CHARTERED INSTITUTE OF ARBITRATORS (SINGAPORE BRANCH) COMPETITION 2018

COMPETITION PACK

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SECTION A
RULES OF COMPETITION

1. Background

The Chartered Institute of Arbitrators (Singapore branch) Competition for 2018 concerns a culture clash between common and civil law procedures and the different approaches to taking evidence in international arbitration in the two legal systems.

2. Competition Submission

The factual scenario used in the competition, including all people, companies, locations and events, is fictional. Any resemblance to actual persons, places or events is unintended and coincidental.

You are the chair of the tribunal in an ad hoc arbitration. The parties and their counsel are from Germany and Singapore, and are unable to agree on the procedure to be adopted for the taking of evidence. The German Claimant and its counsel prefer that civil law procedures be adopted, and the Singaporean Respondent and its counsel prefer that common law procedures be adopted. Your co-arbitrators also originate from different legal systems and are unable to agree on the procedure to be adopted. You are required to find a reasonable solution to this impasse and address issues including, but not limited to, document production, witness evidence and examination of witnesses in view of (i) the different procedural approaches presented to you by the parties; and (ii) the relief sought and defences presented. The evidence is provided in Section B.

As the presiding arbitrator, you have to rule on the procedure to be adopted. You have agreed with your fellow arbitrators that you will prepare a draft order for discussion with them. You also decide to prepare some notes so that you can explain your procedural order and persuade your co-arbitrators to adopt it.

Competitors must submit:

(1) a draft procedural order for discussion with your co-arbitrators; and

(2) an explanatory note that sets out the reasoning for making your order.

All submissions must be sent to competition@ciarb.org.sg in the format provided in the rules below. All entries will be anonymised before submission to the judging panel.

3. Word limit

There is no word limit for the text of the draft procedural order.

There is a word limit of 2,000 words for the commentary on the procedural order. The commentary may cite legal authorities, published articles and other publicly available materials should you wish.

4. Judging criteria

Entries will be judged based on:

(1) Identification of issues affecting procedural aspects of the arbitration.
(2) Clarity, conciseness and content of the draft order.
(3) Reasoning in the explanatory note.

5. Judging Panel

The judging panel comprises leading arbitrators, private practitioners and expert witnesses, including Judith Gill QC and Duarte G Henriques. Ms. Gill was the then joint Co-Chair of the Arbitration Committee of the International Bar Association in 2010 and one of the members of the IBA Rules of Evidence Review Subcommittee that authored the *IBA Rules on the Taking of Evidence in International Arbitration 2010*. Mr. Henriques is a lawyer and arbitrator based in Lisbon and a partner of BCH Lawyers. He is a member of the Working Group of the Prague Rules.

6. Deadline for Submissions

The deadline for submitting entries into the competition is 2 November 2018.

7. Prizes

First Prize Winner: cash prize of S$2,000.

Second Winner: cash prize of S$1,000.

Third Prize Winner: cash prize of S$500.

All cash prizes are generously sponsored by 20 Essex Street barristers' chambers.

8. Rules

(1) The competition is open to anyone, whether or not they are members of the Chartered Institute.

(2) The submission must be the original and sole work of the entrant.

(3) Each entrant may only submit one entry.

(4) All entries shall be in English, typed, and submitted in Microsoft Word format. Each entry is to be accompanied by a title page stating the entrant's name, contact details, place of residence, place of work and age.

(5) All entries will be acknowledged but will not be returned. The organisers will accept no responsibility for the safekeeping of entries.

(6) All persons entering the competition agree to allow the Chartered Institute of Arbitrators and the CIArb Singapore Branch to publish any part of any entry submitted for the competition.

(7) The judging panel may in their absolute discretion award each of the prizes to more than one person or award no prizes.

(8) The judging panel's decision shall be final and no correspondence will be entered into.

SECTION B
ARBITRATION PAPERS

1. STATEMENT OF FACTS

1. WongKa Industries Pte Ltd ("**WongKa**") is a company incorporated under Singapore law, and is engaged in investing in the research, development, production and sale of alternative sources of sugar, which it supplies in various forms to global food manufacturing companies. The most popular of these products is the Golden Grain Sugar Free formula which is retailed in pill and granular form.

2. Slugworth Candy Company GmbH ("**Slugworth**") is a German company, engaged in the production and distribution of sugar and cocoa products. Slugworth acquired from WongKa, the exclusive right to produce and distribute Golden Grain Sugar Free in Europe (excluding the United Kingdom), for a term of four (4) years.

3. On 27 June 2016, the parties entered into a Licensing Agreement ("**the Agreement**") for a four (4) year period, expiring on 31 August 2020. The Agreement commenced on 31 August 2016 in accordance with Clause 1.5 of the Agreement. Under the Agreement, Slugworth has the exclusive licence to use the "Golden Grain Sugar Free" trademark and its related trademarks for the sale of the products to supermarkets, restaurants, and through other channels. Slugworth was required to pay a 2% royalty on sales during the four-year period. Slugworth was also obliged to make reasonable efforts to reach annual target sales (aggregate of USD 150 million expected during this period). The sales of Golden Grain Sugar Free products had been rapidly deteriorating in Europe and North America, which is why WongKa's strategy was to exit the sugar-free production market and focus on other endeavours. WongKa thereby entered into licensing agreements such as this to make whatever was left of its brand of sugar-free products.

4. Pursuant to a Business Transfer Agreement (and for the purpose of the Agreement), WongKa sold to Slugworth, its production facility located in France, WongKa Factory France SARL, now known as Slugworth France SARL ("**Slugworth France**") to facilitate the production and supply of Golden Grain Sugar Free in Europe and to benefit from the intra-EU trade policies. Slugworth invested significant funds (estimated to be not less than USD 12 million) in Slugworth France.

5. In May 2017, global food and drink giant, Oompa Loompa Holdings SA acquired a controlling stake in WongKa. Oompa Loompa Holdings and WongKa launched a new initiative and strategy to be the world's number one producer of alternate sugar products. WongKa made numerous press statements about its intention to end the various licensing agreements in order to recreate its brand of alternate sugar products. During the course of August to December 2017, WongKa regained control over many of its production facilities in North America, China, and a few in Europe. Slugworth had no intention of terminating the Agreement, given the significant investments it had made in the purchase of production facility.

6. Leading up to the termination of the Agreement, WongKa alleged various breaches of the Agreement by Slugworth, including raising allegations that there were numerous issues in the Slugworth France production facilities, problems with the production of

Golden Grain Sugar Free products, and failure by Slugworth to meet the sales targets under the Agreement. Notwithstanding Slugworth's attempts to remedy the alleged issues raised by WongKa, on 27 January 2018, WongKa terminated the Agreement. Slugworth expressed concern that WongKa was looking for a pretext to terminate the Agreement.

7. In terminating the Agreement, WongKa alleged the following material breaches of the Agreement by Slugworth:

(i) Slugworth had breached safety standards in the production of Golden Grain Sugar Free;
(ii) the information published on the packaging of Golden Grain Sugar Free falsely advertised the products as a sugar-replacement which was deceptive and harmed the rights of the consumers;
(iii) the storage and delivery conditions were not in accordance with the requirements set out in the Agreement and impacted the products;
(iv) Slugworth was using inferior packaging, which was affecting the condition of the product, potentially making it unsafe for consumption.

8. Despite Slugworth's refusal to let go of its rights under the Agreement, WongKa maintained the termination. Slugworth decided to commence arbitration.

9. The Agreement contains an arbitration agreement and a governing law clause which provide as follows:

> ***22. Dispute Resolution***
>
> *22.1 Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the UNCITRAL Arbitration Rules for the time being in force.*
>
> *22.2 The Tribunal shall consist of three (3) arbitrators and the language of the arbitration shall be English. Each party shall appoint an arbitrator, and the two appointed arbitrators shall select a third arbitrator who shall be the chairman of the arbitral tribunal.*
>
> ***23. Governing Law***
>
> *This Agreement shall be governed by and construed in accordance with the laws of England.*

10. On 1 June 2018, Slugworth served WongKa with a Notice of Arbitration pursuant to Article 3 of the UNCITRAL Arbitration Rules 2013 ("**UNCITRAL Rules**") for WongKa's alleged wrongful termination of the Agreement. The Notice was served through Slugworth's appointed counsel, Hans & Anderson, Germany's premier boutique arbitration practice. In its Notice, Slugworth notified WongKa of the appointment of its co-arbitrator, Mr. Otto Ollivander, an independent arbitrator and professor of international arbitration at a prestigious German university.

11. Slugworth indicated in its Notice that it wished for the dispute to be resolved quickly and without excessive cost, and that it would seek procedural directions consistent with those wishes in due course.

12. On 30 June 2018, WongKa filed its Response to the Notice of Arbitration pursuant to Article 4 of the UNCITRAL Rules. The Response was served through WongKa's appointed counsel, Ang, Beh & Chan LLP, a leading Singaporean disputes firm. WongKa notified Slugworth of the appointment of its co-arbitrator, Ms. Minerva Ming Ong, S.C., a retired judge of Singapore's Court of Appeal.

13. WongKa noted Slugworth's request in the Notice of Arbitration for a quick and efficient procedure for the resolution of the dispute. WongKa therefore proposed that the parties adopt the *IBA Rules on the Taking of Evidence in International Arbitration (2010)*.

14. On 13 July 2018, the two co-arbitrators appointed you, the presiding arbitrator, dual-qualified in civil and common law jurisdictions, from which date the arbitral tribunal ("**Tribunal**") was constituted.

15. The Tribunal invited the parties to try to agree procedural directions for the arbitration. The parties informed the Tribunal that they had engaged in extensive correspondence to agree directions, but had been unable to do so. Accordingly, the Tribunal convened a teleconference on 27 July 2018 to determine the procedural directions and timetable for the arbitration.

16. An hour before the teleconference was due to take place, counsel for WongKa circulated a draft Procedural Order No. 1 for the purposes of discussion on the conference call. Paragraph 10 of proposed draft order provided, amongst other things, as follows:

> ***10 Document Requests***
>
> *10.1 The Parties may request the other to produce documents relevant in this arbitration in accordance with the timelines set out in the Procedural Timetable No. 1 ("**Document Request**"). Any other Document Request shall be made only with leave from the Tribunal.*
>
> *10.2 The party making a Document Request shall send the answering party a Redfern Schedule (in Microsoft Word format) in the form annexed to this Procedural Order No. 1.*
>
> *[…]*
>
> *10.5 In all document production requests, the Parties shall take into account, and the Tribunal shall be guided by, the criteria set out in the IBA Rules on the Taking of Evidence in International Arbitration. Copies of documents submitted or produced must conform to the originals. All electronic documents must be submitted or produced in*

native format to prevent loss of information. When requested by the Tribunal, any original must be presented for inspection.

10.6 The Tribunal shall rule on any objections to the production of documents, taking into account the legitimate interests of the Parties and all the surrounding circumstances. The Tribunal may direct the Party or Parties from whom documents are requested to produce any relevant documentary evidence in its possession, custody or control.

17. At the preliminary hearing by teleconference, the parties made extensive submissions on what procedure should be adopted for the arbitration. In summary:

    a. Slugworth disagreed with the draft procedural order submitted by WongKa on the basis that it reflected a common law procedural approach that would prove to be expensive and time-consuming. Slugworth submitted that instead the tribunal should adopt a proactive inquisitorial-style procedure. It submitted that the Tribunal should order adoption of the Prague Rules (and Article 4 of those Rules in particular, which deals with documentary evidence), and not the IBA Rules on the Taking of Evidence in International Arbitration ("**the IBA Rules**");

    b. WongKa maintained its view that the IBA Rules ought to be adopted, as a tried and tested means of taking evidence in international arbitration proceedings. It disagreed that the tribunal should adopt the Prague Rules.

18. At the end of the teleconference, the Tribunal reserved its decision on what directions to order.

2. EXTRACTS FROM SLUGWORTH'S STATEMENT OF CLAIM

[…]

34. Slugworth spent extensive funds on studying the issues raised by WongKa and conducted its own investigations. It shared the outcome of the investigations with WongKa, and also notified WongKa of the various remedial actions taken with respect to the safety standards issue and the storage and delivery issue. Slugworth sought further details on the other alleged breaches from WongKa, but received nothing.

35. In fact, WongKa only raised the alleged breaches in relation to the inferior packaging and information on the packaging for the first time in its termination letter.

36. It is clear to Slugworth that WongKa had manufactured these breaches, as a means to terminate the Agreement. Slugworth therefore rejects all of WongKa's allegations of breach of the Agreement.

[…]

47. Slugworth made significant investments in reliance on the Agreement, including but not limited to, the purchase of the production facility in France, significant marketing and business development efforts and investments in new machinery. Slugworth and WongKa estimated revenues of approximately USD 250 million throughout the term of the Agreement, and WongKa's wrongful termination of the Agreement would result in substantial losses, lost profits and damage to Slugworth's reputation in the market due to the potential severance of various third party contracts which WongKa has no intention to honour.

[…]

VII. Request for Relief

55. In light of the above, Slugworth requests the following relief in the form of a Final Award:
    (i) declaration that WongKa breached the Agreement;
    (ii) an order to prohibit WongKa from terminating the Agreement and from preventing Slugworth from performance of the Agreement through its acts and/or omissions;
    (iii) an order that WongKa to pay damages to Slugworth in respect of losses or damages suffered as a result of the breaches of the Agreement;
    (iv) such further orders, financial claims, allowances and adjustments as the Tribunal considers appropriate to return Slugworth to its original position; and

(v) an order that WongKa bear the legal and other costs of the arbitration, including the fees and expenses of the Tribunal;

(vi) an order that WongKa pays interest on the above amounts at such rate and for such period as the Tribunal considers appropriate; and

(vii) such further relief and other relief as the Tribunal considers appropriate.

3. EXTRACTS FROM WONGKA'S STATEMENT OF DEFENCE

[…]

7. WongKa denies Slugworth's claims and states that it is not entitled to any of the relief claimed. Slugworth is being disingenuous in this arbitration by, *inter alia*, attempting to avoid the consequences of the express terms it had agreed to, painting a misleading picture of the events leading to the termination of the Agreement and, attempting to limit the WongKa's ability to protect its brand and the consumers of Golden Grain Sugar Free.

[…]

21. After the commencement of the Agreement, WongKa found that Slugworth was neither experienced nor as qualified in the food and beverage market as it held itself out to be.

22. Moreover, it was WongKa's standard practice to perform quality checks on all its products manufactured and sold by its licensees to ensure that the high quality standards associated with its name was upheld. It discovered various violations of the Agreement in the course of conducting these checks.

[…]

35. It was critical for Slugworth to comply with the standards expected of Golden Grain Sugar Free products, which is clearly reflected in various clauses of the Agreement. The Parties expressly agreed in the event of any material breach of the Agreement by Slugworth, and failure to remedy the same within 45 days, the Respondent was entitled to terminate the Agreement.

36. WongKa states that its termination of the Agreement was proper and justified for, *inter alia*, the following reasons:

(i) some of the material breaches of the Agreement could not be remedied;

(ii) Slugworth failed to remedy the material breaches within 45 days of the first notice;

(iii) WongKa was entitled to terminate under English law.

4. NOTES OF PROCEDURAL TELEPHONE CONFERENCE

Attendance

Tribunal

- Presiding arbitrator
- Mr Otto Ollivander – independent arbitrator based in Germany and international arbitration professor at a prestigious German university, appointed by Slugworth
- Ms Minerva Ming Ong, S.C. – a former judge of Singapore's Court of Appeal, appointed by WongKa

Parties

- Slugworth, represented by Hans & Anderson, Germany's premier boutique arbitration practice
- WongKa, represented by Ang, Beh & Chan LLP, a leading Singaporean disputes firm

Parties' submissions

Slugworth

- The proceedings ought to be conducted as efficiently as possible. Slugworth is particularly concerned that its business is suffering due to WongKa's wrongful interference. *Slugworth had approached WongKa for its agreement for the proceedings to be conducted on a documents-only basis. WongKa rejected that proposal.*
- The tribunal should adopt civil law procedures for the determination of the dispute because (a) the claimant is a company from a civil law jurisdiction, advised by civil lawyers; (b) the seat of the arbitration is not specified in the arbitration agreement and ought to be Germany; and (c) two members of the tribunal are trained in the civil law.
- WongKa's presumption that common law procedures as reflected in many of the provisions of the IBA Rules is misplaced. Certain aspects of common law procedure should not be adopted in this case.
    - The nature of this case is such that extensive document production and e-discovery is not necessary. Making provision for such procedures will generate needless delay and increase costs. The provisions of Article 3 in the IBA Rules that deal with document production are in practice approached by common law counsel to seek broad-ranging 'specific discovery' or, at worst, to fish for all manner of irrelevant and unnecessary documents.
    - This case does not require the Tribunal to consider voluminous evidence from factual witnesses. Slugworth requests that the Tribunal make directions limiting the number of fact witnesses and the prescribing the scope of their

evidence. Parties ought only be able to rely on a witness of fact where this has been expressly been permitted by the tribunal upon a reasoned application setting out:

- the role of witness in the underlying dispute;
- the issues on which the witness shall testify; and
- the materiality of the fact witness evidence on the outcome of the case.

- Slugworth submits that the Tribunal should conduct the examination of any fact witnesses (if he/she is required to testify at the hearing), following which parties' counsel can examine the witnesses on matters limited to those raised by the Tribunal and be subject time limits as ordered by the Tribunal.
- Meetings between the parties' lawyers and their witnesses ought not to be permitted. Such meetings risk improper interference with the recollection and evidence of witnesses (which evidence is likely to be limited in any event). Further, Hans & Anderson are not permitted to hold meetings with witnesses as they would amount to a violation of the professional ethical rules of their local state Bars. By allowing WongKa's counsel to meet with their client's witnesses in these circumstances would create an unfair playing field as regards the preparation and taking of evidence.
- Slugworth submits that the parties ought not to be permitted to appoint expert witnesses, given that there are no expert issues arising for determination. In the event that the Tribunal considers it desirable to hear expert evidence, it ought to appoint an expert and make appropriate directions for the parties to submit questions to that expert.

- Taking these points into consideration, the Tribunal ought to adopt the Prague Rules for taking evidence in this arbitration. Specifically, the Tribunal ought to determine the number of fact-witnesses to be called for examination and apply of Article 5 of the Prague Rules.

WongKa

- WongKa disagrees with Slugworth's submissions on procedure. It submits that the Prague Rules ought not to be adopted: they are new-fangled "untested" and "unfamiliar" procedures, and which may not work in context of the disputes in this arbitration.
- There is in any event, no good reason why the IBA Rules, which embody a compromise of civil and common law procedures, ought not to be adopted in this case. This is all the more so given that, as WongKa will submit, the seat of the arbitration is Singapore.
- The complexity of the issues involved in this dispute require it to seek and review several documents in Slugworth's possession which Slugworth has to date refused to provide. Limiting production of documents, and not permitting e-discovery, would be unfair to WongKa since most of the evidence it will be relying on could only be obtained through e-discovery.
- Parties ought to be permitted to adduce the factual and expert evidence they consider relevant and material in order to prove their case.

- Article 5.6 of the Prague Rules appears to rule out cross-examination. WongKa strongly objects to this procedural limitation. It would be unfair and would have the effect of depriving WongKa of its right to be heard or presenting its full case.

Discussion between the Tribunal members after the conference call

- Mr Ollivander is of the view that at this preliminary stage, the issues in dispute are not complex, and in the Tribunal should take a proactive role in controlling the evidence in the proceedings, in order to resolve the matter as quickly as possible.
    - He notes that document production, unnecessary fact and expert witnesses and excessive cross-examination need to be controlled to save time and costs. In particular, he does not find cross-examination of witnesses in the common law style will benefit the Tribunal since much of this case can be determined by looking at the written record. It will also prolong the hearing unnecessarily.
    - Document production has become a costly and time-consuming exercise, with no help to the Tribunal. In his experience, the documents produced in such an exercise are rarely determinative of a dispute.
    - A good solution is therefore the Prague Rules as suggested by Slugworth.
- Ms Ong, SC notes that in her experience sitting as arbitrator in cases involving parties and counsel from both civil and common law traditions, she notes that the IBA Rules have worked to eliminate irrelevant or unnecessary documents. Ms Ong is concerned that Tribunal should not control the proceedings to the point that it raises the risk of challenge from a dissatisfied party who may be of the view that it has been refused the right to be heard or present its case. She believes that the effect of applying the Prague Rules will only heighten that risk.