TEAM 134R

THE INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION (ADR)

MOOTING COMPETITION 2014

CONGLOMERATED NANYU TOBACCO LTD.

CLAIMANT

v.

REAL QUIK CONVENIENCE STORES LTD.

RESPONDENT

MEMORIAL FOR THE RESPONDENT

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) <u>The period of negotiation agreed is yet to lapse before the dispute is submitted to the tribunal</u>

a) *The date of dispute arose on 11th March 2013*

1. The Respondent contends that the dispute in this case arises on 11th March 2013 [Cl.Ex.6] when the Respondent's CEO sent a letter to the Claimant's CEO proposing renegotiation of the Distribution Agreement (on the 11th of April 2013). The dispute arose on this date because it starts from the date when the Claimant is informed of the possible breach and not from the date which the breach actually occurred [Lauder**,** Burlington's case].

2. In the current case, the Respondent had explained the situation in Gondwana where they couldn't continue with the agreement without facing governmental sanction nor can they continue paying a premium of 20% to the Claimant as tobacco in Gondwana has been commoditized. It is submitted that this is the information of the possible breach given by the Respondent to the Claimant.

b) *The dispute was submitted to the tribunal on 12th January 2014.*

3. With regards to the meeting of both parties on 11th April 2013, the Respondent concedes that there has been a negotiation between parties after the dispute arises. However, such negotiation does not give weightage to the Claimant's submission as the waiting period of 12 months is yet to end at the time the current case is submitted to the Tribunal.

4. The application for arbitration by the Claimant was signed on 12th January 2014. It has only been 10 months and 1 day since the dispute arose. Therefore, based on the arbitration

clause between parties, the Claimant has no authorisation to submit the case today on 12th January 2014.

B) <u>Clause 65 of the distribution agreement is jurisdictional whereby the non-compliance renders the tribunal a lack of jurisdiction to hear the case.</u>

a) *The non- compliance of the negotiation period clause is jurisdictional in nature.*

5. In addition, the Respondent submits that 12 months waiting period in Clause 65 of the Agreement is mandatory and jurisdictional in nature. The failure of the Claimant to comply with the waiting period will amount to its claim being barred by the Tribunal as the Tribunal would be lacking in jurisdiction with regards to the case.

6. There are four recent cases decided by the ICSID panel involving a negotiation period clause that support the contention that non-compliance of the such clause renders the tribunal lack of jurisdiction.

7. In the most recent case, the tribunal found this waiting period as a fundamental requirement that a Claimant must comply with compulsorily, before submitting a request for arbitration [Murphy's case].

11. Such a requirement is also a jurisdictional one. A failure to comply with the requirement would result in a determination of a lack of jurisdiction [Enron's case]. Such contentions are also supported by the case of Generation Ukraine v Ukraine (2003) (ICSID) and Burlington Resources v Republic of Ecuador (2010) (ICSID).

12. Hence, the Tribunal lacks jurisdiction to hear this dispute as the negotiation clause was not complied with by the Claimant due to the insufficiency of the 12 months lapse after the dispute on 11th March 2013 arose.

b) *In the event the Claimant relies on the exception, the exception would not be applicable.*

13. In Murphy's case, an exception to the general rule of the period clause being jurisdictional was established. The exception provides that the clause would be regarded as procedural if it could be proven that both parties clung obstinately to their position, disallowing them from conducting any negotiation to resolve their conflicting issues.

14. It is the submission of the Respondent that the exception would not apply to the current case. Even if the Claimant submits that they had clung obstinately to their position, the Respondent submits that the Respondent has made attempts to negotiate and resolve the issue at the meeting on 11th April 2013 that was in fact proposed by the respondent. Even though the respondent has been silent with regards to the two notices of outstanding termination fee, such short time of two months over 12 months negotiation period cannot be relied on to say that the Respondent refuses to come to an agreement with the Claimant.

15. The case of Murphy itself can be referred to whereby the gap between the respondent's previous futile negotiation between the claimant's and the respondent's negotiation was of 7 months, yet the clause in the case failed to allege any justified futility of a negotiation to exempt them from complying to the negotiation period clause. The Murphy case mentioned involves a period of more than half a year, let alone the current case, of which the respondent was silent for only two months. It would be unjustified to rely solely on this period to say that the respondent does not wish to negotiate any longer. Hence, the exception in Murphy's case cannot be relied on.

16. To conclude, the Tribunal has no jurisdiction to hear today's case because the period of negotiation as agreed has yet to lapse before the dispute is submitted to the Tribunal and such

clause is a jurisdictional one whereby a non compliance would render the Tribunal today a lack of jurisdiction to hear the case.

II. THE ARBITRAL TRIBUNAL SHOULD ADMIT THE GONDWANDAN GOVERNMENT'S AMICUS CURIAE BRIEF FOR CONSIDERATION DURING PROCEEDINGS

A) The Tribunal has the jurisdiction to accept the amicus curiae brief

a) *The Tribunal possesses procedural flexibility*

17. Amicus curiae briefs are documents voluntarily submitted to a court by an entity other than a party to a dispute such that the entity retains substantial discretion over the content of the submission. Literally, amicus curiae mean a friend of the court that is also an entity other than a party to a dispute that assists the court to be properly informed of the materials relevant to reach its decision.

18. Procedurally, even though the UNCITRAL arbitration rules as well as the CIETAC arbitration rules do not expressly provide for the power of tribunals in admitting amicus curiae, Article 15(1) UNCITRAL Arbitration Rules authorises procedural flexibility. It states that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

19. To support such contention, the ICSID panels have decided in several cases that the tribunal has the jurisdiction to admit the application for an amicus curiae submission based on Article 15(1) of the UNCITRAL arbitration rules. The ICSID panels have decided so in the cases of UPS v Canada (2007) (ICSID) and also the in Methanex v USA (2005)(ICSID).

20. In addition to that, Article 15(1) UNCITRAL Arbitration Rules can be further supported with Articles 33(1) and 41 of the CIETAC Arbitration Rules. Both provisions provide for a wide jurisdiction of the arbitral tribunal in examining or considering the disputing case. It is submitted that it includes the jurisdiction of tribunal to admit amicus curiae.

b) *The Tribunal possesses a wide discretionary power*

21. The Tribunal is empowered to strike the balance of such admittance in regards to its effect upon both parties [Chan]. The test to be applied is ‘’whether the applicant is willing to offer the court a submission on law or relevant facts which will assist the court in a way that the court would not otherwise have been assisted...” [Levy].

22. Some of the qualifying grounds laid down in the case are for the amicus not to prejudice the efficient operation of the court; the resultant cost and delay is not disproportionate to its significance and that the current parties are unable or unwilling to provide such assistance.

23. Hence, since Tribunal has wide discretion in determining the need for amicus curiae, the second limb of the contention shall provide the reasons why the Tribunal should consider the amicus curiae brief form the Gondwandan government.

B) <u>There are other substantive grounds for accepting the amicus curiae brief.</u>

a) *Amicus curiae submission may address certain factors the parties are unable or unwilling to address, without being bound by the issues presented to the tribunals by the parties.*

24. In the Methanex’s case, while the US perceived the Californian ban on petrol additive produced by Methanex as a measure to protect public health, the IISD and Bluewater submissions placed it in a wider context of environmental protection and raised the issue of the host State's right to protect the environment and promote sustainable development.

25. Similarly, in UPS, submissions from CUPE and the Council of Canadians (which were amici to the dispute) addressed the issue that neither Canada nor UPS raised, that is the possible consequence of the tribunal's decision on Canadian postal workers and consumers.

b) *Amicus briefs may also supply the tribunals with more comprehensive legal arguments and at the same time the tribunal's reasoning of its decisions may be enhanced in terms of its quality and credibility.*

26. This is possible by citing authority not contained in the parties' arguments [D Shelton] or conducting detailed comparative legal studies [Bartholomeusz]. For example, the amici in Biwater case provided a detailed legal analysis on the investor's duty to act in good faith under international law. Considering that investment treaty arbitration tribunals have limited capacity to conduct their own research, such comprehensive studies by amici may well broaden the basis of the tribunal's analysis and help the tribunal to reach good quality decisions. This will be particularly so when the relevant issues are outside of the arbitrators' areas of expertise.

27. Similar to the current case, these 'extra' perspectives will help tribunals not only to grasp the larger picture but also to make deeper analyses of the case. The tribunal's final decision would also be better in quality as the case will be decided based on a thorough analysis. The Respondent and the Claimant might only view the case in the contractual perspective, but no entity would explain the intention behind the coming into force of Bill 275 better than the Gondwandan government.

28. Besides, the tribunal's reasoning of its decisions may be enhanced in terms of its quality and credibility. As 'friends of the court', the primary purpose of amici should be to assist tribunals by providing additional information and arguments. At any event, the reason for

tribunals to accept amicus curiae submissions should be to enhance the quality and credibility of their own decisions [Bartholomeusz].

c) *There would be no detriment to the Claimant as an amicus need not necessarily be cited once it is heard.*

29. Potential amici do not have the right to be heard. Even if their submissions are received by a tribunal, it is also within the discretion of the tribunal whether to mention or consider them in the awards. Therefore there is no detriment on the part of the claimant even if the amici is admitted into the tribunal.

d) *Amicus curiae is permitted in purely contractual circumstances.*

30. It would be detrimental to say that an amicus curiae brief is only appropriate in circumstances involving public issues. It is the submission of the respondent that there has also been admittance of amici in a contractual dispute such as the one in the current case.

31. In Rotemi Realty, Inc v Act Realty Company Inc, amicus curiae brief from the Commercial Real Estate of Tampa Bay, Inc was admitted in case of a brokerage agreement that was allegedly against the public policy of the state of Florida. Similarly, in Lexmark International Inc v Static Control Components, Inc, amicus curiae brief from the International Trademark Association was also heard in a case of a commercial interest of the party being affected by a false advertisement by the opposing party.

32. Hence, with the expansion of the scope of amicus curiae, there would be no issue of admitting the brief from the Gondwana Government pertaining to the fact that the current case revolves around a contractual relationship between the parties rather than an exercise of a public duty.

33. To conclude, the amicus curiae brief from the Gondwana Government should be admitted in the case today because of the above solid reasons.

III. THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT ARE VITIATED BY THE IMPLEMENTATION OF BILL 275 AND THE GONDWANDAN GOVERNMENT'S NEW, MORE STRINGENT REGULATIONS.

A) The Respondent's obligations are vitiated under Article 79 CISG

34. Art 79 is in nature a force majeure provision, or a frustration provision [UNCITRAL Digest]. Article 79 (5) of the Convention implicates that a successful claim to exemption shields a party from liability for damages. Besides exempting a party of a contract of their liability, this force majeure provision also absolves a party wholly of his obligations under the contract.

35. Article 79 (1) relieves a party of liability for "a failure to perform any of his obligations" if the following requirements are fulfilled: the party's non-performance was "due to an impediment beyond his control"; the impediment is one that the party "could not reasonably be expected to have taken into account at the time of the conclusion of the contract" and lastly, the party could not reasonably have "overcome" the impediment "or its consequences".

a) *The impediment was beyond the control of the party claiming the exemption*.

36. This refers to a supervening event that intervenes with the performance of the contract. It must be something beyond the control of any party and none of the parties could be attributed to such impediment.

37. In the current case, the impediment is primarily the State intervention with regards to the existence of Bill 275 which consequently led to the economic hardship whereby the tobacco product sales decreased very drastically.

38. In the Caviar case, the tribunal held that the United Nations sanction enforced in Yugoslavia was indeed an impediment beyond control as it was enforced without any attribution from the parties.

39. In contrast, the implementation of Bill 275 was neither desired nor made by the Respondent. The Respondent cannot be and is not attributed to the said legislation. It was the in fact the result of a governmental policy that intends to reduce the pollution of Gondawana's air.

40. This legislation can be likened to that of the aforementioned UN sanction, whereby the parties in either case have no control over the implementation of the laws. The Bill is an impediment that forbids, inter alia, the distribution of branded merchandises and display of products, both of which are terms of the Agreement that were affected.

41. Hence the Agreement is frustrated and the Respondent must either run afoul of their contractual obligations or violate the law. This in turn has pushed the Respondent to terminate the Agreement.

42. Further, the Bill has resulted in a 25% decline in the Claimant's sales as evidenced in paragraph 13 of the Moot Problem, and this was merely within the first 6 months of implementing the Bill. The tobacco products were piling up in the Respondent's stockroom because the demand was depleting.

43. In the Clout case no. 166 (1996) the court accepted that the contract was frustrated, falling under Art 79 CISG due to the financial difficulties suffered by the manufacturer. The seller sought to claim damages for the buyer's termination of the contract. The court however ordered the damages to be set aside on the basis that it did not arise from a breach of the contract.

b) *The impediment was unforeseeable.*

44. A party's failure to perform must also be due to an impediment that the party "could not reasonably be expected to have taken . . . into account at the time of the conclusion of the contract". Failure to satisfy this requirement can be a reason cited arbitral tribunals for denying an exemption.

45. All of the rejected cases involved an impediment that is foreseeable i.e. the intervening laws had already existed at the time that the sales contract was concluded.

46. In CISG/Pace case no. 1060 (1993) (CIETAC arbitration proceeding) the buyer claimed an exemption of liability under Art 79 CISG for its failure to obtain an import permit for the contracted sales of semi-auto weapon. Thus the buyer wasn't able to pay the goods on time even though the seller was ready to deliver them. It was held that such claim should fail as the buyer must take the risk of obtaining the import permit. The laws governing the import permit had already existed during the contracting period. Therefore, it was a foreseeable event.

47. The current case is the opposite situation where Bill 275 was enacted and came into force after the conclusion of the contract. The Agreement was signed on 14 Dec 2010, whereas the Bill was introduced on 14 March 2011, and was passed into law on 13 April 2012. Therefore it cannot be said that it was foreseeable for the Respondent that such restrictive bill would intervene with the current sales and distribution contract.

c) *The impediment or its consequences could not be avoided*

48. In Scafom International BV v Lorraine Tubes S.A.S. there was nothing that the seller could have done with respect to the sudden increase in price of the carbon steel tubes. It is a

settled law adopted by France. It was beyond the seller's control. That is the reason why the court ordered a renegotiation between parties to the contract.

49. In the current case, the Respondent has already sought for a renegotiation of the sales contract conditions. Unfortunately, such request was turned down by the claimant [Cl.Ex.7]. As a result, the Respondent suffered a great loss whereby the Respondent cannot move enough stock to justify the minimum order intervals. The Claimant's product was simply piling up the respondent's stockroom. Since there was no longer any demand on the product, the impediment is not curable by the Respondent [Cl.Ex.8]. Further, it has to be reiterated that this impediment cannot be avoided. It is not within the Respondent's power to avoid this legislation.

50. Since the elements required in order to claim under Art 79 of the CISG have been proven, the Respondent humbly requests that exemption from liability in regards to the non-performance of the contract be applicable.

IV. THERE WOULD BE A RISK OF ENFORCEMENT IF THE ARBITRAL TRIBUNAL WERE TO ISSUE AN AWARD IN FAVOUR OF THE CLAIMANT.

A) Article V (2) (b) NYC provides that the recognition and enforcement of an arbitral award may be refused if they would be contrary to the public policy of that country.

51. This provision is also in pari materia with Article 36 (1) (b) (ii) of UNCITRAL. The application of Article V (2) (b) of the New York Convention may be dispersed into two limbs; the restrictive approach in Parsons & Whittemore (US Court of Appeals, 1974) and also from the recommendation as provided in the Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards by the Committee on International Commercial Arbitration (International Law Association: New Delhi Conference 2002)

a) *the restrictive approach in Parsons & Whittemore (US Court of Appeals, 1974)*

52. This approach is adopted where enforcement may be refused if it would violate the forum State's most basic notions of morality and justice. This restrictive approach has been adopted by other countries [PT Asuransi]. The Hong Kong Court of Final Appeal in Hebei Import & Export Corp v Polytek Engineering Co. Ltd. also adopted this approach.

53. In PT Asuransi Jasa Indonesia (Persero) v Dexia Bank S.A., it was held that Article V (2) (b) should only operate in instances where the upholding of an arbitral award would "shock the conscience", or is "clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public", or where it violates the forum's most basic notion of morality and justice. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law.

54. Similarly in BCB Holdings Ltd and another v Attorney General of Belize, it was further stated that enforcement would be refused if the award is 'at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle [Krombach].

b) *adopting the Recommendation*

55. In paragraph 10 of the Final Report, countries may seek to qualify or restrict the scope of public policy by applying a test of 'International Public Policy'. Paragraph 25 of the Final Report further categorizes international public policy into three categories: fundamental principles, lois de police and international obligations.

56. The court of Appeal of Belize in BCB Holdings further noted that the International Law Association ('the ILA') has recommended the use of the phrase 'international public policy' as

an appropriate description of the restrictive scope of public policy that should be applied to convention awards.

57. Therefore, Bill 275 falls under the category of lois de police or public policy rules because it is mandatory and at the same time form part of the State's public policy [Final Report]. It is the view of the legislation in Gondwana that Bill 275 is part of the public policy of the Gondwandan government to protect public health & safety.

58. This view is not without merit. The Gondwandan courts share the same position where the Supreme Court of Gondwana decided that bill 275 was within the sovereign rights of Gondwana to protect public health and safety [Res.Ex.2].

59. Since it falls within the sovereignty of the state, the tribunal should refrain from issuing the award as the position of the state was clear that the enforcement will violate the public policy of Gondwana. This position is further substantiated by the Supreme Court of Gondwana.

60. If the arbitral award were to be issued in favour of the Claimant, the tribunal would be disregarding the sovereignty and the established legal order of the State of Gondwana. The Agreement between the Claimant and the Respondent may be not frustrated under the International law. However, the Claimant disregarded the fact the terms and conditions of the agreement are in their essence illegal under Bill 275. The enforcement of such an award may be refused by the Court of Gondwana as the enforcement would be akin to recognizing the performance of an illegal contract which is against the public policy of the state.

RELIEF REQUESTED

The Respondent respectfully requests Tribunal to adjudge and declare that:

1. A declaration that this Tribunal has no jurisdiction to decide the dispute between the Parties;

2. Alternatively, a declaration that the Agreement has been frustrated; and

3. That due to the Agreement being frustrated, that the Respondent is not liable to pay any alleged termination penalty.

Respectfully submitted,

COUNSELS FOR REAL QUIK CONVENIENCE STORES LTD.