

**KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION**

COLOMBO, SRI LANKA

**THE DISPUTE OVER THE DISTRIBUTION OF “SAILOR’S CEYLON”  
IN MALAYSIA**

**CHELSEA TEA COMPANY  
(CLAIMANT)**

**V.**

**ALMOND TEA COMPANY  
(RESPONDENT)**

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**MEMORIAL FOR THE CLAIMANT**  
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THE LAWASIA INTERNATIONAL CONFERENCE  
INTERNATIONAL MOOT COMPETITION

2016

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## **STATEMENT OF JURISDICTION**

The Claimant and the Respondent have agreed to submit the dispute concerning the manufacture and distribution of “SAILOR’S CEYLON” affixed with Almond Tea Company’s mark to arbitration pursuant to Clause 22 of the Distribution Agreement dated 20 October 2008 the parties have entered into. Pursuant to Clause 22 this arbitral tribunal has jurisdiction to decide “any dispute, controversy or claim arising out of or relating to” the Distribution Agreement or the breach thereof

The parties have agreed that the seat of arbitration shall be Colombo, Sri Lanka while procedural rules governing the arbitral proceedings shall be KLRCA i- Arbitration Rules.

## **QUESTIONS PRESENTED**

The Claimant respectfully asks the Arbitration Tribunal:

1. Whether the dispute over Respondent's distribution of SAILOR'S CEYLON in Malaysia is governed by Sri Lankan law based on the seat theory or by any other law.
2. Whether the Respondent's distribution of SAILOR'S CEYLON affixed with its Mark in Malaysia constituted a breach of the Distribution Agreement.
3. Whether the Respondent has a standing to use the word "CEYLON" in respect of its tea products.
4. Whether the Respondent's use of its Mark is in compliance with the law governing trademark infringement and passing off.

## **STATEMENT OF FACTS**

### **Overview of the Claimant Company**

Chelsea Tea Company, the Claimant, is a company established 1965 and incorporated in Sri Lanka with its registered address at Lot 14, Dawson Street, Colombo 00202, Sri Lanka.

Claimant is a manufacturer of “Ceylon Tea” under the brand name ‘CTC CEYLON’.

Claimant grows and manufactures its CTC CEYLON tea products in the Kandyan District in the Central Province.

### **Use of the Lion Logo as Claimant’s trademark**

Claimant’s tea bear the famous heraldic lion trademark of which the proprietary rights lie with the Sri Lankan Tea Board (SLTB). The Lion Logo is affixed onto the labels or packaging of tea grown and manufactured entirely in Sri Lanka by approved traders that conform to the quality standards set by the SLTB. The SLTB is also the registered trademark proprietor of the Lion Logo in Malaysia.

Claimant has obtained permission from SLTB to use the Lion Logo on CTC CEYLON tea products and is also a registered user of the Lion Logo in Malaysia.

### **Getting into the Distribution Agreement**

In the pursuance of his vision of making CTC CEYLON a globally renowned tea brand, Marvin Ranatunga, the Chairman of its Board of Directors retained the services of the Respondent Company, Almond Tea Company, a tea manufacturing and distributing company incorporated in Singapore, to be the exclusive distributor of Claimant in Malaysia.

There was an initial reluctance on the part of Philip Chan, the Managing Director of the Respondent to accept the offer made by Marvin Ranatunga as it was required that Respondent should cease the sale of all other tea products in Malaysia.

Additionally, the Respondent accepted the Claimant's offer only when a fungal disease devastated the tea plantations from which the Respondent sourced its tealeaves. The Distribution Agreement was concluded between the parties in 20 October 2008 and it was not renewed upon its expiry in October 2013.

### **Required Performance of the Distribution Agreement**

The Distribution Agreement made the Respondent the exclusive distributor of Claimant's products in Malaysia. Clause 4.2 of the Distribution Agreement prohibited the distributor from manufacturing or distributing competing goods in Malaysia affixed with trademarks used by Claimant or any other arguably similar mark.

Clause 9.3.7 of the Distribution Agreement prohibited the Respondent from using any trade mark of trade names so resembling with that of the Claimant is likely to cause confusion and deception.

Clause 9.4 of the Distribution Agreement, it was established that the Respondent will not have any rights in respect to Claimant's trademarks, trade names or the goodwill associated with it and that they will be vested in the Claimant.

### **Breach of the Distribution Agreement**

Respondent has manufactured and distributed black tea products under the brand name SAILOR'S CEYLON affixed with Respondent's mark on their packages since November 2012 while the Distribution Agreement was in operation.

### **Use of Respondent's mark**

Respondent's mark is not a registered trademark under the Malaysian Trademarks Act of 1976. Therefore, it does not enjoy the rights that are attributed to registered proprietors of trademarks such as SLTB or to its authorized users such as the Claimant.

Respondent's mark contains a lion device in black on a white background with the words "SYMBOL OF QUALITY" underneath it while the Lion Logo used in Claimant's products bore the image of a heraldic lion in black on a white background with the words "CEYLON TEA" and "SYMBOL OF QUALITY" underneath it.

Respondent has started using its mark in Malaysia only in 2012 specifically with SAILOR'S CEYLON tea products. Additionally, it has not used its mark on any of its other products in Malaysia but only on the packaging of SAILOR'S CEYLON tea products.

### **Use of Respondent's brand name**

Respondent distributes SAILOR'S CEYLON tea products in Malaysia though it did not manufacture its tea products in accordance with the requirements set out by the Sri Lankan Tea Board.

### **Arbitration Clause of the Distribution Agreement**

Any dispute or claim arising out of the contract or its breach was agreed to be settled by arbitration. Although there was no express choice of law clause in the Agreement regarding the applicable law of the Agreement, the parties agreed that the seat of arbitration shall be Colombo, Sri Lanka which is the place of incorporation of Claimant, the Supplier of the Distribution Agreement.

Accordingly, parties decided to settle the matter by arbitration and it has been fixed for hearing on the 12- 15 August 2016, at Colombo, Sri Lanka.

## SUMMARY OF PLEADINGS

### **Claim A**

The applicable law that should be referred to in this dispute is the Sri Lankan law. Due to the absence of an express choice of law clause in the agreement, the intention of the parties regarding the governing law of the agreement from which they derive their rights and obligations must be interpreted tacitly as the party autonomy cannot be set aside completely. Hence, the maxim *qui indicem forum elegit jus*: a choice of forum is a choice of law establishes that the seat of arbitration chosen by the parties indicates a tacit choice of law clause in the agreement.

### **Claim B**

Respondent has breached the Distribution Agreement between the parties by manufacturing and distributing a competing product in the Malaysian market under a misrepresenting brand name affixed with a mark which closely resembles with the Lion Logo that is used by Claimant in its products. Respondent undertook these actions during the Term of the Distribution Agreement. The Distribution Agreement is governed by Sri Lankan Law where contractual obligations are determined by the Common Law in cases where consideration is involved. Due to the inclusiveness of the Agreement, breach of the Agreement through distributing a competing product affixed with a mark closely resembling the Claimant's in Malaysia, through misrepresentation, through breach of duty of loyalty can be established by exploring the Distribution Agreement itself.

**Claim C**

Respondent's use of the word "CEYLON" in respect of its tea products is a misleading geographical indication. Going by the threefold protection afforded to geographical indications, namely, indication of source, geographical indication of origin and appellation of origin; it is evident that the word "CEYLON" cannot be attached to a product which has no established roots with Sri Lanka. Moreover, Respondent lacks bona fide intention in using the term "CEYLON" to describe their products and thereby causes confusion as to the place of origin.

**Claim D**

Respondent's use of a mark so nearly resembling the Lion Logo of the Claimant amounts to trademark infringement and passing off. The factual similarities between the Lion Logo and Respondent's mark together with its likelihood of causing confusion suffices to constitute trademark infringement and breach of Claimant's rights as an authorized user of SLTB's Lion Logo. Alternatively, a claim of passing off against Respondent can be established on the three grounds: firstly, a goodwill attached to Claimant's products; secondly, a misrepresentation by Respondent which is likely to make the public believe that its products are that of Claimant's; and thirdly, a damage to Claimant's goodwill caused by such misrepresentation.

## PLEADINGS

### **A. THE APPLICABLE LAW THAT SHOULD BE REFERRED TO IN THIS DISPUTE, AS PER THE SEAT THEORY, IS THE SRI LANKAN LAW.**

As the matter at hand is of an international character, as the contract is between parties originating from different places of incorporation etc., the complexity generated from that affects the legal aspect of the contract as well. Consequently, there could be different legal systems that apply to govern different types of substantive and procedural laws that emanate from the contract. In the case at hand, as it is relating international commercial arbitration, one could identify five different systems of that might have a bearing on the matter<sup>1</sup>.

1. The law governing the arbitration agreement and the performance of that agreement.
2. Law governing the existence and proceedings of the arbitral tribunal.
3. The law, or the relevant legal rules, governing the substantive issues in dispute (generally described as the applicable law, the governing law, the proper law of the contract, or the substantive law)
4. Other applicable rules and non-binding guidelines and recommendation.
5. The law governing recognition and enforcement of the award.

### **I. The principle of ‘party autonomy’ may be interpreted tacitly to determine the applicable law in the absence a ‘choice of law’ clause in the Agreement.**

More often than not, the applicable law governing the Agreement between parties is determined by a ‘choice of law’ clause where the parties, on their own, decide on the law applicable to the

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<sup>1</sup> Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009) 157

contract during the formation of the contract through mutual consent. This clause emanates from the principle of ‘party autonomy’ which basically permits the parties to choose the law or laws applicable to the arbitration as well as any procedural rules<sup>2</sup>. In fact, the principle of ‘party autonomy’ is considered as a ‘key principle of current arbitration law’ in the case *Bay Hotel & Resource Ltd. v. Cavalier Construction Co. Ltd.*<sup>3</sup> and in the case *Diagnostica Inc. v. Centerchem Inc.*<sup>4</sup>, as the ‘cornerstone of modern arbitration’. Essentially, in *ICC Award in Case No.1512*<sup>5</sup>, the arbitral tribunal stated:

There are few principles more universally admitted in private international law than that referred to by the standard terms of the ‘proper law of the contract’ according to which the law governing the contract is that which has been chosen by the parties, whether *expressly or* (with certain differences or variations according to the various systems) *tacitly* [emphasis added]. The differences which may be observed here between different national systems relate only to the possible limits of the parties power to choose the applicable law or to certain special questions or to modalities, but not to the principle itself, which is universally accepted.

It is evident that the Distribution Agreement does not *expressly* contain such a choice of law clause which would have assisted to determine both the substantive law of the contract and the

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<sup>2</sup>Andrew Tweeddale and Keren Tweeddale, *Arbitration Of Commercial Disputes* (Oxford University Press 2007) 216

<sup>3</sup> [2001] UKPC 34 (PC)

<sup>4</sup> [1998] 44 New South Wales Law Review 312

<sup>5</sup> [1976] YCA 128 (ICC)

governing law of the arbitration agreement. As the parties have not *expressly* used their party autonomy, it is up to the arbitration tribunal to select the applicable law of the Agreement while considering whether the parties have *tacitly* indicated their party autonomy.

**II. Law of the seat of arbitration, indicating the implied choice of parties, determines both the applicable law of the Distributorship Agreement and the law governing the Arbitration Agreement between Claimant and Respondent.**

*(i) A choice of forum is a choice of law*

As elucidated in *Egon Oldendorff v. Libera Corp*<sup>6</sup>, a contract will frequently be governing by the law of that country on the basis that the choice of the seat is to be regarded as an *implied choice of the law* governing the contract. This principle is expressed in the maxim *qui indicem forum elegit jus*: a choice of forum is a choice of law<sup>7</sup>. In order to apply this, the facts of the case must be such that there is no express choice of law to govern either the contract as a whole or the arbitration agreement.<sup>8</sup> The precedence of this principle was held in other common law cases like *Hamlyn & Co. V. Talisker Distillery*<sup>9</sup> and *NV. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co Ltd*.<sup>10</sup> In the case at hand, since the seat of arbitration chosen by the parties shows the implied choice of the parties to be governed by Sri Lankan law as the substantive law of the Distribution Agreement, no other criterion needs to be assessed as where there is an absence of an express choice of law clause with regards to the governing law of the substance of the

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<sup>6</sup> [1995] 2 Lloyd's Rep 64

<sup>7</sup> **Redfern and Hunter**, *supra* note 2, p. 232.

<sup>8</sup> Lawrence Collins and others, *Dicey, Morris and Collins on The Conflict of Laws* (14th edn, Sweet & Maxwell Ltd 2008) P.719.

<sup>9</sup> [1894] 202 (AC)

<sup>10</sup>[1927] 604 (AC)

contract, the implied choice of the parties takes precedence over any other methods adopted by an arbitral tribunal to determine the applicable law of the Distribution Agreement.

**(ii) *The seat of the arbitration is not chosen on random or neutral grounds***

It is held in the case *James Miller & Partners Ltd. v Whitworth Street Estates (Manchester) Ltd*<sup>11</sup>, that the law of the seat of the arbitration can and will often be different to the applicable law, which the parties have chosen in order to determine the merits of the dispute because arbitral proceedings are likely to take place in a neutral country whereas the substantive law of the country is likely to have some connection with the contract<sup>12</sup>. Yet in this case, the seat of the arbitration chosen is not a neutral country. In fact, it is the place of incorporation of the Claimant's company. Additionally, it is also the place of incorporation of the original owners' of the lion logo, the Sri Lankan Tea Board, from whom Claimant sub-licensed the Trademark. Moreover, the Agreement was made for the distribution of Claimant's Ceylon Tea products. The fact that the origin of products itself shares a connection with the seat of arbitration proves that the seat of the arbitration chosen by parties is not made on random grounds. Hence, a clear nexus between the seat of arbitration and the substantive law of the contract which determines the contractual relationships between the parties could be established.

**(iii) *The significance of the seat of arbitration could be postulated by referring to the impact of 'mandatory rules' on 'choice of law' clauses as well.***

As discussed earlier, even though the principle of 'party autonomy' is a cornerstone in modern arbitration, it is not absolute. For example, the parties cannot make contractual relationships that

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<sup>11</sup> [1970] AC 583

<sup>12</sup> Andrew Tweeddale and Keren Tweeddale, *supra* note 2, p.205

would be in conflict with any mandatory laws applicable at the seat of the arbitration. This could be observed in the case *Diagnostica Inc. v Centerchem Inc.*<sup>13</sup>, as it was held that:

In principle, party autonomy does not mean a complete freedom to exclude a system of law, or particular elements of a system of law, from the relationship between the parties. Confining attention to statutory law, if the statute on its proper construction and with regard to the legislative power of the legislature applies to the parties and their conduct of the arbitration and expressly or by necessary implication cannot be excluded by agreement, the agreement of the parties to exclude it will count for nothing.

Hence it could be posited that the choice of the seat of the arbitration selected by parties is no random or coincidental and both Claimant and Respondent contemplated the effects of the law of the seat of arbitration would have on the Distribution Agreement during the formation of the contract. And the fact that they went ahead with the Sri Lankan jurisdiction for the seat of arbitration contribute to the furtherance of the argument of implied choice of parties being the law of the seat of arbitration to the law governing both the substantive content of the Distribution Agreement and the arbitration agreement.

### **III. The procedural law of the arbitration does not have an impact on the substantive rights, obligations and duties that emanate from the Distributorship Agreement**

Parties have chosen to abide by KLRCA rules as to the procedural law of arbitration. But as explained earlier, the procedural law is only one of the different types of laws that have a bearing on the matter of international commercial arbitration. Therefore, this shares no direct connection

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<sup>13</sup> *Supra* note 2

on the substantive law of the Distribution Agreement between the parties. Due to the advancement of technology and development of international trade, the place in which the contract is finally concluded is often a matter of little or no significance<sup>14</sup>.

## **B. RESPONDENT'S DISTRIBUTION OF SAILOR'S CEYLON IN MALAYSIA AFFIXED WITH ITS MARK CONSTITUTES A BREACH OF THE DISTRIBUTION AGREEMENT**

R. Joliet, 'Trademark Licensing Agreements under the EEC Law of Competition states:

A distributorship agreement is merely a means by which a producer regulates how their goods reach the market. Although distribution agreements are not usually trade mark licenses, such agreements may include clauses requiring the distributor to sell the goods under the producer's trade mark in a manner specified by the producer.<sup>15</sup>

The Distribution Agreement between the Claimant and the Respondent is an exclusive Distribution Agreement as per the wording of **Clause 9.4** which expressly provides that the Respondent has no rights in respect of the trademarks, any trade names or trademarks used by the Claimant in relation to the products for which the Distributorship Agreement is drawn or the goodwill associated with them. Further, by that Clause, the Respondent has acknowledged that it will not acquire any rights in respect of such rights and goodwill except as expressly provided in

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<sup>14</sup> **Redfern and Hunter**, *supra* note 2, p. 233

<sup>15</sup> R Joliet, *Trademark Licensing Agreements under the EEC Law of Competition* (Nw J Intl L & Bus 1983-84) 755,764-5

the Distribution Agreement and that and they are, and shall remain, vested in the Claimant. Hence, this is a situation which stands opposite to *Prince of Peace Enterprises, Inc. V Top Quality Food Market, LLC*,<sup>16</sup> where the distributor had obtained exclusive right of distribution together with the exclusive right to use the trademark.

**I. The Distribution Agreement is governed by Sri Lankan Law where contractual obligations are determined by the Common Law in cases where consideration is involved**

In Sri Lanka, contractual obligations in general are governed by Roman Dutch Law which requires *causa* and not consideration to support a promise; the English concept of consideration forms an essential part of the legal study in Sri Lanka<sup>17</sup>. As held in *Attorney General v. Abraham Saibo & Co.*<sup>18</sup>, the concept of consideration is governed by English Law in Ceylon.

In the case at hand, the parties have agreed upon a nominal monetary consideration of RM 35 000, as per Clause 2.1, and entered into the Distribution Agreement (hereinafter referred to as ‘the Distribution Agreement’). Lush J in *Currie V Misa*<sup>19</sup> holds that, ‘A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other.’ As the Distribution Agreement confers rights and responsibilities to the Claimant and the Respondent, it could be submitted that this initial nominal consideration could be regarded as a valuable consideration before the law. Furthermore, as it was found in *Chapel v*

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<sup>16</sup> [2011] 2 US LEXIS 3917 (LLC)

<sup>17</sup> CG Weeramantry, *The Law of Contracts* (Stamford Lake Publishing 1967) 220

<sup>18</sup> [1915] 18 NLR 417 (SC)

<sup>19</sup> [1875] 10 LR 153 (Ex)

*Nestle Co. Ltd*<sup>20</sup> that three snack wrappers were good consideration and the Courts resolutely refuse to look at the value of the consideration, the monetary consideration of RM 35 000 paid by the Respondent would be sufficient to give validity and thereby enforceability to the Distribution Agreement.

Therefore, the Distribution Agreement will be governed by common law principles as the Distribution Agreement has been entered upon a nominal consideration from which it derives validity and enforceability.

## **II. Inclusiveness of the Distribution Agreement**

According to **Clause 16.2** of the Distribution Agreement, the parties have confirmed that the whole of their negotiations and intentions have been included in it within its context and express clearly their requirements. Further, as per *Greenfield V Philles Records, Inc.*<sup>21</sup>, ‘The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent’. Hence it is submitted that when parties’ intentions are given effect as expressed in the Distribution Agreement, a strong adherence to the clauses set out and agreed by the parties is of utmost importance since they represent the core of the basis of the relationship between the parties. This could be observed in *Comrie V Enterasys Networks Inc.*,<sup>22</sup> where it was held that the primary consideration in interpreting a contract is to, ‘attempt to fulfill, to the extent possible, the reasonable shared expectations of the parties at the time they contracted’. ‘The proper interpretation of an unambiguous contract is a question of law for the court’ and

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<sup>20</sup> [1959] UKHL 1 (HL)

<sup>21</sup> [2002] 98 NY2d 562

<sup>22</sup> [2003] 13 Del Ch 837 (A.2d 1)

‘courts are to enforce them as written’ (*Reyes v Metromedia Software, Inc.*<sup>23</sup>). Thus, it can be inferred that breach of the Distribution Agreement could be established by exploring the Distribution Agreement itself.

### **III. Respondent breached the Distribution Agreement by distributing a competing product affixed with a mark closely resembling the Claimant’s in Malaysia**

**Clause 4.2** of the Distribution Agreement prohibits the Respondent, being the distributor, from being directly or indirectly concerned or interested in the manufacture or distribution in Malaysia of any goods that compete with the products of the Claimant, affixed with the trademarks or any other arguably similar mark during the term of the Distribution Agreement and for a period of 12 months after it. But the Respondent has manufactured and distributed in Malaysia a competing good affixed with a mark which has similar traits with the Claimant’s registered trademark along with some other features to cause some resemblance with the images and wordings used. The facts of the case indicate that the Respondent has distributed ‘SAILOR’S CEYLON’ affixed with such mark since November 2012, which is within the term of the Distribution Agreement (October 2008-October 2013), while the respondent has expressly agreed to refrain from engaging in such acts until October 2014.

It is submitted that the Respondent’s mark falls within the statements of Lord Denning in *Parker-Knoll v Knoll International*<sup>24</sup> that ‘the offending mark must ‘so nearly resemble’, the registered mark as to be “likely” to deceive and cause confusion’ and Narayanan of on ‘*Law of*

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<sup>23</sup> [2012] 752 FSupp2d 13935 (WL)

<sup>24</sup> [1962] 2 RPC 265 (HL)

*Trade Marks and Passing Off*<sup>25</sup> that, ‘for deceptive similarity it is not sufficient if there is some sort of resemblance the resemblance must be such as to be likely to deceive or cause confusion.’ This statements act as a criterion to determine an ‘arguably similar mark’ in **Clause 4.2** while they seem to indicate a breach of **Clause 9.3.7** of the Distribution Agreement which expressly prohibits the use in Malaysia of any trademarks or trade names so resembling the trademarks or trade names of the Claimant as to be likely to cause confusion or deception. As held in *Aristoc v Rysta*<sup>26</sup> that ‘it is necessary to allow for imperfect recollection by a person of ordinary memory’, it is submitted that ‘the impact that the defendant’s mark be likely to have on probable customers, given the expectations that they already have and the amount of attention that they will pay’ (*Morning Star V Express Newspapers*<sup>27</sup>). Going by this precedence, one could establish that precise surveys and investigations need not be carried out to determine whether or not **Clause 9.3.7** has been breached as it could be established through case law as illustrated above.

#### **IV. Breach of the Distribution Agreement by the Respondent through misrepresentation**

The above two arguments construed under **Clauses 4.2 and 9.3.7** could further be related to the statement made by Lord Halsbury in *Reddaway v Banham*<sup>28</sup> that ‘Nobody has any right to represent his goods as the goods of somebody else’. But the Respondent has breached **Clause 16.6** of the Agreement which expressly avoids any exclusion for fraudulent misrepresentation through his conduct of manufacturing and distributing a competing product affixed with a mark

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<sup>25</sup> Narayanan, *Law of Trade Marks and Passing Off* (7th edn, Eastern Law House Private Ltd 2004) 318

<sup>26</sup> [1945] AC 68 (HL)

<sup>27</sup> [1979] FSR 113 (CA)

<sup>28</sup> [1896] 2 199 (AC)

which could cause confusion in the minds of the consumers. Furthermore, fraudulent misrepresentation could be linked with the brand name of the respondent's product which attempts to show a nexus between his trade name 'SAILOR'S CEYLON' and the Claimant's brand 'CTC CEYLON' and its place of incorporation with regards to the word 'CEYLON'.

#### **V. Breach of duty of loyalty by the Respondent exerted by the Distribution Agreement**

The Respondent is strictly prohibited by **Clause 9.7** from doing or authorizing any third party to do any act that would or might invalidate or be inconsistent with any intellectual property of the Claimant, and must not omit to do any act that, by its omission, would have that effect or authorize any third party to omit to do any such act.

The intention of the Claimant to retain exclusive rights over the trademark can be inferred from **Clauses 9.2** and **9.4** of the Distribution Agreement. **Clause 9.2** confers a responsibility on the Respondent to ensure that each reference to and use of any of the trademarks of the Claimant by the Respondent is in a manner periodically approved by the Claimant and an acknowledgement that the mark is used with the authorization of the Claimant.

Further, by **Clause 9.8** of the Distribution Agreement, Claimant confers a duty on the Respondent to promptly and fully notify him of any actual, threatened or suspected infringement in Malaysia of any intellectual property of the Claimant that comes to his notice, which implies that the Respondent is supposed to protect the Claimant's trademark and related rights in Malaysia. Hence, by evaluating the above three Clauses, namely; Clause 9.7, 9.2 and 9.8, it can be construed that the Claimant relies on the Respondent to assure that his registered trademark is not being misused by the Respondent or any third party and that his intellectual property rights

are protected in Malaysia. Consequently, it can be assumed that there is a duty of faith and loyalty constructed by the Distribution Agreement vested upon the Respondent towards the Claimant to protect Claimant's exclusive rights over the product affixed with his trademark, which the Respondent has breached with his conduct during the term of the Distribution Agreement.

### **C. RESPONDENT'S USE OF THE WORD "CEYLON" IN RESPECT OF ITS TEA PRODUCTS IS A MISLEADING GEOGRAPHICAL INDICATION**

**I. The applicable law of the Distribution Agreement denotes that the Respondent is legally prohibited to use the term "CEYLON"**

*(i) Claimant has locus standi to take actions against Respondent under the Intellectual Property Act, No. 36 of 2003<sup>29</sup> of Sri Lanka*

Pursuant to **Section 161** of the Intellectual Property Act, "any interested party" shall be entitled to prevent the misleading of public through geographical indication of goods by any means of designation or presentation. The wording 'any interested party' provides a broader meaning covering public spirited persons and consumers without limiting to those who have business interests. Therefore, Claimant has the standing to take actions against Respondent albeit it is not the registered proprietor of the Lion Logo.

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<sup>29</sup> Intellectual Property Act of Sri Lanka 2003, No 36

**(ii) Unfair Competition as a ground to hold Respondent liable for misusing  
Geographical Indication**

Pursuant to **Section 161 (1) (ii)** of the Intellectual Property Act of Sri Lanka<sup>30</sup>, ‘any use of a geographical indication which constitutes an act of unfair competition’ is a ground that an interested party shall be entitled to prevent. As per **Section 160 (1), (2) and (3)**, an act of unfair competition may consist of an act that is contrary to honest practice, that may or likely to cause confusion or that may or likely to cause damage to the goodwill or reputation of another company respectively.

Respondent’s act of using ‘CEYLON’ as a part of their brand name falls within the scope of unfair competition as set out by **Section 160 (2) (b) and (3) (b)** of the Intellectual Property Act, No. 36 of 2003 as the term in question is ‘ (iii) a business identifier other than a mark or trade name’.

Even if, Malaysian Law is the applied law governing the dispute in question, **Schedule** to the Malaysian Geographical Indications Act of 2000<sup>31</sup> incorporates rules on unfair competition in **Article 10bis** of the **Paris Convention for the Protection of Intellectual Property of 1967**<sup>32</sup> where its paragraph 3 (3) prohibits ‘indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods’ holding Respondent liable for using geographical indications to mislead the public.

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<sup>30</sup> *Ibid*

<sup>31</sup> Geographical Indications Act of Malaysia 2000, (Act 602)

<sup>32</sup> Paris Convention for the Protection of Intellectual Property of 1967. 21 UST 1583, 828 UNTS

## **II. Respondent's use of the word "CEYLON" is misleading going by the threefold protection accorded to Geographical Indications.**

The concept of geographical indications is afforded a threefold protection as follows<sup>33</sup>:

### ***(i) Indication of source***

A defining feature of an indication of source is that, the connection it has to a product of a particular geographical location. An indication of source informs consumers that the product bearing the 'sign' comes from a particular place, region or country.<sup>34</sup> This is further established by the "**Swiss Miss**" case<sup>35</sup> where it was held that, 'Geographical words must not be allowed to mislead the public over where the goods or services come from: a company with no business in Switzerland could not therefore use "Swiss Miss" for its chocolate products'.

Similarly, the fact that Respondent had no business in Sri Lanka asserts that the use of word "CEYLON" by Respondent cannot be justified under indication of source as it misleads the consumers that the particular product is from Sri Lanka, albeit it is manufactured and grown in China.

### ***(ii) Geographical indication of origin***

As per, *Maestro Swiss Chocolate Sdn. Bhd v Chocosuisse Union Des Fabricants Suisses De Chocolat*,<sup>36</sup>:

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<sup>33</sup> Bentley Lionel and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 1112-13

<sup>34</sup> Ibid 1112

<sup>35</sup> [1998] 2 RPC 889 (CA)

<sup>36</sup> [2012] Appeal No 02(f) 97 (CA)

Geographical indication is an indication of source; the indication connects a product to a particular geographical location. It is used to describe goods that originate from particular geographic area. For instance, "Sabah Tea" is a geographical indication for tea, produced in Sabah.

Accordingly, the inherent qualities of a product are largely attributable to its 'origin'. A geographical indication serves as a marketing tool which provides important information on special qualities and attributes of a product.

Sri Lankan tea industry finds its roots in the colonial era and thereby possesses a rich traditional knowledge on producing and processing methods.<sup>37</sup> Additionally, factors such as climate, humidity, soil, temperature, rainfall etc. have a major impact on the quality and the uniqueness attached with Ceylon Tea products.

In *Vine Products Ltd. & Ors v. Mackenzie & Co. Ltd & Ors*<sup>38</sup>, or the "Sherry case", it was held that the word 'Sherry' meant, 'an exclusively Spanish product', which qualified for geographical indication of origin. Furthermore, in the recent case *Agricultural & Processed Food Products Export Development Authority of India (APEDA) v. Syarikat Faiza Sdn Bhd*,<sup>39</sup> it was held that, 'Ponni was not a coined word but descriptive of a particular variety of rice originating from the Tamil Nadu region'.

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<sup>37</sup>Hasitha De Alwis, "CEYLON TEA - SRI LANKA'S BEST KNOWN GEOGRAPHICAL INDICATION" (Worldwide Symposium on Geographical Indications, Bangkok, March 2013) <[http://www.wipo.int/edocs/mdocs/geoind/en/wipo\\_geo\\_bkk\\_13/wipo\\_geo\\_bkk\\_13\\_inf\\_4.pdf](http://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_bkk_13/wipo_geo_bkk_13_inf_4.pdf)> accessed 1 July 2016

<sup>38</sup> [1969] 1 RPC 1 (ChD)

<sup>39</sup> [2011] 2 MLJ 768 (Malaysian High Court)

Accordingly, an incident mentioned in the Worldwide Symposium on Geographical Indications<sup>40</sup>, focusing specifically on the misleading nature in the world market regarding the use of the word ‘Ceylon’, described that ‘a pack similar to the tea products of Al-Fares, a Sri Lankan owned brand which is popular in the Middle East, Libya and Iran, was detected in a free zone market in China with 100% Chinese tea. However, the pack narration said it is 100% pure Ceylon tea’. Similarly, Respondent’s use of the word “CEYLON” misleads the public marking a violation of geographical indications of origin.

*(iii) Appellation of origin*

The defining feature of an appellation of origin is that, ‘the product for which the appellation of origin is used must have a quality and characteristics which are due exclusively or essentially to its geographic environment<sup>41</sup>’. Conspicuously, ‘Ceylon tea consists of seven major agro-climatic regions where each agro-climatic regional tea has a unique taste, indicating that characteristics & reputation of such teas are essentially attributable to its geographical indications’.<sup>42</sup>

In *Chocosuisse Union des Fabricants Suisses de Chocolat v. Cadbury*<sup>43</sup>, it was held that ‘SWISS chocolate had come to be understood by a significant section of the public to mean and to mean only chocolate made in Switzerland due to the qualities attributable to it.’<sup>44</sup> Therefore, the use of the word “CEYLON” by Respondent when its products do not conform to SLTB’s quality standards and are not manufactured under the geographical environment which includes

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<sup>40</sup> *supra* note 37

<sup>41</sup> **Bently and Sherman**. *supra* note 29, 1112

<sup>42</sup> *supra* note 37

<sup>43</sup> [1999] 2 ETMR1020 (ChD)

<sup>44</sup> WR Cornish and others, *Intellectual Property* (8th edn, Sweet & Maxwell Ltd 2013) 57

identical natural, physical and human factors signifies that it could be misleading the appellation of origin.

### **III. Respondent lacks bona fide intention**

SLTB was incorporated in Sri Lanka under the Act of Parliament 1<sup>st</sup> January 1976 while the Claimant is a company which was established in Sri Lanka in 1965. Claimant had a direct connection to use the word “CEYLON” since at the time of its incorporation, Sri Lanka was called Ceylon as it was only after the first Republic Constitution (1972) the country was called ‘Sri Lanka’. As in the case of SLTB, it can be understood that:

When the country changed its name to Sri Lanka in 1972, its premier industry was faced with a knotty problem. Ceylon was not only the former name of the country; it was also one of the world’s leading brands. Abandoning it would deliver a setback and the cost of promoting and establishing an unfamiliar new brand – ‘Sri Lanka Tea’ – would be ruinous.<sup>45</sup>

However, the brand name SAILOR’S CEYLON was first used in 2012 by when it was commonly known that Sri Lanka is no longer called Ceylon. Respondent could claim that as they use seeds sourced from Sri Lanka, it indicates a connection between the product name and the

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<sup>45</sup>Sri Lanka Tea Board, ‘Pure Ceylon Tea’ <<http://www.pureceylontea.com/index.php/features/why-ceylon-tea>> accessed 4<sup>th</sup> July 2016

type of the product. However, this argument only contributes to assert that Respondent could have used the term ‘Sri Lanka’ instead of ‘CEYLON’ if they were in fact acting in bona fide.

In the case *Boots Pure Drug Co. Ltd.’s T.M.*<sup>46</sup>, Court of Appeal of UK held that although the company had a reasonable explanation for the use of the brand name, a combination of “LIV” for “Liver” and “RON” from the word “IRON” – the intention being that it’s a tonic in which liver extract and iron were used, it was not an invented term since it clearly was a geographical name indicating a town in France where they had a factory making medicines for human use.

It can be submitted that even with a fair justification to prove bona fide intention; the Claimant was not successful in proceeding with the name “Livron”. Thus, the use of the word “CEYLON” by Respondent, which was already clouded with lack of bona fide intention convictions, cannot be held reasonable under any circumstance.

#### **IV. Respondent cannot use the term “CEYLON” although its registered address includes “Ceylon Road”.**

Respondent could use the ‘own name defence’ to justify the use of the term “CEYLON” in its brand name establishing a connection between the term and its registered address. However, the House of Lords in *YORK trade mark case*<sup>47</sup>, rendered a geographical signification of a mark incapable in law of distinguishing a product based on the fact that the Applicant has no real connection with such location.

It was held that Applicant’s use of the term “York” referring to a location in Ontario was not connected with the City of York in England and thereby rendered it incapable in law of distinguishing its products. Similarly, Respondent’s use of “CEYLON” in its brand name formed

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<sup>46</sup>[1937] 54 RPC 327 (CA)

<sup>47</sup> [1984] RPC 231 (HL)

in connection with ‘Ceylon Road’ in Singapore does not suffice to form a legally valid distinction of its products.

Moreover, the fact that Respondent only uses a brand name with the term “CEYLON” to distribute a competing product to similar markets of that of CTC CEYLON and not for any of its other products renders the intention of Respondent in using such term questionable.

**D. RESPONDENT’S USE OF A MARK SO NEARLY RESEMBLING THE LION LOGO OF THE CLAIMANT AMOUNTS TO TRADEMARK INFRINGEMENT AND PASSING OFF**

**I. Trademark Infringement**

SLTB has registered ‘Ceylon Tea Lion Logo’ in Sri Lanka under the **Intellectual Property Act of Sri Lanka<sup>48</sup>, No. 36 of 2003**. The following rights conferred upon it by **Section 121 (1)** of the said Act.

- (i) Claimant is entitled to rights over the Lion Logo as an authorized user
  - (a) To use the mark;
  - (b) To assign or transmit the registration of the mark;
  - (c) To conclude license contracts.

SLTB takes measures to ensure that ‘franchise rights for the use of Lion logo awarded to exporters for those products meet not only specific legal requirement for the lion logo scheme

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<sup>48</sup> *Supra* note 29

but which also should pass the quality test'.<sup>49</sup> Accordingly, SLTB has permitted Claimant to use the Lion Logo on its tea products and to register the Lion Logo in Malaysia as per Section **121 (1) (a) and (b)** of the said Act.

**Section 121 (2)** of the Act precludes third parties from 'any use of the mark, or a sign resembling it in such a way as to be likely to mislead the public' and from 'any other use of the mark, or of a sign or trade name resembling it, without just cause and in conditions likely to be prejudicial to the interests of the registered owner of the mark' without the consent of the registered owner of the mark.

**Section 122** of the Act limits the claimant's rights under Sri Lankan Law by stating that the registration of a mark does not confer the right to preclude parties 'from using their bona fide names, addresses, pseudonyms, a geographical name, or exact indications concerning the kind, quality, quantity, destination, value, place of origin or time of production or of supply of their goods and services' unless they can mislead the public.

*(i) Factual similarities between the two marks constitute trademark infringement*

Sri Lankan Court of Appeal held in *Leelananda v Earnest De Silva*<sup>50</sup> that the offence of trademark infringement under Sri Lankan Law 'is made out not only where the impugned mark is an exact copy or a facsimile representation of the registered mark. The offence extends to situations where any sign resembling the registered mark is used in such a way as to be likely to

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<sup>49</sup> *supra* note 45, *Lion Logo* <<http://www.pureceylontea.com/index.php/features/lion-logo>> accessed 6 July 2016

<sup>50</sup> [1990] 2 SLR 237 (CA)

mislead the public'. Further, it holds that two elements, actus reus and mens rea, are necessary to constitute the offence infringement.

In the case at hand, Respondent has affixed its mark which closely resembles Claimant's trademark to its products as revealed by the investigations conducted by the Claimant. It is submitted Respondent has done such act with the intention of causing confusion as it was well-aware of the nature of Claimant's mark and the goodwill attached to it being the distributor of Claimant's products in Malaysia over a period of five years within which Respondent manufactured and distributed its own product to the same market.

Respondent's mark so closely resembles that of Claimant in terms of both visual and phonetic similarities. Both consist of a lion logo in the middle of a quadrangle and contain the phrase 'SYMBOL OF QUALITY' beneath the mark. Apart from the visual similarity of the design of the lion in the marks, the phrase though presented with slight visual differences in the style amounts to the highest degree of phonetic similarity as it has nothing which is 'not common'<sup>51</sup>.

Therefore it is submitted that the Respondent's mark falls within the statement of Lord Denning in *Parker-Knoll v Knoll International*<sup>52</sup> that 'the offending mark must 'so nearly resemble', the registered mark as to be "likely" to deceive and cause confusion' and Narayanan on '*Law of Trade Marks and Passing Off*<sup>53</sup>' that, 'for deceptive similarity, resemblance must be such as to be likely to deceive or cause confusion.'

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<sup>51</sup> *Coca Cola Company of Canada v Pepsi Cola Company of Canada*[1940] 59 RPC 127 (SCR)

<sup>52</sup> *supra* note 24

<sup>53</sup> *supra* note 25

(ii) *The impact of the use of Respondent's mark on its products is such that it is likely to cause confusion*

According to Griffiths, 'trademarks can gain a psychological hold on the minds of the consumers, which gives them a selling power above that of the underlying good will'<sup>54</sup>. In its official website, SLTB demonstrating the connection between the Lion Logo and the particular attributable qualities and standards identifies that, 'Lion Logo on your pack of tea is a guarantee for 100% Pure Ceylon Tea packed in Sri Lanka. To ensure what you buy is Ceylon Tea, look for the Lion Logo.'<sup>55</sup>

The monopoly with a trademark is an absolute one and hence the liability for trademark infringement is strict. As held in *Frisdranken Industrie Winters BV V Red Bull GMBH*<sup>56</sup>, there is no requirement for knowledge, intention or derivation on the part of the defendant, and there is no need for a trademark owner to demonstrate damage<sup>57</sup>.

Pursuant to **Section 121 (4)** of the Intellectual Property Act of Sri Lanka, Justice Palakidnar in *M. S. Hebtulabhoy & Co. Ltd. v. Stassen Exports Ltd.* held, 'the resemblance between the two marks has to be considered with reference to the ear as well as to the eye'<sup>58</sup>. Therefore, it is submitted that the impact of the use of Respondent's mark on its products is such that it constitutes a trademark violation. The Respondent has affixed such mark to the goods traded by them which are similar in nature to the product traded by the Claimant in the same market territory in the course of trade

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<sup>54</sup> Griffiths (2001) I.P.Q. 326

<sup>55</sup> *supra* note 45

<sup>56</sup> [2011] 59 C-1199/10 ECR I-13179

<sup>57</sup> Bentley and Sherman. 1038

<sup>58</sup> *M. S. Hebtulabhoy & Co. Ltd. v. Stassen Exports Ltd., and another* (1989) 1 Sri L. R. 182

In *McCurry Restaurant (KL) Sdn Bhd v. McDonald's Corporation*<sup>59</sup> the Malaysian Court of Appeal used the following distinguishing features to overturn the Malaysian High Court's decision to allow McDonald's the exclusive use of the prefix "Mc" by permitting a local Indian eatery, McCurry Restaurant to use "Mc" in its business signage or in the conduct of its business and to rule out possible confusion.

- Comparison of the marks
- The types of products
- Target market of the two businesses

Accordingly, the possibility of confusion between the two marks of Respondent and Claimant can be determined as follows.

- Respondent's mark cannot be sufficiently contrasted with that of Claimant, as both consist of a graphic of a lion in black on a white background and the phrase 'SYMBOL OF QUALITY' beneath the graphic, although with slightly different lettering. Both products are labelled with the marks in contest.
- Both parties are manufacturing and distributing black tea.
- Both products are widely available in major supermarkets and grocery stores in Malaysia and are also served in some cafes and restaurants. The products are still available in substantially similar markets worldwide.

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<sup>59</sup> [2009] 3 MLJ 774 (Malaysian Court of Appeal)

It is therefore submitted that the Respondent's mark has a high possibility of confusion with the Claimant's Lion Logo which is 'likely to mislead the public' trademark infringement as specified in **Section 121 (2) (a)** of the Intellectual Property Act of Sri Lanka.

## **II. Passing-off**

In *Reckitt & Colman Ltd v Borden Inc*<sup>60</sup> also known as the *Jif Lemon case*, Lord Oliver has stated three elements that a claimant must show in order to make a case of passing off.

1. A goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public.
2. A misrepresentation by the defendant to the public (mental or not) leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the claimant.
3. An actual damage suffered, or in a *quia timet* action, a likelihood of suffering damage by reason of the erroneous belief engendered by the defendant's misrepresentation.

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<sup>60</sup> [1990] 1 All ER 873 (HL)

(i) *A goodwill or reputation attached to Claimant's products is particularly related with its quality standards and place of origin*

**Clause 4.2** of the Distribution Agreement which prohibits the respondent from being 'concerned or interested' in any way in the manufacture or distribution of any goods that compete with the products of the claimant affixed with the Lion Logo or any other arguably similar mark in Malaysia clearly indicates that Claimant intended to retain the goodwill attached to its products and not to vest it upon the Respondent.

Ceylon tea has a goodwill in the market worldwide for its quality and has the 'power of attraction sufficient to bring customers home to the source from which it emanates'<sup>61</sup> which is further assured by the conditions imposed by the Sri Lanka Export Development Board on the usage of the Lion Logo.<sup>62</sup>

Hence, Claimant's mark contains a distinctive trade reputation affixed with the Lion Logo which sufficiently acts as 'a means by which to teach the public to how to get to his goods' (*Powell v Birmingham Vinegar*<sup>63</sup>). Therefore it is submitted that the Claimant's product distributed under the Lion Logo has a goodwill or reputation which can only be attributed to its place of origin and the quality standards.

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<sup>61</sup> *IRC V. Muller & Co. 's Margarine* [1901] 1 AC 217 (HL)

<sup>62</sup> Sri Lanka Export Development Board. <<http://www.srilankabusiness.com/tea/lion-logo.html>> accessed 5 July 2016

<sup>63</sup> [1897] AC 710 (CA)

*(ii) A misrepresentation by Respondent leads the public to believe that its products are Claimant's*

As Lord Halsbury puts it in *Reddaway v Banham*<sup>64</sup>, ‘Nobody has any right to represent his goods as the goods of somebody else’. Respondent’s action in using its mark affixed to the products suffices to ‘generate a requisite confusion in the mind of the public on the origin and quality of the product’, as held in *HFC Bank Plc v Midland Bank Plc*<sup>65</sup>. The usage of Respondent’s mark when looked at as a whole in the context in which it is used<sup>66</sup> reflects that the Respondent has misrepresented his product as having the same origin.

The quality function of a trademark as held in *SA-CNL SUCAL v HAG*<sup>67</sup> can be established in relation to the Lion Logo by its features as set by the Sri Lanka Tea Board which specifies that:

‘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.’<sup>68</sup>

The Lion Logo used by Claimant meets the distinctiveness requirement recognized in *Glaxo Group v Dowelhursts Ltd*<sup>69</sup> as it is a ‘distinctive mark’ which enables the customers to identify a

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<sup>64</sup> [1896] A.C. 199 (HL)

<sup>65</sup> [2000] FSR 176

<sup>66</sup> *Wagamama V. City Center Restaurants* (1995) FSR 713`

<sup>67</sup> [1990] I C-10/89 ECR 8625 (CJEU)

<sup>68</sup> *supra* note 45.

<sup>69</sup> [2000] FSR 529 (CA)

tea product manufactured in Sri Lanka. But Respondent's products were not in compliance with the standards set out by SLTB though it uses a mark with visual similarities to Claimant's.

The customer will not normally have the opportunity of seeing the two marks side by side and of comparing their visual appearances. *Aristoc v Rysta*<sup>70</sup> therefore holds that 'it is necessary to allow for imperfect recollection by a person of ordinary memory'. Hence, it is submitted that the Respondent's mark amounts to misrepresentation of the quality and place of origin in considering the 'impact that the defendant's mark be likely to have on probable customers, given the expectations that they already have and the amount of attention that they will pay' (*Morning Star v Express Newspapers*<sup>71</sup>).

**(iii) Claimant suffers damage due to Respondent's misrepresentation**

W.R. Cornish, D. Llewelyn and T. Aplin in '*Intellectual Property*<sup>72</sup>' write that, 'In "ordinary" passing off between competitors who are selling the same or substitutable products or services, the likelihood of damage is the corollary of demonstrating likelihood of confusion'.

Further, Kiley, J. in *Tisch Hotels Incorporated V Americana Inn Incorporated*<sup>73</sup> as held that even if the parties are not directly in competition geographical, in size, or in cost of service, it does not preclude the relief sought by the plaintiff. Hence, the fact that both parties are distributing black tea to the Malaysian market is highly likely to cause damage to Claimant's trade reputation.

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<sup>70</sup> *supra* note 27

<sup>71</sup> *supra* note 27

<sup>72</sup> *supra* note 44

<sup>73</sup> [1965] 350 F 2d 609

It was held in *McCurry Restaurant (KL) Sdn Bhd v McDonald Corporation*<sup>74</sup> that it is necessary to establish that the two businesses are involved in identical class of goods, a goodwill attached with the claimant's mark, and an actual suffering or a likely to suffer a substantial damage to the claimant's goodwill by the defendant's act are necessary to establish a claim for passing-off.

Therefore it is submitted that the Respondent using a mark which closely resembles the Claimant's Lion Logo so as to cause confusion and thereby misrepresenting the products as associated with the Claimant's is likely to cause damage to Claimant's reputation and goodwill.

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<sup>74</sup> *supra* note 59

## **PRAYER FOR RELIEF**

Claimant requests the arbitral tribunal to:

- a) Order the Respondent to discontinue the sale of its products described as “Ceylon Tea” and to recall all such products from the market.
- b) Order the Respondent to stop using the name SAILOR’S CEYLON, the Respondent’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.
- c) Order that parties can only refer to tea grown and manufactured entirely in Sri Lanka as “Ceylon Tea”.
- d) Order the Respondent to pay damages to the Claimant and to determine the payment of damages by the profits of Respondent made by the sale of SAILOR’S CEYLON in Malaysia.