INTERNATIONAL ADR MOOTING COMPETITION, 2016

5th July- 9th July 2016

HONG KONG

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

MEMORANDUM FOR RESPONDENTS

TEAM NUMBER 872 R

LIST OF ABBREVIATIONS

ABBREVIATION	CONTENT
Art.	Article
Chap.	Chapter
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.

DDP	Delivery Duty Paid
Ex.	Exhibit
HK	Hong Kong
Incoterms 2010	International Commercial Terms 2010
No.	Number
p.	Page
Para.	Paragraph
Parties	Albas Watchstraps Mfg. Co. Ltd. and Gamma Celltech Co. Ltd.
Respondent	Gamma Celltech Co. Ltd.
S.	Section

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	United Nations Commission on International Trade Law

TABLE OF AUTHORITIES

BOOKS

Cited As	Content	Citing Footnote
Chap.1.1 (c), REDFERN & HUNTER (1999)	REDFERN A. & HUNTER M., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 1999, Chap.1.1 (c)	7
Schwenzer (2010)	COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (Ingeborg Schwenzer ed.,3rd Ed., 2010)	37, 42, 43, 45, 49, 50, 51, 53, 56, 57, 60, 61

ARTICLES

Cited As	Content	Citing Footnote
Pavic (2006)	Vladimir Pavic, *'Counterclaim and Set-Off in International Commercial Arbitration'*, 1 Belgrade Law Review (2006), pp. 101-116	15
Leboulanger	Phillipe Leboulanger. *'Multi-contract Arbitration'* (1996) 13,	16

(1996)	Journal of International Arbitration, 43	
Hanotiau(2001)	Bernard Hanotiau, *'Problems raised by complex arbitrations involving multiple contracts, parties and issues: An analysis'* (2001) 18, Journal of International Arbitration, 253	17
CISG-AC Opinion No. 16 (2014)	CISG-AC Opinion No. 16, Exclusion of the CISG under Article 6. Rapporteur: Doctor Lisa Spagnolo, Monash University, Australia. Adopted by the CISG Advisory Council following its 19th meeting, in Pretoria, South Africa on 30 May 2014	19
Ziegel (2005)	Jacob Ziegel, *'The Scope Of The Convention: Reaching Out To Article One And Beyond'*. Available at: http://www.cisg.law.pace.edu/cisg/biblio/ziegel7.html	20
Summary records of the First Committee (1980),para.38-40	Summary Records of the First Committee, 4th Meeting, 13 March 1980, UN Doc. A/CONF.97/C.1/SR.4, reprinted in Official Records UN Doc. A/CONF.97/19, p. 251, para 38-40	28
Dr.Zeller (2006), pp.115-127	Dr. Bruno Zeller, *'The UNIDROIT Principles of Contract Law: Is There Room for Their Inclusion into Domestic Contracts?'* 26, Journal of Law and Commerce, (2006-07), P. 115-127	30
Sloss (2011)	David Sloss, *'Domestic Application of Treaties',* Santa Clara Law Digital Commons, (2011) Available at:	31

	http://digitalcommons.law.scu.edu/facpubs/635	
Hollis (2005), pp. 32–45	Duncan B. Hollis, "*A Comparative Approach to Treaty Law and Practice"* in DUNCAN B. HOLLIS, MERRITT R BLAKESLEE & L. BENJAMIN EDERINGTON (eds), NATIONAL TREATY LAW AND PRACTICE (Martinus Nijhoff, Leiden, Boston (2005) 32–45	32
Ferrari (2009)	*"The CISG and its Impact on National Legal Systems"*, (Franco Ferrari ed.,) Journal of Business Law, 2009 Publication Review	34
Gisberger (2005-06)	Daniel Gisberger, *"The Time limit of Article 39 CISG",* 25, Journal of Law and Commerce ,(2005-06) ,p.241-251 Available at: https://www.uncitral.org/pdf/english/CISG25/Girsberger.pdf	58

CASES

Cited As	**Content**	**Citing Footnote**
Paul Smith case (1991)	*Paul Smith* v. *H&S Intl. Holding inc.* (1991) 2 Lloyd's Rep. 127 Q.B.	1
Hissan Trading Co. (HK High Court) (1992)	*Hissan trading company Ltd.* v. *Orkin Sipping Corp.*, High Court of Hong Kong September 8th, 1992, Mayo.j., Yearbook Commercial Arbitration 1994, 273	1
Reyes case(2012)	*Reyes* v. *Metromedia Software, Inc.* 840	2

	F.Supp.2d 752, 2012 WL 13935 S.D.N.Y., January 04, 2012	
White Sands Condo. Case (2012)	*Natt* v. *White Sands Condo.*, 95 A.D.3d 848, 943 N.Y.S.2d 231 N.Y.A.D. 2 Dept.,2012, May 01, 2012	2
Syncora Guar. (2012)	*Syncora Guar. Inc.* v. *EMC Mortg. Corp.*, 2012 WL 2326068 S.D.N.Y.,2012, June 19, 2012	2
Fehlhaber case (2012)	*Fehlhaber* v. *Board of Educ. of Utica City School Dist.* WL 2571302 N.D.N.Y.,2012, July 03, 2012	2
Ericsson case (2009)	*Ericsson AB* v *EADS Defence & Security Systems Ltd.* (2009) EWHC 2598 (TCC)	3, 4, 5, 13
Gallaway Cook Allan case (2014)	*Carr* v *Gallaway Cook Allan* [2014] NZSC 75	6
Anzen case (2016)	*Anzen Ltd.* v. *Hermes One Ltd.* [2016] UKPC 1	9
Container Corporation of India case (2012)	*M/S Linde Heavy Truck Division Ltd.* v. *Container Corporation Of India Ltd. & Anr.* 195 (2012) DLT 366	9
Jagdish Chander case (2007)	*Jagdish Chander* v. *Ramesh Chander & Ors* (2007) 5 SCC 719	10
Kota Straw Board case (1970)	*B.Gopal Das* v. *Kota Straw Board* 1970 WLN 572	10

SOERNI case(2009)	*Sociétéd'études et représentationsnavales et industrielles* (SOERNI) *et autres* v. *Société Air Sea Broker limited* (ASB), July 8, 2009, Case no. 08-16025	11
Lin Ming case (2011)	*Lin Ming & Anr.* v. *Chen Shu Quan & Ors.* HCA 1900/2011, Supra note at 5	13
Klockner Award	*Klockner* v. *Cameroon* Award of 21 October 1983 (1986) 2 ICSID Reports 9	16
Flottweg case (2009)	*Olivaylle Pty Ltd* v. *Flottweg GmbH & Co KGAA* (No 4) (2009) 255 ALR 632, Federal Court, Australia, 20 May 2009. Available at: http://cisgw3.law.pace.edu/cases/090520a2.html	21
Corn case (2012)	*International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade,* 218y/2011, 23 January 2012, CLOUT Abstract No 1405 Available at: http://cisgw3.law.pace.edu/cases/120123u5.html	22
Gasoline and Gas Oil case (2001)	*Oberster Gerichtshof [Supreme Court]* Austria, 22 October 2001. Available at: http://cisgw3.law.pace.edu/cases/011022a3.html	23

Società X v. Società Y (1994)	*Società X* v. *Società Y*, Ad hoc Tribunal, Florenz (Italy) 19 April 1994] CLOUT case No. 92, Arbitration	26
Fondmetall International case (1993)	N*uovo Fucinati S.p.A.* v. *Fondmetall International* 14 January 1993, Tribunale Civile (Regional Court) di Monza, CLOUT case No. 54, Italy. Availabale at: http://cisgw3.law.pace.edu/cases/930114i3.html	26
Musgrave case (1995)	*Sté Ceramique Culinaire de France* v. *Musgrave Ltd.* Cour d'Appel [Court of Appeal] Colmar, France, 26 September 1995	26
Cobalt case (1995)	*Cobalt Case*, Kantonsgericht (District Court) Zug 16 March 1995] CLOUT case No. 326, Switzerland. Available at: http://cisgw3.law.pace.edu/cases/950316s1.html.	26
BP Oil Case (2003)	*BP Oil International* v. *Empresa Estatal Petroleos de Ecuador* (United States 11 June 2003 Federal Appellate Court [5th Circuit]) Available at: http://cisgw3.law.pace.edu/cases/030611u1.html	36
Raw Salmon Case (1998)	*Raw salmon case*, Germany 22 September 1998 Appellate Court Oldenburg. Available at:	39

	http://cisgw3.law.pace.edu/cases/980922g1.html	
Frozen Bacon Case (1992)	Germany 22 September 1992 Appellate Court Hamm. Available at: http://cisgw3.law.pace.edu/cases/920922g1.html	40
Live Fish Case	Germany 26 May 1998 Appellate Court Thüringen OLG [Jena]. Available at: http://cisgw3.law.pace.edu/cases/980526g1.html	57

INTERNET SOURCES

Cited As	**Content**	**Citing Footnote**
UNCITRAL Digest of CISG Art.6 Case Law	*Uniform interpretation of UNCITRAL texts: ... digest of case law on the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980)*, UNCITRAL digest of CISG article 6 case law *Available at:* http://www.cisg.law.pace.edu/cisg/digest/art06.html#20	27

TABLE OF CONTENTS

ARGUMENTS ADVANCED

I. THE TRIBUNAL DOES NOT HAVE THE JURISDICTION TO HEAR THE CLAIMS PRESENTED BEFORE IT.

Jurisdiction is challenged on the grounds that (i)the dispute resolution clause is ambiguous, defective and requires interpretation, (ii)there was no consensus to arbitrate (iii)continuation of arbitration proceedings will violate the right of the respondent to litigate and(iv)if found to have jurisdiction, the tribunal has the power to adjudicate the counterclaim.

i. *The dispute resolution clause is ambiguous, defective and, requires interpretation.*

There is ambiguity in the dispute resolution clause if it is unclear which form of dispute resolution the parties have consented to.[1] As per the State of New York an ambiguity exists when the provisions in controversy are fairly susceptible of different interpretations or may have more than one meaning.[2] As per Art.20(c) of SPA No.2, validity of the arbitration clause is to be determined only by the Courts of New York; only subsequent to which proceedings can be commenced.

When a minor defect in drafting prevents the operation of a clause, it is deemed to be pathological.[3] Where a clause provided for the parties to opt for either litigation or arbitration

[1]Paul Smith case(1991); Hissan Trading Co. (HK High Court) (1992)

[2]Reyes case(2012); White Sands Condo Case(2012); Syncora Guar(2012); Fehlhaber case (2012).

[3]Ericsson case(2009).

it was deemed to be a defect as allowing such an option defeats the very purpose of inserting the choice for arbitration and parties can always voluntarily consent to it.[4] While interpreting dispute resolution clauses in commercial contracts, use of the word "may" rather than "shall" meant that both forms were available options rather than mutually exclusive alternatives.[5] Thus it also allowed for the option of litigation to be legitimately exercised. However, this could lead to multiplicity of suits in various fora. This shows that the dispute resolution clause is ambiguous and defective as it does not fulfil its purpose. Similarly, in the present case, the dispute resolution clause allows for resolution of dispute by litigation with an option of arbitration. Thus, it is ambiguous and defective

Even a minor defect in the arbitration clause can invalidate the arbitration agreement resulting in an unenforceable award.[6] Thus, where the clause requires for the consent of the parties to arbitrate and where the right to litigate is certain, without such consent, proceedings initiated would be invalid and in violation of the right to litigate.

ii. *There was no consensus to arbitrate.*

The jurisdiction of the tribunal is derived solely from the agreement of the parties.[7] Thus, where there is no consensus, the tribunal does not have the jurisdiction to arbitrate The clause relied upon by the Claimant[8] is insufficient to show consensus to arbitrate. It provides that either party "may" submit a payment dispute to arbitration which implies option or interest and is significantly different from using a word like "shall" which is a mandate. The parties

[4] *Id.*

[5] *Id.*

[6] Gallaway Cook Allan case (2014).

[7] Chap.1.1 (c), REDFERN & HUNTER (1999).

[8] Art.19(c), SPA No.2.

have only consented to re-visiting the option of arbitration in payment disputes should both parties consent. The use of the word "may", shall not amount to a binding arbitration agreement.[9] Mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires further consent of the parties for reference to arbitration.[10] Further, when there is an express provision to allow either party to litigate, it cannot be said that the intention was to bind them in an arbitration agreement. The existence and validity of an arbitration agreement should be determined primarily in light of the common intent of the parties.[11] It is clear that the provision for arbitration was merely an expression of interest and not final and binding.

iii. *Continuation of arbitration proceedings will violate the Respondent's right to litigate*

The Claimant has neglected to mention the entire dispute resolution clause in its application for arbitration. The clause provides for either party to submit disputes to the courts of Hong Kong for resolution.[12] 19(a) merely reflects an interest to arbitrate should both parties agree. Given that there has been no consent and it is standard practice for any court proceeding to be stayed after the commencement of arbitration,[13] it would unfairly take away the right of the Respondent to litigate.

Further, a harmonious interpretation shows that recourse in Clause(a) requires consent of both parties and in Clause(b), such consent is not required. Therefore, if the recourse in Clause(a), which is not binding, has not been consented to and does not have true effect,

[9]Anzen case(2016); Container Corporation of India case(2012).

[10]Jagdish Chander case (2007); Kota Straw Board case (1970).

[11]SOERNI case(2009).

[12] Art.19(b), SPA No.2.

[13] Lin Ming case (2011), *supra* note 5

affects the right of the party to choose recourse through Clause(b), which is an absolute right, or at the very least more certain and enforceable than the remedy in Clause(a), it would be unfair and unjust. Thus, it is necessary to read the entire dispute resolution clause harmoniously lest violate the remedial rights of the parties under the Agreement.

Continuation of arbitration would be an unfair exercise of the dispute resolution clause and against the apparent intention of the parties and their freedom of contract. If a party is forced to arbitrate, the essential element of consent is absent and it would not be a valid award.

iv. If found to have jurisdiction, the tribunal has power to hear the Respondent's counterclaims,

A tribunal constituted under CIETAC has authority to admit counterclaims from the Respondent.[14] However, the rules are silent as to where these counterclaims may come from. A counterclaim may be raised in the course of arbitration only if it falls within reach of the arbitration clause[15]. The counter-claims fall under the category of "payment dispute" as they are concerned with re-payment of the contract price.

The pertinent question is whether the counterclaims may relate to SPA No.1. Whenever there is an economic link between contracts, ensuing from their nature and mutual function, they should not be regarded as autonomous agreements but should be analyzed together with all other related contracts.[16] Such interpretation has also been followed where one contract has its origin in the other.[17] Therefore, if the tribunal has jurisdiction to hear the claims of the Claimant, it also has the jurisdiction to hear the counterclaims raised by the Respondent.

[14]Art.16, CIETAC Rules.

[15] Pavic(2006).

[16]Leboulanger (1996); Klockner award (1986).

[17]Hanotiau(2001).

II. THE CISG DOES NOT GOVERN THE TWO AGREEMENTS.

CISG does not apply to either SPA because (i)the choice of law clause and reference to domestic law reflects intention to exclude CISG and (ii) it does not form a part of the domestic law of Wulaba which is the applicable law for both SPAs.

i. *The choice of law clause and reference to domestic law reflects intention to exclude CISG.*

By virtue of party autonomy,[18] parties may exclude applicability of CISG in whole or in part[19] even where it would otherwise be applicable.[20] Even implicit exclusion has been upheld[21] and in most cases disputes arise when intention was unclear.[22] If it can be established that an exclusion of the Convention was intended, then the CISG will not be applicable.[23] Intention is determined from the words or/and conduct of the parties, which reasonably manifests such an intent to exclude.[24]

[18] Art.6, CISG.

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

[20]Ziegel (2005).

[21]Flottwegcase (2009).

[22] Corn case (2012).

[23] Gasoline and Gas Oil case (2001).

[24]*Supra* Note 1.

Here, intention is manifest in the choice of law clause[25] which explicitly mentions that all other applicable laws except the domestic laws of Wulaba are excluded. It has also been held[26] that choosing to apply the law of a contracting State amounts to an implicit exclusion of the Convention's application, since otherwise the choice of the parties would have no practical meaning.[27]

This approach is consistent with the legislative history in that "referring to municipal law" was seen as evidence of parties' intent to exclude.[28] Therefore, specific reference to the national law of Wulaba as the applicable law[29] amounts to an implicit exclusion of the CISG. Further, exclusion of "all other applicable laws" is a manifestation of the specific expression of intent, thus precluding the application of CISG.

ii. *The application of CISG is excluded as it is not a part of the domestic law of Wulaba.*

General reference to a foreign body of law and the incorporation of specific terms of such a body into a contract are distinct.[30] Whether a treaty becomes a part of the domestic law of a State depends on whether the State in question is monist or dualist.[31] However, in both states, the treaty does not have legal force domestically unless the legislature has acted either to

[25] Art.20, SPA No.18.

[26]Società X v. Società Y (1994); Fondmetall International case (1993); Musgrave case (1995); Cobalt case (1995).

[27]UNCITRAL Digest of CISG Art.6 Case Law.

[28]Summary Records of the First Committee(1980), paras.38- 40.

[29]*Supra* Note 24.

[30] Dr.Zeller(2006), pp.115-127.

[31]Sloss(2011).

approve the treaty before international entry into force, or to implement the treaty after international entry into force.[32]

Although Wulaba is a signatory to CISG, there is no evidence of the incorporation or implementation of the same in domestic law.[33] In any case, the adoption of the CISG by a Contracting State does not guarantee its application in the courts of that State.[34] Thus, CISG is not applicable.

[32]Hollis(2005), pp. 32–45.

[33] Clarification No. 8.

[34]Ferrari(2009).

III. THE CLAIMANT IS IN BREACH OF BOTH THE AGREEMENTS.

Assuming that CISG applies, the Claimant is in breach of both SPAs as (i)it did not insure the first shipment, (ii)the prototypes were not delivered in time, (iii)it delivered non-conforming goods, therefore (iv)the Respondent is entitled to damages claimed.

i. Insurance for the first shipment was to be borne by Claimant.

The Claimant was responsible for all related costs under SPA No.1 as the Respondent was new to the field. The lack of insurance resulted in huge losses for the Respondent and the Claimant is liable to compensate because (a)it is usage under Art.9, CISG when using DDP and (b)the Claimant is bound to insure the goods under Art.32, CISG.

a. The Claimant incorporated the usage in the contract and is bound by it.

The parties are bound by any usage to which they have agreed.[35] DDP constitutes usage as it is a publicly available standard term.[36] These usages and practices create expectations that go without saying.[37]

Under DDP, risk does not transfer till the goods are placed at the disposal of the buyer.[38] Since the place of delivery is the buyer's place of business[39] the Claimant had to bear all costs incurred until the goods were delivered there. The seller has an obligation to arrange

[35] Art.9, CISG.

[36]BP Oil International case(2003).

[37] Schwenzer(2010) p.183.

[38] Sec.A5, DDP, Incoterms(2010).

[39]Raw Salmon case(1998).

everything necessary to ensure buyer can take delivery at the agreed place.[40] Thus the cost of insurance was to be borne by the Claimant.

Further, the Claimant had increased the price by 50%[41] to accommodate the expense of all "related costs" and they had no reason to believe this would exclude insurance. If the contract is silent regarding insurance, it is wrong to assume that the seller is not responsible. The Respondent was assured that it only had to pay the amount stated in SPA No.1. Unless otherwise agreed, cost of insurance is to be borne by whoever bears the transportation cost.[42] Consequently, the Claimant ought to have insured the goods.

In any case, the Claimant is to bear the consequences of ambiguity of terms.

Objective interpretation requires the *contra preferentum* interpretation of unclear terms. The party that has drafted or otherwise supplied a certain term must bear responsibility for ambiguity. This rule is mostly applicable to standard terms.[43] It was the first time that the Respondent was using DDP. The Claimant incorporated it in the contract.[44] It is therefore responsible for any related ambiguity.[45]

ii. The prototypes were not delivered in time.

The Claimant was bound to deliver the prototypes within 14 days of receipt of the deposit. The initial deposit was transferred by the Respondent at 10:00am and the Claimant received

[40] Frozen Bacon case(1992).

[41] Para.6, Facts.

[42] *Supra* Note 37 at p.546.

[43] *Id*. at p170.

[44] Clarification No.33.

[45] *Supra* Note 37 at p.174.

the payment in five minutes.[46] The transaction was complete before commencement of business hours. Thus, the day on which the deposit was made cannot be excluded while calculating the 14-day period. The prototypes should have been delivered on or before 13th August 2014. The Claimant was therefore in breach of its obligation under the contract.[47]

iii. *The final goods were non-conforming.*

The contractual standards of the watchstraps were not met and the Claimant must be held liable for the same because (a)the requirements under Art.35(1), CISG were not met and (b)the requirements under Art.35(2), CISG were not met. Further, (c)the Respondent has the right to rely on non-conformity to withhold payment.

a. The requirements under Art.35(1),CISG were not met.

The final goods must be of the quantity, quality and description required by the contract.[48] Under the CISG the seller warrants that the goods possess the qualities of the goods which he held out as a sample or model. The holding out itself suffices, an implied agreement is not necessary.[49]

The leather of the watchstraps was not as soft as the prototypes and the quality of leather used was inferior. The approval of the prototype was due to the soft hand-stitched nature of the watchstraps and this was made known to the Claimant wherein it was specified that they wished to modify the order because of the excellent quality of the prototypes they received. A seller's unconditional acceptance (upon the request of the buyer) of a modified order

[46] Clarification No.15.

[47] Art.33(b),CISG.

[48] Art.35(1),CISG.

[49] *Supra* Note 37 at 582.

presumes consent to the related technical specifications.[50] A certain detail of goods, possibly of importance to the buyer's sub-buyer, known to the seller, also forms a condition fundamental to a contract.[51]

Further, the watchstraps did not fit the Cherry watchcase which was an explicit requirement of the contract. This requirement formed an essential characteristic of the contract which the Claimant was aware of.[52]

Hence, the Claimant is in violation of Art.35(1).

b. The requirements under Art.35(2), CISG were not met.

The Claimant also breached the contract under Art.35(2) because the watchstraps were not fit for the particular purpose made known to the seller at the time of conclusion of the contract. If a particular purpose within the meaning of Art.35(2)(b) exists, the seller is responsible for the fitness of the goods for that purpose if it has been made known to him.[53] The Respondent made it known that the watchstraps were to be particularly used for Cherry watches only and thus it was essential that the straps should fit the Cherry watchcases.[54] The Claimant was provided with a watchcase to ensure the same.[55] If the parties have discussed the special importance of a particular obligation during the pre-contractual negotiations then there is no

[50] *Id* at 164.

[51] *Id* at 410.

[52] Art.8.1, CISG.

[53] *Supra* Note 37 at p.580.

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

[55] Respondent's Ex.No.1.

room for excluding the fundamental nature of the breach.[56]The Respondent was well aware of the Claimant's reputation and they reasonably relied on the Claimant's skill and judgment.

Further, the Respondent could only arrange for one watchcase and that too with difficulty. Knowing this, it is unreasonable for the Claimant to expect the Respondent to have measured the size of the prototype before approving it.

c. The Respondent has a right to rely on the lack of conformity to withhold payment.

Where large quantities have been delivered, the buyer is not required to examine all the goods, but may restrict the examination to representative, random tests.[57] The Respondent did so by checking a few pieces in every carton as checking all 5,000,000 pieces was not practically possible. Further, the size discrepancy was discovered only after the straps were presented to a prospective buyer as the Respondent was not in possession of a watchcase. The goods were received by the Respondent on 29th January, 2015and the notice was sent by E-mail on 27th February, 2015. One month is a fair period of examination to be granted to avoid discrepancies in international practice[58] and the reasonable period of time to serve notice of non-conformity must be computed from discovery of non-conformity by the buyer and not from the time of receipt of the goods as the opportunity to discover non-conformity arose much after the actual receipt of goods. Thus, the Respondents rightfully withheld payment after giving due notice of the non-conformity.

[56] *Supra* Note 37 at p.412.

[57] *Id* at 615; Live Fish case(1998).

[58] Gisberger(2005-06).

iv. *The Respondent is entitled to damages*

In light of the contract breaches of the Claimant highlighted above, the Respondent is entitled to the damages claimed.[59] The compensation shall include the expectation interest as well as the reliance interest (expenditures made in reliance of the existence of the contract).[60]The Respondent also has a right to recover frustrated expenses[61] and thus the expenses incurred in website development and in rejecting early orders from customers must also be compensated.

[59] Art.45(1)(b), CISG.

[60] Art.74, CISG; *Supra* Note 37 at pp.1000-01.

[61] Art.74, CISG; *Supra* Note 37 at p.1014.

REQUEST FOR RELIEF

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

1. The Tribunal does not have the jurisdiction to adjudicate on the claims presented before it.
2. The CISG does not govern the claims arising under SPA No.1 and SPA No.2.
3. The Claimant is in breach of both the agreements.
4. The Respondent in entitled to counter compensation of:
    - USD 17.4 million for payments advanced to the Claimant.
    - USD 10 thousand for development of the website costs
    - USD 20 million for loss of profits
5. The claimant is liable to pay for all costs of arbitration in accordance with Article 52 of CIETAC Arbitration Rules followed by interests.