THE INTERNATIONAL ADR MOOTING COMPETITION 2014

HONG KONG- 28 JULY-2 AUGUST 2014

MEMORANDUM FOR RESPONDENT

TEAM CODE: 284R

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

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

INDEX OF AUTHORITIES

BOOKS/COMMENTARIES

ILA London Conference	Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards.Rep International Law Association, 2002. Cited as: ILA London Conference (para 23)
Mayer, Pierre	*Mandatory Rules of Law in International Arbitration.* *International Law Association 4 (1986): 274-93.* *Cited as: Mayer* (para 24)
Jacob S. Ziegel	*Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods (July 1981)* *Cited as: Ziegel* (para14)

ARTICLES/PAPERS (INDICATE THE PARAGRAPHS)

Bastin, Lucas	*The Amicus Curiae in Investor-State Arbitration* *Cambridge Journal of International and Comparative Law.Web.* *Cited as: Bastin* (para 9)
Graham, Camilla	*Amicus Curiae & Investment Arbitration Part One* *Advocates for International Development.Web.*
Graham, Camilla	*Amicus Curiae & Investment Arbitration Part Two* *Advocates for International Development.Web.* *Cited as: Graham* (para 9)

Kasolowsky, Boris and Caroline Harvey

Amici Curiae in Investment Treaty Arbitrations: Authority and Procedural Fairness

Arbitration Institute of the Stockholm Chamber of Commerce.

Cited as: Kasolowsky

(para 9)

Levine, Eugenia

Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation

Berkeley Journal of International Law

Miller, Benjamin

Guide for Potential Amici in International Investment Arbitration

University of Toronto Faculty of Law.

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. THIS ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION TO DEAL WITH THIS DISPUTE IN LIGHT OF THE 12 MONTH NEGOTIATION PERIOD STIPULATED IN THE ARBITRATION AGREEMENT.

1. The pre-condition to arbitration as stipulated in Art. 65 of the Agreement to "initially seek a resolution through consultation and negotiation" and to wait for a period of 12 months have not been satisfied and hence, the Tribunal does not have jurisdiction over this dispute. [Art. 65 of the Agreement]

A. Art. 65 of the Agreement is a standard multi-tier dispute resolution clause that is binding upon both parties.

2. Art. 65 of the Agreement states that "In the event of a dispute the Parties *shall* initially seek a resolution through consultation and negotiation. 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 CIETAC for arbitration. (emphasis added) [Art. 65 of the Agreement] This clause is a typical example of a standard multi-tier dispute resolution clause in which the parties to the agreement have to attempt to resolve the conflict by different alternative dispute resolution methods, the "first tier" method, before bringing the dispute to arbitration, the "second tier." The objective of such clauses in contracts is to minimize the effect of a dispute on the parties' business relationship as well as to keep negotiations private. [Shearman & Sterling] In ICC case No. 6276 of 1990, the tribunal held that the pre-arbitral process that both parties had agreed upon voluntarily were to be interpreted as strictly binding upon both parties and that if a claim does not satisfy the prerequisite of the first and second tiers, the request for

arbitration is premature and shall be inadmissible. [Jolles, p.333]

3. The phrasing of Art. 65 of the Agreement indicates that the first tier of dispute resolution is mandatory. The parties "shall," not *may*. The word "shall" is juxtaposed against the word "may" used in the sentence directly following the first sentence. This implies that the parties intended for the consultation and negotiation period of 12 months to be compulsory and not optional, as opposed to the latter option of submitting the dispute for arbitration. Hence, the first tier of the dispute resolution clause is a condition for the consent of both parties to arbitrate a dispute. If one of the parties were to violate such an agreement and started an arbitral proceeding before the 12 month period had passed, it would constitute grounds for refusal of the award under Art. 5 Para. 1 Clause (d) of the NYC; namely that the arbitral procedure is not in accordance with the agreement of the parties. [Davydenko]
4. In this case, The Claimant has brought claims against The Respondent regarding the termination fee pursuant to Clause 60 of the Agreement. [Application for Arbitration] Hence, the subject matter of the arbitration is the termination of the Agreement by The Respondent and whether The Respondent has the obligation of paying the termination fee. For the first tier of the dispute resolution clause to have been satisfied, The Claimant and The Respondent shall have negotiated about the terms of the termination starting from May 1st, 2013 for a period of 12 months. As merely 1 month has passed between the application for arbitration and the termination of The Respondent, as well as having been no effort in part of The Claimant to resolve the dispute through other means of alternative dispute resolutions, the arbitration constituted violates Art. 5 Para. 1 Clause (d) of the NYC in that "the arbitral procedure was not in accordance with the agreement of the parties."

B. The Claimant was negligent in its effort to negotiate, hence cannot claim the 12 month period unnecessary due to its own behavior.

5. The Claimant argues that there is legitimate reason for The Claimant to derogate from the stipulated dispute resolution clause in the Agreement and commence arbitration due to the reasons that a) there is no need to exhaust the first tier since The Respondent's termination has made it clear that there will be no amicable resolution of the dispute and b) that The Claimant has followed reasonable procedures to resolve the matter. The Respondent's counterclaim is as proceeds :
6. The termination by The Respondent and the termination fee claimed by The Claimant are the subject matters of this dispute. Therefore, the termination of the Agreement does not entail that The Respondent had no intentions of negotiation. On the contrary, The Respondent tried to negotiate with The Claimant on numerous occasions leading up to the termination. The market environment essentially made it impossible for The Respondent to fulfill its obligations under the Agreement; hence The Respondent had no choice but to terminate. Since The Respondent terminated due to impediments beyond its control, The Respondent argues that they are exempt from paying the termination fee pursuant to Art. 60 of the Agreement. The Claimant is arguing that The Respondent pay the termination fee. This is the main subject of the dispute, but it has not been negotiated between the two parties. Hence, The Claimant has made an erroneous judgment when arguing that there have ever been any negotiations regarding the dispute up for arbitration.
7. The Claimant claims that the 12 month period should be overlooked since all efforts to reach an amicable settlement between the parties are futile. As can be seen through the correspondence between The Claimant and The Respondent in Cl. Ex. 3, 4, 6 and 7, The Respondent repeatedly requested for negotiations with The Claimant but

received less than cooperative responses from The Claimant. If the tribunal were to accept The Claimant's assertion that the 12 month negotiation period would unnecessarily delay the dispute resolution process, it would essentially be allowing The Claimant to evade the 12 month period by its own actions. This interpretation would vitiate the purpose of mandating the first tier requirement.

Ⅱ. THE ARBITRAL TRIBUNAL SHOULD ADMIT THE GONDWANDAN GOVERNMENT'S AMICUS CURIAE BRIEF.

8. The Respondent claims that the arbitral tribunal has the discretion to allow third party participation, in this case the Gondwandan government's amicus curiae. Furthermore, the Gondwandan government's amicus curiae should be accepted for the arbitration due to the existence of significant public interest. Also, the government can provide information beyond the disputing parties, and is suitable third party to submit the amicus curiae.

A. The arbitral tribunal has its discretion to allow third party participation.

9. According to UNICTRAL Model Law Article 18, it states that "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." This article is also mentioned in UNICTRAL Arbitration Rules Article 17 (1), which has been referred in arbitrations to accept amicus briefs [Graham, p4]. Even though amicus curiae brief is submitted by a third party, it is considered as a reasonable opportunity to present the case. In both cases, Methanex Corp v. U.S. and UPS v. Canada, the tribunal mentioned Article 17, previously Article 15 before being amended, as a legal ground to accept amicus curiae briefs through general discretion of the tribunal [Bastin, p219]. The reasoning for accepting the amicus brief was that it can be used to facilitate the tribunal's process of inquiry into, understanding of, and

resolving the dispute [Kasolowsky, p6]. In the two cases mentioned above, written submissions from NGOs and the work union were allowed to be discussed in the merit phase [Kasolowsky, p6].

10. Furthermore, UNCITRAL Model Law Article 16 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." A similar article is mentioned in CIETAC Article 6, which states that "CIETAC shall have the power to determine… its jurisdiction over an arbitration case. CIETAC may, where necessary, delegate such power to the arbitral tribunal." These two articles grant the arbitral tribunal to have its own authority in determining the jurisdiction of the case. In other words, the tribunal has the discretion to decide whether if the amicus curiae can be submitted.

B. Gondwandan Government fulfills the criteria of submitting Amicus Curiae brief.

a) Significant public interest involved

11. As Claimant is one of the largest and most popular brands in Gondwana, the dispute has significant effect to the mass public of Gondwana. There is clear interest of the government to protect public health. Bill 275 is government's public policy to reduce smoking rate, so that smoke related deaths can decrease. The decision of the tribunal will have great impact to Bill 275 and tribunal's decision may cause hindrance to government's tobacco control and restriction. Enforcing an agreement that goes against public policy is a detrimental impact to public interest; therefore amicus curiae brief should be considered.

b) Insightful information beyond the disputing parties provided

12. Amicus curiae brief from the Gondwandan government can provide information, which was not mentioned in the media, such as government stance in this issue in terms of Gondwandan domestic law and sovereignty. Legal insights are necessary

considering infringement of domestic law and sovereignty in case of enforcement of the award. Furthermore, the government can provide statistical data on the impact of Claimant's tobacco products in the market and consumer demands compared to other cigarette companies, which is needed to prove Claimant's tobacco products' impact to the public. Both disputing parties cannot have a full insight in government's point of view regarding public policy and health; therefore, amicus curiae brief is necessary.

c) Expertise, established interest, and independence of Gondwandan Government

13. Gondwandan government fulfills three criteria to be a suitable petitioner for amicus curiae brief. Firstly, it has expertise in dealing with public interest, especially public health concerns. As Bill 275 was passed by the legislative of Gondwanda, the government has full understanding of this policy's impact. Through abundant resources and information, the government can critically analyze public health improvements. Second, the government has established interest, which is taking responsibility of public health. As the government, it has a duty to protect its citizens in health related issues. Lastly, Gondwandan government is neutral and independent from the disputing parties. Respondent has no relation to the government in anyways, but only follows Bill 275. Government's stance is completely independent from Respondent's stance and has no favor towards any party.

Ⅲ. RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE VITIATED BY IMPLEMENTATION OF BILL 275

A. Issues of validity are outside the scope of CISG, and are therefore governed by domestic law.

14. CISG Art. 4(a) makes clear that the convention does not deal with issues concerning the validity of the contract. Presumably "validity" includes any defense that may

vitiate the contract under the proper laws of the contract for the reason of being "contracts contrary to public policy", as is the case at hand. Hence, the Agreement is outside the scope of CISG and must be governed by the private international law of Gondwana. [Ziegel] The implementation of Bill 275 makes illegal the RESPONDENT's performance of contractual obligations, and therefore vitiates its obligations.

B. Even if the issue was within the scope of CISG, RESPONDENT is exempt from its obligations due to Force Majeure under CISG Art. 79

a) Respondent was faced with "an impediment beyond its control", and the failure to perform was due to said impediment.

15. The implementation of the Bill effectively banned all sale of tobacco merchandise in Gondwana, thus making the RESPONDENT's performance under the Agreement illegal. The passing of the Bill was "an unmanageable risk or a totally exceptional event" that acted as an impediment beyond RESPONDENT's control. [Chinese Goods case] Hence, RESPONDENT is exempt from its obligations under the Agreement due to Force Majeure.

b) The impediment could not have been reasonably foreseen at the time of the conclusion of the contract.

16. It is clear that both the CLAIMANT and RESPONDENT did not foresee that Bill 275 would pass. [Cl.Ex.5, Re.Ex.1] Regulations for the RESPONDENT's government's tobacco legislation had already been expanded in 2009, and both parties had acted upon their mutual understanding of the existing regulations.

c) RESPONDENT could not reasonably avoid or overcome the impediment or its consequences

17. The passing of the Bill made RESPONDENT's performance of its contractual

obligations under the Agreement illegal. RESPONDENT could not have rendered a similar performance that amounts to a "commercially reasonable substitute". The display of tobacco merchandise in RESPONDENT's stores was banned across the board without exceptions.

d) Respondent notified the Claimant.

18. RESPONDENT notified CLAIMANT of the impediment and its effect on RESPONDENT's ability to perform on numerous occasions.[Cl.Ex.6, Re.Ex.3] Having met all the conditions of Art. 79, RESPONDENT is therefore relieved of its obligations under the Agreement.

C. The passing of Bill 275 constitutes hardship

a) Economic hardship constitutes "impediment" under CISG Art. 79

19. The substantial decrease in tobacco consumption after the implementation of Bill 275 has changed the circumstances of the trade to the extent that RESPONDENT's performance has become a serious matter of economic hardship in addition to being an illegal act. According to court rulings, a matter of economic hardship can become an "impediment" referred to in Art. 7 (1) of CISG even if performance has not been rendered literally impossible. [Scafom International BV v. Lorraine Tubes S.A.S.]

b) Even if economic hardship cannot be considered under CISG Art. 79, it can be considered under PICC

20. Art. 7(2) of CISG allow the parties to refer to the general principles concerning matters that are not expressly settled in it. Rebus sic stantibus, a legal doctrine allowing the vitiation of treaties under a fundamental change of circumstances as an exception to the general rule of pacta sunt servanda, is embodied in the 1969 Vienna Convention on the Law of Treaties Art 62. This general principle may act as a basis for applying hardship, if it should be determined to be outside the scope of CISG.

21. The parties, having referred to the UNIDROIT Principles in the Distribution Agreement, may also be subject to its principles in matters that are not dealt with under CISG. Under PICC, RESPONDENT's may be exempt from its obligations for the reason of hardship under PICC Art 6.2.2.

IV. THERE WOULD BE A RISK OF ENFORCEMENT IF THE TRIBUNAL WERE TO ISSUE AN AWARD IN FAVOR OF THE CLAIMANT.

22. When the Respondent to a dispute refuses to carry out the terms of the award in favor of the Claimant, the Claimant can resort to remedies under the NYC in which it can seek compliance with the award either in the national court of the seat of arbitration or the court of the country in which the respondent has its assets, assuming there are no grounds for refusal of the award in the NYC. [Ozumba, p.4] The two grounds to refuse an enforcement of an award that the enforcement court can invoke on its own accord is arbitrability and public policy. In this case, an award in favor of the Claimant would violate the enforcing government's public policy.

A. Bill 275 and its contents constitute a public policy.

23. Public policy of an enforcement state "consists of principles and regulations that pertain to justice or morality or serves the fundamental socio-political and economic interests of that state." [Ozumba, p.6] Other attempts to define public policy have included a violation of basic notions of morality and justice, international public policy and transnational public policy. Most cases indicate that many domestic courts adhere to the definition of an international public policy. [ILA London Conference, p.13]

24. Substantive categories of public policy include mandatory law, fundamental principles of law, public order and national interests. Bill 275 falls under mandatory

law, to which Professor Mayer has stated that "a mandatory rule is an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship. To put it another way: mandatory rules of law are a matter of public policy, and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws." [Mayer, p.274] As the contents of Bill 275 promote public health in Gondwanda, it is not difficult to place Bill 275 as a public policy that must a upheld.

B. An award in favor of the Claimant would manifestly disrupt the essential interests protected by the public policy.

25. A government is entitled to protect its judicial process and maintain the integrity of its judicial system; hence the tribunal enforcing an award that violated the public policy of the government would defeat this objective. [Ozumba, p.10]
26. The obligations of the Respondent under the Agreement are of a character that if the Respondent were to perform them accordingly, the Respondent would be violating the law of Gondwanda encompassing its public policy to pursue the health of its citizens. If the tribunal awards in favor of the Claimant, obliging the Respondent to pay the termination fee, it would bring about the same result as upholding the obligations of the Respondent within the Agreement even when the obligations of the Respondent are deemed illegal by its government. In essence, to have the Gondwandan government enforce the award upon the Respondent would be to strip the Gondwandan government of its authority to preserve its judicial process.

(word count: 2918)