

**The International ADR Mooting
Competition 2014**

27 July 2014 – 2 August 2014.

City University of Hong Kong.

MEMORANDUM FOR CLAIMANT.

Team No: 278C

Before

The arbitral tribunal

China International Economic Trade Arbitration

Commission

Submission of the Claimant

Conglomerated Nanyu Tobacco Ltd

142 Longjiang Drive, Nanyu City, Nanyu

The Claimant.

v.

Real Quik Convenience Stores Ltd.,

42 Abrams Drive, Solanga, Gondwana.

The Respondent.

Books referred

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1	Convention on international sale of Goods 1980.
2	China International Economic trade arbitration Commission.
3	Convention on the recognition and enforcement of foreign Arbitral award , 1958.
4	UNCITRAL model law on International commercial arbitration 1985 as amended in 2006.
5	UNIDROIT principlecs of international commercial contract
6	Framework Convention on tobacco control

List of Abbreviation

UNCITRAL	United Nations Commission on International Trade law.
CISG	UN Convention on contract for International Sale of Goods.
UNIDROID	UNIDROID Principles of International Commercial Contract.
WTO	World Trade Organsation.
ICSID	International Commission for the Settlement of Investment Dispute.
FCTC	Framework Convention on Tobacco Control.
NYC	Newyork Convention for the Recognition and Enforcement of Foreign Arbitral Award.
CIETAC	China International Economic trade Arbitration Commission.
ICC	International Chamber of commerce
Art.	Article.
Sec.	section.
Ltd	limited.
IBA	International Bar Association.
Inc.	Incorporated.

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1. The Tribunal has jurisdiction to deal with this dispute before the lapse of twelve months of accrual or rise of dispute.

1.1 That the parties have already tried to have negotiation under the agreement but the negotiation produced no result.

In pursuant to the distribution agreement the respondent served requisition letter to the conglomerated Nanyu Tobacco limited asking re-negotiation of the distrubution agreement on 11 march 2013 . [claimants exhibit no 06:]. But no mutually amicable solution was reached at in the negotiation .that the language used in the arbitration clause “ **either party may submit the dispute to the CIETAC**, did not prohibit that the party could not approach to arbitration before elapse of twelve months.

1.2 That the pursuance of 12 months was mere formality not the essence of the agreement

Parties to to the present agreement have agreed in their last distribution agreement signed on 14 dec, 2010 to refer “the dispute or difference accruing or arising in their mutual conduct”¹. “CIETAC accepts cases involving economic, trade and other disputes of a contractual or non-contractual nature, based on an agreement of the parties”² The parties may agree to submit their disputes to CIETAC or a sub-commission/center of CIETAC for arbitration. Where the parties have agreed to arbitration by CIETAC, the Secretariat of CIETAC shall accept the arbitration application and administer the case. Where the parties have agreed to arbitration by a sub-commission/center, the secretariat of the sub-commission/center agreed upon by the parties shall accept the

¹ Clause 65, claimants exhibit no 1.

² Art. 3, CIETAC Rules.

arbitration application and administer the case.³ “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 the China International Economic and Trade Arbitration Commission (CIETAC) Hong Kong Sub-Commission (Arbitration Center) for arbitration which shall be conducted in accordance with the CIETAC’s arbitration rules in effect at the time of applying for arbitration”⁴.

Here, the time frame of twelve months to seek a solution through mediation or consultation is not the essence of the agreement, where the parties have failed to reach at a negotiation. Non fulfillment of remaining period to fulfill 12 months shall not affect neither parties’ right to equal proceeding in the arbitration if the arbitration is conducted before the lapse of twelve months.

Moreover, it is exclusively within the jurisdiction of the tribunal to decide on whether it has jurisdiction or not.⁵

“In the event of a dispute, controversy ,or difference arising out of or in connection with this agreement, the party shall initially seek the resolution.

³ Art 2 ,clause 6, CIETAC rules.

⁴ Art 65of the distribution agreement, claimant exhibit 1

⁵ Art. 6 of the CIETACrules.

2. The Arbitral tribunal should not admit the Gondwandan government's *amicus curiae* brief for consideration during the proceedings.

2.1 The tribunal has no jurisdiction to entertain any *amicus curiae* brief.

CIETAC accepts cases involving economic, trade and other disputes of a contractual or non-contractual nature, based on an agreement of the parties⁶. There was no agreement between claimant and respondent to accept *amicus* submission from third party. Neither CIETAC rules nor governing laws allow entertainment of *amicus curiae* brief. The other governing laws agreed by the parties like CISG and UNIDROIT principles do not also lay provision for entertainment of *amicus curiae* brief in the settlement of dispute. “It has been held in *hot rolled lead and carbon steel*⁷ by WTO appellate body “ individuals and organisations which are not member of the WTO have no legal right to make submissions to or to be heard by the appellate body and the appellate body has no legal duty to accept and consider unsolicited *amicus curiae* brief submitted by individuals or organisations not members of the WTO.

2.2 Entertainment of *amicus curiae* brief shall affect the confidentiality, fairness and equality.

“Hearings shall be held in camera. Where both parties request an open hearing, the arbitral tribunal shall make a decision”⁸. It has been held in *methanex corporation*⁹ in accepting an application for *amicus curiae* brief the tribunal shall consider whether the acceptance of such application for

⁷ WTO appellate body decision.

⁸ Article 36.1 CIETAC rules

⁹ *Methanex corporation vs United States of America.*

amici shall affect the equal treatment of the disputing parties and the opportunity of each to fully present its case under sub paragraph 3 of Art 15(1)”. Therefore the tribunal is required to decide a substantive dispute between the claimant and the respondent. The tribunal has no mandate to decide any other substantive issue or any dispute determining the legal rights of a third person.¹⁰ the “Subject to these Rules, 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 an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case”¹¹. Moreover the entertainment of amicus curiae brief shall affect the confidentiality of the arbitral proceedings which has been guaranteed in both CIETAC rules and UNCITRAL model law.

The application of department of state reads ‘As you are well aware, this arbitration touches on topics of Gondwandan public policy, and may well deal with potential infringements of Gondwandan law and sovereignty. As such, the Gondwandan government wishes to submit its *amicus curiae* brief in this matter to establish its position and to ensure that its views are understood by the Arbitral Tribunal.’¹² clearly states that tribunal has to decide on certain points that are not mandated by the parties.

The language of the department of state’s application ‘The Claimant’s arbitration proceedings in this matter will only serve to undermine Gondwana’s sovereign right to regulate and control its public policy. As such, the Tribunal should strongly consider the effect of an award in the Claimant’s favor, and the deleterious impact that it would have on the

¹⁰ Ibid.

¹¹ Article 17.1, UNCITRAL model law.

¹² Application for amicus curiae brief from the department of state , gondwana.

sale, promotion, and consumption of tobacco products in the state of Gondwana'¹³ shows that the entertainment of such amicus curiae brief will severely affect the claimants right .

Therefore the rights of the claimant, both procedural and substantive, shall not remain exactly judicially the same before and after the receipt of such amicus curiae brief.

¹³ Application for amicus curiae brief.

2.3 That there is no public policy in the gondwana totally prohibiting tobacco production and consumption.

Since the conclusion of distribution agreement between the parties there was no strict regulation in administering the tobacco market. Since then, both the parties are performing their mutual obligations. ‘We urge you to continue performing the Distribution Agreement as you have been doing, until we can reach a mutually beneficial solution’¹⁴. The Bill 275 that came into force on 1st january, 2013, laid certain provision on the packaging and marketing of tobacco products, but it did not totally prohibit sale, production and consumption of tobacco products. respondent was also performing respective obligation after the enactment of law within it’s perview. Therefore, issuance of an arbitral award against the respondent for non-performance of contractual obligation shall not frustrate any public policy of gondwana state.

3. That the amount has become due since the service of the notice of termination on 1st june 2010.

As per the distribution agreement between the claimant and the respondent “The Buyer has the right to suspend or terminate this Agreement at any time by giving written notice to the Seller. In the event that the Buyer terminates this Agreement, it shall be liable to pay liquidated damages according to the following scale:

Within 0-3 years from the Date of Signature for this Agreement – USD \$75,000,000”¹⁵ the last distribution agreement between the parties was

¹⁴ Claimants exhibit no -7.

signed on 14 dec, 2010¹⁶. But the respondent issued the termination notice on 1 may, 2013 which insisted that the terminaton shall took place from 1 june, 2013¹⁷.

3.1 That the termination was a voluntary one as the obligations under distribution agreement is still performable even after enactment of bill 275.

the Gondwandan Senate passed Bill 275 into law on 13 April 2012 . The requirements as stated under Bill 275 subsequently entered into force on 1 January 2013. However, Termination notice served on 1st may 2013 by the respondent.

3.2 That the nanyu brand did not loose its distinctly identifiable brand as a result of new legislation.

The requirement of bill 275 is that , “the brand, business, or company name for tobacco products or any variant name for tobacco products may appear on retail pacakaging of tobacco products”¹⁸. Again in bill 275 it is stated that, “the only identifying mark for tobacco products would be the printing of brand or company’s name”. though, no trade marks or brand name or images would be allowed, but it doesn’t mean that brand or company name is prohibited. the claimant notified to the respondent that, “The Nanyu brand is strong, and despite the Gondwandan legislations, we are seeing no significant change in our market share in Gondwana”¹⁹.

⁵. claimant exhibit no. 2
¹⁹ Claimant exhibit no. 7.

3.3 That the alleged decline in the sale of tobacco products was foreseeable both by the claimant and the respondent

Between 1 January 2013 and 1 June 2013, the tobacco industry in Gondwana experienced an average 30% decline in sales through all channels. The Claimant in particular suffered an approximate 25% decline in sales as compared to the same period in 2012. “At the present moment, we cannot justify the current operation of our Distribution Agreement. Sales for tobacco products have dropped significantly ever since Bill 275 has come into force.”

3.4 Sale of promotional materials and branded merchandise has not been prohibited by new legislation therefore the plea of force majeure shall not be pleaded.

As per term of distribution agreement between the parties “The Buyer shall provide space on the register counter whereby promotional material from the Seller may be displayed”²⁰ and “All Branded Merchandise shall be prominently displayed within the immediate vicinity of the Tobacco Products”²¹.

The requirement of new legislation(bill 275) is that there must have required packaging design, eliminating all trademarks, images, designs, colors, and design of any promotional merchandise or any material that promoted smoking would be subject to similar requirements like that of tobacco products never meant for total prohibition of sale of branded merchandise and promotional materials. So, the plea of force majeure shall not be pleaded.

²⁰ Claimant exhibit no.1

²¹ Claimant exhibit no.1

3.5 Sale of promotional materials and branded merchandise constitutes a subtle part of the distribution agreement.

“The Buyer shall provide shelf space in the main section of its retail shops in the direct vicinity of its tobacco products for display of all of the Seller’s products”²² and “All Branded Merchandise shall be prominently displayed within the immediate vicinity of the Tobacco Products”²³ ‘and buyers have asserted that a decrease in the value of the goods being sold should exempt them from damages for refusing to take delivery of and pay for the goods. These arguments have not been successful, and several courts have expressly commented that a party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract’.

4. The arbitral award, if passed by the the tribunal, shall not have any risk of enforcement.

The arbitral tribunal shall have the power to render arbitral award independently and impartially.“ The arbitral award is final and binding upon both the parties. Neither party may bring a lawsuit before a court or make a request to any other organization for revision of the award”²⁴

“The arbitral tribunal has the power to determine in the award the specific time period for the parties to carry out the award and the liabilities for failure to do so within the specified time period.”²⁵. as the arbitral award shall have no chance of affecting the state law or sovereignty of the gonwandan state, so, there shall not have any risk of enforcement. The

²² Claimant exhibit no. 1 (distribution agreement)

²³ Claimant exhibit no. 1 (distribution agreement)

²⁴ Art 47 of the CIETAC

²⁵ Article 47, CIETAC

parties shall automatically carry out the arbitral award within the time period specified in the award. If no time limit is specified in the award, the parties shall carry out the award immediately.

Where one party fails to carry out the award, the other party may apply to a competent court for enforcement of the award in accordance with the law. So, the binding force of arbitral award will be ensured by the parties themselves.

4.1 There is no possibility of availing exemption clause of NYC

Both the nanyu and gondowana are state party to the New York Convention . Therefore if any award is passed in favour of the claimant, it is the general presumption of the arbitral tribunal that there exists no risk of enforcement, if the requirement under the NYC conventions are fulfilled. Though the NYC lays provisions for refusal of the enforcement of arbitral under Art v , but these defense shall not be availed in the present arbitration . To support enforcement of arbitral awards, the Convention provides only a limited number of defenses to enforcement, and these are narrowly construed. They are also considered exhaustive, meaning they are the only grounds on which non enforcement can be based. There are five kinds of defenses found in Article V (1) and two additional defenses in Article V(2). In brief, the five Article V(1) defenses include: (1) incapacity and invalidity, (2) lack of notice or fairness, (3) arbitrator acted in excess of authority, (4) the tribunal or the procedure was not in accord with the parties' agreement, and (5) the award is not yet binding or has been set aside. The two Article V (2) defenses are (1) lack of arbitrability and (2) violation of public policy²⁶ .

²⁶ Margaret L Moses, Ibid, p 208.

Under the Convention, a court cannot refuse enforcement of an award because the arbitrators got it wrong, either on the facts or the law. Rather, the permitted defenses focus on the integrity of the process, including fairness to the parties and a reasonable opportunity to be heard. An arbitration that has been conducted by competent, experienced arbitrators is unlikely to produce an award that is unenforceable. In fact, it has been estimated that voluntary compliance combined with court enforcement results in 98% of international arbitration awards being paid or otherwise carried out.²⁷ “The Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.”²⁸

On the whole, however, most courts have viewed this defense narrowly, in keeping with the Convention’s pro-enforcement purpose.²⁹

Although there are occasional examples of misuse of the public policy defense, in most countries courts have been reluctant to refuse enforcement on public policy grounds. In fact, awards are so rarely refused enforcement on grounds of public policy that some commentators have urged courts to reconsider the application of the public policy defense of Article V(2)(b) to make it more than a theoretical defense, and to apply it somewhat more flexibly as a basis for refusing enforcement where enforcement would condone Unjust or improper results.³⁰

²⁷ Michael Kerr, *Concord and Conflict in International Arbitration*, Arb. Int. 121, 128, n. 24 (1997).

²⁸ 508 F.2d 969 (2d Cir. 1974)USA. *See also*, *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (2004)

²⁹ L. Moses Margaret, *Principles and Practices on Int. Comm. Arbitration* pp 218.

³⁰ *See, e.g.*, Eloise Henderson Bouzari, *The Public Policy Exception to Enforcement of International Arbitral Awards, Implications for Post-NAFTA Jurisprudence*, 30 Tex. Int’l L. J. 205, 217–18 (1995)

4.2 That the dispute is arbitrable and the arbitral award shall not frustrate the public policy of gondwana.

The parties already have made the dispute arbitrable in their arbitration agreement. There is no gondwana law that made the commercial dispute arising from distribution agreement non arbitrable. In most of the countries, commercial disputes are arbitrable. Hence the defense of non arbitrability shall not be well availed in exemption defense.

5. Prayer

Therefore it is most respectfully prayed that the tribunal makes an order in favor of the claimant against the respondent that the claimant is entitled to

1) Termination penalty of USD 75000000 plus interest and cost.

and that

2) 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.

And any other remedy that the tribunal deems necessary.