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 RESPONDENT

TEAM NO. 336 R

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
Ad hoc Florence Arbitration	*Leather/textile wear case* (19 April 1994), Italy, Florence Arbitration proceeding
BSC Footwear v Brumby Street	*BSC Footwear Supplies v. Brumby St* (16 November 2000), Spain. Appellate Court Alican
Codelfa v State Rail Authority	*Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337
Corte di Appello di Milano	*Knitwear case* (20 March 1998). Corte di Appello di Milano, UNCITRAL
Cour d'appel Colmar (France) 1995	*Ceramique Culinaire v. Musgrave* (26 September 1995), France Appellate Court Colmar
Delphic v Agrilex	*Delphic Wholesalers (Aust) Pty Ltd v Agrilex Co Limited* [2010] VSC 328
Hawkins v Clayton	*Hawkins v Clayton* (1988) 164 CLR 539
ICC award no. 8786	International Chamber of Commerce, *Publication No. 8786/1997*, 6 ICC Int'l Ct of Arb, Bulletin Vol 11/No 2 70, 70-76 (Fal 2000)
Kantonsgericht des Kantons Zug 1995	*Cobalt case* (16 March 1995), Switzerland District Court Zug
Lipper Holdings	*Lipper Holdings LLC*, Re 766 N.Y.S.2d 561 (NY App Div 2003)
Natt v White Sands	*Natt v White Sands Condominium*, 943 NYS 2d 231 (NY App Div 2012)

OLG Hamburg	*Floor tiles case* (28 February 1995). OLG Hamburg, UNCITRAL texts (CLOUT), abstract no. 227
Paneccasio v Unisource	*Paneccasio v Unisource Worldwide Inc*, 532 F.3d 101 (2d Cir. 2008)
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
Seabury Construction v Jeffrey Chain	*Seabury Construction Corporation v. Jeffrey Chain Corporation* 289 F.3d 63 (2d Cir. 2002)

LEGISLATION

Abbreviation	**Full citation**
CISG	The United Nations Convention on Contracts for the International Sale of Goods
Incoterms	International Chamber of Commerce, Incoterms 2010 DDP

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

Abbreviation	**Full citation**
CISG Advisory Opinion 16	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).
Pace 32	Secretariat Commentary, 'Guide to CISG Article 32' *(Pace Law School Institute of International Commercial Law,* 2006) <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-32.html>
Poikela	Teija Poikela, 'Conformity of Goods in the 1980 United Nations Convention of Contracts for the International Sale of Goods' (*Pace Law School Institute of International Commercial Law*, 2003) <http://www.cisg.law.pace.edu/cisg/biblio/poikela.html#iv> accessed 18 May 2009.

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I. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION TO DEAL WITH THE CLAIMS RAISED BY THE CLAIMANT

A. THE CLAIMS BROUGHT BY THE CLAIMANT FALL OUTSIDE THE SCOPE OF THE JURISDICTION OF THE ARBITRAL TRIBUNAL.

1. Article 19 should be interpreted in accordance with New York Law in accordance with the parties' intention *[Art 19 SPA 1]*.
2. The clause must be construed as a whole and plain meaning given to the words used *[Banks, ch 9:3 - 9:4]*. The phrases "all disputes" and "any disputes", when contrasted with "concerning payments", show the intent of the parties to apply the arbitration agreement narrowly *[Art 19 SPA 1]*.
3. The Tribunal "must avoid any interpretation that would be absurd, commercially unreasonably or contrary to the reasonable expectations of the parties" *[Lipper Holdings]*.
4. Furthermore, following the canon of contract law *expresio unius est exclusio alterus,* the use of broad language in one sub-clause and not in another means that the parties intended the arbitration agreement to be construed narrowly *[Banks]*.
5. Disputes regarding the applicability of the CISG, insurance, delay and non-conformity of goods do not concern payment. Each regards the merits of the case "arising out of or in connection" with the entire agreement *[Art 19 SPA 1]*. These disputes can only be heard by the Hong Kong courts. .

B. IF THE CLAIMS BROUGHT BY THE CLAIMANT ARE DISPUTES CONCERNING PAYMENT THEN ARTICLE 19 MUST BE VOID FOR UNCERTAINTY.

6. If all jurisdictional and merit disputes are construed as "disputes concerning payment" then Article 19 must be declared void for uncertainty under New York law because there is no clear distinction between the meaning of the Article's clauses.
7. Firstly, the Claimant's interpretation of the arbitration agreement renders it pathological, failing the criteria of a valid arbitration agreement *[Eisemann]*.
8. Secondly, the clause is ambiguous as there is contradictory language which is reasonably susceptible of more than one interpretation and nothing to suggest which meaning is intended *[Natt v White Sands]*.
9. An agreement must be construed in accord with the intent of the parties and New York law requires a construction of the clause that gives meaning to every provision *[Paneccasio v Unisource]*.
10. If conflicting provisions cannot be reasonably reconciled, the clause must be invalidated *[Seabury Construction v Jeffrey Chain]*.

C. IN ANY CASE, THE COURTS OF THE STATE OF NEW YORK ARE THE APPROPRIATE FORUM FOR THIS DISPUTE.

11. While elements of Article 19 are unclear, a plain interpretation of 19(c) demonstrates that the parties intended to resolve any dispute regarding the interpretation of Article 19 in the state of New York.
12. The Tribunal must refer this dispute to the New York state courts. Any other interpretation will invalidate the arbitral award.

II. THE CISG DOES NOT GOVERN THE CLAIMS ARISING UNDER SPA 1 AND 2.

A. THE PARTIES HAVE EXPRESSLY EXCLUDED THE CISG.

13. In designating the "national law of Wulaba" to govern the contract and "excluding all other applicable laws" the parties have excluded the CISG, choosing domestic Wulaban law.

14. The choice of "an expressly specified domestic statute" demonstrates clear intent to exclude the CISG *[CISG Advisory Opinion 16]*. The CISG hasn't been incorporated into Wulaban law and the CISG is not a source of Wulaban law *[Clarifications, 1, 11, 12]* the parties therefore intend to exclude the application of the CISG.

15. Selecting the law of a Contracting State must amount to implicit exclusion otherwise the choice hasn't practical meaning *[Florence Arbitration; Cour d'appel; Kantonsgericht]*. The choice of English law has been held sufficient to exclude the CISG *[BSC Footwear v Brumby Street]*.

B. THE SUBJECTIVE INTENT OF THE PARTIES IS TO EXCLUDE THE CISG.

16. "The formation and interpretation of the exclusion of the CISG is subject to the rules of the Convention, as the CISG determines its sphere of application autonomously" *[Schwenzer, p 104]*. Thus *CISG Art 8* must be referred to in order to evaluate the intent of the parties.

17. The subjective intent of the Respondent was to ensure that Wulaban contract law would apply exclusively to SPA 1 *[Clarifications, p. 30]*. The Respondent's assurance regarding

Article 20's operation as a "standard term" is evidence that there was a mutual, subjective understanding of the effect of Article 20 *[Kroll, p 146]*.

C. A REASONABLE PERSON IN THE SAME CIRCUMSTANCES AS THE CLAIMANT WOULD HAVE UNDERSTOOD THE EXCLUSION OF THE CISG.

18. A reasonable person in the same contractual negotiations would interpret the intent of the parties as excluding the CISG *[Kroll, p 149; Art 8(2) CISG]*. The conduct of the parties prior and subsequent to adopting Article 20 into SPA 1 and 2 should be considered *[Art 8(3) CISG; Advisory Opinion 6]*.
19. The Respondent proposed exclusion of the CISG and the Claimant, although unaware of the effect of Article 20, failed to inquire further. This constitutes assent for Wulaban law to govern SPA 1 and 2 *[Schwenzer, p 163]*. The Claimant's awareness of the applicability of the CISG is irrelevant to determining exclusion *[Schwenzer, p 109]*.
20. An objective business person conducting a sales contract for leather watchstraps would have interpreted "a standard term", on the plain meaning of the words, to mean the application of Wulaban law exclusively *[Schwenzer, p 157]*. Exclusion does not have to result from "individual negotiations" *[Schwenzer, p 107]*.
21. Furthermore the parties have elected Hong Kong, a non-contracting state, to resolve disputes under this contract. Hong Kong has not assented to the CISG and the CISG is not incorporated into Hong Kong law. Hong Kong courts are not bound to apply the CISG and "the procedural laws of the forum remain determinative" in the current dispute *[CISG Advisory Opinion 16]*. The choice of Hong Kong indicates an intention to exclude the CISG from all contractual dealings *[CISG Advisory Opinion 16]*.

III. THE CLAIMANT WAS UNDER AN OBLIGATION TO PURCHASE INSURANCE.

A. THE CISG DEFERS TO THE PARTIES' INTENTION FOR THE CLAIMANT TO PURCHASE INSURANCE.

22. The CISG does not substantively assign liability on either the seller or the buyer. The CISG defers to and is respectful of the contract's assignment of liability. Where the contract has expressly indicated its position, this is respected by the CISG.
23. The express inclusion of Incoterms DDP at the exclusion of CISG provisions or other Incoterms represents a *lex specialis* between the parties *[Art 5 SPA 1]*.
24. The inclusion of such an express contractual indication is envisaged by the CISG. 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 *[Morrissey/Graves]*.

B. PURSUANT TO SPA 1 THE CLAIMANT BEARS THE RESPONSIBILITY FOR THE LACK OF INSURANCE.

25. Under Incoterms DDP the Claimant, as the seller, bears both the risk and cost, including importing and delivery duties, until it reaches the Respondent.
26. While Incoterms DDP does not impose an obligation on either the seller or the buyer to purchase insurance, the placement of risk with the Claimant means it is at its peril that insurance not be purchased. Whether or not an obligation to purchase insurance exists, the Claimant is responsible for the goods until the goods reach the Respondent.

27. There is no indication that the goods were provided on either a "Cost and Freight" or "Free On Board" basis which would nullify any obligation to purchase insurance. Incoterms DDP is an express exclusion of these less onerous obligations on the Claimant *[Incoterms]*.

C. IN ANY EVENT, INSURANCE IS A RELATED COST THAT THE CLAIMANT MUST BEAR.

28. The Claimant made an undertaking to bear all related costs *[record, p 3]*. As the Respondent indicated its lack of experience in the importation of light non-electronic goods, the Claimant increased the price by 50% to include provision for both the Incoterms DDP and other "related costs" *[record, p 3]*.

29. The express obligation for the Claimant to cover "related costs" in addition to Incoterms DDP means the scope of this obligation must have been greater than that provided by Incoterms DDP.

30. Furthermore, insurance represents a low value cost (0.5%) when compared to the related costs of import duty (10%) and VAT (5%). A natural construction of the term "related costs" would include any relatively minor related costs. It is a reasonable inference that insurance is a related cost.

D. ALTERNATIVELY, THE CLAIMANT WAS UNDER AN OBLIGATION TO PROVIDE THE RESPONDENT WITH THE NECESSARY PARTICULARS TO PROCURE INSURANCE.

31. If the Claimant was not under an obligation to purchase insurance, the Claimant was under an obligation to provide all information necessary to allow the Respondent to

procure insurance. There is an obligation that this information be provided in some trades by virtue of a usage which becomes part of the contract terms *[Pace 32]*.

32. The Claimant's decision to not provide the necessary particulars represents a breach of this obligation.

IV. THE LATE DELIVERY OF THE PROTOTYPE IS A BREACH OF A FUNDAMENTAL TERM.

A. THE CLAIMANT HAS BREACHED THE CONTRACT AS THE PROTOTYPE WAS DELIVERED LATE.

33. 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 not received until 15 August 2015 which is inconsistent with the contractually stipulated timeframe *[record, p 9]*.

34. "Provide" should be viewed in the context of the contract. The Claimant's obligation was to provide the Respondent with the opportunity to assess the prototype. "Provide" must therefore mean more than mere dispatch.

B. THE RESPONDENT HAS BEEN SUBSTANTIALLY DEPRIVED OF WHAT HE IS ENTITLED TO EXPECT UNDER THE CONTRACT.

35. 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 *[CISG Art 25]*.

The Respondent was entitled to expect timely delivery under the contract as time was expressed as essential.

36. In the Respondent's initial approach to the Claimant, the Respondent emphasised that time was of the essence. The Respondent indicated that "delivery within a specific time is of special interest" *[OLG Hamburg]*. This was indicated in the language of urgency, "if you could urgently send us prototypes of your finest watchstraps" *[record, p 7]*.
37. A number of further factors from the surrounding circumstances indicate the delivery was an essential term. The Claimant had actual knowledge that the Respondent's existing customers had been informed about the new line of watchstraps *[record, p 18]*. This Respondent developed a public website which included photos of the prototype.
38. Intimations to "sub-buyers", the Respondents' customers, as to a delivery date affirms that time was essential *[Schlechtriem, p 182]*. Furthermore, the watchstraps are highly season sensitive stylistic articles and the seasonality of watch goods in a rapidly changing smartphone market mean market taste would be a significant factor *[Corte di Appello di Milano; ICC award no. 8786]*.
39. Where time is essential, any breach, no matter how small, will be fundamental in nature and give rise to substantial deprivation under the *SPAs [CISG Art 25]*, thereby giving the Respondent the right to terminate the agreement and seek remedies therefrom.

C. THE DETRIMENT TO THE RESPONDENT WAS FORESEEABLE.

40. A party won't be in breach if he did not foresee and a reasonable person of the same kind in the same circumstances wouldn't have foreseen such a result *[CISG Art 25]*. When viewed in the circumstances of a request for the urgent dispatch of the materials, the most

reasonable construction is that the seller would have foreseen the grave consequences of any delay.

V. THE CLAIMANT HAS BREACHED HIS OBLIGATIONS AS THE GOODS DO NOT CONFORM TO THE CONTRACT.

A. THE GOODS "DO NOT FIT THE WATCHCASES" INVOKES ARTICLE 35 OF THE CISG.

41. Where a specific purpose is made known, *CISG Art 35(2)(b)* will operate. The Respondent made it clear in written correspondence and it was accepted between the parties that the specific purpose of the leather watchstraps was to fit, and be a complementary item to, the Cherry Brand watchcase *[Schlechtriem/Schwenzer p. 416; Art 2(g) SPA 1; record, p. 5]*.
42. The ability to use the strap with the case was a condition precedent for the entire agreement: "to check if you will be able to manufacture watchstraps fitting to this case *and if so*, to calculate price*" (emphasis added) [record, p. 17]*. The Respondent also provided the Claimant with a Cherry watchcase, an item that is not yet released for sale and difficult to procure *[record, p. 5]*.
43. The Claimant had explicit knowledge of the specific purpose of the watchstraps, As the watchstraps do not fit, the specific purpose is not fulfilled and the Claimant has breached the contract. [*Schlechtriem/Schwenzer, p. 416; Delphic v Agrilex*]

B. THE RESPONDENT HAS NOT UNREASONABLY RELIED ON THE CLAIMANT'S SKILL AND JUDGEMENT.

44. The watchcase was sent for the sole purpose of tailoring the straps to the case. The Respondent's efforts to provide the case demonstrates the importance placed on the fit. The case was difficult to obtain and the Respondent communicated this to the Claimant *[record, p. 5]*.

45. As the importance was communicated, the Respondent's reliance on the Claimant's judgment to test the prototype with the case was reasonable. The Respondent was also reasonable in relying on the Claimant's skill as a reputable watchstrap manufacturer to create a strap that would fit a tailor-made case. It is not atypical for watches to be sold in cases, the Claimant could not have been unfamiliar with such an important partner-product.

C. ARTICLE 35(2) IS INVOKED AS THE GOODS ARE NOT FIT FOR COMMERCIAL PURPOSES

46. The Claimant has breached the contract as the goods are not fit for commercial purposes. If goods are unable to be sold they will not be fit for commercial purposes *[Schlechtriem/Schwenzer, p. 416]***.**

47. The only possible use for the custom ordered goods was as Cherry brand watchcases, and they cannot be sold for this purpose. It is not clear that there are any other watchcases on the market, let alone that the straps would fit other cases. As such, the straps are not fit for any commercial purpose.

D. CISG ARTICLE 19(2) HAS BEEN INVOKED.

48. In explicitly stating the features of the prototype that were particularly approved of, the Respondent made amendments to SPA 2 *[Art 19(2) CISG]*. The amendments made were that the goods would be of a higher degree of softness and would be hand-stitched *[record, p 9.]*. The Claimant demonstrated a sufficiently definite intention to be bound by those requirements *[Art 14 CISG]*.

49. In specifying amendments to a prototype, it is presumed that the prototype has been approved in all aspects not amended *[Schlechtriem/Schwenzer, p. 414]*. The express mention of the aforementioned details demonstrates that the prototype was approved by the Respondent subject to the amendments requested *[Poikela]*.

50. The Claimant was aware of the amendments made and did not object to the requests as discrepancies. Thus the Respondent's comments were additional amendments to the contract. Following acceptance of the Respondent's amendments the Claimant was bound to act in accordance with this agreement, as it was the final agreement struck with regard to the detail of the goods *[Art 19(2) CISG]*.

51. At the conclusion of this contract, the Claimant knew what the Respondent expected and he derogated from the amended terms. Any discrepancy in quality represents a lack of conformity *[Schlechtriem/Schwenzer p. 414; Poikela]*.

VI. PAYMENT OF MONIES UNDER THE TRANSACTION

A. THE RESPONDENT IS ENTITLED TO A REFUND OF ALL MONEY PAID UNDER SPA 1.

52. SPA 1 was entered into under Incoterms DDP, assigning all risk and responsibility until delivery of the goods to the Claimant. The failure of the goods to reach the specified delivery point amounts to non-performance of the contract by the Claimant. The Respondent had no obligation to make payment.
53. By misrepresenting that responsibility for the lost goods should fall on the Respondent, the Claimant acted dishonestly and in bad faith. The Respondent's acceptance of responsibility is invalid as it was premised on deception.
54. The Claimant deceived the Respondent into believing that the purchase of insurance was the buyer's responsibility, exploiting the Respondent's lack of business experience. The Respondent should therefore not be bound by its acceptance of responsibility for the lost goods, and its right to recover payments made under the first transaction should be upheld.
55. In any event, the Respondent's acceptance of responsibility was conditional on satisfactory completion of the second delivery. The Respondent would not have entered into SPA 2 but for this reason, given the urgency faced by the Respondent in obtaining the goods.

56. A verbal agreement was made prior to SPA 2 between the Claimant and the Respondent. The Respondent would accept responsibility of the lost goods on the condition that the Claimant satisfactorily delivered the goods.
57. The Claimant's knowledge of the urgency faced by the Respondent demonstrates the intention of the parties was for the Claimant to be obliged to complete the second delivery satisfactory. *[Codelfa v State Rail Authority [5]-[8]; Hawkins v Clayton]*.
58. The failure of the second shipment to be made satisfactorily, fundamentally breached the verbal agreement, relieving the Respondent from the obligation to pay for the lost goods.

B. THE RESPONDENT IS NOT OBLIGED TO MAKE PAYMENT UNDER SPA2.

59. It is a condition of SPA 2 that the delivered goods would be reasonably similar to the prototypes; this was the purpose of the prototypes. The goods delivered were not sufficiently similar to the prototypes; they were not handmade, not as soft, and did not fit the Cherry watchcase. This rendered the delivered goods unfit for purpose, not conforming sufficiently to the prototype nor to the description in SPA 2 *[record, p. 6; Art 35(2) CISG]*.
60. The unsatisfactory delivery fundamentally breached SPA 2, allowing the Respondent to terminate the contract. This relieved the Respondent of any obligation to make payment, past or future, for the goods. Therefore, the Respondent is entitled to a refund of monies already paid, and relief from further obligation to pay for the goods under SPA 2.