

The International ADR Mooting Competition 2014

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City University of Hong Kong.

MEMORANDUM FOR RESPONDENT

Team No: 278R

Before

**CHINA INTERNATIONAL ECONOMIC TRADE
ARBITRATION COMMISSION**

Submission of the Respondent

Conglomerated Nanyu Tobacco Ltd

142 Longjiang Drive, Nanyu City, Nanyu

The Claimant.

V.

Real Quick Convenience Stores Ltd.,

42 Abrams Drive, Solanga, Gondwana.

The Respondent.

Books referred

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2. I Jekos, Georgios, *International commercial and marine arbitration*, Published 2008
By Routledge-Cavendish Park Square, Milton Park, Abingdon, Oxon OX14 4RN.
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INDEX OF AUTHORITIES

No.	Name of the statute
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 princplecs 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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ADVANCED ARGUMENTS

1. The tribunal has no jurisdiction to deal with the present arbitration proceeding.

1.1. There has been no consultation or negotiation on the contents of the present dispute since its accrual.

The respondent served the notice¹ of earlier termination to the claimant on dated 1 may, 2013 as the performance under the present distribution agreement has become inoperable since the enactment of bill 275 in the Gondwana. Arbitration clause reads as follows “In the event of any dispute, controversy, or difference arising out of or in connection with this Agreement, the Parties *shall* initially seek a resolution through consultation and negotiation”². Here the resolution through mediation and consultation before arbitration is a must under the distribution agreement, which has never been initiated by the claimant. Therefore, the claimant is barred from bringing any application for arbitration.

1.2 Time requirement of 12 months is essence of the arbitration agreement

Clause 65 further states that either party may only commence arbitration if 12 months have elapsed since the date the dispute arose. Since this current arbitration deals solely with the alleged termination of the Agreement, which occurred on 1 May 2013, the Claimant was contractually obligated to conduct negotiations and consultations in good faith. “the cardinal rule of interpretation of deeds as well as other

¹. Claimant’s exhibit no 8.

². Art 65 of the distribution agreement.

instruments is to gather the intention from the words of the documents”³ and the interpretation to be adopted should be the one which gives effect, if possible to all the parts and does not reject any of them⁴. If the literal meaning is clear, one need not bother for the intention or the purpose.⁵ Hence the requirement of 12 months duration for negotiation and consultation being plain and unambiguous one, it should be considered as essence of the agreement. The derogation from which may frustrate the purpose and intention of the parties. The Claimant was barred from bringing this claim to arbitration until a period of 12 months had passed since the dispute arose on 1 May 2014.

As a result, the Tribunal lacks jurisdiction to decide on this dispute, as it has not been constituted in accordance with the arbitration agreement.

2. The Arbitral Tribunal should admit the Gondwandan government’s *amicus curiae* brief for consideration during the proceedings.

2.1 Admission of amicus curiae brief is allowed in not prohibited in the CIETAC rules of arbitration..

The parties to the present arbitration agreement agreed to conduct the arbitration according to the CIETAC rules of arbitration, but CIETAC rules of arbitration does not prohibit the admission of amicus curiae brief. Rather it is laid down in CIETAC rules of arbitration “The arbitral tribunal may examine the case in the manner it considers appropriate”⁶

³ Gujarat vs variety body builders AIR 1976, SC 2108. India

⁴ Joy kumar datta sitanath datta, 4 DLR 400.

⁵ CBDT vs Aditya Birla 1988 170 ITR 137.

⁶ Art 58 of the CIETAC rules of Arbitration.

analogous provision has been laid down in art 17(1) of the UNCITRAL model laws, which has been explained in *Methanex Corporation*⁷ “Art 15(1) of the UNCITRAL arbitration rules grants the tribunal a broad discretion as to the conduct of this arbitration subject always to the requirement of procedural equality and fairness towards the disputing parties”. Provisions of both the CIETAC and UNCITRAL rules is relatively flexible to grant the *amicus curiae* brief to be applied in the context of particular dispute. As *Gondwana* is a party to the FCTC and has international obligation to respond the anti-tobacco measures, power under CIETAC rule should be exercised in a manner commensurate with the public international law aspect of the case and the fact that it implicated substantial public interest. In this respect the present dispute is to be distinguished from a typical commercial arbitration on the basis that the claimant’s plea has already been struck down⁸ in the supreme court of *Gondwana* on the ground of state sovereignty over copyright and the public health policy of the *Gondwana*.

2.2 Amicus curiae brief is suitable when likely to assist the tribunal and then should be allowed by the tribunal.

The tribunal had the authority to conduct the proceedings as it deemed appropriate subject to the proviso that the parties be treated with equality and given a full opportunity of presenting their case.⁹

WTO appellate body also finds that it had broad authority to adopt procedural authority that does not conflict with the express rules of WTO dispute settlement understanding.¹⁰

⁷ *Methanex Corporation vs United States of America*.

⁸ Respondent exhibit no. 2.

⁹ Comments on Iran –UA claims tribunal, cited in Baker and Davis, *the UNCITRAL arbitration rules in practice*. 1992 pp, 76 and 98.

¹⁰ Imposition of contravelling duties on certain hot rolled lead and bismuth carbon steel products originating in the United Kingdom. Paragraph 39 [WT/DS138/AB/R adopted on 7th June 2000].

Note 5 of the Iran –US claims tribunal¹¹ states *‘the arbitral tribunal may having satisfied itself, that the statement of one of the two government or under special circumstance,s any other person who is not an arbitrating party in a particular case, is likely to assist the tribunal in carrying out its task, permit such govt or persons to assist the arbitral tribunal by presenting written or oral submission.*

In the present hand arbitration, the admission of amicus curiae brief shall assist the tribunal to understand the present legal aspect of bill 275 and its implications in the gondwana.the application of the department of state of gondwana states. *“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.”*¹²and *“The content of the amicus curiae brief will be relatively straightforward. The Gondwandan government has made it a point to reduce tobacco consumption and promotion. Tobacco consumption is one of the world’s leading causes of death, and its harmful effects are well documented. The Gondwandan government is fulfilling its duty to its citizens by implementing regulations that will safeguard the public health and prevent further casualties in the future”*¹³, Clearly shows that the brief may play an important rule in determining the parties’ present obligation in the light of the new legislation and public health policy of the government of gondwana.

¹¹ Iran vs US case no A/15 seethe award no 63 –A/15

¹² Amicus curiae application of the department of stae of gondwana.

¹³ Amicus curiae application of the department of stae of gondwana.

2.3 Confidentiality and equal treatment of the parties shall not be affected by the admission of amicus curiae brief

As it is mandated in art 36 of the CIETAC rules that the arbitration shall be conducted in the camera, the respondent is also willing to maintain the confidentiality. But mere entertainment of a amicus curiae written submission or oral submission shall not result in the loss of confidentiality. Moreover as the issue substantially relates to the public policy of gondwana “ in determining to what extent the arbitration is confidential proper consideration must also be given to the public interest in knowing how disputes are settled”¹⁴

3. The respondent’s obligation has become vitiated by Bill 275 and more stringent regulation of the gondwana.

3.1 The performance of contractual obligation to sell promotional materials has become impossible.

The distribution agreement reads as follows “The Seller agrees to sell to the Buyer, and the Buyer agrees to buy from the Seller, the Branded Merchandise listed in this Agreement on the terms and subject to the conditions set out in this Agreement.

2.2 The Buyer commits to purchase from the Seller a minimum quantity of Branded Merchandise according to the following:

- a. Minimum quantity: 2,000,000 Stock Keeping Units (“SKU”) in any combination;
- b. Fixed price as follows:
 - i. All branded t-shirts and polo shirts at USD \$7.50 per shirt;
 - ii. All branded keychains at USD \$0.75 per keychain;

¹⁴ Hans smith, International Arbitration , 1995, pp 297 & 299.

iii. All branded lighters at USD \$1.00 per lighter;

iv. All branded posters at USD \$0.75 per poster.”¹⁵

But Bill 275 states as follows “*Restrictions on sale and promotion of tobacco products*

(1) No manufacturer, distributor, or retailer may distribute or cause to be distributed any free samples of cigarettes, smokeless tobacco, or other tobacco products¹⁶

(2) No manufacturer, distributor, or retailer may distribute or cause to be distributed any material containing or displaying trademarks or marks associated with tobacco products.

3.2 The sale of tobacco product has become more stringent than that of before.

The claimant had dominant position in the worldwide tobacco market, for which the negotiated price in the Agreement was 20% higher than similar distribution agreements signed between the Respondent and other smaller tobacco companies or wholesalers. But after the enactment of Bill 275, which made all the tobacco brand into commodity the sale of Nanyu brand witnessed substantial reduction in the whole tobacco market amounting to 25% than that of the previous year. The reduction in sale resulted from more stringent tobacco regulation was beyond the control of the respondent.

¹⁵ Distribution agreement between the parties.

¹⁶ Bill 275 of gondowana.

3.3 The respondent could not reasonably foresee constant change in the tobacco regulation of Gondwana.

In 2002, the Gondwandan government implemented new packaging requirements which would require all tobacco packaging to carry warning labels. In

In 2004, the Gondwandan government implemented a national ban on smoking indoors, preventing bars, restaurants, and other businesses from having smoking areas;

In 2005, the Gondwandan government implemented a national ban on smoking in public areas, such as city parks;

In 2009, the Gondwandan government expanded its packaging restrictions, now requiring that the mandatory warning labels include graphic images of diseased lungs

3.4 Display of promotional materials which is a substantial part of the contract has become non performable.

The respondent agreed to display the seller's promotional materials and branded merchandise on following term

“25.1 The Buyer shall display the Tobacco Products in all retail shops in a prominent location and in any event not less than 6 feet away from any register.

25.2 The Buyer shall provide space on the register counter whereby promotional material from the Seller may be displayed.

25.3 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. This shelf space shall not be less than 3 feet horizontal shelf space or 4 feet vertical shelf space.

25.4 All displays shall prominently display the Seller's logos and trademarks. No part of the display may be obscured.

25.5 All Branded Merchandise shall be prominently displayed within the immediate vicinity of the Tobacco Products."¹⁷

But bill 275 prohibit the display of any promotional or branded materials containing any trademark in following language

“(2) No manufacturer, distributor, or retailer may distribute or cause to be distributed any material containing or displaying trademarks or marks associated with tobacco products.”¹⁸

Therefore the new legislation rendered the display requirement totally non-performable under the distribution agreement.

3.5 Respondents obligation is exempted under Art 79 of the CISG convention.

“ A party is not liable for a failure to perform any of its obligations if he proves

that the failure was due to an impediment beyond his control and that he could not

reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”¹⁹

Moreover “(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.”²⁰

¹⁷ Clause 22 , Distribution agreement.

¹⁸ Art 21(2) of the Bill 275.

¹⁹ Art 79 of the CISG convention.

It has been held in *Denny Mott*²¹ that “the performance of a contract is sometimes made legally impossible either by a change in the law or by a change in the operation of the law by reason of new facts supervening. The law may actually forbid the doing of some act undertaken in the contract”.

It has also been held in *Reilly*²² that “the elementary proposition that if further performance of a contract becomes impossible by legislation having that effect the contract is discharged.”

3.6 The impediment beyond the control of the respondent is satisfied.

In order for a non-performing party to qualify for an exemption, article 79 (1) requires that the non-performance be due to an impediment that was “beyond his control”²³.

On the other hand, some decisions have found an impediment beyond the control of a party where governmental regulations or the actions of governmental officials prevented a party’s performance. Thus a buyer that had paid for the goods was held exempt from liability for damages for failing to take delivery where the goods could not be imported into the buyer’s country because officials would not certify their safety²⁴.

The obligation is also exempted under the UNIDROIT principle of international commercial contract. It lays as follows

“Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into

²⁰ Art 79 (5) of the CISG convention.

²¹ *Denny , Mott Dickson ltd. V. fraser and company limited* 1944 A.C 265.

²² *Reilly V. The King.* 1934 A.C 176 per lord Atkin at p 180. On the implications of the theoretical basis of the doctrine.

²³ *CISG digest , published by UNCITRAL, at pp. 391.*

²⁴ . Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award No. 155/1996), Unilex.

account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”²⁵

3.7 Claim of damages has been vitiated under art 79(5) of the CISG:

The claimants claim for damages for earlier termination is barred under art 79 of the CISG. It lays as follows-

“(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention. Follows” Article 79 (5) of the Convention specifies that a successful claim to exemption shields a party from liability for damages, but it does not preclude the other party from “exercising any right other than to claim damages”. Claims against a party for damages have been denied in those cases in which the party qualified for an exemption under article 79.²⁶

A seller’s claim to interest on the unpaid part of the contract price has also been denied on the basis that the buyer had an exemption for its failure to pay²⁷.

4. There is imminent risk of enforcement of arbitral award if passed by the Arbitral award

Though the respondent is a gondwana company and gondwana is a state party to the New York convention. The arbitral award likely to be passed by the tribunal may be rejected by the gondwandon court on numerable grounds.

²⁵ Art 7.1.7. *force majeure*, *UNIDROIT principle*.

²⁶ CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999] (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 22 January 1997 (Arbitral award in case No. 155/1996), Unilex.

²⁷ Amtsgericht Charlottenburg, Germany, 4 May 1994, available on the Internet at www.cisg-online.ch/cisg/urteile/386.htm,

4.1 The arbitral procedure was not in accordance with the agreement of the parties.

Under NYC, enforcement of an arbitral award may be rejected under Art v on several grounds. It reads as follows ‘recognition and enforcement of an award may be refused at the request of the party against whom it is invoked only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that, the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties’²⁸.

According to the arbitration agreement the arbitral procedure shall start only after the expiry 12 months from the accrual of dispute or difference within which parties are expected to conduct negotiation and consultation. Therefore the arbitral procedure being a pre-mature one may serve as strong ground for refusal of the recognition and enforcement of the award.

4.2 Recognition and enforcement of the award may be refused on the ground of public policy.

The recognition and enforcement of the Award may also be refused on the ground that it stands oppose to the public policy of gondowana.

As per the same convention “recognition and enforcement of a foreign arbitral award may also be refused if the authority in the country where recognition and enforcement is sought, finds that the recognition and enforcement of the award would be contrary to the public policy of that country”²⁹.

²⁸ Art v (1) (d) of the Newyork Convention on the recognition and enforcement of the foreign arbitral Award.

²⁹ Art 5(2)(b), of the NYC.

In *Soleimany v. Soleimany*³⁰ “the Court of Appeal refused to enforce a foreign award on the ground that it was contrary to English public policy because the agreement was illegal, and that it was contrary to English public policy for an English award to be enforced if it was based on an English contract which was illegal when made”.

The public policy of Gondwana regarding the production and consumption of tobacco and the market regulation of tobacco product should be understood in light with the Gondwana’s state obligation under FCTC to which it is a ratifying country. as per Art 5(3).of the convention “In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.”

As per Art 8(2) “Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.”

Therefore the anti-tobacco public policy of the Gondwana is not emanating from any domestic principle of morality or justice rather a part of international public policy which may serve as a strong ground for the refusal of arbitral award.

³⁰ [1998] 3 WLR 811.

5. Prayer

The respondent respectfully requests that the Arbitral tribunal makes -

- a. A declaration that the Tribunal has no jurisdiction to decide the dispute between the Parties;
- b. Alternatively, a declaration that the Agreement has been frustrated; and
- c. That due to the Agreement being frustrated, that the Respondent is not liable to pay any alleged termination penalty.