INTERNATIONAL ADR MOOTING COMPETITION, 2016

5th July- 9th July 2016

HONG KONG

ON BEHALF OF	AGAINST
CLAIMANT	RESPONDENT
Albas Watchstraps Mfg. Co. Ltd.,	Gamma Celltech Co. Ltd.,
241 Nathan Drive,	17 Rodeo Lane,
Yanyu City, Yanyu,	Mulaba, Wulaba

MEMORANDUM FOR CLAIMANT

TEAM NUMBER 872 C

LIST OF ABBREVIATIONS

ABBREVIATION	CONTENT
&	And
AAA Rules	International Arbitration Rules of the American Arbitration Association
Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Rules	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules
CISG	United Nations Convention on Contracts for the International Sale of Goods
Clarification	ADR International Mooting Competition, Request for Clarifications
Claimant	Albas Watchstraps Mfg. Co. Ltd.
Co.	Company
DDP	Delivery Duty Paid

Ex.	Exhibit
FTCA Serbia	The Foreign Trade Court of Arbitration with the Chamber of Commerce and Industry of Serbia
ICC Rules	International Chamber of Commerce Rules of Arbitration
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Incoterms 2010	International Commercial Terms 2010
Japan CAA Rules	Commercial Arbitration Rules of the Japan Commercial Arbitration Association
No.	Number
p.	Page
Parties	Albas Watchstraps Mfg. Co. Ltd. and Gamma Celltech Co. Ltd.
PCA Croatia	The Permanent Court of Arbitration with the Croatian Chamber of Commerce
Respondent	Gamma Celltech Co. Ltd.
S.	Section
SoD	Statement of Defense

SPA	Sale and Purchase Agreement
The Agreement	The Sale and Purchase Agreement between Albas Watchstraps Mfg. Co. Ltd. and Gamma Celltech Co. Ltd.
The Tribunal	Ms. Felicity Chan, Dr. Anne Descartes and Mr. Martin Mayfair (presiding arbitrator)
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules
VAC Rules	Rules of Arbitration and Conciliation of the Vienna Arbitration Centre

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BORN(2001), p. 298	BORN G., INTERNATIONAL COMMERCIAL ARBITRATION, (2nd ed.. Hague 2001), p. 298	12
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ARGUMENTS ADVANCED

I. THE TRIBUNAL HAS THE JURISDICTION TO ADJUDICATE ON THE CLAIMS PRESENTED BEFORE IT.

The claims presented before this tribunal have been objected to by the Respondent on the grounds of jurisdiction, in the first instance. Therefore, it becomes essential to prove that (i) The tribunal has the power to decide on its own jurisdiction, (ii) The dispute resolution clause reflects the intention of the parties to refer the matter to arbitration, (iii) The dispute resolution clause constitutes a valid and binding arbitration agreement, (iv) The tribunal has the power to adjudicate in the matter of all claims raised before it, (v) The tribunal cannot hear the matter of the Respondent's counterclaim.

i. *The Tribunal has the power to decide on its own jurisdiction.*

The question relates to whether the tribunal has the jurisdiction to hear the claims raised by the Claimant. The applicable principle here is that of competence-competence which states that an arbitral tribunal has the power to decide its own competence to hear a matter, as does this tribunal.[1] It is generally accepted in international commercial arbitration practice. It overcomes an issue that could arise in the future where the tribunal finds the arbitration agreement to be invalid prima facie and does not have the authority to make that finding in the first place.

[1] Chap.5.4(c), REDFERN & HUNTER (1999); Arts.6(1), 6(3), CIETAC Rules; Art.41(1), ICSID Convention; Art.21, UNCITRAL Rules; Article 6(2), ICC Rules.

The principle has been incorporated into the domestic laws of many countries,[2]international adjudicating institutions,[3] as well as case law.[4] These clearly show that an arbitration tribunal has the competence to decide the matter of its jurisdiction.

ii. *The dispute resolution clause reflects the intention of the parties to arbitrate.*

The validity of the arbitration agreement can be ascertained from the intention reflected in the clause as arbitration is a consensual process. Language providing that a party "may" submit a dispute to arbitration entails mandatory arbitration, otherwise it would render the clause meaningless since parties could always voluntarily submit to arbitration. Therefore, the clause does not provide a choice between arbitration and litigation, but between arbitration and doing nothing at all which also implies that the agreement becomes binding once the option is exercised. Provisions should not be interpreted in a way that renders them superfluous.[5]

Thus, arbitration is mandatory once demanded by either party even though the clause uses the word "may" instead of "shall".[6] Since the option can be exercised by either party, the Respondent has shown strong intention to submit disputes to arbitration and it is distinct from the

[2] S.30, English Arbitration Act, 1996; S.2, Swedish Arbitration Act, 1999.

[3]Art.36(6), ICJ Statute; see *supra* note 1.

[4] ARAMCO case at 117; Joc Oil Case; Texaco case.

[5] JA Apparel case (2010); Reyes case (2012); MBIA case (2012); Dan Dong Dong Jin case (2012).

[6] Hirshenson case(2001); Mercury Constructioncase (1983); Maguire v. King (2005); Owens-Brockway case (1996); Ziegler case (1982); Conax Florida case(2007).

mere mention of arbitration as an idea. Thus, the arbitration agreement reflects a valid consensus to arbitrate.

In any case, exercise of the option of arbitration by the Claimant is sufficient to constitute a binding arbitration agreement.

When a dispute resolution clause creates an option to arbitrate, exercisable by either party, once the option is exercised, a binding arbitration agreement comes into existence.[7] This is pursuant to the intention shown by the parties to do the same with regard to disputes arising out of their present contractual relationship. An analysis whereby notice will trigger the mutual agreement to arbitrate fits better into the consensual scheme of arbitration than one which requires artificial construction.[8]

iii. The dispute resolution clause constitutes a valid and binding arbitration agreement.

The clause provides the seat, venue, language and binding nature of arbitral award and this is enough to constitute certainty. It is unreasonable to assume that despite all the effort made to flesh out the arbitration clause, there is still ambiguity. Art.20(c) of the dispute resolution clause allows for it to be interpreted as per the position of law in the State of New York according to which, a contract cannot be deemed to be ambiguous or in dispute simply because parties do not agree on its construction.[9] The only ambiguity could be with regard to whether the parties are

[7]Bharat Engineering Corp case (1977); Canadian National Railway case(1999); WSG Nimbus case (2002); NB Three Shipping case (2004).

[8] South India Shipping case (1981).

[9] Reyes case (2012); Corral case (2012); Convergent Wealth Advisors case (2012); Homeward Residential case (2014).

excluded from referring payment disputes to litigation. This does not affect the operation of the clause in constituting a valid agreement because it is certain that the clause becomes binding once the option is exercised. Since there is no dispute regarding the certainty of the clause itself, it constitutes a valid arbitration agreement.

In any case, the specific prevails over the general[10]

The specificity of Art.19(a) overrides the generality of 19(b) and even if the parties are entitled to refer any dispute to litigation, 19(a) ensures that the parties can still refer payment disputes to arbitration.

iv. The tribunal has the power to adjudicate with regard to all claims.

An arbitration agreement confers a mandate upon an arbitral tribunal to decide any and all disputes that are within the ambit of that agreement. The claims presented before the tribunal are with regard to money due to the Claimant as a result of the Respondent withholding payment for goods delivered. This is clearly a "payment dispute" under the SPA No.2 and is arbitrable.

v. The tribunal does not have the power to address the counterclaims of the Respondent.

If institutional rules only state that a counter claim is allowed, as the CIETAC Rules do, reference may be made to other institutional rules to determine the extent of a counter claim. These provide that jurisdiction whenever it is based 'on the same agreement to arbitrate', or on

[10] MBIA case (2012); Carolina Power & Light Co. case (1983).

the ‘same relationship’.[11] The relief sought by the Respondent does not pertain to the present contractual relationship between them and is thus outside the jurisdiction of the tribunal.

A counterclaim may be raised only if it falls within reach of the arbitration clause. This follows from the basic principle that arbitral jurisdiction is based on the will of the parties, and that arbitral tribunal may decide only on the issues which fall under the scope of the arbitration clause.[12] Here, intention is paramount and it is evident from the exchange of emails between the parties that they terminated the contractual relationship set out in SPA No.1. Thus, the Respondent’s counterclaim, which is based on the earlier transaction, does not fall under the ambit of the arbitration agreement that confers power on the tribunal in the present matter.

II. THE CISG GOVERNS THE CLAIMS ARISING UNDER SPA NO.1 AND SPA NO.2.

The CISG governs both the agreements as Yanyu and Wulaba are parties to it, (i) The choice of law clause must expressly exclude the application of the CISG and (ii) As CISG forms a part of the domestic law of the Contracting States, it continues to be applicable notwithstanding the clause.

[11]Art.23, FTCA Serbia, Art.15,PCA Croatia; Art.3(2), AAA Rules; Art.7(a),VAC Rules; Art.19(1),Japan CAA Rules. Similarly, with regard to ICC arbitration, Derains &Schwartz, (1998) at 72.

[12]REDFERN & HUNTER (2004), p.295; BORN (2001), p. 298; FOUCHARD (1999), p.1222**.**

i. The choice of law clause must expressly exclude application of the CISG

CISG allows the parties to completely or partially exclude the provisions of the Convention[13] i.e., they may "opt out" of CISG.[14] However, a standard choice of law clause that does not mention CISG is insufficient[15] to opt out of CISG merely because it specifies the law of a particular jurisdiction to govern the contract.[16] The choice of law provision must expressly exclude application of the CISG[17] i.e., being aware that CISG applies to the contract, the Parties should intend to exclude it.[18] This is because an express choice of law of a specific domestic law of a Contracting State does not mean an implied exclusion.[19]

The clear intent to exclude can be inferred from an express exclusion of the CISG or the choice of the law of a non-contracting State or the choice of an expressly specified domestic statute or Code where that would otherwise be displaced by the CISG's application.[20] Mere specification of the general law of a Contracting State does not exclude the application of the Convention.[21]As

[13] Art.6, CISG.

[14] Graves (2011).

[15]Ajax Tool Works case (2003).

[16]Easom Automation Systems case (2007).

[17]Drago & Zoccolillo, Esq. (2002).

[18]Atlarex case (2000).

[19]Holdsworth, deKieffer & Horgan (2001).

[20]CISG-AC Opinion No. 16 (2014).

[21]Assante Technologies case (2001).

certainty is essential in commercial exchanges[22], in the absence of clear language indicating that the parties intend to opt out of the CISG, it will continue to be applicable.[23]

The clause specifying the choice of governing law in this case states that the contract shall be governed by the national law of Wulaba.[24] No express exclusion of the CISG can be found in the clause, thus making the CISG applicable to both the SPAs.

ii. *CISG is a part of the domestic law of the state.*

The CISG is a "self-executing treaty"[25] implying that no additional legislation is required to be enacted to enforce its provisions.[26] On a signatory's assent to the CISG, it automatically becomes part of the domestic law of that State[27] and its application prevails over other regulations that fall within its scope.[28] This is because it forms part of the municipal law of the State.[29] All persons residing in such a State can assert their rights or demand the fulfilment of another party's duty by referring directly to the treaty itself.[30]

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[22] CISG Explanatory Note.

[23]Società X v. Società Y (1994).

[24] Art.20, SPA No.2.

[25]*Lalaosa case (1995).*

[26] Manz, Bappenr, Witz and Selbhen(1991).

[27]Adamfi Video (1992), BP Oil case (2003), Callaghan(1994)

[28] *Supra* note 22.

[29]Zeller (2006).

[30]Volken(1986).

Therefore, the exclusion in Art.20 of SPA No.2 is nullified with regard to the CISG.[31] Hence, the CISG governs both the agreements.

III. THE CLAIMANT IS ENTITLED TO PAYMENT UNDER SPA NO.2.

Assuming the counterclaims are admitted by the tribunal and the CISG applies, it is submitted that (i)the responsibility for insurance was not on the Claimant, (ii)the deadline for delivery of the prototypes was complied with, (iii)the watchstraps were in conformity with the contract, and therefore, (iv)the claimant is entitled to payment for the goods delivered.

i. *The Claimant was not responsible for insuring the goods.*

In consideration of the concerns of the Respondent, Incoterms 2010 (DDP) was incorporated. Consequently, it was responsible for all costs of customs formalities as well as all duties, taxes and other charges and for cost of transit through any country prior to delivery.[32] However, the Claimant had no obligation to insure the goods as DDP does not include insurance.[33]

ii. *The Claimant complied with the deadline for delivery of the prototype*

The prototypes were delivered within the time stipulated by the contract. The initial deposit was received on 31st July, 2014. This is the day of the triggering event. There is a general assumption

[31] *Supra* note 12.

[32] S.A6, DDP, Incoterms 2010.

[33] *Id* at S.A3.

that this is excluded in the calculation.[34] The number of days is calculated after exclusion of the day of performance of obligation by the other party.[35] Since the payment was deposited on 31stJuly, 2014 the contractual deadline of fourteen days would therefore start from 1st August, 2014. The prototypes were delivered on 14th August, 2014 which was the fourteenth day and was within the deadline. In a period of time fixed for delivery, the seller can, in principle, choose when he wishes to deliver: on the first day, on the last day, or sometime in between.[36]

iii. *The watchstraps were in conformity with SPA No.2.*

The Respondent is withholding payment alleging that the goods were not in conformity with the agreed terms of quality. However, (a)conformity with the prototype implies fulfilment of the terms of the contract,(b)The Claimant has not committed any fundamental breach of the contract by using tools to mass produce the final goods

a. Conformity with the prototype implies fulfilment of the contract.

The transaction between the Parties was a sale by sample. Therefore, the goods will be held to not conform to the contract only if they do not possess qualities of the goods which the seller held out as a sample or model.[37] On 14th August 2014, the prototypes were manufactured and sent for approval to the Respondent. First, the Respondent failed to raise an objection as to the size of the watchstrap while approving the prototypes.[38] Since the final goods were produced in

[34]Bulletproof Vest case.

[35]Fiber glass materials case.

[36] Schwenzer(2010), p.552-553.

[37]Article 35(2)(c) CISG.

[38] Claimant's Ex. No.4.

conformity with the approved prototype, the Respondent is not entitled to refuse them on these grounds. Further, the objection with regard to the quality of leather and method of production is not justified. The contract required that the watchstraps be made of soft genuine Yanyu leather[39] and the same was followed in producing the final goods. Leather is not consistent in terms of grain or colour therefore it is inevitable that goods made of even the same roll of leather are prone to differences.[40] The existence of any discrepancy as permitted in various trade sectors, that are usual in the particular trade concerned, is not to be regarded as constituting a lack of conformity.[41]

b. <u>The Claimant has not committed any fundamental breach of the contract by using tools to mass produce the final goods</u>

There is a distinction between the sampling stage and mass production. The prototypes were handmade because it has been the Claimant's policy to invest in necessary tooling for mass production only after approval of the buyer in case of customized orders. This policy is not inconsistent with business custom.[42] The Respondent was aware of the history and reputation of the Claimant.[43] Even a preliminary research by a prospective buyer would reveal the common customs of business and so the Claimant reasonably presumed that the Respondent ought to have known the common policy adopted by the Claimant in manufacturing the goods.

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[39] Claimant's Ex. No.6, Article 2(1)(a), SPA No.2.

[40] Clarification No.26.

[41] *Supra* Note 36 at p.573.

[42] Clarification No.71.

[43] Claimant's Ex. No.1.

Further, the Respondent pressed for an expedient production of 5,000,000 watchstraps within 60 days. Given that it takes 14 days to hand stitch eight pieces, it would be impossible to manufacture the entire consignment in 60 days without using conventional methods of mass production. There was no request made by the Respondent that the watchstrap should look handmade. Where doubt exists concerning a party's intention, or the other party's awareness of that intention, statements should be interpreted according to the understanding of a reasonable person in the circumstances.[44] It wouldn't be unreasonable to expect the Respondent, as a prospective buyer, to understand the practical problems of mass production and the common business practices involved.

In any case, the Respondent is estopped from alleging non-conformity.

The buyer should notify the seller of the alleged non-conformity within a "reasonable time" after it "knew or ought to have known" of the non-conformity.[45] In case the buyer wishes to reject the goods, a rapid notice should be given to the seller to provide him an opportunity to remedy the defect.[46] A buyer who fails to notify the seller loses his right to all remedies relating to non-conformity.[47]

The Respondent failed to notify the Claimant of the alleged non-conformity within a reasonable time and thus forfeited its right to rely on non-conformity of the watchstraps in accordance with Articles 38 and 39 of the CISG. The Respondent received the goods on 29th January, 2015 and

[44]Article 8(2) CISG; Honnold(2009) Pg. 118.

[45]Art.39(1), CISG.

[46] *Supra* Note 36 at p.631.

[47] *Supra* Note 44 at p.259.

the Respondent's employees had checked some pieces in every carton when the consignment arrived at the warehouse.[48] The examination of the goods by the buyer must be made "within as short a period as is practicable in the circumstances". Examination of the goods should occur within a week after delivery and notice of non-conformity should be given in another week at the most.[49]A period of fourteen days for examination and notice is to be considered reasonable in the absence of any specific circumstances.[50] The Claimant was notified of the alleged non-conformity only on 27th February, 2015.Examination of the watch straps ought not to have taken as long as it did and by notifying the Claimant only after 30 days of the receipt of the watchstraps the Respondent failed to provide notice in accordance with Article 39(1) of CISG.

iv. *The Claimant is entitled to payment for goods delivered.*

In the event a buyer defaults on certain obligations under the contract or the CISG convention, the seller may exercise his rights provided in Articles 62-65 of CISG. Requiring specific performance from the defaulting party flows from the principle of *pacta sunt servanda* and is an accepted principle of contractual and international law.[51] Payment of price is the most important contractual obligation in practice.[52] From the above submissions, it is evident that the Claimant is not in breach of any of the terms and conditions of the contract. It is entitled to receive payments for goods delivered the Respondent.

[48]Clarification No. 19.

[49]Oberlandesgericht Koblenz.

[50]G v. S case.

[51] *Supra* Note 36 at p.876.

[52] *Id* at p.869.

REQUEST FOR RELIEF

In light of the arguments advanced, the Claimant respectfully requests the Tribunal to find that:

1. The Tribunal has the jurisdiction to adjudicate on the claims presented before it.
2. The CISG governs the claims arising under SPA No.1 and SPA No.2.
3. The Claimant is entitled to payment under SPA No.2 amounting to USD 9,600,000 plus interest and costs i.e. RMB 61,152,000.