TEAM NO. 907 R

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 RESPONDENT

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
Arbitration Rules	China International Economic and Trade Arbitration Commission Arbitration Rules
Art.(s)	Article(s)
Article 19(a)	Article 19(a) of the Sale and Purchase Agreements concluded on 23. July 2014 and 7. November 2014
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
CNO	Clarification number
HK	Hong Kong
Ibid.	Ibidem / The same place
mil.	million
NY	New York
p. /pp	Page / Pages
PIL	Private International Law
PNO	Page of the Problem
Problem	2016 ADR Moot Court Problem
SPA 1	Share Purchase Agreement concluded on 23. July 2014
SPA 2	Share Purchase Agreement concluded on 7. November 2014
SPAs	SPA 1 and SPA 2
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006

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Biophysics-Dubois Am. Biophysics Corp. v. Dubois Marine Specialties, 411 F. Supp. 2d 61, 62-64 (D.R.I. 2006)

Emirates	Emirates Trading Agency LLC v. Prime Mineral Exports private Limited (2014) EWHC 2104.
ICC Case No. 12739	ICC Case No. 12739, Award, cited in BÜHLER, Michael and Thomas H. WEBSTER. Handbook of ICC Arbitration. Sweet & Maxwell, 2008.
ICC Case No. 6276	ICC Case No. 6276; Partial Award of January 29, 1990
ICC Case No. 8462	ICC Case No. 8462; Final Award of January 27, 1997
ICC Case No. 8482	ICC Arbitration Case No. 8482 of December 1996 [Digest of Presentation at ICAB, Vol. 11/No. 2 (Fall 2000)]
ICC Case No. 9977	ICC Case No. 9977; Final Award of June 22, 1999
ICC Case No. 9984	ICC Case No. 9984; Preliminary Award of June 7, 1999
Mitsubishi-Chrysler	Mitsubishi v. Soler Chrysler-Plymouth 473 U.S. 614 (1985)
Societa-Societa	Società X v. Società Y, Ad Hoc Arbitral Tribunal - Firenze (Florence), Italy, Arbitral Award, 19. 4. 1994
Threlkeld-Metallgesellschaft	David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd. (London), 923 F.2d 245, 248 (2d. Cir. 1991)

MISCELLANEOUS

Marine	UNCTAD, Legal and Documentary Aspects of the Marine Insurance Contract, 1982. Available at: http://unctad.org/en/PublicationsLibrary/c4isl27rev1_en.pdf
OPINION	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.
Secretariat	The Secretariat Commentary is on the 1978 Draft of the CISG. Available at: http://www.cisg.law.pace.edu/cisg/text/cisg-toc.html
UNC Yearbook	United Nations Commission on International Trade Law yearbook. v. XXXII, 2001.

TABLE OF CONTENT

1. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE DISPUTE

1. Respondent submits that Tribunal lacks jurisdiction as there is no consent to arbitrate for the following reasons. Firstly, pre-arbitration procedure is a condition precedent for present arbitration which was not followed and therefore created a jurisdictional impediment for Tribunal to hear the case. As a consequence, the case should be referred to HK courts. However, shall Tribunal consider the amicable resolution step as unenforceable for any reason, Respondent argues in favor of wide interpretation of the term "payment" as enshrined in Art. 19(1) which would cover the Respondent´s counter-claim as whole.

1.1. ESCALATION CLAUSE IS A CONDITION PRECEDENT TO JURISDICTION OF TRIBUNAL

2. Parties included a pre-arbitral procedure into the arbitration clause by which *"disputes concerning payments shall be resolved amicably within a reasonable period of time (not to exceed 14 days)."* In the following paragraphs Respondent shall submit that based on the wording and a strong jurisprudence such arrangement is sufficiently certain as well as definite to be regarded as enforceable.

3. According to the findings of the *Emirates Trading Agency* tribunal, Respondent correspondingly submits that the use of the word "shall" indicates that the obligation to begin with amicable settlement is mandatory, and thus represents a condition precedent to the right to refer a claim to arbitration. In other words, Parties consented to arbitration only subject to the fulfillment of the pre-arbitral steps.[1] Thus, pre-arbitral procedure shall be considered a "condition precedent" to access to the arbitral forum, which is a position advocated by the doctrine,[2] NY courts,[3] and arbitral tribunals.[4]

4. Claimant may argue that the pre-arbitral steps have been fulfilled, however such statement could not be further from the truth. Claimant contacted Respondent only once by letter of 27 February 2015[5] which was a mere response to the Respondent's letter.[6] Such letter shall not be considered as an initiation of any pre-arbitral negotiations. Thus, by Claimant's failure to

[1] BORN&ŠĆEKIĆ, p. 246.
[2] BERGER, p. 6; BORN, p. 841.
[3] BORN&ŠĆEKIĆ, p. 247.
[4] ICC Case No. 12739.
[5] PNO 13.
[6] PNO 18.

comply with the pre-arbitral requirements, the 14-day period have never been activated.

5. Based upon the aforementioned, Tribunal does not have jurisdiction to hear the dispute at hand whereupon the dispute shall be handled by HK courts pursuant to Art. 19(b) SPAs.

6. Solely in case Tribunal should find the fulfillment of pre-arbitment procedure to be a matter of admissibility instead of jurisdiction, then Respondent pursuant to Art. 17 of the Arbitration rules applies for amendment of its jurisdictional objection and respectfully asks Tribunal to hold the claims inadmissible. Hence, may Tribunal stay the proceedings until the first-tier commitment is met.[7]

1.2. ALTERNATIVELY, THE NOTION OF "PAYMENT" SHALL BE INTERPRETED BROADLY

7. In the event Tribunal upholds its jurisdiction over the dispute, Respondent, with regard to its counter-claim, alternatively submits, that the term "Payment" should be interpreted in its ordinary meaning, thereby covering the whole counter-claim submitted by Respondent.

8. Based on well-established case law under the NY law, the agreed source for interpretation for Art. 19(a), Respondent submits that the wording *"disputes concerning payments"* is reasonably susceptible to more than one interpretation. It may be disputed which payments are concerned and what nature of disputes concerning payments is to be covered - and there is nothing to indicate what meaning was truly intended. According to the conclusions of the courts, *"such doubts shall be resolved in favor of arbitration."*[8] Respondent therefore submits that Art. 19(a) covers any dispute related to the term "payment" in its ordinary meaning.

9. As to the question of what is the ordinary meaning, Respondent draws Tribunal's attention to the definition provided by Blacks Law Dictionary that defines "payment" as *"performance of a duty, promise, or obligation, or discharge of a debt or liability, by the delivery of money or other value. Also the money or other thing so delivered."*[9] Accordingly, both Claimant's and Respondent's performance is to be understood as "payment".

10. As such, any dispute concerning any of the performances is to be arbitrable under Art. 19(a) and thus, if Tribunal eventually upholds its jurisdiction, it shall do so in respect of the whole

[7] JOLLES, p. 331.
[8] Threlkeld-Metallgesellschaft; Mitsubishi-Chrysler.
[9] BLACK'S.

Respondent's counter-claim.

2. CISG DOES NOT GOVERN THE CLAIMS RAISED IN DISPUTE AT HAND

11. Parties have excluded CISG by incorporating an effective choice-of-law clause into Article 20 SPAs. Accordingly, the dispute at hand shall be adjudicated in accordance with "*national law of Wulaba.*"[10]

12. Article 6 CISG explicitly sets down the possibility to exclude CISG upon the consent of Parties. There are no formal conditions thereof, nonetheless intention of Parties to that effect suffices.[11] It is acknowledged that such exclusion can be well performed implicitly.[12]

13. The arisen controversy is whether the reference to "*national law of Wulaba*" indicates that SPAs shall be governed by one particular national law or by law of Wulaba in its entirety. Such differentiation is crucial since the overall understanding of both jurisprudence and scholars is that the viability of CISG exclusion by reference to law of Contracting State as such should be rejected.[13]

2.1. CISG HAS BEEN IMPLICITLY EXCLUDED BY EXCLUSIVE CHOICE-OF-LAW CLAUSE REFERRING TO PARTICULAR CODE

14. Being familiar with the prevailing view, Respondent submits that pursuant to Article 8 para. 1 CISG the reference pointed to a particular code.

15. Firstly, it is implied by grammatical interpretation of Article 20 which reads that "*the national law*" and "[a]*ll other applicable laws are excluded.*" It suggests Respondent's intent to have SPAs governed by one respective Wulaba code while Claimant could have not been unaware of it.

16. Secondly, this intent is also demonstrated by the fact that while drafting SPAs, Respondent wanted to avoid situation of being faced with "*unknown and unfamiliar*"[14] law. Since CISG does not form a part of Wulaba law[15] and it is not even one of the sources of Wulaba law,[16]

[10] PNO 7, 12.
[11] KRÖLL, p. 102.
[12] UNC Yearbook, p. 465.
[13] Ibid.
[14] CNO 30.
[15] CNO 8.
[16] CNO 12.

its application was undoubtedly meant to be avoided. Moreover, it has been acknowledged that intention of Parties may be also evidenced by the arbitration or jurisdictional clause pointing to the seat located in non-contracting state.[17] Accordingly, it is accepted by both jurisprudence and scholars that HK is not, for its special administrative status, considered a contracting state to CISG.[18]

17. Additionally, Respondent highlights that Parties explicitly stipulated that "[a]*ll other applicable laws shall be excluded*" meaning that CISG was excluded even for its potential application to fill in gaps present in the particular national code.

2.2. CISG HAS BEEN IMPLICITLY EXCLUDED BY EXCLUSIVE CHOICE-OF-LAW CLAUSE REFERRING TO LAW OF WULABA

18. However, in case Tribunal deems the choice-of-law clause to direct to Wulaba law as a system, Respondent submits that even such reference is capable of excluding CISG. The tribunal in *Societa-Societa* decided that CISG did not apply to the contract, because the contract itself had been made subject exclusively to Italian law.[19] Alike conclusions were reached in *Biophysics-Dubois*[20] and ICC Case No. 8482.[21]

2.3. TRIBUNAL IS NOT BOUND BY INTERNATIONAL PRIVATE LAW OF ANY STATE

19. Following the previous argument, Claimant could still object that even if applying Wulaba law, its PIL points Tribunal back to CISG. However, Tribunal is not bound by any PIL but solely by *lex arbitri, i.e.* respective arbitration rules and effective arbitration laws in place of arbitration.[22]

20. Pursuant to Article 49 para. 2 Arbitration Rules, agreement of parties on applicable law to the substance shall prevail. Only in absence of such agreement or its conflict with mandatory provisions of that law, Tribunal shall determine the law applicable to merits. Thus, the utmost emphasis shall be put on the choice-of-law clause clearly referring to a national law of Wulaba, not CISG. The converse conclusion would eventually render any contractual

[17] OPINION, ¶ 4.10.
[18] List of Contracting States: China (PRC).
[19] Societa-Societa.
[20] Biophysics-Dubois.
[21] ICC Case No. 8482.
[22] SCHMIDT-AHRENDTS, p. 214.

choice-of-law absurd and meaningless.[23]

21. Furthermore, with regard to *lex arbitri*, HK has separate international arbitration system that remains based on the UNCITRAL Model Law, as adopted into HK by the Arbitration Ordinance.[24] Art. 28 UNCITRAL Model Law clearly sets forth that any designation to the law of legal system shall be construed as directly referring to the substantive law of that state and not its conflict of law rules.

3. CLAIMANT PERSISTENTLY DEMONSTRATED LACK OF DILIGENCE WITH RESPECT TO ITS OBLIGATIONS

22. Respondent considers as relevant to briefly describe the overall atmosphere of the business relationship in question beginning with the late delivery of the Prototype. Claimant is in breach of its obligation to deliver the prototype on a date fixed in Art. 5 SPA 1 as is required by Art. 33 CISG. Although the violation of fixed date of delivery had occurred, Respondent, for the purpose of maintaining good business relations, accepted the performance and expected Claimant to rise its level of diligence in the following arrangements.

23. As is further documented,[25] Claimant manifested its lack of professional consistency again. For instance, when handling of the Cherry watchcase provided by Respondent. Although Respondent recognizes the difficulties connected to resignation of high positioned workers, the result of such event being a substantial violation of a contract worth of USD 15 mil. is far from being linked to anything but an error of overall functionality of Claimant's operations.

24. Respondent therefore respectfully asks Tribunal to assess the facts of the present case in light of these circumstances, while noting that they began to rise at the surface no sooner than at the point where Claimant already was to perform under SPAs.

4. CLAIMANT IS IN BREACH OF ITS OBLIGATION TO TAKE OUT INSURANCE

25. It is Respondent’s position that regardless of whether the risk of loss has or has not transferred to it, Claimant was obliged to take out insurance. In the former case, the damages are result of the inability to cover the insured event and, in the latter case, the damage is

[23] Cf. UNC Yearbook, p. 465.
[24] WEIGAND, p. 240, ¶ 4.07.
[25] CNO 41.

result of the non-fulfillment of an obligation to take out insurance.

26. By applying Art. 8 (3) CISG to Art. 3 SPA 1, statements in the course of negotiations show a clear intent to oblige Claimant to bear any expenses connected to a successful delivery of goods to Respondent's office, as an agreed[26] place of delivery. These statements include mainly commitment to bear *"all related costs,"*[27] above the costs covered by DDP, and clear promise of no need to *"think of any extra costs."*[28]

27. Marine insurance is generally recognized as a part of elementary costs of international transport "*so that the risk of an accident* [...] *is not an inhibiting factor in international trade."*[29] Based on the above mentioned broad agreement on Claimant's costs obligation, Respondent legitimately expected a successful delivery to which it is *"feasible and customary that transit losses be covered by a form of insurance."*[30] Such conclusion is consistent with the 50% increase in the final price after subsequent recalculation.[31]

28. As a result of Claimant's failure to perform its obligation to take out insurance, Respondent has been substantially deprived of what he was entitled to expect under SPA 1 pursuant to Art. 25 CISG. Respondent therefore asks Tribunal to rule that Respondent is entitled to remedies provided in Art. 45 CISG and that it lawfully gave a notice[32] avoiding SPA 1 pursuant to Art. 49 (1) (b).

29. In case Tribunal found that the risk of loss was borne by Respondent, it is entitled to damages equal to the loss in the amount of USD 15 mil. as well as loss of profit in the amount of difference between purchase and retail price of the goods. Or alternatively, in case Tribunal found that the risk of loss was borne by Claimant, then Respondent is entitled to damages equal to the non-performance of a contractual obligation that can not be rectified in other way than liquidated damages.

30. Respondent further states that Claimant's objection based on Respondent's alleged "assumption of responsibility"[33] bears no grounds in the facts of the present case. The facts

[26] CNO 1.
[27] PNO 3, ¶ 6.
[28] PNO 18.
[29] Marine, p. 7.
[30] Secretariat, Art. 36.
[31] PNO 3, ¶ 6.
[32] PNO 18.
[33] PNO. 4, ¶ 11.

of the case[34] solely describe Claimant's refusal to discuss any agreements unless the balance payment is paid. Respondent, for the purposes of a constructive solution to the situation and mitigation of the losses caused by potential loss of business opportunity to operate on a newly emerging market, solely acted pursuant to Art. 77 CISG.

5. CLAIMANT IS IN BREACH IN ITS OBLIGATION TO PERFORM UNDER THE SPA 1

31. It is Respondent's first line of argumentation that the reference to the DDP (INCOTERMS 2010) contained in Art. 3 SPA 1 applies to the contract as a whole. Based on this Respondent submits that the risk of loss has not passed to Respondent and Claimant is unjustly enriched as o result of its refusal to perform under SPA 1.

32. Because the obligation to deliver was not fulfilled due to loss during the transportation, Claimant did not perform its general obligation within the date determinable from SPA 1 pursuant to Art. 30 and Art. 33 CISG.

33. The breach of general obligation could not have been corrected by any form of acceptance of responsibility, because no party can take responsibility for absence of the other Party's obligation for performance. In absence of any performance, SPA 1 would no longer satisfy the universally accepted definition of a contract of sale[35] as well as a doctrine underlying CISG[36] which would result in Respondent's performance under SPA 1 being a mere transfer of money in absence of a legal title.

34. Alternatively, if Tribunal would reach a conclusion that the DDP delivery terms refer solely to the provision of price, Respondent submits that Claimant is still in breach of its obligation to take out an insurance, as has been argued in Chapter 4 of this Memorandum.

6. CLAIMANT IS IN BREACH OF ITS OBLIGATION TO DELIVER GOODS IN CONFORMITY WITH THE SPA 2

35. Claimant is in breach of its obligation to deliver the goods which are of the quality and description (collectively referred to as "Characteristics") required by SPA 2 in these three specific instances:

    a) softness of the leather,

[34] CNO 53.
[35] BLACK'S.
[36] WINSHIP.

b) stitching style, and

c) technical parameters of the watchstrap.

36. With respect to the softness and the irregular stitching style of the watchstrap, Claimant presented the goods as a prototype possessing Characteristics, thereby committing itself to deliver matching goods pursuant to Art. 35(2)(c).[37] Claimant had the undeniable opportunity to make reservations as to this commitment, however at no point did he pursue those and not even on a single occasion did it refute Respondent's clear statements[38] as to expectations to this commitment.

37. Regarding the stitching style, brand identification based upon a product characteristic that may to a disinterested observer seem as a defect or imperfection has been a notorious part of brand building. A shining example of this tendency is the French producer J.P. Chenet. Its specific curvature of the bottleneck[39] gives the impression of imperfection caused during a hand made glass blowing. However, being the best-selling French wine with over 160 countries of export, it is undoubtedly a result of a precise process of mass production. Similarly, Respondent could not have been aware that the final goods would not meet the declared Characteristics even with respect to Art. 35(3) CISG.

38. Lastly, due to factors exclusively in Claimant's sphere of influence,[40] the goods fail to fulfill the sole purpose they were produced for, that is to fit into Cherry watchcase. Respondent made numerous references to this essential obligation enshrined in Art. 2(1)(g) SPA 2. Also, in case of a conflict of technical parameters between the SPA 2 and the prototype, being a conflict of Art. 35(1) and 35(2), the description in the SPA 2 prevails.[41]

39. Based on the established obligation to provide goods of a specific Characteristics, Respondent asks Tribunal to rule that Claimant did deliver goods not conforming to its obligations pursuant to Articles 35(1) and 35(2)(c) CISG and that Respondent properly issued a notice[42] specifying the nature of the lack of conformity within a reasonable time.

[37] Secretariat, Art. 35.
[38] PNO 9.
[39] Respondent's Exhibit No. 3.
[40] CNO 41.
[41] ENDERLEIN, p. 158; HENSCHEL, p. 188.
[42] PNO 18.

RELIEF SOUGHT

On the basis of all presented evidence and argumentation, Respondent respectfully asks Tribunal to find that it lacks jurisdiction over the present dispute.

Alternatively, should Tribunal uphold its jurisdiction over the present dispute, Respondent respectfully refers Tribunals attention to its counter-claim as submitted in para. 10 of the Statement of Defense.

Respectfully submitted on 10 June 2016 by

Joseph Cunningham QC
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Garden Street, Mulaba, Wulaba

On behalf of Respondent

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

Respondent's Exhibit No. 3

Picture of the bottle of the seller J.P.Chenet:

source: http://www.jpchenet.com/