SIXTH ANNUAL

INTERNATIONAL ADR (ALTERNATIVE DISPUTE RESOLUTION) MOOTING COMPETITION

5–9 JULY 2016

HONG KONG

MEMORANDUM *for* CLAIMANT

CLAIMANT	RESPONDENT
Albas Watchstraps Mfg Co Ltd	**Gamma Celltech Co Ltd**
241 Nathan Drive	17 Rodeo Lane
Yanyu City	Mulaba
Yanyu	Wulaba

TEAM 750

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Application for Arbitration	The Claimant's application for arbitration [Problem, 1–4]
Arbitration Agreement	Article 19(a) of the Contracts [Problem, 7, 12]
CIETAC Rules	Chinese International Economic and Trade Arbitration Commission Rules
CISG	United Nations Convention on Contracts for the International Sale of Goods
Claimant	Albas Watchstraps Manufacturing Co Ltd
Claims	The claims set out in paragraphs 4 in Procedural Order No 1, paragraph 1 of the request for relief in the Application for Arbitration and paragraph 10 of the Statement of the Defense. [Problem, 4, 16, 20]
Clarifications	Request for Clarifications
Contract One	The Sale and Purchase Agreement concluded between the Parties on 23 July 2014 [Problem, 6–7]
Contract Two	The Sale and Purchase Agreement concluded between the Parties on 7 November 2014 [Problem, 11–12]

Contracts	Contract One and Contract Two, collectively [Problem, 6–7, 11–12]
DDP	Delivery Duty Paid
Deposit One	USD$3,000,000 paid by the Respondent under article 4 of Contract One
Disputes	Disputes between the Parties on issues outlined in Procedural Order No 1, part 4 [Problem, 20]
Final Goods	Watchstraps purchased by the Respondent under Contract Two
Goods	Watchstraps purchased by the Respondent under Contract One
ICC	International Chamber of Commerce
Incoterms	International Commercial Terms 2010
Insurance	Any potential insurance purchased for the Goods
Lost Goods	The watchstraps that were lost at sea on 28 October 2014 [Problem, 10]
Parties	The Claimant and the Respondent, collectively

Pre-Arbitration Procedure	The requirement under article 19(a) of the Contracts for disputes concerning payment to be resolved amicably between the Parties [Problem, 7, 12]
Problem	The Sixth International ADR (Alternative Dispute Resolution) Mooting Competition, Moot Problem 2016
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Respondent	Gamma Celltech Co Ltd
Statement of Defense	The Respondent's statement of defense [Problem, 14-16]
The Dispute Resolution Clause	Article 19 of the Contracts [Problem 7, 12]
Tribunal, the	Tribunal located in CIETAC Arbitration Centre Hong Kong constituted on 5-9 July 2016
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law

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I THE TRIBUNAL HAS JURISDICTION TO HEAR THE CLAIMS

1 The Tribunal has jurisdiction to hear the Claims because: (A) the Tribunal has power to rule on its own jurisdiction; (B) the Contracts contain a valid arbitration agreement; (C) the Arbitration Agreement is international; (D) the Parties have agreed to submit the Disputes to arbitration; (E) the Pre-Arbitration Procedure is invalid; and, (F) the Arbitration Agreement extends to all Claims.

A The Tribunal has power to rule on its own jurisdiction

2 Parties can determine their arbitration's procedure by incorporating institutional rules into their arbitration agreement.[1] A tribunal seated in the CIETAC Hong Kong Arbitration Centre has power to rule on its own jurisdiction.[2]

3 The Arbitration Agreement provides that either party may submit disputes to the CIETAC Hong Kong Arbitration Centre for arbitration in accordance with the CIETAC Rules.[3] The Tribunal is seated in Hong Kong.[4]

B The Contracts contain a valid arbitration agreement

4 An arbitration agreement must be valid for parties to arbitrate.[5] An arbitration agreement will only be valid if it is in writing.[6] The Arbitration Agreement is in writing.[7]

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[1] Born, 830–1; Fouchard/Gaillard/Goldman, 32 [51]; *P & P v Sutter*, 867; *St Lawrence v Worthy Bros,* 188; *Mulcahy v Whitehill,* 918.
[2] *CIETAC Arbitration Rules*, arts 73, 75; UNCITRAL Model Law, art 16; *Arbitration Ordinance,* ss 5(1), 34; Born, 1059–60; Redfern/Hunter, 347.
[3] Problem, 7, 12.
[4] Ibid.
[5] Born, 239–40; Rana/Sanson, 30; Redfern/Hunter, 89.
[6] UNCITRAL Model Law, ch 2 arts 7(2), 7(3); CIETAC Arbitration Rules, art 5(1).
[7] Problem, 7, 12.

5 The Contracts contain a valid arbitration agreement because: (i) the Parties consented to the Arbitration Agreement; (ii) a tribunal will not invalidate the Arbitration Agreement due to uncertainty; and, (iii) the CIETAC Rules do not invalidate the Arbitration Agreement.

i The Parties consented to the Arbitration Agreement

6 An arbitration agreement will only be valid if both parties consent to the arbitration agreement.[8] Parties cannot consent to an arbitration agreement that is internally contradictory[9] or optional.[10]

7 The Parties consented to the Arbitration Agreement because: (a) the Arbitration Agreement is not internally contradictory; and, (b) the Arbitration Agreement is mandatory.

a The Arbitration Agreement is not internally contradictory

8 An arbitration agreement will not be internally contradictory if a tribunal can remedy any contradiction by giving the agreement commercial sense.[11] A tribunal may do this by deleting words or resolving inconsistencies through liberal and creative interpretation.[12] A tribunal will treat a clause that contemplates both arbitration and litigation as allowing for arbitration first and litigation second.[13]

[8] Born, 726; Fouchard/Gaillard/Goldman, 253–4 [471]–[472]; Redfern/Hunter, 19 [1.52].
[9] Born, 762; Redfern/Hunter, 146 [2.178]; Fletcher, [3] [5]–[6] [11].
[10] Born, 762; Fletcher, [11]; *CJSC v Sony-Ericsson*; *Kruppa v Benedetti*, 423.
[11] Born, 782; Karton, 5; *Donohue v Armco*, 426; *Eleni P*, 469.
[12] Born, 782; *Kwasny v AcryliCon*, 3; *Great Earth v Simons*, 890; *ICC 2321*, 133.
[13] Born, 643, 782–5; Fouchard/Gaillard/Goldman, 270 [490]; *Fiona Trust 2015*, [6]–[7] [12] [16] [36]; *Paul Smith,* 130; *Kruppa v Benedetti*, 423; *Baer v Waxfield*, 279; *NB Three Shipping*, 513–14 [10]; *Zhejiang Yisheng v INVISTA*.

9 The Dispute Resolution Clause contains the Arbitration Agreement[14] and two options for litigation.[15] The Tribunal must give the Dispute Resolution Clause commercial sense by first allowing for arbitration.

b The Tribunal must treat the Arbitration Agreement as mandatory

10 An arbitration agreement that states a dispute 'may' be resolved in arbitration allows either party to trigger mandatory arbitration.[16] Additionally, a tribunal will treat an arbitration agreement incorporating institutional arbitration rules as mandatory.[17]

11 The Arbitration Agreement provides that either party 'may' submit disputes to arbitration and also incorporates the CIETAC Rules.[18] The Claimant has initiated arbitration.[19]

ii A tribunal will not invalidate the Arbitration Agreement due to uncertainty

12 An arbitration agreement does not need a defined scope to be valid.[20] A tribunal will imply the scope from the parties' contractual relations if the scope is uncertain.[21]

13 The Arbitration Agreement provides that the Parties may arbitrate 'disputes concerning payment'.[22] The Arbitration Agreement will not be invalid if the Tribunal finds that the phrase 'disputes concerning payment' is uncertain.

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[14] Problem, 7, 12.
[15] Ibid.
[16] Born, 788; *Austin v Owens-Brockway,* 880–1; *Bonnot v Congress*, 355; *Grandeur Electrical v Cheung*, [21]; *WSG Nimbus*, 1097; *Canadian National Railway v Lovat*.
[17] Born, 788; *McKee v Home Buyers*, 983; *Washington Mutual Bank v Crest Mortgage*, 862.
[18] Problem, 7, 12.
[19] Ibid 1.
[20] Born, 767–8; Redfern/Hunter, 108 [2.58]; *Frankfurt 27 August 2009*.
[21] Born, 767–8; Redfern/Hunter, 108 [2.59].
[22] Problem, 7, 12.

iii The CIETAC rules do not invalidate the Arbitration Agreement

14 In the event of inconsistency, the applicable law for determining the form and validity of an arbitration agreement will prevail over the provisions of CIETAC.[23] UNCITRAL Model Law is the applicable law.[24] It contains provisions for determining the form and validity of an arbitration agreement.[25] The CIETAC Rules provide that an arbitration agreement exists when it is asserted by one party and not denied by another.[26] An arbitration agreement recorded in a contract is still valid under UNCITRAL Model Law even if it is denied by one party.[27]

C The Arbitration Agreement is international

15 An arbitration agreement is international if it exists between parties from different countries.[28] The Claimant is from Yanyu.[29] The Respondent is from Wulaba.[30]

D The Parties have agreed to submit the Dispute to arbitration

16 Parties to a contract must agree to submit their dispute to arbitration.[31] A dispute occurs when parties disagree on law or fact.[32] The Parties disagree on the issues in Procedural Order No 1.[33]

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[23] CIETAC Arbitration Rules, art 5(3).
[24] *Arbitration Ordinance,* ss 5(1), 34.
[25] UNCITRAL Model Law, ch 2.
[26] CIETAC Arbitration Rules, art 5(2).
[27] See, UNCITRAL Model Law, ch 2 arts 7(2), 7(3).
[28] UNCITRAL Model Law, ch 1 art 1(1); Born, 322.
[29] Problem, 2.
[30] Ibid 8.
[31] UNCITRAL Model Law, ch 2 art 7(1).
[32] Born, 1347; Rana/Sanson, 49.
[33] Problem, 20.

E The Pre-Arbitration Procedure is invalid

17 A pre-arbitration requirement for negotiation will only be valid when it sets out a reasonably clear set of procedural and substantive requirements against which parties' efforts can be measured.[34] There must be a process with discernible steps.[35]

18 The Pre-Arbitration Procedure does not have reasonably clear procedural or substantive requirements. It provides that 'disputes concerning payments' shall be resolved amicably between the Parties within 14 days.[36] It does not state what constitutes an amicable resolution, or how one may be reached.[37]

F The Arbitration Agreement extends to all Claims

19 A tribunal will interpret the scope of an arbitration agreement broadly,[38] and presume that parties intend for their arbitration agreement to extend to all disputes.[39] Further, a tribunal may give an agreement clarity by deleting words.[40]

20 The Tribunal should take a broad approach when interpreting the term 'payments' in the Arbitration Agreement. The Parties' substantive Claims concern entitlement to funds, either by payment or refund.[41] Further, if the Tribunal finds the term 'payments' ambiguous, it may delete it from the Arbitration Agreement. The scope of the Arbitration Agreement will extend to all of the Parties' claims.

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[34] Born, 917–18; *Schoffman v Cent*, 221; *Courtney & Fairbairn v Tolaini*, 300–1; *Sulamerica v Enesa*, 116–18; *Tang v Grant Thornton*, 678.
[35] *Tang v Grant Thornton*, 664.
[36] Problem, 7, 12.
[37] Ibid.
[38] Born, 1318–19, 1336; Fouchard/Gaillard/Goldman, 297 [512]; *Larsen v Petroprod*, [18]–[19]; *Klöckner v Advance Technology*, [17].
[39] Born, 1336; *Fiona Trust,* 145–6*; Klöckner v Advance Technology*, [17]; *Larsen v Petroprod*, [18]–[19].
[40] Born, 782.
[41] See, submission IV.

II THE CISG APPLIES TO THE CONTRACTS

21 The CISG applies to international sale of goods contracts between parties in different countries when they are party to the CISG.[42] The CISG applies even when parties specify that domestic laws of a signatory country should apply.[43] In order to exclude the CISG, a contract must expressly provide that the CISG does not apply.[44] If there is any doubt about whether parties intended to exclude the CISG, it will not be excluded.[45]

22 The Claimant is from Yanyu.[46] The Respondent is from Wulaba.[47] Both countries are party to the CISG.[48] The Contracts only state that the national law of Wulaba will apply and that all other applicable laws will be excluded.[49] The Contracts do not expressly exclude the CISG.

[42] CISG, art 1(1)(a).
[43] Schlechtriem/Schwenzer, 106–7; Kröll/Mistelis/Perales, 105[18]; *Boiler Case*; *Easom Automatic v Thyssenkrupp*.
[44] CISG Advisory Council Opinion No 16, [4.9]; Drago/Zoccolillo; *Auto Case*.
[45] Bridge, 541 [11.43].
[46] Problem, 2.
[47] Ibid.
[48] Clarification, 24.
[49] Problem, 7, 12.

III THE CLAIMANT IS NOT RESPONSIBLE FOR PURCHASING INSURANCE

23 Contract One does not expressly oblige the Claimant to purchase Insurance.[50] Further, the Claimant is not responsible for purchasing Insurance because: (A) the Incoterms DDP do not oblige the Claimant to purchase Insurance; (B) there is no trade usage that requires the Claimant to purchase insurance; and, (C) Insurance is not a 'related cost'.

A The Incoterms DDP do not oblige the Claimant to purchase Insurance

24 The Incoterms will have a binding effect if parties agree to them in a contract.[51] An Incoterms DDP sale does not place an obligation on either party to purchase insurance.[52]

25 Contract One references 'DDP (Incoterms 2010)'.[53] DDP does not require the Claimant to purchase Insurance.

B There is no trade usage that requires the Claimant to purchase insurance

26 Parties are bound by any trade usage that they know or ought to know.[54] A trade usage is one that is widely known and regularly observed by parties in a particular industry.[55] There is no trade usage that requires a seller in a DDP sale to purchase insurance. In fact, commentary suggests that the buyer should purchase insurance.[56] The fact that a seller bears transportation costs does not constitute an obligation to purchase insurance.[57]

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[50] Problem, 6–7.
[51] Schlechtriem/Schwenzer, 516 [5]; Kröll/Mistelis/Perales, 403 [37]; Bridge, 546 [11.50]; Romein, 10.
[52] INCOTERMS, DDP A3(b), B3(b).
[53] Problem, 6.
[54] CISG, art 9.
[55] Ibid art 9(2).
[56] Kröll/Mistelis/Perales, 451 [27].
[57] Ibid, citing Ferrari, [12].

C Insurance is not a 'related cost'

27 A tribunal can imply a term into a contract based on parties' statements.[58] A tribunal must interpret a party's statements according to that party's intent or the understanding of a reasonable person in the other party's position.[59] The other party must have known, or 'could not have been unaware', of the first party's intent.[60] A reasonable person would interpret any implied term in good faith.[61]

28 The Claimant stated in pre-contractual negotiations that it would bear 'all related costs'.[62] Contract One does not define 'related costs'.[63] The ordinary meaning of 'related' is ambiguous.[64] 'Related costs' could denote only the costs *necessary* for the performance of a contract, or extend to *any* costs contemplated by a party in connection with a contract. The Respondent could not have been aware of the scope of the Claimant's offer to bear 'all related costs'. In good faith, a reasonable person in the Respondent's position would interpret 'related costs' as denoting only the costs necessary for the performance of Contract One, and not insurance.

[58] Gillette/Walt, 240–1; Ferreri, 237 [6].
[59] CISG, arts 8(1), 8(2).
[60] Ibid art 8(1).
[61] UNCITRAL Digest, 57 [23]; *Fruit and Vegetables Case*.
[62] Problem, 3, 15.
[63] See, ibid 6–7, 11–12.
[64] Oxford Dictionary, 'related'.

IV THE TIMING OF DELIVERY OF THE PROTOTYPES DID NOT GIVE RISE TO A BREACH OF CONTRACT ONE

29 Parties can modify a contract by mere agreement.[65] An agreement can be evidenced by parties' behaviour.[66] A buyer that acquiesces to a delay in delivery agrees to modify the contractual delivery date.[67]

30 The Prototypes were due within 14 days of the Claimant receiving Deposit One.[68] The Claimant delivered the Prototypes after this time period.[69] The Respondent agreed to modify the delivery date of the Prototypes under Contract One by accepting their delivery, with thanks, on 15 July 2014.[70]

[65] CISG, art 29(1); *Textiles Case*.
[66] Kröll/Mistelis/Perales, 385 [8].
[67] Ibid; Schlechtriem/Schwenzer, 498 [9]; *Valero Marketing v Greeni Oy*; *Macromex v Globex*.
[68] Problem, 7.
[69] Ibid 9.
[70] Ibid.

V THE FINAL GOODS CONFORM TO CONTRACT TWO

31 The Final Goods conform to Contract Two because: (A) the Final Goods are the same size as the Prototypes; and, (B) the Claimant was not required to hand-make the Final Goods. In any event: (C) the Respondent failed to give notice of non-conformity within a reasonable time.

A The Final Goods are the same size as the Prototypes

32 Goods will conform to a contract if they possess the qualities of goods which a seller has held out to a buyer as a sample or model.[71] A seller 'holds out' goods as a sample or model when it intends, or its statements and conduct evidence an intention, that a sample bear contractual relevance.[72] In this case, the goods are not required to be fit for any particular purpose made known to the seller.[73] A prototype is a model.[74]

33 The Claimant intended for the Goods to conform to the Prototypes. The Claimant only started producing the Goods after the Respondent approved the Prototypes. Further, the Claimant made adjustments to the Goods based on the Respondent's assessment of the Prototypes.[75] The Finals Goods are the same size as the Prototypes.[76]

B The Claimant was not required to hand-make the Final Goods

34 The Contracts do not oblige the Claimant to hand-make the Final Goods.[77] Parties are bound by any trade usage that is widely known and regularly observed in a particular industry.[78]

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[71] CISG, art 35(2)(c).
[72] Kröll/Mistelis/Perales, 523 [129]; Schlechtriem/Schwenzer, 610, [28]–[29]; *Frames for Mountain Bikes Case*.
[73] CISG, arts 35(1), 35(2)(b), 35(2)(c); Kröll/Mistelis/Perales, 524 [135]; Kuoppala, 8 [2.3.1]; Bianca/Bonnell, 278 [2.8.2].
[74] Gillette/Walt, 236–7.
[75] Problem, 7.
[76] Ibid 13.
[77] Ibid 5–13, 17–20.
[78] CISG, art 9(2).

Trade usages prevail over the CISG.[79] Machine-manufacturing watchstraps is a trade usage known to the Respondent.[80] This trade usage prevails over article 35(2)(c) of the CISG, which provides that goods must possess the same qualities as the sample. Despite the fact that the Prototypes were handmade, trade usage dictated the Final Goods would be machine-made.

C The Respondent failed to give notice of non-conformity within a reasonable time

35 A buyer is obliged to notify a seller of a lack of conformity within a reasonable time after it is, or ought to have been, discovered.[81] Generally, one month is considered a reasonable time.[82] However, this time period is shorter if a buyer is seeking to reject the goods,[83] or its defects are easily recognisable.[84]

36 The Respondent received the Final Goods on 29 January 2015.[85] The Respondent ought to have discovered the alleged non-conformity of the look and feel of the Final Goods immediately because these alleged defects were easily recognisable.[86] Additionally, the Respondent only needed to place a watchstrap in the watchcase to discover that the Goods did not fit. Further, the Respondent sought to reject the Final Goods.[87] The Respondent waited 29 days to notify the Claimant of the alleged defects.[88] The time limit of one month should be reduced.

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[79] Graffi, 277; Pamboukis, 108–09; *Wood Case*.
[80] See, Problem, 5, 13; Clarification, 71.
[81] CISG, art 39(1).
[82] Schlechtriem/Schwenzer, 662 [17].
[83] Ibid 661 [16]; Bianca/Bonnell, 309; Muñoz, [5.3b].
[84] Muñoz, [5.3b]; *Sport d'Hiver v Ets Louys*.
[85] Problem, 16.
[86] See, CISG, art 38(1).
[87] Problem, 18.
[88] Problem, 18.

VI THE CLAIMANT IS ENTITLED TO PAYMENT UNDER THE CONTRACTS

37 The Claimant is entitled to payment under the Contracts because: (A) the Respondent is not entitled to a refund under Contract One; and (B) the Claimant is entitled to the payment of the balance under Contract Two.

A The Respondent is not entitled to a refund under Contract One

38 The Respondent is not entitled to a refund under Contract One because: (i) the Respondent agreed to pay for the Lost Goods; and, (ii) the Claimant did not fundamentally breach Contract One.

i The Respondent agreed to pay for the Lost Goods

39 Parties may modify a contract by mere agreement.[89] A tribunal will more readily find that parties have agreed to modify a contract if a party's ability to deliver goods has changed.[90]

40 The Parties agreed to modify Contract One when the Respondent accepted responsibility and agreed to pay for the Lost Goods.[91]

ii The Claimant did not fundamentally breach Contract One

41 A buyer may avoid a contract if the seller has fundamentally breached that contract.[92] A fundamental breach occurs when the innocent party is substantially deprived of its entitlements under a contract.[93] Late performance will amount to a fundamental breach when

[89] CISG, art 29(1).
[90] Schlechtriem/Schwenzer, 501 [13]; *Valero Marketing v Greeni Oy*.
[91] Problem, 4, 16.
[92] CISG, art 49(1)(a).
[93] Ibid art 25.

time is of the essence.[94] Time is of the essence when a buyer has a particular interest in strict compliance with a delivery deadline.[95]

42 Contract One does not have a precise date for delivery.[96] The delivery was made only one day after the agreed delivery period.[97] The Respondent accepted the delay and therefore could not have had a particular interest in a strict compliance with the delivery deadline.[98]

B The Claimant is entitled to payment of the Balance under Contract Two

43 The Claimant is entitled to payment of the Balance under Contract Two because: (i) the Final Goods conform to Contract Two; and, in any event, (ii) the Claimant did not fundamentally breach Contract Two.

i The Final Goods conform to Contract Two

44 A party is entitled to payment if it performs its obligations.[99] The Final Goods conform to Contract Two.[100]

ii The Claimant did not fundamentally breach Contract Two

45 A breach is not fundamental if a buyer has the ability to on-sell the goods.[101]

46 The Respondent can on-sell the watchstraps. The Respondent 'secured orders from clients based on the prototypes',[102] and had plans to expand its business to 'other smartphone watches'.[103] The Respondent had the potential to on-sell the Final Goods to these businesses.

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[94] Kröll/Mistelis/Perales, 729 [29]; UNCITRAL Digest, 119 [7].
[95] Schlechtriem/Schwenzer, 438 [38]–[39]; *Shoes Case*; *Iron Molybdenum Case*.
[96] Problem, 7.
[97] Ibid 18.
[98] Ibid 9.
[99] CISG, arts 53, 54.
[100] See, submission V.
[101] UNCITRAL Digest, 119 [8]; *Cobalt Sulphate Case*; *Shoes Case*.
[102] Clarification, 25.
[103] Ibid.