THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG - AUGUST 2010

MEMORANDUM FOR CLAIMANT

Team Number: 297

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INDEX OF ABBREVIATIONS

¶	Paragraph of Problem
§	Article of PICC
Agreement	Distribution Agreement
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Clause	Clause of the Agreement
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
IDC	Inachi District Court
Inachi	Peoples Republic of Inachi
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Off Cmt	Official Comment to the PICC (UNIDROIT, 2004) (http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1)
SIS	Sun Island State
UNCITRAL	United Nations Commission on International Trade Law
UML on Arbitration	UNCITRAL Model Law on International Commercial Arbitration
UNIDROIT	International Institute for the Unification of Private Law
para / paras	paragraph / paragraphs
Product	Blanco bean suncare creams
PICC	UNIDROIT Principles of International Commercial Contracts of 2004

INDEX OF AUTHORITIES

Vogenauer, Stefan Kleinheisterkamp, Jan	Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) OXFORD University Press 2009 (Cited as: Vogenauer) (Para: 17)
Eberhard, Stefan	‘‘Les santions de l’inexécution du contrat et les Principles Unidroit” (2005) (Cited as: Eberhard) (Para: 18)
Huber and Mullis	‘‘The CISG” (2007) 221-225 (Cited: Huber) (Para: 17)
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
PICC	UNIDROIT Principles of International Commercial Contracts of 2004
Uncitral Model Law on Arbitration	UNCITRAL Model Law on International Commercial Arbitration

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STATEMENT OF FACTS

Hampton SunCare Ltd. ("Claimant") is a company headquartered in the Sun Island State ("SIS"), which manufactures its sun cream. Heng SunCare Ltd. ("Respondent") is a company incorporated by Mr. Heng and headquartered in Peoples Republic of Inachi ("Inachi").

On **15 January 2002** Claimant and Respondent executed a Distribution Agreement ("Agreement") under which Claimant appointed Respondent as an exclusive distributor in Inachi of Claimant's moisturizing sun cream ("Product") for a five-year term, commencing January 31, 2002. The Agreement included the minimum sales target as a relevant material.

In early 2009, Respondent's sales of the Product dropped sharply. On **15 December 2009** Respondent emailed to Claimant with the suspicious parallel importation. On **20 December 2009** Claimant replied by rejecting the insinuation and noted that Claimant required all its new distributors or other purchasers to sign a declaration: "The Distributor shall not resupply the products outside the Territory (…)." Nonetheless, Claimant directed its employee, Ms. Turncoat, to conduct an investigation.

On **1 March 2010** a super typhoon hit SIS and ruined most of the Blanco bean plantations in SIS, including those of Claimant. There was a severe shortage of Blanco beans in SIS and the price per pound of beans rose by 75%. After assessing the extent of the damage, Claimant realized that, under the circumstances, it was no longer viable to

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continue producing Blanco bean.

On **10 March 2010,** without notification to Claimant, Respondent commenced legal action in the Inachi District Court ("IDC") against Claimant for the damages it suffered as a result of the suspicious parallel importation.

On **12 March 2010** Claimant terminated the Agreement on the following alternate grounds: (1) for breach of clause 10 for failure to meet minimum sales targets in 2009; (2) for reasons of force majeure and hardship caused by the super typhoon; (3) with 60 days notice under Clause 21.1.4; or (4) due to fundamental break down of the relationship.

On **14 March 2010** Respondent amended his suit against Claimant and on **20 March 2010** Claimant filed a notice of the dispute with HKIAC in accordance with the Arbitration Rules. The parties have agreed to hold the arbitration in Inachi without prejudice to their rights to challenge the jurisdiction of the tribunal.

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ARGUMENTS

I. THE TRIBUNAL HAS JURISDICTION AS RESPONDENT IS BOUND BY THE ARBITRATION AGREEMENT

1. The tribunal has jurisdiction as Respondent is bound by the arbitration agreement: (1.1) the Parties are bound by the valid arbitration agreement; (1.2) Claimant fulfilled the pre-arbitral requirements; and (1.3) IDC is not entitled to hold the jurisdiction over this dispute.

1.1 THE PARTIES ARE BOUND BY THE VALID ARBITRATION AGREEMENT

2. Under Clause 22.1, the Parties agree that this Agreement and all its provisions may be governed in all respects by HKIAC and general principles of law, but not by the courts nor the law of the respective countries of the contracting Parties [¶4]. Subsequently, the Parties have agreed to hold the arbitration in Inachi [¶16].

1.2 CLAIMANT FULFILLED THE PRE-ABRITRAL REQUIREMENTS

(A) Claimant has attempted in good faith to resolve a suspicious parallel importation

3. Clause 22 provides that the Parties will in good faith to mutually resolve any disputes related to this Agreement. As being emailed by Respondent regarding the suspicious

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parallel importation, Claimant investigated it and took appropriate measures directing that no further consignment to Buccaneer be fulfilled or approved [¶10].

(B) The attempt to mutually resolve disputes failed due to Respondent's legal action

4. Nevertheless, Respondent commenced legal action in IDC against Claimant for damages without prior notification to Claimant while Claimant suffered a super typhoon. After assessing the extent of the damage, Claimant realized that, under the circumstances, it was no longer viable to continue producing. Due to reasons beyond its control, Hampton SunCare purported in good faith to terminate the Agreement [¶¶12; 13].

5. On the contrary, Respondent rejected Claimant's amicable resolution amending its suit to include a claim for declaratory relief that the purported termination of the Agreement was unlawful [¶15]. For the above reasons, Respondent's actions have precluded the possibility of a mutual resolution under the Agreement. Therefore, the Parties should submit to arbitration pursuant to Clause 22.1.

1.3 IDC HAS NO JURISDICTION OVER THIS DISPUTE

(A) IDC shall refer the Parties to arbitration as Inachi has adopted UML on Arbitration

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6. Inachi has adopted UML on Arbitration without any alterations [¶16]. Art 8 of UML on Arbitration states that a court before which an action is brought in a matter which is the subject of an arbitration agreement shall refer the Parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The arbitration agreement between the Parties is clearly valid, operative and capable of being performed.

(B) IDC shall refer the Parties to arbitration as Inachi is a party to NY Convention

7. Inachi is also a party to NY Convention [¶16]. Under Art II.2 and 3 of NY Convention, each Contracting State shall recognize an agreement in writing concerning a subject matter capable of settlement by arbitration and the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement shall refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

8. The arbitration agreement between the Parties is clearly valid, operative and capable of being performed. In addition, Claimant reserves the right to request to be referred to arbitration. Thus, IDC shall refer the parties to arbitration.

CONCLUSION ON JURISDICTION

9. This tribunal should exercise the jurisdiction over the dispute as: (1.1) the Parties are bound by the valid arbitration agreement; (1.2) Claimant fulfilled the pre-abritral

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requirements; and (1.3) IDC has no jurisdiction over this dispute.

II. THE AGREEMENT HAS BEEN LEGITIMATELY TERMINATED BY CLAIMANT

10. On 12 March 2010 Claimant terminated the Agreement between the Parties on the following alternate grounds: (2.1) For breach of Clause 10 for failure to meet minimum sales targets in 2009; (2.2) For reasons of force majeure and hardship caused by the super typhoon; (2.3) With 60 days notice under Clause 21.1.4; or (2.4) Due to fundamental break down of the relationship [¶13].

2.1 CLAIMANT TERMINATED THE AGREEMENT DUE TO RESPONDENT'S BREACH OF CLAUSE 10 FOR FAILURE TO MEET MINIMUM SALES TARGETS IN 2009

(A) Clause 10 is the most fundamental provision of the Agreement between the Parties

11. Clause 10 deals amongst other things with the minimum sales target, stating "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." Accordingly, the minimum sales target shall be relevant for the Agreement to be entered into one year exclusive Agreement.

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12. In light of the letter of intent issued on 31 October 2001 by Claimant, the minimum sales target was also basic term under which Respondent shall ensure that a minimum quantity of the Product is sold [AnnexureA]. Thus, the minimum sales target would be converted in Clause 10 as a vertebral column in the Agreement.

(B) Respondent's breach of Clause 10 amounts to a fundamental non-performance of the Agreement, entitling termination

13. In 2009 Respondent failed to attain the applicable sales target [¶12]. Any failure by a Party to perform any of its obligations under the contract amounts to a non-performance [*CAM*]. Respondent emailed to Claimant on 15 December 2009 admitting its failure to satisfy minimum records [AnnexureB].

(i) Respondents's failure to attain the applicable target in 2009 is fundamental non-performance of the Agreement

14. In accordance with Clause 10, the Parties have its own obligations to sell and purchase the specified quantity of the Product en each contractual year, which is of paramount importance. In 2009, however, Respondent failed to obtain its strict compliance which substantially deprived Claimant of benefits from supplying the Product and of renewing automatically the Agreement [*CAM*].

15. Furthermore, in 2009 Respondent was suffering the weak economy and two wholesallers' parallel importation in Inachi. Despite of its obligations under Clauses 5

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and 10, Respondent did not take any other measures to procure orders or to lower prices [AnnexureB]. As such, Respondent constituted intentional or reckless disregard for performing its obligation to meet the minimum sales target [*CAM*].

16. The non-performing party may cure non-performance pursuant to Art 7.1.4 of PICC. In contrast, Respondent suited against Claimant, which is further breach of the Agreement and shows that Respondent waived its right to cure non-performance [¶12]. Therefore, Claimant cannot rely on Respondent's future performance [*CAM*].

(ii) Respondent's fundamental non-performance gives Claimant to terminate the Agreement

17. The Parties agreed in Clause 22.6 that the governing law of the Agreement shall be PICC whereby a Party may terminate the contract where the failure of the other Party to perform an obligation under the Agreement amounts to a fundamental non-performance [§7.3.1(1); Huber; *ICC 10422*]. The right to terminate will exist when the breach is fundamental and cannot be cured in accordance with the requirements of Art 7.1.4 of PICC in case of non-performance [Vogenauer p816].

18. The Parties expressly or implicitly attach particular weight to certain obligations with the consequence that a breach of Clause 10 is regarded as fundamental [Eberhard p143]. As a consequence, Claimant terminated the Agreement on the ground that Respondent failed recklessly to complete its obligation and waived its right to cure being deprived Claimant of its expectation.

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2.2. CLAIMANT TERMINATED THE AGREEMENT FOR REASONS OF FORCE MAJEURE AND HARDSHIP CAUSED BY THE SUPER TYPHOON

19. Claimant shall supply the Product with Respondent subject to Clause 10. However, the super typhoon caused the severe impediment for Claimant to perform its fundamental obligation [¶13]. Termination of the Agreement was inevitable due to: (A) force majeure; and (B) hardship caused by the super typhoon.

(A) The super typhoon is force majeure

20. If the obligor can prove that non-performance was caused by force majeure, it is excused [§7.1.7(1)]. What force majeure does do, where it applies, is to excuse the non-performing party from liability in damages [§7.1.7 Off Cmt 2].

21. This allows taking into account the effect of consequential impediments caused by the original impediment, such as when the construction of a pipeline across Siberia is delayed for a month due to force majeure but the beginning Siberian frost ensures that works cannot be continued before spring [§7.1.7 Illustration 2].

22. In accordance with the Agreement, the Parties contracted regarding supplying the Product, not producing the raw material. The super typhoon ruined most of the Blanco bean plantations in SIS and it was no longer viable to continue producing Blanco bean

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[¶13]. Consequentely, supplying the Product was impeded by the super typhoon, which could be force majeure due to the impediment beyond its control and not reasonably foreseeable at the time of the conclusion of the Agreement.

(B) The super typhoon is also hardship

23. There is hardship as a situation where the occurrence of events fundamentally alters the equilibrium of the Agreement, provided that those events meet the requirements in (a) to (d) [§6.2.2 Off Cmt 1]. The substantial increase in the cost may, for instance, be due to a dramatic rise in the price of the raw materials necessary for the production of the goods [§6.2.2 Off Cmt 2]. The 1994 edition of PICC stated, "An alternation amounting to 50% or more of the cost is likely to amount to a "fundamental alternation." As such, the dramatic 75% rise in the price of the raw material altered the equilibrium of the Agreement.

24. Additionally, the dramatic rise occurred and became known to Claimant after the conclusion of the Agreement. Claimant could not take into account the dramatic rise caused by the super typhoon which was not typical in meteorological events [¶1; *Europe*]. Meanwhile, Respondent did not provide to Claiment on or before 15 February purchasing figures under Clause 10. As such, the risk of the event was not assumed by Claimant.

(C) Claimant may terminate the Agreement by force majeure and hardship

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25. On 1 March 2010 as a result of the super typhoon there was a severe shortage un-useable for the manufacture of the cream. In the meanwhile, on 10 March 2010 Respondent did not purport to terminate the Agreement, and continued to request consignments of stock [¶¶13,12]. However, Claimant could not cure its default due to force majeure and hardship, and on 12 March 2010 Claimant terminated the Agreement.

26. In accordance with Art 6.2.3(3) of PICC, upon failure to reach agreement within a reasonable time either party may resort to the court. Thus, the tribunal terminates the Agreement if it finds hardship. Nevertheless, hardship does not in itself exclude the Claimant's liability for non-performance [*CAM*]. However, force majeure excuses it.

2.3 CLAUSE 21.1.4 ALLOWS THE AGREEMENT TO BE ENDED WITH 60 DAYS NOTICE

27. Clause 21.1.4 prescibes, ''The Agreement ends at the expiration of 60 days written notice by one Party to the other." An Agreement shall be interpreted according to the common intention of the Parties [§4.1(1)]. As such, Clause 21.1.4 shall be interpreted subject to rights and obligations of the Parties.

(A) Claimant terminated the Agreement with 60 days notice under Clause 21.1.4 due to Respondent's breach of Clauses 5 or 10

28. In accordance with Clauses 5 and 10, Respondent is obliged to use its best efforts to

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prevent the sale of Products in Inachi by persons other than Respondent and to sell minimum sales targets in each contractual period. Consideration is to be given to all relevant circumstances including the prior and subequent conduct of the Parties [§4.3; CISG Art 8(3); *Catio Roger*].

29. The Agreement was made based on the letter of intent which contained two provisions in related with Clauses 5 and 10, failing which Claimant may terminate its appointment as distributor with 2 (two) months prior written notice. Therefore, Claimant termnated the Agreement under Clause 21.1.4 on the grounds that Respondent failed to meet minimum sales target in 2009 and to prevent the parallel importation in Inachi.

(B) Due to the steep increase of the raw material, continuation of the Agreement will likely make Claimant insolvent

30. As a result of the super typhoon, Claimant suffered a huge property damages. In addition, it was no longer viable that Claimant continue producing the Product, at least until next year's bean harvest [¶13]. Under Clause 21.1.3, if either party seeks any form of protection from, or arrangement with, its creditors pursuant to the applicable bankruptcy or insolvency laws.

31. When interpreting Clauses 21.1.3 and 21.1.4, the intentions and understanding of a reasonable person in the same type of business and under the same circumstances are decisive [§§§4.1,4.2,4.3; *ICC 10422*; CISG Art 8(2); *MAP*; *Barley*]. As such, it is clear

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that Claimant should seeks any from of protection, terminating the Agreement at the expiration 60 days written notice to Respondent.

2.4 CLAIMANT TERMINATED THE AGREEMENT DUE TO FUNDAMENTAL BREAK DOWN OF THE RELATIONSHIP

(A) Respondent committed abuse of right

32. Each Party must act in accordance with good faith and fair dealing in international trade and the Parties may not exclude or limit this duty [§1.7(1)(2)]. The Parties agreed under Clause 21.1, ‘‘The Parties will in good faith attempt to mutually resolve any disputes related to this Agreement.” As such, Respondent is liable for resolving any dispute in good faith.

33. The Arbitral Tribunal rejected Defendant’s claim that Claimant, by rejecting Defendant’s porposals for an amicable settlement, had breached its duty to act in good faith as imposed by French Civil Code as well as Art 1.7(1) of PICC [*Europe; Aiton*]. In contrast, Respondent sued Claimant, without an amicable settlement, for the suspicious damages from the parallel importation. Therefore, Respondent breached its duty to act in good faith.

(B) Respondent behaved inconsistently with its previous conduct

34. A Party cannot act inconsistently with an understanding it has caused the other Party to

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have and upon which that other Party reasonably has acted in reliance to its detriment [§ 1.8]. Defendant had already distributed those competing goods at the time of the conclusion of the contract and continued to do so afterwards and Claimant, though being perfectly aware of the situation, made no objections. To invoke Defendant's violation of its contractual obligation all of sudden at this late stage definitely amounts to a case of inconsistent behaviour [*Europe*].

35. In fact, the Parties renewed the Agreement 2009-2010 on February 2009 and it would be assumed that the parallel importation occur at the conclusion of the Agreement [¶12]. Indeed, Respondent was perfectly aware of the situation during the contractual period. One year after, all of a sudden, Respondent accused Claimant of damages from the parallel importation, which amounts to a case of inconsist behaviour.

CONCLUSION ON SUBSTANTIVE ISSUE

36. The Tribunal should find that (II) the Agreement has been terminated legitimately by Claimant: (2.1) for breach of Clause 10 for failure to meet minimum sales targets in 2009; (2.2) for reasons of force majeure and hardship caused by the super typhoon; (2.3) with 60 days notice under Clause 21.1.4; or (2.4) due to fundamental break down of the relationship.

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RELIEF REQUESTED

37. CLAIMANT respectfully requests that the Arbitral Tribunal find that:

- The Tribunal has jurisdiction as Respondent is bound by the arbitration agreement;
- the Agreement has been terminated legitimately by Claimant due to:

(a) Respondent's breach of Clause 10 for failure to meet minimum sales targets in 2009;

(b) reasons of force majeure and hardship caused by the super typhoon;

(c) with 60 days notice under Clause 21.1.4; or

(d) fundamental break down of the relationship.

38. Consequently, CLAIMANT respectfully requests the Arbitral Tribunal to order RESPONDENT:

- to pay damages;
- to pay loss of profit
- to pay interest on the said sums; and
- to pay the costs of arbitration

For HAMPTON SUNCARE CO., LTD.

(signed) _____ , 2 July 2010