

TEAM 134C

THE INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION (ADR)
MOOTING COMPETITION 2014

CONGLOMERATED NANYU TOBACCO LTD.

CLAIMANT

v.

REAL QUIK CONVENIENCE STORES LTD.

RESPONDENT

MEMORIAL FOR THE CLAIMANT

July – August 2014

On submission to the China International Economic and Trade Arbitration Commission
(CIETAC)

Hong Kong Sub-Commission (Arbitration Centre)

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QUESTIONS PRESENTED

- I. Whether the Arbitral Tribunal has jurisdiction to deal with this dispute in light of the 12 month negotiation period stipulated in the arbitration agreement;
- II. Whether the Arbitral Tribunal should admit the Gondwandan government's amicus curiae brief for consideration during the proceedings?
- III. Whether the Respondent's obligations under the Agreement were vitiated by the implementation of Bill 275 and the Gondwandan government's new, more stringent regulations;
- IV. If the Tribunal were to issue an award in favour of the Claimant, would there be a risk of enforcement?

STATEMENT OF FACTS

This case concerns a distribution agreement between Conglomerated Nanyu Tobacco, Ltd. (“the Claimant”) and Real Quik Convenience Stores Ltd. (“the Respondent”) signed on 14 December 2010. A Bill 275 came into force on 1 January 2013 in Gondawana which reportedly affected the respondent’s performance of the Agreement. A meeting between both parties was held in Nanyu City on 11 April 2013 to discuss renegotiations of the terms of the Agreement but was fruitless. A series of letters were exchanged between both parties addressing the concerns of the Respondent, primarily that the terms of the Agreement were in violation of Bill 275. However no amicable solution could be reached. The Respondent then sent a notice of termination of the agreement effective from 1 June 2013, following a notification to the Claimant informing them of the termination. The Claimant thus requested that the Respondent pay liquidated damages in the sum of USD \$75,000,000 pursuant to Clause 60 of the Agreement. The Respondent claims that they are not liable to pay the liquidated damages as the termination of the Agreement was due to factors outside of the control of the Respondent, namely the new governmental regulations preventing the sale of branded merchandise and the need for plain packaged tobacco products. Further, the Respondent contends that under Clause 65 of the Agreement that the Parties were to undergo negotiation and consultation before arbitration could commence. The Claimant thus submits this issue to arbitration.

ARGUMENTS**I. THIS ARBITRAL TRIBUNAL DOES HAVE THE JURISDICTION TO DEAL WITH THIS DISPUTE IN LIGHT OF THE 12 MONTH PERIOD STIPULATED IN THE ARBITRATION AGREEMENT****A) The need for negotiation and consultation is a procedural formality and does not affect the jurisdiction of the Tribunal to decide on the disputed sum.**

1. Tribunals have generally tended to meet consultation period as directory and procedural rather than as mandatory and jurisdictional in nature [Lauder].

2. When the waiting period is jurisdictional in nature, it is an exception [Murphy]. A party is permitted to not comply with the waiting period for negotiation and consultation if both parties cling obstinately to their positions and the possibilities for having a successful negotiation become null. The objective of the waiting period is to give the parties the opportunity to come to an amicable solution through negotiations before bringing the matter to the arbitral tribunal.

3. In the present case, it is submitted that at the time of the negotiation the parties had clung obstinately to their own views, rendering the negotiation to become unsuccessful [Cl.Ex.7]. Further, the Respondent sent a notice of termination less than a month after the first negotiation which became effective on June, 1st 2013 [Cl.Ex.8].

4. Consequently, the futility of future negotiations which resulted from the fact that the parties had clung obstinately to their own views is evidenced from this very fact. The termination of the Agreement indicates the intention of the Respondent to refrain from taking part in any future negotiation and thus defeats the purpose of the waiting period stipulated in

the Agreement. Hence, even if the 12-month negotiation period did not lapse, the tribunal still has jurisdiction over the matter at hand.

II. THE ARBITRAL TRIBUNAL SHOULD NOT ADMIT THE AMICUS CURIAE SUBMISSION FOR CONSIDERATION DURING THE PROCEEDINGS

A) The amicus curiae would have no relevance in the subject matter of the dispute

a) *The amicus curiae submission will not bear any major consequence to the public policy in Gondwana.*

5. The public policy of Gondawana will not be affected by the amicus curiae submission [IBA Rules, Article 2(a)]. Tribunals have accepted the amicus curiae submissions on the grounds that the parties to those cases were the states themselves and the public policy of those particular states were directly affected [Methanex, UPS].

6. In actuality, the state is not the one benefiting or bound by this case. In cases of purely commercial disputes where the impact of an arbitral award is limited to the disputing parties, it is not only unnecessary, but also inappropriate to introduce such a change.

7. In comparison, the dispute before this tribunal is an international commercial arbitration and it will only bind private parties. Thus, it will not affect the public policy of the state of Gondwana.

b) *The amicus curiae submission will not be impartial to the dispute.*

8. Even if the tribunal has the jurisdiction to accept amicus curiae briefs, its decision on this is still subject to the rights of the parties to agree on the matter [UNCITRAL Model Law, Article 34(1)]. The principle of amicus curiae was originally a judicial principle to expound a

law [Allen's case]. Hence, the essence of this principle is that the amicus curiae submission must be impartial as its role is only to expound the law.

9. Indeed, each party has to be given full opportunity of presenting his case [UNCITRAL Model Law, Article 18(1)]. However, this principle of equality is not without any limitation. Discrimination in the presentation of the parties' respective position is strictly prohibited [Revised Draft].

10. Furthermore, it is the essence of amicus curiae submission that its purpose is to expound the law impartially. Accepting an amicus curiae submission which clearly sides with one disputing party is not only unfair to the other party but also detrimental to the findings of the case.

11. The Claimant might also seek to rebut our contention on the basis that there will be legal impediment and that the Respondent will obtain unfair privilege which will jeopardize the fairness and equality between the parties [IBA Rules, Articles 2(b) & 3(e)].

12. The Tribunal is under a duty to exclude the production the Amicus Curiae on the basis of commercial confidentiality and for considerations of procedural economy, proportionality, fairness or equality of the parties [IBA Rules, Articles 2(e) & 2(g)].

13. An amicus brief submitted by the Respondent's government would favour and benefit the Respondent, striking out the need for equality. In practicality, amicus should be neutral in nature so as to not prejudice either party. The amicus curiae could be tainted by political influence because the government has already stated that if the tribunal refuses to accept it, it will be detrimental to the public policy of state [Re.Ex.3]. To a certain degree, it will damage the reputation of the Claimant's business unjustly when the dispute is strictly on a contractual basis which will only affect the Claimant and the Respondent.

14. The tribunal would be formulating a new principle if it were to accept the amicus curiae submission by the Respondent's government as the element of impartiality which is the essence of the principle of amicus curiae would be disregarded.

15. Thus, the amicus curiae brief proposed to be submitted by the Government of Gondwana should not be admitted as it is not relevant to the commercial dispute at hand and it is not impartial.

III. THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE NOT VITIATED BY THE IMPLEMENTATION OF BILL 275 AND THE GONDWANDAN GOVERNMENT'S NEW, MORE STRINGENT REGULATIONS.

A) The elements to satisfy a claim of frustration are not fulfilled.

16. Despite the implementation of Bill 275 and the issuance of Gondwana's new more stringent regulations, the contract cannot be deemed to be frustrated under Article 79 [CISG] as its first and second elements cannot be fulfilled by the respondent. The elements concerned are the existence of an impediment beyond control and unforeseeability of the impediment.

a) *The impediment was not beyond the Respondent's control*

17. Frustration requires the impediment or supervening event to be beyond the control of the party claiming it. However in the present case, the claimant contends that the impediment which is the implementation of Bill 275 is within the Respondent's control.

18. The impediment in a sale and delivery contract is usually the passing of government decree. In order to be deemed beyond the control of the parties, the decree must absolutely prevent the transaction and not providing for a mere restriction [Sanguinarine case].

19. The Claimant contends that Bill 275 does not absolutely exclude any sale of tobacco products. It only restricts the promotional aspect of tobacco products, and thus it is not a sufficient impediment beyond the control of the respondent.

20. A situation where performance of the contract only became impracticable rather than impossible is held to be within the control of the parties [Tomato Case].

21. The Respondent cannot claim the Distribution Agreement as frustrated as the performance is only impracticable rather than impossible as the contract is severable and hence, it is still possible to be executed [CISG Articles 51 & 73]. The contract is divisible into two parts which are the sales of tobacco products and the sales of branded merchandise. This is obvious as the items are described in separate terms and the purchase orders are also separated.

22. It is contended that the agreement to sever the contract to enable performance can be achieved through another negotiation between the parties within reasonable time. Although there was indeed an offer for a re-negotiation after the first negotiation on 11th April 2013, it is submitted that the offer was made too soon which is 8 days after the first negotiation on 19th of April 2013. Thus, it was not made within reasonable time. Moreover, on 1st of May which is less than a month after the negotiation on 11th April, the Respondent had terminated the contract.

b) *The respondent must not have reasonably expected the impediment*

23. In the case of Sanguinarine, there exists foreseeability as the Federal Environmental Law that banned sales of sanguinarine without approval is enacted and enforced before the conclusion of the contract. Hence, the claim under Article 79 was not upheld as it was

reasonable for the buyer to expect that the sanguinarine cannot be imported without an approval.

24. In comparison, the enactment and enforcement of Bill 275 was on the 14th March 2011 and 13th April 2012 which is after the conclusion of the Distribution Agreement on the 14th of December 2010. However so, the claimant argues that the respondent can reasonably foresee the coming of such Bill as the Gondwandan government had been enforcing regulations on the sale and use of tobacco products, and this has been continuously done and consistently getting stricter from 2001.

IV. THERE WOULD BE NO RISK OF ENFORCEMENT IF THE ARBITRAL TRIBUNAL WERE TO ISSUE AN AWARD IN FAVOUR OF THE CLAIMANT.

25. The award if to be given to the claimant would be enforceable as against the Gondwana's government contention that it would violate the public policy of Gondwana [New York Convention, Article V (2)(b)].

26. International arbitral award is contrary to public policy if the enforcement would [PT Asuransi]; "shock the conscience", [Downer Connect] "clearly injurious to the public to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public" [Deutsche] or "where it violates the forum's most basic notion of morality and justice" [Parsons v Whittemore].

27. The position of the courts in Singapore is deemed to be consistent with the narrow interpretation of public policy as a ground to refuse recognition or enforcement.

28. Furthermore, the International Law Association (ILA) has recommended the use of the phrase of 'international public policy' as an appropriate description of the restrictive scope of public policy that should apply to convention awards [BCB].

29. International public policy can be broken down in three categories: fundamental principles; lois de police; and international obligations [Final Report].

30. To determine whether the award made is contrary to the public policy, the public policy must first be identified. Then, it must be shown which part of the award conflicts with it [John v Toyo].

31. Bill 275 in the present case may fall within the second category of international public policy which is lois de police as it is mandatory and at the same time form part of the State's international public policy [Final Report of 2002].

32. Even if Bill 275 is a lois de police, the award sought by the claimant would not affect the public policy of the state. This is because, claimant is only seeking for liquidated damages of USD \$75,000,000 that is payable to them upon respondent's early termination of the Distribution Agreement. This is compared to seeking for the continuing performance of the agreement that would surely violate Gondwana's public policy.

33. Indeed that tobacco control and restriction is a keystone of Gondwana's public policy. But, this public policy does not encompass any prohibition of the sale of tobacco products in totality, nor does it prohibit the making of any contract which contains any contrary terms and conditions. The public policy under Bill 275 merely limits the sale of tobacco products in the form of the packaging as well as the promotion of the merchandise of the tobacco products.

34. The contract between the parties is a valid contract and not frustrated as it is able to be severed, thus the payment of liquidated damages should be made payable to the claimant.

35. It is contended that since the award sought is the payment of liquidated damages, there is no conflict between the public policy and the award as it only affects the parties in the Distribution Agreement and not the people of Gondwana.

36. The award will not encourage the people of Gondwana to smoke more tobacco, nor will it affect the justice system in Gondwana as the claimant is not pursuing for performance of the contract. Hence, the enforcement of the award will not shock the conscience, or is clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the state of Gondwana, or where it violates Gondwana's most basic notion of morality and justice.

RELIEF REQUESTED

The Claimant respectfully requests Tribunal to adjudge and declare that:

1. Liquidated damages in the sum of USD \$75,000,000 pursuant to Clause 60 of the Agreement is payable to the Claimant;
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.

Respectfully submitted,

COUNSELS FOR CONGLOMERATED NANYU TOBACCO LTD.