THE 6th INTERNATIONAL ADR

(ALTERNATIVE DISPUTE RESOLUTION)

MOOTING COMPETITION

5th JULY- 9th JULY 2016

HONGKONG

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

MEMORANDUM FOR RESPONDENT

Team No. 458 R

List of Abbreviations

Abbreviation	Content
AfA	Application for Arbitration
Art.	Article
Art.19	Art. 19 of Sale and Purchase Agreement No. 2
Art.20	Art. 20 of Sale and Purchase Agreement No. 2
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Rules	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules
CISG	Convention on International Sale of Goods, 1980
CLAIMANT	Albas Watchstraps Mfg. Co. Ltd
Cl. Ex.	Claimant's Exhibit
Inco	Incoterms 2010
No.	Number
p.	page
PARTIES	Albas Watchstraps Mfg. Co. Ltd. and Gamma Celltech Co. Ltd.
Res. Ex.	Respondent's Exhibit
RESPONDENT	Gamma Celltech Co. Ltd
Agreements	Sale and Purchase Agreement between Albas Watchstraps Mfg. Co. Ltd. and Gamma Celltech Co. Ltd.

the Tribunal	Ms. Felicity Chan, Dr. Anne Descartes and Mr. Martin Mayfair
UNCITRAL Model Law	UNCITRAL Model Law on International Arbitration, amended in 2006
UNDP Guide	*UNDP Shipping and Incoterms Practice Guide*

Table of Authority

Cited As	Content	Citing Paragraph
Ginza Pty. Ltd case	*Ginza Pty. Ltd. v. Vista Corporation Pty. Ltd*	29
Coburg case	*Landgericht Coburg District Court, German* Avaliable at: http://cisgw3.law.pace.edu/cases/061212g1.html	31
Germany 1997 case	Available at: http://www.unilex.info/case.cfm?id=439	37
CLOUT case No. 594	Germany: Oberlandesgericht Karlsruhe 19 U 8/02 19 December 2002 Available at: http://www.uncitral.org/clout/clout/data/deu/clout_case_594_leg-1381.html	40
CLOUT case No. 229	Germany: Bundesgerichtshof; VIII ZR 306/95 4 December 1996 Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V99/811/74/PDF/V9981174.pdf?OpenElement	41
CLOUT case No. 310	Germany: Oberlandesgericht Düsseldorf; 17 U 136/93 12 March 1993 Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V00/518/25/PDF/V0051825.pdf?OpenElement	42
CLOUT case No. 123	Germany: Bundesgerichtshof; VIII ZR 159/94 8 March 1995 Available at:	42

	https://documents-dds-ny.un.org/doc/UNDOC/GEN/V96/842/23/IMG/V9684223.pdf?OpenElement	
Erauw	Article: <The Risk of Loss and Passing It> Johan Erauw	47,48

Table of Content

ARGUMENT

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

1. **RESPONDENT** submits that *Art.19(a)* doesn't grant the Tribunal jurisdiction over the dispute because (**A**) The arbitration clause is not binding and valid, (**B**) even if the Tribunal considers the arbitration clause is valid and binding, the pre-arbitral requirement was not fulfilled.

A. The arbitration clause is not binding and valid.

i. The arbitration clause is not binding.

2. *Art.19(a)* of agreements reads: "the either party may submit the dispute to CIETAC". The word "may" means that it is not an obligation to resort to arbitration. Therefore **PARTIES** have space to find a way to resolve. Also, arbitration clause should be suggested as an obligation. In addition, clause (b) and (c) of *Art.19* give an open resolution and it indicates either party could choose. In the present case, **PARTIES** never want to make a totally specific structure to solve the dispute.

ii. Art. 19(a) does not indicate PARTIES' consensus to arbitrate and it's invalid.

3. **CLAIMANT** conveniently relies on *Art.19(a)* to submit that it's **PARTIES**' consensus to resort to arbitration. However, **RESPONDENT** just added clause (b) and (c) on the basis of clause (a) which is suggested by **CLAIMANT** and both sides had never negotiated over *Art.19*.

4. Here, **RESPONDENT** considers there existing conflict within *Art.19*. Since the phrase "all disputes arising out of or in connection with the agreement" has implied that it includes "disputes concerning payment". Since there is overlap on subject dispute which could be solved by several forum, it is inoperative and invalid.

5. In a nutshell, the **TRIBUNAL** does not have jurisdiction over the payment claims raised by CLAIMANT.

B. Even if the Tribunal considers the arbitration clause is valid and binding, the pre-arbitral requirement was not fulfilled.

6. As *Art.19(a)* expresses, "disputes concerning payments shall be resolved amicably between the Parties. Failure to reach an amicable resolution within a reasonable period of time (not to exceed 14 days).....", it shows **PARTIES** are obliged to negotiate. The word "shall" means "be required to", which drafters typically intend and courts typically uphold to be of a mandatory character. A number of ICC Tribunals concluded that, "when a word expressing obligation, such as 'shall' is used in connection with amicable dispute resolution techniques, such provision is binding upon parties". Unfortunately, **CLAIMANT** and **RESPONDENT** haven't done that. Therefore, the arbitration process cannot be initiated.

II. *CISG* DOES NOT GOVERN THE CLAIMS ARISING UNDER THE SALE AND PURCHASE AGREEMENT AND THE SALE AND PURCHASE AGREEMENT NO.2.

7. In terms of the laws governing the contracts, (**A**) If the **PARTIES** desire the application of *CISG*, they should express in the Choice of Law term, (**B**) Instead of *CISG*, the parties have expressly chosen the applicable law with clear intention, (**C**) Even applying *CISG* can be appropriate, it has been explicitly excluded.

A. If the PARTIES desire the application of *CISG*, they should express in the Choice of Law term.

8. According to *Art.4 of Hague Principles*, "A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances." [*Hague Conference*] Therefore, if the **PARTIES** desire to apply *CISG*, they need to incorporate it in *Art.20* of both agreements.

B. Instead of *CISG*, the parties have expressly chosen the applicable law with clear intention.

i. The choice of law is express and clear.

9. Pursuant to *Art.20* of Sale and Purchase Agreement (hereinafter "Agreement No.1") and Sale and Purchase Agreement No.2 (hereinafter "Agreement No.2"), " The contract shall be governed by national law of Wulaba." [*p7, Cl. Ex. No.2; p12, Cl. Ex. No.6*]

10. Plus, according to *the commentary of Hague Conference*, "when the contract contains terminology characteristic of a particular legal system or references to national provisions that make it clear that the parties were thinking in terms of, and intended to subject their contract to, that law." [*Hague Conference*] Therefore, the choice of law is specified and targeted.

11. **PARTIES** have used the word "shall" in the clause, providing an effective clearness in the targeted law. The word "shall" is supposed to be confined to the

meaning "'has a duty to' and use it to impose a duty on a capable actor". [*Bryan Dictionary*]

ii. ***PARTIES****' autonomy should be respected*

12. Under *UNCITRAL Model Law*, the choice of law by the parties to the substance of the dispute is respected [*Art.28.1 UNCITRAL Model Law*], so the national law of Wulaba governs the contracts and both parties need to abide by it to fulfill the contract.

C. Even applying *CISG* can be appropriate, it has been explicitly excluded.

13. Not only didn't **PARTIES** mention about *CISG* in agreements, but they have excluded it expressly. Under *Art. 20* of both agreements, "All other applicable laws are excluded."[*p7, Cl. Ex. No.2; p12, Cl. Ex. No.6*] It gives exclusive effect of Wulaba domestic law and the other laws have all been excluded, including *CISG*.

III. ASSUMING THE *CISG* DOES APPLY, HAVE ITS PROVISIONS BEEN INVOKED ON ACCOUNT OF THE FOLLOWING.

i. LACK OF INSURANCE COVERAGE IN THE FIRST TRANSACTION.

14. **(A)** Although neither *CISG* nor DDP impose any obligation of buying insurance on **PARTIES**, it's **CLAIMANT** who should bear the risk of lost goods. Besides, **(B)** the insurance coverage was in the "related costs".

A. Although neither *CISG* nor DDP impose any obligation of buying insurance on PARTIES, it's CLAIMANT who should bear the risk of lost goods

15. Neither *CISG* nor DDP impose any obligation of buying insurance on **PARTIES**, but under DDP, (**i**) the seller bears all risks of loss or damage to the goods until they have been delivered. (**ii**) with the exception of loss or damage in the circumstances described in B5[*ICC Guide to Incoterms 2010*].

i. The seller bears all risks of loss of or damage to the goods until they have been delivered.

16. In DDP, A4 writes that he seller must deliver the goods by placing them at the disposal of the buyer on the arriving means of transport ready for unloading at the agreed point, if any, at the named place of destination on the agreed date or within the agreed period [*ICC Guide to Incoterms 2010*]. In the present case, the goods were lost at sea, and they didn't reach **RESPONDENT**. So, **CLAIMANT** didn't deliver in accordance with A4.

ii. With the exception of loss or damage in the circumstances described in B5.

17. B5 regulates the circumstances when buyer should bear the risk. The fact is that **RESPONDENT** has fulfilled this article well, and **PARTIES** have no disputes on this issue. Besides, **PARTIES** have no disputes regarding **RESPONDENT**'s obligation under B7.

18. In a nutshell, **RESPONDENT** has fulfilled its obligations. It is **CLAIMANT** who should bear the risks of goods.

B. The insurance coverage was in the "related costs"

19. In the present case, Albas had agreed to be responsible for all related costs. **RESPONDENT** did not have experience in dealing with such kind of goods and did not want to be surprised by any "extra costs", **CLAIMANT** then assured **RESPONDENT** that it would bear all related costs. It is a common practice in the commercial world to insure goods in transit [*UNDP Guide*], so the insurance coverage should be the "related costs", thus **CLAIMANT** should be liable for lack of insurance coverage.

20. In conclusion, **CLAIMANT** should be liable for lack of insurance coverage.

ii. TIMING OF DELIVERY OF PROTOTYPE.

21. Concerning timing of prototype's delivery, (**A**) **CLAIMANT** breached the contract by doing an overdue delivery of prototype, (**B**) **RESPONDENT** didn't lose the right to rely on the lack of conformity of the goods.

A. CLAIMANT breached the contract by doing an overdue delivery of prototype

22. Subject to the provisions of *Art.33(a) CISG*, the seller must deliver the goods on the date fixed by or determinable by the contract, if the date is fixed and determined. In this case, **RESPODENT** and **CLAIMANT** have concluded the Agreement No.1 which says **CLAIMANT** must deliver prototypes "within 14

days" since **RESPONDENT** pay the initial deposit. [*p6, Cl. Ex. No.2*] **CLAIMANT** received the initial deposit on 31st July, 2014, and sent the prototypes on 14th August, 2014, the 15th day since **CLAIMANT** received the deposit. [*Cl. Ex. No.3; Ex. No.4*] Obviously **CLAIMANT** delivered the prototypes beyond the period of 14 days, contributing to an overdue delivery of prototypes, and breached the contract and *Art. 33(a) CISG*.

B. RESPONDENT didn't lose the right to rely on the lack of conformity of the goods.

23. **CLAIMANT** may claim that **RESPONDENT** had lost the right to rely on the lack of conformity because **RESPONDENT** didn't send notice to **CLAIMANT** within a reasonable time in accordance with the *Art.39(1) CISG*. However, *Art.39(1)* merely asks the buyer to give notice after he has discovered it or ought to have discovered it. But only when the lawyer told **RESPONDENT** that the time of delivery was late, did **RESPONDENT** find it. Then **RESPONDENT** sent the notice to **CLAIMANT**. So **RESPONDENT** didn't lose the right to rely on the lack of conformity.

24. *Art.39(2) CISG* gives the longest time period, two years, for buyer to claim non-conformity and **RESPONDENT** gave the notice to the buyer in two years. So **RESPONDENT** didn't lose the right to rely on non-conformity of the goods on this aspect.

25. In conclusion, **CLAIMANT** breached the contract by doing an overdue delivery

of prototype.

iii. NON-CONFORMITY AND PAYMENT ISSUES ARISING FROM AGREEMENT NO.2

26. **RESPONDENT** submits that: (**A**) The goods in fact are not conform, (**B**) **CLAIMANT** fundamentally breached the contract.

A. The goods in fact are not conform.

27. Under *CISG Art.35(1)*, goods delivered by the seller must be of the quantity, quality and description by the contract. Referring to Agreement No.1, the size described is strapping to fit customer's watchcase. [*p6, Cl. Ex. No.2 Art.2*] While the fact is that the ends of watchstraps produced by **CLAIMANT** did not fit into Cherry watchcases. [*Res. Ex. No.2 , p18*] Consequently, goods delivered by **CLAIMANT** were not of the description of the contract.

28. *CISG Art.35(2)* states standards relating to the goods' quality, function and packaging . Pursuant to *CISG Art.35(2)*, the goods in fact are not conform.

i. The goods are unfit for the purpose for which goods of the same description would originally be used.

29. *Art.35(2)(a)* only requires the goods to be fit for the purposes for which they are ordinarily used, which has been variously described as "market-able" quality [*Ginza Pty. Ltd case]*. In this case, the watchstraps delivered by **CLAIMANT** could not fit with the watchcase [*p18, Res. Ex. No.2*]

ii. The goods delivered by CLAIMANT were not fit for "any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract".

30. Circumstance under *CISG Art.35(2)(b)* is that if one or more particular purposes were revealed to the seller when the contract was concluded, and the special purpose was known by the seller with sufficient clarity. [*CISG digest*] In the present case, the watchcases are particularly used for the substitution of Cherry watchstraps. [*p5, Cl. Ex. No.1, para 1*] The fitness between watchcase and watchstrap is of great significance.

31. What's more, the exception of *Art.35(2)(b)* does not comply with this case. It has been held that a buyer is not deemed to have relied on the seller's skill and judgment where the buyer possessed skill concerning and knowledge of the goods equal to or greater than that of the seller. [*Coburg case*] Since **CLAIMANT** is one of the leading manufacturers and exporters built in 1973, while **RESPONDENT** had no experience in dealing in watchcases. [C*larification para 46, p8*] It is unreasonable to rely on **RESPONDENT** 's skill and judgment on goods.

32. Moreover, **RESPONDENT** could procure one watchcase the Cherry brand and it was impossible for **CLAIMANT** to check whether the prototypes can fit the watchcase under the condition that the **CLAIMANT** had not sent the watchcase back .[*Clarification para 27, p5, para 34, p34*]

iii. The goods do not possess the qualities which the seller has held out to the buyer as a sample or model.

33. *CISG Art.35(2)(c)* states that once the goods possess the qualities of a sample or model seller held out to buyer, goods are conform. **RESPONDENT** admired the softness of the hand-made prototype, [*Cl. Ex. No.4. para2*] and for which **RESPONDENT** approved the mass production. However, the goods were not hand-made, nor as soft. [*p18, Res. Ex. No.2*] Thus **CLAIMANT** obviously breached *CISG Art.35 (2)(c)*.

34. There is no dispute on the package issue between **PARTIES** concerning *CISG Art.35(2)(d)*.

35. In conclusion, pursuant to *CISG Art.35*, the goods provided by *CLAIMANT* were not conform.

B. CLAIMANT fundamentally breached the contract

36. Based on the fact that goods delivered by **CLAIMANT** were not in conformity with the contract, (**i**) **CLAIMANT** fundamentally breached the contract, contributing to the avoidance of the contract. And (**ii**) a notice of avoidance was made in a reasonable time. As a result, (**iii**) **RESPONDENT** is supposed to refund the payment.

*i. **CLAIMANT** fundamentally breached the contract, contributing to the avoidance of contract.*

37. Before concluding Agreement No.1, **RESPONDENT** expressly told **CLAIMANT** about its intention of selling substituted watchstraps for Cherry Watch. [*p5, Cl. Ex. No.1*] However, non-conformity of goods consequently contributed to the unfitness to Cherry watchcase, which substantially deprived **RESPONDENT** of what it was entitled to expect under the contract, as is illustrated in Art.25 *CISG*. [*Germany 1997 case*]

38. When it comes to fundamental breach of the contract, **RESPONDENT** is entitled to resort to *CISG Art.49,* which allows **RESPONDENT** to avoid the contract.

ii. A notice of avoidance was made in a reasonable time

39. *CISG Art.*26&39 require the buyer to make a notice specifying the nature of non-conformity to seller in a reasonable time for the avoidance. And **RESPONDENT** did so.

40. Firstly, on Feb 27, 2015, **RESPONDENT** sent an e-mail to **CLAIMANT**, making its intention clear – ceasing the performance of making the balance payment as well as asking for a refund. [*p18, Res. Ex. No.2*] which is a notice of avoidance. [*CLOUT case No. 594*]

41. Secondly, **RESPONDENT** specially described the defects arising from the goods -- softness, handmade quality and the size. [*p18, RES. Ex.No.2*], sufficient to let seller know what the claimed lack of conformity consisted of. [*CLOUT case No. 229*].

42. Thirdly, RESPONDENT discovered the lack of conformity between Jan 29 and Feb 27, 2015. On Feb 27, **RESPONDENT** sent the notice to **CLAIMANT**. The

total time costed less than a month. The reasonable time period varies with the facts of each case [*CLOUT case No. 310*]. One month for giving notice following the discovery of defects has been accepted. [*CLOUT case No. 123*]

43. To summarize, Agreement No.2 was avoided.

iii. RESPONDENT is supposed to refund the payment

44. Upon the avoidance of the contract, **RESPONDENT** is not obliged to deliver the balance payment any more under *CISG Art.*81, and **CLAIMANT** is obliged to restitute the payment delivered before under the contract.

iv. PAYMENT IN AGREEMENT NO.1

45. By the application of Incoterms, (**A**) risks did not pass to **RESPONDENT** when goods were lost at sea. As a result, **CLAIMANT** should bear the risks. So (**B**) **RESPONDENT** is supposed to refund the payment.

A. Risks did not pass to RESPONDENT when goods were lost at sea, CLAIMANT should bear the risks

46. From *Art.*3 of the agreements, it is clear and unambiguous that the **PARTIES** applied DDP (Intercoms 2010) autonomously. [*p.6, Cl. Ex. No.2. Art.3*] In this case, when matters are ruled in DDP, the rules of DDP should firstly be applied in the issues. Pursuant to A4 and A5 of DDP, with agreement on place of destination before, risks of goods transfer at the time when the goods are placed at the buyer's office ready for unloading. Since goods were lost in the sea, the risks

have never been passed to **RESPONDENT**.

47. However, regarding to the time when risks pass, rules of DDP is different from provisions of *CISG*. So the question comes to which one to apply. According to *CISG Art.*6, it allows **PARTIES** to partially repeal or abrogate the provisions of it. Meanwhile, Incoterms can be used to deviate from the default risk allocation. [*Erauw*] Some professional even said that disputes relating to delivery and passing of risk normally will concern trade terms related to the *CISG* instead of CISG itself. Upon all these above, *Art.*67 was derogated. And risks did not pass to **RESPONDENT** when goods were lost at sea, pursuant to DDP.

48. Therefore, **CLAIMANT** must resupply them because obligation remains. [*Erauw*] However, **CLAIMANT** insisted on asking **RESPONDENT** for balance payment instead of resupplying the goods. As a result, **CLAIMANT** failed to deliver the goods, contributing to a breach of contract and *CISG Art.*60.

B. RESPONDENT is supposed to refund the payment.

49. Resorting to Art.74, **RESPONDENT** may claim damages which consist of a sum equal to the loss for **CLAIMANT**'s breach, including loss of profit. Since **RESPONDENT** has never received the goods, and has paid the entire payment, **CLAIMANT** is supposed to refund the payment because the entire payment is the loss suffered by **RESPONDENT**.

50. On condition that the purchasing price and number were fixed in the contract [*p.6, Cl. Ex. No.2. Art.3*], **PARTIES** could foresee that a breach of contract would be

related to the payment. Also, before the conclusion of Agreement No.1, **RESPONDENT** expressly told **CLAIMANT** its purpose of purchasing watchstraps, and Cherry Watch has been officially launched for several months, the loss of profits is also foreseeable.