

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

MEMORANDUM FOR RESPONDENT

TEAM CODE: NO.120R

On Behalf of

Conglomerated Nanyu Tobacco Ltd.

142 Longjiang Drive

Nanyu city

Nanyu
“CLAIMANT”

Against

Real Quik Convenience Stores Ltd.

42 Abrams Drive

Solanga

Gondwana
“RESPONDENT”

TABLE OF CONTENT

INDEX OF ABBREVIATIONS	VIII
LIST OF AUTHORITIES	IX
STATEMENT OF FACTS	1
ARGUMENT	2
PART ONE: THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER THE DISPUTE	2
The Tribunal has no jurisdiction over this dispute on the basis that:	2
I. The Tribunal may determine its own jurisdiction	2
II. A valid arbitration agreement is in place	2
III. There is a Multi-tier dispute resolution in the arbitration Agreement	3
A. <i>3.1 Clause 65 of the agreement:</i>	3
B. <i>Fact</i>	4
IV. There is no fulfillment of mandatory conciliation	4
A. Conducting negotiation is the expressed obligation in the agreement.	4
B. Conducting negotiation is the implied obligation in the agreement.	5
C. Conducting negotiation is mandatory and a pre-condition to arbitration.	5
D. Conducting negotiation is to show respect for the party autonomy.	5
V. There is no fulfillment of the 12-month period.	6
A. The precondition of 12-month period isn't satisfied	6
B. The 12-month period is promissory and binding.	6
C. The 12-month period is cooling-off period.	6

PART TWO: THE ARBITRAL SHOULD ADMIT THE GONDWANA GOVERNMENT’S AMICUS CURIAE BRIEF 7

The arbitral tribunal should admit the Gondwana government’s amicus curiae brief for consideration during the proceedings based on that:

- I. The conception of amicus curiae 7
- II. The rapid rise of admitting amicus curiae 7
- III. The assistance of amicus curiae 8
- IV. The standard of admitting the amicus curiae brief 9

PART THREE: THE RESPONDENT’S OBLIGATIONS UNDER THE AGREEMENT WERE VITIATED BY THE IMPLEMENTATION OF BILL275 AND THE GONDWANDAN GOVERNMENT GOVERNMENT’S NEW, MORE STRINGENT REGULATIONS. 10

I. The respondent should have fulfilled their obligations in the contract. But after the implementation of the bill275, if the respondent continue to perform the obligations under the Distribution Agreement , it will breach Gondwandan laws. 10

A. The respondent should have fulfilled their obligations in the contract. 11

B. But the implementation of the bill275 is the main reason for termination. 12

a. The bill 275 which was passed into law by the Gondwandan Senate should be obeyed. 12

b. The bill275 is opposite to the obligations of the respondent. 12

II. Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due(CISG ART.81)	12
A. The avoidance of the contract can apply to the CISG	12
a. The relevant governing law clause is found in Clause 66 of the Agreement	12
b. The dispute falls within the scope of the CISG.	12
B. The respondent terminated the contract effectively, so the obligations before terminating are vitiated	13
a. Respondent’s notice of termination of the Distribution Agreement is effective.	13
B. <i>Avoidance of the contract releases both parties from their obligations under it, subject to any damages, which may be due. CISG ART.81 (1)</i>	13
III. They can apply to the CISGART.79, so the respondent shall be exempted from liability, the liquidated damages shouldn’t be performed as well.	14
A. The impediment beyond respondent’s control.	14
B. The respondent can’t reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoid or overcome it or its consequences.	14
a. The government has already began researching methods of	

curbing this percentage, and
 began to enforce stricter
 regulations on the sale and use
 of tobacco products. 14

b. Social discourse also indicated
 that it was unlikely to implement
 a stricter bill. 15

PART FOUR: IF THE TRIBUNAL WERE TO ISSUE AN AWARD IN
 FAVOR OF THE CLAIMANT, THERE WOULD BE A RISK OF
 ENFORCEMENT 16

I. According to the governing law, namely the NYC
 which mentioned in ART.5, Recognition and
 enforcement of an arbitral award may also be
 refused if the competent authority in the country
 where recognition and enforcement is
 sought finds that 2(b) the recognition or
 enforcement of the award would be contrary
 to the public policy of that country 16

**A. Recognition and enforcement of an arbitral
 award may also be refused if it would be
 contrary to the public policy of that country
 .NYC.ART.5 (2) 16**

a. *“The New York Convention” is
 an applicable law 16*

**B. The “public policy” here should be
 identified as “international public policy”. 16**

a. The reason for international public
 Policy.

16

- b. The standard of the international public policy. 17
- c. Three types of international public policy 17

II. Protecting public health and safety is the public policy in Gondwana. And indeed, the government's bill275 and the regulation lead to 30% decline in tobacco industry in Gondwana. It protected public health and safety. 18

A. Protecting public health and safety is the public policy in Gondwana. 18

B. The government's bill275 and the regulations protected public health and safety. 18

- a. The goal of government's regulations is to protect public health and safety. 18
- b. The implementation of bill 275 protects the public health and safety. 18

III. But if the tribunal issue an award in favor of the claimant, it means that they don't favor in the respondent's choice. The meaning of judgement is to promote the selling of the tobacco products and people to smoking. It will hurt public health and safety. 19

A. The award tribunal issued in favor of the Claimant 19

B. The meaning of judgement is to promote the

**selling of the tobacco products and people to
smoking. It will hurting public health
and safety. 19**

PRAYER FOR RELIEF 20

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
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

LIST OF AUTHORITIES

TREATIES, CONVENTIONS AND LAWS

<i>UNCITRAL Model Law</i>	UNCITRAL Model Law on International Commercial Arbitration, 1985.
<i>NEW YORK Convention</i>	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.
<i>UNIDROIT Principles</i>	UNIDROIT Principles of International Commercial Contracts, 2010.
<i>CIETAC rules</i>	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules
<i>CISG</i>	The United Nations Convention on Contracts for the International Sale of Goods of 1980
<i>Final Report</i>	Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards

BIBLIOGRAPHY

The Influence of Amicus Curiae Briefs on the Supreme Court	Joseph D. Kearney& Thomas W. Merrill, University of Pennsylvania Law Review,Vol,148,p.743,2000]
"Arbitral proceedings and public policy"	For a recent review, see Sikiric, "Arbitral proceedings and public policy", (2000) 7 Croation Arbitration Yearbook85
Public policy rules	International Law Association New Delhi Conference (2002) Committee On International Commercial Arbitration P6
Interim Report part II;	Mayer, Droit International Priv é (6the dn., Montchrestien, 1998), p. 135 et seq.

CASES

ICSID Case No ARB/11/28	In Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey
US Court	Salmon LJ (as Lord Salmon) in Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229 at p. 266 F-G
US Court	Ryan v. Commodity Futures Trading Comm'n, 125F.3d1062,1063(7th Cir.1997
US Court	Parsons & Whittemore Overseas Co., Inc. -v- Soci é éG éri érale de l'Industrie du Papier RAKTA and Bank of America508 F. 2d 969 (2nd Cir., 1974)

STATEMENT OF FACTS

Conglomerated Nanyu Tobacco Ltd [referred as Claimant] and Real Quik Convenience stores Ltd [referred as Respondent] have a long-time business relationship in the field of sales of tobacco products in the Gondwana state . Both parties signed a ten year's sales contract [referred as the Distributed Agreement] on 14 December 2010.which states the parties' obligations. Parties also admitted that if the environment kept steady, the obligations should be fulfilled as written in the agreement.

On 14 March 2011, a Gondwana senator introduced“Clean our Air”(Bill275) which passed into law on 13 April 2012 and then entered into force on 1 January 2013. The implementation of Bill 275 has an effect on the performance of respondent's obligations. Because the Gondwandan regulations clearly prohibit the sale of any promotional items,which is something that we are contractually obligated to sell under the current Distribution Agreement. So the respondent can't sell the branded merchandise from the claimant legally and provide the prominent counter space to promote the selling of claimants' tobacco products.

On the 11 April 2013, both the parties renegotiate the Agreement in the light of the implementation of bill275. However, the Parties were unable to come to an agreement and in the end the Agreement remained the same.

On 1 May 2013, the Respondent notified the Claimant that it would no longer be able to perform its duties under the current Agreement, and that as a result it would be terminating the Agreement, effective from 1 June 2013 .The Respondent noted that due to the new governmental regulations, it would be impossible for the Respondent to comply with provisions of the Agreement that required the Respondent to provide shelf and counter space for the Claimant's displays, and that it would be impossible for the Respondent to provide branded merchandise in compliance with the new regulations. As a result of it, respondent terminate the contract by sending notices.

Claimant accepted the termination yet claim for liquidated damages, which is \$75,000,000 as Cls 60 in the contract regulates But the respondent refused to pay the liquidated damages because the termination of the Agreement was due to factors outside of the Respondent's control, which could not have been foreseen at the time the Agreement was signed, the Agreement is thus frustrated.

On the 12 Jan 2014, the claimant applied for the arbitration.

ARGUMENT ON PROCEDURAL PART

PART ONE : THE TRIBUNAL HAS NO JURISDICTION OVER THE DISPUTE

The Tribunal has no jurisdiction over this dispute on the basis that:

- I. The Tribunal may determine its own jurisdiction
- II. A valid arbitration agreement is in place
- III. There is a Multi-tier dispute resolution in the arbitration agreement
- IV. There is no fulfillment of mandatory conciliation
- V. There is no fulfillment of the 12-month period.

I. Jurisdiction determined by Tribunal

CIETAC shall have the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case. CIETAC may, where necessary, delegate such power to the arbitral tribunal. [Article 6.1 CIETAC Rules]

The arbitral may rule on its own jurisdiction including any objection with respect to the existence or validity of the arbitration agreement [Article 16(1) UNCITRAL Model Law;].

II. A valid arbitration agreement is in place

The arbitration agreement, namely the clause 65, is valid. Before a matter may be conferred for arbitration there must be a valid agreement between the parties in writing [Article 7 UNCITRAL Model Law].

For that purpose, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the other terms of the contract. A decision by the

arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. [Article 16(1) UNCITRAL Model Law;]

In our case, the arbitration clause is the clause 65[Page 11. 65.1]. Both parties admit the legal effect of the clause 65, especially that the party can submit the dispute to arbitration only after 12 months periods without a resolution.

On this basic, if the parties want to submit dispute to arbitration, the requirement in the arbitration agreement should be satisfied. Following, let's focus on the clause 65 and the fact.

III. There is a Multi-tier dispute resolution in the arbitration agreement.

A. Clause 65 of the agreement:

Clause 65 of the Agreement states that any dispute shall be settled through consultation or negotiation. Clause 65 further states that either party may only commence arbitration if 12 months have elapsed since the date the dispute arose.

A multi-step dispute resolution clause is a contractual provision that requires the parties to an agreement to escalate a dispute through varying levels of management or other processes, such as negotiation or consultation, using agreed-upon procedures before litigation or arbitration may proceed.

D. Jason File's helpful article on these clauses picks up from there:

These clauses typically prescribe tiered procedures in the event of a dispute. Such procedures often begin with the notification and description of a dispute by the aggrieved party followed by a period of consultation, negotiation and/or mediation.

B. Fact:

The date on which the dispute arising is *MAY 1 2013*, on account that this dispute is about the early termination of the agreement due to the bill 275 [P20: Claimant's Exhibit No. 8] The date on which respondent submit this dispute to CIETAC is January 12 2014[P1]. Only a period of 8 months has elapsed from the date on which the dispute arose.

Furthermore my client only received the notions of Default from July 1 and August 1. Those notions ignored the fact my client has to terminate the performance, if not, we will face the risk of illegal act. There is no negotiation between two parties after the dispute arose.

IV. There is no fulfillment of mandatory conciliation**A. Conducting negotiation is the expressed obligation in the agreement.**

According to the Arbitration clause, it states that the Parties shall initially seek a resolution through consultation and negotiation. "Shall" means have the duty to or be required to. To correctly use "shall," confine it to the meaning "has a duty to" and use it to impose a duty on a capable actor¹.

This is the true intention from both parties when they enacted this contract. When the dispute arose, both parties have the contractually obligation to negotiate the dispute firstly rather than apply for arbitration.

B. Conducting negotiation is the implied obligation in the agreement.

In this case, since this current arbitration deals solely with the alleged termination of the agreement, the claimant was contractually obligated to

¹ Bryan A. Garner, *A Dictionary of Modern Legal Usage* 940-941 (2d ed., Oxford U. Press 1995).]

conduct negotiate and consult in good faith. Under the UNIDROIT PICC Article 5.1.1: Implied obligations stem from good faith and fair.

C. Conducting negotiation is mandatory and a pre-condition to arbitration.

In Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey (ICSID Case No ARB/11/28), an ICSID tribunal considered a requirement to seek to resolve disputes through negotiation was mandatory and a pre-condition to arbitration. The Tribunal rejects Claimant's contention that Article 8(2) is merely procedural.

D. Conducting negotiation is to show respect for the party autonomy

This distribution contract is based on the parties' common intention, which means after the dispute arose, the negotiation and consultation are required due to their intention when draw this contract. Both parties should follow it and show the respect for the party autonomy.

But after the termination of the agreement on June 1 2014, Claimant skipped the negotiation period, and submits the arbitration application directly to the tribunal.

V. There is no fulfillment of the 12-month period.

A. The precondition of 12-month period isn't satisfied

The Claimant is barred from bringing this claim to arbitration until a period of 12 months had passed since the dispute arose. This means Claimant cannot submit this dispute to arbitration until May 1 2014. In

effect, they submitted applications on January 12 2014. The 12-month period was not over at that time.

B. The 12-month period is promissory and binding.

The first reason is that the 12 months was recorded in the clause of the distribution agreement. The parties both acknowledge the legal effect, so it is promissory and binding.

C. The 12-month period is cooling-off period.

The second reason is, considering the long-lasting business relationship between my client and Claimant; they need to negotiate during certain sufficient time. And due to the agreement is about 10 years cooperation plan, the 12-month period is sufficient and acceptable.

If the arbitration starts immediately after the dispute arose, the award will be final and binding. It will effect the next step cooperation between the parties if they want.

In summary, the effective arbitration agreement as construed in clause 65 of the agreement would not arise until MAY 1,2014, which means the tribunal cannot control this case until that time.

As a result, the tribunal lacks jurisdiction to decide on this dispute, as it has not been constituted in accordance with the arbitration agreement.

PART TWO: The arbitral tribunal should admit the Gondwana government's
amicus curiae brief

The arbitral tribunal should admit the Gondwana government's amicus curiae brief for consideration during the proceedings based on that:

- I. The conception of amicus curiae
- I. The rapid rise of admitting amicus curiae.
- II. The assistance of amicus curiae
- III. The standard of admitting the amicus curiae brief.

I. The conception of amicus curiae

Amicus curiae, which means friend of the court, is someone that is not a party to a particular litigation but that is permitted by the court to advise it in respect to some matter of law that directly affects the case in question. The purpose of amicus curiae is to help the courts to deliver impartial justice.²

For us, it refers to the latter from Gondwana Government. The purpose Gov. wants to submit is to ensure the arbitral tribunal understands its view. The reason why they enforce the bill 275 is to safeguard the public health and prevent further casualties in the future.

II. The rapid rise of admitting amicus curiae.

Furthermore, the amicus curia brief is becoming widely used in the litigation and arbitration.

Amicus participation has risen dramatically over the last fifty years. From 1986 to 1995, the percentage of Cases Quoting an Amicus in All Cases is 15%; also, beginning with

² As stated by Salmon LJ (as Lord Salmon) in *Allen v. Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at p. 266 F-G

close to 18% of the cases with amicus filers decided between 1946 and 1955 and ending with just under 37% of the cases with amicus filers between 1986 and 1995.³

According to a literature by Cambridge Journal of International and Comparative Law DOI: 10.7574 , “As one review notes, it served to allow amicus curiae participation in 35 cases between 1 November 1998 and 31 March 2005, and it signifies probably the most active amicus curiae forum in international law.” We can see that it is increasingly popular.

The rapid rise of admit this brief during consideration illustrate the important of amicus curiae. The reason why this system is important is that the brief can notice the tribunal the public interest outside the parties. During the proceedings, the exhibits we saw are to prove the interests of the parties; the amicus curiae brief from Gov. can broaden the tribunals’ cognitive range.

III. The assistance of amicus curiae

Since both parties haven’t expressed clearly the meaning and the intention of the state law, (p32) the amicus curiae reiterate the public policy; explain the strong position of the government public policy

On the one hand, admitting this brief will help tribunal recognize that “tobacco control and restriction is a keystone”, considering the amicus curie’s real intention is to protect public health. It will also help the arbitral tribunal to deliver impartial justice.

Referred to a case, which successfully accepted amicus curiae (United States v. Stevens) , in this case,“amicus brief urged the Court to recognize the protection of animals as a compelling government interest and uphold the statute. ”

On the other hand, this dispute touch the public policy of Gov. The Gov. spares no pains

³ [See Joseph D. Kearney& Thomas W.Merrill,The Influence of Amicus Curiae Briefs on the Supreme Court,University of Pennsylvania Law Review,Vol,148,p.743,2000]

to reduce tobacco consumption to safeguard the health. If the tribunal doesn't admit the brief, they won't have a better chance to realize what happened in Gondwana tobacco market and the real intention of the bill 275 as the public policy.

IV. The standard of admitting the amicus curiae brief.⁴

Courts have recognized the circumstances in which an amicus briefs should normally be allowed:

- A. When a party is not represented competently or is not represented at all,
- B. When the amicus has an interest in some other case that maybe affected by the decision in the present case, or
- C. When the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. If these conditions are not met, leave to file amicus curiae brief should be denied.

In this case, Gondwana provide the unique perspective that help tribunal recognize that “tobacco control and restriction is a keystone”. The amicus curie’s real intention is to protect public health.

In conclusion, the amicus curiae help the arbitration know the real intention of the government and bad circumstance that respondent would face. The arbitral tribunal should accept the amicus curiae.

⁴ Ryan v. Commodity Futures Trading Comm’n, 125F.3d1062,1063(7th Cir.1997);

ARGUMENT ON MERTS PART

PART THREE: THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE VITIATED BY THE IMPLEMENTATION OF BILL275 AND THE GONDWANDAN GOVERNMENT GOVERNMENT'S NEW, MORE STRINGENT REGULATIONS.

The respondent should have fulfilled their obligations in the contract. But after the implementation of the bill275, if the respondent continue to perform the obligations under the Distribution Agreement , it will breach Gondwandan laws. (I)As a result of it , the respondent terminated the contract. The effect of termination is to release both parties from their obligation to effect and to receive future performance. So the respondent's obligations were vitiating.(II) They can apply to the CISGART.79, so the respondent shall be exempted from liability ,the liquidated damages shouldn't be performed as well.(III)

I. The respondent should have fulfilled their obligations in the contract.(A) After the implementation of bill 275, continued performance of our obligations under the Distribution Agreement would result in us breaching Gondwandan laws, and respondent would rather terminate the Agreement than face a governmental fine or possibly jail. So the implementation of the bill275 is the main reason for termination (B)

A. The respondent should have fulfilled their obligations in the contract.

The parties signed a 10 year distribution agreement on 14th Dec2010, which states our obligations. Parties also admitted that if the environment kept steady, the obligations should be fulfilled as written in the agreement. (Cl.Fact.6.P3)

The respondent needs to perform three obligations before the termination. The first one is selling and purchasing of the tobacco products. The second one is selling and purchasing

branded merchandise. The third one is display requirement provide (prominent counter space). (Cl.Ex.1.P8)

B. But the implementation of the bill275 is the main reason for termination

a. The bill 275 which was passed into law by the Gondwandan Senate should be obeyed.

On 14 March 2011, a Gondwandan senator introduced the “Clean our Air” Bill 275/2011 (“Bill 275”). Despite the controversy, the Gondwandan Senate passed Bill 275 into law on 13 April 2012 by a vote of 52-49. The requirements as stated under Bill 275 subsequently entered into force on 1 January 2013. (Cl.Fact.12.P5)

As a convenience store chains in the state of Gondwana , the respondent should obey the laws in Gondwana ,.

b. The bill275 is opposite to the obligations of the respondent.

Gondwandan regulations clearly prohibit the sale of any promotional items, which is something that we are contractually obligated to sell under the current Distribution Agreement. So the respondent can’t sell the branded merchandise from the claimant legally and provide the prominent counter space to promote the selling of claimants’ tobacco products.

The bill275’s requirements for retail packaging and appearance of tobacco products have five parts. (Cl.Ex.2.P13-P14) The bill ruled the tobacco product and any promotional merchandise or any material that promoted smoking packaging and forbid any free samples of cigarettes and material containing or displaying trade marks or marks associated with tobacco products.

The first one is about the retail packaging of all tobacco products. The outer surfaces and inner surfaces of the packaging must not have any decorative ridges, embossing, bulges

or other irregularities of shape or texture, or any other embellishments, other than as permitted by the regulations. And the cigarette pack or cigarette carton must comply with the bill's requirements.

The second one is about color and finish of retail packaging. All outer surfaces and inner surfaces of the retail packaging, and both sides of any lining of a cigarette pack must be in matte finish; and If regulations are in force prescribing a color – must be that color, otherwise must be drab olive green. The above section shall not apply to the health warnings, relevant legislative requirements, or text of the brand, business, or company name for the tobacco products.

The third one is Prohibition on Trademarks and Marks generally appearing on Retail Packaging. No mark and trade may appear anywhere on the retail packaging of tobacco products. Which can be appeared on the retail packaging of tobacco products are the brand, business or company name for the tobacco products, any variant name for the tobacco products the relevant legislative requirements and health warnings.

The forth one is Requirements for brand, business, company or variant name

The fifth one is Restrictions on sale and promotion of tobacco products

- (1) No manufacturer, distributor, or retailer may distribute or cause to be distributed any free samples of cigarettes, smokeless tobacco, or other tobacco products;
- (2) No manufacturer, distributor, or retailer may distribute or cause to be distributed any material containing or displaying trade marks or marks associated with tobacco products.

II. Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. (CISG ART.81)

A.The avoidance of the contract can apply to the CISG

- a. The relevant governing law clause is found in Clause 66 of the Agreement, which

states:

“This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG), supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts 2010.”

The dispute was arising out of the agreement. The dispute here is effect of termination. There are articles in the CISG that can govern this dispute.

b. The dispute falls within the scope of the CISG.

CISG applies to contracts of sales of goods between parties whose places of business are in different states that are contracting states or the rules of private international law lead to the application of the law of a contracting state (CISG Art1) . Nanyu and Gondwana are both parties to the CISG and they are different states, thus CISG can be applied to this dispute.

B. The respondent terminated the contract effectively , so the obligations before terminating are vitiated.

a. Respondent's notice of termination of the Distribution Agreement is effective.

The respondent wrote to inform claimant that effective from 1 June 2013, it will be terminating the Distribution Agreement between our two companies. (CISG Article 26. A declaration of avoidance of the contract is effective only if made by notice to the other party.)

b. Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. CISG ART.81(1)

CISG ART.81 ruled that “Avoidance of the contract releases both parties from their

obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract". As a result of it , the respondent's obligation doesn't need to be fulfilled after the termination. Then the obligations were vitiated.

III. We can apply to the CISG Art.79 to be exempted from liability after the termination , so the third obligation(paying liquidated damages) is vitiated. The impediment beyond respondent's control.(A)The respondent can't reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoid or overcome it or its consequences.(B)

A.The impediment beyond respondent's control.

The bill 275 is Gondwandan laws so that respondent must obey it. If the respondent choose to perform their obligations , it would face a governmental fine or possibly jail.

In fact, the claimant was challenging the constitutionality of Bill 275 before the Gondwandan courts, but fails. In April 2011, the Claimant took action before Gondwandan courts challenging the constitutionality of Bill 275, claiming that the Bill would eliminate the Claimant's intellectual property. However, the Court decided in its judgment on 23 June 2011 that Bill 275 was within the sovereign rights of Gondwana to protect public health and safety. (Re.Fact.14.P26)

B.The respondent can't reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoid or overcome it or its consequences.

- a. *The government has already began researching methods of curbing this percentage, and began to enforce stricter regulations on the sale and use of tobacco products.*

Starting in 2001, the Gondwandan government began to implement national bans on smoking areas and expanded its packaging restrictions. But the government's regulations never related to the branded merchandise so that respondent can't reasonably foresee the bill 275 which forbidding the selling of branded merchandise and providing the prominent counter space.

b. Social discourse also indicated that it was unlikely to implement a stricter bill

Excerpts from the Gondwandan Herald in 22 June 2009 "New Tobacco Regulations criticized – Too Little, Too Late?" Analysts estimate however, that despite the criticism, it is highly unlikely that the Gondwandan government will continue to implement stricter regulations, and that since the current regulations bring Gondwana in line with most major countries, there is unlikely to be a strong push for stronger regulation in the future.

{ Re.Ex.01.P28 }

Excerpts from the Gondwandan Herald in 1 April 2011 "Gondwandan plain packaging legislation – Big Tobacco to go up in smoke?" Analysts also point to the recent amendments to the Gondwandan government's tobacco legislation in 2009 which expanded packaging restrictions, and state that a more stringent bill this soon after is unlikely to pass.

Indeed, the vote of the bill is 52-49, it indicated that the bill itself was very controversial.

{ Cl.Ex.05.p17 }

- c. As a reasonable man, if the respondent can foresee the implementation of bill 275, it would foresee that it should undertake the due obligations. But as a dominant player in the Gondwana, respondent has no reason to sign this DA.

**PART FOUR : IF THE TRIBUNAL WERE TO ISSUE AN AWARD IN
FAVOR OF THE CLAIMANT, THERE WOULD BE A RISK OF
ENFORCEMENT**

According to the governing law, namely the NYC which mentioned in ART.5, Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that 2(b) the recognition or enforcement of the award would be contrary to the public policy of that country .(I) Protecting public health and safety is the public policy in gondwana . And indeed, the government’s bill275 and the regulation lead to 30% decline in tobacco industry in gondwana. It protected public health and safety.(II) But if the tribunal issue an award in favor of the claimant ,it means that they don’t favor in the respondent’s choice. The meaning of judgement is to promote the selling of the tobacco products and people to smoking. It will hurting public health and safety.(III)

I.Recognition and enforcement of an arbitral award may also be refused if it would be contrary to the public policy of that country.NYC.ART.5(2)(A) The“public policy” here should be identified as “international public policy”. (B)

A. Recognition and enforcement of an arbitral award may also be refused if it would be contrary to the public policy of that country.NYC.ART.5(2)

a. “the New York Convention” is an applicable law

Nanyu and Gondwana are both parties to the CISG and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“the New York Convention”). And the dispute was arising out of the agreement. The dispute here is about public policy. There are articles in the NYC that can govern this dispute.

B.The“public policy” here should be identified as “international public policy”.

a. The reason for international public policy.

In the context of enforcement of arbitral awards, the legislatures⁵ and courts of a number of countries have sought to qualify or restrict the scope of public policy by applying a test of "international public policy"⁶. Leading commentators have also approved the narrowing of the public policy exception and the application of "international public policy"⁷. The Committee endorses the application of a test of "international public policy".

b. The standard of the international public policy.

There have been attempts to define the contents of "public policy" and "international public policy" but no precise definition is possible.⁸ The most oft quoted comment, in arbitration case law, is that of Judge Joseph Smith in *Parsons & Whittemore* (US Court of Appeals, 1974) in which he stated that enforcement of a foreign award should be denied "only where enforcement would violate the forum state's most basic notions of morality and justice".⁹

c. Three types of international public policy

"The international public policy of any State includes: fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules"; and the duty of

⁵ As noted above (n. 10), the arbitration legislation in France, Portugal, Algeria, Lebanon and OHADA make reference to "international public policy"

⁶ For a recent review, see Sikiric, "Arbitral proceedings and public policy", (2000) 7 *Croatian Arbitration Yearbook* 85

⁷ E.g., van den Berg, "Distinction Domestic-International Public Policy" in "New York Convention Consolidated Commentary Cases", (1996) XXI *ICCA Yearbook* at p. 502; and "Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few" in *Arbitration in the Next Decade* (ICC Bulletin - 1999 Special Supplement) at p. 86

⁸ See Interim Report, part II; and Mayer, *Droit International Privé* (6th ed., Montchrestien, 1998), p. 135 et seq.

⁹ *Parsons & Whittemore Overseas Co., Inc. -v- Société Générale de l'Industrie du Papier RAKTA and Bank of America* 508 F. 2d 969 (2nd Cir., 1974)

the State to respect its obligations towards other States or international organisations."¹⁰

II. Protecting public health and safety is the public policy in Gondwana. (A) And indeed, the government's bill275 and the regulation lead to 30% decline in tobacco industry in gondwana. It protected public health and safety.(B)

A. Protecting public health and safety is the public policy in Gondwana.

The Supreme Court struck down Conglomerated Nanyu Tobacco Ltd.'s challenge, stating that not only did the Gondwandan government have the power to institute regulations protecting public health and safety, but that it had the duty to do so as a sovereign power. Bill 275 would therefore fall within the government's purview and was constitutional. (Re.Ex.02)

B.The government's bill275 and the regulations protected public health and safety.

a. The goal of government's regulations is to protect public health and safety.

The Gondwandan government began researching methods of curbing the percentage of smoking people, and began to enforce stricter regulations on the sale and use of tobacco products. And the bill275 is a law and its goal is to clean our air and protect public health and safety. (Cl.Fact.9.P4)

b. The implementation of bill 275 can protect the public health and safety.

After the bill275 entered into force in 2013.1.1, between 1 January 2013 and 1 June 2013, the tobacco industry in Gondwana experienced an average 30% decline in sales through all channels. (Cl.Fact.13.P5)

¹⁰ INTERNATIONAL LAW ASSOCIATION NEW DELHI CONFERENCE (2002) COMMITTEE ON INTERNATIONAL COMMERCIAL ARBITRATION P6

The decline in sales through all channels shows that fewer tobacco products can make our air cleaner and protect public health and safety.

III. But If the tribunal issue an award in favor of the claimant , (A)it means that they don't favor in the respondent's choice. The meaning of judgement is to promote the selling of the tobacco products and people to smoking. It will hurting public health and safety.(B)

A. The award tribunal issued in favor of the claimant

The award in favor of the claimant is that respondent pay the Claimant the liquidated damages and the all cost of the arbitration. (Cl.Req. P5)

B. The meaning of judgement is to promote the selling of the tobacco products and people to smoking. It will hurting public health and safety.

Even though the payment itself won't against the law or other governmental regulations. But the respondent terminate the distribution agreement because it doesn't want to break the law. The respondent have to make a choice between the breaching the law and payment. If the tribunal issue an award in favor of the claimant ,it means that the tribunal deny the respondent's choice . or said differently, the tribunal admit or prefer to the legality of the business of original form(packaging promotional and branded merchandise) . The meaning of judgement is to promote the selling of the tobacco products and people to smoking. It will hurting public health and safety.

PRAAYER FOR RELIEF

In light of the submissions made above, RESPONDENT respectfully requests Tribunal to declare that:

- **Tribunal has no jurisdiction over the dispute;**
- **The arbitral tribunal should admit the Gondwana government's amicus curiae brief**
- **The RESPONDENT's obligations under the agreement were vitiated by the implementation of bill 275**
- **If the Tribunal were to issue an award in favor of the Claimant, there would be a risk of enforcement.**

Respectfully signed and submitted by counsel on June 19, 2014.