SIXTH ANNUAL
INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION
MOOTING COMPETITION

MEMORANDUM FOR THE RESPONDENT

ON BEHALF OF RESPONDENT	**AGAINST CLAIMANT**
Gamma Celltech Co. Ltd	Albas Watchstraps Mfg. Co. Ltd.
17 Rodeo Lane, Mulaba, Wulaba	241 Nathan Drive, Yanyu City, Yanyu

Team 446

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INDEX OF ABBREVIATION

¶ / ¶¶	Paragraph / paragraphs
Art./Arts.	Article/Articles
Claimant	Albas Watchstraps Mfg. Co. Ltd
Clarification	The Sixth International Alternative Dispute Resolution Mooting Competition Clarification
Cl. Ex.	Claimant's Exhibit
CIETAC	China International Economic and Trade Arbitration Commission Arbitration Rules effective as of 1 January 2015
CISG	The United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
DDP	Incoterms 2010 Delivery Duty Paid
ed(s)	Editor(s) *or* Edition(s)
ECCTL	European Convention on the Calculation of Time-Limits
et. al.	and others
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006
Moot Problem	The Sixth International Alternative Dispute Resolution Mooting Competition Moot Problem 2016
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
No.	Number
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Parties	Claimant and Respondent collectively
Req. Arb.	Request for Arbitration
Respondent	Gamma Celltech Co. Ltd
Res. Ex.	Respondent's Exhibit
S&PA(I)	Sale and Purchase Agreement I
S&PA(II)	Sale and Purchase Agreement II
SGA	English Sale of Goods Act 1979
Tribunal	Arbitral Tribunal
UN	United Nations
UNCITRAL	United National Commission on International Trade Law
UNIDROIT	The UNIDROIT Principles of International Commercial Contracts
USD	United States Dollars

INDEX OF LEGAL SOURCES

CITED AS	FULL CITATION	CITED AT
CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules effective as of 1 January 2015	¶¶1, 12
CISG	The United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980	¶¶12-24, 26, 31-36, 42
ECCTL	European Convention on the Calculation of Time-Limits	¶28
UNIDROIT	The UNIDROIT Principles of International Commercial Contracts	¶28

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Schwenzer (2010)	Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, (Oxford, 2010)	¶¶13, 14, 16, 23, 38
UNCITRAL Digest	Pace Law School Institute of International Commercial Law, 2012 UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods	¶¶16, 23, 31
UN Official Records	United Nations, *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations Publication, Sales No. E.81.IV.3)	¶16
UNCITRAL Secretariat's Commentary	UNCITRAL Secretariat's Commentary**,** 'Commentary on the 1978 Draft Convention on Secretariat's Commentary on Article 5', *United Nations Conference on Contracts for the International Sale of Goods* (1979) <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-06.html> accessed 10 June 2016	¶14

INDEX OF CASES

CITED AS	FULL CITATION	CITED AT
Aluminium Hydroxide Case	*Aluminium Hydroxide Case*, OLG Köln, 21 August 1997, CISG- online 287	¶38
Auto Case	*Auto Case,* Oberlandesgericht [Appellate Court] Linz, 23 January 2006, CISG-online 1377	¶23
Blood Infusion Devices Case	*Blood Infusion Devices Case*, OG des Kantons Luzern, 8 January 1997, CISG-online 228	¶38
Boiler Case	*Boiler Case*, Oberster Gerichtshof [Supreme Court] 2 April 2009, CISG-online 1889	¶22
BP Refinery	*BP Refinery (Westernpoint) Pty Ltd v Shire of Hastings* (1978) 52 ALJR 20, 26	¶24
Clothing Case	*Clothing Case*, Court of Arbitration of the International Chamber of Commerce, January 1997, ICC Arbitration Case No. 8786	¶31
Emirates	*Emirates Trading Agency v Prime Mineral Exports Limited* [2014] EWHC 2014	¶7
Magnesium Case	*Magnesium Case,* Court of Arbitration of the International Chamber of Commerce, ICC Arbitration Case No. 8324 of 1995	¶20
Printing System and Software Case	*Printing System and Software Case,* Bundesgerichtshof [Federal Supreme Court], 4 December 1996, CISH-online 260	¶23

I. NO JURISDICTION OF THE TRIBUNAL

1. The Tribunal has no jurisdiction to hear the dispute because (A) there was no consensus to arbitrate and (B) the condition precedent to arbitration was not satisfied. Accordingly, Respondent is entitled to object the jurisdiction of the Tribunal under **CIETAC Rules, Art.6(4)**.

A. Absence of Consensus to Arbitrate

2. S&PA(II), Art.19 is not an arbitration agreement but merely a forum selection clause. While Art.19(a) provides the parties with the choice of arbitration, (b) and (c) allow the parties to resort to courts.

3. Where a contractual clause allows both arbitration and court actions, the expression of the parties' intent to resolve their disputes through arbitration is ambiguous which renders the clause invalid. The lack of certainty as to the forum of dispute resolution negates the consent to the Tribunal.[1]

[1] Born, 257.

4. Art.19(b) and Art.19(c) were inserted by Respondent and agreed by Claimant with the intent to keep the options for forum of disputes resolution open.[2] The lack of certainty of the Parties' intent to arbitrate negates the existence and validity of the arbitration agreement.

5. The Parties are not obliged to arbitrate and the Tribunal has no jurisdiction to hear the disputes.

B. Condition precedents to arbitration not satisfied

6. Pursuant to Art.19(a), the Tribunal only has jurisdiction provided that (1) the Parties have taken steps to resolve the disputes amicably before arbitration and (2) the Parties failed to reach a resolution within 14 days. The non-satisfaction of these conditions means that the Tribunal's jurisdiction is defective even consensus to arbitrate is found.

[2] Clarification No. 13.

7. With the word 'shall' in S&PA(II), Art.19(a), the Parties have a mandatory obligation to resolve disputes concerning payments by amicable resolution. The enforceability of this contractual term that requires parties to first seek resolution by friendly discussion has been gaining recognition in line with public interest.[3]

8. The Parties have never taken steps to resolve the disputes. Although Claimant responded to Respondent's complaint immediately on 27 February 2015,[4] Claimant simply expressed his views on the matters. The correspondence on 27 February 2015 falls short of exchange of ideas.

9. There is little to support that there were any kind of correspondence, let alone negotiation, between the parties since 28 February 2015. No steps were taken by the Parties to resolve the disputes before arbitration. Thus, the first condition is not satisfied.

[3] *Emirates.*

[4] Moot Problem, P.13, Cl. Ex. No.7; Moot Problem, P.18, Res. Ex. No.2.

10. The second condition of the cooling-off period of 14 days is connected to the obligation to resolve the dispute amicably. Since there has not been any attempt to settle the disputes by the Parties, the 14 days did not start on 27 February 2015. Even if it started, there is no evidence showing that the Parties have engaged in an amicable resolution for 14 days. In either situation, the second condition precedent is not satisfied.

11. Accordingly, the Tribunal has no jurisdiction to hear the disputes.

II. CISG DOES NOT GOVERN THE CLAIM

12. CISG does not govern the claims arising under S&PA(I) and (II) because (A) the Parties have *expressly* opted-out of CISG, or alternatively (B) the Parties have *implicitly* opted-out of CISG.

13. To apply CISG, the pre-requisites in **CISG, Arts 1-5, 100** have to be met,[5] which is not contested in our case. Even all CISG's requirements for applicability are met,

[5] Schwenzer (2010) 107, [10].

CISG does not apply if it is excluded pursuant to **Art.6**.[6] The exclusion only operates if the terms containing the exclusion were incorporated.[7] S&PA(I)[8] and S&PA(II),[9] Art.20 is indisputably incorporated with the Parties' acknowledgement.[10]

A. Express exclusion

14. Under **CISG, Art.6**, the Parties may exclude CISG expressly.[11] Authorities require the specific exclusion of 'CISG' or other relevant terms.[12] Respondent submits that 'all other applicable laws′ includes CISG. Hence, Art.20 constitutes an express exclusion of CISG.

B. Implicit exclusion

15. The Parties have opted-out CISG implicitly because (1) implicit exclusion is possible; (2) S&PA (I) & (II), Art.20 constitutes an implicit exclusion of CISG.

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[6] Ferrari (2005).

[7] Schlechtriem/ Schwenzer (2005) 20.

[8] Cl. Ex. No 2, P.7.

[9] Cl. Ex. No 6, P.12.

[10] Moot Problem, P.4, [15].

[11] UNCITRAL Secretariat's Commentary.

[12] Schwenzer (2010), 111, [17].

(1) Implicit exclusion is possible

16. CISG can be opted-out implicitly. Many tribunals expressly admit the possibility of this,[13] as long as the parties' intent to exclude CISG is clear and real.[14] Although little support for this view is shown in the language of CISG, a majority of delegations of the diplomatic conference opposed the requirement of express exclusion.[15] This was justified by the fact that an express reference to the possibility of an implicit exclusion was eliminated from CISG text 'lest the special reference to implied exclusion might encourage courts to conclude, on insufficient grounds, that [CISG] had been wholly excluded.'[16] The lack of an express reference to an implicit exclusion must not be regarded as precluding such a possibility.[17]

(2) S&PA(I) and (II) Art.20 constitutes an implicit exclusion

17. S&PA (I) & (II), Art.20 provides '*[t]he contract shall be governed by the national law of Wulaba. All other applicable laws are excluded.*'[18] Choosing a law other than

[13] UNCITRAL Digest, para.9; *Boiler Case.*

[14] UNCITRAL Digest, para.9; Schwenzer (2010), 103.

[15] UN Official Records, 85-86.

[16] UNCITRAL Secretariat's Commentary, [17].

[17] Ferrari (2012), 161.

[18] Cl. Ex.No.7; Res. Ex. No.2.

CISG to govern the contract is recognised as a way to exclude CISG.[19] This is a matter of interpretation of the relevant clause under **CISG, Art.8**.[20] Respondent submits that **CISG** has been excluded under (i) **CISG, Art.8(1)**, and (ii) **CISG, Art.8(2)**.

(i) CISG, Art.8(1)

18. Under **CISG, Art.8(1)**, the contract is interpreted according to the subjective and real intent of the parties, if it is known or could not have been unaware of by the other party to each other. **CISG, Art.8(3)** supplemented that consideration should be given to all relevant circumstances, such as negotiations between the parties.

19. Art.20 was inserted by Respondent's lawyer to avoid surprise of having unknown or unfamiliar law,[21] including CISG. Respondent was relatively new to CISG[22] at the time of signing S&PA(I) and (II) and its lawyers were newly qualified.[23] Given that

[19] UNCITRAL Secretariat's Commentary, [1].

[20] Schwenzer (2005), 91, [14].

[21] Clarification No. 19.

[22] Moot Problem, P.3, [1]

[23] Clarification No.30.

Claimant had signed Art.20,[24] Respondent's intent to exclude CISG ought to be known to Claimant.

(ii) CISG, Art.8(2)

20. If the subjective intent of parties is not inferred, an objective analysis to interpretation under **CISG, Art.8(2)** is adopted.[25] The adjudicator will need to determine whether a clear inference arises from the words and/or conduct of the parties to the effect that they intended to exclude the CISG, in the sense that these would be reasonably understood as manifesting such intent.[26]

21. Authorities are not unanimous.[27] There is a line of authorities suggesting that a choice to applicable laws amounts to an implied exclusion of CISG, otherwise the choice would have no practical meaning.[28] 'When a State participates in [CISG] the latter can be assumed to be part of his domestic law so that additional reference to it

[24] Clarification No.30.

[25] *Magnesium Case*.

[26] CISG.AC.6.

[27] Kroll et. al.,104.

[28] Ferrari (2012), 165.

could be considered as superfluous at first, and/or for the reference to make sense, as an exclusion of [CISG].' [29] This is especially true when the parties refer to the 'exclusive' applicability of the law of a contracting state to CISG.[30]

22. **S&PA (I) and (II), Art.20** stipulates '[a]ll other applicable laws are excluded', indicating the exclusive applicability of the national law of Wulaba.[31] It would otherwise be difficult to understand why the Parties highlighted the fact that the national law of Wulaba should be exclusively applied if it was not intended. Rather, the parties could have agreed on the primary application of the CISG. It can be inferred that the exclusion of the application of CISG was intended.[32]

23. Although the majority view supports the application of CISG where the parties have chosen the law of a Contracting State without further specification as part of that law,[33] the exclusion of CISG is on a case-by-case basis.[34] The drafters of CISG

[29] Enderlein, 48, [1.3].

[30] *Adex International Ltd.*

[31] Cl. Ex.No.7; Res. Ex. No.2.

[32] *Boiler Case*.

[33] Schwenzer (2010),110; Kroll et. al.,104; UNCITRAL Digest (2012) [11].

[34] *Auto Case*.

affirmed the principle to uphold party autonomy.[35] Respondent respectfully invites the Tribunal to deviate from the majority view and find an implicit exclusion of the CISG considering the circumstances of this case.

III. INSURANCE

24. Under S&PA(I), Art.3, the Parties expressly agreed to the application and **DDP** by virtue of **CISG, Art.9(1)**. In **DDP, Arts.A10** and **B10**, no legal obligation is imposed on either party to purchase insurance. In the oral negotiation which is part of the contract, Claimant *expressly* agreed to be 'responsible for all related costs'.[36] 'Related costs' was intended to include insurance because Claimant reassured Respondent that Respondent need not consider any extra costs.[37] This sufficiently *implied* that Claimant had assumed the responsibility of buying insurance. [38]

25. If the term was not expressly made, it is *implied* that Claimant bore the obligation to buy insurance. As Claimant during negotiation expressly stated that Respondent need

[35] *Printing System and Software Case.*

[36] Moot Problem, P.3, [6]

[37] Moot Problem, P.18, Res.Ex. No.2, [6]

[38] *BP Refinery* 26.

not worry about other related costs, it would be reasonable to imply so in S&PA(I).[39] It is more efficient for Claimant to provide insurance considering their expertise. It is so obvious without stating that Claimant will be responsible for buying insurance. The obligation to purchase insurance by Claimant does not contradict with any express terms in S&PA(I).

26. Failure to buy insurance is a fundamental breach of S&PA(I) because it resulted in a substantial detriment to Respondent who was unable to recover the loss of goods at sea[40] by insurance when such harm was foreseeable. Under **CISG, Art.49**, S&PA(I) is avoided due to such fundamental breach.

IV. LATE DELIVERY OF PROTOTYPE

27. Under S&PA(I), Art.5, Claimant will provide a prototype for approval within 14 days from receipt of deposit. The agreed place of delivery is Respondent's office.[41]

[39] Moot Problem, P.3, [6].

[40] Moot Problem, P.10, [1].

[41] Clarification No.1.

Respondent paid the deposit on 31 July 2014[42] but only received the prototypes on 15 August 2014.[43]

A. 14-days rule

28. The 14th day is included for the purpose of 'within'.[44] By **UNIDROIT Art.6.1.8** the counting of 14 days begins on 31 July 2014 once the bank has received the deposit on behalf of Claimant. **ECCTL, Art.3(1)** provides time-limits expressed in days shall run from the *dies a quo* at midnight to the *dies ad quem* at midnight. As there is no time difference between the parties' home countries,[45] it is safe to compute the starting period as from the 00:00 of 1 August 2014 to the ending period of 14 August 2014 at 24:00.

B. 'Receive'

29. Shipment must arrive prior to or at latest midnight of 14 August 2014 to be considered within the agreed time period between the Parties. Claimant failed to

[42] Moot Problem, P.3, [7].

[43] Moot Problem, P.9, Cl. Ex. No.4.

[44] Ferrari (2004), 622.

[45] Clarification No.73(b).

deliver the prototypes within the 14-day period. Delivery of prototypes was late as per the agreed terms in S&PA(I).

30. For business efficacy reasons it is reasonable to assume 'receive' means when the goods have arrived at the hands of Respondent. It would be impractical and illogical if it was only to provide the goods and not ensure that the goods were received.

C. Article 33

31. Although CISG does not define goods, with reference to **CISG Arts.2 and 3**, goods must be manufactured or produced.[46] As prototypes are capable of being manufactured and produced, it should be considered as goods, and therefore **CISG, Art.33** which requires Claimant to deliver goods on time applies. If prototypes are not considered as goods, according to the 2012 UNCITRAL Digest,[47] **CISG, Art.33** is still applicable.

[46] Bridge.

[47] UNCITRAL Digest; *Clothing Case*.

D. No Fundamental Breach

32. Late delivery of prototypes constitutes a fundamental breach under **CISG, Art.25** for being a substantial detriment and it being a foreseeable consequence. The Cherry Watch launched in August 2014[48] and Respondent invested in creating a website to display photos of the prototypes[49] proving there is substantial impact due to the time and efforts spent in preparation. In general for trading contracts time is of essence especially for those in the context of mercantile industry.[50] Claimant had special knowledge regarding the circumstances of the Respondent in the current case which justifies time is of essence. Respondent stated to Claimant during their communications that Respondent wished to enter the market before anyone else does.[51] It is essential the delivery is made on time so it would not affect the process of launching the products into the market.

33. Under **CISG, Art.49**, S&PA(I) is avoided for the fundamental breach by Claimant not delivering the prototype on time.

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[48] Clarification No.27.

[49] Moot Problem, P.16, [8].

[50] Halsbury's Laws, vol.45, [355.151].

[51] Moot Problem, P.5, Cl. Ex. No.1, [3].

V. NON-CONFORMTIY OF WATCHSTRAPSS

A. 'Handmade' and softness

34. **CISG, Art.35(2)(c)**, goods are expected to conform with the sample. The seller will be responsible for ensuring the goods possess the qualities of that sample.[52] Respondent expressed their fondness of the hand stitching on the prototype[53] which led Respondent to change the quantity placed in the S&PA(II) order.[54] Unlike the prototypes, the stitching on the final goods was straight lines in same lengths with much glue.[55] Respondent expressed their fondness of the softness of the prototype.[56] Unlike the prototypes, the final goods are not as soft.[57] Claimant breached **CISG, Art.35(2)(c)**.

[52] SA Kruisinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?* (Intersentia 2004) 33.

[53] Moot Problem, P.9, Cl. Ex. No.4, [3].

[54] Moot Problem, P.11, Cl. Ex. No.6, S&PA(II), Art.2(f).

[55] Clarification 51.

[56] Moot Problem, P.9, Cl. Ex. No.4, [2].

[57] Moot Problem P.18, Res. Ex. No.2, [3].

Softness is one of the unique features of the watchstraps. The difference or non-conformity in the leather quality destroys the root of the contract and is a fundamental breach of S&PA(II) under **CISG, Art.25**.

B. Size

35. Respondent provided Claimant with a Cherry watchcase and requested for the goods to be made fitting to it.[58] It was explicitly stated in the contract that the watchstraps should fit the watchcase provided by Respondent to Claimant.[59] It was Claimant's fault that the workers produced the watchstraps without being aware of the watchcase.[60] The goods being unable to fit the Cherry watches destroys the root of the contract and is thus a fundamental breach under **CISG, Art.25**. Such non-conformity also breached **CISG, Art.35(2)(b)** for being unfit for the particular purpose expressly made known to Claimant.

[58] Moot Problem, P.17, Res. Ex. No.1, [1].

[59] Moot Problem, P.11, Cl. Ex. No.6, S&PA(II), Art.2(g).

[60] Clarification No. 41.

C. Timely Notice

36. Respondent checked some pieces upon arrival.[61] However, the handmade quality and softness of leather defects could only be discovered upon close inspection so Respondent didn't discover them at the time of arrival. Close examination is not required under **CISG, Art.38**.

37. It was also impossible to discover the discrepancy in size at the time. The only watchcase[62] for checking the size was in the possession of Claimant for the production of the prototype.[63]

38. The time that Respondent notified the Claimant about the non-conformity was not unreasonable[64] and within an appropriate time period of discovery,[65] and in any event within two years.[66]

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[61] Clarification No.19.

[62] Clarification No. 27.

[63] Moot Problem, No.17, Res. Ex. No.1, [1].

[64] Schwenzery (2010), 630, [16].

[65] *Aluminium Hydroxide Case*; *Blood Infusion Devices Case.*

[66] CISG, Art.39.

VI. PAYMENT

A. S&PA(I)

39. Respondent is entitled to the refund of US15M paid under S&PA(I) under **CISG, Art.74** on two grounds.

40. First, Respondent is entitled to avoid the contract under **CISG, Art.49** for Claimant's fundamental breach not having purchased insurance and delivered the prototypes on time under **CISG, Art.25**.

41. Second, Claimant still bore the risk when the goods were lost at sea. **DDP, Arts.A4** and **A5** provide that risk only passes when the goods have been delivered and placed at the disposal of Respondent. The agreed place of destination is Respondent's office.[67] Since the goods were lost at sea before reaching Respondent's office, risk had not passed hence Claimant should be responsible for the loss.

[67] Clarification No.1.

B. S&PA(II)

42. Refer to ¶¶34&35 for non-conformity of the quality of the prototype. Respondent is entitled to the refund of US$2.4M deposit under S&PA(II) under **CISG, Art.74**.

43. Due to the non-conformity, Respondent suffered from website development costs and loss of profits for damage on reputation. Refer to ¶32 for special knowledge.[68] The loss suffered is foreseeable, Respondent should be entitled to the sum of US$20M for the loss of profits under **CISG, Art.74**.

[68] CISG Art. 74.

VII. REQUEST FOR RELIEF

The Respondent respectfully asks the Tribunal to adjudge and declare that:

1. The Tribunal does not have jurisdiction to hear the Disputes;
2. CISG does not govern the claims arising from the current dispute;
3. Claimant bore the obligation to purchase insurance;
4. The delivery of prototypes by Claimant was late and it frustrated the root of S&PA(II);
5. There is a fundamental breach by the Claimant and the goods did not conform;
6. Communication of the non-conformity is timely;
7. Respondent has the right to avoid S&PA(I) and S&PA(II).

The Respondent respectfully requests the Tribunal to award that:

8. Refund of USD15M under S&PA(I);
9. Refund of USD2.4M under S&PA(II);
10. The sum of USD10K for the development of the website costs;
11. The sum of USD20M for loss of profits;

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

13. Interest on the amounts set forth in items 8 to 12 above, from the date Respondent had paid the first deposit.

Respectfully Submitted

Counsel for the Respondent