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**Kuala Lumpur Regional Center for Arbitration,
Colombo, Sri Lanka.**

2016

Chelsea Tea Company V Almond Tea Company

Memorial for Claimant

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Cases.

- K Aviraj Pandit Durgadutt Sharma V Nav R Atna Pharmaceutical Laboratories. AIR 1965 SC 989
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Web search.

- <http://klrca.org/dispute-resolution/>
- <http://www.srilankabusiness.com/tea/>
- <http://www.pureceylontea.com/index.php/features/why-ceylon-tea>
- <http://www.pureceylontea.com/index.php/features/why-ceylon-tea>
- <http://ratetea.com/topic/climate-geography/55/>

Articles.

- "CEYLON TEA" - SRI LANKA'S BEST KNOWN GEOGRAPHICAL INDICATION
by Mr. Hasita De Alwis, Director (Promotion), Sri Lanka Tea Board, Colombo.

- Hartmann & Kester's Plant Propagation: Principles and Practices by Hartmann, Kester, Davies and Gneve (2010).

Statement of Jurisdiction.

This Panel of Arbitration has the jurisdiction to arbitrate this case by virtue of Article 22 of the Distribution Agreement signed with mutual understanding by both parties namely Chelsea Tea Company and Almond Tea Company which was entered onto on the 20th October 2008. This Arbitration shall be in accordance with the KLRCA i-Arbitration Rules. The process of arbitration was initiated by the Chelsea Tea Company (Claimant) in respect of a breach of the said Distribution Agreement.

Questions presented.

1. What is the Jurisdiction applicable to the situation?
2. Has ATC breached the Agreement between ATC and CTC, by distributing SAILOR'S CEYLON affixed with the ATC's Mark in Malaysia?
3. Is the ATC's usage of similar terms in mark, 'Ceylon' is misleading?
4. What are the factors that determine the taste and quality of Tea?
5. Is the ATC's mark deceptively similar to that of the Lion logo of CTC which is sufficient to create a confusion among the public?
6. Were the goods manufactured by CTC and ATC similar?

Statement of facts.

- **1965**
 - Incorporation of the Chelsea Tea Company (CTC) at Lot 14, Dawson Street, Colombo 00202, Sri Lanka
- **1st January 1976**
 - Establishment of the Sri Lanka Tea Board by an Act of Parliament
- **1999**
 - Incorporation of Almond Tea Company (ATC) at Suite 18-1, Katong Tower, 87 Ceylon Road, Singapore 429665
- **2008**
 - Ranatunga visited the Cameron Highlands, Malaysia and met Philip Chan.
 - Ranatunga made the proposal of appointing ATC as CTC's agent in Malaysia, which was rejected.
 - A fungal disease destroyed the tea plantations from which ATC sourced its tea leaves.
- **20th October 2008**
 - CTC and ATC entered into the Distribution Agreement.
- **January 2009**
 - ATC commenced growing and manufacturing tea in China.
- **2009 – 2013**
 - The proportion of market share of CTC's tea products (which were under ATC's distributorship) is believed to be equal to the market share of ATC's own

products. When combined, they made up approximately 30% of the tea products sold in Malaysia.

- **November 2012**

- ATC commenced the usage of the ATC's Mark in Malaysia in order to distribute Sailor's Ceylon Tea.
- ATC continued the distribution of SAILOR'S CEYLON in countries other than Malaysia.

- **20th October 2013**

- Expiry of the Distribution Agreement between ATC and CTC.

- **2013 – 2014**

- ATC is known to market its green tea and white tea in Malaysia under different brand names.

- **March 2015**

- The attention of the CTC was brought to the fact that ATC has been growing and manufacturing tea in China and distributing such tea products under the brand name 'SAILOR'S CEYLON' in Malaysia since November 2012.

- **12 – 15 August 2016**-The arbitration has been fixed for hearing.

- CTC continued to make some profits although its sales fell by 30% in 2013. The sales suffered a further 15% drop in 2014. The 2015 figures, however, reported a slight increase of 8% from the previous year.

Summary of pleadings.

The Distribution Agreement is proof of the meeting of minds accomplished by the Chelsea Tea Company, Sri Lanka and the Almond Tea Company, Singapore. Therefore, any dispute, controversy or claim arising out of or relating to this contract, or the breach thereof could be settled by Arbitration. In, consequence of a claim for such a breach of the Agreement, the claimant has brought forth the following clauses as has been breached by the respondent. The ATC has commenced the distribution of tea and used a mark similar to the Lion Logo in the Territory in November 2012 which is during the period of the Agreement, thus violating Article 4.2. The ATC has also used a trademark which resembles the trademark used by CTC, thus violating Article 9.3.7 and the intellectual property rights of CTC, violating Article 9.7. As a matter of fact when ATC has used the term 'CEYLON' with the affixation of 'SAILOR'S CEYLON', it misleads the customers of the CTC Tea. Though ATC's inception of tea growing was sourced with seeds from Sri Lanka, the taste and quality of Tea depends on climate and geography of the place it is grown. Due to this Ceylon tea or Sri Lankan grown tea are different from the tea grown in the province of Fujian. According to **doctrine of imperfect recall** misleading of the customers is proved. ATC has used the ATC's unregistered mark within Malaysia by distributing tea products under the brand name of SAILOR'S CEYLON since November, 2012. The introduction of such a mark resulted in a confusion in the mind of the public on the origin of the ATC's products to be that of CTC. Due to the fact that ATC was engaged in the production of a similar product as CTC, Black tea this further created a negative impact on the market share of CTC by misleading them. As a result of the use of the ATC's mark in ATC products a massive impact was created on the goodwill of CTC. This amounted to a trademark infringement and passing off.

Pleadings.

a) Applicable law referred to in the dispute.

According to the Distribution Agreement entered into on 20th October 2008 between Chelsea Tea Company (CTC) (Supplier) and Almond Tea Company (ATC) (Distributor), clause 22.1 states that Arbitration shall be settled in accordance with the **KLRCA i-Arbitration rules**¹. The KLRCA Arbitration Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.²

Furthermore, Law of Contract was taken into consideration. Based on which, an establishment was made on the fact that there was a breach of the contractual obligations on the part of the respondent. Hence, it has resulted in creating all rights on Claimant's favor to pray for relief in lieu of the unjust encountered.

In addition, the Paris Convention for the protection of industrial property of 1883 along with the Trade Related aspects of Intellectual Property rights of 1994 were applied in the establishment of the fact that the respondent's use of the word 'CEYLON' in respect of tea products is clearly objectionable. National legal provision, Sri Lanka Intellectual Property Act No. 36 of 2003 was used as the base of introducing the claimant's right to bring forward a claim on the use of 'CEYLON' in tea products to be misleading.

¹ KLRCA i- Arbitration rules 2014

² <http://klrca.org/dispute-resolution/>

Lastly, Intellectual Property Law was followed in order to establish the respondent's attempts to engage in unfair competition. It can be clearly seen that the claimant's intellectual property rights have been explicitly violated by every mean possible. The respondent's open air infringement of trademark and successful creation of a confusion in the minds of the public on the origin of the product to be as of the claimant establishes all rights on claimant's behalf to make the respondent guilty of his act.

- b) ATC has breached the Distribution Agreement by distributing SAILOR'S CEYLON affixed with the ATC's Mark in Malaysia.

ATC can be said to have breached Article 4.2 of the Agreement on two grounds. The said Article expressly specifies that "During the term and for a period of twelve months after it the Distributor must not be concerned or interested, either directly or indirectly, in the manufacture or distribution in the Territory of any goods that compete with the Products, affixed with the Trade Marks or any other arguably similar mark in the Territory."

The ATC can be undeniably said to have breached this Article on the grounds of it having distributing tea which has been grown and manufactured in China under the brand name "Sailor's Ceylon". This distribution of ATC's tea, Sailor's Ceylon commenced in November 2012, four years and one month since the commencement of the Distribution Agreement between ATC and CTC. The products of ATC were made available to end consumers through intermediaries such as wholesalers, retailers and food and beverage establishments which includes major supermarkets and grocery stores as well as cafes and restaurants. These aforementioned places of distribution are of the same genre of the places of distribution for the Products of CTC, thus indicating a similarity in the market of the

two products. This therefore causes a contradiction in the content of what was agreed between CTC and ATC in the Distribution Agreement. ATC is seen to have undoubtedly violated Article 4.2 in the sense of it distributing goods that compete with the products.

The ATC can again be held for a breach of the Distribution Agreement on the grounds that it has done this distribution of tea products under an emblem which as can be observed shows a direct resemblance to the 'Lion Logo' used by the SLTB and thus the CTC. The ATC's Mark exhibits a lion which is in an offensive stance, having its right paw above the ground. The lion depicted in the SLTB's Lion Logo too exhibits a lion in an offensive stance, which too has its right paw above the ground. The ATC's Mark displays the phrase "Symbol of Quality", which is the exact same phrase depicted in the Lion Logo of the SLTB. This therefore clearly is a mark similar to the Lion Logo used by CTC in its products. Thus a likelihood to cause confusion could be established. According to *K Aviraj Pandit Durgadutt Sharma V Nav R Atna Pharmaceutical Laboratories*³, in order to establish the likelihood to cause confusion, similarity between plaintiff's and the defendant's mark must be identified which is so close either visually, phonetically or otherwise. Here, the use of the lion and the words "Symbol of Quality" in the ATC's Mark can be said to closely resemble the SLTB's Lion Logo both visually and phonetically. ATC can thus be shown to have violated Article 4.2 of the Distribution Agreement, in the latter where it states that ATC would not be concerned or interested in any other arguably similar mark in the Territory.

It can thus been shown that ATC has violated Article 4.2 of the Distribution Agreement.

³ AIR 1965 SC 989 [India]

Article 9.3.7 of the Distribution Agreement is based on the Intellectual Property Rights of the CTC over its trademarks used representing the SLTB. Article 9.3.7 prohibits the Distributor, namely the ATC from “use in the Territory any Trademarks or trade names so resembling the Trade Marks, any trade mark or trade names of the Supplier as to be likely to cause confusion or deception.”

The ATC can be shown to have breached this Article of the Agreement on the grounds that the ATC’s Mark used by the ATC on their products being similar to that of the SLTB’s Lion Logo, the Mark so used on the products of the CTC. This ATC’s Mark consists of a lion which is in an offensive stance, having its right paw raised above the ground. The lion depicted in the SLTB’s Lion Logo too consists of a lion in an offensive stance, which too has its right paw raised similarly above the ground. The ATC’s Mark displays the wordings “Symbol of Quality”, which is the exact same wordings depicted in the Lion Logo of the SLTB.

Article 9.7 of the Distribution Agreement is also based on the Intellectual Property Rights of the CTC over its trademarks which it uses under the authority of the SLTB. Article 9.7 prohibits the ATC from doing any act which could be deemed to invalidate or be inconsistent with the intellectual property rights of the Supplier, the CTC in the clause “The Distributor must not do or authorize any third party to do any act that would or might invalidate or be inconsistent with any intellectual property of the Supplier, and must not omit to do any act that, by its omission, would have that effect or character, or authorize any third party to omit to do any such act”

The ATC, having used a logo arguably similar to the Lion Logo of the SLTB as the ATC’s Mark can be deemed to be an ‘act that would or might invalidate or be inconsistent with

any intellectual property of the Supplier', namely the CTC. This is a violation of the Intellectual Property Right of the CTC by reason of similarity of the mark, as supported by the case *International Business Machines Corp V Web-Sphere Ltd*⁴. Thus, ATC can be shown to have violated Article 9.7 of the Distribution Agreement.

c) ATC's use of the word 'CEYLON' in respect of its tea products is misleading.

Ceylon Tea is a global leader in many aspects. This is not a co-incident but a well thought-out path which Ceylon Tea commenced more than 145 years ago in 1867. Not only is Sri Lanka the largest producer of orthodox black tea but it is also the largest exporter of orthodox black tea to the world. While Sri Lanka is the 4th largest global tea producer after China, India & Kenya, it is the second largest tea exporter in the world after Kenya.⁵ Sri Lankan Tea, known for generations as 'Ceylon Tea' satisfy 19% of global demand for tea. With Sri Lanka's awe-inspiring status of being the number one manufacturer cum exporter of orthodox **black tea**, the tea export trade from Sri Lanka is simply at US\$ 1.5 billion.⁶

As a matter of fact both CTC's and ATC's products are both available in Malaysia, the application of **doctrine of imperfect recall comes into play**. In *De Cordova & Others v Vick Chemical Company*⁷ the courts recognise that, most people do not have a photographic recollection of the visual details of a mark, but instead remember marks by

⁴ [2004] EWHC 529 [UK]

⁵ WIPO/GEO/BKK/13/INF/4 page 3 "CEYLON TEA" - SRI LANKA'S BEST KNOWN GEOGRAPHICAL INDICATION prepared by Mr. Hasita De Alwis, Director (Promotion), Sri Lanka Tea Board, Colombo

⁶ <http://www.srilankabusiness.com/tea/07/13/2016>

⁷ (1951) 68 RPC 103 at 106

their general impression, or by some significant detail. This means that when considering whether two marks are sufficiently similar for citation purposes, a detailed comparison or close examination of the marks is not appropriate. Customers of CTC are misled because of 'imperfect recollection' of the Ceylon due to this.

According to the facts of the situation, in January 2009, when ATC started growing tea in China they used seeds that were first sourced from Sri Lanka. Standing on that fact, using the word CEYLON is misleading on number of reasons.

Firstly, throughout Sri Lanka to manufacture Black tea, seeds are not used as a matter of technology, instead of that vegetative propagation technology is used. During sexual propagation (ie. Propagation by seeds) resulting progeny (ie. Children or offspring) will be not similar. As you all know this is due to the mix-up of genetic material (ie. DNA) from both parents. But during asexual propagation (ie. vegetative propagation) resulting progeny will be exactly similar to mother plant as there will be no any mix-up of genetic material. This is a universally known fact. In plantation crops such as, tea, rubber standard of practice is vegetative propagation or clones (Use cuttings to propagate Tea) to retain desirable characters like high yield, resistance to pest and diseases.⁸ This is a clear evidence to prove that, though ATC used seeds from Kandy it does not assure that end product of tea leaves are the same as the tea plantation technology is different from each other. Even though same clone is used under different climatic conditions it gives different taste in tea. Sri Lankan tea is also grown under the highest social and environmental standards; excellence in process and purity of product are reflected by world class certifications. Several

⁸ Hartmann & Kester's Plant Propagation: Principles and Practices by Hartmann, Kester, Davies and Gneve (2010).

plantations are Forest Stewardship Council (FSC) accredited and GLOBAL GAP compliant.

Secondly, tea of Ceylon Tea is not just an extract from a dried tea leaf, climate and geography are key factors which determines where tea can be grown and how the tea grown in particular region tastes. To qualify for the special, legal distinction denoted by the words 'Ceylon Tea', and for the famous Lion logo that goes with it, the tea must not only be grown and manufactured entirely in Sri Lanka; it must also conform to strict quality standards laid down and administered by the Sri Lanka Tea Board.⁹

The climate of Kandy, where CTC tea are grown has a special reference for it to attach the word 'Ceylon' in it. The local weather (Kandy) is influenced largely by the southwest monsoon system, the winds blowing in force up the mountain passes, though Kandy itself is relatively sheltered. Many of the estates, too, are clustered in valleys where the wind is less fierce, and the tea they produce are stronger and deeper-coloured than the rest of the region's produce.¹⁰ Moreover, the lowest temperature reported in Kandy is 11°C and highest temperature reported is 37°C. This provides an immense evidence that tea grown in Kandy are highly affected with monsoon system, which adds quality to the result of black tea grown. As a matter of fact ATC manufacture tea in Fujian province, latitude/longitude 24 28'47N 118 04'54E. Its climate is mild and humid, the lowest temperature is marked as -2°C and highest as 38°C. Accordingly, this high range of temperature difference depicts seasonal change in the province of Fujian. Though seasonality is thus an asset in tea production, wet-dry pattern like Asian Monsoon is

⁹ <http://www.pureceylontea.com/index.php/features/why-ceylon-tea>

¹⁰ <http://www.pureceylontea.com/index.php/features/why-ceylon-tea>

preferable for tea plantation.¹¹ Moreover, climate also influences flavour and other qualities of tea. In cooler and drier air, common at high elevations, when processing tea as one would make black tea, it is possible to achieve a "hard wither", where the tea leaves dry out before they are fully allowed to oxidize. In hot, humid air, this same process is not possible. This is very common to black tea.

Taking into consideration the geography, climate and seasonality it is evident that tea manufactured by ATC does not exclusively confirm the quality of standard of Ceylon Tea manufactured in Sri Lanka by CTC, though the seeds of ATC were first sourced from the region of Kandy. This is further confirmed with the facts of the situation, which states, 'ATC did not manufacture its tea products in accordance with the requirements set out by the SLTB'. However, bearing the 'SAILOR'S CEYLON' and in particular word 'CEYLON', amounts to an implied assurance to the customer that it is originated from Sri Lanka, which is falls.

Finally, it is evident that, with the inception of 'SAILOR'S CEYLON' brand in 2012 November, CTC's profit fell drastically. In detail sales fell 30% in 2013, further 15% drop in 2014 and in 2015 it was reported a slight increase of 8% from the previous Year. This is a clear evidence that ATC's use of word 'CEYLON' caused unfair competition between ATC product and CTC product. In *CI JI Family Pty Limited and Luong Huynh Ngo v National Australian Nappies (NAN) Pty Limited and Nhut Thang Ho*¹² The Federal Court has granted injunctive relief and ordered damages in favour of the CI JI Family Pty Limited and Mr Ngo against National Australian Nappies and its sole director Mr Ho following its

¹¹ <http://ratetea.com/topic/climate-geography/55/>

¹² [2014] FCA 79

determination that the NAN parties had engaged in misleading and deceptive conduct and passing off, as a result of their use in New South Wales of a substantially similar business name to the business name "Nappy Land".

The CI JI parties carried on a business in New South Wales under the business name "Nappy Land", and using the following logo:



In October 2000, NAN registered the business name "Nappy Land" in Victoria, Queensland and South Australia.



In conclusion ATC use of 'CEYLON' is misleading the customers of Malaysia.

- d) ATC's use of the ATC's Mark amounts to Trademark infringement and passing off.

ATC has clearly invaded the statutory rights established by CTC through developing a mark which is deceptively similar to that of the registered Lion logo of CTC and by using the said ATC mark on similar goods as that of CTC. This is clearly seen as an attempt of

capitalizing on the attached reputation of CTC. Hence, it is evident that ATC with the fraudulent intention of trading its products with a trademark which goes in line with the Lion logo has intended to capture the CTC market share by encroaching into the trademark rights of CTC. This resulted in creating an injury on the goodwill of CTC.

As per the case of *Ox-cart Baywatch Production Co Inc v The Home Video Channel*¹³, if the use of a mark in a manner not likely to indicate the trade origin, it may not attract the cause of action for infringement. The famous heraldic lion insignia of the CTC over time, since 1976, has acquired a degree of distinctiveness through its registration across many jurisdictions. Furthermore, it is an accepted actual fact that in Malaysia Tea Industry there is no other registered Tea product supplier with the Lion logo. Hence, across jurisdictions the image of a Lion on tea products would instantly bring CEYLON TEA into remembrance. Hence, even though the Lion Logo and the ATC mark are not identical, the ATC mark is suffice to cause confusion in the minds of the buyer on the origin of SAILOR'S CEYLON tea to be that from Ceylon as it carries the image of a lion.

Furthermore it can be seen as in the case of *Gucci v Guess*, CTC's products have been copied stitch-for-stitch by ATC. Allowing no chance of distinction between the two products but creating a tendency of confusion in the minds of the averagely intelligent buyers on which product origins from which supplier. Both the ATC's mark and the Lion logo do not take up huge spaces on their respective packaging (typically do not exceed 4cm² in size on a 100 cm² surface). Furthermore, the Lion Logo and the ATC Mark are respectively affixed on the sides of the boxes, usually above the information of importers,

¹³ (1997) FSR 22

packers, and/or distributors. Hence, it can be seen that the entire outlook of the two products possess the same appearance which is likely to misleading the public.

It is clearly manifested that ATC, driven by the marketing intention of targeting consumers in the tea market of CTC, has wittingly chosen Malaysia as its market to distribute SAILOR'S CEYLON. These products were of close physical proximity in the market place as they are placed in same outlets for consumers to purchase. Hence, there is a very high likelihood of confusion among consumers from being created¹⁴.

Above mentioned legal aspects clearly establishes the fact that, when the closely similar mark in question was generated, ATC had an intention of creating a confusion in CTC's customers. The sole aim of it is to tap on CTC's target market and injure CTC's goodwill. Therefore, it is evident that ATC had infringed the trademark, Lion logo¹⁵.

Going by the generally accepted practice it could be seen that CTC, as a major commercial player, has taken necessary steps to ensure that it has obtained the permission of SLTB to use the Lion logo on CTC CEYLON tea products in Malaysia, and is a registered user of the Lion Logo in Malaysia. However, it could be seen that in contrast, ATC has not taken any procedure to register the ATC's mark under Trade Marks Act 1976.

As per the Paris Convention Article 6 (B)(1), Trademarks that come within the Article may be neither denied registration nor invalidated except when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed. It would be logical to derive that ATC was denied registration of mark as a trademark based on the ground that the Intellectual Property Corporation of Malaysia was aware that the ATC's mark is infringing the rights of the readily registered Lion logo.

¹⁴ AMF, Inc v Sleekcraft Boats case from 1979

¹⁵ AMF, Inc v Sleekcraft Boats case from 1979.

It is clearly evident that the mark of ATC was made available to the end consumers through intermediaries such as wholesalers, retailers, and food and beverage establishments. Therefore, ATC's mark came into the association of the public mind, because ATC took all feasible measures to ensure that customers of CTC would find the SAILOR'S CEYLON tea products at the very place where they would find the CTC products. Therefore, SAILOR'S CEYLON has successfully misled the public to believe that they procured the CTC's tea products when in fact they in actual terms acquired ATC's products.

Furthermore, since tea is a daily used consumer product the degree of care exercised by consumers is lesser than when purchasing a luxurious product. Hence, they are more likely to be easily confused by the similar marks. This is as they quickly scan the aisle of a supermarket and impulsively purchase a box of Tea without realizing that a confusion has arisen on the choice of brands but where in the actual terms a confusion has been created. This further proves the likelihood of confusion that would have aroused in the minds of the public who purchased CTC's Lion logo bearing products¹⁶. This confusion would be likely to affect the future purchasing decisions of the customers. This is proved by the fact that from 2013 to 2015 the turnover of CTC has been negatively fluctuating and the confusion was strong enough to equalize the market share of ATC's own products in 2009 – 2013 to that of CTC.

Therefore, it can be conclude that ATC has been involved in unfair competition through introducing goods with the mark of ATC's. This ATC's mark resulted in the creation of the confusion in the minds of the public of Malaysia on the origin of ATC's product to be that of CTC. And this in turn resulted in damaging the goodwill of CTC which is clearly

¹⁶ Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492 (2d Cir. 1961)

evident by the drop in turnover since the 2009 which is the year in which ATC entered into Malaysia along with a deceptive mark. This supported by ATC's decision to choose South East Asia as its main market which is also the main market of CTC, drove the target market of CTC to decline. Moreover, ATC by approaching the same market as CTC, it was made easier to confuse the public rather than by entering into a completely new market.

Prayer for Relief

In light of the law applicable, the facts of the case and the application of the law to the facts in the above arguments, it is respectfully submitted to the Kuala Lumpur Regional Center for Arbitration, Colombo, Sri Lanka that the respondent is guilty of the charges levelled against it. Hence, the claimant wishes to pray from the Arbitral Tribunal for an order directing ATC to stop using the name 'SAILOR'S CEYLON', the ATC's Logo, or any other name or mark containing the word 'CEYLON' or a lion device if its tea does not originate from Sri Lanka and for a payment of damages based on the profits made by ATC out of the sale of SAILOR'S CEYLON. Moreover, CTC wishes to pray for an order directing ATC to discontinue the sale of its products described as 'Ceylon tea' and to recall all such products from the market. Lastly, it is humbly prayed to make an order that parties can only refer to tea grown and manufactured entirely in Malaysia. The Arbitration Tribunal is requested to hold that the respondent, Almond Tea Company is guilty of the charges.

Date: 15th July, 2016 all of which respectfully submitted

Place: Kuala Lumpur Regional Center for Arbitration,

Colombo, Sri Lanka

Counsel for Claimant