Nutrisoya v. Sunrich: Anatomy of a Sales Dispute (A)

This case concerns an actual sales contract between two companies and a dispute that arises under that contract. So you are prepared to discuss the contract and issues surrounding it with your peers, please complete the following pre-class preparation:

- Before class, thoughtfully read the annotated Manufacturing and Packaging Agreement between Sunrich Foods, Inc., and Nutrisoya Foods, Inc., which follows at pages 2-11.
- The contract is annotated with comments and questions in the margins to guide your reading of the contract. You will complete written answers to certain of these questions as a written assignment before class.

  - If your last name begins with A-K, please write brief answers to the questions posed in Comments 1, 3, 6, 8, and 11.
  - If your last name begins with L-Z, please write brief answers to the questions posed in Comments 2, 5, 7, 10, and 13.

Bring the contract, your textbook with the UCC, and your written responses to class.

During the first part of class, you will form small groups and evaluate the contract. You may be asked to respond to the following general questions (which you may wish to keep in mind while reading the contract before class):

1. Are many terms in the contract left open?
2. Does this contract depart in major ways from normal UCC rules?
3. Does this contract appear to favor one party or the other? (FYI, this contract was jointly drafted.)
4. What types of breach, disputes, changed circumstances, or potential legal liability did the parties seem to anticipate?
5. Does this strike you as a well-drafted contract? Explain. What terms seem especially important or valuable?

Later in class, you will receive information about the dispute between the parties and its adjudication, and will consider the legal issues and business decisions presented. This case is intended to demonstrate the relevance of topics covered in this course and the complexity of disputes in the real world, and to reinforce your understanding of legal and broader business issues.

Case exercise © 2011, Tonia Hap Murphy. This case was prepared and the contract annotated for class discussion and educational purposes only.
MANUFACTURING AND PACKAGING AGREEMENT


BETWEEN

SUNRICH FOODS INC.
P.O. Box 128
Hope, Minnesota, U.S.A 56046
(hereinafter referred to as "Sunrich")

AND:

NUTRISOYA FOODS INC.
4050 av. Pinard
St-Hyacinthe, Quebec J2S8K4
(hereinafter referred to as "Nutrisoya")

WHEREAS Sunrich possesses the capacity to manufacture and package certain types of food products, including aseptically packaged rice-based beverages.

WHEREAS Sunrich is willing to manufacture and package organic rice-based beverages for Nutrisoya;

WHEREAS Nutrisoya wishes to entrust such manufacturing and packaging of organic rice-based beverages to Sunrich;

WHEREAS Sunrich and Nutrisoya wish to enter into an agreement pursuant to which Sunrich will manufacture and package organic rice-based beverages for Nutrisoya, to be sold to Nutrisoya as a finished product for sale within the Territory (as herein defined);

WHEREAS nothing in this agreement shall be interpreted as transferring to a party any right, title and interest in the intellectual property belonging to the other party;

WHEREAS Sunrich and Nutrisoya have agreed as follows:

1. Preamble and Appendices

1.1 The preamble and the appendices form part of this Agreement.

2. Definitions

For purposes of this Agreement and the documents related or referring thereto, unless there is a mention to the contrary or incompatibility with the context, the following terms and expressions shall have the following meanings:

2.1 "Agreement" refers to this Agreement and to any amendment, renewal or change which could be made thereto from time to time.

2.2.1 "Default" refers to the cases of default prescribed in Section 13 of this Agreement.

2.3 "Effective Date" refers to the date this Agreement is signed by Sunrich and Nutrisoya, namely, April 1, 2004.
2.4 "Intellectual Property" refers to all the rights, title and interests in trademarks and trade names, patents, patent applications, discoveries, processes, drawings, including industrial drawings, inventions, specifications, software, technical information, know-how, technologies, formulas, algorithms, copyrights, databases, data, models, patterns, recipes, prototypes used or in development, results and knowledge arising directly or indirectly from the completion of research and development projects which are not in the public domain, including all rights, title and interests in any improvement or modification to any of the foregoing elements, the rights related to their registration, applications for their registration or renewal, and all other intellectual property and industrial property rights, including, without limitation, rights in licenses and sublicenses.

2.5 "Nutrisoya Customers" refers to the customers to whom Nutrisoya sells the Product during the Term or the Renewal Period.

2.6 "Party" or "Parties" designates the parties to this Agreement.

2.7 "Product" refers to an organic rice-based beverage packaged and prepared in accordance with the methods, procedures and formulations for preparation of the Rice-Urn brand of rice-based beverages manufactured and packaged by Sunrich, which shall be certified as kosher under the seal of a recognized kosher supervision.

2.8 "Specifications" refers to the formulations, methods and procedures, for the rice-based beverage manufactured by Sunrich under the Rice-Urn brand.

2.9 "Territory" refers to the territory of Canada, the Caribbean Islands and Central America.

3. REPRESENTATIONS AND WARRANTIES OF THE PARTIES

3.1 Nutrisoya represents and warrants to Sunrich that the following representations and warranties are true and accurate on the Effective Date and that they will also be true and accurate for the term of this Agreement and any renewal period, and Nutrisoya acknowledges that these representations and warranties constitute fundamental determinants for Sunrich which led Sunrich to sign this Agreement:

3.1.1 It is duly incorporated and organized and is validly subsisting and in good standing under the laws of its jurisdiction of incorporation and possesses all the powers, capacity and authority necessary to enter into this Agreement and fulfill its obligations thereunder.

3.1.2 It has the general powers and the capacity and is duly authorized to own its property and assets and to carry on its business in the manner it currently does, everywhere it does business.

3.1.3 It is entitled to use the Intellectual Property which it owns or uses which pertains to its business, without infringing any legislative or regulatory provision relating to Intellectual Property. [Comment [A3]: Why would Sunrich be interested in this provision? See 2.312(3).]

3.1.4 The Product will not be sold and marketed outside the Territory.

3.1.5 It holds all the permits, authorizations and approvals necessary to sell and market the Product within the Territory.
3.1.6 The signing of this Agreement and of the documents related thereto by Nutrisoya does not and will not have the effect of:

3.1.6.1 Violating any provision of any applicable law, its constating documents or any order, judgment or decree of any court or other regulatory body;

3.1.6.2 Coming into conflict with the terms of any agreement to which it is party or resulting in a violation of the provisions of such agreement or a default under the terms of such agreement.

3.2 Sunrich represents and warrants to Nutrisoya that the following representations and warranties are true and accurate on the Effective Date and that they will also be true and accurate for the term of this Agreement and any renewal period, and Sunrich acknowledges that these representations and warranties constitute essential factors, which led Nutrisoya to sign this Agreement:

3.2.1 Sunrich is duly incorporated and organized and is validly subsisting and in good standing under the laws of its jurisdiction of incorporation and has all the powers, capacity and authority necessary to enter into this Agreement and fulfill its obligations thereunder.

3.2.2 Sunrich has the general powers and capacity and is duly qualified to carry on its business in the manner it currently does, everywhere it does business.

3.2.3 Sunrich represents that it holds all the permits and all the authorizations necessary and required to proceed with the manufacturing and packaging of the Product at its manufacturing facilities.

3.2.4 That the product will conform to the norms, standards and regulations of the Canadian Food Inspection Agency and other food regulatory bodies as required for lawful sale in Canada.

3.2.5 That the organic certifying body for the Product is recognized in Canada (e.g. QAI, OCPP, OCIA, etc.), as shall the Kosher (kosher) certifier.

3.2.6 The signing of this Agreement and of the documents related thereto by Sunrich does not and will not have the effect of:

3.2.6.1 Violating any provision of any applicable law, its constating documents or any order, judgment or decree of any court or other regulatory body;

3.2.6.2 Coming into conflict with the terms of any agreement to which it is party or resulting in a violation of the provisions of such agreement or a default under the terms of such agreement.

4. PURPOSE AND SCOPE OF THIS AGREEMENT

4.1 Sunrich shall manufacture and package the Product for Nutrisoya to be marketed and sold within the Territory, subject to the terms and conditions mentioned herein.
5. MANUFACTURING AND PACKAGING

5.1 Sunrich covenants to manufacture and package the Products in packaging which it shall provide, in accordance with the Specifications and Manufacturing and Packaging Plan.

5.2 Sunrich may, during the Term and Renewal Period, change the Specifications to the extent that: (i) it has transmitted a prior notice to Nutrisoya of at least 60 days before implementation of this change, (ii) the change shall not bear upon the price of the Product charged to Nutrisoya.

6. MANUFACTURING AND PACKAGING PLAN

6.1 Nutrisoya covenants to transmit in writing to Sunrich, as required by Sunrich, a monthly manufacturing and packaging projection plan for the Product, for a period of three consecutive months.

6.2 At least 21 days before the beginning of each month, Nutrisoya shall transmit to Sunrich, for its approval, a written plan confirmation for the subject month to enable Sunrich to better plan its short-term operations, including the purchase of Ingredients and Packaging Components, as the case may be, and to serve the interests of Nutrisoya and its customers more adequately.

7. INGREDIENTS AND PACKAGING COMPONENTS

7.1 The Ingredients and Packaging Components necessary for the manufacturing and packaging of the Product shall be ordered and paid by Sunrich directly to suppliers, subject to the following.

7.2 Nutrisoya shall be responsible for artwork and printing plates for purposes of the manufacture of the Packaging Components at its own cost.

7.3 Nutrisoya shall reimburse Sunrich upon simple written notice and accompanying invoice for all packaging which has become obsolete or which remains in the possession of Sunrich at the termination of this Agreement, such reimbursement to be an amount equivalent to the cost to Sunrich of such packaging, limited to direct costs, handling and processing costs payable to outside contractors, and transport.

8. QUALITY INSPECTION

8.1 Sunrich covenants to perform Quality Inspections to ensure that the Product is manufactured and packaged in accordance with the product’s specifications.

8.2 When a Product proves to be non-conforming to the specifications or to be unfit for human consumption, Sunrich agrees to hold harmless and indemnify Nutrisoya from and against any loss or damage which could result therefrom, including any amount which may become due by Nutrisoya to one of Nutrisoya Customers excluding any loss of profit incurred by Nutrisoya or by Nutrisoya Customers, and to reimburse Nutrisoya for the cost of any defective Product including transportation costs and the expenses related to their destruction, to the exclusion of indirect damages including any loss of profits by Nutrisoya.

8.3 When Product is recalled due to its non-conformity or because it is unfit for human consumption, Sunrich then agrees to provide Nutrisoya with access to its registers to enable
Nutrisoya to identify the batch from which the defective Product comes. Upon receipt of this information Nutrisoya, at its sole expense, will conduct the research necessary to locate each Product from the relevant batch so as to be able to proceed with the removal of every Product that is non-conforming or unfit for human consumption. To the extent that the Products recall results from Sunrich's negligence, Sunrich, in addition to indemnifying Nutrisoya for the losses and damages identified in subsection 8.2, will bear the transportation costs resulting from the said Products recall.

9. PRODUCT STORAGE AND SHIPPING

9.1 Sunrich shall arrange, at its own cost, for transport of Product, also at its own cost, to Nutrisoya's designated warehouse in Montreal, Quebec; all shipments of Product shall be f.o.b. Nutrisoya's Montreal warehouse.

9.2 Until delivery to Nutrisoya's Montreal warehouse, Sunrich assumes full responsibility for Products and all risks of loss or damage to Products.

10. PRICE AND TERMS OF PAYMENT

10.1 The price of $9.00 USD per case of 12 units of 946 ml (32 oz.) each represents the price applicable as of the Effective Date, charged to Nutrisoya by Sunrich for the Product and shall include transportation (the "Prices") f.o.b. Nutrisoya's Montreal warehouse.

10.2 In the event of an upward variation in costs of ingredients and packaging components paid directly by Sunrich to suppliers and the cost of labor assigned directly or indirectly to the manufacturing, packaging, storage, handling and loading of the Product, Sunrich may adjust the Price accordingly upon three (3) full calendar months written notice (the "Notice Period"), accompanied by vouchers and other substantiating documents and the new Price shall to take effect upon the first day of the calendar month next following expiry of the notice.

10.3 The Price does not include applicable sales tax and duties created or imposed by an authority of competent jurisdiction; these taxes and duties shall be borne by Nutrisoya.

10.4 Terms of Payment for Product sold by Sunrich to Nutrisoya shall be thirty (30) days net following delivery.

11. INSURANCE

11.1 Each of the parties hereto, during the Term, shall obtain and maintain in force an insurance policy or policies covering their respective operations and activities, in accordance with industry standards, with a specialized firm recognized in this field. Such policies, in particular, shall cover their general civil liability, including risks related to completed products and works, for a minimum of two million dollars USD ($2,000,000) for Sunrich and $2,000,000 CAD for Nutrisoya of coverage per incident (including liability for bodily injury, liability for material damage and employer liability). The insurance policy shall name the other party as a co-insured.

12. ACT OF GOD OR FORTUITOUS EVENT

12.1 Notwithstanding any provision to the contrary, a party shall in no way be liable for any default in the performance of any of its obligations under this Agreement or for any damage or loss caused to the other party if this default, damage or loss is caused by a fortuitous event or Act of God provided, however, that the party released from its obligations take the
necessary action to prevent, mitigate or put a stop to the act, event or fact rendering the performance of its obligations impossible. A party who finds it impossible to perform any of its obligations caused by a fortuitous event or Act of God covenants to notify the other party promptly of the probable duration and the reasons why it cannot fulfill its obligations and covenants to take the necessary steps to remedy this impossibility as soon as practicable.

13. **DEFAULT**

Each of the following events shall constitute a default:

13.1 If a party becomes insolvent, assigns its business or all or a substantial part of its property for the benefit of its creditors in general, is put into bankruptcy or liquidation, takes or attempts to take advantage of any law pertaining to insolvency or bankruptcy or affecting the rights of creditors in general, or if a receiver or trustee is appointed for the property of this party or any portion thereof.

13.2 Nutrisoya is in default of payment at maturity (on demand, in the case of amounts payable on demand) of any amount owed under this Agreement.

13.3 A party is in default of payment at maturity of any amount owed under this Agreement, other than the amounts mentioned in subsection 13.2, and this default is not remedied within 15 business days of the transmittal of a notice to this effect by the other party.

13.4 All or part of Nutrisoya's assets are transferred or sold to a third party without the prior written consent of Sunrich or a creditor takes possession of Nutrisoya's business or of all of a substantial part of its property.

13.6 Any of the representations made in this Agreement or in a document or information given or delivered in relation to this Agreement is inaccurate to any material degree.

13.7 A party does not fulfill one of its obligations or does not observe one of its covenants under this Agreement and this situation has not been remedied within 15 business days of the transmittal of a notice to this effect by the other party.

14. REMEDIES IN CASE OF DEFAULT

In the event of a Default by a party, the other party may:

14.1 Terminate the Agreement;

14.2 Claim immediate payment of all or part of the amounts owed under this Agreement; and

14.3 Claim any damages suffered, according to the circumstances.

15. CONFIDENTIALITY

15.1 Each of the parties acknowledges that it has received or will receive on a confidential basis information and material pertaining to the business, operations and commercial activities of the other party during the term of this Agreement (hereinafter the "Confidential Information").
15.2 Each party acknowledges that the disclosure or use of such Confidential Information which is not authorized by the other party could be prejudicial to the other party and contrary to its best interests. Consequently, each party covenants to respect the confidentiality of this Confidential Information, not to disclose it directly or indirectly to any person and not to make any direct or indirect use thereof not authorized under this Agreement, without the specific consent and instructions of the party concerned, during the term of the Agreement and at any time after its termination.

15.3 The parties agree not to consider as confidential any information which:

15.3.1 is in the public domain at the time of its disclosure or which subsequently entered the public domain, without this being due to any act or omission of Sunrich or Canada; or

15.3.2 has become available to Sunrich or Nutrisoya through a third party who did not acquire it under a covenant or obligation to respect its confidentiality contracted directly or indirectly with Sunrich or Nutrisoya; or

15.3.3 is already known to Sunrich at the time of its disclosure by Nutrisoya and vice versa; or

15.3.4 must be disclosed by law.

16 MARKETING PLAN AND TRADE-MARKS

16.1 Nutrisoya shall use, for purposes of the sale and marketing of the Product within the Territory, the trade-mark "Rice-Plus" or "Natur-a", or such other trade-marks as it may specify from time to time.

16.2 In the event that packaging components purchased by Sunrich become obsolete by reason of any packaging change implemented by Nutrisoya, Nutrisoya shall immediately reimburse Sunrich for such packaging components which remain in its possession, at Sunrich’s cost price.

16.3 The Product shall, in addition to trade-marks designated by Nutrisoya in association with which such Products are sold, shall bear the "Rice Um" trademark and logo (at 1/5 the size of the principal trade-mark and logo) on the front and back panels of the package alongside Nutrisoya’s trademark and logo.

16.4 Sunrich shall supply nutrition facts and ingredients list as well as a nutritional and microbiological analysis, if necessary.

17 TERRITORY PROTECTION

17.1 Sunrich covenants not to contact or solicit business from Nutrisoya customers during the Term, Renewal or Renewal Period of this Agreement and for a period of one (1) year thereafter. In addition to the above-mentioned non-solicitation period, Sunrich will not, directly or indirectly, contact, deal with, solicit or take any order from or manufacture and package any rice-based beverages for any Nutrisoya Customers during such Term, Renewal or Renewal Period of this Agreement.

Comment [A11]: Do you have any concern that this is an illegal restraint of trade? Explain.
17.2 The parties recognize and accept, however, that nothing contained herein prohibits Sunrich from manufacturing and packaging for any Nutrisoya customer products other than rice-based beverages or products that are not manufactured for and on behalf of Nutrisoya during the Term of this Agreement.

17.3 Nutrisoya, for its part, undertakes that it will not sell or market the Product, directly or indirectly, beyond the Territory, and that it will cease supplying Product to any of its customers within the Territory upon being notified, in writing, by Sunrich, that such Product is finding its way to locations beyond the Territory.

17.4 Sunrich shall advise Nutrisoya, in writing, at least six (6) months in advance in the event that it decides to supply rice-based beverages to any other customer for sale in the Territory. In such case Nutrisoya reserves the right to terminate this Agreement upon the expiry of the notice period.

18. EXCLUSIVITY

18.1 In the event that Nutrisoya, during the Term, purchases from Sunrich more than 5,000 cases per month on average of Product during three consecutive calendar months and notifies Sunrich of such fact, in writing, Sunrich shall refrain from supplying or selling aseptically packaged rice-based beverages competitive to the Product to any new customers for sale within the Territory and continue to refrain from accepting new customers for such purpose so long as Nutrisoya continues to purchase Product from it in such volumes, (i.e. 5,000 cases per month on average over any period of three consecutive calendar months).

19. INDEMNIFICATION

19.1 Each of the parties (the "Defaulting Party") covenants to hold harmless and indemnify the other party, its employees, agents and directors (the "Indemnified Party") from and against and to pay the Indemnified Party for any damage, loss, debt, overpayment, commitment, obligation, liability, claim, charge, deficit, cost and other expense (including, without limitation, all lawyer’s and any other adviser’s fees and disbursements, as well as the judicial and extrajudicial costs and fees and other expenses arising from any litigation, including damages, interest, fines, penalties and assessments arising therefrom and the amounts that may be paid in settlement of such litigation)(hereinafter collectively called a "Loss") which the Indemnified Party might have to pay, suffer, incur or otherwise bear, directly or indirectly, as a result of or due to the non-performance by the Defaulting Party of any of its covenants or obligations under this Agreement.

20. TERM AND RENEWAL

20.1 The initial term of this Agreement shall be three (3) years from the Effective Date (the "Term") unless it is terminated earlier for any of the causes mentioned herein.

20.2 Nutrisoya shall have the right and option to renew this Agreement for a further period of three (3) years (the "Renewal Period"), provided that it has advised Sunrich, in writing, at least six (6) months prior to the expiry of the Term of its intention to exercise the said option, provided that during the twelve (12) month period prior to the exercise of the option, its purchases amount, on average, to at least five thousand (5,000) cases per month.

20.3 Subject to the foregoing, at its expiration this Agreement shall be renewed automatically on the same terms and conditions for successive periods of one (1) year (the "Renewal"), unless
one of the parties, at least six (6) months before the expiration date of the Term or three (3) months before the expiration date of a Renewal Period, as the case may, has given the.
other party a notice of non-renewal.

20.4 On the expiration date of this Agreement, if not renewed:

20.4.1 Any amount owed by Nutrisoya to Sunrich under the terms of this Agreement shall become immediately due and payable to Sunrich;

20.4.2 The parties agree to expend reasonable efforts under the circumstances to continue manufacturing and packaging the Products to use up the inventory of Ingredients and Packaging Components. After this operation, Nutrisoya covenants to remove, at its expense, all Packaging Components and all Finished Products located in the Sunrich facility and to pay Sunrich immediately after the expiration date of this Agreement, the balance of the amounts of the invoice pertaining to each of these items, together with Sunrich’s direct cost for packaging components as per sub-section 7.3

20.4.3 Each party agrees to return to the other party all information, documentation or Confidential Information in its possession regarding the other party’s business and belonging to the other party.

21. NOTICE

21.1 Any notice or communication under this Agreement shall be in writing and shall be validly given if it is delivered or sent by postage-paid mail at the addresses indicated hereinafter or by fax at the following number:

In the case of Sunrich:
Sunrich Foods Inc.
P.O. Box 128
Hope, Minnesota, U.S.A. 56046
Fax: 507-xxx-xxxx

In the case of Nutrisoya:
Nutrisoya Foods Inc.
4050 Pinard
St.-Hyacinthe, Quebec, Canada J2S 8K4
Fax: 450-xxx-xxxx

Any notice thus addressed shall be deemed to have been received on the date of its transmittal if it is delivered, on the fifth business day following its transmittal if it is mailed or on the day following its transmittal if it is sent by fax. Any party may, at any time, change its address by simple notice transmitted in accordance with the foregoing.

22. MISCELLANEOUS

22.1 This Agreement constitutes the sole agreement between the parties respecting the operations that are its subject and replaces all previous oral or written understandings, agreements and commitments.

22.2 The parties agree to execute and sign or see to the execution and signing, from time to time, of any other act, document or writing that one of the parties may reasonably request for the purposes of giving effect to this Agreement.

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22.3 Nutrisoya may not assign, in whole or in part, its rights or obligations under this Agreement without the prior written consent of Sunrich. 

Comment [A14]: Anti-assignment clause. Note that there is no clause prohibiting assignment by Sunrich.

22.4 Any decision of a court to the effect that any of the provisions of this Agreement is null and void or unenforceable shall in no way affect the validity or enforceability of the other provisions.

22.5 Any modification to this Agreement or waiver of a right arising therefrom shall be without effect unless it is evidence in a writing signed by the parties.

22.6 The fact that a party does not require the full performance of a covenant contained in this Agreement or does not exercise one of its rights shall not be construed as a waiver of such right or of the full performance of this covenant in the future. Except if expressly stipulated to the contrary, any waiver by a party of any of its rights shall only be valid if it is evidenced in writing and only in respect of the rights and circumstances specifically contemplated in the waiver.

Comment [A15]: These clauses will also be of interest in our class discussion.

22.7 The debtor of an obligation under this Agreement shall be called upon to perform this obligation by the mere passage of the time prescribed to perform it.

22.8 This Agreement may be signed in an indeterminate number of distinct copies which shall all be originals but which, taken collectively, shall only constitute one and the same document.

22.9 This Agreement shall bind, or as the case may be, shall enure to the benefit of the parties and their successors and assigns.

22.10 This Agreement, its interpretation and its application are governed by the laws in force in the domicile of the defendant and the parties agree and accept that only the courts of the domicile of the defendant having jurisdiction shall be competent to hear and rule on any litigation arising from or pertaining to this Agreement.

Comment [A16]: This provision will figure in our class discussion.

IN WITNESS WHEREOF OF THE PARTIES HAVE SIGNED in the places heretofore mentioned.

SUNRICH FOODS INC


NUTRISOYA FOODS INC


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