

MEMORANDUM FOR RESPONDENT

On Behalf of:

Gamma Celltech Co. Ltd.
17 Rodeo Lane
Mulaba, Wulaba
RESPONDENT

Against:

Albas Watchstraps Mfg. Co. Ltd
241 Nathan Drive
Yanyu City, Yanyu
CLAIMANT

TEAM NO. 955 R

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List of Abbreviations

Abbreviation	Content
<i>Arbitration Centre</i>	China International Economic and Trade Arbitration Commission Hong Kong Sub-Commission
<i>Art.</i>	Article
<i>CE</i>	Claimant's Exhibit
<i>CIETAC</i>	China International Economic and Trade Arbitration Commission
<i>CIETAC Rules</i>	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules
<i>CISG</i>	United Nations Convention on Contracts for the International Sale of Goods 1980
<i>Claimant</i>	Albas Watchstaps Mfg. Co. Ltd
<i>Contracts</i>	S&P and S&P 2

<i>Dispute Resolution Clause</i>	Article 19 of the Sale and Purchase Agreements (both 1 and 2) concluded by the Parties
<i>No.</i>	Number
<i>P.</i>	Page
<i>Para</i>	Paragraph
<i>Parties</i>	Albas Watchstraps Mfg. Co. Ltd and Gamma Celltech Co. Ltd
<i>PO2</i>	Procedural order 2
<i>RE</i>	Respondent's Exhibit
<i>Respondent</i>	Gamma Celltech Co. Ltd
<i>S&P</i>	Sale and Purchase Agreement No. 1
<i>S&P2</i>	Sale and Purchase Agreement No. 2
<i>Sec.</i>	Section

<i>SoC</i>	Statement of Claim – Claimants statement of facts
<i>SoD</i>	Statement of Defence – Respondents statement of facts
<i>Sub.</i>	Subsection
<i>Tribunal</i>	The three member panel convened to preside over the matter in dispute between the Parties.

Tables of Authority

Articles

Cited As	Content	Pin Point
<i>Deak</i>	<i>Computation of Time in International Law</i> , Francis Deak http://www.heinonline.org.ezproxy.ecu.edu.au/HOL/Page? handle=hein.journals/ajil20&div=35&start_page=502&col lection=journals&set_as_cursor=3&men_tab=srchresults	513
<i>Ramberg</i>	<i>ICC Guide to Incoterms 2010 – Understanding and practical use</i> , Jan Ramberg	25
<i>Coetzee</i>	<i>The Interplay Between Incoterms and the CISG</i> , Juana Coetzee	10-11
<i>Klein</i>	<i>J Klein, RDC 2013</i>	565
<i>Fellas</i>	<i>A Fair and Efficient International Arbitration Process</i> , John Fellas, 59 APR Disp. Resol. J. 78, 82 (2004)	

Căruntu & Lăpădușă	<p>Complex Issues regarding the Role and Importance of Internationally Codified Rules and Incoterms Constantin Căruntu, Mihaela Loredana Lăpădușă</p>	102
<i>Linne</i>	<i>Anna L Linne</i>	

Books

Cited As	Content	Pin Point
<i>Felemezas</i>	John Felemezas, An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law, Cambridge University Press, 2007	42, 168

Cases

Cited As	Content	Pin Point
<i>Kaplan</i>	<i>Kaplan v First Options of Chicago Inc</i> 19 F3d 1503 (3rd Cir. 1994) 1512	1512
<i>Anzen Limited</i>	<i>Anzen Limited v Hermes One Limited</i> [2016] UKPC 1, 16	16
<i>China State Construction</i>	<i>China State Construction Engineering Corporation Guangdong Branch v Madiford Ltd</i> [1992] 1 HKC 325	325
<i>Asante Technologies</i>	<i>Asante Technologies, Inc v PMC-Sierra, Inc., U.S.</i> Federal District Court for the Northern District of California, 39 July 2001	
<i>French Case</i>	<i>French Case Cass Civ 1, June 12 2013, [2013] I Bull Civ, 121</i>	
<i>U.S. District Court</i>	<i>U.S. District Court, Eastern District of California, United States, 21 January 2010</i>	

Conventions/Legislation/Rules

Cited As	Content	Pin Point
<i>CIETAC Rules</i>	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules	Article 6(1)
<i>UNCITRAL Model Law</i>	UNCITRAL Model Law International Commercial Arbitration 2006?	Article 16(1)
<i>Vienna Convention</i>	Vienna Convention Law on the Law of Treaties 1969	
<i>UNIDROIT Principles</i>	UNIDROIT Principles of International Commercial Contracts 2010	Article 1.1(1)
<i>NY Convention</i>	United Nations Conference on International Commercial Arbitration: Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958	Article III(3)

Internet Sources

Cited As	Content	Pin Point
<i>Trans-Lex Principles</i>	http://www.trans-lex.org/968902	Para 2
	http://www.cisg.law.pace.edu/cisg/biblio/enderlein1.html#id.	
<i>CISG-AC Opinion No. 16</i>	<i>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</i>	

Argument

1. *Respondent* is seeking orders with respect to procedural matters, inclusive of the jurisdiction of the *Tribunal* and applicability of the *CISG* as the governing law. Further, *Respondent* is seeking orders with respect to substantive issues, namely insurance, non-conformity of goods, timing of delivery and payment for goods.

Procedural Issues

The Tribunal does not have jurisdiction to deal with the payment claims raised by *Claimant*

2. It is *Respondent*'s position that while the *Tribunal* may hear the dispute [*CIETAC Rules Art 73(1)*], the *Tribunal* does not have jurisdiction to deal with the payment claim as the *Dispute Resolution Clause* requires a consensus to arbitrate [*SoD 3*].
3. There are three sub-clauses in the *Dispute Resolution Clause*, allowing the parties to remit a matter to:
 - a) Arbitration at CIETAC;
 - b) Litigation in Hong Kong Courts; and
 - c) Litigation in New York.

4. *Claimant's* statements regarding the: constitution of *CIETAC*; pre-arbitral procedures; validity of the clause; intention of the parties and the presumption of *in favorem Kaplan* are safe.
5. *Respondent* does not agree that the *Dispute Resolution Clause* itself is sufficient for the *Tribunal* to invoke its jurisdiction, rather, the *Tribunal* should look at the intention of the parties [*SoC 4; Art. 16(1) UNCITRAL Model Law*]. It was never *Respondent's* intention to have a binding arbitration clause. Rather, *Claimant* suggested an arbitration clause in addition to the other two sub-clauses. *Respondent* did not mind having an arbitration agreement but maintained that various options should be open with no specific precedence [*P02 13*].

Multilateral Option Clause

6. *Respondent* acknowledges *Claimant's* characterisation of *Art. 19* as a multilateral option clause. However, such a clause must be interpreted regarding the intention of the parties. Here, *Respondent's* intention was that dispute resolution forums were optional.
7. The applicability of this intention can be distinguished from *Claimant's* analysis of what is known as a sole-option clause. Such a clause will only give one party the exclusive right to choose a forum. *Respondent* contends that the addition of *CIETAC* in the *Dispute Resolution Clause* is insufficient itself to amount to a sole-option clause [*French Case*].

8. In principle, this view prevents a clause being potestative which effectively allows one of the parties to have entire discretion and control over the choice of jurisdiction, going against principles of party equality [*Klein, p 565.*]
9. Further, the intention of the *Parties* to reach a consensus to arbitrate can be seen in the reading of the words “*either party may submit*” in *Art. 19*. *Respondent* submits that the *Tribunal* does not have jurisdiction and if the *Tribunal* does not agree with *Respondent*, the *Tribunal* shall not apply its discretionary jurisdiction in respect of party equality.

Pathological Clause

10. *Respondent* acknowledges *Claimants* concern regarding *Art. 19* being a pathological clause. *Respondent*’s lawyers were non-arbitration specialists and were newly qualified [*PO2, 13*]. *Respondent* brings the *Tribunal*’s attention to the fact that a clause may be deemed to be pathological when it does not unequivocally choose arbitration [*Fellas*].
11. Should the *Tribunal* find the clause is pathological, *Respondent* applies *Claimants* submission that regard should be had to the intention of the parties. As stated in the above passages, *Respondent*’s intention was not to have a sole-option arbitration clause. Therefore, the *Tribunal* should not apply its jurisdiction on this issue.

The CISG does not govern the claims arising under the Contracts

12. *Respondent* submits that the *CISG* is not applicable as the *Parties* have opted out by virtue of *Art 20*:

“The Contract shall be governed by the national law of Wulaba. All other applicable laws are excluded”

13. The *CISG* itself does not impose any obligation upon arbitral tribunals to apply the *CISG*, thus in principle no duty arises to apply the *CISG ex officio* where parties have remained silent on the issue. [*CISG-AC Opinion No. 16*]

14. *Respondent* acknowledges that the *CISG* would be an applicable law as both parties have their place of business in different states, however the *Parties* have excluded the application of the *CISG* [*Art. 20 Contracts; Art. 6 CISG*].

15. Where a contract provides for a choice of law provision as per *Art. 20* of the *Contracts*, then such parties have been said to have selected that as the governing law of the contract [*U.S. District Court*].

16. Whether this amounts to sufficient exclusion under *Art. 6 CISG* has been controversial as well as whether exclusion must be explicit or implied. While *Respondent* acknowledges there is no express wording in the *Contracts* to exclude the *CISG*, the *Tribunal* should apply internationally recognised norms as per *Art. 7 CISG* to promote uniformity and good faith in international trade.

17. Where contracting parties have accepted that the choice of law of a non-contracting State will be the governing law this has been held to amount to an implied exclusion as it is not part of that State's national law [*Felemegeas p 42*].

18. *Respondent* acknowledges that Wulaba is a contracting State to the *CISG* [CF 15] however, Wulaba has not ratified since becoming a signatory to the *CISG* in 2007 [PO2 8/24; Art. 14 Vienna Convention] providing that the *CISG* is not the national law of Wulaba and that the parties have chosen the law

Substantive Issues

Lack of Insurance coverage in the first transaction

19. The delivery of the watch straps is to be governed by the 2010 Incoterm DDP (Delivered Duty Paid) (*Contracts Art 3*). This term places the maximum possible obligation upon the seller. That is, the seller is responsible for delivery of the goods which occurs when the goods are placed at the disposal of the buyer [*Incoterms Guide 2010*].

20. *Respondent* is of the position that *Claimant* expressed that they would cover all 'related costs' to the first shipment of the goods [*SoF* para 6 & 10; *SoD* para 7]. It was reasonable for *Respondent* to have relied upon this representation as insurance is deemed to be a 'related cost' [*Incoterms 2010 Guide, p 80-81*]. As such, *Respondent* is of the position that the onus was not on them to organise insurance on the goods.

21. Further, *Respondent* brings to the *Tribunal's* attention that this was the first time *Respondent* had any dealings with this type of transaction [*SoF* para 6; *SoD* para 7] and relied upon *Claimant* as they were the leading manufacturer and had extensive experience in the area [*SoF* para 1].

22. In addition, *Respondent* puts forward that the obligation regarding conclusion of contracts for insurance lies with the seller; whereas the obligation to terminate contracts of insurance lies with the buyer [Căruntu & Lăpăduși, p 102].

Timing of delivery of prototype

23. *Respondent's* position is that the 14 day period under *S&P Art. 5* was breached as *Respondent* paid the deposit on 31 July 2014 [*SOC* para 7] and received the prototypes on 15 August 2014 [*CE* 4].

24. Under the *CISG Art. 33(b)* the seller has the obligation to deliver certain goods within a specified period of time. This provision does not define the accrual of when this period begins or ends and therefore principles of international law must be relied upon *Art. 7 CISG*.

25. In international trade the computation of time under *Art. 33(b) CISG* has been held to be determinable by reference to the circumstances of each case. The reasoning for this interpretation is to reflect common but necessary business flexibilities [Enderleins].

26. Here *Claimant* distinguishes its normal business of making watch straps to this particular sale where prototypes had to fit a particular watch case. However *Respondent* contends there is no difference in these circumstances as the manager in charge of the warehouse where the watch case was stored resigned the day after the watch case arrived and the prototypes were never checked against the sizing of the watch case [PO2 41]. Moreover, *Claimant* followed common practice by prioritising production of the orders over priority of production of prototypes. [P02 41].

27. On these facts *Respondent* contends that the *Tribunal* should favour computation of time for *Respondent* being that computation of time began to accrue upon receipt of deposit paid on 31st July 2014 at 10:05am. Therefore the *Claimant* breached their obligations for timely delivery under the *CISG*.

Conformity of Goods

28. *Respondent* maintains that the goods delivered to *Respondent* by *Claimant* were not in conformity with the contract as per *Art. 35 CISG*.

29. The seller must deliver goods that are of a ‘quantity, quality and description required by the contract’ [*CISG Art. 35(1)*]. Goods do not conform with the contract unless they are fit for the purposes of which goods of the same description would ordinarily be used [*CISG Art. 35(2)(a)*]. However on the finding of certain facts goods are also held not to conform with the contract unless they are fit for a particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract [*CISG*

Art. 35(2)(b); Linne]. Similarly there is no conformity if the goods do not ‘possess qualities handed out in a sample or model’ [CISG Art. 35(2)(c)].

30. The *Contracts* stipulate that the size of the watchstrap must fit the Cherry watchcase [CE No. 2] provided to *Claimant* for the specific purpose aforementioned. This requirement of size was conveyed to *Claimant* as an express purpose within the *Contracts* and was impliedly necessitous in order for the goods to satisfy that purpose elicited by *Respondent*. Therefore while the watch straps may be used and re sold as a general purpose watch strap, the facts in this case give rise to the application of *Art. 35(2)(b) and (c) CISG*.

31. *Respondent* relies on *Art. 35(2)(b) CISG* as *Claimant* is the leading manufacturer with skills and expertise to make watch straps in accordance with the terms of the *Contracts* [SOF 1]. *Respondent*’s skill only lies with smart mobile phones [CE No. 1]. It is unreasonable for *Claimant* to assert that *Respondent* did not rely on *Claimant*’s skill and judgement in producing the watch straps to fit cherry watch case as made aware numerous times in communications [CE No. 1 & 7].

32. Further, under article 35(2)(c) *CISG* *Claimant* provided prototypes which they deemed to be a model base for conformity of the goods. However, the *Respondent* contends that the goods received did not possess the qualities held out by the seller in the prototype provided. The goods received were not as soft as the prototypes nor were they handmade [RE No. 2]. This inherent difference in quality renders the goods non-conforming with the model held out by the seller.

33. Lastly under *Art. 35(3) CISG* it must have been unreasonable for *Respondent* to check conformity with the prototype. *Claimant's* position states that it was reasonable for *Respondent* to check the conformity after the delivery was received under the S&P2. However the *Respondent* could not have done so at the time the prototype were delivered on the 15th August 2014 [CE No. 4]. As the Cherry brand had only launched its watch collection for sale at the end of August 2014 [PO2 27].

34. The goods received by *Respondent* sent by *Claimant* did not fit the watchcase. This lack of conformity resulted in a breach of the terms of *Contracts* and therefore *Respondent* suffered loss of profits.

Payment of money under the transactions

35. *Respondent* acknowledges that under *CISG* they have an obligation to pay for the goods and to comply with any laws in relation to enabling such payment [*Art. 53 & 54 CISG*].

36. *Respondent* brings to the *Tribunal's* attention that some form of payment was made in relation to both *Contracts*; the first shipment of goods was paid for in full [S&P1], and a deposit was made for the second shipment [S&P2]. *Respondent* is of the position that the balance payment for the first shipment and deposit for the second were only made due to *Claimant* demanding such, otherwise *Respondent* would not receive a second shipment of the goods [*SoF, para 11*].

37. Further, *Respondent* is of the position that the behaviour of *Claimant*, as described above, is such that amounts to economic duress and unconscionability, this being in contravention to the intention of *Art. 7 CISG* which requires parties to observe good faith in international trade.

38. In addition, *Respondent* is of the opinion that statements made by *Claimant* in demanding payment were reasonably interpreted as statements of economic duress and therefore would satisfy intention under *Art. 8(1) CISG*.

Request for Relief

1. *Respondent* hereby submits that the *Tribunal* finds in favour of the *Respondent*:
 - a. Compensation in the sum of :
 - i. USD 17.4 million for the payments made to *Claimant*
 - ii. USD 10 thousand for the development of the website costs
 - iii. USD 20 million for loss of profits
 - b. *Claimant* pay all costs of the arbitration, including *Respondents* expenses for legal representation, arbitration fee paid to *CIETAC* and additional expenses of the arbitration.
 - c. *Claimant* pay *Respondent* interest on the amounts from the date *Respondent* paid first deposit.