INTERNATIONAL ALTERNATE DISPUTE RESOLUTION

MOOTING COMPETITION

2016

MEMORANDUM FOR RESPONDENT

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 R

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2. C.H. Beck,Hart, Nomos, *UN Convention on Contracts for International Sale of Goods (CISG) Commentary* (Hart Publishing, 2011).
3. Constitutional Reform and Governance Act, 2010.
4. Dicey, Morris & Collins, Dicey, Morris & Collins on Conflict of Laws (14th ed., Sweet & Maxwell, 2006)
5. Gary B. Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International, 2014).
6. Port, Otto, et al., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on New York Convention* (Kluwer Law International, 2010).
7. 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
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LIST OF ABBREVIATIONS

S. No.	Abbreviations	Content
1.	CIETAC	China International Economic and Trade Arbitration Commission
2.	CISG	United Nations Convention on Contracts for the International Sale of Goods
3.	Claimant	Albas Watchstraps Mfg. Co. Ltd.,
4.	DDP	Delivery Duty Paid
5.	INCOTERMS	International Commercial Terms
6.	No.	Number
7.	Ref.	Refer
8.	Respondent	Gamma Celltech Co. Ltd.,
9.	SPA	Sale Purchase Agreement
10.	SPA 2	Sale Purchase Agreement 2
11.	USD	United States Dollar
12.	v.	Versus

SUMMARY OF ARGUMENTS

I. The Tribunal does not have jurisdiction to hear the present dispute

II. The Agreements are governed by the law of Wulaba

III. Assuming the provisions of CISG are invoked, the following would be the consequence of the same:

a. The Claimant breached his duty towards the Respondent and failed to procure an Insurance

b. There was non-conformity of the goods

c. The Claimant was in breach of the Agreement as the delivery of the prototype was not done within the prescribed time frame.

d. The Respondent is entitled to claim back all the monies paid to the Claimant under the Agreement.

ARGUMENTS ADVANCED

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

1. It is submitted that Tribunal does not have the jurisdiction to deal with the present dispute as **(A)** The Respondent has claimed reliefs not within the scope of the arbitration agreement and splitting of claims ought not be allowed in the instant case as that would result in inefficiency, inconsistency and will be against public policy **(B)** If splitting of claims is permitted, the arbitral award will not be enforceable in Wulaba in accordance to Article V of the New York Convention, **(C)** "amicable resolution" is a condition precedent to arbitration under the laws of New York, **(D)** The counter-claims addressed by tribunal are arbitrable.

(A) THE RESPONDENT HAS CLAIMED RELIEFS NOT WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT AND SPLITTING OF CLAIMS OUGHT NOT TO BE ALLOWED IN THE INSTANT CASE AS THAT WOULD RESULT IN INEFFICIENCY, INCONSISTENCY AND WILL BE AGAINST PUBLIC POLICY.

2. The Respondent has claimed reliefs arising out common mistake and negligence under SPA. Further, it has claimed damages for website costs incurred by the Respondent and loss of profits that has resulted from SPA and SPA 2.
3. It is an accepted principle in law that an entire claim arising either upon a contract or a wrong, cannot be divided into several suits if the claims are indivisible, further, a pendency of the first may be pleaded in abatement of the others. It has been further established that for the prevention of vexation and oppression, the courts will enforce consolidation[1].
4. In present case, splitting of claims shall not be done as the underlying agreement of this arbitration agreement is being challenged on the grounds of common mistake and negligence done by the Claimant. The dispute in front of this Tribunal are so intrinsically connected to the matter that will be effectuated in the courts, that if the Tribunal gives an award under this arbitration, it will be inconsistent and inefficient as the underlying agreement is in contention.

[1] Secor v. Sturgis, 16 N.Y. 548

5. For efficiency and consistency to be preserved, all issues arising out of or in connection with the underlying agreement, including disputes concerning payments, shall be dealt with by the Courts of Hong Kong.

(B) IF SPLITTING OF THE CLAIMS IS PERMITTED, THE ARBITRAL AWARD WILL NOT BE ENFORCEABLE IN WULABA IN ACCORDANCE TO ARTICLE V OF THE NEW YORK CONVENTION.

6. Under Wulaba law, the principle of issue estoppel plays a vital role, whereby once a claim has been decided; it cannot be a matter of dispute again[2]. It has been held that issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation[3]. Therefore, splitting of claims is against public policy when such claims are intrinsically connected and a judgment on one is bound to affect the other. The law as established by the English courts states that splitting of claims arising out of the same cause of action or agreement is not allowed[4].
7. Article V of New York Convention states that the recognition and enforcement of an arbitral award may be refused it goes against the public policy of a country. Hence, even if this Tribunal were to hold and pass an award that the various claims of the Parties can be split and pursued in different fora, the enforceability of the such award would be contrary to the public policy of Wulaba.

(C) "AMICABLE RESOLUTION" IS A CONDITION PRECEDENT TO ARBITRATION UNDER THE LAWS OF NEW YORK.

8. The pre-requisite of entering into an "amicable resolution" shall be treated as condition precedent to initiating arbitration. It is settled law that to infer whether a pre-requisite forms an essential part of the contract, so as to satisfy the requirements of being a condition precedent, depends upon the substance and function it is perceived to be playing[5].
9. The "amicable resolution" process plays an essential part in the arbitration agreement, as the parties would only enter into arbitration if they "fail" to reach an amicable resolution. Therefore, unless this prerequisite has been satisfied either of the parties cannot move for arbitration. In present case, there was no attempt to satisfy the condition precedent resulting in the tribunal not having any jurisdiction. It has been settled

[2]R v Hogan [2007] EWHC (Admin) 978
[3]Mills v Cooper [1967] 2 QB 459 1967
[4]Rex v. The Sheriff of Herefordshire l B. &A'l. 672
[5] County of Rockland v Primiano Construction Company 51 N.Y.2d 1 (1980)

in law unequivocally that where a party has not paid any consideration to a condition precedent, the arbitration agreement as a whole has been established to have no consensus.

10. Even if the condition precedent is not of binding nature, it is settled law that even where the initial stages of dispute resolution are not contractually binding, the enforceability of the process has been upheld[6]. Therefore emphasising on importance of following all initial stages as required.

(D) SHOULD THE TRIBUNAL FIND THAT IT HAS JURISDICTION; THE COUNTER-CLAIMS ADDRESSED BY THE RESPONDENT ARE ARBITRABLE.

11. The Respondent's counter claims concerning payments is a sum of USD 17.4 million arising out of SPA and SPA 2.
12. A counter-claim is an independent claim; therefore, the Respondent under Article 14, CIETAC Arbitration Rules intends to merge payment claims arising out of SPA and SPA2 in one arbitration agreement.
13. Assuming the validity of the governing law under 19(c) is challenged by the Claimant, the Respondent submits that the arbitration agreement was signed by Claimant and he had a duty to exercise ordinary diligence and ought to have delved into and understand the meaning of the clauses under Article 19. This contention if made by the Claimant would render the agreement to be within the jurisdiction of the New York Courts as the jurisdiction to any dispute concerning the interpretation of the clause falls within their jurisdiction.

[6]Amf Inc. V. Brunswick Corp., (E.D.N.Y. 1985). 621 F. Supp. 456.

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

14. It is submitted that the CISG does not govern the claims arising under SPA and SPA2 as **(A)** the Parties expressly excluded "all other applicable laws" under Article 20, SPA and SPA 2, **(B)** Even otherwise, the CISG is not applicable to Wulaba as it has not ratified the Convention, **(C)** the laws of Yanyu would not be applicable under Article 1(1)(b), CISG, **(D)** SPA and SPA 2 are void as a result of a common mistake and the Respondent has claimed reliefs arising out of void contracts, and **(E)** The CISG is inapplicable to claims under void contracts and tortious remedies.

(A) THE PARTIES EXPRESSLY EXCLUDED "ALL OTHER APPLICABLE LAWS" UNDER ARTICLE 20 OF SPA AND SPA 2

15. The parties in SPA and SPA 2 expressly excluded "all other applicable laws". This claim is inclusive of the aspect of inapplicability of CISG to this contract. The meaning of "applicable law" means having direct relevance to the contract.[7] Thus, as declared in Article 20, Wulaba law would be governing law of contract.[8]

(B) EVEN OTHERWISE, CISG IS NOT APPLICABLE TO WULABA AS IT HAS NOT RATIFIED THE CONVENTION

16. As arguendo, the CISG would not apply to this contract because Wulaba is only a signatory to CISG and it has not ratified the convention. In regard to the national law of Wulaba, the condition precedent for applicability of any convention is that, it must be ratified by the state of Wulaba.[9] As Wulaba did not ratify CISG, so it would not be incorporated to this contract in accordance with Article 1(1)(a), CISG.

(C) THE LAWS OF YANYU WOULD NOT BE APPLICABLE UNDER ARTICLE 1(1)(B), CISG

17. The laws of Yanyu would not be applicable under Article 1(1)(b), CISG. It is admitted that the Claimant drafted SPA 2 and the Respondent who was situated in the state of Wulaba accepted it. Deriving from provisions of national law of Wulaba, the minute the Respondent accepted the offer of the Claimant and the acceptance was put in course of transmission, the transaction completed and the sale had taken place.

[7] Black's Law Dictionary (10th ed. 2014)
[8] HoMyungMoolsan, Co. Ltd. v. Manitou Mineral Water, Inc., (S.D.N.Y. December 2, 2010)[8].
[9] Part 2, Constitutional Reform and Governance Act, 2010.

This sale concluded in Wulaba. In accordance with the principles of private international law[10], that are applied in regard to Article 1(1)(b), CISG, the law of that contracting state would be applicable to the contract where majority of transaction had taken place. As majority of transaction took place in Wulaba, hence national law of Wulaba would be applicable to the contract.

(D) SPA AND SPA 2 ARE VOID A RESULT OF A COMMON MISTAKE AND THE RESPONDENT HAS CLAIMED RELIEFS ARISING OUT OF VOID CONTRACTS

18. Even otherwise, the Respondent contends that SPA and SPA 2 are void on the grounds of common mistake. Under the Wulaba law, it is settled that a common mistake occurs where two parties have reached agreement but both have made the same mistake as to some fundamental fact concerning the contract. Such fundamental fact includes a mistake as to the subject matter of the contract.[11]

19. In present case, the Respondent entered into the contract only on a precondition that the watchstrap must fit into cherry watchcase and when the Claimant agreed to this prerequisite, only then the Respondent started the further negotiations to the contract. The watchstrap fitting the watchcase was principally the essence of the contract. The given facts evidently establish that (a) the Claimant made the watchstraps "without being aware about the watchcase" and consequently represented to the Respondent that the watchstrap was in conformity with the watchcase. (b) The Respondent who did not possess the watchcase with itself; could not have checked for the watchstrap fitting in the dimensions of the watchcase. Also, Respondent had a reasonable expectation and genuinely believed that the Claimant would prepare the watchstrap in conformity with the occupying capacity of the watchcase. Hence, both parties made a mistake as to subject matter of the contract arising out of the same set of facts. The consequence of a common mistake is that the money paid under the contract is held in trust and/or leads to claim under unjust enrichment. The reliefs claimed by the Respondent are USD 3 Million under SPA, USD 12 Million under SPA and USD 12 Million under SPA 2. These reliefs are claimed under a void contract.

[10]Dicey, Morris & Collins on the Conflict of Laws, 14th edn. By Lawrence Collins with specialist editors. London: Sweet & Maxwell, 2006. 1950

[11]Galloway v. Galloway (1914) 30 T.L.R. 531.

(E) CISG IS INAPPLICABLE TO CLAIMS UNDER VOID CONTRACTS AND TORTIOUS REMEDIES

20. CISG is inapplicable to claims under void contracts in regard to Article 4(a), CISG.[12]The CISG is inapplicable to the reliefs claimed under void contracts.[13]
21. Furthermore, even otherwise the Claimant has admittedly been negligent in preparing the straps in accordance with the watchcase as the workers in the Claimant's factory initially made prototypes and further did mass production without being aware of the existence of watchcase. Such reliefs arising out of Claimant's negligence, being tortious remedies are not governed by the CISG.
22. Therefore, law of Wulaba would be applicable to this contract as CISG would not cover reliefs and remedies claimed under void and tortious contracts respectively.

[12] Herber in v. Caemmerer and Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht* (1990) Article 4, no. 7.
[13]Chase Manhattan Bank NA v Israel-British Bank (London) Ltd [1981] Ch 105.

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

23. It is submitted that assuming the CISG does apply, **(A)** the Claimant was liable for lack of insurance under Article 69, CISG and INCOTERMS (DDP), **(B)** the goods are not in conformity with the prototypes and contract as required under Article 35, CISG, **(C)** the Claimant breached the SPA as it failed to deliver prototype within specified period, **(D)** the Claimant has no right to claim for payment as it failed to perform its obligation and furthermore, it should pay for loss of profit to Respondent under Article 74, CISG.

(A) LACK OF INSURANCE COVERAGE IN THE FIRST TRANSACTION

24. It is submitted that, the obligation to take insurance for the shipment under SPA was on the Claimant because the risk remained with Claimant during course of shipment as per DDP and Article 69, CISG. As per Heading A5 of Interpretation of Incoterms (DDP), Claimant must bear all risks of loss of or damage to the goods until such time as they have been delivered to the Respondent's office. Furthermore, according to Article 69, the risk passes to Respondent only when it takes over the goods. It was also made clear to Claimant that Respondent did not have experience in dealing with such goods and did not want to be surprised by any extra cost.

(B) NON-CONFORMITY OF GOODS

25. From the letter dated 17th July 2014 and Article 2 (1) (g) of SPA and SPA 2 it is indisputably established that the Claimant was required to manufacture watchstraps that fit to the customer's watchcase. Claimant could have avoided being negligent by exercising ordinary diligence to make the watchstraps fit into the watchcase. The Claimant knew that goods would not fit in watchcase. It delivered non-conforming goods to the Respondent and hence, acted in bad faith. It could therefore be inferred that the goods are neither fit for the fundamental purpose for which the contract was entered into, which was expressly made known to Claimant in SPA and SPA 2 and nor did mass production conform with the prototype. [14]

26. Under Article 35(1), CISG, goods are deemed to be in conforming when they correspond to the concrete description contained in the contractual agreement. Furthermore, Article 35(2)(c), CISG provides that

[14](Art 35 (2)(b) and Art. 35 (2)(C))

finals goods should be in conformity to the sample provided by Claimant. It has been submitted that when the Claimant specifically provided a sample, it specified its offer by showing that those qualities would be possessed by final product. In reference to the case of *Delchi Carrier v. Rotorex*[15], the seller was held liable as the goods produced by him did not conform with the prototype which had initially been sent to the buyer. It is submitted that the conformity of the delivered goods must be determined in accordance to the contractual agreement as the seller is obliged to deliver goods which fulfil the requirements of the contract (Art. 35(1), CISG). Goods are deemed not to fulfil the agreed criteria if they are deficient even if they are individually usable.[16]In present case, the goods delivered i.e., the manufactured watchstraps are non-conforming goods as they do not conform to the requirements of the Respondent.

(C) TIMING OF DELIVERY OF PROTOTYPE

27. As per the terms of SPA, the Claimant was required to provide Respondent with the prototype within 14 days from the receipt of deposit money under the SPA. The Respondent provided the consideration for initial deposit on 31st July 2014. But Respondent received the prototype on 15th July 2014, which makes the delivery of the prototype on fifteenth day rather than fourteenth day from deposit of monies. The time is of fundamental essence to the contract as the Respondent in this case desired to have a first mover advantage in the market. The facts evidently establish that the Claimant failed perform its obligation as it should have ideally provided the prototype within 14 days. Hence, it is submitted that the Claimant was in breach of SPA for not delivering the prototypes in time.

(D) PAYMENT OF MONEY UNDER THE TRANSACTIONS

28. It is established that parties to a contract could only ask for damages pursuant to performance of contract. It is submitted that Claimant has not fully performed SPA and SPA 2 and therefore, Respondent is not required to make any payments to Claimant. If goods were delivered under SPA then the Respondent would not have made the payment, as those goods were not in conformity with the prototype and contract.

[15] United States 9 September 1994 Federal District Court (Delchi Carrier v. Rotorex)
[16] Switzerland 27 January 2004 District Court Schaffhausen (Model locomotives case)

Under Article 58, CISG, the seller must perform its obligations in regard to fulfilment of the contract before the buyer. In this case, Claimant failed to perform its obligations by delivering non-conforming goods. This was brought to the knowledge of Claimant by giving it a timely notice pursuant to Article 39(1), CISG. Therefore, Respondent has a right to avoid the contract as the Claimant failed to perform his obligations under the contract by delivering non-conforming goods under Article 51(2). The goods delivered by the Seller are not just below the standards of expectation but are totally unfit for the purpose of the contract. These goods cannot be put to any other reasonable use. As goods are not of the desired quality therefore they cannot be sold to the distributors and hence goods are non-merchantable. The French Supreme Court used the merchantability of the goods as a criterion for determining fundamental breach. In the case seller's manipulation was said to affect the quality of the wine to the extent that its breach was considered a fundamental one and adversely affected the contract.[17]

29. As a consequence of fundamental breach in regard to an essential term of contract by Claimant, Respondent had no obligations to make any further payments in regard to the contract. Furthermore, the Respondent is also entitled to claim back all monies paid to the Seller as provided under Article 81(2), CISG. The Respondent is also entitled to claim loss of profit (USD 20 million) under Article 74, CISG.

[17]See Cour de Cassation, 23 January 1996, Page no. 343

REQUEST FOR RELIEF

For the reasons and authorities stated above, the Respondent respectfully asks the Tribunal to declare that:

I. The Tribunal does not have jurisdiction to hear this dispute

II. The Sale and Purchase Agreements are governed by the law of Wulaba

III. In the case the provisions of CISG are invoked, the following would be the consequences on the parties: -

   a. The Claimant breached his duty towards the Respondent and failed to procure an Insurance
   b. There was non-conformity of the goods
   c. The delivery of the prototype was not done within the prescribed time frame.
   d. The Respondent is entitled to claim back all the monies paid to the Claimant under the Agreements.

The respondent respectfully requests the Tribunal to award:

1. The sum of USD 17.4 million for the payments made to Albas
2. The sum of USD 10 thousand for the development of the website costs
3. The sum of USD 20 million for loss of profits
4. Albas to pay all costs of the arbitration, including GCT 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;
5. Albas to pay GCT interest on the amounts set forth in items 1 and 2 above, from the date GCT had paid the first deposit.

Respectfully submitted,

Counsel for the Respondent