INTERNATIONAL ALTERNATE DISPUTE RESOLUTION

MOOTING COMPETITION

2016

MEMORANDUM FOR CLAIMANT

CLAIMANT	**RESPONDENT**
Albas Watchstraps Mfg Co Ltd.,	Gamma Celltech Co. Ltd.,
241 Nathan Drive,	17 Rodeo Lane,
Yanyu City, Yanyu. Wulaba.	Mulaba, Tel: (922) 2245522

Team Code: 609 C

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LIST OF AUTHORITIES

BOOK/COMMENTARIES

1. Nigel Blackaby, Constantine Partasides, et. al., *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press, 2015).
2. C.H. Beck, Hart, Nomos, *UN Convention on Contracts for International Sale of Goods (CISG) Commentary* (Hart Publishing, 2011).
3. Dicey, Morris & Collins, Dicey, Morris & Collins on Conflict of Laws (14th ed., Sweet & Maxwell, 2006)
4. Gary B. Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International, 2014).
5. Port, Otto, et al., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on New York Convention* (Kluwer Law International, 2010)
6. Robert Duxbury, *Contract Law* (1ed., Sweet & Maxwell Limited, 2008).

CONVENTION/ RULES/ STATUES

China International Economic and Trade Arbitration Commission, 2015	CIETAC
UN Convention on Contracts for International Sale of Goods, 1980	CISG
International Commercial Terms, 2010	INCOTERMS
The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1959	New York Convention

CASES

INDEX OF ABBREVIATIONS

S. No.	Abbreviation	Content
1.	CIETAC	China International Economic and Trade Arbitration Commission
2.	CLAIMANT	Albas Watchstraps Mfg. Co. Ltd.,
3.	CISG	United Nation Convention on Sale of Goods
4.	CP	Condition Precedent
5.	DDP	Delivery Duty Paid
6.	HK	Hong Kong
7.	INCOTERMS	International Commercial Terms
8.	RESPONDENT	Gamma Celltech Co. Ltd.,
9.	SPA	Sale Purchase Agreement
10.	SPA 2	Sale Purchase Agreement 2
11.	USA	United States of America
12.	USD	United States Dollar

SUMMARY OF ARGUMENTS

I. The Tribunal has the jurisdiction to hear the present dispute.

II. CISG is the substantive law of the Sale and Purchase Agreements.

III. Assuming CISG has been invoked, the following has been established:

a. The Respondent is liable to buy insurance under Article 32 (3) of the CISG

b. Time was not the essence of the contract and the Claimant is not liable for any alleged late delivery of the prototype.

c. The goods are in conformity with the prototype

d. The claimant is entitled to reliefs under Article 62, CISG.

ARGUMENTS ADVANCED

I. THE TRIBUNAL HAS THE JURISDICTION TO DEAL WITH THE CLAIMS OF THE CLAIMANT.

1. It is submitted that this Tribunal has the jurisdiction to deal with the present dispute in light of **(A)** Under CIETAC Arbitration Rules the Tribunal has the power to determine its jurisdiction, **(B)** The present disputes of the Claimant are "Disputes concerning payments", **(C)** Even if the dispute presents multiple claims, some arbitrable and some allegedly not, the former must be sent to arbitration, **(D)** That Article 19 (b) and (c) are void for absence of consensus ad idem and hence the Claimant cannot be bound by them.

(A) UNDER CIETAC ARBITRATION RULES THE TRIBUNAL HAS THE POWER TO DETERMINE ITS JURISDICTION

2. Article 6 of the CIETAC Arbitration Rules enunciates the *Competence-Competence* principle of international arbitration which enables the Tribunal to determine its own jurisdiction. Furthermore, Article 19(c) of the SPA states that the said clause "*would be interpreted in accordance with the laws of the State of New York*". It is trite law that the arbitration clause is autonomous[1] and separable from the main contract in which it appears[2]. This is known as the 'separability doctrine' in arbitration, which effectively means that if the main contract is tainted with illegality or is terminated[3], the arbitration clause will survive[4] and can be enforced as a separate agreement.[5] Furthermore, it is settled law that there may be different laws governing the underlying contract and the arbitration agreement such that the arbitration agreement can be governed and interpreted by the law specific to it[6].

3. To make the mere formality of entering into "an amicable resolution" prescribed under Article 19 to be legally enforceable as a condition precedent, the laws of New York state that there should be a contract that provides some definite and objective criteria or standards for determining whether a sufficient negotiation took place[7]. Further, when parties are called upon to use their "best efforts" or in the present case "amicably" reach an

[1] Final Award in ICC Case No. 8938, XXIVa Y.B. Comm. Arb. 174, 176 (1999).
[2] Granite Rock Co. v. Int'l Bhd of Teamsters, 130 S.Ct. 2847, 2857 (U.S. S.Ct. 2010).
[3] BP Exploration Co. v. Gov't of the Libyan Arab Repub., Ad Hoc Award on Merits of 10 October 1973, V Y.B. Comm. Arb. 143, 157 (1980)
[4] Harbour Assurance Co. v. Kansa General International Insurance Co., [1992] 1 Lloyd's Rep. 81, ¶¶92-93.
[5] Westacre Invs. Inc. v. Jugoimport-SDPR Holdings Co. [1998] 4 All ER 570 (QB) (English High Ct.)
[6] Arsanovia Ltd. & Ors. v. Cruz City 1 Mauritius Holdings, [2012] EWHC 3702 (Comm).
[7] Jillcy Film Enterprises v. Home Box Office, 593 F. Supp. 515 (S.D.N.Y. 1984**).**

agreement and resolve the matter are unenforceable unless there is a clear set of guidelines against which to measure a party's best efforts[8]. In the present case, there is no evidence of any such criteria laid down in the dispute resolution agreement, thereby making that part of the clause lack legal backing and validation.

(B) THE PRESENT DISPUTES OF THE CLAIMANT ARE "DISPUTES CONCERNING PAYMENTS".

4. "Disputes concerning payments" includes disputes concerning contractual and non-contractual monetary claims that have any factual relation to the contract. The Claimant's claim of USD 9.6 million arising out of the non-payment under Sale and Purchase Agreement (SPA)[9] and the Respondent's claim of 17.4 million which includes payments made under SPA and Sale and Purchase Agreement No.2 (SPA2) [10]are arbitrable under the arbitration agreement. The loss of profits is merely a consequential relief both under the law of Wulaba and CISG (74) and hence, `arbitrable.
5. Under Article 14 of the CIETAC Rules, the Claimant to merge payment claims under SPA and SPA 2.

(C) EVEN IF THE DISPUTE PRESENTS MULTIPLE CLAIMS, SOME ARBITRABLE AND SOME ALLEGEDLY NOT, THE FORMER MUST BE SENT TO ARBITRATION.

6. Assuming whilst denying that under the present dispute some claims are arbitrable and some not, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. The laws of New York as interpreted by the Supreme Court of United States of America irrevocably state that in cases where the complaint deals with arbitrable claims and non-arbitrable claims, the court shall mandate the arbitration of arbitrable claims when one party files for motion to compel, even where the result would lead to "piecemeal litigation" or inefficient maintenance of separate proceedings in different fora.[11]
7. In the present case, even if the Tribunal were to hold that the following claims raised by the parties are not arbitrable, as stated above splitting of claims is legally permitted, therefore the Tribunal may proceed with the claims it has jurisdiction over.

[8] Mocca Lounge, Inc. v. Misak 94 A.D.2d 761 (1983).
[9]Moot Problem, Pg. 4.
[10]Moot Problem, Pg.16.
[11]KPMG v. Cocchi No. – 1521, decided 7th November 2011. ; Dean Witter Reynolds Inc. v. Byrd,470 U. S. 213, 217 (1985).

a. Respondent counter claim of USD10 thousand for the development of the website costs.

b. Respondent counter claim of USD 20 million for loss of profits[12]

(D) ARTICLE 19 (B) AND (C) ARE VOID FOR ABSENCE OF CONSENSUS AD IDEM AND HENCE THE CLAIMANT CANNOT BE BOUND BY THEM.

8. It is submitted that the Claimant did not consent to Article 19 (b) and (c) of the SPA. A prior conversation between the Claimant and the Respondent indicates that consensus was reached only with regard to preferring arbitration as a dispute resolution mechanism. It is an established fact that the Respondent has inserted clause (b) and clause (c) without the knowledge of the Claimant and to give rise to confusion and effectuate non applicability of the arbitration agreement altogether, even though there is a valid arbitration agreement under 19 (a)[13].
9. If clause (c) is rendered void and severed from the agreement, the governing law of the arbitration agreement will, according to the conflict of laws rules, be the system of law which has the closest and most real connection to the arbitration agreement[14]. In the present case, the parties by consenting to Hong Kong as the seat of the arbitration, it can be inferred that Hong Kong has a real connection to arbitration agreement and Article 19 is governed by the laws of Hong Kong, as applicable.
10. Should the Tribunal decide that Hong Kong law is the governing law of the arbitration agreement; the mere formality of "an amicable resolution" before resorting to arbitration is not enforceable due to "contractual uncertainty"[15], thereby legally permitting the parties to initiate arbitration.

II. THE CISG GOVERNS THE CLAIMS ARISING UNDER SALE AND PURCHASE AGREEMENT AND THE SALE AND PURCHASE AGREEMENT NO. 2

11. It is submitted that **(A)** with regard to Article 20 of SPA and SPA 2, the CISG was not explicitly excluded in the terms of the contract and hence, it would be the governing law of the contract, **(B)** assuming whilst not admitted that the CISG is not applicable to the State of Wulaba, CISG is applicable in accordance with Article 1(1)(b), the CISG, **(C)** Article 20 is void and the law of Yanyu is the governing law of the contracts

[12]Moot Problem, Pg. 16
[13]§20. Restatement (Second) of contracts
[14]Sulamerica CIA Nacional de Seguros SA and others v. Enesa Engenharia SA and others [2012] EWCA Civ 638
[15] Hyundai Engineering and Construction Co. Ltd. v. Vigour Ltd. [2005] 1 HKC 579.

and the CISG would apply. Therefore, the CISG is the law applicable to the contract and not the laws of Wulaba.

(A) UNDER ARTICLE 20 OF SPA AND SPA 2, THE CISG WAS EXPLICITLY EXCLUDED

12. Article 1(1)(a) of the CISG states that the CISG applies to contracts of sale of goods between parties whose business are in different states when the states are contracting states. Therefore, the CISG would govern the contract. Under the CISG, if parties wish to exclude the application of the CISG to their transaction, they must provide clear language evidencing such intent.[16] The choice of law clause of the contract should be of such a nature that it unambiguously eliminates the applicability of the CISG[17].
13. In the present case, the application of the CISG was not explicitly excluded in the language of Article 20 as the wording used in second sentence of this Article is "all other applicable laws are excluded." This Article did not expressly mention the exclusion of the CISG and hence it should be applicable.

(B) ARTICLE 20 OF THE SPA AND SPA 2 ARE VOID AND INAPPLICABLE

14. It is submitted that Article 20 of SPA and SPA 2 are void and hence inapplicable because of misrepresentation by the Respondent to the Claimant in regard with a material fact of substantial importance to the contract. It is unequivocally clear that the Claimant did not understand the purpose of Article 20 in the contract. On seeking more information from the Respondent with respect to the scope and effect of Article 20, the Respondent assured the Claimant that, "it is a standard term and it would not make affect the Claimant." Relying on this representation, the Claimant signed the contract[18]**.**
15. It is now beyond dispute that the Respondent's representation was false. Therefore, in accordance with the law of Wulaba, the Respondent is liable of misrepresentation and such a misrepresentation, being of actionable nature, would render the contract voidable at the instance of the Claimant.[19] Therefore, Article 20 is void and inapplicable.

[16]Assante Technologies, Inc. v. PMC-Sierra, Inc., 164 F.Supp. 2d 1142.
[17]Ukraine 23 January 2012 Arbitration proceeding (Corn case), decided on 23 Jan. 2012.
[18] Clarification No. 30.
[19]Avon Insurance Plc v. Swire Fraser Ltd. [2000] 1 All E.R. (Comm) 573 ;Pilmore v. Hood (1853) 5 Bing., N.C. 97

(C) ARTICLE 20 BEING VOID, YANYU IS THE GOVERNING LAW OF THE CONTRACT AND CISG WOULD APPLY

16. As a consequence of Article 20 being void, the national law of Wulaba would not be applicable and the governing law of the contracts would be determined in accordance with the conflict of law rules. The rules unequivocally state that the law applicable to a contract would be the one, which is "most closely connected to the contract."[20] Furthermore, it is presumed that the contract is most closely connected with the country where the party who is effectuating the performance of the contract is the habitual resident at the time of conclusion of the contract[21]. This signifies that the governing law of that particular state would be applicable which is effectuating the performance of the contract at the time when the contract completes.

17. In the present case, the law of Wulaba would not apply to the contract as the contract was not completed in Wulaba. The contract concluded in the state of Yanyu as majority of transactions took place in Yanyu, which is the seller's state. Therefore, the law of Yanyu would be applicable to this contract. It is acknowledged that Wulaba and Yanyu are signatories of CISG but it was only Wulaba that did not incorporate the CISG. This by implication means that Yanyu applied CISG to its national law. Thus, CISG would be applicable to the contract.

[20] *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.,* [1984] A.C. 50
[21] *James Miller & Partners Ltd. Appellants v Whitworth Street Estates (Manchester) Ltd*

III ASSUMING THE CISG DOES APPLY, ITS PROVISIONS HAVE BEEN RIGHTLY INVOKED

18. It is submitted that assuming the CISG does apply, its provisions have been rightly invoked and **(A)** the Respondent is liable for lack of insurance coverage in SPA under Article 32(3), CISG, **(B)** time was not the essence of the contract and the Claimant is not liable for any alleged late delivery of the prototype, **(C)** the goods are in conformity with the prototype and **(D)** the Claimant is entitled to the reliefs under Article 62, CISG.

(A) THE RESPONDENT IS LIABLE TO BUY INSURANCE FOR THE TRANSACTION UNDER ARTICLE 32(3), CISG

19. In the present case, the contracts provide for delivery of the goods to be made in accordance with DDP (INCOTERMS) 2010.[22]The INCOTERMS unequivocally do not cover or provide for any obligation on the buyer to insure the goods.[23] Even if the INCOTERMS were to be construed to oblige the seller to purchase insurance, such obligation will arise only upon a request by the buyer.[24]In the present case, admittedly, there has been no request by the Respondent to the Claimant to purchase any insurance.
20. Furthermore, even under Article 32 (3) of the CISG, given that the Claimant is not bound to effect insurance under the INCOTERMS, the Claimant is only obligated, if requested by the Respondent, to provide all available information necessary for the Respondent to effect insurance.[25] No such request has been made by the Respondent.

(B) TIME WAS NOT THE ESSENCE OF THE CONTRACT AND THE CLAIMANT IS NOT LIABLE FOR ANY ALLEGED LATE DELIVERY OF THE PROTOTYPE

21. The Claimant delivered the prototype within the specified delivery period. The payment was made to the Claimant on 31st July 2014 and the prototype was received by the Respondent on 14thAugust 2014, which is with the 14 days' period provided in the contract. Even if it is held that the Claimant delayed delivery of the prototype, it is submitted that the timing of delivery of prototype was not the essence of the contract in order

[22]Art. 3, SPA and SPA2.
[23]Part III, Chapter II Obligation of Seller, Commentary on CISG, edited by Stefan Kroll, LoukasMistelis, Pilar Perales Viscasillas (eds), ISBN 978-7-406-58416-9], Page No. 455.
[24]Heading B3 of Interpretation of INCOTERMS 2010,
[25]Part II, Chapter II Obligation of Seller, Commentary on CISG, edited by Stefan Kroll, LoukasMistelis, Pilar Perales Viscasillas (eds), ISBN 978-7-406-58416-9], Page no. 450-451.

to invoke a fundamental breach under Article 43 of the CISG. A mere failure to observe a delivery date, with delivery still being possible, is not generally to be regarded as a fundamental breach of the contract.[26]

22. Further, the buyer may claim damages if the delay has caused him any damage, however, he is not entitled to terminate the contract for this reason.[27]
23. Therefore, even though the CISG does not explicitly mention whether the timing of delivery of prototype can cause a fundamental breach, the case laws and commentaries have established that mere late delivery cannot constitute breach**[28].** The timing of delivery of prototype was not the essence of the contracts as the Respondent went ahead to enter into another contract (SPAII) without raising any objection to the late delivery of prototype.

(C) THE GOODS ARE IN CONFORMITY WITH THE PROTOTYPE.

24. The Claimant prepared the prototypes in conformity with the specifications under SPA, it could only start production goods once prototypes were approved by the Respondent. Upon examining the prototype, the Respondent approved the prototype and called upon the Claimant "to start mass production". This establishes that the Respondent has approved the prototype in the form they were provided to it.
25. The Respondent's allegation that the goods do not conform to the prototype as they are allegedly "not as soft" nor "look handmade" are not valid reasons for non-conformity under Article 35, CISG. The goods are fit for the purposes for which they would be ordinarily used. The Respondent was well aware that the final goods manufactured by the Claimant would not be handmade because Claimant was required to arrange the tooling for mass production only after the prototypes were approved.

[26](Schlechtriem, in Commentary on the UN Convention on the International Sale of Goods (CISG), Schlechtriem ed., Munich, 1998, p. 177)
[27]CLOUT Case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 Apr. 1997

(D) THE CLAIMANT IS ENTITLED TO THE RELIEFS UNDER ARTICLE 62, CISG

26. The Claimant has performed its obligations under SPA2. For reasons stated hereinabove, the Respondent has failed to perform its obligations under the contract. In the circumstances, the Claimant is entitled to the reliefs of payment in accordance with Article 61 read with Article 62, CISG.

REQUEST FOR RELIEF

For the reasons and authorities discussed above, the Claimant respectfully asks the Tribunal to adjudge and declare that:

I. The Tribunal has jurisdiction to hear this dispute.

II. The Sale and Purchase Agreements are governed by CISG

III. Under the applicability of CISG, the following is the affect on the parties:-

   a. The Respondent is liable to buy insurance under Article 32 (3) of the CISG

   b. Time was not the essence of the contract and the Claimant is not liable for any alleged late delivery of the prototype.

   c. The goods are in conformity with the prototype

   d. The claimant is entitled to reliefs under Article 62, CISG.

The claimant respectfully asks the Tribunal to award that:

1. Liquidated damages in the sum of USD 9.6 million.
2. GCT to pay all costs of the arbitration, including Albas' expenses for legal representation, the arbitration fee paid to CIETAC, and the additional expenses of the arbitration as set out in Article 52, CIETAC Arbitration Rules;
3. GCT to pay Albas interest on the amounts set forth in items 1 and 2 above, from the date Albas made those expenditures to the date of payment by GCT.

Respectfully submitted,

Counsel for the Claimant.