THE 6TH INTERNATIONAL ADR

(ALTERNATE DISPUTE RESOLUTION) MOOTING COMPETITION

5 – 9 JULY 2016

HONG KONG

MEMORANDUM FOR THE RESPONDENT

TEAM 153

ON BEHALF OF:

Gamma Celltech Co. Ltd.
17 Rodeo Lane, Mulaba, Wulaba
Tel: (992) 22455422
Fax: (992) 22455422
Email: enquiries@gammacelltech.com

AGAINST:

Albas Watchstraps Mfg. Co. Ltd.
241 Nathan Drive, Yanyu City, Yanyu
Tel: (136) 2412905
Fax: (136) 241 5092
Email: giovannikonstantopoulous@albaswatchstraps.com

TABLE OF CONTENTS

ARGUMENT ON MERITS

II. CISG DOESN'T GOVERN THE CLAIM ARISING UNDER THE SALE AND PURCHASE AGREEMENT AND SALE AND PURCHASE AND PURCHASE AGREEMENT NO. 2.

Article 20 To The Sale And Purchase Agreements Specifies That The Contract Shall Be Governed By National Law Of Wulaba.

A. Contract Is Not Covered Under The Scope Of CISG.

B. Implied Conduct Of Seller And Buyer.

III. CISG PROVISIONS HAVE NOT BEEN INVOKED ON ACCOUNT OF THE FOLLOWING

i) Lack Of Insurance Coverage In First Transaction

ii) Timing Of Delivery Of Prototype

iii) Non- Conformity Of Goods

iv) Payment Of Money Under Transactions

INDEX OF ABBREVIATIONS

Art/ Arts	Article/ Articles
Agreements	Sale and Purchase Agreements No.1 & 2
Cl. Ex.	Claimant Exhibit
Rs. Ex.	Respondent Exhibit
Sec/Ss	Section/Sections
Para	Paragraph
CIF	Cost Insurance and Freight
CIP	Carriage and Insurance Paid
DDP	Delivery Duty Paid
ICC	International Chamber of Commerce
ADR	Alternate Dispute Resolution
INCOTERMS	International Commercial Terms
NYC	New York Convention
CISG	Convention on International Sale of Goods
FAA	Federal Arbitration Act
HKO	Hong Kong Arbitration Ordinance
SGA	English Sale of Goods Act
CIETAC	China International Economic and Trade Arbitration Commission
UNCITRAL	United National Commission on International Trade Law

INDEX OF AUTHORITIES

TREATIES, CONVENTIONS AND LAWS (5)

RULES (3)

COMMENTARIES (30)

Born	Gary B. Born, International Commercial Arbitration, (First Indian Reprint, 2010), Kluwer Law International	**15**
Coetzee	Juana Coetzee, INCOTERMS as a form of standardisation in international sales law: An Analysis of the Interplay between Mercantile Custom and Substantive Sales Law with specific reference to the passing of risk.	**19**
Erauw	Johan Erauw, Journal of Law and Commerce, Vol. 25, Pgs 203-217	**20**
Sturini/ Hui	Andrea Sturini and Lorrain Hui Commentary on Arbitration Rules of China International Economic and Trade Arbitration Commission (2011) 15(2) VJ 267-288	**12, 16**
Alazemi	http://www.cisg.law.pace.edu/cisg/biblio/alazemi.html	**17**

CASES AND AWARDS

- **CASES**

CANADA

Hoteles Doral CA	Hoteles Doral CA vs. Corporacion L' Hoteles CA, Judgement of 20th June 2001, Venezuela S.Ct of Justice, pg 677	**14**

GERMANY

Hamburg (Iron molybdenum case)	Hamburg (Iron molybdenum case), 1 U 167/95, 28 February 1997	**20**

INDIA

K.K. Modi, Bharat Bhushan Bansal, Encon Builders, Damodar Das	• K.K Modi vs. K.N. Modi(1998) 3 SCC 573 • Bharat Bhushan Bansal vs. U.P. Small Industries Corpn. Ltd (1999) 2 SCC 166 • Bihar State Mineral Development Corpn vs. Encon Builders (I) (P) Ltd.(2003) 7 SCC 418 • State of Orissa vs. Damodar Das (1996) 2 SCC 216	**13**
Jagdish Chander	Jagdish Chander vs. Ramesh Chander and Ors (2007) 5 SCC 719	**13**

ITALY

Nuova Fusinati	In Nuova Fusinati S.P.A vs. Fond Metal International A.B. (Jan 14 1993 (Italy, Tribunate Civile De Monza) UNILEX	**18**

NEW ZEALAND

Nathalie Voser	Nathalie Voser, Sanktionen Bei Nichterfullung Schlichtungsklausel , case note decision of March 15,1999 of Zurich Court of Cassation, ZR 99 (2000) No.29; ASA Bulletin 2002, pp.376-381.	**16**

U.K

Cable & Wireless	Cable & Wireless plc vs. IBM United Kingdom Ltd (2002) 2 All E.R. (Comm.) 1041, 1054 (Q.B.)	**15**

Anzen Ltd & Ors	Anzen Ltd & Ors vs. Hermes One Ltd [2016] UKPC 1, 18 January 2016	**13**
White vs. Kampner	White vs. Kampner, 641 A.2d 1381, 1387 (Conn. 1994)	**15**
Thomas vs. Lambert	Thomas vs. Lambert 4 L.J.K.B. 153	**20**

U.S.

First Option of Chicago	First option of Chicago Inc. Vs. Kaplan 514, U.S. 938, 942-943 (1995)	**14**
Hilaturas Miel	Hilaturas Miel, S.L. vs. Republic of Iraq http://www.unilex.info/case.cfm?id=1465	**22**
Delchi vs. Rotorex	Delchi vs. Rotorex, See U.S. District Court, N.D.N.Y., 9 September 1994, WL 495787, and U.S. 2d Circuit, 6 December 1995, in UNILEX	**21**

- **AWARDS**

ICC 10256	ICC International Court of Arbitration Case no. 10256, 1999	**15**
ICC 9984	ICC International Court of Arbitration Case no. 9984, 1999	**15**
Final Award Case No 8445 of 1996.	See Final Award Case No 8445, 26 Y.B. COM.ARB. 167	**22**

OTHER SOURCES

Black's Law	Black's Law Dictionary, Eight Edition, Thomas West	**12**
Advanced Law Lexicon	P. Ramanatha Aiyar, Justice Y.V. Chandrachud (Former Chief Justice of Supreme Court of India, (3rd Ed.), Advanced Law Lexicon, Book 3 and 4, Wadhwa Nagpur: 2005	**12**
Stroud's Judicial Dictionary	Stroud's Judicial Dictionary of words and Phrases 4th Edition by John S. James, Vol.5 S-Z, London Sweet & Maxwell Limited 1974	**20**

STATEMENT OF FACTS

- Gamma Celltech Co. Ltd (Respondent) formed in 2002, is one of the fastest growing traders of smart mobile phones in Wulaba.

- In 2011 it expanded its product range to include smart mobile phone accessories.

- On 28 May 2014 the Respondent sent a letter to Claimant requesting for prototypes of watchstraps with soft Yanyu Leather together with Price List.

- On 17 July 2014 the Respondent sent a Cherry Watchcase to Claimant as a sample for size.

- On 23rd July 2014 lengthy negotiations took place between Respondent and Claimant and the Sale and Purchase Agreement No.1 was concluded. Through oral negotiations the Claimant offered the delivery of goods (watchstraps) DDP Incoterms 2010 and increased the price by 50%.

- On 31st July 2014 the Respondent made the initial deposit of UDS 3 million.

- On 14th August 2014 a handmade prototype was sent by Claimant to the Respondent for approval.

- On 15th August 2014 the prototype was approved and certain modifications were made to the Sale and Purchase Agreement No.1.

- On 10th October 2014 the Claimant arranged the shipment for the watchstraps

- On 28th October 2014 a letter was received by the Claimant from the Shipping Company that the watchstraps were lost at sea directing to claim insurance for the watchstraps lost therein. The Claimant forwarded the same letter to Respondent to claim insurance.

- On 7th November 2014 the Sale and Purchase Agreement No.2 was concluded by both parties after the Respondent accepted responsibility and made full payment for the lost goods.

- On 29th December 2014 the second shipment took place of the fresh stock of watchstraps with the Claimant undertaking to purchase insurance.

- On 27th February 2015 the Respondent receives the goods and refuses to pay balance amount due and demands refund on Agreement No.1, as the goods were not in conformity with the prototype.

- On 18th December 2015 Respondent files Statement of Defence before the CIETAC's for Dispute Resolution through Arbitration at Hong Kong Sub –Commission.

ARGUMENTS ON JURISDICTION

I. HON'BLE TRIBUNAL HAS NO JURISDICTION TO HEAR THE PAYMENT CLAIMS

1. The Respondent has raised a preliminary challenge to this Hon'ble Tribunal's jurisdiction on the ground that there is no "consensus to arbitrate" for the following core reasons:

A. Parties Not Bound By Arbitration Agreement As:

i) Clause 19 Is Not An Express Obligation To Arbitrate

ii) The Clause Is Ambiguous Hence Inoperative

i) Clause 19 Is Not An Express Obligation To Arbitrate

2. Clause 19 provides that *...failure to reach an amicable resolution within a reasonable period of time (not to exceed 14 days) means that the either party **may** submit the dispute to CIETAC Hong Kong (Arbitration Center) for arbitration...(Cl. Ex. 6).* The Parties used the word **'may'** to imply that submission to arbitration is a choice not an obligation. The word **'may'** is generally permissive and not mandatory. *(Black's Law Dictionary 1592, Advanced Law Lexicon 2947)* and the word 'shall' in common parlance has always a compulsory meaning *(Advanced Law Lexicon 4325).* Model Arbitration clauses uses the word 'shall' *(CIETAC Rules 2, Sturini & Hui)* the choice to derogate from model clause indicate that the parties didn't want arbitration to be their sole recourse.

3. It was observed that the intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. It has been held that where

there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement *(K.K Modi, Bharat Bhushan Bansal, Encon Builders, Damodar Das).*

4. In *Jagdish Chander,* the Hon'ble SC of India laid down fundamental guidelines and principles relating to a valid arbitration agreement along with reference to the above mentioned cases. Mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "In the event of any dispute, the parties may also agree to refer the same to arbitration" or if any disputes arise between the parties, they shall consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement.

5. The Privy Council held that an arbitration clause providing that "any party **may** submit a dispute to arbitration" was not a binding agreement to arbitrate. Instead, (i) in the first instance, either party could commence litigation, but (ii) this was subject to an option, exercisable by either party, to submit the dispute to arbitration, whereupon binding agreement would come into existence and any litigation would have to be stayed *(Anzen Ltd & Ors).*

ii) The Clause Is Ambiguous Hence Invalid

6. Clause 19(a) and (b) are uncertain and need interpretation according to sub-clause (c). Clause 19 (c) states that the clause would be interpreted in accordance with the laws

of the State of New York *i.e.* the FAA which governs International Commercial Arbitration, and any dispute shall be submitted to the Courts in State of New York.

7. The ambiguity arises as to where to refer the dispute i.e. in New York Courts or to CIETAC and its sub-commissions. The HKO gives validity to the doctrine of *Kompetenz- Kompetenz* and the FAA rules out *Kompetenz- Kompetenz*, absent the agreement of the parties, applicable in this case. Thus the uncertainly of which is the proper law of arbitration creates ambiguity. Ambiguity in Arbitration Agreement invalidates the clause *(Hoteles Doral CA).* Hence with no valid arbitration agreement the Tribunal has no jurisdiction to hear the dispute.

8. A court will void an arbitration agreement if the uncertainty is such that it is difficult to make sense of it *(Blackaby 146).* Recognition and enforcement of an award may be refused if the said agreement is not valid under the law to which the parties have subjected it to (Art. II (3) NYC).

B. Tribunal Is Not Authorised To Determine Its Own Jurisdiction

9. Since the clause 19 would be interpreted in accordance with the laws of the state of New York and any disputes shall be submitted to the Courts in state of New York, the question of Tribunal authorised to determine its own jurisdiction doesn't arise since the law governing arbitration is the FAA. The Court unanimously held that, unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitral tribunal *(First Option of Chicago).*

C. Pre-Arbitration Requirement Is A Binding Requirement Prior To Arbitration.

10. Clause 19 provides that *disputes concerning payments **shall** be resolved amicably between parties....* The use of word **'shall'** emphasises the need of mandatory pre-arbitration amicable dispute resolution, which the parties have not done so and hence they cannot arbitrate. Use of mandatory term shall rather than the permissive may suggests that conciliation is binding *(ICC 10256; ICC 9984).* Further the pre-arbitration condition is clear as it also specified the time limit within which the dispute shall be resolved.

11. If dispute resolution clauses expressly provide that negotiations or other procedural steps are a condition precedent to arbitration courts sometimes require compliance with those provisions *(Cable & Wireless).*

12. The provision in question is drafted in a mandatory fashion ("the parties **shall** meet and negotiate") and the right to arbitrate is arguably conditioned on compliance with this requirement ("only if the parties are unable to resolve their dispute through good faith negotiation after 30 days, then either party may refer the dispute to arbitration") *(Born 842).*

13. Thus, where a contract contained a "mandatory negotiation" clause and the plaintiff commenced an arbitration before any negotiation could take place, the court annulled the subsequent award on the grounds that "the Parties were required to participate in the mandatory negotiation sessions prior to arbitration" *(White vs. Kampner) (Born 843).*

D. Tribunal Should Consider Pre-Arbitration Condition Unfulfilled, And Allow Parties To Fulfil The Requirement Without Closing Arbitral Proceedings.

- Pre-condition is mandatory as it's a procedural matter prior to arbitration
- Conciliation/ amicable dispute resolution cannot be deemed futile even it was non-binding.
- Respondent request conciliation in good faith and that the Tribunal should close or alternatively stay the proceedings

14. The most significant features unique to CIETAC arbitration is that the CIETAC Rules allow for combination of conciliation and arbitration (Art. 40 of CIETAC Rules). Conciliation may occur in the arbitration proceedings if both parties have expressed agreement to that effect. This process is often regarded as 'Arb-Med' or 'Med-Arb' and has been a long standing practice of arbitration in China *(Sturini & Hui).*

15. Violation of first tier commitments does not exclude an Arbitral Tribunal's jurisdiction but suggest that the tribunal should stay the proceedings until compliance with the first tier commitments *(Nathalie Voser).*

ARGUMENT ON MERITS

II. CISG DOESN'T GOVERN THE CLAIM ARISING UNDER THE SALE AND PURCHASE AGREEMENT AND SALE AND PURCHASE AGREEMENT NO. 2.

A. Article 20 To The Sale And Purchase Agreements Specifies That The Contract Shall Be Governed By National Law of Wulaba.

16. Art. 20 of the Sale and Purchase Agreements specify that the contract shall be governed by national law of Wulaba. The national law of Wulaba is an alter ego of the English Sale of Goods Act 1979.

17. Articles 25 and 49 of the CISG illustrate that a fundamental breach is a precondition for avoidance of contract; while according to the SGA any non-conformity is regarded as a breach of contract.

18. CISG does not provide the required certainty as, unlike English law, it lacks adequate detailed rules on "passing of risk" and "property" and a developed body of case law. Contracting parties must be aware that if Section 32(1) of the SGA is applied and the seller is responsible for arranging transportation, Sub- section 2 of this Section would require the seller to pay enough attention to the nature of the commodities as well as the surrounding circumstances, and hence to make a "reasonable contract." Therefore, in the situation where the commodities are lost or damaged during transit as a consequence of the seller's failure to make a reasonable contract, or if the damages make the cargo unsatisfactory, the purchaser will have the right to claim damages *(Alazemi, Chapter III, English Law).*

B. Parties Have Opted Out From The CISG.

19. Art. 20 of the Sale and Purchase Agreements specify that the contract shall be governed by national law of Wulaba and that all other applicable laws are excluded by this the parties have opted out of the CISG.

20. That further Art.6 of the CISG allows the parties to agree that CISG does not apply i.e. they may opt out of CISG. The Choice of the law of a contracting State as the law governing the contract, poses more difficult problems. It has been suggested in an arbitral award *(Societa/ CLOUT Case No. 92)* and several court decisions *(Ste Ceramique)* that the choice of law of a contracting State ought to amount to an implicit exclusion of the Convention's application, since otherwise the choice of the parties would have no meaning.

21. In *Nuova Fusinati,* the Italian Court held that the CISG is inapplicable to a contract between an Italian seller and a Swedish buyer. It ruled that even though the parties had chosen Italian law as the law governing the contract, the CISG was inapplicable under Art 1(1)(b) in "Private International Law- Conflict of Laws" standard, because Art 1(1)(b) operates only in the absence of a choice of the applicable law by the parties. In addition, the parties had chosen "Italian Law," not "Italian Law including CISG"

III. CISG PROVISIONS HAVE NOT BEEN INVOKED ON ACCOUNT OF THE FOLLOWING

i) Lack Of Insurance Coverage In First Transaction

22. Art. 31 of CISG provide for the duty of the Seller i.e. The Claimant with respect to delivery of goods. Art.32 (3) states that *"if the seller is not bound to effect insurance in respect of the carriage of goods, he must, at the buyer's request, provide him with all the available information necessary to enable him to affect such insurance."*

23. This provision is not applicable in this case as the parties had invoked DDP Incoterms 2010. According to the DDP Incoterms 2010 neither the Seller nor the Buyer are bound to affect insurance but the concept of passing of risk needs to be highlighted, that is the risk passes at the point of destination in this case the Respondent's Office.

24. Arts. 66-70 of the CISG refer to but do not actually define "risk". Art. 66 refer to "Loss or damage of goods". Commentators generally agree that the damage or loss causing events should not be brought about by one of the parties to the contract or persons for whom they are responsible. The provision on the passing of risk are concerned with accidental loss or damage which affect the physical condition of the goods, caused by so called acts of God, for example fire or storms. They also cover loss or damage caused by independent thirds parties such as thieve and vandals. Situations where goods could not be found, were stolen, or transferred to another person have also been associated with loss of the goods *(Coetzee).*

25. If the risk is still with the seller and loss occurs due to an impediment not within the seller's control, then the loss is the seller's. Before the risk with regard to goods

passes and in order to assure conforming delivery, the seller must procure the goods, must preserve them, repair them if necessary and duly bring them to the point of delivery; and if they are lost or undergo accidental damage during this process, he must resupply them because his obligation remains *(Erauw).*

26. The risk was still with the Claimant under the DDP Incoterms as place of destination was Respondent's office. The Respondent was only responsible for unloading. The Respondent made it clear he did not have experience with non-electronic goods. The Claimant thus offered DDP Incoterms and increased the price drastically by 50%. The Claimant was bound impliedly to purchase insurance as it amounted to just 0.5% of the total value of goods and the Shipping Company was arranged by him. Moreover the Agreement No.2 was concluded without increase in price for insurance on the contrary goods offered at a discount, with Claimant undertaking to purchase insurance.

ii) Timing Of Delivery Of Prototype

27. The Respondent contends that the Claimant delayed in delivering the Prototypes according to the Agreements 1 & 2 (Art. 5). Where something is to be done "within" a stated time "BEFORE" a stated date, means that it is to be done at some time during the course of the stated time immediately preceding the stated date *(Thomas vs. Lambert) (Stroud's Judicial Dictionary 3035).*

28. The goods in question were perishable and of special interest to the Respondent hence there is additional importance to timely delivery *[See Hamburg (Iron molybdenum case)]*.

29. Art. 33 is given in priority order. The Claimant cannot take the defence of delivery made within reasonable time under sub clause (c) of 33 since a period of time was fixed.

iii) Non- Conformity Of Goods

30. The Claimant has breached his duty to provide the goods accordance to Art 35 (c). It was held that the buyer had the right to avoid the contract because 93% of the goods didn't conform to the contracted samples and did not satisfy the quality control standards *(Delchi vs. Rotorex).*

31. That further notice under Art. 39 was also served to the seller by way of letter dated 27th February 2015 hence buyers right to rely on lack of conformity and hold the seller liable is not lost under Art 39.

32. That further the Claimant cannot rely on defence of Art. 38 and 39 as the Claimant was well aware that the Respondent had an expectation that the watchstraps be according to the prototypes i.e. handmade for the fact that the Agreement No.1 was amended to increase the quantum of stitched watchstraps.

33. The goods also are not merchantable and the fundamental breach by the Claimant has amounted to a substantial deprivation of Respondent's contractual rights:

    - The quality of watchstraps being neither soft nor handmade
    - One of the biggest distributors rejected the Respondent's offer as the size did not fit the Cherry Watchcase
    - Customers were informed and had high expectations

A buyer can require the delivery of substitute goods only if the goods delivered were not in conformity with the contract and the lack of conformity constituted a fundamental breach of contract *(Secretary) (Hilaturas Miel).*

iv) Payment Of Money Under Transactions

34. The Respondent has not breached his obligations under Art 58(3) as on examining the goods being not in conformity with the contract the Respondent has rightly withheld the payment of price until he received the correct goods [Art. 46(2)] *(Rs.Ex.2).*

35. With respect to the payment made under the Agreement No. 1 the Respondent demands a refund of the same under the principle Unjust Enrichment. That under Art.74 the Respondent is entitled to development of website costs as it amounts to loss of profits as the loss was certain and foreseeable to the Claimant *(See Final Award Case No 8445 of 1996).* The Claimant is to refund the above payment along with interest under Art. 84 of CISG.

REQUEST FOR RELIEF

Respondent respectfully requests that the Arbitral Tribunal find that:

i) The Tribunal has no jurisdiction to hear the Present Payment Claims

ii) The Respondent be entitled to liquidated damages to the sum of USD 17.4 million for payments made to Claimant

iii) The Respondent be entitled to sum of USD 10 thousand for the development of website costs

iv) The Respondent be entitled to sum of USD 20 million for loss of profits

v) Claimant 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 Art. 52, CIETAC Arbitration Rules

vi) Claimant to pay interest on the amount set forth in terms 1 and 2 above, from the date Respondent had paid the first deposit.