SIXTH INTERNATIONAL

ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

5 – 9 JULY 2016

HONG KONG

MEMORANDUM FOR RESPONDENT

ALBAS WATCHSTRAPS MFG CO LTD

Claimant

v.

GAMMA CELLTECH CO LTD

Respondent

Team No. 841 R

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
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

LIST OF AUTHORITIES

DOCTRINE

CITED AS	CONTENT	PAGE
Julian	Julian D.M. Lew, Loukas A. Mistelis, Stefan Kröll, Comparative International Commercial Arbitration Kluwer Law International (2003)	*418*
Born	Gary B. Born, International Commercial Arbitration, Second Edition, Kluwer Law International (2014)	*2614-2778*
Rachel Engle	Rachel Engle, Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability 15 The Transnational Lawyer (2002)	*323*
Grigera Naón	Grigera Naón, Choice-of-Law Problems in International Commercial Arbitration, 289 Recueil des Cours (2001)	*9, 28*
Yu	Yu, Choice of the Proper Law vs. Public Policy 1 Contemporary Asia Arbitration Journal (2008)	*107, 109*
Jingzhou Tao	Jingzhou Tao, Arbitration Law of the People's Republic of China, Chapter I, Article 7 *in* Loukas A. Mistelis, Concise International Arbitration, Second Edition,Kluwer Law International (2015)	*917-19*
Schlechtriem&Schwenzer	Peter Schlechtriem & Ingeborg Schwenzer, Commentary on the UN Convention on the International Sale of Goods Third Edition, Oxford University Publishers (2010)	*Art. 35, §12; p.1005-1014*
Flechtner	Harry M. Flechtner, Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C. 8 Journal of Law and Commerce (1988)	*53, 56*

Peel&Treitel	Edwin Peel, G. H. Treitel, Law of Contract, Thirteenth edition Sweet & Maxwell (2011)	*746–57*
Rabel	Ernst Rabel, *Recht des Warenkaufs*, vol 1, Walter de Gruyter (1957)	*509*
Bundesrat	Schweizerischen Bundesrates, Botschaft betreffend das Wiener Übereinkommen über Verträge über den internationalen Warenkauf (11 January 1989)	*235.53*

CASES

CITED AS	CONTENT	PARA
	CHINA	
Nedlloyd v. Wah	P & O Nedlloyd Limited and P & O Nedlloyd (HK) Limited v. Wah Hing Seafreight 06-05-2000 Guangzhou Maritime Court	12
Engineering Co. v. Weber	Yanzhou Hock Weber Mining Engineering Co. Ltd v. A. Weber S.A and Sofirol S.A 18 May 2009 Supreme People's Court of the People's Republic of China	4
JSLC v. Guo	Henan Cisa Food JSLC v. Guo Baoxian (2010) 03 June 2010 Zhengzhou IPC	19
	USA	
Valley v. Centriys	Golden Valley Grape Juice and Wine, LLC v. Centriys Corporation 21 January 2010 U.S. District Court, Eastern District of California	7

GERMANY		
Shoes case	5 U 164/90 17 September 1991 Oberlandesgericht Frankfurt http://cisgw3.law.pace.edu/cases/910917g1.html	23
Acrylic blankets case	2 U 31/96 31 January 1997 Oberlandesgericht Koblenz http://cisgw3.law.pace.edu/cases/970131g1.html	29
Shoes case 1994	5 U 15/93 18 January 1994 Oberlandesgericht Frankfurt cisgw3.law.pace.edu/cases/940118g1.html	12
Sport clothing case	54 O 644/94 5 April 1995 Landgericht Landshut cisgw3.law.pace.edu/cases/950405g1.html	34
Cleaners case	2 September 1998 Oberlandesgericht Celle http://www.unilex.info/case.cfm?id=498	2
Used car case	21 May 1996 Oberlandesgericht Köln cisgw3.law.pace.edu/cases/960521g1.html	4
Hearing aid case	14 May 1993 Landgericht Aachen cisgw3.law.pace.edu/cases/930514g1.html	5
CIETAC		
Waste plastic case	CISG-online 1715 31 October 2005 CIETAC China International Economic & Trade Arbitration Commission http://www.globalsaleslaw.org/content/api/cisg/urteile/1715.pdf	

Heating system case	CISG-online 1744 26 December 2005 CIETAC China International Economic & Trade Arbitration Commission	
SWITZERLAND		
Cutlery case	OR.96.0-0013 Handelsgericht Aargau 26 September 1997 http://cisgw3.law.pace.edu/cases/970926s1.html	80
Printed materials case	25 June 2007 Handelsgericht des Kantons Zürich cisgw3.law.pace.edu/cases/070625s1.html	
AUSTRIA		
Cooling system case	14 January 2002 Oberster Gerichtshof http://cisgw3.law.pace.edu/cases/020114a3.html	53
FINLAND		
Carpets case	26 October 2000 Helsingin hoviokeus cisgw3.law.pace.edu/cases/001026f5.html	7.4.2.2
FRANCE		
Wine case	Société Sacovini/M. Marrazza v. Sté les fils de Henri Ramel/Sté Bonfils Georges/Sté Preau et compagnie 23 January 1996 Cour de Cassation	8
ICC		
Exporter v. Distributor	US exporter v. Argentine distributor, Partial Award, ICC Case No. 5073, 1986	18
SPAIN		
Dye for clothes case	20 June 1997 Audiencia Provincial de Barcelona, sección 16ª cisgw3.law.pace.edu/cases/970620s4.html	III

CONVENTIONS/RULES

CITED AS	CONTENT
GPCLPRC	General Principles of the Civil Law of the People's Republic of China 1986
CLPRC	Contract Law of the People's Republic of China 1999
ALPRC	Arbitration Law of the People's Republic of China 1994
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
UNIDROIT Principles	Unidroit Principle of International Commercial Contract, 2010
VCLT	The Vienna Convention on the Law of Treaties

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

1. Respondent submits that the Tribunal has no jurisdiction over the submitted dispute for the following reasons: **[A]** the arbitral agreement is non-existent; and, even if otherwise **[B]** the arbitration clause is invalid.

A. THE ARBITRAL AGREEMENT IS NON-EXISTENT

2. Respondent contends that the arbitration agreement does not exist due to the lack of express and clear intention on behalf of the parties to arbitrate. For such intention to be found, the wording of the arbitration agreement should indicate that arbitration is to be exclusive.
3. The arbitration clause contained in Article 19(a) of the Sale and Purchase Agreement no. 2 does not exclusively provide for the arbitration of the dispute arising out of or in connection with this agreement. In particular, Article 19(b) allows dispute resolution via litigation in Hong Kong national courts.
4. This combination of arbitration and litigation is inadmissible as it fails to clearly indicate the intent to arbitrate [*Nedlloyd v. Wah*].
5. Furthermore, Article 19 cannot be interpreted as to exclude disputes concerning payments from the competence of Hong Kong courts, since there are no words used which 'in accordance with the ordinary meaning' given to them could indicate such intention of the Parties [*Art. 31 VCLT*].

B. THE ARBITRATION CLAUSE IS INVALID

6. Where a contract contains both arbitration and litigation clauses, the former breaches the principle of 'arbitration or litigation' and is therefore invalid [*JSLC v. Guo*].
7. Article 19 contains conflicting dispute resolution clauses allowing for arbitration in the CIETAC Hong Kong Arbitration Centre and litigation in the Hong Kong courts.
8. Furthermore, an arbitration agreement designating both arbitration and litigation, as being concurrently available to the parties as a dispute resolution means, would be considered now in China as invalid due to a lack of clear and unambiguous intent to arbitrate [*Jingzhou Tao, Chapter III, Article 16*].

9. Therefore, the arbitration clause in question containing a concurrent choice of arbitration and litigation is invalid.

10. Thus, the Arbitral Tribunal does not have jurisdiction over the dispute submitted.

II. THE CISG DOES NOT GOVERN THE CLAIMS ARISING UNDER THE SALE AND PURCHASE AGREEMENTS

A. THE CHOICE-OF-LAW CLAUSE IS VALID

11. The parties' autonomy to select the substantive law governing their international commercial relations is regarded as a general principle of international law [*Rachel Engle*].
12. While assessing applicable law 'an international arbitration tribunal should not seek to substitute its own choice of law for that of the parties where there is an express clear and unambiguous choice of law' [*Julian*].
13. Both arbitration tribunals and courts are reluctant to question the applicability of law expressly chosen by the Parties in order not to impede on their freedom of choice [*Born*].
14. Furthermore, arbitral tribunals while assessing the validity of the choice-of-law clauses have on multiple occasions refused to conclude that a choice-of-law agreement was invalid merely because the parties had chosen a law that was unfair or unconscionable [*Exporter v. Distributor*].
15. Therefore, Article 20 represents a valid choice-of-law clause.

B. THE PARTIES EXCLUDED THE CISG FROM GOVERNING THE CONTRACTS

16. When deciding on the applicable law, the first consideration is the law chosen by the parties [*Art. 145 GPCLPRC*].
17. Free choice of law principle to a foreign-related dispute is recognised, unless otherwise expressly provided for by a specific law [*Jingzhou Tao, pp. 917-919*].
18. The Parties expressly chose the contract to be governed by the national laws of Wulaba while excluding all other applicable law by Article 20 of the Sale and Purchase Agreement no. 2. That is, including the CISG the application of which can be excluded as provided under Article 6 CISG. There are no express provisions by a specific law to the contrary.
19. Court practice illustrates that for the Convention not to apply it suffices that the 'contract contains a choice-of-law provision'. [*Valley v. Centriys*]

20. The fact that the term the applicable law was a standard term for Respondent and Claimant signed it without understanding [*Clarifications, §30*] is irrelevant since standard terms are binding upon the signature of the contract document as a whole [*UNIDROIT Principles, Art. 2.1.19*].
21. For the reasons presented Respondent asserts that the CISG is not applicable to the claims arising from the contracts between the Parties.

III. INSURANCE COVERAGE IN THE FISRT TRANSACTION WAS CLAIMANT'S RESPONSIBILITY

22. Respondent asserts that under the provisions of CISG it was Claimant's responsibility to purchase insurance.

23. Under Article 8(3) CISG the understanding of a reasonable person would have had is to be determined with due consideration given to all relevant circumstances of the case including the negotiations.

24. Since at negotiations Claimant took responsibility for all related costs and assured Respondent that it only has to pay as per the amount stated in the Sale and Purchase Agreement [*Statement of Defense, §7*], Respondent reasonably understood that thereby Claimant assumed responsibility for purchasing insurance.

25. Even if the Incoterms 2010 are to be invoked in respect of insurance coverage, Incoterms 2010 see no obligation for the Buyer to provide for insurance, and Respondent made no enquiries to Claimant as to indicate Respondent's intention to purchase insurance coverage [*DDP B3*]. Bearing all risks as the seller [*DDP A5*] and taking responsibility for all related costs, Claimant had no reason to believe that Respondent would purchase insurance for the goods in transit.

IV. DELIVERY OF PROTOTYPE WAS LATE AS PER THE AGREED TERMS

26. Respondent asserts that Claimant is in breach of the first agreement due to the late delivery of prototype as per the terms agreed under the first Sales and Purchase Agreement.

27. Under the Incoterms DDP term the seller fulfils his obligation to deliver when the goods have been made available at the named place in the country of importation. In particular, the obligation to deliver the goods is understood as placing the goods at the disposal of the buyer on the date or within the period stipulated [*DDP A4*].

28. The date when Claimant sent the prototype for approval (August, 14) is not the time of completing its delivery obligation. Claimant received deposit on July, 31 [*Clarifications, §15*], however Respondent received the prototype on August, 15 while Article 5 of the Agreement states 14-days period for providing the prototype. This clearly indicates that the delivery of prototype was late as per the agreed terms.

V. THE GOODS DELIVERED BY CLAIMANT ARE NOT IN CONFORMITY WITH THE SALE AND PURCHASE AGREEMENT NO. 2

29. Article 35 CISG imposes an obligation on the Seller to deliver goods which conform with the contract.

A. THE WATCHSTRAPS DELIVERED DO NOT CONFORM WITH THE PROTOTYPE

30. Article 35(2)(c) CISG stipulates that 'the goods do not conform with the contract unless they possess the qualities of goods which the seller has held out to the buyer as a sample or model'.

31. Respondent assumed that the goods would correspond to the prototypes, [*Clarifications, §45*] whereas in fact the goods delivered were neither soft nor handmade, the stitching was different both in direction and length, and the watchstraps contained more glue than samples did [*Clarifications, §51*].

B. THE WATCHSTRAPS DELIVERED DO NOT FIT CHERRY WATCHES

32. Article 35(2)(b) specifies that 'the goods do not conform with the contract unless they are fit for any particular purpose <…> made known to the seller at the time of the conclusion of the contract'. In determining the conformity of the goods the intended purpose is of particular importance [*Schlechtriem&Schwenzer, Art. 35 §12*].

33. Respondent expressly informed Claimant [*Claimant's Exhibit No. 1*] that the watchstraps were meant for Cherry Watches, as Respondent wished to grow its product line by being one of the first sellers to enter the market with leather watchstraps for Cherry Watches [*Problem, §4*].

34. To achieve abovementioned Respondent provided Claimant with the prototype Cherry Watchcase which Claimant possessed during the production of both prototype watchstraps and mass order [*Clarifications, §34*].

35. Thus, Claimant was to secure the fitness of the watchstraps, while resignation the factory manager in charge of the watch case, which lead to irregularities in checking the size of the watchstraps [*Clarifications, §41*], does not relieve Claimant from conformity of goods liability.

Besides, Article 36(1) CISG provides that 'the seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.' Therefore, the fact that Respondent inspected the goods [*Clarifications, §19*] and their non-conformity became apparent only when Respondent took some of the goods to a large distributor, does not lead to Respondent losing its right to rely on a lack of conformity of the goods.

36. Therefore, Respondent contends that Claimant breached his obligation under Article 35 CISG to provide conforming goods.

VI. PAYMENT OF MONEY UNDER THE TRANSACTIONS

A. RESPONDENT REFUSES TO MAKE THE BALANCE PAYMENT UNDER THE SECOND TRANSACTION

37. Respondent declares the contract avoided due to a fundamental breach of the Sale and Purchase Agreement no. 2 on behalf of Claimant, [*Art. 49(1)(i) CISG*] thereby unilaterally terminates the contractual relationship and refuses conducting the balance payment to Claimant [*Shoes case; Acrylic blankets case; Cutlery case*].

38. A breach is fundamental if it results in substantially depriving a party of what it is entitled to expect under the contract, provided this result is foreseeable [*Art. 29 CISG; Flechtner*]. Furthermore, if the non-conforming goods cannot be reused or resold using reasonable efforts and without unreasonable inconvenience to the buyer, the delivery constitutes a fundamental breach and entitles the buyer to declare the contract avoided [*Wine case; Shoes case 1994; Sport clothing case*].

39. Respondent was entitled to expect watchstraps suiting Cherry Watches but was delivered goods that did not fit Cherry's watchcase. This delivery of non-conforming goods constitutes a fundamental breach of contract between the Parties allowing Respondent not to make the balance payment.

B. COUNTERCLAIM COMPENSATION

40. In respect of the counterclaim, even in the absence of fundamental breach, the mere breach of a contractual obligation is sufficient to trigger liability [*Peel&Treitel*].

41. Article 74 CISG, Article 7.4.2 of UNIDROIT Principles state that the aggrieved party is entitled to compensation for both losses incurred and *(emphasis added)* gain deprived of as a consequence of the non-performance.

42. Recoverability should be determined in accordance with the overall objective of the CISG to achieve full compensation in view of the particular purpose of the contract [*Schlechtriem&Schwenzer, p. 1005*].

(1) Claimant should return the payments under the first transaction

43. Claimant failed to deliver conforming goods while it was a condition for Respondent's assumption of responsibility under the first transaction. Therefore, Respondent declares the first Agreement avoided and, having performed its obligations under the first Agreement, claims restitution from Claimant as provided under Article 81 CISG.

(2) Claimant should compensate for the development of the website costs

44. Respondent claims recovery of frustrated expenses based on Article 74 CISG [*Waste plastic case*].

45. Although CISG does not expressly address the issue of compensation for expenditure, general principles of CISG can be used to fill this internal gap in accordance with Article 7(2) CISG by way of a damages claim [*Bundesrat*].

46. Court decisions have awarded incidental damages to aggrieved buyers who made reasonable expenditures for the marketing costs purposes [*Carpets case*] and recognized the potential recovery of a buyer's advertising costs. Thus, Respondent's expenses in respect of development of the website should be compensated by Claimant [*Cleaners case*].

(3) Claimant should compensate for loss of profits

47. Loss of profits includes the profit which the buyer could have realized in a resale lost due to the seller's breach of contract. Loss of profit also include losses following inability to maintain business operations upon breach [*Schlechtriem&Schwenzer, p. 1014*].

48. The foreseeability rule limits liability and damages to the risks foreseeable when entering into a contract [*Rabel*] meaning what a reasonable person aware of the circumstances at the time of the conclusion of the contract would have foreseen [*Cooling system case*]. Courts suggest that the seller of goods to a retail buyer should foresee that the buyer would resell the goods [*Used car case; Hearing aid case*].

49. A reasonable person in the shoes of Claimant aware of the intention of Respondent to conquer the market with leather watchstraps for Cherry Watches [*Problem, §4*] would have foreseen

Respondent securing orders from its clients based on the prototypes in reliance on the conformity of goods delivered by Claimant [*Clarifications, §25*].

50. Court practice shows that loss of profits might include evidence of non-performed orders, loss of customers and reputation where breaching seller knew or should have known of such losses [*Dye for clothes case*].

51. In present case Respondent failed to receive a big order from one of its largest distributors that pointed out that the ends of the watchstraps did not fit into Cherry watchcases [*Respondent's Exhibit No. 2, p. 18*]. Respondent is now also unable to become one of the first sellers to enter the Cherry watchcase market, thus unable to maintain its business operations upon breach.

52. Respondent asserts that it is entitled to counterclaim compensation stated.

PRAYER FOR RELIEF

Respondent Gamma Celltech Co Ltd respectfully requests the Tribunal:

1. Find that the Tribunal has no jurisdiction over Albas's claims;

2. Find that the claims under the Sale and Purchase Agreement are not governed by CISG;

3. Find that insurance coverage in the first transaction was Claimant's responsibility;

4. Find that prototype was late as per the agreed terms;

5. Find that the good delivered by Claimant are not in conformity with the Sale and Purchase Agreement no. 2;

6. Reject Albas's payment claims;

7. Find that GCT is entitled to counterclaim compensation in the sum of USD 17.4 million for the payments made to Albas, in the sum of USD 10 thousand for the development of the website costs and in the sum of USD 20 million for loss of profits.

Team No. 841

On behalf of Respondent

Gamma Celltech Co Ltd