SIXTH INTERNATIONAL

ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

5 – 9 JULY 2016

HONG KONG

MEMORANDUM FOR CLAIMANT

ALBAS WATCHSTRAPS MFG CO LTD

Claimant

v.

GAMMA CELLTECH CO LTD

Respondent

Team No. 841 C

LIST OF ABBREVIATIONS

ABBREVIATION	CONTENT
Art.	Article
Agreement	Sale and Purchase Agreement
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Rules	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules
CIF	Cost, Insurance and Freight
CISG, the Convention	International Sale of Goods (CISG) & Related Transactions, 1980
Claimant, Alba	Albas Watchstraps Mfg Co Ltd
Clarifications	Procedure Order No.2
DDP	Delivery Duty Paid
Incoterms	International commercial terms
Parties	Albas Watchstraps Mfg Co Ltd and Gamma Celltech Co Ltd
Respondent, GCT	Gamma Celltech Co Ltd
UNIDROIT Principles	UNIDROIT Principle of International Commercial Contract, 2010
VCLT	Vienna Convention on the Law of Treaties

LIST OF AUTHORITIES

DOCTRINE

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Born	Gary Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (Fourth Edition), 4th edition, Kluwer Law International 2013	*159 - 170*
Briggs	Adrian Briggs, Agreements on Jurisdiction and Choice of Law 85-97, Oxford University Press (2008)	*529*
Schwenzer	I. Schwenzer & P. Hachem, in I. Schwenzer, Schlechtriem & Schwenzer: Commentary on the UN CISG, 3rd edition, Oxford University Press (2010)	*105*
Fouchard	Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International, 1999	*§1513-14*
Klotz	James M. Klotz International Sales Agreements: An Annotated Drafting and Negotiating Guide, Kluwer Law International, 2008	*126*
Schwenzer, Hachem and Knee	Ingeborg Schwenzer, Pascal Hachem, Christopher Knee, Global Sales and Contract Law, Oxford University Press, 2012	*347*

CASES

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CHINA	
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Jington Estate v. Zhenli; Hock Weber v. A. Weber; R&T v.Henan	Jingtong Real Estate v. Zhenli Technology (2001), Hock Weber v. A. Weber et al. (2009), R&T Administration v. Henan CATV (2011)

Hong Kong Development v. Shenzhen Yong	Hong Kong Jia Development Company v. Shenzhen Yong Company, Intermediate People's Court of Shenzhen Municipality, (2012) Shen Zhong Fa She Wai Zhong Zi No. 226 Case Date 20 November 2012
Lanxi Industrial v. Properties Management	Xi'an Lanxi Industrial Limited v. Xi'an Sanfu Properties Management Co., Ltd. (Application for Confirming Validity of Arbitration Clauses) [Shanghai Second Intermediate Court (2003) Shanghai Second Intermediate Court, 2nd Civil Division, (Civil Case), Initial Ruling, Case No. 64][20040312]
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ICC		
Framatome v. Atomic Energy	Framatome SA v. Atomic Energy Organisation of Iran (AEOI), ICC Case No. 3896, 1982	Supra note 110
FRANCE		
Societé Laborall v. SA Matis	4 March 1998 Cour d'appel de Paris, http://cisgw3.law.pace.edu/cases/980304f1.html	31, 35
Traction Levage SA v. Drahtseilerei	6 November 2001 Cour d'appel de Paris http://cisgw3.law.pace.edu/cases/011106f1.html	x abstract
GERMANY		
Raw salmon case	22 September 1998 Oberlandesgericht Oldenburg	30, 31

CONVENTIONS/RULES

CITED AS	CONTENT
UNIDROIT	Principles of International Commercial Contracts 2010
CIETAC Rules	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules 2015
CISG	International Sale of Goods (CISG) & Related Transactions, 1980
Incoterms	International commercial terms, 2010
VCLT	The Vienna Convention on the Law of Treaties

I. THE TRIBUNAL HAS JURISDICTION TO DEAL WITH THE PAYMENT CLAIMS RAISED

1. Claimant submits that the Tribunal has jurisdiction following a valid arbitration agreement as provided in Article 19(a) of the Sale and Purchase Agreement no. 2.

2. Under CIETAC Rules [*CIETAC Rules, Art. 6(1)]* the CIETAC is entitled to decide its own jurisdiction and, since it has delegated such power to the Arbitral Tribunal. Claimant submits that the Tribunal would affirm its jurisdiction to deal with the payment claims raised by Claimant for the following reasons: **[A]** parties intended to submit their disputes to arbitration by including a relevant dispute resolution clause in their agreement; **[B]** the arbitration agreement is valid.

A. PARTIES INTENDED TO SUBMIT THEIR DISPUTE TO ARBITRATION BY INCLUDING A RELEVANT DISPURE RESOLUTION CLAUSE IN THEIR AGREEMENT

3. Parties have shown clearly their intent to arbitrate in Article 19(a), since Article 19(a) contains an express intention of the parties to submit their dispute to the CIETAC Hong Kong Arbitration Centre [*Hong Kong Development v. Shenzhen Yong*].

4. Present dispute involves the liquidated damages claim stemming from the Sale and Purchase Agreement no. 2 thus being a dispute concerning payments falls within the scope of the dispute resolution clause.

B. THE ARBITRATION CLAUSE IS VALID

5. Notwithstanding Article 19 provides both for arbitration and court proceedings, under the established court practice concerning the concurrent choice of arbitration and litigation the principle of ‘arbitration or litigation’ has not been breached [*Jington Estate v. Zhenli; Hock Weber v. A. Weber; R&T v. Henan*].

6. Moreover, ‘the mere reference to a lawsuit in an arbitration clause does not necessarily suffice to interpret it as a concurrent choice of arbitration and litigation’. Thus, the arbitration clause in question is valid and should be upheld.

7. Furthermore, although the arbitration clause mentions both arbitration and litigation, the Parties explicitly provided for the dispute concerning payments to be resolved via arbitration.

8. Since the Parties have specified the type of disputes to be resolved via arbitration, in the light of the interpretation rules provided under Article 31(3) of the Vienna Convention on the Law of Treaties [*Art. 31(3) VCLT*], the arbitration clause contained in Article 19(a) covers dispute concerning payments, while Article 19(b) allows for other disputes arising out of or in connection with the Agreement being resolved via litigation. Thus, the clause provides for arbitration of certain disputes and for litigation concerning a different kind of disputes and is therefore valid in the absence of concurrent choice of arbitration and litigation [*Lanxi v. Sanfu*].

9. Even if the wording of Article 19 cannot be interpreted as to exclude this type of disputes from the competence of national courts, it still might give priority to arbitration in relation to the disputes concerning payments. In that case such choice of dispute resolution provided in the arbitration clause is not considered ‘concurrent’ thus not affecting the validity of the arbitration clause [*Jiangsu Instalment v. Hongda Thermal*].

10. Therefore, the Arbitral Tribunal has jurisdiction over the present dispute.

II. THE CISG GOVERNS THE CLAIMS ARISING UNDER THE SALE AND PURCHASE AGREEMENTS

11. Claimant believes that the CISG applies to the merits of the case for the following reasons: **[A]** the choice-of-law clause is not existent, and, even if otherwise, **[B]** the application of the CISG has not been excluded.

A. THE CHOICE-OF-LAW CLAUSE IS INVALID

12. The general approach is that the validity of choice-of-law agreements may be challenged, including for defects in formation, including on the basis of unconscionability [*Briggs*].

13. Claimant signed the Agreement without understanding Article 20 relying on Respondent's assurance that Article 20 represented a standard term for that type of contracts [*Clarifications, §20*]. Thus, Claimant submits that there is no effective choice-of-law clause contained in the contract due to lack of agreement on applicable law by Parties.

14. The CISG applies autonomously where both parties have their places of business in contracting states, or where the rules of private international law determine the law of a contracting state as governing [*Schwenzer, Art. 6 §§2-3*].

15. Therefore, Claimant asserts that the CISG should be deemed applicable and governing the claims arising under the contract between the Parties.

B. THE APPLICATION OF THE CISG HAS NOT BEEN EXCLUDED

16. The party alleging exclusion of the Convention bears the burden of proof regarding the existence of an agreement excluding the Convention [*Auto case; Traction Levage SA v. Drahtseilerei*].

17. Where the CISG has been adopted by a country, it becomes applicable to all international sales and displaces the domestic sales law, unless the parties choose another legal system where the CISG does not apply or have expressly excluded the application of the CISG [*Schwenzer, Art. 6 §§8-9*].

18. It follows that Parties are free to exclude CISG Convention's substantive provisions [*Art. 6 CISG*], but such provisions must be express. A simple choice-of-law provision, selecting a national law is not sufficient to opt out of the Convention; express excluding language and selection of an alternative law are necessary [*Born*].

19. The wording of Article 20 does not indicate an express exclusion of the CISG Convention, while in the absence of such express language the CISG remains applicable to the claims raised.

20. In any event, case law suggests that arbitrators are entitled to apply relevant trade usages independently of the provisions of the law chosen by the parties [*Fouchard; Framatome v. Atomic Energy*]. Following that, the choice of law expressed in Article 20 of the Agreement does not prevent the Tribunal from applying relevant trade usages such as, for instance, derived from CISG.

III. INSURANCE COVERAGE IN THE FISRT TRANSACTION WAS NOT CLAIMANT'S RESPONSIBILITY

21. Claimant asserts that insurance policy is to be governed by the Incoterms DDP as agreed by the Parties [*Problem, §6*] and not the CISG, since price-delivery terms prevail over the rules of the Convention [*Societé Laborall v. SA Matis; Raw salmon case*].

22. Moreover, Incoterms 2010 under the DDP term provide no obligation on behalf of the seller to insure the goods [*DDP A3*].

23. Furthermore, the related costs under DDP include the payment of formalities, customs duties, taxes and other charges necessary for import in the country of destination, while insurance is regarded as separate service. If Respondent wanted Claimant to bear the cost of insurance other commercial terms, for instance CIF should have been agreed upon.

IV. PROTOTYPE WAS DELIVERED WITHIN 14 DAYS FROM RECEIPT OF DEPOSIT

24. Legal systems typically consider time periods to begin at 00.00 of the next day and to end at midnight on the last day of the period [*Schwenzer, Hachem and Knee; Klotz*].

25. In the light of the abovementioned, Claimant contends that the time period of 14 days for the delivery of prototype began on August, 1, that is on the next day after the receipt of the deposit payment on July, 31 [*Clarifications, §15*], and ended on the last day of the period. Thus, no late delivery can be established and Claimant is not in a breach of first agreement.

V. THE GOODS DELIVERED BY CLAIMANT ARE IN CONFORMITY WITH THE SALE AND PURCHASE AGREEMENT NO. 2

26. Claimant contends that the goods delivered to Respondent satisfy the requirement of conformity with the contract under Article 35 CISG.

A. THE WATCHSTRAPS DELIVERED CONFORM WITH THE PROTOTYPE

27. Article 9(2) CISG indicates that 'the parties are considered <…> to have impliedly made applicable to their contract <…> a usage of which the parties knew or should have known which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned.'

28. Claimant has been operating in the trade of watchstraps for 30 years and has conducted its business accordingly [*Problem, §1; Claimant's Exhibit No. 7*]. Claimant's clients know the distinction between the sampling stage and mass production [*Clarifications, §26*]. In particular, it is a standard procedure that the prototypes are handmade since at that stage it is impossible to make machine made watchstraps as investment in the tooling is made only after receiving the customer's approval [*Problem, §7*].

29. Thus, the difference between the sample and mass production constitutes normal practice in this watchstrap industry [*Clarifications, §26*] and applies to the contract between Claimant and Respondent as well.

30. Furthermore, as required under Article 8(2) CISG a reasonable person would understand that the prototypes are handmade only because the seller would not invest in tooling before the placement of order is assured, as well as that the price and the time stated for the mass production does indicated that the goods are going to be manufactured [*Claimant's Exhibit No. 7*].

31. In addition, Respondent did not make any request that the watchstraps should look handmade [*Clarifications, §45*], while Respondent initially chose to place its order with Claimant based

on Claimant's 'history and reputation' [*Claimant's Exhibit No. 1*]. Thus, Respondent should have known when choosing Claimant that Claimant's mass production watchstraps are not handmade.

B. CLAIMANT IS NOT RESPONSIBLE FOR THE WATCHSTRAPS DELIVERED NOT FITTING CHERRY WATCHES

32. Respondent approved the prototypes sent by Claimant [*Problem, §7*], thus Claimant made no amendments further on as to the size of the watchstraps during the mass production [*Claimant's Exhibit No. 7; Clarifications, §58*].

33. Moreover, no additional checking was made due to Respondent's warning about a Cherry watchcase requiring extreme carefulness in handling [*Claimant's Exhibit No. 7; Respondent's Exhibit No. 1*].

34. Furthermore, Respondent's employees checked the goods upon arrival at the Respondent's warehouse connected to its office [*Clarifications, §19*] on January, 29 [*Statement of Defense, §9*]. At that time Respondent made no notifications to Claimant concerning the non-conformity of the goods. It is only after taking some of the goods to the distributor that Respondent notified Claimant on February 27, unsatisfied with the quality of the watchstraps.

35. Article 39(1) CISG states that 'the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it'. It is questionable that Respondent gave notice to Claimant within a reasonable time period since the rest 80% of the balance payment under the Sale and Purchase Agreement no. 2 was to be transferred within 14 days from receipt of the goods [*Sale and Purchase Agreement no. 2, Art. 4*].

36. Therefore, Claimant submits that Respondent lost its right to rely on a lack of conformity of the goods in case such is present.

VI. PAYMENT OF MONEY UNDER THE TRANSACTIONS

A. PAYMENT CLAIMS

37. Article 54 of CISG provides that it is ‘the buyer's obligation to pay the price’.

38. The general rule is that ‘where a party who is obliged to pay money does not do so, the other party may require payment’ [*UNIDROIT Art. 7.2.1*].

39. Claimant relying on Articles 61, 62 and 74 CISG claims for the balance payment and costs under the second transaction to be paid by Respondent.

40. Article 7.4.9(1) of UNIDROIT Principles of International Commercial Contracts 2010 stipulates that Claimant is entitled to interest upon the sum unpaid by Respondent from the time when the payment became due to the date of payment by Respondent which is yet to occur.

B. RESPONSE TO COUNTERCLAIM COMPENSATION

41. Claimant submits that no balance payment under the first transaction is to be returned to Respondent. When Respondent proceeded with a replacement arrangement, it assumed responsibility for the watchstraps lost at sea and in return got a discount under the Sale and Purchase Agreement no. 2 as well as allocation of insurance costs on Claimant. Agreement No. 2 is a standalone and separate transaction to Agreement No. 1 [*Clarifications, §20*]. Thus, the actual delivery of goods under the second Agreement should not affect the relations between the Parties under the first Agreement.

42. As for the website costs and loss of profits arising from Respondent's new line promotion campaign, Claimant asserts that they exceed the loss Claimant foresaw or ought to have foreseen when entering into the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract [*Art.74 CISG*]. In addition, even though Respondent states Claimant knew about the clients informed

and website created [*Statement of Defense, §8*], no evidence was provided in support of such statement.

43. Claimant could not have foreseen Respondent's website and prototypes promotion investments [*Clarifications, §25*] as the latter were sent to Respondent for mere approval for further mass production of the ordered watchstraps. Respondent's decision to invest was spontaneous and based on its predictions that the watchstrap replacement business would become a successful project [*Clarifications, §25*]. Claimant argues that such predictions of Respondent and its actions therefrom could not have been foreseeable.

44. Therefore, Respondent's counterclaim for the costs named is unsubstantiated.

PRAYER FOR RELIEF

Claimant Albas Watchstraps Mfg Co Ltd respectfully requests the Tribunal:

1. Find that the Tribunal has jurisdiction over Albas's claims;

2. Find that the claims under the Sale and Purchase Agreement are governed by CISG;

3. Find that insurance coverage in the first transaction was not Claimant's responsibility;

4. Find that prototype was delivered without delay;

5. Find that the good delivered by Claimant are in conformity with the Sale and Purchase Agreement no. 2;

6. Satisfy Albas's payment claims in the sum of USD 9.6 million and order GCT to pay Albas interest on the amount set;

7. Reject GCT's counterclaim compensation.

Team No. 841

On behalf of Claimant

Albas Watchstraps Mfg Co Ltd