TEAM NO. 907 C

THE 6TH INTERNATIONAL ADR (ALTERNATIVE DISPUTE RESOLUTION) MOOTING COMPETITION

5TH - 9TH JULY 2016

CITY UNIVERSITY OF HONG KONG, HONG KONG

ALBAS WATCHSTRAPS MFG. CO. LTD.
CLAIMANT

V.

GAMMA CELLTECH CO. LTD.
RESPONDENT

MEMORANDUM FOR CLAIMANT

Claimant:

Albas Watchstraps Mfg. Co. Ltd.,
a company incorporated under the laws of Yanyu
241 Nathan Drive, Yanyu City, Yanyu
Head of Company: Giovanni Konstantopoulos, CEO

Legal Representative:

Tim Morrow
Ring and Associates, LLP
7/F, The Bauxer Building
7 Garden Street, Yanyu City, Yanyu

Respondent:

Gamma Celltech Co. Ltd.,
a company incorporated under the laws of Wulaba
17 Rodeo Lane, Mulaba, Wulaba
Head of Company: Anastasia Carter, CEO

Legal Representative:

Joseph Cunningham QC
Cunningham Chambers
20 Innex Court
7 Garden Street, Mulaba, Wulaba

LIST OF ABBREVIATIONS

¶ / para.	Paragraph
Art. / Arts.	Article / Articles
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Arbitration Rules	The China International Economic and Trade Arbitration Commission Arbitration Rules 2015
CISG	United Nations Convention on Contracts for the International Sale of Goods
Clause	Dispute Resolution Clause
CNO	Clarification number
HK	Hong Kong
mil.	million
NY law	Law of the State of New York
Parties	Claimant and Respondent
PIL	Private International Law
PNO	Page of the Problem
SPA 1	Sale and Purchase Agreement, dated 23 July 2014
SPA 2	Sale and Purchase Agreement, dated 7 November 2014
SPAs	SPA 1 and SPA 2
UNCITRAL	United Nations Commission on International Trade Law
USD	American dollar
U.S.	United States of America

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Asante v. PMC	United States, 27 July 2001, Federal District Court [California]
Cooling system case	Austria, 14 January 2002, Supreme Court
Design of radio phone case	Belgium, 15 May 2002, Appellate Court Gent (*NV A.R. v. NV I.*)
Bernards v. Carstenfelder	Netherlands, 2 January 2007, Appellate Court 's-Hertogenbosch
Burney v. Raza	India, 21 April 2011, Supreme Court of India
Cietac 1	People's Republic of China, 1 April 1993, China International Economic and Trade Arbitration Commission, Arbitral award No. 750.
Case No. 340/1999	Russia, 10 February 2000, Arbitration proceeding 340/1999
Commercial vehicles case	Germany, 10 March 2004, Appellate Court Celle
Computers and accessories case	Germany, 18 June 2003, District Court Tübingen
Clothes case	Germany, 27 March 1996, District Court Oldenburg
Cysteine case	China**,** 7 January 2000, CIETAC Arbitration proceeding
Daimler v. Franklin	U.S., 30 August 2004, Court of Appeals of

	Indiana
Eastman v. Altek	U.S., 29 March 2013, District Court of New York
Fabrics case	Germany, 21 March 2003, District Court Berlin
Traction v. Drahtseilerei	France, 6 November 2001, Appellate Court Paris
Funnel covers case	Germany 8, November 2007, Appellate Court Dresden
Halifax v. Intuitive	England, 1999, English High Court
Him Portland v. Devito	U.S., 17 January 2003, United States Court of Appeals
Hungarian wheat	Germany, 8 February 2006, Appellate Court Karlsruhe
Imation v. KPE	U.S., 3 November 2009, United States Court of Appeals
Marzipan case	Germany, 11 December 1996, Supreme Court
Melody v. Loffredo	Netherlands, 26 February 1992, Appellate Court 's-Hertogenbosch
Minibus case	Netherlands, 29 July 2009, District Court Arnhem
Mislenkov v. AMD	U.S., 23 January 2001, United States Court of Appeals
Mops case	Greece, 2009 Decision 8161/2009 of the Single-Member Court of First Instance of Athens
Pitted sour cherries case	Germany, 3 August 2005, District Court Neubrandenburg
Pizza cartons case	Germany, 13 April 2000, Lower Court Duisburg
Pre Pain v. Bakkershuis	Belgium, 20 September 2005, Commercial Court Hasselt
Printing case	Germany, 4 December 1996, Supreme Court

Truffles case	Germany, 24 January 1996, District Court Bochum
Window plant production case	Germany, 3 December 1999, Appellate Court München

MISCELLANEOUS

DICTIONARY	BLACK J. et al., *Dictionary of Economics.* Oxford University Press, 2012.
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TABLE OF CONTENT

1. THE TRIBUNAL DOES HAVE JURISDICTION OVER THE DISPUTE

1 Claimant submits that the Tribunal has jurisdiction for the following reasons: (1) the Parties intended to submit disputes concerning payments in connection to SPAs to arbitration by virtue of the Arbitration Agreement, (2) multi-tier clause is of a solely procedural nature with no effect to the jurisdiction of the Tribunal.

1.1. PARTIES INTENDED TO SUBMIT DISPUTES TO ARBITRATION

2 The Parties have shown a clear intent to arbitrate in Art. 19(a) of SPAs, which state that after *"failure to reach an amicable resolution within a reasonable period of time (not to exceed 14 days)* [...] *either party may submit the dispute* [concerning payments] *to the* [...] *CIETAC*".

3 The dispute at hand is based upon Respondent's breach of the obligation to pay *"80%* [of the amount of the total Payment] *within 14 days from receipt of the goods"* stipulated in Art. 4 of the Agreement No. 2.

1.2. TERM PAYMENT SHOULD BE INTERPRETED AUTONOMOUSLY WITHIN THE MEANING OF THE SPAS

4 Claimant submits that the arbitration clause should be interpreted as encompassing disputes relating directly to the term "Payments" as defined in Art. 4. Claims arising under any other grounds are therefore not arbitrable.

5 Presented conclusion has been repeatedly concluded by various tribunals, according to which Parties are only bound to arbitrate those issues that they have clearly agreed to arbitrate.[1] The tribunal in *Daimler case* added to this perception that the wording of arbitration agreements *"should not be extended by construction or implication."*[2] As the NY law governs the interpretation,[3] the Tribunal should therefore pursuant to NY jurisprudence presume that the same words used in different parts of SPAs have the same meaning.[4] Claimant therefore asks the Tribunal to respect the general principle of freedom of contract by adopting the definition of the term "Payment" in its mutually agreed form embedded in Art. 4 of SPAs and not to seek any further extensions that go beyond its jurisdiction.

[1] Mislenkov v. AMD.
[2] Daimler v. Franklin.
[3] PNO 7, 12.
[4] Imation v. KPE; Eastman v. Altek.

1.3. AMICABLE SETTLEMENT IS NOT A PRE-ARBITRAL REQUIREMENT

6 Parties included a pre-arbitral procedure into the arbitration clause by which *"disputes concerning payments"* are to be resolved amicably *"within a reasonable period of time (not to exceed 14 days)."* Claimant submits that such arrangement fails to be sufficiently specific in consequence of which the escalation clause is unenforceable.[5]

7 However, even if the multi-tier clause would be found enforceable, it shall be noted that the 14-day period is clearly insufficient for assessment of the full range of the currently disputed issues. A contrary conclusion would transform the amicable settlement into an instrument of a mere obstruction and abuse of party's rights for the purpose of postponing a final judgement, a conclusion which a *"tribunal is ought to employ all instruments to prevent."*[6]

8 In any case, it is generally acknowledged that circumvention of escalation clause does not pose an obstacle to jurisdiction but to admissibility of raised claims,[7] unless it contains wording as *"condition precedent to arbitration"*[8] which is not the case.

9 Consequently, Claimant respectfully asks the Tribunal to evaluate the Art. 19(a) as an encouragement of Parties to enter into negotiations in the interest of maintaining good business relations and preventing cost associated with arbitration procedures and not as a pre-arbitral requirement affecting Tribunal's jurisdiction.[9]

2. CISG DOES GOVERN THE CLAIMS ARISING UNDER BOTH AGREEMENTS

10 Claimant submits that choice-of-law clause, contained in Art. 20 of SPAs, referring to "*the national law of Wulaba,*" does not render CISG implicitly excluded and thus CISG shall be applied to the substance. Should the Tribunal find otherwise, it is Respondent who should bear the burden of showing that the parties mutually intended to exclude its application.[10]

[5] BORN&ŠĆEKIĆ, p. 231.
[6] YEARBOOK, ¶ 26.04.
[7] BORN&ŠĆEKIĆ, p. 244.
[8] Him Portland v. Devito.
[9] Halifax v. Intuitive.
[10] JOHNSON, p. 291.

2.1. CHOICE-OF-LAW CLAUSE, IF READ AS REFERRING TO PARTICULAR LAW, DOES NOT EXCLUDE CISG APPLICATION

11 Art. 20 of SPAs stipulate that "[t]*he contract shall be governed by the national law of Wulaba. All other applicable laws are excluded.*"

12 Claimant's position is that Art. 20 of SPAs does not refer to a particular law, since such choice of law would have to be specific and not raising any doubts as to what exact law shall be applied.[11] A majority of tribunals acknowledges that a choice-of-law clause merely specifying the general law of a Contracting State is insufficient to exclude the application of the Convention.[12] Specific choice-of-law would contain reference to *e.g.* "Italian Codice civile".[13]

13 Claimant may object that the exclusion was executed implicitly. It shall not be omitted, though, that in any case, Parties must have primarily intended to exclude CISG.[14] When drafting SPAs, Claimant did not understand the purpose of Art. 20.[15] Thus, the intention to exclude CISG was missing on its side pursuant to Art. 8 para. 1 of the CISG. As from the position of Respondent, the only motivation that seems to underline incorporation of choice-of-law clause is to avoid situation of being "*faced by surprise by having some other unknown and unfamiliar law applicable*".[16] Nonetheless, CISG does not represent law unknown to Respondent when Wulaba is Contracting State thereof since 2007. In this regard, Claimant points to the fact that in order to apply CISG it is of no importance whether Respondent knew of the CISG applicability when drafting SPAs.[17]

14 Furthermore, Claimant is established under Yanyu law[18] belonging to the civil law system,[19] within which it is generally accepted that the mere reference to national law does not exclude CISG. Thus, Claimant submits that not even under the objective test (Art. 8 para. 2 of the CISG) shall the Claimant's behaviour be interpreted to the effect as intending to exclude CISG.

15 Therefore, since the intent of the Parties is unclear a generally strict approach shall favour

[11] OPINION ¶ 4.5; SCHLECHTRIEM, p. 36.
[12] Asante v. PMC; DRAGO&ZOCCOLILLO.
[13] KRÖLL, p. 105; OPINION ¶ 4.4.
[14] BUTLER, p. 9.
[15] CNO 30.
[16] CNO 30.
[17] KRÖLL, p. 105.
[18] PNO 3, ¶ 1.
[19] CNO 23.

application of the CISG.[20]

2.2. CHOICE-OF-LAW CLAUSE, IF READ AS REFERRING TO WULABA LAW IN ITS ENTIRETY, DID NOT IMPLICITLY EXCLUDE CISG APPLICATION

16 It is generally understood that even in case when choice-of-law clauses refer to the national law in its entirety, it is not capable of excluding the application of CISG,[21] since CISG is still a uniform international sales law which automatically becomes a part of Wulaba law[22] and thus it directly binds individuals of contracting states thereof.

17 Nevertheless, the choice-of-law clause is not completely meaningless. It is believed that by its inclusion into the contract, Parties intended the chosen law to fill the CISG's gaps.[23] This is well-evidenced by arbitral jurisprudence.[24]

18 In conclusion, since all the conditions stipulated by Arts. 1 and 2 of the CISG were fulfilled and CISG has not been excluded pursuant to Art. 6 thereof, Respondent submits that CISG shall apply as the law applicable to substance, while it shall be resorted to Wulaba law to fill in potential gaps.

3. CLAIMANT HAD NO OBLIGATION TO SECURE INSURANCE UNDER SPA 1

19 Respondent reasons the lack of insurance under SPA 1 by the fact that "*the prices were DDP*" and Claimant "*assured the Respondent that it would bear all related costs*".[25]

20 Respectively, Claimant firstly contends that SPA 1 does not stipulate an explicit obligation of Claimant to secure insurance. Although Claimant undertook to "*ship the goods by sea*", an obligation to secure transportation is independent from the one to secure insurance.[26] Accordingly, there is no obligation to conduct insurance under DDP INCOTERMS in which it is explicitly stated that "*the seller has no obligation to* […] *make a contract of*

[20] OPINION, ¶ 4.9.
[21] OPINION, ¶ 4.8; Cooling system case; Design of radio phone case; Traction v. Drahtseilerei and more referred to in KRÖLL, p. 104.
[22] HOLDSWORT; CNO 72.
[23] KRÖLL, p. 105.
[24] Case No. 340/1999.
[25] PNO 15.
[26] SAENGER, Art. 32., ¶ 12.

insurance".[27]

21 If Respondent intended to impose such duty on Claimant, a respective provision should have been inserted into the SPA 1. It is Respondent who drafted SPA 1,[28] therefore Art. 3 of the SPAs should be subjected to *contra proferentem* interpretation stating that "*if contract terms supplied by one party are unclear, an interpretation against that party shall be adopted*."[29]

22 Secondly, the alleged "related costs" extension of INCOTERMS DDP must be read in light of the fact that Claimant additionally offered DDP parity[30] that imposed additional obligations with new associated "related" costs.

23 Claimant submits that it would be unfounded for Tribunal to evaluate "related costs" reassurance as a residual category for potentially limitless spectrum of obligations that Respondent may object to, depending on future circumstances. Consequently, Respondent could soon seek to be relieved from other payment obligations such as the costs of wire transfer.

4. RESPONDENT'S CLAIM FOR LATE DELIVERY IS INSUFFICIENT

24 Respondent claims "*a breach of the first agreement* [...] *because* [...] *sample was late*"[31] However, the Problem is silent on the issue whether the prototypes have been delivered on 14 or 15 of August 2015. In such situation Respondent bears the burden of proof.[32]

25 Moreover, given that Respondent did not draw any consequences from alleged late delivery,[33] Tribunal shall not grant any relief, pursuant to generally accepted No Relief Unless Claimed principle,[34] which has not been sought by Respondent.

26 Claimant furthermore points to the fact that Respondent firstly accepted the goods without raising any objection and after 6 months Respondent claims the breach of contract. Should the Tribunal indeed find a breach, it is suggested for Tribunal that one day delay may not constitute a fundamental breach as held in Cloths case.[35] Moreover, the expiration of a

[27] RAMBERG, p. 151.
[28] CNO 18.
[29] Cysteine case.
[30] PNO 3.
[31] PNO 18.
[32] Automobile case.
[33] PNO 18.
[34] Burney v. Raza.
[35] Clothes case.

reasonable period to object, in conjunction with principle of estoppel underlying the CISG,[36] shall bar any Respondent's plea for contractual avoidance.[37] Neither should Respondent be able to seek damages, as none could in the present dispute arise in connection to a single day delay.

5. RESPONDENT HAS LOST ITS RIGHT TO RELY ON THE LACK OF CONFORMITY

27 Respondent invokes Claimant's breach of its obligation to deliver the goods as required by prototype as well as non-compliance with contractual description under SPA 2[38] (together referred as "Characteristics"). However it is argued that Respondent failed to deliver sufficiently specific and timely notice in respect of both, thus Respondent lost any right to object to the lack of conformity.

5.1. REASONABLE EXAMINATION SHOULD HAVE DISCOVERED ALL DEFECTS

28 Claimant submits that an examination "*conducted to concern all aspects of conformity of the goods*"[39] ought to have revealed all defects on 26 January 2015, when Respondent in fact examined the goods.[40]

29 Firstly, Respondent had an obligation to assemble the watchcase with the watchstraps as confirmed in *Funnel Cover case.*[41] Even if Respondent did not possess a watchcase, it could have obtained one as the Cherry brand has already launched its watch collection.[42]

30 Secondly, Respondent had the prototypes received on 14 August 2014,[43] where a simple visual examination combined with an examination by touch should have discovered any discrepancies with the prototypes.

31 Based on the aforementioned, Claimant should have become aware, within the meaning or Art. 39, of defects of Characteristics on 26 January 2015.

[36] Melody v. Loffredo.
[37] Minibus case.
[38] PNO 18.
[39] Bernards v. Carstenfelder.
[40] CNO 19; with CNO 50.
[41] Funnel covers case.
[42] CNO 27.
[43] PNO 8.

5.2. RESPONDENT'S NOTIFICATION WAS UNTIMELY

32 As Respondent sent the notification on 27 February 2015.[44] A notification sent one month and one day after Respondent had become aware of claimed defects, shall, under the Art.'s 39 strict[45] and short term[46] standard, be considered as untimely.

33 Moreover, the fact that Respondent paid particular attention to expedited delivery under SPA 2 as he was "*desperate for the products*"[47] shortens the period to give notice.[48] Such urgency, as held in *Fabrics case,* created Claimant's expectations to receive "*notice of any lack of conformity after the lapse of one month at the latest*".[49]

5.3. RESPONDENT'S NOTIFICATION WAS NOT SUFFICIENTLY SPECIFIC

34 Respondent alleges that watchstraps are neither "*as soft*", nor *"do they look handmade."*[50] However, such general statements cannot meet any reasonable standard of specificity, as is required by case law[51] and do not indicate "*unmistakably what was meant.*"[52]

35 It is suggested that Tribunal shall follow the opinion espoused in *Truffles case* which faced objection that the truffles were "*soft*" but nonetheless held that "*defect in the truffles was not sufficiently detailed,*" while it would require reasoning as "*the truffles had maggots*".[53]

36 Given the aforementioned, Respondent failed to provide sufficiently specific notice in regard of the prototypes.

5.4. RESPONDENT WAS IN LIGHT OF THE CIRCUMSTANCES ACQUAINTED WITH THE CHARACTERISTICS OF FINAL PRODUCTS

37 Respondent claims the lack of "*high-end feel"*[54] while Respondent associates it with handmade production, as it is apparent from statement that "*the watchstraps are beautiful all the way to the hand-stitch*".[55] However, Respondent never requested the goods to be

[44] PNO 18.
[45] Computers and accessories case.
[46] Pre Pain v. Bakkershuis.
[47] PNO 18.
[48] Fabrics case.
[49] Ibid.
[50] PNO 18.
[51] Hungarian wheat case; Commercial vehicles case.
[52] Printing case.
[53] Truffles case.
[54] PNO 16.
[55] PNO 9.

handmade.[56] In fact Respondent agreed with the "*mass production*",[57] which is ordinarily understood as "*production* […] *using mechanized methods* […] [as] *contrasted with handicraft production...*"[58] Thus under these circumstances Respondent could not reasonably expect the handmade quality.

38 Respondent moreover contends that the ends of "*watchstraps do not fit the cherry watchcases*."[59] However, by providing the approval of prototypes Respondent undertook to accept the goods in size presented by prototypes. The approval shifted the caveat venditor stance contained in Art. 35(1) to the caveat emptor, causing any related non-conformity to be remedied by its consent.

6. INCOTERMS DOES NOT AFFECT THE PLACE OF PERFORMANCE, HENCE RESPONDENT WAS BURDENED BY THE RISK OF LOSS UNDER SPA 2

39 Claimant argues that it has fulfilled its obligation to deliver goods under SPA 1 by handing it over to first carrier on 10 October 2014,[60] while on the same date the risk has passed to the buyer.[61] As a consequence any "*loss* [...] *to the goods* [...] *d*[id] *not discharge* [Respondent] *from his obligation to pay the purchase price.*"[62] The inclusion of INCOTERMS DDP clause cannot alter the transfer of risk as it was perceived solely as a costs clause for reasons further demonstrated.

40 The content of INCOTERMS DDP shall be interpreted in light of the heading "*Quantity and price*".[63] If the Parties in fact intended to detach the heading from interpretation, an explicit disclaimer had to be used.[64]

41 Moreover, Respondent itself acknowledged that "*the prices were DDP*",[65] what complies with the said argumentation as well as with decisions in *Marzipan case*[66] and *Window*

[56] CNO 45.
[57] PNO 9.
[58] DICTIONARY, p. 258.
[59] PNO 18.
[60] PNO 3.
[61] Art. 67 CISG.
[62] Art. 67 CISG.
[63] FONTAINE, p. 151.
[64] FONTAINE, p. 152.
[65] PNO 15.
[66] Marzipan case.

production plant case[67] which confirmed the Art. 31 CISG as a basic rule. In fact the burden of proof lies on a party intending to divert from it,[68] while in cases of doubt, there is a strong presumption established to favour such ground rule.[69]

7. RESPONDENT IS IN BREACH OF SPA 2 WHICH FORMS THE BASIS FOR ITS DAMAGES CLAIM

42 Respondent withholds balance payment for SPA 2 until it receives "*correct goods*".[70] However no right of suspension for non-conforming goods arises either out of the SPA 2 or out of the CISG.[71] The inability of Respondent to refuse performance follows Art. 48 CISG that restricts the claims to avoidance and damages.[72] By not providing a balance payment under SPA 2 Respondent committed a breach which is sought to be remedied by Claimant's damages relief.

8. RESPONDENT'S CALCULATIONS FOR DAMAGES ARE ILL-SUPPORTED

43 As Respondent did not give any due notice, Tribunal is therefore called, pursuant to Art. 44 CISG, to dismiss any Respondent's counter-claim for damages.

44 Notwithstanding the notification, Respondent's claim for USD 17.4 million does not address the USD 15 million subject to Respondent's acceptance of responsibility, which consumatted the SPA 1 and displaced any respective Respondent's claim for damages.[73]

45 Secondly, website development claim for USD 10 thousand could not have been reasonably foreseen at the time of conclusion of SPA 2, thus Claimant cannot be held liable under Art. 74 CISG.[74]

46 Lastly, the highly speculative and unsubstantiated USD 20 million loss of profit counter-

[67] Window production plant case.
[68] Pizza cartons case.
[69] Pitted sour cherries case.
[70] PNO 18.
[71] Mops case.
[72] HONSELL, Art. 48, p. 55 et seqq.
[73] Cietac 1.
[74] KNAPP, ¶ 2.8.

claim leads to the enrichment of Respondent. In fact Respondent's business was declining[75] it is therefore doubtful whether the Respondent's poor business situation reflects the ability to achieve USD 20 mil profit. From evidentiary point of view, Respondent bears the burden of proof[76] and it fact failed to satisfy such standard.

[75] CNO 25.
[76] SINGH, p. 217.

RELIEF SOUGHT

On the basis of all presented evidence and argumentation, Claimant respectfully requests Tribunal to:

(1) find that it has jurisdiction over the Claimant's damages claim;

(2) dismiss all prongs of Respondent's counter-claim;

(3) award relief as stipulated in the Claiman's Request for relief which may be found on page 4 of the Problem.

Submitted on 10 June 2016 by

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On behalf of Claimant

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