SIXTH INTERNATIONAL

ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

5 JULY – 9 JULY 2016

HONG KONG

MEMORANDUM FOR CLAIMANT

Team No. 392 C

ON BEHALF OF	AGAINST
ALBAS WATCHSTRAPS MFG. CO. LTD.	GAMMA CELLTECH CO. LTD.
241 NATHAN DRIVE YANYU CITY YANYU	17 RODEO LANE MULABA WULABA
CLAIMANT	**RESPONDENT**

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Abbreviation	Full Title
CISG	United Nations Convention on Contracts for the International Sale of Goods (2010)
CIETAC Rules	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules (2015)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2010)
NY State Law	Laws of New York State

LIST OF ABBREVIATIONS

Abbreviation	Word/Phrase
¶(¶)	Paragraph(s)
AfA	Application for Arbitration
Art.	Article
Agreement-No.1	The Sale and Purchase Agreement concluded by Albas Watchstraps Mfg. Co. Ltd and Gamma Celltech Co. Ltd. on 23 July 2014
Agreement-No.2	The Sale and Purchase Agreement concluded by Albas Watchstraps Mfg. Co. Ltd and Gamma Celltech Co. Ltd. on 7 November 2014
Agreements	Agreement-No.1 and Agreement-No.2
CLAIMANT	Claimant in this arbitration, Albas Watchstraps Mfg. Co. Ltd., based in Yanyu.
Clarifications	Request for Clarifications
CL.Memo	Memorandum for CLAIMANT
CIETAC	China International Economic and Trade Arbitration Commission
Exh.C	Claimant's Exhibit Number
Exh.R	Respondent's Exhibit Number
K	thousand(s)
M	million
mm	millimeter
PARTIES	Albas Watchstraps Mfg. Co. Ltd. & Gamma Celltech Co. Ltd.

Abbreviation	Word/Phrase
p.	Page
PO1	Procedural Order Number 1
RESPONDENT	Respondent in this arbitration, Gamma Celltech Co. Ltd. , based in Wulaba
SoD	Statement of Defense
Tribunal	Ms. Felicity Chan, Dr. Anne Descartes and Mr. Martin Mayfair
$	United States Dollars

A. The Tribunal has jurisdiction to deal with the payment claims

1 The Tribunal has the competence to rule on a *prima facie* basis and to proceed with the arbitral proceedings *[Art.75 CIETAC Rules; PCCW-Case,¶60]*. CLAIMANT submits that the Tribunal has jurisdiction over the current dispute since **[I]** PARTIES have validly agreed to arbitrate disputes concerning payment claims, and that **[II]** the pre-arbitral procedural requirements does not defeat the Tribunal's jurisdiction.

I. PARTIES have validly agreed to arbitrate disputes concerning payment claims

2 Parties' consensus to arbitrate is the cornerstone in arbitration settings *[Born,p.83]*. PARTIES did have the intention to arbitrate in which **[a]** Art.19(a) of Agreements grant the Tribunal jurisdiction to dispute concerning payment claims; and that **[b]** Art.19(b) and **[c]** Art.19(c) of Agreements does not alter PARTIES' intention to arbitrate.

a. Art.19(a) of Agreements grant the Tribunal jurisdiction over dispute concerning payment claims

3 Art.19(a) of Agreements reads, "[d]isputes concerning payments shall be resolved amicably between the Parties. […] either party may submit the dispute to the China International Economic and Trade Arbitration Commission (CIETAC) […].", which demonstrated a *prima facie* arbitration agreement between PARTIES to submit their dispute to CIETAC *[Art.6 CIETAC Rules]*, and the intention of PARTIES must be presumed *[ICC_No.2321]*. On top

of the valid arbitration agreement, the current dispute falls within the scope of Art.19(a) of Agreements, where CLAIMANT had claimed for the balance payment under Agreement No.2.

b. The internal contradiction between Art. 19(b) of Agreements does not make the Dispute Resolution Clause void

4 RESPONDENT alleged that the Dispute Resolution Clause is void due to an internal contradiction between Art.19(a) and Art.19(b) of Agreements *[SoD¶3]*. However, the allegation is groundless.

5 Art.19(b) of Agreements provide that, "[a]ll disputes arising out of or in connection with this agreement allows for either party to submit their differences to the Hong Kong courts [...]." The language "allows for" was permissive rather than mandatory. Mandatory clauses typically contain terms such as "must", "shall" or "exclusive" while permissive clauses do not *[Celistics-Case]*. The effect of a permissive forum selection clause is to avoid jurisdictional objections to the specific forum instead of requiring parties to litigate in such forum *[Lederman,p.423]*. This interpretation corresponds to RESPONDENT's lawyer's intention of inserting Art.19(b) into Agreement-No.1, which is to keep its option open *[Clarifications¶13]*. Thus, the existence of Art.19(b) does not make the Dispute Resolution Clause void.

c. Art.19(c) of Agreement-No.2 does not alter PARTIES' intention to arbitrate

6 In *PCCW-Case*, clause 11.2 contains a nearly identical clause to Art.19(c) of Agreements which provides that "[t]he clause would be interpreted in accordance with the laws of the State of New York, and any disputes shall be submitted to the courts in the State of New York." In other section another clause provides that "[t]he Parties hereby submits to the exclusive jurisdiction to Hong Kong Courts." The court found that in order to reasonably interpret the clause as a whole, the word 'shall' contained in the second tier of the dispute resolution clause cannot be mandatory *[PCCW-Case,¶66]*. Considering RESPONDENT's lawyer's intention to keep its options open *[Clarifications¶13]*, we urge the Tribunal to adopt the same interpretation.

7 Even if the word "shall" is deemed mandatory, Art.19(c) of Agreements can be reconciled with Art.19(a) of Agreements. In *Paul-Smith-Case*, the parties' contract contains a clause that provides, "any disputes shall be adjudicated upon under the ICC Rules of Arbitration", while another clause stated "that Courts of England shall have exclusive jurisdiction". The judge reconciled the two clauses by stating that the reference to English courts only specified the court that had "supervisory jurisdiction over arbitrations" (e.g. having the right to remove an arbitrator for misconduct). Such liberal interpretation of the clauses should be adopted to resolve the internal inconsistency between Art.19(a) and Art.19(c) of Agreements, if any, in the same way *[Born,p.782; Japan-Korea-Case; Personal-Motorola-Case]*.

II. The pre-arbitral procedural requirements will not defeat the Tribunal's jurisdiction

8 RESPONDENT may resist jurisdiction by alleging the pre-arbitral procedure provided in Art.19 of Agreements were not fulfilled. However, **[a]** the pre-arbitral procedures are procedural requirements instead of condition precedent to arbitration; alternatively, **[b]** CLAIMANT complied with the requirements before arbitration.

a. The pre-arbitral procedures are the procedural requirements instead of conditions precedent to arbitration

9 Pre-arbitration rules are procedural rules which are only intended to encourage amicable negotiations *[Born,p.936; SGS-Case]* unless explicitly suggested by parties otherwise *[Licensor-Case; Him-Devito-Case]*. The pre-arbitration rule in Art.19(a) of Agreements did not explicitly reveal PARTIES' intention to set the waiting period as a precondition to arbitration.

b. Alternatively, CLAIMANT complied with the pre-arbitral requirements before pursuing to arbitration

10 Even if the pre-arbitral procedures are mandatory, the pre-arbitral requirements have been fulfilled since CLAIMANT has tried but failed to reach an amicable resolution before applying for arbitration on 18/11/2015 *[Exh.R2; Exh.C7]*.

B. CISG governs the claims arising under Agreements

11 CISG is the governing law under Agreements since **[I]** national law of Wulaba chosen by PARTIES includes CISG; and that **[II]** the language of the choice of law clause does not indicate PARTIES' intention to opt out CISG.

I. The national law of Wulaba includes CISG

12 Art.20 of Agreement-No.2 specified that the contract shall be governed by national law of Wulaba. By simply specifying the law of a particular CISG contracting state to govern the contract, CISG shall be included as the applicable law *[Schlechtriem/Schwenzer,Art.6¶14; Morrissey/Graves,p.72]* since CISG is law of such contracting state which governs international sale of goods contracts *[Drago&Zoccolillo]*.

II. The language of the choice of law clause does not indicate PARTIES' intention to opt out CISG

13 Art.6 CISG allows contracting parties to exclude the application of CISG in which parties had clearly stated such intention in the choice of law clause *[CISG-online-2039; CISG-Digest, Art.6; CISG-AC_Op_No.16]*. Also, a choice of law clause designating the law of any contracting state without further specifications does not sufficiently indicate an intention of the parties to exclude CISG *[Schlechtriem/Schwenzer,Art.6¶14]*.

14 The wording of Art.20 of Agreements: "[a]ll other applicable laws are excluded" does not clearly indicate PARTIES' intention to opt out CISG. It merely demonstrated that PARTIES

wanted to exclude the laws which only apply to certain clause in Agreements such as the NY State Law.

C. By invoking CISG, CLAIMANT is entitled to $9.6M balance payment under Agreement-No.2 and RESPONDENT cannot claim for $2.4M prepayment under Agreement-No.2 nor $15M payment under Agreement No. 1 on account of the following:

I. Lack of insurance coverage under Agreement-No.1

15 Because **[a]** lack of insurance coverage under Agreement-No.1 was not a breach; **[b]** alternatively, such breach was not fundamental, and thus RESPONDENT cannot invoke Art.49(1)(a) CISG to avoid Agreement-No.1 and claim 15M refund under Art.81(2) CISG.

a. The lack of insurance coverage was not a breach

16 In principle, only violation of obligations under the contract or CISG would constitute a breach in CISG *[Schlechtriem/Schwenzer,Art.25¶14]*. Moreover, Art.9(1) CISG provides that PARTIES are bound by practices established between them and usages they both agreed to.

17 In the present case, no provision under Agreement-No.1 nor established practices obligates PARTIES to effect insurance *[Exh.C2; AfA,¶6]*. Also the DDP shipment term agreed by PARTIES *[Exh.C2,Art.3; Schlechtriem/Schwenzer,Art.9¶¶17,26]*, does not obligate any party

to effect insurance *[Incoterms-2010,DDP,A3(b)]*. Therefore, CLAIMANT was not obliged to effect insurance under Agreement-No.1 or CISG, and no breach occurred consequently.

b. Alternatively, the lack of insurance coverage was not a fundamental breach

18 Art.25 CISG provides that a breach is fundamental if it substantially deprives the other party of what he is entitled to expect under the contract.

19 RESPONDENT has no expectation interest on the insurance because it was CLAIMANT who would be entitled to the indemnification of insurance if the first transaction was covered by insurance. Accordingly, lack of insurance coverage under Agreement-No.1 is not a fundamental breach.

II. Timing of delivery of the prototype under Agreement-No.1

20 RESPONDENT cannot avoid Agreement-No.1 under Art.49(1) CISG based on timing of delivery of prototype because **[a]** CLAIMANT timely delivered the prototype; **[b]** alternatively, a one-day delay does not constitute a fundamental breach.

a. CLAIMANT timely delivered the prototype

21 Agreement-No.1 obliges CLAIMANT to provide the prototype within 14 days from receipt of deposit *[Exh.C2,Art.5]*. Where the clause indicating time period appears to begin immediately ‘in three working days’, ‘in four weeks’, the day of contract conclusion is

typically not included *[Schwenzer/Hachem/Kee,p346¶¶29.53]*. Therefore, the calculation of the 14-day period shall start from 00:00 of 01/08/2014, the day after the receipt of deposit. Any delivery between 01/08/2014 and 14/08/2014 was timely.

22 Where the contract involves carriage of goods, seller's delivery obligation is deemed to be fulfilled when he handed goods over to the first independent carrier under Art.31(1) CISG *[Schlechtriem/Schwenzer,Art.31¶1; Mullis,p.111]*. CLAIMANT's obligation to "provide" the prototype under shipment clause *[Exh.C2,Art.5]* can be referred as an agreement involving carriage of prototype. CLAIMANT handed the prototype over to the post officer, an independent carrier, on 14/08/2014 *[Exh.C3]*. Therefore, the delivery of prototype is timely.

b. Alternatively, a one-day delay does not constitute a fundamental breach

23 Even if the delivery was delayed, a one-day delay does not amount to a fundamental breach *[CISG-online-17; CISG-online-188; Schlechtriem/Schwenzer,Art.25¶40]*. RESPONDENT is not entitled to avoid Agreement-No.1 on account of late delivery of prototypes.

III. Non-conformity of goods under Agreement No. 2

24 **[a]** CLAIMANT delivered conforming goods under Art.35 CISG; alternatively, the non-conformity did not constitute a fundamental breach. In any event, **[b]** RESPONDENT is not entitled to claim for full amount of price reduction pursuant to Art.50 CISG. In addition, **[c]** CLAIMANT's liability of non-conformity should be exempted under Art.80 CISG.

a. CLAIMANT delivered conforming goods under Art.35 CISG; alternatively, the non-conformity did not constitute a fundamental breach

25 **[i]** The goods conform with Agreement-No.2 under Art.35(1) CISG and **[ii]** the model under Art.35(2)(c) CISG, which also constitutes the exception of particular purpose under Art. 35(2)(b) CISG. In any event, **[iii]** CLAIMANT shall not be held liable for lack of conformity under Art.35(3) CISG. In addition, **[iv]** RESPONDENT loses its right to claim for non-conformity due to late notice under Art.39(1) CISG. Alternatively, **[v]** the non-conformity of goods is not a fundamental breach under Art.25 CISG.

i. The goods conform with Agreement-No.2 under Art.35(1) CISG

26 Art.35(1) CISG requires seller to deliver goods conforming with the contract. If a model is different from what was agreed in the contract, standard for conformity shall be referred to Art.8 CISG *[Schlechtriem/Schwenzer,Art.35¶26; CISG-online-2228; CLOUT_306]*. CLAIMANT submits that the prototypes delivered to RESPONDENT for approval had altered the standard for the substance of the contract *[CISG-online-654]*.

27 The goods CLAIMANT delivered conformed with the descriptions set forth in Art.2 of Agreement-No.2 and the size of prototypes approved by RESPONDENT *[Clarifications¶¶4,73(i)(c)]*. Lack of "handmade quality" argued by RESPONDENT, however, was not a requirement under Agreements. Also, RESPONDENT knew that the

goods would be made under mass production *[Exh.C3]*, where reasonable difference between handmade prototypes and the goods should be easily deduced. Therefore, RESPONDENT cannot argue the non-conformity of quality based on Art.35(1) CISG.

ii. The goods conform with the model under Art.35(2)(c) CISG which also constitutes the exception of particular purpose under Art. 35(2)(b) CISG

28 According to Art.35(2)(c) CISG, the goods shall be deemed conforming if they possess the same qualities as the model held out to the buyer. Accordingly, except for the reasonable difference *[CL.Memo¶27]*, the goods conform with the prototypes under Art.35(2)(c) CISG.

29 Relying on RESPONDENT's approval of prototypes *[SoD¶6]*, CLAIMANT started the production of watchstraps. Since the function of the prototypes is to provide RESPONDENT with the possibility of examining the goods in the trial run *[Schlechtriem/Schwenzer,Art.35¶26]*, it is not reasonable for RESPONDENT to rely on CLAIMANT's skill and judgment under Art.35(2)(b) CISG.

iii. CLAIMANT shall not be held liable for lack of conformity under Art.35(3) CISG

30 Art.35(3) CISG relieves the seller of liability if the buyer could not have been unaware of the non-conformity when concluding the contract *[CSIG-Digest,Art.35¶15]*. When concluding Agreement No.2, RESPONDENT who possessed the prototypes should have known that the

goods would be in accordance with the size of prototypes *[Clarifications¶43]*. Therefore, CLAIMANT shall not be held liable for lack of conformity under Art.35(3) CISG.

iv. RESPONDENT loses its right to claim for non-conformity due to the late notice under Art.39(1) CISG

31 The buyer loses the right to claim non-conformity if it does not notify the seller within a reasonable time which should be determined by considering all the relevant circumstances *[CISG-AC_Op_No.2,¶5.4; Schlechtriem/Schwenzer,Art.39¶16]*.

32 RESPONDENT received the goods on 26/01/2015, and had kept silent for over one month to react to the alleged non-conformity *[Clarifications¶50; Exh.R2]*. Such long period was not reasonable since the non-conformity in size shall be discovered immediately. Consequently, RESPONDENT loses its right to claim for non-conformity based on Art.39(1) CISG.

v. Alternatively, the non-conformity of goods is not a fundamental breach under Art.25 CISG

33 Avoidance of contract is considered to be the last resort and shall be exercised only under exceptional circumstances *[Schlechtriem/Schwenzer,Art.25¶51; CLOUT_248; CISG-online-654; CISG-online-709]*. As long as the goods are not totally useless, or are able to be resold at a discount, non-conformity of goods should not constitute a fundamental breach *[CLOUT_171; CISG-online-918; CLOUT_1399; CLOUT_938; CISG-online-654]*.

34 . Although the goods cannot fit to the Cherry watchcase, they can still be resold and fit to other watchcases as the standard sizes of watchstraps in the market could range from 6mm to 42mm *[Apple-Watch-Bands; eBay; Watchband-Center]*. Therefore, by no means can the inconformity be considered as a severe detriment to RESPONDENT; thus the breach is not fundamental.

b. RESPONDENT is not entitled to claim for full amount of price reduction pursuant to Art.50 CISG

35 To claim for full amount of price reduction, the delivered goods shall be of no value at all or completely useless *[CISG-Digest,Art.50¶10; Schlechtriem/Schwenzer,Art.50¶13; CLOUT_938; CLOUT_724]*. In the present case, the watchstraps are still valuable for the genuine leather quality and can be resold *[CL.Memo¶34]*. Therefore, RESPONDENT could not claim for price reduction to zero.

c. CLAIMANT's liability of non-conformity should be exempted under Art.80 CISG

36 RESPONDENT's omission of not examining the size of prototypes caused CLAIMANT to deliver non-conforming goods; thus CLAIMANT's liability should be exempted under Art.80 CISG and RESPONDENT cannot avoid the contract since its contribution to causation outweighs that of the CLAIMANT *[Schlechtriem/Schwenzer,Art.80¶¶4,7,9]*.

IV. Payment under the transactions

37 RESPONDENT claimed for $17.4M refund of payments under the transactions based on non-conformity of goods, lack of insurance and delay of prototypes. However, **[a]** RESPONDENT is not entitled to avoid Agreement-No.1 and claim for the $15M refund and **[b]** nor entitled to avoid Agreement-No.2 and claim for $2.4M refund of deposit, CLAIMANT is entitled to the $9.6M balance payment under Agreement No.2.

a. RESPONDENT cannot claim for $15M refund under Agreement-No.1 since it has waived its right to avoid Agreement-No.1

38 PARTIES reached a settlement with the dispute arose under Agreement-No.1. RESPONDENT voluntarily undertook the responsibility for the loss of goods by paying the balance payment *[Clarifications¶53]*. Whilst CLAIMANT's failure to seek insurance and the delay of prototype did not amount to fundamental breach, RESPONDENT cannot avoid Agreement-No.1 and claim for $15M refund.

b. RESPONDENT cannot claim for the $2.4M refund and CLAIMANT is entitled to the balance payment of Agreement No. 2 under Art.62 CISG

39 RESPONDENT lost its right to avoid Agreement-No.2 since it failed to do so within a reasonable time *[CISG Art.49(2)(b)(i)]*. The calculation of a reasonable time period starts when the buyer became aware of or ought to have been aware of the breach in accordance with Art.47(1) or Art.48(2) CISG *[CISG-Digest,Art.49¶23]*.

40 RESPONDENT received the goods on 29/01/2015 *[SoD¶9]*, and ought to be aware of the non-conformity. However, RESPONDENT failed to declare its intention to avoid Agreement-No.2 until pursuing to arbitration on 18/11/2015 *[Exh.R2]*, which was nine months after the delivery of goods and such long period shall not be considered reasonable *[CLOUT_282; CLOUT_165; CISG-online-1900]*. Therefore, RESPONDENT cannot avoid Agreement-No.2.

41 Even if RESPONDENT can avoid Agreement-No.2, it is not entitled to $15M refund from Agreement-No.1 since Agreements are separate transactions with independent rights and obligations *[Clarifications¶20]*.

D. RESPONDENT cannot claim 20.01M damages

42 RESPONDENT is not entitled to the damages for **[I]** website costs and **[II]** loss of profits.

I. RESPONDENT is not entitled to $10K damages for the website costs

43 The expenditures on reliance of performance shall be limited when the things bought do not totally lose their value *[CISG-online-1570]*. Furthermore, if the advertisement was not solely spent on the defective goods, the buyer cannot claim for the such expenditure as damages under Art.74 CISG *[CLOUT_343]*. Websites allow consumers around the world to access to RESPONDENT's products, including smart mobile phones and accessories *[Clarifications¶39; Exh.C1; Facts¶2]*. The commercial value of websites exists regardless of whether watchstraps conform to the watchcase.

II. RESPONDENT is not entitled to $20M damages for loss of profits

44 To claim loss of profit, an aggrieved party needs to prove the loss with reasonable certainty *[CISG-AC_Op_No.6,¶3,13; CLOUT_210]*. It is in question whether the consumers will replace the old watchstraps as alleged by RESPONDENT since RESPONDENT lacks experience with watchstraps products *[Exh.C1; SoD¶7; Clarifications¶¶21,46]*.

45 Moreover, according to Art.77 CISG, if it is reasonable for the buyer to purchase substitute goods but he did not do so, the damages are reduced to the amount that would be due if he had purchased the replacement goods *[N.V.-Case; CISG-online-2022; CLOUT_271]*. Leather watchstraps are available in the market *[Clarifications¶22]*, which means it is possible to find another manufacturer. However, RESPONDENT did not do so *[Clarifications¶35]*. In any event, the asserted loss of profit up to $20M is groundless.

REQUEST FOR RELIEF

CLAIMANT respectfully requests the Tribunal to render in favor of CLAIMANT:

1. **that the Tribunal has full jurisdiction over the payment claims raised by CLAIMANT.**

2. **that the CISG governs the Claims under both Agreements.**

3. **that CLAIMANT is entitled to payment of $9.6M under Agreement No.2.**

4. **that RESPONDENT cannot claim for the $17.4M refund and damages of $20.01M.**