THE INTERNATIONAL ADR MOOTING COMPETITION 2014

HONG KONG- 28 JULY-2 AUGUST 2014

MEMORANDUM FOR CLAIMANT

TEAM CODE: 284C

ON BEHALF OF	AGAINST
Conglomerated Nanyu Tobacco Ltd.,	Real Quik Convenience Stores Ltd.,
14 Park Street,	42 Abrams Drive,
Nanyu City,	Solanga,
Nanyu	Gondwana
CLAIMANT	**RESPONDENT**

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

Agreement	Distribution Agreement between CLAIMANT and RESPONDENT
Art.	Article
CISG	United Nations Convention of Contracts for the International Sale of Goods 1980
Cl.Ex.	Claimant Exhibit
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
Off Cmt	Official Commentary
p.	page
PICC	UNIDROIT Principles of International Commercial Contract 2010
ProcOrder	Procedural Order No.
Q.	Question
Re.Ex.	Respondent Exhibit

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CONVENTIONS/RULES

CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1985
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
PICC	UNIDROIT Principles of International Commercial Contracts, 2010

INDEX OF CASES AND AWARDS

ARGUMENTS

I. THE ARBITRAL TRIBUNAL HAS JURISDICTION TO DEAL WITH THIS DISPUTE IN LIGHT OF THE 12 MONTH NEGOTIATION PERIOD STIPULATED IN THE ARBITRATION AGREEMENT.

1. The Claimant claims that this Tribunal has the jurisdiction to arbitrate this dispute under Art. 65 of the Agreement against the contention of The Respondent that the pre-conditions to arbitration have not been met and that the Tribunal does not have jurisdiction over the subject matter of the dispute.

A. The 12 month negotiation period is unnecessary since attempts at dispute resolution through consultation and negotiation have been frustrated.

2. Art. 65 can be classified as a "multi-step clause," which states that parties to such an agreement will first attempt to resolve disputes arising from the agreement by negotiation or mediation, and afterwards when they fail to reach a resolution, will commence the process of binding arbitration. [Moses, p. 47] The problem with such clauses is that a technical application of this clause will unnecessarily delay the process of dispute resolution in cases where one or both of the parties are not sincerely dedicated to the process of negotiating or mediating. This is why the trend of international arbitral tribunals is to hold that the arbitral tribunal has jurisdiction in cases where the Claimant can demonstrate that "it would be futile to commence or to exhaust the mediation – perhaps because the parties have already agreed that they cannot resolve their differences by amicable means." [Shearman & Sterling] In such a case, the unilateral decision of the Claimant to derogate from the pre-conditions stated in the dispute resolution may be legitimately justified by the fact that any delays in arbitration may lead to difficulty in the preservation of evidence. [Shearman & Sterling]

3. In this case, The Claimant and The Respondent met on April 11th, 2013 to renegotiate the terms of the Agreement per The Respondent's request. However, no agreement was reached and the terms of the Agreement remained the same. The Claimant sent The Respondent a letter corresponding to the disappointing result of the meeting and explicitly stated The Claimant's intention to engage in future discussions in good faith. [Cl. Ex. 7] But The Respondent resorted to terminate the Agreement on May 5th, 2013. The action of The Respondent of unilaterally terminating the contract without further negotiations with The Claimant sufficiently shows that The Claimant and The Respondent have reached an impasse and cannot rely on amicable means of dispute resolution. To force The Claimant to comply with the 12 month negotiating period is to deprive The Claimant of the right to commence arbitration without unnecessary delay. As such, The Claimant has been dispensed from this contractual prerequisite by The Respondent's termination of the contract. This is in line with the general view of international arbitral tribunals that, "where the Claimant has taken reasonable steps to bring the dispute to the (The Respondent's) attention and resolve the matter amicably or where negotiations are bound to be futile, no purpose would be served by suspending the arbitration, and even less so, by forcing the Claimant to re-start the proceedings (after such preconditions have been fulfilled)." [Ludwig]

B. The multi-tier clause is unenforceable due to ambiguity in its terms.

4. Non-compliance with the pre-arbitration procedure on part of The Claimant is impossible to prove in this case since the wording of the dispute resolution clause is too vague. The conditions needed for a tribunal to consider a request for arbitration as inadmissible are that the agreement is not merely a permissive or non-mandatory provision and that the multi-step mechanism should "be defined to precisely determine the stage at which the efforts will be considered exhausted and the pre-

arbitral requirements satisfied." [Jolles, p.336] "In case of doubt, a tribunal should hold in favor of admissibility."

5. In this case, the wording of the dispute resolution clause is ambiguous as to the point in time the dispute is to be considered to have "arisen." The Respondent claims that the "dispute" refers to the termination of the Agreement and hence, the 12 month period starts from the date of termination. But it would be difficult to imagine a situation in which two parties to a contract were obligated to negotiate for 12 months after termination of a contract to reach "amicable results". The intention of the dispute resolution clause in mandating a 12 month period of negotiations before arbitration is to allow the parties to come to a negotiated result that would prevent the contract to come to an end. Therefore, the termination of The Respondent has rendered the negotiation period moot. In any case, the ambiguity of the term "dispute" gives doubt in which the tribunal should rule in favor of the admissibility of the claim.

Ⅱ. THE ARBITRAL TRIBUNAL SHOULD NOT ADMIT THE GONDWANDAN GOVERNMENT'S AMICUS CURIAE BRIEF FOR CONSIDERATION DURING THE PROCEEDINGS.

6. The Claimant claims that the arbitral tribunal does not have the discretion to allow third party participation, in this case the Gondwandan government's amicus curiae. Even if the arbitral tribunal has the discretion, amicus curiae should not be allowed due to lack of significant public interest involved, information beyond the disputing parties, and suitability of the Gondwandan government.

A. The arbitral tribunal's discretion does not include third party participation.

7. Arbitral tribunal's discretion over jurisdiction determines whether if the amicus curiae can be accepted or denied. According to UNCITRAL Model Law Article 16, it states that "The arbitral tribunal may rule on its own jurisdiction, including any objections

with respect to the existence or validity of the arbitration agreement." However, this clause does not clearly mention third party participation. The tribunal's jurisdiction is solely restricted between the two disputing parties, which mean there is no authority given to the tribunal to accept non-disputing parties. Even in CIETAC Article 6, which grants arbitral tribunal's authority to decide the jurisdiction, there is no reference of third-party participation. Overall, there is no reference to third party participation throughout UNICTRAL Model Law and CIETAC. This implicitly states that third parties are not in consideration between an agreement between two parties and the dispute should also be settled between the two parties. The tribunal only has its jurisdiction over this scope and has no authority to accept third-party participation.

B. Gondwandan Government does not fulfill the requirements to submit Amicus Curiae brief.

a) No significant public interest related to the dispute

8. Even though Claimant is one of the major tobacco companies worldwide, it is not the only company exporting tobacco products to Gondwana. There are other small and medium sized companies that provide tobacco products. Therefore, absence of Claimant's tobacco products in the market will have meager effect to the public of Gondwana. There is no clear special interest as well. The arbitration is only between the Claimant and Respondent regarding the termination fee. The result of the arbitration shall not affect the government's public policy. The arbitration does not consider about Claimant's will to prolong the sales agreement in Gondwana, but only on how the termination fee should be settled. Therefore tribunal's decision does not go against any public policy of the government, which is Bill 275.

b)No insightful information beyond the disputing parties

9. The Gondwandan government has no further insightful information that Claimant or Respondent need. The timeline of the government's policy reforms were all clearly mentioned in the Respondent's letters and media coverage. Claimant has profound understanding of Bill 275 through the Supreme Court case back in June, 2011. Furthermore, Claimant is well aware of its market share in Gondwana, the current changes in tobacco consumption, and tobacco market trends. Basic statistical data of the tobacco market is already provided and further information is unnecessary. The harms of tobacco consumption is not important in this case, as detrimental harms of cigarettes is common sense as well as not in the scope of the dispute. Amicus curiae brief from the Gondwandan government is only reiterating the stance of the government already known through legal reforms and unnecessary information, which does not need to be considered during the arbitration.

c) Lack of independence, expertise, and established interest regarding the dispute

10. The Gondwandan government lacks all three criteria to be a suitable petitioner. Firstly, the government only supports the interest of the Respondent; thus lacks neutrality. If the amicus curiae brief is submitted, it is definite that it will be disadvantageous to the Claimant. According to the letter sent from the representative of the Gondwandan Department of State, it is clear that government has a hostile attitude towards the Claimant. Secondly, the government does not have expertise in public health matters. The government is only responsible of passing Bill 275, but does not have expertise in health related issues and the impacts. Lastly, the government does not have established interest, but only has a vague purpose, which is "public health". Specific interest needs to be clearly defined. Nevertheless, the government only has the purpose to hinder the procedure of the arbitration, but pressuring the tribunal to rule in the Respondent's favor.

Ⅲ. RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE NOT VITIATED BY IMPLEMENTATION OF BILL 275

A. The internationalist directive of CISG Art. 7(1) outweighs the validity exception of Art. 4(a)

11. Under the CISG, courts are required to read their states' public policies narrowly in cases to which the Convention applies with regard to "its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." [Art.7.(a), CISG] The internationalist directive of article 7(1) is given predominant consideration in international commercial transactions than in sales made domestically.
12. The validity exception of Art. 4(a) was not intended to "impose a domestic public policy on the entire world." [*Hartnell* p.90]. What constitutes an issue of 'validity' and is therefore outside the scope of CISG is not clearly defined. The validity issue of 'contracts contrary to public policy' is not indiscriminately excluded without consideration, unlike in issues of 'contractual capacity', for example, which are clearly excluded from the scope of the convention. [*Honnold* p.116]
13. Not all public policies are given equal weight when being weighed against the needs of the international legal order. The Respondent's government's initiative to curb domestic tobacco consumption is not crucial enough to overpower the need for international legal stability. In addition, the Agreement does not threaten extant national public policy concerns set forth by the Respondent's government, however of less importance it may be. The selling of tobacco products to Respondent's store chain cannot in itself cause increased consumption of tobacco.
14. In addition, the absence of laws regarding intellectual property in Gondwana's

property law opens the gate for the discussion of intellectual property rights under international law. Hence, the public policy to reduce tobacco consumption through the implementation of strict restraints conflicts with yet another need.

B. Respondent cannot consider the contract avoided under CISG

15. Other claims that can be made for the vitiation of the Agreement include contract avoidance of Art. 49, and Force Majeure of Art. 79; none of which is applicable to the case at hand.

a) CLAIMANT has fulfilled all of its contractual obligations under the contract

16. Respondent cannot claim to have avoided the contract due to the implementation of Bill 275. Claimant has fulfilled its material obligations to Respondent as was agreed under the Distribution Agreement. [Art. 49 CISG]

b) RESPONDENT cannot be exempt from its obligations due to Force Majeure under CISG Art. 79

i)The implementation of Bill 275 and its subsequent impact on RESPONDENT does not constitute "hardship" that may qualify as an "impediment" under Article 79(1)

17. In terminating the Agreement, Respondent stated that it could not justify the prices that it is paying according to the Agreement due to the current market environment. [Cl.Ex.8] However, hardship caused by negative market developments does not constitute an impediment within Article 79(1) and hence Respondent cannot claim exemption from its obligations.[Advisory Council No.7] Change in the cost of performance or the value of the goods does not exempt a party from its obligations; a party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract. [*Steel ropes* Case]

18. Such has been reaffirmed by several courts, effectively turning down buyers'

arguments 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. Such price fluctuations are foreseeable aspects of international trade, and the losses they produce are part of the "normal risk of commercial activities".[Digest of Case Law, p.391]Art. 79 does not provide for an exemption for hardship of negative market developments. Thus, Respondent cannot claim exemption for liability.

IV. THERE WOULD NOT BE A RISK OF ENFORCEMENT IF THE TRIBUNAL WERE TO ISSUE AN AWARD IN FAVOR OF THE CLAIMANT.

A. The Respondent has no grounds to refuse enforcement of the Tribunal's award.

19. As both The Claimant and The Respondent's governments are parties to the NYC, both parties must enforce the award of the Tribunal accordingly. The Respondent's government claims that it may have grounds to refuse the enforcement of the Tribunal's award, if made in favor of The Claimant, as a violation of Art.5 Par.2 Clause (b) of the NYC. The Claimant's argument that the government of The Respondent is mistaken in the application of the clause proceeds as follows:

a) The intent of the clause does not provide for application in this case.

20. The option to resort to a public policy clause is guaranteed in most international laws, but they provide limited grounds for a substantial argument in part of the invoker. The public policy clause in the NYC is phrased specifically to limit the scope of its application to certain fundamental issues and exclude it from being applied to mere violations of domestic laws. This intent of the legislators becomes clearer when comparing the NYC public policy clause to Art.1 of the Geneva Convention which includes "principles of the law of the country" in its public policy clause. [Kluwer, p.365]

21. Also important to note is the language of the public policy clause in the NYC. Since the article states that the "recognition or enforcement of the award" must violate public policy, the Tribunal must determine whether the enforcement of the award in and of itself will produce a result that violates public policy rather than considering the contents of the entire award violate public policy. [Kluwer, p.366]
22. In this case, the enforcement of the award is to obligate The Respondent to pay the termination fee. The act of paying the termination fee itself does not harm the "public policy" that the government of The Respondent is referring to.

b) The interpretation of "public policy" does not comprise Bill 275.

23. Art. 5 Para. 2 Clause (b) has also been interpreted by international tribunals as "refer(ing) to international public policy, and not domestic public policy. Not every breach of a mandatory rule of the host country could justify refusing recognition or enforcement of a foreign award. Such a refusal is only justified where the award contravenes principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value." [Greenberg, Kee & Weeramantry, p.462] Using this standard, cases go on to interpret public policy as having a narrow scope and only operating in circumstances where "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." [Final Report, p.2-7] The scope is substantially narrower than domestic public policy because an expansive interpretation would otherwise vitiate the main purpose of the NYC which is to remove unwarranted obstacles to the enforcement of arbitration awards.
24. It is apparent that the mere violation of Bill 275 in and of itself as a violation of

domestic law does not constitute a violation of public policy, but the issue of whether the contents of Bill 275 can be elevated to having a standing as public policy remains to be considered. The objective of Bill 275 is for the government to instill values of health and well-being in a country where 35% of its citizens smoke regularly. The fact that smokers populated over 1/3 of the citizens of Gondwana illustrate that an award in favor of The Claimant would hardly "shock the conscience" of the public, nor would it violate the basic notions of morality and justice.

25. Furthermore, the stringent conditions enforced by Bill 275 could have the effect tantamount to the eradication and expropriation of brand premiums, and have been found to be unconstitutional in other regions. To have such extreme regulatory laws regarding commercialization of tobacco products cannot be seen as constituting international public policy.

B. Even if the public policy argument were to be taken as valid, the tribunal may still consider partial award enforcement.

26. In any case, if Bill 275 were to be construed as a public policy as in Art. 5 Para. 2 Clause (b) of the NYC, the tribunal may still make a partial award that would not have the risk of enforcement. According to former rulings, "a party may seek partial enforcement/recognition even if a ground exists under Article 5(2) to refuse recognition/enforcement of other parts of the award, provided that the "harmful" and "harmless" elements can be separated. A typical example of where partial enforcement would be sensible is where the interest awarded violates the public policy of the enforcing country." [Kluwer, p.414] In this case, the tribunal can award in favor of The Claimant since the termination fee itself is not harmful to the public policy of Gondwana and does not violate Bill 275. (word count 2983)