

MATA

Mediation and Training Alternatives

FRIENDLYPHARM

General Information

Dramatis Personai

Lo Sun is Managing Director of LoCo. He came to this country from Indonesia in the late 1960's. Trained as pharmacist, set up pharmaceutical company here, which has traded successfully for the last fifteen years.

Hikko Makinen is the Finnish Chief Executive of International Pharmaceuticals (InterPharm). Brought into company four years ago to develop new markets and expand sales. Background in corporate management, has succeeded in internationalising company.

Background

Lo Sun and Makinen met three years ago at an international convention on new developments in the pharmaceutical industry. They struck up a friendship, and on visits to this country, Hikko would get together with Lo Sun, and sometimes stay with him and his family.

InterPharm sells pharmaceutical products all over the world. Hikko recognised that medicines could be bought more cheaply in some countries than they could in others. Two years ago they decided that significant profits could be made if they formed a joint venture company to sell medicines abroad that had been repackaged cheaply in this country. The company was to be called **FriendlyPharm Ltd**, and in the summer of that year a shareholders agreement was signed.

As an acknowledgement of the new venture, InterPharm placed some repackaging business with LoCo, the result of which was a profit of £150,000 to LoCo

Last year (some fourteen months after the agreement was signed) Makinen wrote to Lo Sun stating that, because of the time that had elapsed with no activity from LoCo, he no longer intended to proceed with the joint venture and was instituting arbitration proceedings claiming damages against LoCo, on the basis that LoCo had breached the terms of the shareholders agreement.

Issues

Both parties agree that the agreement was signed. They disagree about its effect. While it dealt with the division of shares, it made no reference to a number of practical matters. InterPharm asserts that it was nevertheless binding on the signatories. LoCo say that it was too vague and uncertain to enforce, and was no more than an 'agreement to agree' at some time in the future. The relevant wording reads as follows:

“Memorandum of Agreement

The Parties agree that ...

...3. each party will this day transfer its business to Friendly Pharmaceuticals Ltd according to the terms of separate agreements entered into by the parties...”

No such separate agreements were ever signed. Furthermore there was no reference in the Memorandum to premises or staff, and it made no provision for the obtaining of licences to trade, an essential step before business could begin.

Makinen has however disclosed some notes in the arbitration proceedings as evidence of part of the ‘agreement’ between them.

InterPharm rely on the verbal discussions between Hikko and Lo Sun, when they talked about these issues. They say that it was agreed that LoCo were responsible for these steps – finding premises, obtaining staff and a licence – and they failed to do so.

LoCo’s case is that these were merely preliminary negotiations, and cannot be taken to be part of the written Memorandum. They also deny that they agreed to be responsible for these steps; they point out that InterPharm made no complaint about these ‘failures’ for the first fourteen months of the joint venture.

In any event, says LoCo, the Shareholders Agreement is in breach of the relevant competition laws, and is therefore illegal. As such there is nothing to arbitrate, and the arbitration cannot take place.

Lastly, InterPharm did not in fact transfer any of its business to the joint venture. This shows, according to LoCo, that they never treated the Memorandum as binding in law. InterPharm state that they were always willing to carry out their side of the bargain, and point to the interim repackaging business that they placed with LoCo while waiting for them to activate the joint venture company.

The Claims

InterPharm claim that LoCo is in breach of the Shareholders Agreement in failing to

1. transfer the business it was required to to FriendlyPharm
2. assist with the operation of FriendlyPharm’s business
3. cooperate with the holding of meetings of directors of FriendlyPharm
4. put the repackaging order (and therefore the £150,000 profit) through the joint venture.

InterPharm value their claim at £8.5 million, being damages for

1. breach of contract, including loss of revenue and interest at £4.5 m
2. loss of capital appreciation that could be expected as the company grew at £4 m.
3. plus half the £150,000 profit from the repackaging order.

LoCo deny liability, and say that the claim must fail for the reasons given. Their position as set out in the most recent correspondence is that LoCo owes InterPharm nothing, but would be happy to “shake hands and walk away as friends”.

The Mediation

The lawyers for both parties have had a 'without prejudice' meeting and persuaded their clients to try to mediate a settlement, and so avoid what will be an expensive, time consuming and stressful process for all concerned.

Attending the mediation will be:

Lo Sun, Managing Director of LoCo.

Lawyer A, a partner of a local law firm who has worked with Lo Sun since he started LoCo fifteen years ago.

Hikko Makinen, Chief Executive of InterPharm based in Finland.

Lawyer B, in-house counsel for InterPharm.