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ARBITRATION REGARDING THE SALE OF CEYLON TEA

BETWEEN

CHELSEA TEA COMPANY

CLAIMANT

AND

ALMOND TEA COMPANY

RESPONDENT

MEMORIAL FOR THE RESPONDENT

TABLE OF CONTENTS

LIST OF ABBREVIATIONS VI

INDEX OF AUTHORITIES VII

STATEMENT OF JURISDICTION IX

QUESTIONS PRESENTED X

STATEMENT OF FACTS XI

SUMMARY OF PLEADINGS XIV

PLEADINGS XV

I. THE PROCEDURAL LAW OF THE ARBITRATION IS THE LAWS OF MALAYSIA AND THE LAW GOVERNING THE SUBSTANTIVE MATTERS OF THIS DISPUTE IS THE LAWS OF MALAYSIA1

 A. THE LAWS OF MALAYSIA GOVERN THE PROCEDURES OF THIS ARBITRATION1

 Kuala Lumpur, Malaysia is the seat of arbitration2

 As Malaysia Is The Seat Of Arbitration, The Laws Of Malaysia Shall Govern The Procedures Of This Arbitration3

 B. THE LAWS OF MALAYSIA GOVERN THE SUBSTANTIVE MATTERS OF THIS ARBITRATION4

 The Conflict Of Laws Principles Of Malaysia Indicate The Laws Of Malaysia To Be The Applicable Law5

 The Laws Of Malaysia Are The Applicable Laws Following The *Lex Loci Arbitri* Rule5

 The Laws Of Malaysia Are The Applicable Laws Following The *Lex Loci Delicti Commissi* Rule6

The Laws of Malaysia Are The Applicable Laws Following The Principle Of Neutrality	6
C. THUS THE ONLY JURISDICTIONAL RESULT IS TO APPLY MALAYSIAN LAW	7
II. ATC HAS NOT BREACHED THE AGREEMENT BY DISTRIBUTING SAILOR’S CEYLON AFFIXED WITH THE ATC’S MARK IN MALAYSIA	7
D. ENGLISH LAW WILL BE USED TO GOVERN THE DECISION OF WHETHER THERE HAS BEEN A BREACH OF AGREEMENT	7
Sri Lankan and Malaysian law are both based on English common law	7
E. ATC HAS NOT BREACHED THE AGREEMENT	7
The scope of Article 4.2	7
Remoteness	8
F. ATC Has Not Breached The Agreement	9
III. ATC’S USE OF THE WORD ‘CEYLON’ IN RESPECT OF ITS PRODUCTS IS NOT MISLEADING	9
ATC had not used the word ‘CEYLON’ on its tea products before 2008	9
The Tea That ATC Grew in China Originated From Sri Lanka	10
IV. ATC’S USE OF THE ATC’S MARK DID NOT AMOUNT TO TRADEMARK INFRINGEMENT AND/OR PASSING OFF	10
A. ESTABLISHING INFRINGEMENT OF A TRADE MARK UNDER SECTION 38(1)(A)	11
The test in determining whether a mark is likely to deceive and/or confuse the public	11
B. WHETHER THERE WAS A LIKELIHOOD OF CONFUSION	12

	The circumstances of a case to be considered when considering whether there was a likelihood of confusion	12
	Making a comparison between the claimants and respondents mark	13
C.	EVIDENCE OF ACTUAL CONFUSION	13
	The presence and availability in the market	13
D.	CRUCIAL SURROUNDING FACTORS AND FEATURES	14
	An image of a lion is not distinctive	14
	The image of the Lion (in the lion logo) can be distinguished from the image of the lion in the ATC's Mark	14
	SLTB have no exclusive rights over the words 'SYMBOL OF QUALITY'	15
	There is no evidence of imperfect recollection of the mark	15
E.	A LIKELIHOOD IS SUFFICIENT TO ATTRACT LIABILITY	15
	A likelihood of confusion as actual confusion	16
F.	FURTHER CLARIFICATIONS	16
	All ATC's tea products contain on their packaging the country of origin	16
	ATC manufactured black tea in China	17
	The size and location of their respective marks are not distinctive	17
	The distribution channels for both ATC and CTC are the same	17
G.	THE TORT OF A PASSING-OFF ACTION	18
	The <i>classic</i> trinity test	18
H.	GOODWILL AND REPUTATION	18
	Marks that are seen as indicating that a particular product or service comes from a particular trade source	18
	CTC Ceylon was mainly marketed in Europe	19
I.	MISREPRESENTATION	19

The considerations and reasoning in deciding misrepresentation20

J. DAMAGES21

 Probability of damage21

 Diversion of business22

 The tea products offered are wholly different22

K. RELIEF23

PRAYER FOR RELIEF25

LIST OF ABBREVIATIONS

1 ST . CLF.	Clarifications to the Moot Problem
2 nd . CLF.	Additional Clarifications to the Moot Problem
ATC	Almond Tea Company
CLJ	<i>Malaysia Current Law Journal</i>
CTC	Chelsea Tea Company
KLRC A i-Arbitration	Kuala Lumpur Regional Centre Rules for i-Arbitration
MAA 2005	<i>Malaysian Arbitration Act 2005</i>
Moot Problem	11 th LawAsia International Moot Problem 2016
MLJ	Malayan Law Journal
TM	Trade Marks Act 1976 (Malaysia)
SLTB	Sri Lankan Tea Board
UNCITRAL	United Nations Commission on International Trade Law

INDEX OF AUTHORITIES

Institutional Rules

The KLRCA i-Arbitration RulesXI / 2

International Conventions and International Instruments

Madrid Protocol (relating to that agreement) of 1989VII

The Madrid Agreement on the International Registration of Marks of 1891VII

The Paris Convention for the Protection of Industrial PropertyVII

Relevant Applicable Legislation

Arbitration Act 2005 (Malaysia)4

Indian Contract Act 18727

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12712

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STATEMENT OF JURISDICTION

Chelsea Tea Company (“The Claimant”) and Almond Tea Company (“The Respondent”) have agreed in writing to submit this dispute to arbitration.

The arbitration shall be conducted and administered by the Kuala Lumpur Regional Centre for Arbitration (“KLIRCA”) in accordance with The KLIRCA i-Arbitration Rules (the “Rules”).

The parties do not dispute the validity and enforceability of the arbitration agreement, and any award rendered by the tribunal is acknowledged to be final and binding upon the Parties as per Rule 12 (7) of the Rules.

QUESTIONS PRESENTED

- i. What is the applicable law that should be referred to in this dispute;
- ii. Whether or not the respondent has breached the Agreement by distributing SAILOR'S CEYLON affixed with the respondents Mark in Malaysia;
- iii. Whether or not the respondents use of the word 'CEYLON' in respect of its tea products is misleading;
- iv. Whether or not the respondents use of the respondents Mark amounts to trademark infringement and/or passing off; and
- v. Whether or not the claimant is entitled to the following relief:
 - Payment of damages to be determined by the profits of the respondent made by the sale of SAILOR'S CEYLON in Malaysia;
 - An order that parties can only refer to tea grown and manufactured entirely in Sri Lanka as 'Ceylon Tea';
 - An order directing the respondent to stop using the name 'SAILOR'S CEYLON', the respondents 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
 - An order directing the respondents to discontinue the sale of its products described as 'Ceylon tea' and to recall all such products from the market.

STATEMENT OF FACTS

The Parties To The Dispute

The Claimant, Chelsea Tea Company, is the manufacturer (and supplier) of “Ceylon Tea” under the brand name ‘CTC Ceylon’. The Respondent, Almond Tea Company, is the (exclusive) distributor of CTC Ceylon in Malaysia (subject to the ‘Agreement’ – see Appendix A).

The Background

The Sri Lankan Tea Board (“SLTB”) is the apex regulatory and administrative body of the Sri Lankan tea industry. The Claimant is a company incorporated in Sri Lanka and is the manufacturer of Ceylon Tea under the brand name CTC Ceylon. Marvan Ranatunga (the Chairman of the Board of Directors of CTC) and a committed tea enthusiast wishes to make CTC Ceylon a globally renowned Ceylon tea brand.

CTC Ceylon teas bear the famous heraldic lion logo insignia (see para.3 of the Moot Problem for a representation) and is affixed onto labels and packaging of tea *grown and manufactured entirely* in Sri Lanka. SLTB has obtained trade mark registrations for the Lion logo in many jurisdictions worldwide. SLTB is the registered trademark proprietor of the Lion logo in Malaysia. A condition of the registration of the Lion logo imposed by the Intellectual Property of Corporation of Malaysia (“MyIPO”) is such that SLTB has *no exclusive rights* over the words ‘CEYLON TEA’ and ‘SYMBOL OF QUALITY’ contained in the Lion logo.

Ranatunga recognised the potential of the Malaysia tea market, as such ensured that CTC) obtained the permission of SLTB to use the Lion logo on CTC CEYLON tea products in

Malaysia, and is the registered user of the Lion logo in Malaysia. Philip Chan (a former sea captain) has embarked into the tea manufacturing and distribution in his home country (Singapore) and in Malaysia. He is the Managing Director of the Almond Tea Company, a company incorporated in Singapore.

The Facts

In 2008, during a leisure visit to Malaysia, Ranatunga met Philip Chan and decided he wanted to appoint the respondent as the exclusive distributor of CTC Ceylon in Malaysia. A condition of the offer to supply CTC Ceylon imposed by Ranatunga was such that the respondent would be obliged to cease the sale of all other tea products in Malaysia. Chan was not keen on the offer and Ranatunga failed to persuade Chan to change his mind. The following month, a fungal disease decimated the tea plantations from which the respondent sourced their tealeaves. Ranatunga took this opportunity to contact Chan and after protracted negotiations, the claimant and the respondent agreed (upon a nominal monetary consideration) and entered into a distribution agreement (see Appendix A).

The agreement set out restrictions on respondent's sale (manufacture and distribution) of other tea products in Malaysia that compete with claimant's product (for a term of 5 years and for a period 12 months after it), affixed with the Lion logo or any other arguably similar mark in Malaysia. Utilising the respondents considerable marketing and sales experience in Malaysia, CTC CEYLON established a strong consumer base in Malaysia. The total profits from the sale of CTC CEYLON increased year to year, surpassing targets, and in four years constituted 35% of the global net revenue of the claimant. The agreement was not renewed upon its expiry in 2013 as the claimant had then set up its Southeast Asian head office to promote and distribute CTC CEYLON in the region.

In March 2015, the claimant learned that the respondent has been growing and manufacturing tea in China, and distributing such tea products (under the brand name ‘SAILORS CEYLON’) in Malaysia since November 2012 (see para.14 of Moot Problem for representation of the ATC’s mark).

The claimant then wrote to the respondent asking to pay damages for breach of the agreement, demanded that the respondent cease using their mark on the packaging of their tea products and not to use the word “Ceylon” to describe their product. The respondent replied by denying that it had breached the agreement, would not accede to the claimant’s demands. The respondent contends that it has the right to use the word “Ceylon” on (or to describe) their tea products and that they are within their legal rights to use their mark on their tea products and/or packaging.

As the parties could not come to an agreement, the claimant and respondent have agreed to settle the matter by arbitration in accordance with clause 22 of the Agreement.

SUMMARY PLEADINGS

- I. Malaysian law governs the procedural aspects of this arbitration and the arbitration agreement, because the seat of arbitration is in Kuala Lumpur, Malaysia.
- II. The laws of Malaysia will govern the substantive aspects of this dispute as the Malaysian conflict of laws principles of the *lex loci arbitri*, *lex loci delicti commissi* and *neutrality* indicate as such.
- III. ATC has not breached the agreement by distributing SAILOR'S CEYLON affixed with the ATC's Mark in Malaysia. The laws of England govern the substantive matter of the alleged agreement breach. ATC's selling of its products do not fall into the boundaries of conflicting with article 4.2 of the Agreement. The principles of *remoteness* testify to whether there has been a breach or not. The principle of *remoteness* is not satisfied; thus a breach cannot be found.
- IV. ATC's use of the word 'CEYLON' in respect of its tea products is not misleading. ATC had not used the word 'CEYLON' on its tea products before 2008¹ (when entered into a distribution agreement). The tea that ATC grew in China originated from Sri Lanka: the seeds were first sourced from Sri Lanka.²
- V. ATC's use of ATC's Mark did not amount to trademark infringement and/or passing-off. On the issue of infringement, it is argued that the respondent has not used in the

¹ Answer to question 5 of 2nd. CLF.

² Answer to question 5 of 1st. CLF.

course of their trade a mark that is deceptively and/or confusingly similar to the claimants Lion logo (see section 38 Trade Marks Act 1976).

- VII. The claimant has not successfully established that there is the likelihood of confusion. The claimant need not show actual confusion to come within the test necessary to show infringement of a trade mark as set out in the case of *Leo Pharmaceutical*.³ However, the claimant has failed to show a likelihood of confusion.
- VIII. And on the evidence, it is contended the respondent is not liable for the tort of passing-off SAILOR'S CEYLON as CTC CEYLON to the detriment of the claimant

³ *Leo Pharmaceutical Products Ltd A/S v. Kotra Pharma (M) Sdn Bhd* [2009] 5 MLJ 703[2009] 5 MLJ 703

PLEADINGS

I. THE PROCEDURAL LAW OF THE ARBITRATION IS THE LAWS OF MALAYSIA AND THE LAW GOVERNING THE SUBSTANTIVE MATTERS OF THIS DISPUTE IS THE LAWS OF MALAYSIA

1. In an international arbitration, multiple laws may govern different aspects of the arbitration. Generally, the laws governing the procedural aspects and the substantive merits of the dispute may be different.⁴

2. Although the Claimant and the Respondents (“**Parties**”) have not expressly chosen an applicable law, they have agreed to use the KLRCA i-Arbitration Rules (“**Rules**”).

A. The Laws Of Malaysia Govern The Procedures Of This Arbitration

3. The procedural aspects of an arbitral proceeding is regulated by the institutional rules chosen by the parties and the laws of the seat of arbitration.⁵

(a) Kuala Lumpur, Malaysia is the seat of arbitration

⁴ *Arsanovia Ltd. and Others v. Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), para. 9; *Kuwait Airways Corp. v. Iraqi Airways* [2002] 2 AC 883, pg. 1078.

⁵ *C v. D* [2007] EWCA Civ 1282 [2007] All ER 61, para. 17; *Government of India v. Cairn Energy India Pty Ltd* [2012] 3 MLRA 1, pg. 3, para. 9(1)

4. The importance of the seat of arbitration stems from the theory of the jurisdictional nature of arbitration,⁶ where an arbitration operates within the framework of a national legal order and never in a vacuum.⁷

4.1. In *Dubai Islamic Bank PJSC v. Paymentech Merchant Services Incorporated*, it was held that where the parties have not designated a seat of arbitration, the arbitral panel must consider all significant factors in determining an appropriate seat of arbitration.

5. These factors include the proposed procedure, the centrality of the dispute, the subject matter in dispute, and the convenience of the parties. In the present dispute, Malaysia is the most appropriate seat of arbitration for the following reasons:-

5.1. Pursuant to Rule 6(1) of the i-Arbitration rules, Malaysia shall be the seat of arbitration, given that there is no other appropriate seat.

5.2. Though the parties involved are from different States, the express choice of venue is a strong indication of the parties' intention as to the seat of arbitration.

5.3. The subject matter is currently located in Kuala Lumpur, Malaysia. As such, it is expeditious and efficient to enforce the arbitral award within the jurisdiction of Malaysia, in accordance with Malaysian rules of procedures.

(b) As Malaysia Is The Seat Of Arbitration, The Laws Of Malaysia Shall Govern The Procedures Of This Arbitration

⁶ Loukas Mistelis, *Reality Test: Current State Of Affairs In Theory And Practice Relating To "Lex Arbitri"*, pg. 172.

⁷ *Dubai Islamic Bank PJSC v. Paymentech Merchant Services Incorporated* [2001] 1 All ER (Comm) 514, para. 52.

6. It is trite that the laws of the seat of arbitration regulate the powers of an arbitral tribunal and supervise the arbitral award of an arbitral proceeding.
7. Since the seat of arbitration of the present proceedings is in Malaysia, the laws of Malaysia shall be the procedural law of this arbitration, and the determination of the substantive applicable law (*lex causae*) shall primarily be governed by the 2005 Arbitration Act of Malaysia ("MAA 2005").

B. As Malaysia Is The Seat Of Arbitration, The Laws Of Malaysia Shall Govern The Substantive Of This Arbitration

(a) The Conflict Of Laws Principles Of Malaysia Indicate The Laws Of Malaysia To Be The Applicable Law

8. S.30 (3) of the MAA 2005 provides that "*any designation by the parties of the law of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.*" Thus given the intention of the parties to refer to Malaysian law as both the seat of the arbitration and equally the procedural rules as their *leges fori*, it follows similarly that the parties have chosen Malaysian law as their *lex causae*.
9. Equally, and in the alternative, s.30(4) of the MAA 2005 provides that where parties have failed to agree upon the applicable law, "*the arbitral tribunal shall apply the law determined by the conflict of laws rules*".

10. It is submitted that the conflict rules of the *lex arbitri* shall be applied in the present dispute. The present wording of s.30(4) of the MAA 2005 restricts the application of conflict of laws principles to the conflict of laws rules of Malaysia for the following reasons:-
 - 10.1. Although s.30(4) of the MAA 2005 was modelled after the Article 28(2) of the UNCITRAL Model Law, s.30(4) of the MAA 2005 departed from the original provisions of the UNCITRAL Model Law that allowed for the choice of the most appropriate conflict of laws rules.
 - 10.2. An agreement to commence arbitration at a specified place pursuant to specified arbitration rules and procedures constitutes an implied agreement to use the conflict of laws rules of the *lex arbitri*.
11. The Respondents submit that there are two relevant conflict of laws principles under the laws of Malaysia, indicating the applicable law to the substantive matters of the dispute to be the laws of Malaysia

(b) The Laws Of Malaysia Are The Applicable Laws Following The *Lex Loci Arbitri* Rule

12. With regard to the lack of express selection of *lex arbitri*, the Arbitration is charged with looking to the surrounding locus for connecting factors in order to link the case to a specific forum.

13. Thus for the purposes of connecting factors, one of the available forums is arbitration. Hence the fact the parties have chosen Malaysia as their place of arbitration is certainly an indication that the parties intend Malaysian law to apply.

(c) The Laws Of Malaysia Are The Applicable Laws Following The Lex Loci Delicti Commissi Rule

14. According to the Claimant's case, the alleged tort (passing off and trademark infringement) was committed in Malaysia.
15. Thus following the principle of *lex loci delicti commissi* in Malaysian conflict of laws rules, the law of the country where the alleged tort occurred should stand as the *lex arbitri*. Ergo Malaysian law.

(d) The Laws of Malaysia Are The Applicable Laws Following The Principle Of Neutrality

16. Abiding by the aim of arbitration to offer a neutral judgement, Malaysian law must be used in order to provide equality to the parties.
17. The resulting opposite would be that either party, acting in their own domestic legislation would be unfairly advantaged. Whilst 'technically international'⁸, it may still be handled like a domestic arbitration resulting in miscarriages of justice.⁹

⁸ Ph. Fouchard, "Quand un arbitrage est-il international?", Revue de l'arbitrage 1970, p. 59

⁹http://www.lalive.ch/data/publications/43_On_the_Neutrality_of_the_Arbitrator_and_of_the_Place_of_Arbitration_Recueil_de_travaux_suissees_sur_l'arbitrage_international.pdf

C. Thus The Only Jurisdictional Result Is To Apply Malaysian Law

II. ATC HAS NOT BREACHED THE AGREEMENT BY DISTRIBUTING SAILOR'S CEYLON AFFIXED WITH THE ATC'S MARK IN MALAYSIA

D. English Law Will Be Used To Govern The Decision Of Whether There Has Been A Breach Of Agreement

18. Sri Lankan¹⁰ and Malaysian¹¹ contract law are both based, and contemporarily resemble English common law and more specifically English contract law. Thus it is the legal system most connected to either legal system and under conflict of laws principles must form the *lex arbitri vis-à-vis* the contractual matter.
19. English law offers a neutral legal position thus it must be held as the *lex arbitri*.

E. ATC Has Not Breached The Agreement

20. The scope of article 4.2 is to forbid ATC from using the experience and knowledge gained from working for CTC to make a spin-off of their own brand, which certainly would cause a precarious and polemic situation regarding intellectual property and contractual breach. However, this is not the case here.

¹⁰ <https://www.casrilanka.com/casl/images/stories/EDBA/contract%20law.pdf>

¹¹ Based on Indian Contract Act 1872, formed during British India is equally based on English Common Law

21. ATC was a distributor of tea, since 1999¹² – long before CTC engaged them in the contract. The act of them selling their own tea is merely a continuation of them carrying on with their own business (something which was discontinued due to the fungal disease destroying their crop back in 2008). Thus it is beyond illogical to presume that in 2013, 5 years on, ATC would not have regained their tea production and selling.
22. Selling its product in Malaysia is merely one part of its business, selling equally in; China, Japan, Bangladesh, Nepal, India, Pakistan, Singapore, Thailand, Indonesia, Philippines, Cambodia, Vietnam, Germany, and the United Kingdom.¹³
23. What is more, in order for a claim of breach to be proved, there has to be close relationship between the act of the Respondent and the loss caused to the Claimant under the remoteness principle. The leading case for this demands there to be a naturally arising loss caused where the offending party is either taken to know what the loss will be, or (in abnormal cases of loss) loss which could have reasonably be supposed to be in contemplation to the parties.¹⁴
24. However, this principle cannot apply. The reason for why is that ATC selling its own product, grown independently in China and marketed worldwide acts as a different tea market than the product sold by CTC given it is a different type of tea. Tea purchasers would not need to choose between ATC tea or that of CTC given they are different tea types, if they are fond of tea varieties they may in fact purchase both brands.

¹² 1st. CLF.

¹³ 2nd. CLF.

¹⁴ *Hadley v Baxendale*, House of Lords (1854)

25. Following that the remoteness principle does not apply, it can only be stated that ATC has not breached the agreement.
26. Equally, and in the alternative, according to the general principles of a free market, competition between companies operating in similar circles is to be encouraged in order to lower prices for consumers, improve quality and root out inefficiencies.
27. To rule in favor of a breach of contract would be to enable a creation of a company monopoly. This goes directly against the aims of a free and fair market.
28. Equally so, given the aims of the Claimant to achieve ‘global dominance’¹⁵, it is submitted by the Respondents that the nature of this claim is frivolous, in order to scare away authentic competition.

F. Therefore, ATC Has Not Breached The Agreement

III. ATC’S USE OF THE WORD ‘CEYLON’ IN RESPECT OF ITS TEA PRODUCTS IS NOT MISLEADING

29. ATC had not used the word ‘CEYLON’ on its tea products before 2008¹⁶ (when entered into a distribution agreement). ATC had existing sources (of tea products) in Malaysia and China;¹⁷ they did not use the word ‘Ceylon’ on these tea products.

¹⁵ Moot Problem

¹⁶ Answer to question 5 of 2nd. CLF.

¹⁷ Answer to question 5 of 2nd. CLF.

29.1. A condition of the registration of the Lion logo imposed by MyIPO is such that SLTB has no exclusive rights over the words 'Ceylon Tea'. The claimant was little ground on which to challenge the respondents use of the word Ceylon, this is despite the fact ATC had never declared any of its tea products as Ceylon tea in its advertisements.

G. The Tea That ATC Grew In China Originated From Sri Lanka

30. The tea that ATC grew in China originated from Sri Lanka: the seeds were first sourced from Sri Lanka.¹⁸

V. ATC'S USE OF THE ATC'S MARK DID NOT AMOUNT TO TRADEMARK INFRINGEMENT AND/OR PASSING OFF

31. The Malaysian Trade Marks Act 1976¹⁹ provides for two types of infringement, which are:

- the unauthorised use of a mark which is identical and/or highly similar to²⁰ the registered mark in respect of the same goods or services such as it will likely *deceive and/or confuse* the public; (emphasis added)
- the unauthorised use of a mark which is identical and/or highly similar to the registered mark such that it imports a reference to the registered proprietor.²¹

¹⁸ Answer to question 5 of 1st. CLF.

¹⁹ Section 38. Infringement of a trade mark

²⁰ The offending mark need not be identical to the registered mark. It suffices if the mark is substantially identical that will likely deceive or confuse: see Teo Boon Kwang, in Wen'guang Zhang (ed), *Trade mark law and practice in Malaysia* and Dr Dan Shanahan et. al, *Shanahan's Australian Law of Trade Marks and Passing Off* (3rd edn Lawbook Company 2003)

²¹ Henry Goh & Co. Sdn. Bhd., *A Guide to the Malaysian IP System*, Informational Booklet (2016)

H. Establishing Infringement Of A Trade Mark Under Section 38(1)(A)

32. The test in determining whether a mark is likely to deceive and/or confuse the public was laid down by Parker J in in the case of *The Pianotist Co Ltd*.²² The test was stated as follows:

‘You must take the two words. You must judge them, both by their looks and by their sound. You must consider the goods to which they are applied. You must consider the nature and kind of customer who would be likely to buy those goods. *In fact you must consider all the surrounding circumstances ...*’ (emphasis added)

33. The test in *The Pianotist* case was adopted by the Supreme Court of Malaysia in *Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd*²³. It was resolved that one does not have to place the two products next to each other to determine if they are so similar as to lead to confusion, but having regard to the *totality of the circumstances of the case*. In the latter case of *Sanbos (Malaysia) Sdn Bhd v. Tiong Mak Liquor Trading (M) Sdn Bhd*²⁴, the court held that “the ultimate analysis is whether the mark used by the defendant as a whole is deceptively similar or cause confusion to that of the plaintiff’s registered mark.”

34. The arbitration ought to adopt the principles of law outlined in the (above) cited cases to be applied in a trade mark infringement case.²⁵

²² [1906] xxiii RPC 774

²³ [1992] 1 CLJ (Rep) 344

²⁴ [2008] 10 CLJ 538

²⁵ G. Miaoulis & N. D’Amato ‘Consumer Confusion & Trademark Infringement’ (1978) 42(2) Journal of Marketing 48, 51

I. Whether There Was A Likelihood Of Confusion

35. It is a question of fact whether a mark is identical and/or highly similar that it will likely deceive and/or confuse.²⁶ The court has to consider the general impression and/or basic idea that the mark creates in the mind of the consumer(s).²⁷ In the *LeoPharmaceutical*²⁸ case the Court listed out (all) the circumstances of a case to be considered when concluding whether there was a likelihood of confusion. These were stated as follows:²⁹
- (i) the idea of the mark;
 - (ii) the elements of a mark
 - (iii) the imperfect recollection of a mark by the purchaser;
 - (iv) the aural as well as the visual aspect of a purchaser towards the mark³⁰ and,
 - (v) all the circumstances of the trade.
36. The main features of the claimant's logo, the Lion logo, comprise of the following:
- (i) the image of a lion (substantially identical to that of the lion on the Sri Lankan flag)
 - (ii) the words 'CEYLON TEA' beneath the lion
 - (iii) the description 'SYMBOL OF QUALITY' underneath the above; and
 - (iv) all within a bold (formatted) box

²⁶ *Aristoc Ltd v. Rysta Ltd* (1943) 60 R.P.C. 87 CA

²⁷ *Rotta Research Laboratorium S.p.A & Anor v Ho Tack Sien & Others* [2011] 1 LNS 597

²⁸ *Leo Pharmaceutical* [2009] 5 MLJ 703

²⁹ Similar requirements were also set out in *Fabrique Ebel Societe Anoyne v Syarikat Perniagaan Tukang Jam City Port & Ors* [1988] 1 MLJ 188, *Abercrombie & Fitch Co & Anor v Fashion Factory Outlet KL Sdn Bhd & Ors* [2008] 4 MLJ 127 and *Consitex SA v TCL Marketing Sdn Bhd* [2008] 8 CLJ 444. See also B. Beebe, 'An Empirical Study of the Multifactor Tests for Trademark Infringement' (2006) (94)(6) 1581, 1594

³⁰ The essential features are not just pictures but also words and sounds, said the Privy Council in *De Cordova & Others v Vick Chemical Coy* (1951) 68 RPC 103

37. The main features of the respondent's logo, the 'ATC's Mark', comprise of the following:
- (i) the image of a lion (substantially different to that found on the Lion logo and that on the Sri Lankan flag)
 - (ii) the description 'SYMBOL OF QUALITY' beneath the lion (although in different font)
 - (iii) the number '1972' underneath the above; and
 - (iv) all within a bold (formatted) box broken up by '1972'³¹ at the bottom
38. Making a comparison between the claimants and the respondents logo the following similarities can be noted;
- (i) the use of an image of a lion
 - (ii) the use of the description 'SYMBOL OF QUALITY'
 - (iii) the use of a box surrounding the above elements

J. Evidence Of Actual Confusion

39. The burden of proof is on the claimant to prove that there exists the element of deception or confusion.³²

³¹ It is acknowledged the mere addition of a prefixes or suffixes to a mark does not prevent infringement. See *Sinma Medical Products (M) Sdn Bhd v. Yomeishu Seizo Co. Ltd & Ors* [2004] 3 CLJ 815

³² *Consitex SA v TCL Marketing Sdn Bhd* [2008] 8 CLJ 444

- 9.1. There is no *actual* evidence that the presence and availability of SAILOR'S CEYLON in the market has caused confusion in the mind of the consumer(s).³³
- 9.2. No such evidence has been produced to date to prove this. The arbitration ought to be satisfied there is no real tangible danger of confusion.

K. Crucial Surrounding Factors And Features

40. Having regard to the totality of the circumstances of the case, the following is noted:
- 40.1. An image of a lion is not distinctive. The law does not allow a claim for trade mark protection over generic symbols. It would be 'incongruous for a competitive distributive economy to allow any single legal individual to appropriate exclusive rights over general symbols.'³⁴
- 40.1. Alternatively, it is argued the image is similarly significant to Singapore and/or Singaporeans. The lion (head) symbol is an alternative national symbol of Singapore.
- 40.2. The English language name of Singapore comes from the Malay 'Singapura' (which is derived from Sanskrit) meaning Lion City.
- 40.3. Philip Chan (Managing Director of the Almond Tea Company) is himself Singaporean and the company itself incorporated in Singapore – the idea of the mark is the connection to Singapore.

³³ Answer to question 4 of 1st. CLF.

³⁴ S. Timberg, 'Trade-marks, Monopoly, and the Restraint of Competition' (1949) 14(2), *Law and Contemporary Problems*, 323, 330; W.M. Landes & R.A. Posner 'Trademark Law: An Economic Perspective' (1987) (30)(2) *The Journal of Law and Economics* 265, 270; and F.I. Schechter, 'The Rational Basis of Trademark Protection' (1927) (40)(6) *Harvard Law Review* 813, 815

41. The image of the Lion (in the Lion logo) can be distinguished from the image of the lion in the ATC's Mark:
- 41.1. The Lion logo depicts a lion with spots and bearing a sword.
 - 41.2. ATC's Mark depicts a lion absent spots or sword.
42. The SLTB as registered proprietors (and CTC as registered users) of the Lion logo in Malaysia have no exclusive rights over the words 'SYMBOL OF QUALITY'.
- 42.1. A condition of the registration of the Lion logo imposed by the Intellectual Property Corporation of Malaysia is such that SLTB has no exclusive rights over the words 'SYMBOL OF QUALITY' contained in the Lion Logo. The claimant cannot point to this element of the mark as a potential space of confusion amongst consumers.
43. There is no evidence of the imperfect recollection³⁵ of the mark by the purchaser.
- 43.1. There is no evidence of actual confusion that the presence and availability SAILOR'S CEYLON in the market has caused confusion in the mind of the consumer(s). For example, market survey and/or comparative field assessment that speaks to confusion amongst consumer(s).³⁶

³⁵ 'Imperfect recollection test' established in *Sandown Ltd.'s Application* (1914) 31 RPC 196

³⁶ Answer to question 4 of 1st. CLF.

- 43.2. The pronunciation and/or visual impact of the mark is not identical and/or highly similar to the registered mark such that it is likely to confuse the consumer(s). The former begins with CTC and the latter ‘SAILOR’S’.
- 43.3. There is little evidence of the effect of careless speech pronunciation not only on part of purchasers (but also by shop assistants)³⁷

L. A Likelihood Is Sufficient To Attract Liability

44. In *Leo Pharmaceutical*³⁸ the court held that “the plaintiff in a trademark infringement case is only required to show a likelihood of confusion as actual confusion. A likelihood³⁹ is sufficient to attract liability.”

44.1. The burden of proof for a trademark infringement action is easier to discharge than the burden for a passing-off action. However, the above cited case, has to be distinguished from the present case as the facts are vastly different.

44.2. In the case of *Leo Pharmaceutical*’s drugs and/or pharmaceutical products were involved. Most of the purchasers of drugs (in that case to treat osteoarthritis) were the elderly, who are (usually) less attentive to specific details. The court accepted the contention that such psychical closeness in the display of products in pharmacies was found to contribute to the actual and/or likelihood of confusion.

44.3. The same argument cannot be accepted or applied to the sale of tea products.

³⁷ *Aristoc Ltd v. Rysta Ltd* (1943) 60 R.P.C. 87 CA

³⁸ *Leo Pharmaceutical* [2009] 5 MLJ 703

³⁹ A. Bartow ‘Likelihood of Confusion’ (2004) 41 San Diego Law Review 41, 58

M. Further Clarifications

45. All ATC's tea products contain on their packaging the country of origin.⁴⁰ ATC did not manufacture its tea products in accordance with the requirements set out by the SLTB and never declared any of its tea products as Ceylon tea in its advertisements.⁴¹ There is nothing to suggest this will likely deceive and/or confuse the public.
46. ATC manufactured black tea in China.⁴² And distributed a range of black tea products under the brand name 'SAILOR'S CEYLON', for example Earl Grey Tea.⁴³ It is contended the difference in tea product and specific product names used in conjunction with this brand name is enough to distinguish the competing product in the market.
47. The Lion logo and ATC's Mark are respectively affixed on the sides of boxes⁴⁴ and do not take up huge spaces on the packaging.⁴⁵ The size and location of their respective marks are not distinctive of any tea product currently on the market such that it will likely deceive and/or confuse the public.
48. Products of ATC and CTC are both made available to end consumers through intermediaries such as wholesalers, retailers, and food and beverage establishments.⁴⁶ The recommended retail price of both products are similar.⁴⁷ The above mentioned

⁴⁰ Answer to question 6 of 2nd. CLF.

⁴¹ Answer to question 4 of 2nd. CLF

⁴² Answer to question 13 of 2nd. CLF

⁴³ Answer to question 11 of 2nd. CLF

⁴⁴ Answer to question 20 of 2nd. CLF

⁴⁵ Answer to question 21 of 2nd. CLF

⁴⁶ Answer to question 22 of 2nd. CLF

⁴⁷ Answer to question 17 of 2nd. CLF

distributorship and sale of tea products is similar to that of many (if not all) tea products already on the market. There is nothing to suggest that this is likely to deceive and/or confuse the public.

49. Thus on the issue of infringement it is argued that the respondent has not used in the course of their trade a mark (the ATC's Mark) that is deceptively and/or confusingly similar to the claimants Lion logo (see section 38 Trade Marks Act 1976).

49.1. The claimant has not successfully established that there is the likelihood of confusion. The claimant need not show actual confusion to come within the test necessary to show infringement of a trade mark as set out in the case of *Leo Pharmaceutical*.⁴⁸ However, the claimant has failed to show a likelihood of confusion.

N. The Tort Of A Passing-off Action⁴⁹

50. The tort of a passing off⁵⁰ action is to provide restitution for the injury caused by the defendant to the *business or goodwill* (emphasis added) hitherto enjoyed by the plaintiff through his or her business endeavors.⁵¹

⁴⁸ *Leo Pharmaceutical* [2009] 5 MLJ 703

⁴⁹ M. Spence, *Intellectual Property* (Clarendon Law Series 2007); D. Bainbridge, *Intellectual Property* (9th edn Harlow: Pearson 2012) and M. Elmslie, *Intellectual Property* (Elsevier 2011)

⁵⁰ First recognised in *JG v. Samford* (Unreported, 1584)

⁵¹ see *Perry v. Trufitt* [1842] 49 ER 749; *Erven Warnick v Townsend & Sons (Hull) Ltd* (1979) AC 731; *Reckitt & Solman Products Ltd v Borden Inc & Ors (No. 3)* (1990) 1 All ER 873; (1990) RPC 341; *Mun Loong Co Sdn Bhd v. Chal Tuck Kin* [1982] CLJ 80; and *Seet Chuan Seng & Anor v Tee Yin Jia Food Manufacturing Pte Ltd* [1994] 3 CLJ 13)

50.1. The *classic* trinity test accepted as the defining standard to succeed in such a claim is as follows:

- (i) the plaintiff must establish goodwill⁵² and/or reputation in the get-up
- (ii) demonstrate a misrepresentation by the defendant that is likely to deceive the public; and
- (iii) the plaintiff has suffered or is likely to suffer damage or injury to his business or goodwill by reason of said action

50.2. Put differently, the question is: did the respondent represent his business to be that of the claimant?⁵³

O. Goodwill And Reputation

51. In respect of the first requirement, the claimant has not put in enough evidence to show the name, logo and/or symbol employed has come to be connected/associated with the business.

51.1. The claimant has been doing business for about 5 years in Malaysia as at the date to which this dispute pertains. They have not shown the consumer(s) had made this connection i.e. evidence by way of study reposts or field surveys.

51.2. Up until 2008 CTC CEYLON was mainly marketed in Europe, where such a connection could be argued.

⁵² see *IRC v. Muller & Co.'s Margarine* [1901] AC 217 and *Star Industrial Co. v. Yap Kwee Kor* [1976] FSR 217 for a description of goodwill

⁵³ L. Bently & B. Sherman, *Intellectual Property Law* (4th edn, OUP 2014) 826

51.3. The claimant cannot argue goodwill associated with packaging because the exact nature of the packaging of the products is not given. Nor is any reference made to goodwill associated with advertising styles and/or slogans.

P. Misrepresentation

52. In respect of the second requirement, the same consideration and reasoning equally apply in deciding on this sub-issue; mainly:

- the claimant has only to show the likelihood of confusion and not actual confusion;⁵⁴ and
- it will be sufficient if the misrepresentation indicates an association between the business of the respondent and the claimant⁵⁵

53. More need not be said except to reiterate that the (alleged) similarities between the two marks was suitably explained and evidenced. It is argued that there is no obvious attempt by the respondent to ride on the goodwill⁵⁶ and trade reputation of the claimant.

In addition:

53.1. The respondent has not made the relevant misrepresentation (or that which could be implied) by their actions.

53.2. The respondent did not engage in comparative advertising (in which the goods and services are compared with another i.e. price, value etc.).

⁵⁴ *Leo Pharmaceutical* [2009] 5 MLJ 703

⁵⁵ Trade Marks Act 1976 s.38(1)

⁵⁶ R.Burrell and D. Gangjee, 'Because Your're worth it: L'Oreal and the prohibiyion in Free-riding' (2010) 73 MLR 282, 283

52.3. The respondent has not attempted to misrepresent the source of its tea leaves or the quality of its tea products.⁵⁷

54. The claimant must show deception and the likelihood of suffering damage, confusion is not enough.⁵⁸

Q. Damages

55. On the last requirement, actual damage need not be proved, it is sufficient for them to prove probability of damage. And where goods are in direct competition the Court will readily infer such a likelihood of damage.⁵⁹

55. When referred to the evidence⁶⁰ it is not possible to say that except for the introduction of SAILOR'S CEYLON into the market the sale of the claimants CTC CEYLON tea products had been consistent. This is a bare statement unsupported by any actual figures and although sales suffered a 15% drop in 2014 there is no evidence to suggest that the introduction of the respondent's tea products had any marked effect.

55.1. The 2015 figures reported a slight increase of 8% from the previous year – despite the respondent still distributing their products (in particular SAILOR'S CEYLON) in Malaysia as of 20 October 2013. Put another way, the claimant cannot contend the introduction of SAILOR'S CEYLON into the market

⁵⁷ Answer to question in 2nd. CLF.

⁵⁸ L. Bently & B. Sherman, *Intellectual Property Law* (4th edn, OUP 2014) 859

⁵⁹ *Seet Chuan Seng & Anor v. Tee Yih Jia Food Manufacturing Pte Ltd* [1994] 3 CLJ 7)

⁶⁰ Answer to question 10 of 1st. CLF.

affected their sales when under the same conditions the 2015 figures reported a slight increase from the previous year.

56. Despite the above mentioned fall in profits, the evidence states CTC continued to make profits.⁶¹ And although its sales fell by 30% in 2013 and as above suffered a further 15% drop in 2014, the loss and/or damage suffered can be explained.

56.1. The respondent company is also selling other types of tea in Malaysia for the period 2013 to 2014. ATC markets its green tea and white tea in Malaysia under different brand names.⁶² The existence of competition and/or other tea products in the market place explains loss and diversion of business.

57. In respect to the second part of point 55 i.e. where goods are in direct competition the Court will readily infer such a likelihood of damage, a recent Court of Appeal decision⁶³ allowed an appeal against passing-off, holding that the (food) items the appellant offered to its customers were *wholly different* from those offered by the respondent.

57.1. It is argued that the same rationale can be applied to the facts in this dispute. The respondent manufactures black tea in China whereas the CTC manufactures Ceylon tea in accordance with the standards set by the SLTB.⁶⁴ It is contended the following products are wholly different and intended for different customers.

⁶¹ Answer to question 10 1st. CLF.

⁶² Answer to question 16 of 2nd. CLF.

⁶³ *McCurry Restaurant (KL) Sdn Bhd v. McDonald's Corporation* [2009] 3 CLJ 540

⁶⁴ Answer to question 11 & 15 of 1st. CLF.

58. On the evidence, it is contended the respondent is not liable for the tort of passing-off SAILOR'S CEYLON as CTC CEYLON to the detriment of the claimant.

R. Relief

59. It is contended that there ought to be no payment of damages (determined by the profits of ATC made by the sale of SAILOR'S CEYLON in Malaysia) in that:

59.1. on the issue of infringement, the respondent has not used in the course of their trade a mark (the ATC's Mark) that is deceptively and/or confusingly similar to the claimants Lion logo (see section 38 TM ACT); and

59.2. on the evidence, is not liable for the tort of passing-off SAILOR'S CEYLON as CTC CEYLON to the detriment of the claimant

60. It is contended that there ought to be no order that the parties can only refer to tea grown and manufactured in Sri Lanka as 'Ceylon Tea' in that:

60.1. The tea that ATC grew in China originated from Sri Lanka: the seeds were first sourced from Sri Lanka.⁶⁵

61. It is contended there ought to be no 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 in that:

⁶⁵ Answer to question 5 of 1st. CLF.

- (i) ATC had not breached the distribution agreement; and
- (ii) ATC's use of the ATC's Mark did not amount to trademark infringement and/or passing off and

62. It is contended that there ought to no order directing ATC to discontinue the sale of its products described as 'Ceylon tea' and to recall all such products from the market in that:

- it cannot be proved that the respondent has done anything other than conduct his business in good faith. And continue to perform his contractual obligations.

PRAYER FOR RELIEF

The respondents request this arbitral tribunal to make the following orders:

- I. The laws governing the procedures of this arbitration shall be the laws of Malaysia.
- II. That the laws of Malaysia are the appropriate applicable laws to govern the substantive matters of this arbitration.
- III. That ATC has not breached the Agreement by distributing SAILOR'S CEYLON affixed with the ATC's Mark in Malaysia.
- IV. That ATC's use of the word 'Ceylon' in respect of its tea products is not misleading
- V. That ACT's use of ATC'S Mark did not amount to trademark infringement and/or passing off.

Respectfully submitted,
Counsel for the Respondent.