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**FIRST ANNUAL**

**INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION**

**MOOT COMPETITION**

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**MEMORANDUM FOR**

**RESPONDENT**

**On behalf of:**

**Heng SunCare Ltd.**

**Against:**

**Hampton SunCare Ltd.**

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**TEAM 130**

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**TABLE OF AUTHORITIES****Treaties, Conventions and Laws**

*NYC* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.

*PICC* UNIDROIT Principles of International Commercial Contracts, 2004.

**Rules**

*HKIAC Rules* Administered Arbitration Rules of the Hong Kong International Arbitration Centre.

*ICC Rules* Arbitration Rules of the International Chamber of Commerce.

*SCC Rules* Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

**Dictionaries**

*Australian Oxford* Australian Concise Oxford Dictionary (5<sup>th</sup> ed.) (Victoria, Oxford University Press: 2009).

*Macquarie* Macquarie Dictionary (5<sup>th</sup> ed.) (Sydney, Macquarie Dictionary Publishers: 2009).

*Oxford* The Oxford English Dictionary (2<sup>nd</sup> ed.) (Oxford, Oxford University Press: 1989).

## **Commentary**

*Blackaby/Partasides* Nigel Blackaby, Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Commercial Arbitration* (5<sup>th</sup> Ed.) (New York, Oxford University Press: 2009).

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**Cases**

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<i>Hospital Products</i>	Hospital Products Ltd. v. United States Surgical Corporation and Others (1984) 156 CLR 41.
<i>Marconi Systems</i>	GEC Marconi Systems Pty. Ltd. v. BHP Information Technology Pty. Ltd. [2003] FCA 50.

**Awards**

<i>Ad hoc Award</i>	Ad hoc Tribunal, Arbitral Award 4 March 2004.
<i>CAM Award</i>	Centro de Arbitraje de Mexico, Arbitral Award 30 November 2006.
<i>ICC Award 8223</i>	ICC International Court of Arbitration, Arbitral Award April 1998, ICC Case No. 8223.
<i>ICC Award 9875</i>	ICC International Court of Arbitration, Arbitral Award March 2000, ICC Case No. 9875.
<i>ICC Award 10422</i>	ICC International Court of Arbitration, Arbitral Award 2001, ICC Case No. 10422.
<i>Nuova Award</i>	<i>Nuova Fucinati S.p.A v Fondmetal International A.B.</i> , Arbitral Award 1993, CISG Case No. 4267/88.

## ARGUMENT ON JURISDICTION

### I. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THIS DISPUTE

The Tribunal does not have jurisdiction to hear this dispute because: **(A)** Clause 22.1 is not an express obligation to arbitrate; and **(B)** alternatively, Clause 22.1 is inoperative because it is uncertain; and **(C)** in any event, the preconditions for arbitration have not been satisfied.

#### A. Clause 22.1 is not an express obligation to arbitrate

Clause 22.1 does not create an express obligation to arbitrate. Clause 22.1 provides that ‘... the parties agree that this Agreement and all its provisions *may* be governed in all respects by the Hong Kong International Arbitration Centre... ’ [emphasis added]. The parties used the word ‘may’ to imply that submission to arbitration is a choice and not an obligation. The word ‘may’ is consistently defined as ‘expressing a possibility’ [*Macquarie* 1034; *Australian Oxford* 2009; *Oxford* 501] whereas the word ‘shall’ is commonly defined along the lines of ‘expressing intention or expectation’ [*Macquarie* 1512] and ‘expressing a strong command or assertion rather than a wish’ [*Australian Oxford* 1318]. Model arbitration clauses use the word ‘shall’ [*HKIAC Rules* 2; *ICC Rules* 3; *SCC Rules* 2]. The choice to derogate from the model clause indicates that the parties did not want arbitration to be their sole recourse.

**B. Alternatively, Clause 22.1 is inoperative because it is uncertain**

Clause 22.1 is inoperative because when read in conjunction with Clause 22.2 it is uncertain. 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’ [Art II (3) *NYC*]. Clause 22.6 provides that the law applying to the Agreement is *PICC*. Under *PICC* any ambiguities contained in a contract have to be interpreted *contra proferentem* [Art 4.6 *PICC*]. Clause 22.1 purports to oust national courts of their jurisdiction to hear any dispute. Clause 22.2 however provides that disputes arising between the parties ‘shall be submitted to the Court defined in 22.1’. The courts referred to in Clause 22.1 are those of the ‘respective countries of the contracting parties’. This complete contradiction renders the clause void for uncertainty. With no valid arbitration agreement this Tribunal has no jurisdiction to hear the dispute.

**C. In any event, the preconditions for arbitration have not been satisfied**

The Tribunal cannot hear this dispute because CLAIMANT and RESPONDENT have not attempted to mutually resolve the dispute and mutual resolution is a precondition to arbitration. Clause 22.1 obliges the parties to ‘... in good faith attempt to mutually resolve any disputes ...’ before arbitration. The parties have not attempted to mutually resolve the dispute and cannot arbitrate until they have done so.



## **ARGUMENT ON THE MERITS**

### **II. CLAIMANT UNLAWFULLY TERMINATED ITS AGREEMENT WITH RESPONDENT**

CLAIMANT unlawfully terminated the Agreement because: **(A)** RESPONDENT did not breach Clause 10 of the Agreement; and **(B)** the doctrine of *force majeure* does not apply; and **(C)** Clause 21.1.4 is not a valid term of the Agreement; and **(D)** ‘fundamental breakdown of the relationship’ is not a valid ground for termination.

#### **A. RESPONDENT did not breach Clause 10 of the Agreement**

RESPONDENT did not breach Clause 10 of the Agreement because: **(1)** RESPONDENT fulfilled its duty of best efforts; or **(2)** alternatively, RESPONDENT fulfilled its duty to achieve a specific result; or **(3)** alternatively, RESPONDENT achieved partial performance and CLAIMANT is obliged to accept the partial performance; or **(4)** alternatively, RESPONDENT is excused from meeting its sales targets; or **(5)** alternatively, RESPONDENT’s non-performance was not fundamental; and **(6)** in any event, CLAIMANT has not acted in good faith.

##### ***1. RESPONDENT fulfilled its duty of best efforts***

RESPONDENT fulfilled its obligation under Clause 10 of the Agreement because it made such efforts as to constitute ‘best efforts’. Contractual duties will be construed so as to impose either a duty to achieve a specific result or a duty of best efforts [Art 5.1.4 *PICC*]. The type of duty will be determined by having regard to the circumstances surrounding the formation of the contract [Art 5.1.5 *PICC*]. RESPONDENT developed a unique trademark,

spent 2.2 million Inachi dollars advertising the product, and consistently exceeded the sales targets [*Facts ¶6*]. Clause 10 of the Agreement does not expressly bind RESPONDENT to sell a particular quantity of the Product. A distributor cannot reasonably be bound by a duty to achieve a specific result when such a duty is not stipulated in the agreement [*ICC Award 10422*]. The degree of risk associated with meeting the sales target is extraordinarily onerous because the sale of the Product is subject to market forces.

***2. Alternatively, RESPONDENT fulfilled its duty to perform a specific result***

If the Tribunal finds that Clause 10 imposes a duty to perform a specific result the RESPONDENT fulfilled this duty. Clause 10 provides that ‘The Distributor will in each year up to 31 January 2007 sell the Product ...’. The clause does not mention an obligation to sell the product post 31 January 2007. Clause 10 continues ‘... For each year subsequent to 31 January 2007 during which this agreement remains valid, the applicable sales target will unless otherwise agreed be deemed to be the target set for 2006-2007’. RESPONDENT is not obliged under Clause 10 to actually meet the sales targets after 31 January 2007.

***3. Alternatively, RESPONDENT achieved partial performance and CLAIMANT is obliged to accept the partial performance***

RESPONDENT has still partially performed its obligations under Clause 10. A party can only reject partial performance when it has a legitimate interest in doing so [*Vogenauer/Kleinheisterkamp 627*]. RESPONDENT did not meet its sales target of 94,500 units in 2009 however RESPONDENT still sold 60,000 units [*Facts ¶6; Annexure B*]. CLAIMANT has no legitimate interest in refusing partial performance.

**4. *Alternatively, RESPONDENT is excused from meeting its sales targets***

RESPONDENT is excused from meeting the sales target because CLAIMANT's contract with Buccaneer Distributors ("Buccaneer") hindered RESPONDENT's performance. A party's non-performance will be excused where the other party's act or omission causes the non-performance [Art 7.1.2 *PICC*]. CLAIMANT sold the Product to Buccaneer who resold the Product into Inachi. Buccaneer's parallel importation caused RESPONDENT's failure to meet the sales target. CLAIMANT ought to have known that Buccaneer would export the Product into Inachi and should not have sold Buccaneer the product as a result of this. RESPONDENT's non-performance is excused because CLAIMANT caused the non-performance.

**5. *Alternatively, RESPONDENT's non-performance was not fundamental***

RESPONDENT's non-performance was not fundamental and CLAIMANT cannot terminate the contract. Non-performance must be fundamental to entitle termination [Art 7.3.1(1) *PICC*]. RESPONDENT's breach was not fundamental because it did not substantially deprive CLAIMANT of what it could have expected under the Agreement. A party's reasonable expectation is to be determined at the time of the conclusion of the contract [*Vogenaue/Kleinheisterkamp* 826]. The Tribunal is to have regard to whether termination will cause the non-performing party disproportionate loss [Art 7.3.1(2)(e) *PICC*]. CLAIMANT anticipated a 5% increase in sales at the conclusion of the contract. RESPONDENT consistently increased sales by 20% per year [*Facts ¶6*]. CLAIMANT could not have expected sales of 60,000 units in 2009 despite the fact that RESPONDENT failed to increase sales by 5% in that year. CLAIMANT has no reason to believe RESPONDENT cannot fulfil its obligations under the Agreement in the future because RESPONDENT has consistently sold substantially more of the Product than required [*Facts ¶6*]. The Agreement

does not stipulate that Clause 10 is fundamental or of the essence. CLAIMANT's termination will cause RESPONDENT disproportionate loss because the 2.2 million Inachi dollars spent on advertising will be foregone.

**6. *In any event, CLAIMANT has not acted in good faith***

CLAIMANT cannot terminate the contract because it would go against the principle of good faith. Parties to a contract are obliged to act in good faith [Art 1.7 PICC]. Where a party fails to meet a sales target for one period after consistently exceeding that target termination by the other party will not be in accordance with the principle of good faith [*Ad hoc Award*]. A party intending to terminate a contract is under a duty of good faith to inform the other party of its intention within a reasonably short period of time [*ICC Award 10422*]. CLAIMANT failed to take into consideration RESPONDENT's increased sales of 20% between 2002-2007. CLAIMANT became aware RESPONDENT would not meet sales target in December 2009 [*Facts* ¶¶7, 12, Annexure B] yet failed to give notice of termination until 12 March 2010 [*Facts* ¶13]. CLAIMANT did not give notice in a timely manner. Instead CLAIMANT withheld notice of termination until it realised it was no longer commercially viable to continue production.

**B. The doctrine of *force majeure* does not apply**

CLAIMANT cannot rely on the doctrine of *force majeure* to terminate the agreement because: (1) the impediment was reasonably foreseeable; or (2) CLAIMANT can overcome the impediment; or (3) CLAIMANT did not give RESPONDENT sufficient notice of *force majeure*; and (4) in any event, CLAIMANT cannot terminate the Agreement because the impediment is only temporary.

### ***1. The impediment was reasonably foreseeable***

CLAIMANT could have reasonably foreseen the impediment caused by the typhoon. A promisor is responsible for impediments outside his sphere of control if he ought to have taken them into account when entering the contract [*Schlechtriem* 817]. Typhoons in SIS are rare but not unheard of [*Facts* ¶1]. Weather patterns in SIS have become increasingly erratic over the last few years [*Clarifications* ¶3]. CLAIMANT could have reasonably foreseen the impact of such a typhoon and could have included a *force majeure* clause in the contract if it wanted to limit its liability.

### ***2. CLAIMANT can overcome the impediment***

CLAIMANT can still perform its obligations under the contract. Even an impediment that a promisor could not have reasonably foreseen will not exempt performance if performance is still possible and reasonable [*Schlechtriem* 817]. A promisor is expected to overcome an impediment even when this results in a greatly increased cost or even a business loss [*Schlechtriem* 817; *Nuova Award*]. CLAIMANT can still purchase Blanco beans at an increased cost [*Facts* ¶13]. CLAIMANT is obliged under the doctrine of *pacta sunt servanda* to fulfil its obligations under the Agreement.

### ***3. CLAIMANT did not give RESPONDENT sufficient notice of force majeure***

CLAIMANT never communicated notice of *force majeure* to RESPONDENT. The promisor must communicate notice of *force majeure* to the promisee after the promisor knows of the impediment [*PICC Official Comment* 774]. CLAIMANT purported to terminate the Agreement without first informing RESPONDENT of the impediment.

**4. In any event, CLAIMANT cannot terminate the Agreement because the impediment is only temporary**

CLAIMANT is obliged to fulfil its obligations under the contract in the future because the impediment is only temporary. A promisor is only excused from performance for such a period as is reasonable having regard to the effect of the impediment on performance when an impediment is temporary [*PICC Official Comment 775*]. CLAIMANT is only likely to be impeded from performing its obligations for one year [*Facts ¶13*]. CLAIMANT therefore cannot terminate the contract for reasons of *force majeure*.

**C. Clause 21.1.4 is not a valid term of the Agreement**

CLAIMANT may not invoke Clause 21.1.4 to terminate the contract because: (1) Clause 21.1.4 is invalid because it is a ‘surprising’ term; or (2) In any event, CLAIMANT has not acted in good faith.

**1. Clause 21.1.4 is invalid because it is a ‘surprising’ term**

CLAIMANT cannot invoke Clause 21.1.4 because it is a standard term that is ‘surprising’. Standard terms are drafted without negotiation in advance for general and repeated use by one party [*PICC Official Comment 66*]. A standard term ‘... cannot be considered, in the absence of a contrary indication, as an expression of the common intention of the parties’ [*ICC Award 8223*]. A party will not be bound by a standard term if that term is ‘surprising’ [*Vogenauer/Kleinheisterkamp 316*]. A surprising term is one which the other party could not have reasonably expected [Art 2.1.20 *PICC*]. Clause 21.1.4 is a standard term because it does not reflect the intentions of the parties as negotiated. RESPONDENT argued strenuously during negotiations that CLAIMANT should guarantee four years notice

for termination [*Facts* ¶5]. Clause 21.1.4 is inconsistent with RESPONDENT's reasonable expectations and is therefore a 'surprising' term.

**2. *In any event, CLAIMANT has not acted in good faith***

CLAIMANT has not acted in good faith because it has terminated its relational contract with RESPONDENT without just cause. Contracts that not only involve a mere exchange but also a relationship between the parties [*Marconi Systems* ¶224] and sole distributor contracts [*Bobux* ¶43] are characterised as relational contracts. A terminating party has just cause when it cannot be expected in justice, equity and good conscience to continue to perform under the agreement [*Draft Chapter 4*]. CLAIMANT and RESPONDENT entered into a relational contract and CLAIMANT had no just cause for terminating the contract.

**D. 'Fundamental breakdown of the relationship' is not a valid ground for termination**

CLAIMANT cannot terminate the Agreement even if there has been a fundamental breakdown of the relationship between the parties because such a ground for termination does not exist. There is no term in the Agreement allowing for termination when there is a 'fundamental breakdown of the relationship' and there is no equivalent provision in *PICC*.

### **III. CLAIMANT BREACHED ITS OBLIGATIONS UNDER THE AGREEMENT**

CLAIMANT has breached its obligations under the Agreement because: **(A)** Claimant has breached Clause 5 of the Agreement; and **(B)** CLAIMANT has breached Clause 12 of the Agreement.

#### **A. CLAIMANT has breached Clause 5 of the Agreement**

CLAIMANT has breached Clause 5 of the Agreement because: **(1)** CLAIMANT granted similar rights to Buccaneer; or **(2)** alternatively, CLAIMANT failed to use best efforts to prevent the sale of the Product by third parties in Inachi; or **(3)** in any event, CLAIMANT has not acted in good faith.

##### ***1. CLAIMANT granted similar rights to Buccaneer***

CLAIMANT breached Clause 5.1 by granting similar distribution rights to Buccaneer. Clause 5.1 prohibits CLAIMANT from selling the Product in Inachi or granting ‘similar rights’ to a third party. Terms in a contract of this nature are to be interpreted by having regard to all the surrounding circumstances [Art 4.3 *PICC*] and from the perspective of an average, honest and diligent business man [*Zurich Award*]. ‘Similar rights’ should be construed as those rights that an exclusive distributor has [*Australian Medic-Care ¶5*]. A supplier will be found to have fundamentally breached its agreement with a distributor if it opens the door for indirect sales in the protected territory [*ICC Award 9875; CAM Award*]. CLAIMANT granted Buccaneer the rights to exploit the Product which is a ‘similar right’ to the right it had already granted RESPONDENT.



**2. *Alternatively, CLAIMANT failed to use best efforts to prevent the sale of the Product by third parties in Inachi***

CLAIMANT failed to use its best efforts to ensure that Buccaneer would not resell the product outside of Ornia. Parties are bound to use best efforts in the performance of the contract as would be used by a reasonable person of the same kind in the same circumstances [Art 5.1.4(2) *PICC*]. The supplier must refrain from any act that is unfavourable to the market in which the distributor sells its product [*Hospital Products* 96]. CLAIMANT cannot suggest that the declaration it makes all distributors sign satisfies the duty of best efforts. CLAIMANT failed to make appropriate enquiries as to whether the Product would be on-sold into Inachi and ignored evidence of greater quantities of the Product being sold than would ordinarily be expected in the Ornian market. CLAIMANT sold the Product to Buccaneer and then failed to notify RESPONDENT that the Product had been sold to Buccaneer.

**3. *In any event, CLAIMANT has not acted in good faith***

CLAIMANT has failed to act in good faith by selling the Product to Buccaneer. The doctrine of good faith prevents a supplier from selling a product to a distributor that the supplier knew or ought to have known intends to resell in another distributor's territory [*ICC Award* 9875]. CLAIMANT knew or ought to have known that Buccaneer would resell the Product in Inachi. Buccaneer purchased suspect quantities of the Product and Inachi is the only other territory outside of Ornia with an Inachalese population [*Facts* ¶10; *Clarifications* ¶3].

**B. CLAIMANT has breached Clause 12 of the Agreement**

CLAIMANT has breached Clause 12 of the Agreement because: (1) CLAIMANT's exploitation rights do not extend to the supply of the Product to Buccaneer; and (2) CLAIMANT's sale of the product to Buccaneer amounts to non-performance and CLAIMANT is liable for the harm suffered.

***1. CLAIMANT's exploitation rights do not extend to the supply of the Product to Buccaneer***

CLAIMANT has breached its obligations under Clause 12 of the Agreement by selling the Product to Buccaneer. Clause 12 allows CLAIMANT to 'exploit trademarks and descriptions only insofar as is necessary to complete its obligations under this agreement'. CLAIMANT did not need to sell the Product to Buccaneer to meet any of its obligations under the Agreement.

***2. CLAIMANT's sale of the product to Buccaneer amounts to non-performance and CLAIMANT is liable for the harm suffered***

CLAIMANT has failed to carry out its obligations under Clause 12 and must compensate RESPONDENT for the harm RESPONDENT has suffered. Non-performance is failure by a party to perform obligations and includes defective performance [Art 7.1.1 PICC]. Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty [Art 7.4.3 PICC]. CLAIMANT ought to have reasonably foreseen that selling RESPONDENT's trademark protected Product to Buccaneer would lead to parallel importation.

**REQUEST FOR RELIEF**

RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal does not have jurisdiction to hear this dispute.
2. CLAIMANT unlawfully terminated its Agreement with RESPONDENT.
3. CLAIMANT breached its obligations under the Agreement.