the goods would be handmade *[Art 8(2)-(3) CISG]*.