FIFTH ANNUAL
INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION MOOTING COMPETITION
27 JULY – 2 AUGUST 2014
HONG KONG

IN THE CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

and

IN THE MATTER OF AN ARBITRATION

BETWEEN

CONGLOMERATED NANYU TOBACCO LTD **Claimant**

and

REAL QUICK CONVENIENCE STORES LTD. **Respondent**

MEMORANDUM FOR CLAIMANT

TEAM NO. 217C

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LIST OF ABBREVIATIONS

Art	Article
CIETAC	China International Economic and Trade Arbitration Commission (CIETAC)
CISG	United Nations Convention on Contracts for the International sale of Goods
FCTC Convention	The WHO Framework Convention on Tobacco Control
ICSID	International Centre for Settlement of Investment Disputes
New York convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PICC	UNIDROIT Principles of International Contract 2010
SOD	Statement of Defense
The Distribution Agreement	Distribution Agreement between Conglomerated Nanyu Tobacco Ltd And Real Quick Convenience Stores Ltd.
UNICTRAL Model Law	UNICTRAL Model Law on International Commercial Arbitration, 1985

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BOOKS/ARTICLES

ARGUMENTS

[A]. THE TRIBUNAL HAS JURISDICTION TO HEAR THE PRESENT DISPUTE.

The Respondent disputes the jurisdiction of the tribunal on the ground that the Claimant did not fulfil Clause 65 of the agreement that specified that the parties were to undergo negotiation and consultation before the arbitral process could commence.[Facts¶ 21] The Claimant rejects this argument for three principle reasons: first, the Tribunal has competence to determine its own jurisdiction (A.1); second, the condition precedent in the arbitration agreement is merely a procedural formality that is unenforceable (A.2) and third, the Claimant had attempted to negotiate with the respondent, but all such attempts proved futile (A.3).

[A.1]. The Tribunal has competence to determine its own jurisdiction.

The Doctrine of *'Kompetz-Kompetenz'* states that the Tribunal can determine its own Jurisdiction. The same is also stated in Article 6(1) of the CIETAC rules. The doctrine is codified in similar language by Art. 16(1) Model Law, which, having been adopted by both Nanyu and Gondwana, applies in the present case. Further, because the arbitration agreement specifies no *lex arbitri*, the question of jurisdiction is governed also by the law of the seat, that being Hong Kong, which too has adopted the UNCITRAL Model Law along with the 2006 amendments.[*Fouchard at 429*]

[A.2]. The Condition Precedent in the Arbitration Agreement if a procedural formality that is unenforceable

Clause 65.1 of the agreement states that in case of a dispute, the parties shall initially seek a resolution through consultation and negotiation. The respondent's submission that the clause has not been properly fulfilled is based on the assumption that the agreement to negotiate is

enforceable. The claimant submits that this clause is not the case and Clause 65.1 contains no indicia of the certainty that might compel a court or tribunal to enforce it.

Cases concerning negotiation, mediation and conciliation in good faith are non-binding according to jurists [*Michael Pryles*] as well as numerous decisions of domestic courts [*Paul Smith; Courtney & Fairbairn Ltd*.] and tribunals. In order to be considered enforceable, such clauses must not be vague, imprecise or generic [*Candid Prod; Elizabeth*]. When parties fail to describe a definite procedure for the first tier of dispute resolution, the clause will not be enforced. [*White*]

In the present case, the negotiation requirement present in Clause 65 is not enforceable for the lack of certainty. Though it prescribes a time period during which the negotiation has to be completed, neither does it provide for a procedure for the negotiation nor does it describe when negotiations can be deemed to be completed. This inherent vagueness in the clause renders it unenforceable [*Cable & Wireless plc; Tank Chung Wah*].

Claimant submits that the negotiation clause on the whole is vague, uncertain and ambiguous. Where there is ambiguity, a tribunal should prefer a conclusion where it has jurisdiction [*Jolles at 336*]. Thus, failure to comply with it does not affect the jurisdiction of the Tribunal in any way.

[A.3]. The Claimant had attempted to negotiate but all such attempts proved futile.

It is well established that a party cannot avoid arbitration because of its own failure to comply with the steps of a grievance procedure [*Biloune*] by refusing to negotiate and providing a reasonable justification for the same [*Welborn Clinic*].

The first tier in a multi-tier clause is satisfied if the claimant has corresponded through various communications to settle difference [*ICC Case no. 9977*]. A true and honest purpose

of reaching an agreement is enough to satisfy the first tier of a multi tier clause [ICC Case No. 9977]. In the instant case the claimant arranged a meeting on 11/04/2013 which failed to yield a result that was suitable to both parties[*Claimant's Exhibit No. 7*]. Further, even after the receipt of the notice of termination of the Distribution Agreement [*Claimant's Exhibit No. 9*], the Claimant has attempted to communicate with the respondents through numerous phone calls as well as through notices dated 01/07/2013[*Claimant's Exhibit No. 10.*], 02/08/2013 and 02/09/2013[*Claimant's Exhibit No. 11*]. It is only after these communications failed did the Claimant filing an application for arbitration on 12/01/2014.

When considering the admissibility of jurisdictional objections, tribunals should base their decision on the pragmatic assessment of all relevant factors of the case, placing emphasis on the considerations of efficiency and fairness [*Born at 979*]. In determining whether it is appropriate to insist on pre-arbitral proceedings, due consideration should also be given to the prior behavior of the parties. It is also established that in case of a deadlock, the parties should not be obliged to engage in fruitless negotiations as it would needlessly delay the dispute resolution process [ICC *Case No.8445*]. Rather, arbitral tribunals have found that it is in the best interests of the parties to allow a request for arbitration when it has been "*quite obvious that the parties were too divided to entertain an amicable settlement*" [*Figueres at 72*].

In the current case it could not be clearer that the Parties are too divided to reach an amicable settlement. Numerous communications and meetings between the Claimant and Respondent have not resulted in an amicable settlement and an insistence that a negotiation process is carried on will only further delay the arbitration process.

In conclusion, the Claimant submits that even if the negotiation mandated by Clause 65 is to be considered mandatory, all the procedural requirements have been met and this tribunal has jurisdiction to hear the matter on its merits.

[B].THE TRIBUNAL SHOULD NOT ADMIT GONDAWANDAN GOVERNMENT'S *AMICUS CURIAE* BRIEF FOR CONSIDERATION DURING THE PROCEEDINGS.

The State of Gondwandan has submitted amicus *curiae brief* before the Tribunal, stating inter alia, that it is highly interested in the outcome of the arbitration, as it touches upon topics of Gondwandan public policy. The Claimant refutes the same on two primary grounds: firstly, the tribunal does not have jurisdiction to admit the brief (B.1); secondly, the State of Gondwandan does not fulfill the requirement of an amicus curiae (B.2).

[B.1].The Tribunal should rule that it does not have jurisdiction to admit the brief.

Unlike ICSID, which specifically allows for *amicus curiae* submissions under ICSID Rule 37 (2) and the UNCITRAL Arbitration Rules which have been interpreted to allow amicus curiae submissions under Article 17 (1)[*Methanex*], there is nothing in the CIETAC rules to allow such submissions. As such, the recent trend towards accepting *amicus curiae* submissions cannot be deemed to be applicable to the CIETAC rules, because even though the rules were amended as recently as 2012, no provision regarding the admission of *amicus curiae* briefs was added.

Arbitration is a private procedure based on consent, [*14 ICC International Court Of Arbitration Bulletin*] wherein parties have consented to submit to arbitration particular disputes arising between them and them only [*Oxford Shipping*]. Claimant reiterates that it has not consented to non-disputing parties being allowed to participate in the proceedings. In

the absence of an express provision in the CIETAC rules, '*amicus curiae'* submissions should not be allowed in the present matter.

[B.2]. State of Gondwana does not fulfil the requirements of Amicus Curiae

Alternatively, if the Tribunal finds that it does have the jurisdiction to allow for an *amicus curiae* submission, the Tribunal must also look at the standards of *amicus curiae* submissions that have been defined by tribunals [*United Parcel Service of America Inc.; Biwater Gauff*] and institutions[*ICSID Rules of Procedure for Arbitration Proceedings*.]. There are three essentials which must be fulfilled:

Firstly, that the non-disputing party's submission should assist the Tribunal in determining a factual or legal issue related to the proceedings by bringing a perspective different from that of a disputing party. Secondly, that the non-disputing party should address a matter within the scope of the dispute. Finally, that the non-disputing party has a significant interest in the proceedings.

Both the Claimant and the Respondent agree on the fact that this arbitration deals solely with the termination of the agreement and the liquidated damages that the Respondent is liable for the same[*SOD ¶ 6.*]. The Claimant only seeks to enforce Clause 60.2 of the Distribution Agreement which deals with the respondent's liability to pay liquid damages in case the termination or suspension of the agreement is at the insistence of the respondent. It is thus clear, that the clauses regarding the sale of tobacco products are not in question. The Claimant thus submits that since the scope of this arbitration is limited and does not in anyway to pertain to Gondwanan punlic policy, the State of Gondwana does not fulfil any of the criteria required for it to make a submission as an amicus.

In conclusion, the Claimant submits that by filing the brief outside the scope of the dispute, Gondwana, has unfairly put an additional burden on the Claimant that is against its interests [*Aguas Argentinas*]. It is thus submitted that the amicus brief is inadmissible.

[C]. THE RESPONDENT OBLIGATIONS UNDER THE AGREEMENT WERE NOT VITIATED BY THE IMPLEMENTATION OF BILL 275 AND THE GONDAWANDAN'S GOVERNMENT NEW MORE STINGENT REGULATIONS

The respondent's claim that the agreement is frustrated by the passing of the new Gondwandan Regulation, and therefore it is not liable to perform the obligations under the agreement cannot be accepted. The claimant contends that the new regulation merely make a case of economic hardship, not frustration, and therefore will not be covered under the procedure prescribed under CISG, but would be covered under the UNIDROIT. In addition, the unilateral termination of the agreement by the respondent will make him liable to pay the penalty as stipulated under clause 60.2 of the agreement.

[C.1]. The new Regulation passed by the Gondwandan government does not frustrates the agreement entered between the parties.

The new Regulation, in order to apply in the present case, must substantially influence the character of the agreement in question [*Paradine*]. It implies that the new Regulation must create an impediment that makes the agreement impossible to perform.[*Glidden*] The new Regulation, in the instant case, restricts the sale of branded merchandise [*Bill 275* & *Art.13 FCTC guidelines*], but allows the sell and the purchase of the tobacco products and therefore does not substantially influence the character of the agreement the parties agreed to.

[C.1.a]*The claim of the respondent pertains to economic hardship, which is not a valid ground for frustration of the agreement.*

The agreement obliges the Claimant & the Respondent to sell and to purchase, respectively, the products manufactured by the Claimant [*Clause 1.1 & 1.2, The Distribution Agreement*]. It is implied that any such commodity sold to the Respondent would in any case be in compliance with the laws of Gondwana so as to satisfy the requirements of the agreement [*J.O.Honnold*].

As the Respondent would suffer losses because of its inability to sell certain merchandise bought under the agreement, the case becomes purely that of economic hardship, and cannot be considered to be an impediment for establishing an excuse from any liability under the agreement [*Art.79,CISG*; *Honnold* at 621; *Ingeborg Schwenzer*]. As economic hardship is not considered to be a ground for frustration of contracts [*Elena Zaccaria*], the Respondent likewise cannot use the same as a valid defense. Further, in a case of economic hardship, if the respondent terminates the agreement, he would be liable to pay penalties as stipulated under the agreement.

[C.2].The present case would be covered by Article 6.2.2 of UNIDROIT PICC.

As the Respondent's submission relates to the economic losses that it has suffered or will suffer if the agreement is enforced, Article 79 of CISG would be inapplicable to the present case [*Sarah Howard Jenkins*]. Since the dispute is not governed by the CISG, therefore for matters which are not governed by it must be supplemented by the UNIDROIT [*Clause 66 of the Agreement*]. As parties have agreed to the application of the UNIDROIT PICC, Article 6.2.2 would be attracted to the present case.

[C.2.a]. *The respondent's claim pertaining to frustration by decrease in sales is not covered by the exemption of economic hardship.*

The Respondents first claim pertaining to losses suffered by decrease in sales cannot be sustained as the same only signifies a business risk and no a drastic change brought about to the circumstances of the case affecting the economic scope of the agreement [*UNIDROIT*]. This is so because the agreement cannot be excused on the ground that the parties purpose to earn money and avoid loss is frustrated [*Aluminum Co. of America; American Trading & Prod. Corp*]. The cost of performance going beyond the party's anticipation is insufficient to hold the agreement frustrated.[*Tsakiroglou & Co. Ltd.; Transatlantic Fin.Corp; Florida Power & Light Co*] Moreover, in a long term contract the court usually does not invalidate a contract on the basis of economic losses.[*Steven W. Hubbard*]. In the instant case, the new Regulation restricts the sale of the merchandise products and commoditised the tobacco products that led to decrease in the business of the respondent which has increased its cost of performance, but did not frustrate the agreement.

[C.3].The Respondent's obligations are not terminated after the dispute over adaptability is submitted for arbitration.

The Respondent is under an obligation to not withhold the performance of the agreement pursuant to submitting its request for renegotiation and the procedure that follows [*Art.6.2.3 (2), UNIDROIT PICC*]. As arbitral tribunals are authorized to perform the function of courts under Article 6.2.3[*Karl M.Meesen*.], the procedure that is being followed by the parties to this dispute has to be considered valid for the purpose of Article 6.2.3.

This signifies that as the agreement between the parties had never been frustrated, it is only the actions of the Respondent that leads to unilateral termination, thereby attracting the penalties under the agreement.

[C.4].The respondent is liable to pay the penalty stipulated under clause 60.2 of the agreement.

The party to the agreement will be liable to pay penalty if he unilaterally terminates the agreement between the parties [*Queenstown*]. The Respondent's liability to pay penalties under Clause 60.2 of the Agreement arises out of its unilateral termination of the agreement for the sale and purchase of the Claimant's tobacco and related products.[*Claimant's Exhibit No. 8*.] This liability cannot be evaded by the Respondent on the grounds of frustration of the impugned agreement.

[D]. THERE IS NO RISK OF ENFORCEMENT OF THE ARBITRAL TRIBUNAL AWARD

The award passed by the arbitral tribunal will result in accrual of penalties for the Respondent and likewise, if the tribunal considers the agreement adaptable as per the laws of Gondwana, a further adaptation of the terms of the agreement. Any risk of enforcement that the award may face at the time of enforcement should also be judged on the basis of only these two outcomes.

[D.1].The tribunal should consider the proper law of the contract for deciding on the validity of the imposition of penalty.

It is to be noted that it is the proper law of contract which governs the penalty and liquidated damages clauses [*AAA Steel Co; ICC Case No 9978; Redfern & Hunter*]. In the present case the same is CISG, which allows the recovery of any pecuniary damages from the defaulter[*Art. 6 r/w Art. 74 of CISG; Honnold at 581*]. As Gondwana is a party to CISG, [*Facts ¶24*] it can be implied that it has incorporated the provisions of CISG in its domestic framework. Regardless of this fact, Art. 1 of CISG states that in matters of conflict between CISG and a national law, CISG shall take precedence [*Art. 1(3) of CISG*.]. Hence it can

reasonably be concluded that the award levying a penalty on the Respondent will not suffer any risk of enforcement in the Gondwana.

[D.2].The part of the award levying penalty to respondent and adaptability of the agreement on the Respondent cannot be struck down.

It is submitted that in several jurisdictions where arbitral awards imposing penalties are considered to be a matter of public policy [*Garrity*]. However, arbitral tribunals are considered empowered to impose penalties where parties have agreed to the same in the agreement [*Arthur Rovine*]. The agreement [Clause 60.1, The Distribution Agreement] clearly states that if the buyer terminates the contract which it does in the instant case, will be liable to pay liquidated damages.

Further, in case the arbitration tribunal takes any measure to adapt the impugned contract, the same would not result in a violation of public policy [*Art. V(2)a, New York Convention*] of Gondwana as an adaptation of this agreement is bound to take place to keep the agreement in compliance with the circumstances prevailing in Gondwana [*UNIDROIT Official Commentary* at 221]. The adaptation of the agreement will help the parties to comply with the Gondwandan regulation.

Hence it can be reasonably concluded that the award passed by the arbitral tribunal will not suffer risk of enforcement.

REQUEST FOR RELIEF

In the light of the arguments advanced the Claimant requests the tribunal to find and declare that:

1. The tribunal has the jurisdiction to adjudicate the dispute between the Claimant & the Respondent.
2. The Respondent is liable to pay penalties under Clause 60.2 of the Distribution Agreement
3. for the unilateral termination of the agreement on 1 May, 2013.
4. The Respondent shall pay the costs of arbitration, including 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.

Respectfully signed and submitted by the counsel on 20th June, 2014.

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Counsel on behalf of the Claimant