SIXTH INTERNATIONAL

ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

5 – 9 JULY 2016

HONG KONG

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

MEMORANDUM FOR RESPONDENT

TEAM NO. 521 R

List of Abbreviations

Abbreviation	Full Citation
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules
CIETAC Model Clause	China International Economic and Trade Arbitration Commission Model Arbitration Clause
CISG	The United Nations Convention on Contracts for the International Sale of Goods
CLAIMANT	Albas Watchstraps Mfg. Co. Ltd.
Cl. Ex.	Claimant's Exhibit
DDP	Delivered Duty Paid (INCOTERMS 2010)
ICSID	International Centre for Settlement of Investment Disputes
n.	footnote
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.
Sec.	Section
SPA-1	Sale and Purchase Agreement no. 1
SPA-2	Sale and Purchase Agreement no. 2
SPAs	Sale and Purchase Agreement no. 1 and no. 2
Sub.	Subsection
UNCITRAL	The United Nations Commission on International Trade Law

the Tribunal	Ms. Felicity Chan, Dr. Anne Descartes and Mr. Martin Mayfair (chief).

Table of Authorities

Cases

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Progress Bulk Carriers	*Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm) English Commercial Court Feb. 17, 2012	31
	United States	
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Hauser	*Hauser v Western Group Nurseries, Inc* 767 F. Supp. 475, 488 United States District Court for the Southern	2

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Online resources

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ARGUMENTS

I. Whether the Tribunal Has Jurisdiction to Deal with the Payment Claims?

1. **RESPONDENT** respectfully submits that the Tribunal, constituted in accordance with Article 19(a) SPA-2, is entitled to hear the dispute and determine its own jurisdiction under the competence-competence principle. Both Article 16(1) UNCITRAL Model Law and Article 6(1) *CIETAC Rules* provide express recognition and empowerment of the competence-competence of this Tribunal.

A. Interpretation of Article 19 SPA-2

2. To start with, it is noted that Article 19 as a whole[1] should be interpreted according to laws of the State of New York under Article 19(c). As a matter of contract law in New York State, it is generally accepted that in the case of total repugnancy between two contract clauses, the first of such clauses shall be received, and the subsequent one rejected. [*Brennan*; *Honigsbaum's*] However, where two seemingly conflicting provisions can be reconciled, a court should do so in order to give both effect. [*Hauser*] Moreover, in cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it. [*Jacobson*]

3. In the present case, Article 19 (a) concerns arbitration over "disputes concerning payments" while Article 19 (b) speaks of litigation in the Hong Kong courts over "all disputes arising out of or in connection with" the SPA-2. These two clauses

[1] Clarification # 3.

prima facie prescribe two irreconcilable dispute settlement methods on the same matter, "disputes concerning payments". Article 19(b) contains expansive language which is broad enough to cover "disputes concerning payments" prescribed in Article 19(a). Notwithstanding, these two clauses can be reconciled through interpretation and this Tribunal should do so in order to give both effect. "Disputes over payments" can be narrowly and literally taken to mean matters such as the amount of money the parties are entitled to receive and obligated to pay or the methods of payments while "all disputes" can be construed to mean "all other disputes unrelated to payments". Moreover, since Article 19 was prepared by **CLAIMANT**, it should also be construed most strongly against the party who prepared it. Accordingly, Article 19 can be interpreted to mean that it gives a selection of dispute settlement methods to **PARTIES** over different matters, i.e. arbitration over "disputes concerning payment" and litigation over "all other disputes unrelated to payments"

B. Disputes Unrelated to the Payments

4. **RESPONDENT** respectfully submits that the Tribunal does not have jurisdiction to deal with the payment claims. In the present case, **RESPONDENT** does not dispute the amount of money it should pay or the methods of payments, if any. By contrast, **RESPONDENT** did not pay the balance because **CLAIMANT** breached the contract by providing watchstraps which are not of good quality. Moreover, **RESPONDENT** demands a refund of its first payment, which was procured by economic duress. Under the circumstances, the disputes are unrelated to the payments but whether **CLAIMANT** has breached the contract in the second

transaction. Accordingly, the present disputes fall within the scope of Article 19(b) and thus should be resolved through litigation.

C. Pre-Arbitration Procedures

5. Alternatively, even if the present disputes are governed by Article 19(a) SPA-2, **RESPONDENT** submits that **CLAIMANT** failed to comply with the pre-arbitration requirements in Article 19(a), that is, to resolve the disputes and reach an amicable resolution within a reasonable period of time (not to exceed 14 days).

6. **RESPONDENT** submits that such pre-arbitration requirements are a mandatory contractual obligation. In *Kemiron*, it was held that the provision requiring the matter to be "mediated within fifteen days after receipt of notice" and "in the event the dispute cannot be settled through mediation, the parties shall submit the matter to arbitration within ten days after receipt of notice" is mandatory.[2] Moreover, in *Consolidated Edison*, the Supreme Court of New York held that a requirement to give notice of dispute and attempt to settle it for 30 days was also mandatory. According to a study of ICC arbitral awards, it also concludes that "when a word expressing obligation (such as "shall") is used in connection with amicable dispute resolution techniques, arbitrators have found that this makes the provision binding upon the parties" and "compulsory, before taking jurisdiction."[3]

7. Likewise, in the present case, **RESPONDENT** submits that the pre-arbitration procedures in Article 19(a) are mandatory in nature. First, the imperative term "shall"

[2] See *Kemiron*.
[3] Figuera, Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, 14(1) ICC Ct. Bull. 71, 72 (2003)

is used. Second, both **PARTIES** are also required to resolve the disputes and reach an amicable resolution within 14 days. On 27 February 2015, **RESPONDENT** wrote to **CLAIMANT** regarding its breach of contract.[4] However, since then, **CLAIMANT** has never communicated with **RESPONDENT** to resolve the disputes. As **CLAIMANT** has now suddenly applied for arbitration without paying regard to the mandatory pre-arbitration requirements, its request for arbitration should be dismissed, even if the Tribunal finds that it has jurisdiction to deal with the payment claims in accordance with Article 19(a) SPA-2.

II. Whether the CISG Governs the Claims Arising under the SPAs?

8. It is submitted that the CISG governs the claims arising under the SPAs on the grounds that the CISG applies to contracts of sale of goods between parties whose places of business are in different Contracting States according to Article 1(1)(a) CISG, unless parties have expressly excluded its application according to Article 6 CISG.

9. In the present case, it is undisputed that both Yanyu and Wulaba became Contracting States to the CISG in 2006 and 2007 respectively.[5] It is further undisputed that since the contract in question is a contract of sale of watchstraps between **PARTIES**, whose places of business are in Yanyu and Wulaba respectively, the CISG is supposed to be applicable accordingly.

[4] *Res. Ex. No.2.*
[5] Clarification # 20.

10. However, **RESPONDENT** submits that it has effectively excluded the application of the CISG in accordance with Article 6 CISG. In the present case, Article 20 SPAs is a choice of law clause, which does not refer to the CISG. It provides that "[t]*he contract shall be governed by the national law of Wulaba. All other applicable laws are excluded*."

11. In *ICC Arbitration Case No. 8482*, the contract between the parties from Poland and Greece contained a clause that "this contract shall be subject to the Swiss law." As regards the question of whether the CISG has been effectively excluded, the arbitral tribunal held that it should interpret the intentions of the parties in accordance with Article 8 CISG and subsequently that, "by choosing Swiss law as a 'neutral' law to apply to the Contract and with an Arbitration Clause choosing Zurich as the place of the Arbitration, it may be concluded that the Parties intended the Arbitrators to apply the Swiss Code of Obligation and not the Vienna Convention…"

12. In light of the above jurisprudence, it is submitted that **RESPONDENT** also intended to and does opt out the CISG. First of all, Article 20 SPAs specifically refers to "*the national law of Wulaba*", rather than "*the law of Wulaba*". The term "national" is intended to qualify and confine "law" to the legislations and case-law at national level. It is acknowledged that the CISG is a self-executing treaty which "properly creates a private right of action"[6], meaning that the CISG does not require domestic legislation but is binding as soon as it is ratified. However, the CISG is still an international treaty and should by no means be regarded as "*the national law of Wulaba*".

[6] See *Asante Technologies.*

13. Moreover, it is noted that the national law of Wulaba is an alter ego of the English Sale of Goods Act 1979[7] and the United Kingdom is not a Contracting State of the CISG. Under the circumstances, this also shows that **RESPONDENT** wants to exclude the application of the CISG to the contract.

14. Finally, such an intention is also evidenced in Article 19 SPAs. Similar to *ICC Arbitration Case No. 8482,* under Article 19 SPAs, **RESPONDENT** chose Hong Kong as a place of arbitration over disputes concerning payments and of litigations over disputes unrelated to payments. Hong Kong is a common law jurisdiction, the same as Wulaba[8]. Accordingly, this further strengthens the proposition that **RESPONDENT** intended to exclude the application of the CISG as it did not want to be caught by surprise by having some other unknown or unfamiliar law applicable to the contract.[9] Therefore, it is submitted that **RESPONDENT** has effectively excluded the CISG.

III. Assuming the CISG does Apply, whether its Provisions have been Invoked regarding:

A. Lack of Insurance Coverage in the First Transaction

15. **RESPONDENT** submits that **CLAIMANT** is liable for the lack of insurance in the first transaction.

[7] Clarification # 11.
[8] Clarification # 23.
[9] Clarification # 30.

16. Article 9(1) CISG states that the parties are bound by any usage to which they have agreed, whether it is local or international. In the present case, according to Article 3 SPA-1, **PARTIES** agreed for the watchstraps to be shipped on the DDP term. INCOTERMS 2010, as published by the ICC, defines "DDP" as being where "the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities."[10] Under DDP, **CLAIMANT** has to bear "*all the costs and risks*" of bringing the goods to the office of **RESPONDENT**. The risks of the goods would not pass to **RESPONDENT** until the goods were delivered to **RESPONDENT's** office. Therefore, it is not necessary for **RESPONDENT** to take out an insurance policy for the goods because **CLAIMANT** is ultimately liable for any loss or damage incurred in the course of delivery.

17. Moreover, the understanding that insurance coverage is part of DDP is also reflected in the letter sent by the CEO of the shipping company to **CLAIMANT** on 28 October 2014, in which the CEO asked **CLAIMANT** to "contact its insurance company" if it has "purchased insurance for the goods."[11]

[10] Available at: www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/ (last visited 7 June 2016).
[11] *Cl. Ex. No.5*.

18. Accordingly, **RESPONDENT** is not responsible for the purchase of an insurance policy for the goods.

B. Timing of Delivery of the Prototypes

19. Article 5 SPA-1 requires the Seller to provide a prototype for approval within 14 days from receipt of deposit. **RESPONDENT** paid the deposit on 31 July 2014 and **CLAIMANT** sent the prototypes on 14 August 2014 which **RESPONDENT** received on 15 August 2014.[12] **RESPONDENT** submits that since it had not been provided with the prototypes within 14 days, **CLAIMANT** failed to comply with the 14-day requirement.

20. Under Article 8(1) CISG, when interpreting the meaning of statements and conducts of parties to a contract, the first inquiry is to establish the parties' intent. In the present case, Article 5 SPA-1 was drafted by **RESPONDENT's** lawyers.[13] The phrase "will provide" was used in the first paragraph of Article 5 SPA-1. Unlike the second paragraph in the same article, **RESPONDENT** did not use the phrases such as "will ship", "will send" or "will deliver" because they will normally include a transit time. For example, in the case of "will ship" in the second paragraph, it means that the Seller can start to ship the goods within 60 days from receipt of the Buyer's approval of the prototypes but the transit time will not be included in this 60-day period. **RESPONDENT's** lawyers deliberately employed the phrase "will provide" to mean that **RESPONDENT** should have received the prototypes within 14 days, inclusive of the transit time. Such intent of **RESPONDENT** will become

[12] *Cl. Ex. No.4*.
[13] Clarification # 13.

clearer if the first paragraph is re-phrased as "[t]he Buyer will be provided with a prototype within 14 days from receipt of deposit." Accordingly, when **CLAIMANT** sent the prototypes on 14 August 2014 which **RESPONDENT** received on 15 August 2014, **CLAIMANT** was a day late and thus violated the 14-day requirement.

21. **RESPONDENT** did approve the quality of the prototypes by saying the prototypes are "beautiful" and instructing **CLAIMANT** to start mass production.[14] However, this should not be taken to mean that **RESPONDENT** acquiesced late delivery of the prototypes on 15 August 2015.

C. Non-conformity of Goods

22. **RESPONDENT** submits that **CLAIMANT** has not delivered goods conforming to the contract, as required by Article 35(1) CISG, because the watchstraps produced by **CLAIMANT** are not fit for purpose, namely, the watchstraps are unable to fit into **RESPONDENT's** watchcases.

23. In the *Netherlands case,* which concerned an increased level of mercury in crude oil products and the English company buyer's refusal to pay on the ground of non-conformity of the goods, the arbitral tribunal held that Article 35 (2)(a) CISG should be interpreted according to the reasonable quality criterion. Contrary to Article 35(2)(b) CISG, Article 35(2)(a) does not require that quality requirements be determined *at the time* of the conclusion of the contract, but that factual elements

[14] *Cl. Ex. No.4*.

occurring *after* the conclusion of the contract might also be taken into account to determine quality standards.

24. In the present case, Article 2(1)(g) SPA-2 contains a product quality specification on the size of the watchstraps, which have to "fit the customer's watchcase". This clause had expressly indicated the particular purpose of the watchstraps. On 17 July 2014, **RESPONDENT** also sent a Cherry watchcase to **CLAIMANT** to facilitate its technician to check if **CLAIMANT** will be able to manufacture watchstraps that fitted to the watchcases.[15] However, upon receipt of the final batch of watchstraps, **RESPONDENT** discovered that the watchstraps did not fit into the Cherry watchcases. Accordingly, **CLAIMANT** has violated Article 35(2)(a) CISG by having manufactured goods not fit for purpose.

D. Payment of Money under the Transactions

25. In relation to the first payment, **RESPONDENT** submits that it is entitled to demand a full refund. Since **PARTIES** agreed for the watchstraps to be shipped on the DDP term, the risks of the goods had not passed to **RESPONDENT**. **CLAIMANT** remains liable for any loss or damage incurred in the course of delivery.

26. In addition, **RESPONDENT** submits that the payments for the first transaction and the second transaction were procured by economic duress. Article 4(a) CISG governs only the formation of the contract of sale of goods, not the validity of

[15] *Res. Ex. No.1.*

contract. In *False hair*, which concerned a dispute over the validity of the contract, the CIETAC tribunal held that Article 4(a) CISG did not cover such an issue, and therefore the validity of the contract was governed by Chinese law following the principle of the most and real closest connection principle.[16]

27. Unlike *False hair*, in the present case, both SPAs contain a choice of law clause referring to the national law of Wulaba, which is a common law jurisdiction. Accordingly, whether the first payment and the second transaction were procured by economic duress can be examined in light of common law principles in that regard.

28. In *DSND*, the court set out the elements of economic duress, in which there must be: (a) a threat or pressure; (b) in practical terms, compulsion on, or a lack of practical choice for, the victim; (c) illegitimate pressure, and (d) significant cause to induce a party to enter into the contract.

29. In the present case, **RESPONDENT** submits that it was forced to make full payment for the lost goods in the first transaction, otherwise, **CLAIMANT** would have not arranged for a replacement shipment. **RESPONDENT** needed the watchstraps urgently. **RESPONDENT** would have never signed the SPA-2 had **RESPONDENT** not been desperate for the watchstraps.

30. Moreover, it is submitted that **RESPONDENT** did not have practical choice. **RESPONDENT** planned to introduce the watchstraps in February 2015.[17] It had arranged for expensive professional photos of the prototypes for its newly launched

[16] See *False hair*.
[17] Clarification # 54.

website and an expensive design company to create a website for the promotion of the products.[18] **RESPONDENT** also managed to secure some orders from its clients based on the prototypes.[19] It would suffer a great loss if it had not agreed to the replacement arrangement.

31. Furthermore, **RESPONDENT** submits that the pressure so exerted was illegitimate. In *Progress Bulk Carriers,* the court held that illegitimate pressure includes lawful but unethical behaviour. In the present case, **CLAIMANT** knew that **RESPONDENT** had informed all of its existing customers about the new line of smartphone accessories and had even created a new website and posted photos of the prototypes on its website. Knowing that **RESPONDENT** was so desperate for the watchstraps, **CLAIMANT** was unethical in coercing **RESPONDENT** to settle the SPA-1 and enter into the SPA-2.

32. Finally, there was a significant cause inducing **RESPONDENT** to enter into the second contract. **CLAIMANT** offered to provide a replacement shipment only if **RESPONDENT** accepted to make full payment for the lost goods. As a result, since **RESPONDENT** needed the watchstraps urgently, it reluctantly paid for the lost goods and proceeded with the SPA-2.

33. Accordingly, **RESPONDENT** submits that the first payment and the second contract were procured by economic duress.

[18] Clarification # 39.
[19] Clarification # 25.

REQUEST FOR RELIEF

RESPONDENT respectfully submits that the Tribunal render in favor of **RESPONDENT**:

1. Counterclaim compensation:

   (a) the sum of USD 17.4 million for the payments made to **CLAIMANT**;

   (b) the sum of USD 10 thousand for the development of the website costs; and

   (c) the sum of USD 20 million for loss of profits

2. **CLAIMANT** pays all costs of the arbitration; and

3. **CLAIMANT** pays **RESPONDENT** interest on the amounts set forth in items 1 and 2 above, from the date **RESPONDENT** had paid the first deposit.