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 ON BEHALF OF RESPONDENT

TEAM NO. 217R

TABLE OF CONTENTS

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	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
ILA	International Law Association

INDEX OF AUTHORITIES

BOOKS/ARTICLES

ARBITRAL TRIBUNALS

ICC AWARDS

(2007)

Cited as UPS

ARBITRATION BULLETIN

International Law Association, Final Report On Public Policy As A Bar To Enforcement Of International Arbitral Awards, Recommendation 1(d) (New Delhi, 2002) 10

Cited as ILA Recommendation

GUIDE TO CISG ARTICLE 79 Secretariat Commentary (closest counterpart to an Official Commentary) 6

Cited as draft counterpart of CISG article 79

CISG Advisory Council Opinion No. 9 Consequences of Avoidance of the Contract 8

Cited as Advisory opinion No.9

ARGUMENTS

[A]. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE PRESENT DISPUTE.

The Claimant submits that the non-fulfilment of Clause 65 of the agreement that specified that the parties were to undergo negotiation and consultation before arbitration could commence, does not affect the jurisdiction of the tribunal [*Facts*¶ *22*]. The same is rejected by the Respondent on five principle grounds: firstly, the Tribunal is competent to determine its own jurisdiction (A.1); secondly, negotiation is an enforceable and binding precondition to arbitration (A.2); thirdly, the compliance with the pre-arbitral step is a procedural issue (A.3); fourthly, there is a distinct possibility of the parties reaching a compromise (A.4) and lastly, an award rendered by the tribunal may be unenforceable (A.5)

[A.1]. The Tribunal is competent 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 [*Fouchard*].

[A.2]. Negotiation is a condition precedent to arbitration and is enforceable

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 submits that the negotiation procedure is mandatory and enforceable, as all necessary prerequisites, developed in case law and scholarly writings are fulfilled. First, the clause stipulates that disputes '*shall* be resolved

by negotiation'. Use of the mandatory term *shall* rather than the permissive *may* suggests that negotiation is binding [*ICC 10256; ICC 9984*; *Cremades*].

Secondly, negotiation was a clear precondition to arbitration: The arbitration agreement states :'*If, after a period of 12 months has elapsed from the date on which the dispute arose, the Parties have been unable to come to an agreement in regards to the dispute, either Party may submit the dispute to arbitration*'. *If* and *shall* together establish unequivocally a binding prerequisite to arbitration [*Berger; Figueres*]. Thirdly, the negotiation clause was indicative of the framework to be followed and the stage at which the efforts will be deemed exhausted [*Pryles, Jolles*] and thus, precise.

The Respondent submits that the negotiation clause is not merely a vague 'agreement to agree' [*Elizabeth Bay*]; rather, it is a precise framework to participate in 'a process from which cooperation and consent might come' [*Hooper Bailie*]. Hence, the tribunal should hold it to be an enforceable precondition, non-fulfilment of which does not allow the tribunal to exercise jurisdiction over the substantive dispute.

[A.3] The non-fulfilment of the pre-arbitral step is a procedural issue and should lead to the dismissal of the claim as premature

The claimant could argue that non-compliance with the negotiation precondition is merely a substantial matter irrelevant to the Tribunal's jurisdiction. The respondent however asserts that in the light of opinions given by jurists [*Born; Berger; Jolles*] and the decisions of different courts [*Poire; National Boat*] the Claimant's non-compliance with the pre-arbitral step must be treated as procedural, thereby depriving the tribunal of its jurisdiction.

[A.4] The Tribunal ought not to proceed to the merits of the dispute as negotiation cannot be deemed futile

The claimant may argue that the parties are now in a deadlock and that negotiation is unlikely to yield any results. The respondent submits that this is not the case. Firstly, the tribunal should take into account the lengthy business relationship in between the parties and the constant emphasis on maintaining the relationship that is apparent in the communication between them[*Claimant Ex. Nos. 3, 4, 6, and 7*]. This is in contradistinction to *ICC 8445*, cited by the claimant as there were no acrimonious exchanges or litigation between the parties in the intervening period [*ICC 8445*].

Secondly, the Tribunal should also take into account the fact that both parties agree that the current arbitration deals with the termination of the contract. The original negotiation which took place on the 11th of April, 2013 was regarding the terms and conditions of the contract and not regarding its termination. It is thus strongly contended that no negotiations have taken place over the actual subject matter of the arbitration.

It is thus submitted that the tribunal should not rule that a pre-arbitral is futile merely because one of the parties considers it so [*Bankers*] and declare that it does not have any jurisdiction till the pre-arbitral tier is fulfilled.

[A.5]. An award rendered by this tribunal may be unenforceable

One of a tribunal's primary duties is to render an enforceable award [*Redfern and Hunter*]. Under the New York Convention, the recognition and enforcement of an award may be refused if a party proves that "the arbitral procedure was not in accordance with the agreement of the parties" [*NY Convention, Art. V(1)(d)*; *Born*]. Specifically, if this tribunal renders an award before the precondition to arbitration has been satisfied, then the arbitral procedure will be deemed not to have been conducted in accordance with the agreement of the parties [*Born*].

It is uncontested that the parties agreed to engage in negotiation as a precondition to arbitration. Since no negotiation has been carried out with regard to the alleged termination of the agreement, if this Tribunal proceeds, it risks rendering an unenforceable award. It is thus submitted that this Tribunal should find the precondition to arbitration was not properly fulfilled and should decline jurisdiction.

[B].THE TRIBUNAL SHOULD ADMIT GONDWANDAN GOVERNMENT'S *AMICUS CURIAE* BRIEF FOR CONSIDERATION DURING THE PROCEEDINGS.

In arbitration that has a result that has a significant bearing on the rights and welfare of people at large, it is vitally important that the dispute settlement process itself is transparent and open to public input [*Bernasconi-Osterwalder*]. Following the lead of the growing tolerance of third party participation, tribunals in a large number of international arbitrations have allowed third parties to submit amicus briefs.

The State of Gondwana 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 Gondwana's public policy. The respondent submits that the brief should be admitted by the tribunal on because of two primary reasons: firstly, the tribunal has jurisdiction to admit the brief (B.1), and secondly, the State of Gondwana fulfils the internationally accepted standards for an Amicus Curiae (B.2).

[B.1].The Tribunal has jurisdiction to admit the brief.

It is not an uncommon practice for tribunals to base their decisions upon their residual power to exercise their discretion while resolving procedural matters not addressed in the relevant institutional rules. The tribunals in the *Methanex* and *UPS* cases, found that they had the authority to grant *amicus curiae* status to third parties even though the UNCITRAL Rules do

not have an explicit provision regarding this form of third party participation [*Methanex*; *UPS*].

The tribunals considered the provisions of the UNCITRAL Rules, and ultimately held that, even thought there was no explicit provision regarding amicus curiae participation, Art. 15(1) of the rules gave the tribunal an implied procedural authority to permit or prohibit amicus access.

The respondent submits that Article 33 of the CIETAC rules is couched in similar language to Article 15 (1) of the UNCITRAL Rules [*Art. 33, CIETAC Rules*]. Further, Article 41 of the rules allows the tribunal to undertake investigations and collect evidence on its own initiative as it considers necessary [*CIETAC RULES, Article 41*]. This Tribunal should, therefore, not hesitate to consider whether it has the authority to accept the *amicus* submission.

[B.2]. The State of Gondwana fulfils the requirements of an Amicus Curiae

Before admitting an amicus brief, the Tribunal must also look at the standards of *amicus curiae* submissions that have been identified by tribunals [*UPS; 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 should have a significant interest in the proceedings.

It has been held in different jurisdictions that the health of citizens is a significant manner of public policy and the inherent confidentiality of commercial arbitrations is not applicable in

such a case [*Esso*]. Further, the State of Gondwana by raising an issue regarding the very enforceability of the award, on the grounds of it being contrary to public policy, has brought to the notice of this tribunal a very important issue which neither of the disputing parties have addressed.

The respondent submits that the State of Gondwana meets all the qualifications required of an Amicus Curiae in international arbitrations. Hence, the brief that has been submitted by it should be considered during the arbitration proceedings

[C.] THE RESPONDENT IS NOT LIABLE TO PAY THE TERMINATION PENALTY UNDER CLAUSE 60.2 OF THE DISTRIBUTION AGREEMENT.

It is submitted that any claims made by the Claimant, regarding the payment of termination penalty by the respondent, should be rejected by the tribunal as the actions of the respondent do not result in the unilateral termination of the agreement. This is so because the prevailing situations in Gondwana allow the Respondent to avoid any obligations arising under the agreement [*Art.79, CISG*].

[C.1]. The enforcement of Bill 275 acts as an '*impediment*' in the execution of the Distribution agreement.

Article 79 states that the party will not be liable to perform any of its obligations under the agreement if the failure is due to any impediment beyond his control. The '*impediment'* can be of strike, wars, government embargo, or closing of international waterways, industrial dispute etc [*Draft counterpart of CISG article 79*]. This *impediment* must be beyond the control of either party to the agreement [*CISG Advisory Opinion no 7*] and must prevent performance of the agreement [*Honnold at p.478*]. In the present case, BILL 275 acted as an impediment in the performance of the distribution agreement by the Respondent.

The BILL 275 directly attacks the distribution agreement on the requirement on the use of the trademark or marks, when the tobacco products are displayed in the retail shops [*Clause 25, Distribution Agreement r/w BILL 275*]. Further, the scope of application of Bill 275 results in the distribution agreement being avoided on grounds of illegality as it requires mandatory display of all branded merchandise and promotional material bearing the trademarks of the Claimant [Claimant Exhibit No. 1].

[C.1.a]. *The supervening illegality was unforeseeable and unavoidable.*

As per Article 79 of CISG, any party invoking this defence would have to prove that the impediment was unforeseeable and unavoidable [*Chengwei Liu*]. In any other case, this defence cannot be invoked if, *firstly*, the prevailing events were within the personal sphere of responsibilities and risks of the person claiming such a defence [*Vine Wax*], *secondly*, such a situation making the performance impossible was foreseeable by the party claiming the defence [*Flambouras*].

It is submitted that the present case qualifies for the application of Article 79 as the impediment i.e. the enforcement of Bill 275, satisfies both the conditions stated above. This is so because *firstly*, all measures that were taken by the Gondwandan government prior to the parties entering into the distribution agreement, did not target the distribution of merchandise displaying trademarks or tobacco related trademarks, and also did not seek to commoditize tobacco [*Facts, pg.4*]. This makes the passage of the bill a supervening event and not an antecedent one, thereby making this event an unforeseeable one [*Edwin Peel*].

Secondly, the Passage of Bill 275, being an action of the state, was a fact completely outside the scope of both the parties to the distribution agreement [*Ingeborg schwenzer(Ed.)*]. This is evidenced by the fact that all possible measures that could have been taken to avoid the enforcement of this bill had already been taken by the Claimant, by approaching the domestic

courts of Gondwana [*Respondent Exhibit No. 2*]. Further, there exists no other possible substitute as promotion by the usage of any mark associated to tobacco products has been prohibited by Bill 275.

[C.2.] The BILL 275 is in compliance with the Gondwandan International Obligation.

The purpose of this law being to comply with Gondwana international obligations under the FCTC [*Clarification No. 16*], it seeks to prohibit the promotion of tobacco products and other products associated with tobacco products [*Claimant Exhibit No. 2*]. The convention makes it mandatory to every signing state to adopt and implement effective legislative measures to prevent the consumption of tobacco products [*Art. 5, FCTC*]. With view to achieve these objectives the government of Gondwana passed the BILL 275 to comply with the obligation under the agreement.

[C.3] The avoidance of the contract results in dissolution of all obligations under the distribution agreement.

As per Article 81 of CISG, the end result of avoidance of any agreement under Article 79 is that both parties are released from their primary performance obligations and are no longer entitled to perform those obligations, making the agreement terminated by supervening events [*CISG Advisory Council Opinion No. 9*] all obligations under the distribution agreement stood terminated, thereby attracting no liability of the Respondent under Clause 60.2.

Hence it can be concluded that the BILL 275 created an impediment that made the agreement frustrated and hence impossible for the respondent to carry on the obligations under the distribution agreement.

[D]. AN AWARD ISSUED IN FAVOUR OF THE CLAIMANT WOULD BE STRUCK DOWN UNDER GONDWANDAN LAWS.

It is argued that an award passed in favour of the Claimant would require the enforcement of distribution agreement on as is basis, as it has abstained from negotiating the terms of the distribution agreement even after the Gondwandan laws affected the execution of the same.

It is submitted that such an award will not be enforced by Gondwandan courts as it will be in direct contravention with the Gondwandan domestic policy on tobacco control.

[D.1]. The award will be struck down under Article V (2) b of the New York convention.

The Gondwandan Bill 275 enshrines in itself a measure to protect the health of the citizens of Gondwana, which in itself is an essential interest of the state concerned. [*General Comment No. 14*]. The Gondwandan government has been searching methods to curb the growth of smoking in the country since 2001, because according to the data collected in 2000, 35 percent of the people were engaged in smoking [*Facts ¶ 8,9*]. Therefore the government passed different stringent regulations from 2001 to 2009 and finally on 14th March, 2011 passed the BILL 275[*Facts ¶ 9, 10*]. These measures have been taken in furtherance of the Gondwandan public policy, and any violation of the same would attract Article V(2)b of the New York Convention. [*Herbert Kronke*].

[D.1.a]. *Gondwandan tobacco control measures are universally accepted as international public policy measures.*

It is submitted that Article V(2) b of the New York convention requires the court refusing enforcement to prove that the measure was taken in furtherance of international and not domestic public policy [*Herbert Kronke at 366*].International public policy includes in itself

lois de police or public policy rules.[*Bernard Hanotiau& Olivier Caprasse*; *ILA Recommendation*]. The implementation of the international convention in the domestic laws of a country is also treated as the public policy of that concerned country [*ILA Recommendation*].

There seems to be no standard test for deciding what *lois de police* make up public policy, and therefore jurists advocate that all and any *lois de police* are part of public policy or shall be treated like public policy [*Christoph Liebscher*]. It is for this reason, Gondwandan governments measure to regulate the sale and promotion of tobacco products should be considered to be a public policy measure for the purpose of applying Article V (2)b of the New York Convention.

[D.1.b]. *Control on tobacco consumption now holds normative value in international law as well.*

It is argued that the state of Gondwana would be acting in furtherance of its international obligations under the WHO Framework Convention on Tobacco Control, to which it is a party [Clarification 16]. It is because of this treaty regime that regulations for controlling tobacco consumption now hold normative value in international law. [*Valentina Vadi*].

[D.1.c]. *The courts in Gondwana has also upheld the public policy of the government.*

The BILL 275 was challenged in the supreme court of Gondwana, where it was rightly held by the court that the government of Gondwana not only has the right but also the sovereign duty to protect the health of the citizens of the country [*Respondent's Exhibit No.2*]. The principle of precedent makes the judgment binding on all the courts of the country. In view of this judgment, it is clear that the courts in Gondwana will treat the award so passed by the

arbitral tribunal in conflict with the binding precedent and in turn against the public policy of the country.

REQUEST FOR RELIEF

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

1. The tribunal has does not have any jurisdiction to adjudicate the dispute between the Claimant & the Respondent.
2. The distribution agreement is frustrated and therefore the respondent is not liable to pay any alleged amount of termination penalty.
3. The Claimant shall pay the costs of arbitration, including Respondent'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 Respondent