FIRST ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOT COMPETITION

MEMORANDUM FOR

CLAIMANT

On behalf of:	Against:
Hampton SunCare Ltd.	**Heng SunCare Ltd.**

TEAM 130

Contents

TABLE OF AUTHORITIES 4

ARGUMENT ON JURISDICTION 7

I. The Tribunal has jurisdiction to hear this dispute 7

A. The Tribunal is authorised to determine its own jurisdiction 7

B. The preconditions to arbitration have been fulfilled 7

C. Clause 22.1 is a valid arbitration agreement 8

1. Clause 22.1 is a mandatory obligation to arbitrate disputes 8

2. Clause 22.1 is not ambiguous 8

3. In any event, even if Clause 22.1 is ambiguous, it should still be given effect 9

D. The Inachi District Court must stay proceedings in favour of arbitration 9

ARGUMENT ON THE MERITS 10

II. CLAIMANT lawfully terminated the Agreement with RESPONDENT 10

A. RESPONDENT breached Clause 10 of the Agreement 10

1. RESPONDENT failed to achieve the specific result required by Clause 10 10

2. Alternatively, RESPONDENT failed to fulfil its duty of best efforts 11

3. The failure amounts to a fundamental non-performance entitling termination 11

4. RESPONDENT cannot rely on CLAIMANT's interference to excuse breach 12

5. CLAIMANT is not obliged to accept partial performance 12

B. Alternatively, CLAIMANT can rely on *force majeure* 13

1. The typhoon was an impediment beyond CLAIMANT's control 13

2. The impediment was unforeseeable 13

3. Overcoming the impediment would be an unreasonable burden on CLAIMANT ……14

C. Alternatively, CLAIMANT gave 60 days notice 14

D. Alternatively, the relationship between CLAIMANT and RESPONDENT has fundamentally broken down 15

III. CLAIMANT has not breached any of its obligations under the Agreement 16

A. CLAIMANT did not breach its obligations under Clause 5 of the Agreement.....16

1. CLAIMANT did not grant similar rights to Buccaneer.....16

2. CLAIMANT used its best efforts to prevent the sale of the Product in Inachi by third parties 17

B. CLAIMANT did not breach its obligations under Clause 12 of the Agreement...17

1. RESPONDENT does not have a trademark protected by Clause 12 of the Agreement.....17

2. In any event, CLAIMANT is not liable for damages because harm was not reasonably foreseeable.....18

REQUEST FOR RELIEF 19

TABLE OF AUTHORITIES

Treaties, Conventions and Laws

Madrid Protocol Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, Madrid, June 27 1989.

Model Law UNCITRAL Model Law on International Commercial Arbitration, 1985.

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.

Commentary

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

Brunner Christoph Brunner, Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration (Netherlands, Kluwer Law International: 2008).

Cremades	Bernardo M. Cremades, *Multi-tiered Resolution Clauses* (New York, CPR Institute for Dispute Resolution: 2004).
PICC Official Comment	Official Comments on Articles of the UNIDROIT Principles.
Pryles	Michael Pryles, 'Multi-tiered Dispute Resolution Clauses' (2001) 18 (2) *Journal of International Arbitration* 159-176.
Schlechtriem	Peter Schlechtriem (ed.), Commentary on the UN Convention on the International Sale of Goods, (Oxford University Press: 1998).
Draft Chapter	UNIDROIT, 'Draft Chapter on Termination of Long Term Contracts for Just Cause', Working Group, Rome, 25-29 May 2009.
Vogenauer/ Kleinheisterkamp	Stefan Vogenauer and Jan Kleinheisterkamp (eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, (New York, Oxford University Press: 2009).

Cases

Aiton	Aiton Australia Pty. Ltd. v. Transfield Pty. Ltd. [1999] NSWSC 996.
Australian Medic-Care	Australian Medic-Care Co. Ltd. v. Hamilton Pharmaceutical Pty. Ltd. [2009] FCA 1220.

Harris	Harris Corporation v. Giesting & Associates Inc. [2002] USCA11 236.
Howtek	Howtek Inc. v. Relisys, 958 F.Supp.46 (D.N.H 1996).
Poiré v. Tripier	Poiré v. Tripier, Cour de Cassation (France), 14 February 2003.
Trionic	Trionic Assocs., Inc. v. Harris Corp. 27F. Supp.2d 175, 180-85 (E.D.N.Y 1998).

Awards

A-1795/51	Camera Arbitrale Nazionale e Internazionale di Milano, Arbitral Award, 1 December 1996, Case No. A-1795/51.
ICC Award 10422	ICC International Court of Arbitration, Arbitral Award 2001, ICC Case No. 10422.
Zurich Award	Zurich Chamber of Commerce, Arbitral Award 25 November 1994.

ARGUMENT ON JURISDICTION

I. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE

The Tribunal has jurisdiction to hear this dispute because: **(A)** the Tribunal is authorised to determine its own jurisdiction; and **(B)** the preconditions to arbitration have been fulfilled; and **(C)** Clause 22.1 is a valid arbitration agreement. Consequently, **(D)** the Inachi District Court must stay proceedings in favour of arbitration.

A. The Tribunal is authorised to determine its own jurisdiction

The Tribunal must decide its own competence. Arbitral tribunals can rule on their own jurisdiction under the doctrine of *Kompetenz/Kompetenz* [*Blackaby/Partasides* ¶5.99]. The competence to rule on jurisdiction is expressly provided in Article 16(1) *Model Law* and Article 20.1 *HKIAC Rules*, which govern the procedure of this dispute [*Facts* ¶16]. The Tribunal can hear the arguments as to jurisdiction and proceed to decide on its own jurisdiction despite the proceedings in the Inachi District Court.

B. The preconditions to arbitration have been fulfilled

The preconditions to arbitration have been fulfilled because the parties do not have to mutually resolve disputes before arbitration can commence. The Clause 22.1 requirement to '… in good faith attempt to mutually resolve any disputes… ' is not a mandatory obligation. Agreements to negotiate in good faith are unenforceable unless they are sufficiently certain [*Howtek* 48; *Pryles* 167-8; *Poiré v. Tripier* 368]. Such agreements will only be certain if they

designate a time at which the time for negotiation comes to an end [*Aiton* ¶74]. The negotiation period could potentially continue indefinitely thereby precluding the other party from having their rights enforced by an arbitral tribunal [*Cremades* 1]. CLAIMANT is not bound to mutually resolve the dispute in good faith because the requirement lacks certainty.

C. Clause 22.1 is a valid arbitration agreement

The agreement to arbitrate is valid because: **(1)** Clause 22.1 is a mandatory obligation to arbitrate disputes; and **(2)** Clause 22.1 is not ambiguous; and **(3)** in any event, even if Clause 22.1 is ambiguous, it should still be given effect.

1. Clause 22.1 is a mandatory obligation to arbitrate disputes

Clause 22.1 provides that '… this Agreement and all its provisions may be governed in all respects by the Hong Kong International Arbitration Centre'. The Clause expressly ousts national courts of their jurisdiction. If Clause 22.1 were not given effect the parties would be left with no possible way to resolve their disputes. It is clear that parties intended to arbitrate all disputes arising from the Agreement.

2. Clause 22.1 is not ambiguous

Clause 22.1 is a valid agreement to arbitrate. A Court will only declare an arbitration agreement invalid if it is inoperative or incapable of being performed [Art. II(3) *NYC;* Art. 8(1) *Model Law*]. Clause 22.1 is not inoperative because the clause clearly states that *HKIAC* has jurisdiction to hear all disputes relating to the Agreement. This clause is not inconsistent with Clause 22.2 because Clause 22.2 confirms that '… disputes arising between the Parties shall be submitted to the Court defined in 22.1…'. The word 'Court' includes arbitral tribunals [Art 1.11 *PICC*]. When Clause 22.2 refers to the 'Court' it means *HKIAC*. This is

the only possible interpretation as national courts are expressly ousted of their jurisdiction. The parties clearly intended for their disputes to be resolved by arbitration.

3. In any event, even if Clause 22.1 is ambiguous, it should still be given effect

The Tribunal should still find that Clause 22.1 is a valid arbitration agreement because it is clear in the circumstances that the parties intended to arbitrate their disputes. The incorrect use of proper legal terminology should not exclude the validity of an arbitration clause where the drafters of the contract are not lawyers [*ICC Award 10422*]. A clause may still be given effect by asking what reasonable persons in the same circumstances would have understood by such language [*ICC Award 10422*]. Preference should be given to interpretations that give the arbitration clause effect [Art 4.5 *PICC*; *ICC Award 10422*]. CLAIMANT and RESPONDENT drafted their agreement following detailed negotiations between Mr Heng and Mr Smith who are businessmen. A reasonable person would understand Clause 22.1 to mean that disputes must be referred to arbitration.

D. The Inachi District Court must stay proceedings in favour of arbitration

The Inachi District Court does not have jurisdiction to hear this dispute because its jurisdiction is expressly precluded. Clause 22.1 provides that the Agreement may not be governed '… by the courts nor the law of the respective countries of the contracting parties'. When a valid arbitration agreement exists, courts are obliged to stay proceedings [Art. II(3) *NYC;* Art. 8(1) *Model Law*]. An Award of the Tribunal is likely to be upheld by the Inachalese courts because they are arbitration friendly [*Clarifications* ¶6].

ARGUMENT ON THE MERITS

II. CLAIMANT LAWFULLY TERMINATED THE AGREEMENT WITH RESPONDENT

CLAIMANT has lawfully terminated the Agreement with RESPONDENT because: **(A)** RESPONDENT breached Clause 10 of the Agreement; **(B)** alternatively, CLAIMANT can rely on *force majeure*; **(C)** alternatively, CLAIMANT gave 60 days notice; or **(D)** alternatively, the relationship between CLAIMANT and RESPONDENT has fundamentally broken down.

A. RESPONDENT breached Clause 10 of the Agreement

RESPONDENT has breached Clause 10 of the Agreement because: **(1)** RESPONDENT failed to achieve the specific result required by Clause 10; **(2)** alternatively, RESPONDENT failed to fulfil its duty of best efforts; and **(3)** the failure amounts to a fundamental non-performance entitling termination; and **(4)** RESPONDENT cannot rely on CLAIMANT's interference to excuse the breach; and **(5)** CLAIMANT is not obliged to accept partial performance.

1. RESPONDENT failed to achieve the specific result required by Clause 10

RESPONDENT failed to achieve the specific result because RESPONDENT was required to sell 94,500 units but only sold 60,000 [*Facts* ¶¶6, 12, Annexure B]. The Tribunal must determine whether RESPONDENT owed a duty to achieve a specific result or a duty of best efforts. Regard should be had to circumstances surrounding the formation of the contract [Art 5.1.5 *PICC*]. To the extent that an obligation of a party involves a duty to achieve a

specific result that party is bound to achieve that result [Art 5.1.4(1) *PICC*]. A distributor who undertakes to reach a quota of sales in a particular year will be under a duty to achieve a specific result [*Brunner* 73]. Clause 10 of the Agreement expressly binds RESPONDENT to meet sales targets [*Facts* ¶¶4, 6]. The degree of risk associated with meeting the sales targets is not onerous because there is a strong market for the Product [*Facts* ¶¶2, 6].

2. Alternatively, RESPONDENT failed to fulfil its duty of best efforts

If the Tribunal finds that RESPONDENT was bound by a duty of best efforts, RESPONDENT has still failed to fulfil its duty. 'To the extent that an obligation of a party involves a duty of best efforts ... that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances' [Art 5.1.4(2) *PICC*]. RESPONDENT failed to fulfil its duty of best efforts because RESPONDENT became aware of the decreasing sales in early 2009 but failed to notify CLAIMANT until December 2009 [*Facts* ¶7].

3. The failure amounts to a fundamental non-performance entitling termination

RESPONDENT's non-performance was fundamental. Non-performance must be fundamental to entitle termination [Art 7.3.1 *PICC*]. Non-performance will be fundamental if it is material and not merely of minor importance [*PICC Official Comment* 221]. Notice of termination must be given within a reasonable period of time after a party has or ought to have become aware of non-conforming performance [Art 7.3.2 *PICC*]. Whether notice was given in a reasonable time must be assessed on the circumstances of the case [*Vogenauer/Kleinheisterkamp* 843]. CLAIMANT has been substantially deprived and has suffered loss as a result. CLAIMANT expected RESPONDENT to meet a sales target of 94,500 units for 2009 and RESPONDENT failed to meet this target by 34,500 units [*Facts* ¶¶6, 12, Annexure B]. RESPONDENT was bound to meet the sales targets because this was

the essence of the Agreement. CLAIMANT can no longer rely on RESPONDENT to meet the sales targets due to the competing products now available on the market. CLAIMANT gave notice of termination on 12 March 2010 [*Facts* ¶13] subsequent to RESPONDENT's breach of Clause 10. CLAIMANT gave notice of termination in a reasonable time.

4. RESPONDENT cannot rely on CLAIMANT's interference to excuse breach

CLAIMANT's contract with Buccaneer Distributors ("Buccaneer") has not hindered RESPONDENT's ability to perform. 'A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission…' [Art 7.1.2 *PICC*]. Buccaneer's parallel importation caused the non-performance. CLAIMANT is not responsible for the act of Buccaneer because CLAIMANT made Buccaneer sign a declaration that it would not sell the Product outside of its territory.

5. CLAIMANT is not obliged to accept partial performance

CLAIMANT does not have to accept RESPONDENT's partial performance because CLAIMANT has legitimate interest in rejecting it. Partial performance occurs when the promisor tenders less in quantity than what was contracted for [*Vogenauer/Kleinheisterkamp* 625]. A promisee may reject partial performance if it has a legitimate interest to do so [Art 6.1.3 *PICC*]. RESPONDENT's sales dropped from 90,000 to 60,000 units in 2009 [*Facts* Annexure B]. RESPONDENT was bound to sell 94,500 units [*Facts* ¶6, Annexure B]. RESPONDENT fell short by 34,500 units. CLAIMANT has a legitimate interest in rejecting RESPONDENT's partial performance because RESPONDENT fell substantially short of the sales target.

B. Alternatively, CLAIMANT can rely on *force majeure*

CLAIMANT can rely on the doctrine of *force majeure* to terminate the contract because: **(1)** the typhoon was an impediment beyond CLAIMANT's control; **(2)** the impediment was unforeseeable; and **(3)** overcoming the impediment would be an unreasonable burden on CLAIMANT.

1. The typhoon was an impediment beyond CLAIMANT's control

A party to a contract may be excused from performing its obligations if there exists an impediment which prevents performance [Art 7.1.7 *PICC*]. Only events external to the promisor can be considered impediments [*Schlechtriem* 814]. A super typhoon hit SIS on 1 March 2010 and destroyed most of the Blanco bean plantations in SIS [*Facts* ¶13]. This external impediment led to a 75% increase in the cost of Blanco beans in SIS [*Facts* ¶13].

The typhoon was outside of CLAIMANT's sphere of control. The impediment must be beyond the promisor's control [Art 7.1.7(1) *PICC*]. The promisor's sphere of control is one within which it is objectively possible to ensure performance of the contract by exercising appropriate control [*Schlechtriem* 814]. It is generally accepted that natural catastrophes are outside the promisor's sphere of control [*Brunner* 206].

2. The impediment was unforeseeable

CLAIMANT did not foresee the impediment. A promisor will still be responsible for impediments outside of his sphere of control if he ought to have taken them into account when entering into the contract [Art 7.1.7(1) *PICC*; *Schlechtriem* 817]. Since natural disasters are always somewhat foreseeable, weight is to be given to the likelihood of its occurrence [*Brunner* 159]. The occurrence of a natural disaster may be so remote that the promisor cannot be expected to have assumed the risk [*Brunner* 159]. Typhoons in SIS are a

rare occurrence [*Facts* ¶1] and this typhoon occurred outside the usual rainy season [*Clarifications* ¶4]. CLAIMANT cannot reasonably be expected to have foreseen the impediment and to have assumed the risk.

3. Overcoming the impediment would be an unreasonable burden on CLAIMANT

CLAIMANT cannot be expected to overcome the impediment because the burden would be too unreasonable. An impediment will not relieve a promisor of performance if overcoming the impediment is both reasonable and possible [*Schlechtriem* 817]. Performance will not be reasonable if it becomes excessively more onerous for the promisor to fulfil its obligations [*Brunner* 213]. When there is fundamental alteration of the equilibrium of the contract the limit of economic reasonableness will have been over-stepped [*PICC Official Comment* 774]. CLAIMANT would only be able to source Blanco beans at a 75% price increase [*Facts* ¶13]. This increase is excessively onerous and would not be economically reasonable.

C. Alternatively, CLAIMANT gave 60 days notice

CLAIMANT lawfully terminated the Agreement by giving 60 days notice on 12 March 2010. Parties are free to enter into contracts and determine their contents [Art 1.1 *PICC*]. Contracts are binding upon parties and can only be modified or terminated if provided for by their terms, by agreement, or by application of *PICC* [Art 1.3 *PICC*]. Contractual clauses on the right to terminate take precedence over provisions of *PICC* which may restrict their application [*A-1795/51*]. Courts have held that clauses allowing for termination on notice are valid [*Australian Medic-Care* ¶225] despite *PICC* usually requiring fundamental non-performance for termination [Art 7.3.1(1) *PICC*]. CLAIMANT and

RESPONDENT freely entered into the Agreement and are bound by its express terms. Both RESPONDENT and CLAIMANT have the ability to terminate the contract upon 60 days notice by invoking Clause 21.1.4. CLAIMANT lawfully exercised its right to terminate the Agreement under Clause 21.1.4.

CLAIMANT acted in good faith when it exercised its right to terminate the Agreement under Clause 21.1.4. Parties to a contract are bound to act in good faith [Art 1.7 *PICC*]. Conduct that is expressly authorised by a contract cannot be said to breach the implied duty of good faith [*Harris* 22; *Trionic* 3]. CLAIMANT exercised a right expressly authorised under the Agreement.

D. Alternatively, the relationship between CLAIMANT and RESPONDENT has fundamentally broken down

CLAIMANT can terminate the Agreement because CLAIMANT lost trust and confidence in RESPONDENT. Terms can be implied into contracts [Art 5.1.2 *PICC*]. The need for just cause in the termination of contracts of mutual trust and confidence has been recognised [*Australian Medic-Care* ¶3]. Termination for just cause should be implied into the Agreement. To terminate for just cause there must be significant changes in the relationship between the parties that makes continuation of the contract intolerable for the party deciding to terminate [*Draft Chapter* ¶6]. CLAIMANT lost trust and confidence in RESPONDENT when RESPONDENT referred its dispute to the Inachi District Court without trying to mutually resolve the issue.

III. CLAIMANT HAS NOT BREACHED ANY OF ITS OBLIGATIONS UNDER THE AGREEMENT

CLAIMANT is not responsible for any damages suffered by RESPONDENT because: **(A)** CLAIMANT did not breach its obligations under Clause 5 of the Agreement; and **(B)** CLAIMANT did not breach its obligations under Clause 12 of the Agreement.

A. CLAIMANT did not breach its obligations under Clause 5 of the Agreement

CLAIMANT did not breach its obligations under Clause 5 of the Agreement because: **(1)** CLAIMANT did not grant similar rights to Buccaneer; and **(2)** CLAIMANT used its best efforts to prevent the sale of the Product in Inachi by third parties.

1. CLAIMANT did not grant similar rights to Buccaneer

CLAIMANT has not breached Clause 5.1 of the Agreement by selling the Product to Buccaneer. Clause 5 prohibits CLAIMANT from selling the Product in Inachi or granting 'similar rights' to a third party. The parties have different views as to the meaning of the term 'similar rights'. The term should be interpreted having regard to all the circumstances [Art 4.3 *PICC*] and from the perspective of an average, honest and diligent business man [*Zurich Award*]. Similar rights are to be construed as those rights that the exclusive distributor has [*Australian Medic-Care* ¶270]. CLAIMANT must not grant third parties rights to sell the product in Inachi because this would be a 'similar right'. CLAIMANT is not prohibited from granting rights for the sale of the Product outside of Inachi.

2. CLAIMANT used its best efforts to prevent the sale of the Product in Inachi by third parties

CLAIMANT took reasonable steps to ensure that Buccaneer would not resell the Product outside of Ornia. Parties must use best efforts in the performance of a contract as would be used by a reasonable person of the same kind in the same circumstances [Art 5.1.4(2) *PICC*]. CLAIMANT makes all distributors sign a declaration not to sell products outside of their territory [*Facts* ¶8]. CLAIMANT had no prior knowledge of the parallel importation [*Facts* ¶¶8, 10]. When CLAIMANT became aware of the parallel importation it terminated in full the consignment to Buccaneer [*Facts* ¶10]. It has been held that terminating the consignment of stock to the infringing third party within a reasonable time frame is sufficient to discharge the duty of best efforts [*Australian Medic-Care* ¶352]. CLAIMANT used best efforts to prevent the sale of the Product in Inachi by Buccaneer.

B. CLAIMANT did not breach its obligations under Clause 12 of the Agreement

CLAIMANT did not breach its obligations under Clause 12 of the Agreement because: **(1)** RESPONDENT does not have a trademark protected by Clause 12 of the Agreement; and **(2)** in any event, CLAIMANT is not liable to pay damages because harm was not reasonably foreseeable.

1. RESPONDENT does not have a trademark protected by Clause 12 of the Agreement

CLAIMANT has not breached Clause 12 because RESPONDENT does not have a registered trademark. At international law a party will only have rights over a purported trademark if that trademark is registered [Art 2(1) *Madrid Protocol*]. There is no evidence to

suggest that RESPONDENT has a registered trademark over the Product. CLAIMANT cannot have infringed RESPONDENT's trademark rights where those rights do not exist.

2. In any event, CLAIMANT is not liable for damages because harm was not reasonably foreseeable

CLAIMANT does not have to compensate RESPONDENT because the harm suffered was not reasonably foreseeable. A party will only be liable for harm it foresaw or ought reasonably to have foreseen [Art 7.4.4 *PICC*] and only where that harm can be established with a relative degree of certainty [Art 7.4.3 *PICC*]. RESPONDENT cannot establish harm with any certainty.

REQUEST FOR RELIEF

CLAIMANT respectfully requests the Tribunal to find that:

1. The Tribunal has jurisdiction to hear this dispute.
2. CLAIMANT lawfully terminated the Agreement with RESPONDENT.
3. CLAIMANT has not breached any of its obligations under the Agreement.