

THE 5th INTERNATIONAL ADR MOOTING COMPETITION
JULY-AUGUST 2014
HONGKONG

MEMORANDUM FOR CLAIMANT

TEAM CODE: NO.120C

On Behalf of	Against
Conglomerated Nanyu Tobacco Ltd.	Real Quik Convenience Stores Ltd.
142 Longjiang Drive	42 Abrams Drive
Nanyu city	Solanga
Nanyu	Gondwana
“CLAIMANT”	“RESPONDENT”

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2005. Effective as from May 1, 2005.)cited as: *CIETAC rules**New York Convention*Convention on the Recognition and
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INDEX OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CIETAC	China International Economic and Trade Arbitration Commission
Claimant	Conglomerated Nanyu Tobacco Ltd.
Respondent	Real Quick Convenience Stores Ltd.
CR	CIETAC Rules
CEO	Chief Executive Officer
ART.	Article
LTD.	Limited
Para .	Paragraph
P.	Page
Ex.	Exhibit
&	And
<i>ed.</i>	Edition
CIETAC Rules	China International Economic and Trade Arbitration Commission Rules
Model Law	UNCITRAL Model Law with the 2006 amendments
PICC	UNCITRAL Model Law with the 2006 amendments
CISG	the United Nations Convention on Contracts for the International Sale of Goods of 1980
NYC	New York Convention
FCIC	the Framework Convention on Tobacco Control

STATEMENT OF FACTS

- 1994 The formation of Conglomerated Nanyu Tobacco Ltd.
- 1999 The formation of Real Quik Convenience Stores Ltd.
- 2000 The Claimant and Respondent began a long-lasting business relationship.
- 2001 The Gondwandan government began to enforce stricter regulations on the sale and use of tobacco products.
- 2002 The Gondwandan government implemented new packaging requirements requiring all tobacco packaging to carry warning labels detailing the harmful effects of smoking.
- 2004 the Gondwandan government implemented a national ban on smoking indoors.
- 2005 The Gondwandan government implemented a national ban on smoking in public areas .
- 2009 The Gondwandan government expanded its packaging restrictions.
- 2009.6.22 Excerpts from the Gondwandan Herald: it is highly unlikely that the Gondwandan government will continue to implement stricter regulations.
- 2010.12.14 The last Distribution Agreement between the Parties was signed.
- 2011.3.14 a Gondwandan senator introduced the “Clean our Air” Bill 275/2011 .
- 2011.3.21 The Respondent asked for renegotiations on certain terms of the Distribution Agreement so as to comply with the new governmental regulations.
- 2011.4.1 Excerpts from the Gondwandan Herald : a more stringent bill this soon after is unlikely to pass. (Political analysts)
- 2011.4 The Claimant launched the first salvo against the Bill.
- 2011.5 the Supreme Court of Gondwana heard arguments from both Conglomerated Nanyu Tobacco Ltd..
- 2011.6.23 Gondwandan court strikes down challenge to Bill 275.
- 2012.4.13 the Gondwandan Senate passed Bill 275 into law .
- 2013.1.1 Bill 275 subsequently entered into force.

- 2013.3.11 Respondent proposed renegotiation of the Distribution Agreement
- 2013.4.11 Bare Renegotiation
- 2013.4.12 Claimant confirms negotiations have failed and asks the Respondent to continue performing the Agreement
- 2013.4.19 Respondent stated that If the Claimant incontinue down this path, we will have no choice but to suspend our performance
- 2013.5.1 Notice of Termination of the Distribution Agreement
- 2013.7.1 Notice of Outstanding Termination Fee
- 2013.8.2 Final Notice of Outstanding Termination Penalty
- 2013.9.2 Pre-Action Demand Letter
- 2013.11.26 Answer and Statement of Defense from Real Quik Convenience Stores Ltd.
- 2014.1.12 Claimant applied for arbitration
- 2014.2.12 Respondent:Statement of Defense
- 2014.2.19 Notice on the Formation of Arbitral Tribunal Case No. M2014/24
- 2014.2.25 Pending Arbitration between Conglomerated Nanyu Tobacco Ltd And Real Quik Convenience Stores Ltd. (the *amicus curiae* brief)
- 2014.2.27 A conference call between the Parties' representatives and the Arbitral Tribunal

ARGUMENTS

A.THE ARBITRAL TRIBUNAL HAS THE JURISDICTION TO DEAL WITH THIS DISPUTE IN LIGHT OF 12 MONTHS NEGOTIATION PERIOD STIPULATED IN THE ARBITRATION AGREEMENT.

Claimant submits that Arbitral Tribunal has the jurisdiction to deal with this dispute in light of 12 months negotiation period stipulated in the arbitration agreement on the grounds that (I)Claimant had performed its obligation to negotiate with Respondent.(II)It is no need to wait for a full 12 months.(III)CIETAC rules allow the jurisdiction of Arbitral Tribunal.

(I)CLAIMANT HAD PERFORMED ITS OBLIGATION TO NEGOTIATE WITH RESPONDENT

RESPONDENT argued that the dispute arose on 1 MAY 2014 and Claimant did not obligated to conduct negotiations in good faith[*Respondent's Statement of Defense*].Claimant submits that the dispute date that Respondent argued was not right and it was actually on 11 March 2013.Furthermore,Claimant had performed its obligation to negotiate with Respondent.

i .The dispute date that Respondent argued is not right.

DISPUTE means A conflict or controversy,and major dispute, under the Railway Labor Act,means a disagreement about basic working conditions, often resulting in a new collective-bargaining agreement or a change in the existing agreement.[*Black's Law Dictionary (8th ed. 2004)]*

Respondent argued that dispute date was 1 MAY 2013 and the dispute was whether terminate Agreement or not .Claimant submits that “whether terminate Agreement or not ”is not a dispute,it is actually a result of a dispute. If dispute can negotiate and solve,Agreement could go on;or,terminate.

Respondent indicated that the current situation is untenable, they can not continue perform the Agreement, and they wanted to sit down and discuss [Claimant's EX.6]. Just because the Respondent had a disagreement with Claimant in current Distribution Agreement, so Respondent wanted to renegotiate, to get a change in the existing Agreement. Pursuant to *Black's Law Dictionary*, it was obvious a dispute arising.

Therefore, Claimant submits that the dispute arose actually was on 11 March 2013, but not on 1 MAY 2013, which the Respondent considered subjectively.

ii. Claimant negotiated with Respondent after the dispute arising.

Since the dispute arose on 11 March 2013, Claimant had performed its obligation to negotiate with Respondent after the dispute arising.

Claimant renegotiated with Respondent in a meeting on 11 April 2013, though the parties were unable to come to an agreement. [Claimant's EX NO.7] On the meanwhile, Claimant expressed the willing which he would be open to further discussion. Claimant was in good faith.

(II) IT IS NO NEED TO WAIT FOR A FULL 12 MONTHS.

i. The negotiation on 11 APRIL 2013 was fruitless.

At the meeting, the Respondent noted that due to the elimination of all trademarks from Gondwandan tobacco packaging, that the Respondent no longer saw a need for the Claimant to require a 20% price premium over its competitors. However, the Parties were unable to come to an agreement and in the end the Agreement remained the same. [Claimant's EX NO.7]

Claimant insisted that Nanyu brand was strong, 20% price premium over its competitors should not change. It will not change. If Respondent could not accept this, the more renegotiations may be also fruitless.

ii. Respondent had no intention to renegotiate.

Claimant insisted 20% price premium over its competitors should not change, but Claimant would like to negotiate other aspects like selling the promotional merchandise [Claimant's EX NO. 7].

However, Respondent neglected our good faith to negotiate other aspects, several days after the meeting, Respondent noticed that he would terminate the Distribution Agreement on 1 June 2013, they said they were left with no choice but to terminate Distribution Agreement. [Claimant's EX NO. 8].

Claimant submits that all negotiations should base on the conduct of valid contract. Once the Respondent terminated the contract and did not express their intention to negotiate with us, it meant they thought there were no other ideas or solutions to solve disputes, and renegotiate did not need.

(III) CIETAC rules allow the jurisdiction of Arbitral Tribunal.

The arbitral tribunal has the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case. [CIETAC, Art. 6(1)]

And, Arbitral Tribunal may make a decision based on such evidence that it has jurisdiction over the arbitration case if CIETAC is satisfied by prima facie evidence that an arbitration agreement providing for arbitration by CIETAC exists [CIETAC Art. 6(2)]. Cause the arbitration agreement providing for arbitration by CIETAC exists [The Arbitration Clause], tribunal may make a decision based on such evidence that it has jurisdiction over the case.

B. THE ARBITRAL TRIBUNAL SHOULD NOT ADMIT THE GONDWANDAN GOVERNMENT'S AMICUS CURIAE FOR CONSIDERATION DURING THE PROCEEDINGS.

Claimant submits that Tribunal should not admit the Gondwandan government's amicus curiae for consideration during the proceedings on the grounds that (I)Tribunal has no right to admit amicus curiae in principle.(II)Even if Tribunal has the right,there is no need to accept Gondawandan government's amicus curiae brief.

(I) TRIBUNAL HAS NO RIGHT TO ADMIT AMICUS CURIAE IN PRINCIPLE

AMICUS CURIAE means a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.[*Black's Law Dictionary (8th ed. 2004)*].

As we can see,amicus curiae is applicable to court.There are no authorities awarding tribunal the right to admit amicus curiae in principle.

(II)EVEN IF TRIBUNAL HAS THE RIGHT,THERE ID NO NEED TO ACCEPT GONDAWANDAN GOVERNMENT'S AMICUS CURIAE BRIEF

i .The brief's main purpose had no relationship with CLAIMANT's relief.

The amicus curiae brief from the Gondwandan Department of State stated that:this arbitration touches on topics of Gondwandan public policy[*Malcolm Reynolds's letter,Para.4*] And reiterated that:The CLAIMANT's arbitration proceedings will only serve to undermine Gondwana's sovereign right to regulate and control its public policy ,and if the Arbitral Tribunal is inclined to issue an award in favor of the CLAIMANT,any such award would be contrary to Gondwandan public policy. [*Malcolm Reynolds's letter,Para.5&7*]

Here,Claimant submits that:such award that in favor of the Claimant would not be contrary to Gondwandan public policy.

In conformity to the MODEL LAW's digest[*MODEL LAW's digest,ARTICLE 59,substantive public policy*].It writes,“there was no violation of public policy in cases where awarded liquidated damages or payments for breach of contract.”

In today's arbitration, Respondent breached the contract at first, Claimant just want Respondent to pay the liquidated damages [*Request for Relief in Application for Arbitration*], based on the digest, it did not violate of public policy.

Payments for breach of contract was not contrary to the public policy, the court enforced the arbitral award that in favor of the CLAIMANT. [*Robert E. Schreter v. Gasmac Inc., Ontario Court, 1992*] Therefore, even if the Arbitral Tribunal is inclined to issue an award in favor of the CLAIMANT, such award would not be contrary to Gondwanda public policy.

ii. The amicus curiae was only the Respondent's friend, not a friend of arbitral tribunal.

Gondwanda government handed over this amicus curiae brief. In this brief, it can be seen obviously that Gondwanda government stood in Respondent position, the content of brief was all about awarding in favor of Claimant would be contrary to Gondwanda public policy and the Claimant's arbitration proceedings would only serve to undermine Gondwana's sovereign right to regulate and control its public policy [*Malcolm Reynolds's letter*]. This brief did not stand in Claimant's position to consider Claimant's losses and interests.

The person who hands over amicus curiae should be neutral, he can not support either party. This this brief, Gondwanda government completely support Respondent, he was only the Respondent's friend, not a friend of arbitral tribunal.

Under all circumstances, the arbitral tribunal shall act impartially and fairly and the arbitral tribunal shall independently and impartially render an arbitral award [*CIETAC, Art. 33(1) & 47(1)*]. Accept this amicus curiae, will affect the fairness and impartiality of arbitration.

iii. Admitting this brief may reduce tribunal's efficiency.

The arbitral tribunal shall render an arbitral award within six (6) months from the date on which the arbitral tribunal is formed. [CIETAC Art. 46] The arbitral award is time limited. So accept and discuss the government's brief will extend the award time and reduce the tribunal's efficiency.

C. THE RESPONDENT'S OBLIGATIONS WERE NOT VITIATED BY THE IMPLEMENTATION OF THE BILL 275 AND THE GONDWANDAN GOVERNMENT'S NEW TOBACCO REGULATIONS

The Respondent's obligations under the distribution agreement should be undertaken since the new legislation did not frustrate the performance. However, Respondent terminated the agreement, which saddled the Respondent with the obligation of undertaking liquidated damages.

(I) THE NEW TOBACCO LEGISLATION IS REASONABLY FORESEEABLE FOR THE RESPONDENT

i .Smoking was prevalent in Gondwana

It is estimated that roughly 35% of the population smoked and there was a large amount of regular smokers in Gondwana.

ii .Gondwandan government had attached emphases on tobacco control

Starting in 2001, the Gondwandan government began researching methods of curbing the percentage and set about enacting stricter regulations. During 2002 and 2009, the government had enforced several corresponding regulations and became party to FCTC [Clarification no.16]. .

iii. The existing tobacco regulations had not done enough to dissuade minors from using tobacco product required in "FCTC"

Parties to FCTC are liable for paying efforts to take measures to restrict sales to minors [Art.16 in FCTC]. However, in fact, the tobacco companies were getting around

requirements by purchasing brightly colored packages that appeal to the younger demographic as well as by heavily advertising flavored cigarettes and cigars in an attempt to draw in new smokers[*Respondent's Ex.No.1*].

iv. The long run of the distribution agreement also renders it possible for

Respondent to foresee the new legislation

The distribution agreement between the two parties is a 10-year-contract. In such a social contest that tobacco control has been laid too much importance and the existing regulations have not done enough to dissuade more minor to smoke, it is reasonable for the Respondent to foresee that a new stricter tobacco regulation will be enforced during the distribution agreement.

(II)THE DEFENSE OF HARDSHIP OR FORCE MAJEURE DOES NOT EXCUSE RESPONDENT'S NON PERFORMANCE.

i .The Respondent cannot rely on hardship for non-performance

The indispensable element of hardship or force majeure is unforeseeability. Only when this event could not reasonably have been taken into account by the Respondent at the time of the conclusion of this distribution agreement can the new tobacco regulation be defined as hardship[*Art. 6.2.2 Para.(b) UNIDROIT*].

ii .The Respondent is not entitled to rely on force majeure for non-performance

a.The article of exemption can not be used to exempt Respondent from the obligation of liquidated damages

Even if the article of exemptions could be applied into the Respondent's situation, nothing in this article prevents either party from exercising any right other than to claim damages under this convention[*Art. 79 Para.(5) CISG*]. Specifically, article 79 (5) declares that an exemption precludes only the aggrieved party's right to claim damages, and not any other rights of either party under the Convention[*P.388 CISG digest*]. Other rights under the Convention include requiring Respondent to perform the obligation of paying liquidated damages which has not been resorted to another remedy inconsistent with this requirement

t[Art. 61 CISG][Art. 62 CISG].

b.The impediment was reasonably foreseeable

Only when the situation is beyond Respondent's control and could not reasonably be expected to have taken into account by the Respondent at the time of the conclusion of the agreement can Respondent be excused relying on force majeure[Art. 7.1.7 UNIDROIT][Art. 79 Para.(5) CISG].

iii.Respondent could continue to perform obligations provided under the agreement

a.The 20% premium is still reasonable

The Claimant is the largest tobacco producers in Nanyu and has a global presence in the worldwide tobacco market. Claimant began to use the Respondent as a distributor in 2000 when Respondent was only a newborn convenience store chains. Considering the Claimant's dominant position,the negotiated price was 20% higher than other similar contracts. After the enforcement of Bill 275,the tobacco industry in Gondwana experienced an average 30% decline in sales through all channels.The Claimant suffered an approximate 25% decline, which means the Claimant's brand is still dominant. Besides, Bill 275 does not prohibit the brand, business or company name for the tobacco products, and Claimant's products are still identifiable. The Claimant's products did and do deserve the 20% premium .

b.Claimant agreed to further discussion on promotional merchandises

Claimant appreciated that Respondent may have difficulties with selling the promotional merchandise as required under the Agreement and would be open to further discussion on this aspect to render the obligations compliant with the new tobacco regulations[Claimant's Ex. No.7].There is no doctrine or power of suspension for changes of circumstances which were likely to be temporary or of limited duration[Gerald 22.17]. Respondent could continue the Agreement without violation of new regulations .

c. The Respondent did not exert best efforts to perform the agreement

The Claimant had performed obligations with good faith and was willing to renegotiate reasonable and necessary problems in order to keep this long-run business relationship. However, Respondent refused to accept the reasonable 20% premium provided under the Agreement and terminated performance without good faith. It has been seen that the obligor's duty to overcome an impediment by a commercially reasonable substitute performance only arises where the means or way of performance which has become unavailable was, according to the parties' intentions at the time of contracting, not meant to be *exclusive* [Brunner P.322].

(III) Respondent is liable for the liquidated damages

i. The distribution agreement definitely prescribes the liquidated damages

In the event that the Respondent terminates the Agreement within 0-3 years from the date of signature, Respondent is liable for USD\$75,000,000 [Clause 65, Claimant's Ex. No.1].

ii. Respondent terminated the agreement in three years

The two parties signed the distribution agreement on 14 December 2010, and the Respondent terminated it on 1 June 2013. The Agreement has not been performed for 3 years.

iii. Claimant is entitled to claim liquidated damages against Respondent for termination

Where the contract provides that a party who does not perform is to pay a specified sum which is not grossly excessive to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm [Art. 7.4.13 UNIDROIT]. The Claimant Respondent's anticipatory termination brought the liability to pay liquidated damages: USD \$75,000,000.

D. IF THE TRIBUNAL WERE TO ISSUE AN AWARD IN FAVOR OF THE CLAIMANT, THE ISSUE COULD BE ENFORCED

(I) THE NEW TOBACCO REGULATION IS NOT A PUBLIC POLICY IN COMPLIANCE WITH NEW YORK CONVENTION

i .Public policy in compliance with New York Convention refers to international public policy

If the competent authority finds that the recognition or enforcement of the award would be contrary to the public policy of the country, recognition and enforcement may be refused[*Art.5 Para.2 NYC*]. The finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances. Only exceptional circumstances could be regarded as violating international public policy[*Recommend 1(a)(b) Final Report*]. That means public policy in compliance with NYC refers to international public policy.

ii .The new tobacco regulation is not an international public policy

The international public policy of any state includes:(1)fundamental principles pertaining to justice or morality;(2)rules designed to serve the essential political social or economic interests of the state;(3)the duty of the state to respect its obligations towards other states or international organizations[*Recommend.1(d) Final Report*]. In this case, the award favoring the Claimant does not pertain to fundamental principles about justice, morality and the duty to other countries..

In fact, the new tobacco regulation has met with strong opposition from almost all major tobacco distributors with most claiming that such stringent restrictions would cause massive disruptions in their operations and could amount to a complete eradication of their trademarks and brand images[*Claimant's Ex.no.5*]. An international public policy is common to many state and is based on basic notions of justice and morality[*Parsons & Whittemore v. Societe Generale*]. The prohibition of trademarks and marks is not provided in the FCTC[*Art.11 FCTC*]. The new tobacco regulation, only a national law, also harms the intellectual property rights and business operations of the tobacco producers. It is not of universal application.

**(II) AN AWARD IN FAVOR OF CLAIMANT DOES NOT AFFECT PUBLIC
POLICY IN GONDWANA**

i .There is no violation of public policy when awarded liquidated damages

“Contrary to public policy” means “contrary to the fundamental principles of morality and justice of the forum” [*Hebei Import & Export Corp v Polytek*].When the enforcement leads to actions which are either directly prohibited by law or harm the sovereignty or safety of the state, affect the interests of large social groups, are incompatible with the principles of building an economic, political and legal state, affect the constitutional rights and freedoms of citizens or contradict the fundamental principles of civil law, such as the equality of parties,inviolability of property or freedom of agreement,an international commercial arbitration award may be deemed to be in violation of the public policy [*Odjell SE v. OAO*]

In this case,the award in favor of the Claimant is that the Respondent should pay liquidated damages.The public policy in Gondwana is to control sale and use of tobacco. This new strict tobacco regulation which lacks universal application and harms social benefits is not included in public policies in compliance with NYC.There was no violation of public policy in cases where awarded liquidated damages[*Para.59 Model Law digest 2012*].

CONCLUSION ON SUBSTANTIVE SUIT

In the light of the above, it is the submission of the Claimant that the enforcement of Bill 275 and new tobacco regulation are reasonably foreseeable for the Respondent and are not the excuse of the termination.Therefore,The Respondent’s obligations were not vitiated and the Respondent is liable for liquidated damages the Agreement required.

REQUEST FOR RELIEF

Claimant respectfully requests the Tribunal to order that:

1. Liquidated damages in the sum of USD \$75,000,000 pursuant to Clause 60 of the Agreement;
2. The Respondent to pay all costs of the arbitration, including the Claimant's expenses for legal representation, the arbitration fee paid to CIETAC, and the additional expenses of the arbitration as set out in Article 50, CIETAC Arbitration Rules;
3. The Respondent to pay the Claimant interest on the amounts set forth in items 1 and 2 above, from the date those expenditures were made by the Claimant to the date of payment by the Respondent