SIXTH INTERNATIONAL

ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

5 – 9 JULY 2016

HONG KONG

ON BEHALF OF	AGAINST
CLAIMANT	RESPONDENT
ALBAS WATCHSTRAPS MFG. CO. LTD.	GAMMA CELLTECH CO. LTD.
241 NATHAN DRIVE, YANYU CITY, YANYU	17 RODEO LANE, MULABA, WULABA

MEMORANDUM FOR CLAIMANT

TEAM NO. 521 C

List of Abbreviations

Abbreviation	Full Citation
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules
CIETAC Model Clause	China International Economic and Trade Arbitration Commission Model Arbitration Clause
CISG	The United Nations Convention on Contracts for the International Sale of Goods
CLAIMANT	Albas Watchstraps Mfg. Co. Ltd.
Cl. Ex.	Claimant's Exhibit
DDP	Delivered Duty Paid (INCOTERMS 2010)
ICSID	International Centre for Settlement of Investment Disputes
n.	footnote
No.	Number
p.	page
PARTIES	Albas Watchstraps Mfg. Co. Ltd. and Gamma Celltech Co. Ltd.
Res. Ex.	Respondent's Exhibit
RESPONDENT	Gamma Celltech Co. Ltd.
Sec.	Section
SPA-1	Sale and Purchase Agreement no. 1
SPA-2	Sale and Purchase Agreement no. 2
SPAs	Sale and Purchase Agreement no. 1 and no. 2

Sub.	Subsection
UNCITRAL	The United Nations Commission on International Trade Law
the Tribunal	Ms. Felicity Chan, Dr. Anne Descartes and Mr. Martin Mayfair (chief).

Table of Authorities

Cases

Brennan	*Kathryn Brennan v Bally Total Fitness* 153 F. Supp. 2d 408 United States District Courts for the Southern District of New York No. 01 CIV. 0533 (SAS) Jul. 16, 2001	2, 3
Alghanim	*Alghanim v Alghanim* 2011 WL 5978350 (S.D.N.Y. Nov. 29, 2011) The District Court for the Southern District of New York No. 1:2009cv08098 Sep. 22, 2009	3
Easom	*Easom Automation System, Inc v Thyssenkrupp Fabco, Corp* WL 2875256 United States District Court, Eastern District Michigan, Federal Court of First Instance No. 06-14553 Decided Sep. 28, 2007 http://cisgw3.law.pace.edu/cases/070928u1.html	14
Ajax	*Ajax Tool Works, Inc v Can-Eng Manufacturing Ltd* United States District Court, Northern District of Illinois, Eastern Division No. 01 C 5938 Decided Jan. 29, 2003	14

	http://www.unilex.info/case.cfm?id=834	
Asante Technologies	*Asante Technologies, Inc v PMC-Sierra, Inc* United States District Court, Northern District of California, San Jose Division, Federal Court of First Instance No. C 01-20230 JW Decided Jul. 27, 2001 http://cisgw3.law.pace.edu/cases/010727u1.html	15
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ICC case No. 10256	Interim Award in ICC Case No. 10256 of 2000, in ***Figueres, D.J.***, Multi-Tiered Dispute Resolution Clauses, in ICC Arbitration ICC International Court of Arbitration Bulletin 82, 87 Vol. 14/No. 1, Spring 2003	6
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Online resources

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International Chamber of Commerce	Available at: http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/	17

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ARGUMENTS

I. Whether the Tribunal Has Jurisdiction to Deal with the Payment Claims?

1. **CLAIMANT** respectfully submits that the Tribunal, constituted in accordance with Article 19(a) SPA-2, is entitled to hear the dispute and determine its own jurisdiction under the competence-competence principle. Both Article 16(1) UNCITRAL Model Law and Article 6(1) CIETAC Rules provide express recognition and empowerment of the competence-competence of this Tribunal.

A. Interpretation of Article 19 SPAs

2. To start with, it is noted that Article 19 as a whole[1] should be interpreted in accordance with the laws of the State of New York in pursuance of Article 19(c) SPA-2. As a matter of contract law in New York State, it is generally accepted that in the case of total repugnancy between two contract clauses, the first of such clauses shall be received, and the subsequent one rejected. [*Brennan*; *Honigsbaum's*]

3. In the present case, **CLAIMANT** submits that Article 19 contains two irreconcilable clauses. Article 19 (a) concerns arbitration over "disputes concerning payments" while Article 19 (b) speaks of litigation in the Hong Kong courts over "all disputes arising out of or in connection with" the SPA-2. In *Alghanim,* the Southern District Court of New York considered an arbitration clause covering "any claim or controversy arising out of or relating to the agreement" as "the paradigm of a broad

[1] Clarification # 3.

clause"[2]. Likewise, Article 19(b) also contains expansive language which is broad enough to cover "disputes concerning payments" prescribed in Article 19(a). However, such disputes, according to Article 19(b), are required to be resolved through litigation in the Hong Kong courts, not through arbitration as required in Article 19(a). Therefore, these two clauses contain two irreconcilable dispute settlement methods on the same matter, "disputes concerning payments". Applying the rule in *Brennan* and *Honigsbaum's* to the present case, when Article 19(a) and Article 19(b) are of total repugnancy, the former should, therefore, be received while the latter should be rejected. Accordingly, resolving "disputes concerning payments" through arbitration should be the *only* dispute settlement method mutually consented to by the parties.

B. Disputes Concerning Payments

4. In the present case, on 29 December 2014, **CLAIMANT** shipped the watchstraps on DDP basis to **RESPONDENT** who received them on 26 January 2015. [3] **CLAIMANT** had performed its contractual obligations and, as required by Article 4 SPA-2, the balance payment should, therefore, have been made within 14 days from receipt of the goods. However, **RESPONDENT** failed to pay the balance duly as it was not satisfied with the quality of the watchstraps. Moreover, **RESPONDENT** also demands a refund of its first payment since it claims that the first payment was made only on the condition of a successful replacement transaction, although such a claim has no contractual basis. Under the circumstances, the disputes are ultimately related to "payments", i.e. how much **CLAIMANT** and **RESPONDENT** is entitled

[2] See *Alghanim*, at *p*.29.
[3] Clarification # 50.

to receive and obligated to pay respectively. Accordingly, the present dispute *prima facie* falls within the scope of Article 19(a) SPA-2.

C. Pre-Arbitration Procedures

5. Article 19(a) SPA-2 requires of **PARTIES** that, prior to the submission to arbitration, they should try to resolve their disputes concerning payments and reach an amicable resolution within a reasonable period of time (not to exceed 14 days).

6. In this regard, **CLAIMANT** submits that such a pre-arbitration requirement is a non-mandatory contractual obligation in the first place. In *ICC Case No*. 11490, the arbitral tribunal held that the arbitration clause that disputes "be settled in an amicable way" constituted no condition precedent to referral to arbitration.[4] In *Biwater Gauff*, the arbitral tribunal also ruled that a specified period of time for negotiation shall not be used to impede or obstruct arbitration proceeding and that the specified period shall only be regarded as procedural and directory in nature. In one tribunal's words in *ICC Case No.10256*, clauses requiring efforts to reach an amicable settlement before commencing arbitration "*are primarily expression of intention*" and "*should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute*."[5]

7. Accordingly, applying the above jurisprudence to the present case, **CLAIMANT** submits that the pre-arbitration procedures in Article 19(a) are primarily an

[4] Final Award (2012) XXXVII YB Comm Arb 32.
[5] Interim Award, in Figuera, Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, 14(1) ICC Ct. Bull. 82, 87 (2003)

expression of intention only and are directory in nature. There is no evidence to suggest that the parties intended for the pre-arbitration procedures under Article 19(a) to be binding in nature or to prevent either party from proceeding to arbitration even in the absence of compliance. Rather, it is noted that Article 19(a) was drafted in the context that many companies in various fields enter into arbitration agreements.[6] Therefore, **PARTIES** originally intended to resort to arbitration for disputes concerning payments. Therefore, the pre-arbitration procedures should not be regarded as a mandatory obligation, with which **CLAIMANT** has to comply, or violation of which will prevent **CLAIMANT** from exercising its right to commence arbitration.

8. Alternatively, even if Article 19(a) contains mandatory procedural requirements, **CLAIMANT** has duly satisfied the requirements. On 27 February 2015, **CLAIMANT** requested **RESPONDENT** to arrange for the balance payment in order to settle this dispute.[7] However, **RESPONDENT** has never approached **CLAIMANT** for any amicable resolution since then. On 18 November 2015, having waited for about eight months, **CLAIMANT** finally applied for arbitration under the CIETAC Rules in order not to further delay an orderly resolution of the dispute.[8]

II. Whether the CISG Governs the Claims Arising under the SPAs?

9. It is submitted that the CISG governs the claims arising under the SPAs on the grounds that the CISG applies to contracts of sale of goods between parties whose

[6] Clarification # 13.
[7] *Cl. Ex.* No.7.
[8] Application for Arbitration dated 18 November 2015.

places of business are in different Contracting States according to Article 1(1)(a) CISG, unless parties have expressly excluded its application according to Article 6 CISG.

A. Different Places of Business in Contracting States

10. In the present case, it is undisputed that both Yanyu and Wulaba became Contracting States to the CISG in 2006 and 2007 respectively.[9] It is further undisputed that since the contract in question is a contract of sale of watchstraps between **PARTIES**, whose places of business are in Yanyu and Wulaba respectively, the CISG becomes applicable accordingly.

B. The Choice of Law Clause: Express Exclusion of the CISG?

11. Moreover, **CLAIMANT** submits that **RESPONDENT** have not expressly excluded the application of the CISG in accordance with Article 6 CISG.

12. In the present case, Article 20 of both SPAs is a choice of law clause, providing that, "*The contract shall be governed by the national law of Wulaba. All other applicable laws are excluded*."

13. Although it is undisputed that Article 20 SPAs does not refer to the CISG, it is equally true that **RESPONDENT** has not employed clear language to effectively opt out of its application.

[9] Clarification # 20.

14. In *Ajax* the contract between a Canadian and an American corporation contained a clause that the "agreement shall be governed by the laws of the Province of Ontario, Canada." Regarding the question of whether the CISG had been excluded, the Northern District Court of Illinois held that the CISG is the law of Ontario since Canada is one of its contracting states, therefore, this clause did not exclude the CISG and still governed the parties' contract. Moreover, the Eastern District Court of Michigan, in *Easom* also reiterated that where the contract is between parties within the CISG Contracting States, to opt out of the CISG, it is insufficient to merely include a choice of law clause stating that the law of that party's state or nation governs. That clause must expressly exclude application of the CISG by stating "the CISG did not apply".

15. In the light of the above jurisprudence, although Article 20 SPAs refers to "the national law of Wulaba", it is ineffective for opting out of the CISG. First of all, Wulaba is a Contracting State to the CISG which thus becomes the law of Wulaba. The CISG is a self-executing treaty which "properly creates a private right of action." [*Asante Technologies*] This means that the CISG does not require domestic legislation but is binding as soon as it is ratified. Moreover, although Article 20 SPAs contains the clause "all other applicable laws are excluded", it does not contain sufficiently clear language and gives rise to ambiguity. For example, "all other applicable laws" may be understood to refer to (i) national laws of other countries, such as Yanyu, (ii) international treaties such as the CISG, or both (i) and (ii). Accordingly, **CLAIMANT** submits that Article 20 SPAs fail to opt out of the application of the CISG effectively.

III. Assuming the CISG does Apply, whether its Provisions have been Invoked regarding:

A. Lack of Insurance Coverage in the First Transaction

16. It is submitted that **CLAIMANT** is not liable for the lack of insurance in the first transaction.

17. Article 9(1) CISG states that the parties are bound by any usage to which they have agreed, whether it is local or international. In the present case, according to Article 3 SPA-1, **PARTIES** agreed for the watchstraps to be shipped on the terms of DDP. INCOTERMS 2010, as published by the ICC, defines "DDP" as where "the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities."[10] Under DDP, **CLAIMANT** already has to bear "*all the costs and risks*" of bringing the goods to the office of RESPONDENT, so taking out an insurance policy for **RESPONDENT** is not necessary, if not redundant. Accordingly, **CLAIMANT** is not responsible for the purchase of an insurance policy for **RESPONDENT**.

B. Timing of Delivery of the Prototypes

[10] Available at: www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/ (last visited 7 June 2016).

18. Article 5 SPA-1 requires the Seller to provide a prototype for approval within 14 days from receipt of deposit. **RESPONDENT** paid the deposit on 31 July 2014 and **CLAIMANT** sent prototypes on 14 August 2014. Accordingly, **CLAIMANT** has complied with the 14-day requirement.

19. Since the computation of days is a matter governed by the CISG but not expressly settled in it, Article 7(2) CISG should apply. In that regard, it should be settled in conformity with the general principle, on which the CISG is based, that is, the principle of good faith.

20. **CLAIMANT** sent handmade prototypes on 14 August 2014 and **RESPONDENT** replied on 15 August 2014 "with thanks" and further instructed **CLAIMANT** to start mass production. [11] In this regard, According to Article 8(1) CISG, **RESPONDENT's** statements should be interpreted according to his intent. Submitting no complaints or objections to **CLAIMANT's** delivery of prototypes is, therefore, taken to mean that **RESPONDENT** did not consider any violation of the 14-day requirement by **CLAIMANT** or that it acquiesced the late delivery, even if it was.

21. Alternatively, under Article 7(2) CISG, even if the CISG's underlying principles are not able to resolve the question of the computation of days, such a question can be dealt with by the relevant applicable law by virtue of the private international laws. In the present case, the governing law of the SPAs is the national law of Wulaba

[11] *Cl. Ex.* No.4.

which is a common law jurisdiction. As a matter of common law tradition, where there is a reference to at least a number of days between two events, in calculating that number of days the days on which the events happened are excluded.[12] Accordingly, since **RESPONDENT** transferred the deposit on 31 July 2014, this day shall be excluded and, therefore, when the prototypes were sent on 14 August 2014, **CLAIMANT** fulfilled the 14-day requirement.

22. Finally, in case of doubts and ambiguities about the meaning of term "provide", i.e. whether it means **CLAIMANT** should have sent or **RESPONDENT** should have received within 14 days from receipt of deposit, since the SPA-1 was prepared by **RESPONDENT**, the term should be interpreted *contra proferentem* according to Article 4.6 UNCITRAL Principles 2010.

C. Non-conformity of Goods

23. **CLAIMANT** submits that it has delivered goods conforming to the contract, as required by Article 35(1) CISG. In *the Cloth case*, a German buyer ordered fabrics from an Italian seller at a textile fair for the production of skirts and dresses. Upon receipt of the fabrics, the buyer rejected the payment due to non-conformity of the quality of the fabrics, which it found could not be cut in an economical manner. The Landgericht Regensburg (District Court) of Germany held that the buyer had no right to refuse payment since the fabrics corresponded to the samples presented by the seller at the fair and they were in conformity with the contract.

[12] See *Heresfordshire*; Section 27(1) of the Canadian Interpretation Act.

24. In the present case, Article 2 SPA-2, stipulates that the watchstraps will be manufactured using soft genuine Yanyu leather. On 15 August, 2014, upon receipt of the watchstrap prototypes, **RESPONDENT** not only approved the prototypes but also instructed **CLAIMANT** to "start mass production". Since the final batch of watchstraps exactly corresponded to the prototypes, **CLAIMANT** submits there was no non-conformity of goods in pursuance of Article 35(2)(c) CISG.

D. Payment of Money under the Transactions

25. It is submitted that **RESPONDENT** ought, as required by Article 53 CISG, to pay for the goods in the second transaction since they conformed to the requirements set out in the contract. Alternatively, even if there was a lack of conformity of the goods, **RESPONDENT** has lost its right to claim so because it did not notify **CLAIMANT** within a reasonable time.

26. Under Article 38(1) CISG, the buyer must examine the goods within as short a period as practicable in the circumstances. According to Article 38(2) CISG, if the contract involves carriage of the goods, examination should being "as quick as practicable" after the goods are delivered to the buyers. It is accepted that the time limit for examination in general is no more than one week and the buyer is expected to take at least samples from the delivery for examination during this period.[13] Article 39(1) CISG further stipulates that the buyer will lose its right to rely on a lack of conformity of the goods if it does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after it has discovered it or

[13] See *T. SA case.*

ought to have discovered it. A reasonable time for notification must also be decided by taking account of the particular circumstances of the case.[14]

27. In the *T. SA case*, concerning the delivery of lambskin coats containing defects, i.e., the non-matching colors of patched lambskin parts and the heavy weight of the coats, the Commercial Court of Zürich held that since the defects could have been discovered easily, examination within one week to ten days after the goods had been stored in the buyer's warehouse and another period for a week up to fourteen days would be within a reasonable time in the sense required by Articles 38(1) and 39(1) CISG respectively. In *Trekking shoes*, the Supreme Court also found that the reasonable periods pursuant to Articles 38 and 39 CISG are not long periods. In the absence of special circumstances, the buyer should notify the seller of any lack of conformity pursuant to Article 39(1) CISG within about 14 days from delivery.

28. In the present case, **RESPONDENT** received the watchstraps on 26 January 2015[15] and, as required by Article 4 SPA-2, the balance payment should have been made within 14 days from the receipt of goods. However, **RESPONDENT** did not submit payment and only 5 weeks later, on 27 February 2015, informed **CLAIMANT** to correct the goods.[16] Accordingly, since **RESPONDENT** could have discovered the defects of whether the watchstraps fitted into the Cherry watchcases easily and also had an obligation to submit payment within 14 days from the receipt of the goods, **RESPONDENT** loses its right to rely on a lack of conformity of the goods since it

[14] See *n.13.*
[15] Clarification # 50.
[16] *Res. Ex.* No.2.

did not notify **CLAIMANT** within a reasonable time after it has discovered it or ought to have discovered it.

29. In relation RESPONDENT's full payment for the lost goods, since there was no evidence to suggest that the payment was procured by any vitiating factor, such as economic duress in particular, which is not governed by the CISG. Accordingly, it is submitted that **CLAIMANT** should be entitled to keep the payment made under the first transaction.

REQUEST FOR RELIEF

CLAIMANT hereby submits that the Tribunal render in favor of CLAIMANT:

1. Liquidated damages in the sum of USD 9.6 million;
2. **RESPONDENT** to pay all costs of the arbitration, including **CLAIMANT**'s expenses for legal representation, the arbitration fee paid to CIETAC, and the additional expenses of the arbitration as set out in Article 52, *CIETAC Rules*; and
3. **RESPONDENT** to pay **CLAIMANT** interest on the amounts set forth in items 1 and 2 above, from the date **CLAIMANT** made those expenditures to the date of payment by **RESPONDENT**.