# SIXTH ANNUAL INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION MOOTING COMPETITION

**5-9 JULY 2016**

**HONG KONG**

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*In the matter of:*

Albas Watchstraps Manufacturing Co. Ltd.

v.

Gamma Celltech Co. Ltd.

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MEMORANDUM FOR CLAIMANT

**Team No. 115**

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| $ | United States Dollars |
| & | and |
| A.D. | American Decisions |
| AC | Advisory Council |
| Art. | Article |
| CCI | Chambre de Commerce Internationale |
| CIETAC | China International Economic and Trade Arbitration Commission |
| CISG | Convention on International Sale of Goods |
| Cl. | Claimant |
| CLOUT | Case Law on UNCITRAL Text |
| Co. | Company |

| | |
|---|---|
| Comm. | Commission |
| d. | Division |
| DDP | Delivery Duty Paid |
| E.g. | Example |
| Ex. | Exhibit |
| F.2d. | Federal Second Division |
| F.L.R. | Family Law Reporter |
| Fr. | France |
| Ger. | Germany |
| Hist. | History |
| Hon'ble | Honourable |
| Hung. | Hungary |

| | |
|---|---|
| ICC | International Commercial Arbitration |
| ICSID | International Centre for Settlement of Investment Disputes |
| Id. | Ibid |
| Inc. | Incorporate |
| Ins. | Insurance |
| Int'l | International |
| Leg. | Legislative |
| Ltd. | Limited |
| NE | North Eastern |
| No. | Number |
| NSWLR | New South Wales Law Reporter |
| Op. | Opinion |

| | |
|---|---|
| pp. | Pages |
| Pty | Proprietary Company |
| Rep. | Reporter |
| s. | Section |
| S&P No. 2 | Sale and Purchase Agreement No. 2 |
| SGCA | Singapore Court of Appeal |
| SGHC | Singapore High Court |
| St. | Saint |
| U.N. | United Nations |
| U.S. | United States of America |
| UNDROIT | International Institute for the Unification of Private Law |
| v. | Versus |

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## STATEMENT OF FACTS

The parties to the Contract are Albas Watchstraps Mfg. Co. Ltd. (CLAIMANT) and Gamma Celltech Co. Ltd. (RESPONDENT).

CLAIMANT is a company based in Yanyu since 1973. It sells its watchstraps to various importers and watch producers all over the world.

RESPONDENT is a company based in Wulaba, established in 2002. It has been considered to be one of the fastest growing traders of smart mobile phone accessories.

**23.07.2014** Earlier during the year, RESPONDENT approached CLAIMANT with regards to the purchase of leather watchstraps for the Cherry Watch, belonging to the Cherry Brand. Subsequently, a Sale and Purchase agreement was concluded by the Parties.

**Note:**

It was agreed on by the Parties that due to RESPONDENT'S inexperience in the field, CLAIMANT offered the DDP Incoterms and the goods at an increased 50% price and agreed to be responsible for all related costs.

**31.07.2014** RESPONDENT paid a deposit of USD 3 million to CLAIMANT.

**14.08.2014** As agreed between the parties, CLAIMANT sent an approval prototype for the RESPONDENT to confirm in order to start manufacturing – a standard procedure regularly followed by CLAIMANT. RESPONDENT approved the prototype and CLAIMANT, thus, invested in the necessary production tools.

**10.10.2014** CLAIMANT, as agreed between the parties, arranged for the watchstraps to be shipped by sea.

**28.10.2014** CLAIMANT received a notice from the shipping company stating that the goods were lost at sea and due to this, CLAIMANT sent a letter to RESPONDENT informing them about the same so RESPONDENTS could claim compensation from the insurance company for the same. However, RESPONDENT informed CLAIMANT that as per the decided terms of the agreement, CLAIMANT was responsible for all related costs, including insurance of the goods.

**07.11.2014** Subsequently, CLAIMANT offered a replacement shipment, provided RESPONDENT agreed to make full payment of the lost goods. The Parties thus signed a second Sale and Purchase agreement at a discounted rate this time.

**29.12.2014** Upon receiving the balance payment for the initial Sale and Purchase Agreement and a deposit for the new Sale and Purchase Agreement, CLAIMANT managed to arrange for the watchstraps to be shipped at the earliest on the above mentioned

date.

**27.02.2015** CLAIMANT received a letter from RESPONDENT refusing to pay the balance amount as it was not satisfied with the quality of the watchstraps. Furthermore, RESPONDENT also demanded a refund on the initial payment as it was a conditional payment for the right replacement transaction.

**18.11.2015** CLAIMANT made an application for arbitration praying for liquidated damages in the sum of USD 9.6 million before the China International Economic and Trade Arbitration Commission.

## ARGUMENTS ADVANCED

### I. The Tribunal has jurisdiction to deal with the payment claims raised by the CLAIMANTS.

1. It is respectfully submitted that the Hon'ble Tribunal has jurisdiction as per the arbitration clause contained in the Sale and Purchase Agreement No. 2 [*CL. EX. 6*]. The *lex arbitri* governing the arbitration is the Laws of Hong Kong which is also the seat of the arbitration. [*ARTICLE 74, CIETAC RULES*]
2. The issue of jurisdiction of this tribunal shall be dealt as under **(A)** The tribunal has competence to determine its jurisdiction, **(B)** the claims raised by CLAIMANT are payment claims and **(C)** the arbitration agreement is valid and there was consensus between the parties to arbitrate.

#### A. The Tribunal has competence to determine its jurisdiction.

3. According to the principle of *Kompetenz-Kompetenz* this Tribunal has the power to determine its jurisdiction, which is also recognised as a general principle of international law. [*FOUCHARD ¶473, REDFERN ¶5.109,G. BORN P.1060, TOPCO V. LIBYA*]. The same has also been codified in Hong Kong laws [*S.34, ARBITRATION ORDINANCE, 2015*] as well as in Article 75 CIETAC Rules, which has been adopted as per Article 19(a) of Sale and Purchase agreement No. 2 [*CL. EX. 6*]
4. This Tribunal has the first right to determine the validity of the arbitration agreement and the Courts of State of New York have a mere supervisory jurisdiction over the same. [*FOUCHARD ¶658, PAUL SMITH; NORSE AIR*]
5. CLAIMANT further submits that the arbitration is not premature as CLAIMANT is under no legal obligation to settle disputes amicably on account of lack of certainty and

there being "acrimonious" correspondence between the parties. [*AITION V. TRANSFIELD; ELIZABETH V. BORAL; ICC CASE NO. 8445*]

**B. The claims raised by CLAIMANT are payment claims.**

6. The claim raised by CLAIMANT is for the payment of the balance amount under Sale and Purchase Agreement No.2 and is thus a payment claim. [*SGS; NIKO; ICC CASE NO. 17050/GZ*] The parties have agreed to submit all payment related disputes to this Tribunal which has jurisdiction to deal with the claims raised by CLAIMANT. [*FOUCHARD ¶512*] RESPONDENT has failed to make the balance payment of $9.6 million within the prescribed time of 14 days after receiving the goods i.e. within 14 days of 27th February 2015. On RESPONDENTS' failure to make the payment before the expiry of the term and refusing to pay therein after, CLAIMANT became entitled to the remainder. [*LUFTHANSA*]

**C. The arbitration agreement is valid.**

7. The arbitration agreement is valid as there is exists a clear consensus to arbitrate. The mere use of the term "may" does not make the arbitration optional and it is binding. [*ROCHESTER*]. The purpose of the "may" language is to give the aggrieved party the choice between arbitration or abandonment of its claim. [*BONNOT*; *EGOL*]. Once CLAIMANT invokes arbitration, it is deemed to be obligatory for RESPONDENT. This can also be inferred as the parties intended the award to be final and binding.
8. Furthermore, if the parties had no intention to arbitrate they would have never inserted an arbitration clause in the agreement. [*FOUCHARD ¶490*] The clause should be interpreted by considering that if the parties had not wished to submit their disputes to arbitration, they would have refrained from mentioning the possibility of

doing so. Thus, the act of insertion of an arbitration clause shows that there exists a clear intention of the parties to arbitrate.

9. CLAIMANT further submits that there is no conflict between the jurisdiction of the arbitral tribunal and the Hong Kong courts. Article 19(a) provides for arbitration of payment disputes and Article 19(b) provides for the jurisdiction of the Hong Kong courts. Thus the parties wished to only submit payment disputes to arbitration and disputes not related to payment fall under the jurisdiction of Hong Kong Courts. Hence, there is no overlapping of jurisdictions [*EISEMAN; FOUCHARD ¶490*].
10. In a recent case, the Supreme Court of New York upheld an arbitration clause that was limited to the amount of the purchase price and all other disputes regarding the sale of the building were to be determined in the Court of Commerce of Paris according to French law. [*WORLD BUSINESS CENTER*]

## II. The CISG governs claims arising under the Sale and Purchase agreement No.1 and the Sale and Purchase agreement no. 2.

11. According Article 20 of the Sale and Purchase agreements [*Cl. Ex. 2 & 6*], the national law of Wulaba is to be applied. However the Tribunal should apply CISG to the claims arising out of the Sale and Purchase agreements furthermore, the Sale and Purchase agreements fall within the scope of CISG.

### A. The choice of law clause in the Sale and Purchase agreement directs this Tribunal to apply CISG.

12. Article 20 of the Sale and Purchase agreement [*Cl. Ex. 2 & 6*], must direct the Tribunal to apply CISG. Both Yanyu and Wulaba are signatories to the convention and CISG has been integrated into the Wulaban legal order to apply to international sales contracts [*RF CCI 105/2005; ST. PAUL GUARDIAN INS. CO. V. NEUROMED (U.S.)*]. Parties need not "opt in" to CISG through an explicit reference in the choice of law clause [*GRAVES, P. 7*].

13. The Sale and Purchase agreements deal with "sale of goods" as envisaged under CISG [*Arts. 1 & 3 CISG*] and CLAIMANT and RESPONDENT have their places of business in different States, Yanyu and Wulaba, which are both Contracting States to the CISG. Therefore, to stipulate that the law of Wulaba governs the Sale and Purchase agreements is, in these circumstances, to ensure that CISG governs the contract [*COKE CASE (ICC); MARBLE SLAB CASE (GER.); CÉRAMIQUE CULINAIRE (FR.); STEEL BARS CASE (ICC); SURFACE PROTECTIVE FILM CASE (GER.)*].

**B. There is no "clear indication" by the parties to opt out of CISG.**

14. In various Countries, courts have held that parties must clearly opt out of CISG [*E.G. BP OIL (U.S.); CEDAR PETROCHEMICALS (U.S.); SPACERS FOR INSULATION GLASS CASE (AUSTRIA); SPORT CLOTHING CASE (GER.); ST. PAUL GUARDIAN INS. (U.S.)*]. Art. 6 CISG also provides that "parties may exclude its application" [*BOILER CASE (AUSTRIA); JEWELRY CASE (AUSTRIA); HUBER/MULLIS, P. 60*]. They specifically emphasize that the contract should contain "clear language" conveying the parties' intention to exclude the application of CISG to their contract [*ASANTE (U.S.), P. 1150*]. Clear and unambiguous language stating that CISG would not be applicable is necessary to prevent its application in situations where it would otherwise apply [*GASOLINE AND GAS OIL CASE (AUSTRIA); WASTE CONTAINER CASE (HUNG.)*]. Merely specifying the general law of a contracting state is not sufficient to exclude CISG [*ASANTE (U.S.), P. 1150; YARN CASE (GER.); BONELL/LIGUORI, P. 391; DRAGO/ZOCCOLILLO, P. 9; FERRARI, P. 165; HUBER/MULLIS, PP. 63-64*].

15. This position is supported by the legislative history of CISG [*CISG Leg. Hist., Rep. 1st Comm. 1980*]. During the drafting process, amendments to Art. 6 suggesting otherwise were rejected, with a majority of delegates favoring the French position that "the parties" choice of a national law means that CISG applies if that state has adopted CISG" [*SCHLECHTRIEM 1986, P. 35*]. Commentator Ferrari states that tribunals must find that the parties showed a "clear indication" that they intended to exclude CISG [*FERRARI, P. 161*]. Other commentators have suggested examples of how CISG can be excluded in practice [*MCMAHON; CRAWFORD, PP. 192-93; WINSHIP*]. For example, choice of law provisions can read *"the law of France excluding CISG,"* or *"the laws of Pennsylvania not including the 1980 U.N. CISG" [Id.].*

16. In the Sale and Purchase agreements [*Cl. Ex. 2 & 6*], Article 20 only mentions that the *"The contract shall be governed by the national law of Wulaba"* and followed by an ambiguous statement, *"All other applicable laws are excluded"*. No "clear indication" to opt out of CISG can be inferred from this ambiguous statement as there is no express mention of opting out of CISG as examples followed by the commentators above. Article 20 of the Sale and Purchase Agreement [*Cl. Ex. 2 & 6*] is incorporated to exclude all other applicable laws but CISG cannot be excluded as it forms an integral part of the Wulaban legal order especially with regard to international sale contracts.

**C. The Sale and Purchase agreements constitute a sales contract within the scope of CISG.**

17. The Sale and Purchase agreements [*Cl. Ex. 2 & 6*], envisages the sale and purchase of various types of leather watchstraps [*Id.*]. This constitutes a sale of goods within the scope of CISG [*Art. 3 CISG; Art. 1(1) CISG; SCAFFOLD FITTINGS CASE (ICC)*] for two reasons. Firstly, the predominant obligations of CLAIMANT under the Sale and Purchase agreements concern the sale of goods (hardware & software) and not services (installation & personal training), which under Article 3(2) brings the Sale and Purchase agreements within the scope of CISG. Second, CLAIMANT has provided all the manufacturing materials under Article 3(1). By applying Article 3 there is a "pro convention principle". The burden of proof is on RESPONDENT to displace the prima facie application of CISG, which is presumed [*CISG-AC Op. 4, ¶ 2.10, ¶ 4.4*].

## III. Assuming CISG applies, its provisions been invoked on the account of:

### A. Lack of insurance cover in the first transaction.

18. The parties are bound by usage and practice of the parties or industries that are impliedly incorporated into the agreement unless otherwise agreed [*GENEVA TECHNOLOGY V. BARR INC.]*. Pursuant to Article 9 (2) of the CISG, INCOTERMS definitions shall apply by its incorporation into the contract. [*GAURDIAN INSURANCE V. NEUROMED SYSTEMS*].
19. The claimant has agreed to bear the cost related to transport as per incoterm DDP, and DDP does not impose any obligation on CLAIMANT to purchase insurance, thus the CLAIMANT isn't liable for any lack of purchase of insurance [*JAN RAMBERG*].

### B. Timing of delivery of prototypes.

20. It's respectfully submitted that the payment was made on 31st July to CLAIMANT'S bank and the prototypes were dispatched by 14th August, which was received by RESPONDENT on 15th August. RESPONDENT claims that it amounts to a breach as it was delayed by one day. CLAIMANT disputes this claim as the date of delivery of receipt is unknown and more the term used is 'provide' and not 'deliver' and hence the Claimant isn't liable as he provided by dispatching the prototypes on the 14th day.
21. Assuming but not conceding that there is a delay, it wouldn't amount to a fundamental breach as envisaged under Article 25 of CISG as it is not detrimental to deprive the respondent of what he is to expect under the contract as RESPONDENT only planned to introduce the goods during Christmas sale and that such delay of one day wouldn't deprive him of any sale. [*CLOTHES CASE*].

### C. Non-conformity of goods.

22. CLAIMANT cant be held liable for goods delivered provided that the goods conform with samples held out to RESPONDENT [*ARTICLE 35(2) (C) CISG*] and the buyer knew or couldn't

be unaware of lack of conformity [*ARTICLE 35 (3) CISG*]. CLAIMANT was obliged to deliver according to the size as prescribed in the prototype and there is proof that the size of final goods matches the prototype. [*STANDARD SOFTWARE CASE*]

23. The buyer loses the right to claim for lack on conformity if he fails to give a notice [*ARTICLE 39 CISG*] and it's the duty of RESPONDENT to give a complete picture of lack of conformity in the notice. [*NV CARTA MUNDI V. INDEX SYNDICATE LTD.*]
24. However with regards to the quality goods, in leather industry it's a standard usage that the leather isn't always consistent and moreover the manufacturing process was discussed about during the negotiations and it's reasonable the final goods might not be as soft as its only a minor defect [*SCHWENZER*].

**D. Payment of money under the transaction.**

25. CLAIMANT further submits that the 2nd contract was concluded on the sole condition that RESPONDENT makes the balance payment of the first transaction. This was a condition to be met before any new sale purchase agreement was agreed. Its a condition precedent for agreement No. 2 and must be fulfilled before any binding obligations can be created [*KIM LEWISON; MONA V. FLEMING*] and its clear that agreement No. 2 came into existence upon the respondent fulfilling the condition precedent.
26. The alleged non-conformity if any as the claim states is only a minor non-conformity to which the respondent is still required to pay for the contract, despite the non-conformity [*HTTP://WWW.UNILEX.INFO/CASE.CFM?ID=473*]. This was further clarified that a minor non-conformity would not justify withholding the amount due under the contract [*BOWLING APPARATUS; INFLATABLE TRIUMPHAL ARCH CASE*].

## IV. Counterclaim compensation claimed by the Respondent stands invalid.

27. It is respectfully submitted before this Tribunal that counter claim (b) and (c) weigh no substance for their legitimacy to be claimed against CLAIMANT as the arbitration agreement provides for payment disputes and not for expenses incurred by RESPONDENT for the purpose of marketing.

### A. Counterclaim (b) by the Respondent stands invalid as there is no direct connection between the website development cost and the present dispute.

28. The CLAIMANT submits that RESPONDENT'S claim is for the costs incurred in the development of the website for the purpose of marketing and the same has no direct connection with the present dispute.

29. CLAIMANT further submits that CIETAC rules provide that RESPONDENT must attach the facts and grounds for the counterclaim and must pay the required arbitration fees in accordance with the rules. RESPONDENT has not set out any grounds for the counterclaim nor have they deposited the requisite arbitration fee. Thus, the counterclaim is in violation of the CIETAC Rules and is liable be dismissed on grounds of non-compliance with the procedures. [ARTICLE 16(2) AND 16(3), CIETAC RULES]

30. The parties have agreed to submit only payment disputes to arbitration and this Tribunal can only arbitrate a dispute if it falls under the ambit of payment disputes. The counterclaim raised by RESPONDENT is related to a cost incurred by RESPONDENT and the same has no direct relation to the present payment dispute. [*ART SHY V. NAVISTAR INTERNATIONAL CORPORATION*]

31. CLAIMANT firmly contends that the cost claimed by RESPONDENT for the development of the website is not in direct relation with the present dispute. If there is any

ambiguity then it must be resolved in the favour of arbitration even when an arbitration clause is limited in scope. CLAIMANT submits that the present arbitration is limited to the costs directly mentioned in the agreement. Claim for the cost of website development is clear direction of the external costs being added by RESPONDENT. [*BRATT ENTERS. V. NOBLE INT'L LTD.*]

**B. Counterclaim (c) by the RESPONDENT claiming compensation for loss of profits is an unnatural claim, not directly concerning the arbitration dispute.**

32. CLAIMANT humbly submits before this Tribunal that the counterclaim made by RESPONDENT for compensation of loss of profits is abnormal as there can't be any stipulation of a yet to be launched products' success rate and in turn the success rate of the accessories for the same. RESPONDENT does not have any experience in the watchstraps market, hence no goodwill or tangible loss was suffered by RESPONDENT. [*TOLTEC FABRICS, INC., V. AUGUST INCORPORATED*]

33. CLAIMANT contends that in the present dispute there is no breach of contract with regard to future loss in the contract nor is there any reasonable measure to see the certainty of the incurred amount of future loss. The claim by RESPONDENT is superficial and abnormal. [*TWIN DISC, INCORPORATED, V. BIG BUD TRACTOR, INC*]

## REQUEST FOR RELIEF

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

1. This Tribunal has jurisdiction to deal with the payment claims raised by the CLAIMANT;
2. CISG governs the claims arising under Sale and Purchase agreement No.1 and Sale and Purchase agreement No. 2;
3. RESPONDENT is liable to pay CLAIMANT $9.6 million as liquidated damages;
4. Counterclaims raised by RESPONDENT are invalid.