THE 5TH INTERNATIONAL ADR (ALTERNATIVE DISPUTE RESOLUTION) MOOTING COMPETITION 2014

Arbitral Tribunal Case No. M2014/24

Between

CONGLOMERATED NANYU TOBACCO LTD.
142 Longjiang Drive
Nanyu City, Nanyu

…. Claimant

And

REAL QUIK CONVENIENCE STORES LTD.
42 Abrams Drive
Solanga, Gondwana

… Respondent

MEMORANDUM FOR RESPONDENT
TEAM CODE – 328R

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20 June 2014

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RESPONDENT'S CASE

I. TABLE OF ABBREVIATIONS

Agreement	The Distribution Agreement between the Claimant and the Respondent dated 14th December 2010
Bill 275	The Gondwandan Senate Bill 275/2011, which was passed into law on 13 April 2012 and entered into force on 1 January 2013.
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
Claimant	Conglomerated Nanyu Tobacco Ltd.
HK Ordinance	Hong Kong Arbitration Ordinance 2014, Chapter 609
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration 2010
ICSID	International Centre for Settlement of Investment Disputes
p. / *pp.*	Page / Pages
Para	Paragraph
Parties	Conglomerated Nanyu Tobacco Ltd. and Real Quik Convenience Stores Ltd.

	Respondent	Real Quik Convenience Stores Ltd.
A		
	s	Section
	Tribunal	The arbitral tribunal formed on 19 February 2014 for the present proceedings
B		
	UNCITRAL	United Nations Commission on International Trade Law
C	UNIDROIT	International Institute for the Unification of Private Law
	UNIDROIT PICC	UNIDROIT Principles of International Commercial Contracts 2010
D		
E		

II. INDEX OF AUTHORITIES

A

BOOKS / COMMENTARIES

B

Jolles	Alexander Jolles, "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement", 72 Arbitration 4 (2006)

C

Chan	Chan Leng Sun, *Singapore Law on Arbitral Awards* (Singapore: Academy Publishing, 2011)

D

Figueres	Dyalá Jiménez Figueres, "Multi-Tiered Dispute Resolution Clauses in ICC Arbitration", 14 ICC International Court of Arbitration Bulletin 1 (2003)
Di Pietro	Domenico Di Pietro, Platte, Martin, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (London: Cameron May, 2001)

E

Born	Gary B. Born, *International Commercial Arbitration: Volume I* (Netherlands: Kluwer Law International, 2009)
Born Vol. 2	Gary B. Born, *International Commercial Arbitration: Volume II* (Netherlands: Kluwer Law International, 2009)
IBA Commentary	IBA Working Party, 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2010) 5

A

O'Malley	Nathan O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa 2012)

B

UNCITRAL Model Law on International Commercial Conciliation	UNCITRAL Model Law on International Commercial Conciliation, art. 13, UN Doc. A/57/71, 2002, Annex I, *p.* 6

C

D

E

A

CASES AND ARBITRAL AWARDS

B

Abaclat	*Abaclat and others v Argentina*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5
Cable & Wireless	*Cable & Wireless plc. v IBM United Kingdom Ltd* [2002] 2 All E.R. (Comm.) 1041 (Q.B.)

C

Channel Tunnel	*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 2 WLR 262

D

Daimler	*Daimler Financial Services AG v Argentina*, Award, ICSID Case No. ARB/05/01
Food Serv. of Am.	*Food Serv. of Am., Inc. v Pan Pacific Specialties Ltd*, 32 B.C.L.R.3d 225 (B.C. S.Ct. 1997)

E

Fluor Enters	*Fluor Enters. Inc. v Solutia Inc.*, 147 FSupp.2d 648 (S.D. Tex. 2001)
HIM Portland	*HIM Portland, LLC v DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003)
Licensor and buyer v Manufacturer	Interim Award and Final Award in *Licensor and buyer v Manufacturer*, 17 July 1992
Judgment of 20 Nov	*Judgment of 20 November 2003*, XXIX Y.B. Comm. Arb. 771 (Bavarian Oberstes Landesgericht) (2004)

A

Karaha Bodas	*Karaha Bodas Co., LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F.Supp.2d 936 (S.D. Tex. 2001)

B

Kemiron Atlantic	*Kemiron Atlantic Inc. v Aguakem Int'l Inc.*, 290 F.3d 1287 (11th Cir. 2002)

C

Ledee	*Ledee v Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982)
Partial Award in ICC Case No. 6276	Partial Award in ICC Case No. 6276, January 29, 1990

D

Preliminary Award in ICC Case No. 9984	Preliminary Award in ICC Case No. 9984, June 7, 1999

E

Soleimany	*Soleimany v Soleimany* [1999] Q.B. 785 (English Court of Appeal)
United Paperworkers	*United Paperworkers Int'l Union v Misco, Inc.*, 484 U.S. 29 (U.S. S.Ct. 1987)
W.R. Grace	*W.R. Grace & Co. v Local Union 759*, 461 U.S. 757 (U.S. S.Ct. 1983)
Weekly Homes	*Weekly Homes Inc. v. Jennings*, 936 SW 2d 16 (Tex. App. 1996)
White	*White v Kampner*, 641 A.2d 1381, 1387 (Conn. 1994)

III. THE RESPONDENT'S CONTENTIONS

A

A. The Tribunal has no jurisdiction to determine the dispute.

1. The Respondent submits that the Tribunal lacks jurisdiction to hear the dispute as the Claimant failed to comply with procedural requirements under Clause 65 of the Agreement. In particular, (*i*) there was no attempt at consultation or negotiation and (*ii*) the request for arbitration was made before the 12-month period had elapsed.

B

C

2. Pursuant to s 34(2) of the HK Ordinance, the Tribunal has jurisdiction to rule on its own jurisdiction. It can decide as to what matters have been submitted to arbitration in accordance with the arbitration agreement [s 34(2)(b)].

D

1. Parties must comply with procedural requirements provided in Clause 65 before arbitration can commence.

E

3. Parties' intentions to resolve differences under specific conditions will be upheld if these intentions are expressly stipulated. While the tribunal in *Licensor and buyer v Manufacturer* held that an agreement to negotiate did not prevent the tribunal from seizing jurisdiction over the dispute, it only did so because parties' intentions to avail the right to resort to arbitration contingent upon the fulfilment of more specific conditions were not expressly stipulated. Parties who have expressly placed specific conditions precedent to arbitration in the contract are taken to have "clearly intended to make arbitration a dispute mechanism of last resort" [*Kemiron Atlantic, p.*1291].

4. The failure to comply with the procedural requirements in a multi-step dispute resolution clause "constitutes a jurisdictional defect affecting the arbitral proceedings" [Born, *p.*842]. Unless there is "good cause for departing from them", parties must strictly comply with the different tiers of dispute resolution [*Channel Tunnel*, *p.*276]. Courts require strict compliance with these provisions, especially where parties "intentionally conditioned arbitration upon" other modes of dispute resolution [*Cable & Wireless*, *p.*1054; *HIM Portland*, *p.*42], and can determine the issue of arbitrability where the arbitration provision is expressly qualified by an unsatisfied condition precedent that requires parties to first enter into negotiation or consultation [*Weekly Homes*, *p.*18; *White*].

5. Clause 65 uses the obligatory word "shall" and thus mandates that Parties "seek a resolution through consultation and negotiation", reflecting mandatory negotiation requirements [*Fluor Enters*, *p.*653]. Further, the second paragraph of Clause 65 does not merely reflect a "waiting period", as it is worded "if…the Parties have been unable to come to an agreement" and thus restricts the power to commence arbitration being contingent upon the failure of the Parties to reach an agreement after exhausting the avenues of consultation and negotiation.

6. Even if it is similar to a "waiting period", it cannot be ignored as it cannot be shown that abiding by that period would prove futile for the Parties' negotiations regarding termination or that it would be more efficient to immediately proceed to arbitration [*Daimler*; *Abaclat*].

2. There was no consultation or negotiation that complied with Clause 65 of the Agreement.

7. The Claimant's assertion that the Parties have already attempted to negotiate on 11 April 2013 is unmeritorious. First, any attempt at negotiation before 1 May 2013 does not relate to the dispute submitted for arbitration. Because termination was not contemplated by the Parties before 1 May 2013, any negotiation attempt before 1 May 2013 could not possibly relate to the dispute over termination. Given that the issue submitted for arbitration solely concerns the termination of the Agreement and the applicability of Clause 60, the attempt to negotiate contractual performance on 11 April 2013 does not constitute consultation or negotiation on the dispute submitted for arbitration.

8. Second, the requirement of consultation and negotiation refers to a series of mandatory negotiation sessions prior to arbitration and the informally called meeting does not constitute a good faith attempt at consultation or negotiation [*White*].

3. The requirement for arbitrability is not met as there is no conclusive proof that it was impossible for the Parties to reach a negotiated resolution to the dispute.

9. The negotiation requirement should be considered fulfilled before the term established by the parties for negotiation has expired only when it is clear that the parties' positions are so opposed that it would be virtually impossible to reach a negotiated solution [*Figueres, p.* 77]. While a letter stating that the negotiation

concluded without an agreement being reached can satisfy the negotiation requirement, it must additionally fix a date that signals total failure of agreement if parties fail to negotiate a solution by then [*Preliminary Award in ICC Case No. 9984*]. Accordingly, if there is no such date stipulated, the applicable negotiation requirement is the one Parties initially agreed upon.

10. The Parties' positions are not so opposed such that it would be impossible to negotiate a solution to the dispute submitted for arbitration. There is no impasse in negotiations pertaining to termination of the Agreement, since such negotiations have not taken place. Even if the Tribunal regards the negotiation as one that is connected to the dispute submitted for arbitration, the Claimant's assertion on 1 May 2013 that there is no choice but to terminate the Agreement should not be taken as a "formal milestone" satisfying the negotiation requirement, as it disregarded the Respondent's openness to further discussion and did not stipulate a date which would displace the end of the 12-month period.

4. The Claimant did not submit the dispute for arbitration in accordance with the 12-month period requirement in Clause 65 of the Agreement.

11. In addition, the Claimant's notice for arbitration is inconsistent with the procedural requirement that the power to submit the dispute for arbitration arises only 12 months from the date on which the dispute arose. Since the dispute refers to the alleged termination of the Agreement, which occurred on 1 May 2013 at the earliest, Clause 65 prohibits the Claimant from commencing arbitration proceedings 12 January 2014 as this is within 12 months from 1 May 2013.

12. Even if the Claimant asserts that the dispute arose sometime in April 2013 and that there was therefore an attempt at negotiations, the Claimant's application for arbitration falls afoul Clause 65.

B. Even if the Tribunal has jurisdiction to deal with this dispute, the Tribunal should dismiss the arbitration proceedings on the grounds of the Claimant's breach of procedural requirements.

13. Even if the Tribunal has jurisdiction to decide the issue, the Tribunal should decide *sua sponte* that the Claimant has breached the procedural requirements and the Tribunal should therefore dismiss the arbitration proceedings [*Partial Award in ICC Case No. 6276*].

14. The Tribunal may suspend the arbitration proceedings, send the Parties to negotiation, and only to resume the proceedings if negotiation fails. The initiation of arbitration proceedings are not to be regarded as a waiver of the agreement to negotiate or as a termination of the negotiation requirement [UNCITRAL Model Law on International Commercial Conciliation, art. 13]. The Tribunal may impose specific guidelines for the negotiation set out in Clause 65 [Born, *p.*843; Jolles, *p.*337].

C. The Gondwandan government's *amicus curiae* brief should be admitted for consideration as it is relevant to the Respondent's submissions and material to the final award.

15. The Respondent seeks to admit an *amicus curiae* brief by the Gondwandan government on the grounds that it is relevant and material to its submissions on the enforcement of the arbitral award [IBA Rules, Article 3(11)]. Since the IBA

Rules do not contain any specialised provisions for *amici curiae* [IBA Commentary], the Respondent seeks to admit the brief under the rules for admission of supplementary evidence in Article 3(11).

16. Given that the Tribunal has the power to interpret the meaning of any disputed terms "according to their purpose and in the manner most appropriate for the particular arbitration" [IBA Rules, Art 1(4)], the Respondent submits that 'relevancy' is satisfied when the moving party articulates convincingly why it believes a certain document supports a contention [O'Malley, para 3.69]. The Respondent also submits that 'materiality' is satisfied when it can be shown that the document will have a bearing upon the final award [O'Malley, para 3.73].

17. Accordingly, the brief is relevant to the Respondent's submissions on the enforceability of the arbitral award because it reflects the Gondwandan government's refusal to enforce an award in favour of the Claimant, on public policy grounds. The brief is also material to the final award because it lays out the reasons for which the Gondwandan government may refuse to enforce the resulting arbitral award under Article V(2)(b) of the New York Convention. If the Gondwandan government has a legitimate right to refuse to enforce any arbitral award in favour of the Claimant under the New York Convention, this would clearly have an impact on the final award issued by the Arbitral Tribunal.

D. The Respondent's obligations under the Agreement were vitiated by the implementation of Bill 275.

1. The UNIDROIT PICC should be used to address the applicability of Clause 60 of the Agreement, in light of Bill 275.

18. The provisions in CISG are insufficient to fully address the issues that have arisen with regard to the applicability of Clause 60. Under CISG, only Article 79 is directly relevant to the issues that have arisen with regard to Bill 275 because it addresses impediments to the performance of contractual obligations. However, Bill 275 does not directly affect the Respondent's ability to execute the liquidated damages clause in Clause 60. Rather, Bill 275 affects the fundamental purpose of the entire contract and the Respondent's ability to carry out fundamental obligations of the contract, such as the display requirements in Clause 25. Hence, the provisions governing hardship in UNIDROIT PICC are more applicable than Article 79 of CISG. The Respondent therefore submits that the Tribunal employ Articles 6.2.2 and 6.2.3 in UNIDROIT PICC to address the applicability of Clause 60 in light of the changes brought about by Bill 275.

2. The termination penalties should be waived, as the Respondent suffered hardship in light of Bill 275.

19. Hardship, as laid out in Article 6.2.2 of UNIDROIT PICC, requires the fulfilment of four criteria: (i) the events occur or become known to the disadvantaged party after the conclusion of the contract, (ii) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract, (iii) the events are beyond the control of the disadvantaged party,

and (iv) the risk of the events was not assumed by the disadvantaged party.

20. Criteria (i), (iii), and (iv) are met. Regarding (i), the Respondent's knowledge of the legislation's passage came after the date of said passing, 13 April 2012, 16 months after the signing of the contract on 14 December 2010. Regarding (iii), the Gondwandan government's decision to pass legislation curbing tobacco sales was certainly not within the Respondent's control. Regarding (iv), the Respondent should not bear any risk as risk allocation is not mentioned in the contract and Parties did not agree to any clause bearing risk for unforeseen supervening events. While UNIDROIT PICC does not require the risk to have been taken over expressly, and considers risk to have been assumed by parties entering into "speculative transactions" [Article 6.2.2 comments, *p.*216], it is submitted that the material contract was not a "speculative transaction", since there was a long-lasting business relationship between the Parties, with the Claimant's products being popular in Gondwana.

21. Criterion (ii) brings into question the foreseeability of the supervening event. It is submitted that the passage of Bill 275 was an unforeseen event. While the World Health Organisation Framework Convention on Tobacco Control has 178 parties, only a minute fraction of the world's countries have passed legislation as rigid and specific as Bill 275, likely because the Convention only holds its parties to very general guidelines. Legislation of such strictness is therefore exceptional, and not the norm, given that it may make "the tobacco market in Gondwana one of the most stringently regulated markets in the world". The previous implementation of tobacco control measures does not logically lead to conclusion

that Bill 275 would be passed. The fact that Bill 275 was passed only by a hair's majority, and resulted in widespread demonstrations, illustrates that the passing of Bill 275 was, by general consensus, unexpected.

22. The commentary in UNIDROIT PICC provides that "sometimes the change in circumstances is gradual, but the final result... may constitute... hardship... [if] the pace of change increases dramatically during the life of the contract" (Art 6.2.2 comments, *p.*215). It is submitted that said provisions were designed precisely to protect against the hardship the Respondent is facing.

23. Further, the Respondent attempted to highlight its concerns with the Claimant in a letter dated 21 March 2011, when the debate regarding Bill 275 commenced (after the conclusion of the contract). The Claimant brushed this aside and even alleged there was no "real risk" of legislative change.

24. Pursuant to Article 6.2.3, hardship entitles the Respondent to request renegotiations promptly and with explanation. Upon failure to reach agreement, Article 6.2.3 allows the court to terminate the contract at a date and on terms to be fixed. The court should waive the harsh termination penalties, given the Respondent's unforeseen hardship in attempting to carry out its duties.

3. The Respondent is not liable for the inability to perform its obligations as the inability stemmed from an event beyond its control.

25. Additionally, the Respondent's inability to perform its obligations in Clause 25 is

protected by Article 79 of CISG. Parties are not liable for failure to perform if "the failure was due to an impediment beyond his control" and if he could not "have taken the impediment into account" when entering the contract, "or to have avoided or overcome [the impediment], or its consequences".

26. The impediment in that case stemmed from the government's unexpected legislation (beyond the Respondent's control), and once Bill 275 was passed, it would have been impossible to avoid or overcome the impediment without breaching the law. It is submitted that the Respondent could not have taken the impediment into account when entering the contract, as debate on the bill had not even been publicly announced at the time. Existing tobacco control legislation at the time is not unusual in most countries, as mentioned above. The Respondent cannot reasonably be expected to precisely predict that the Gondwandan government would suddenly pass such harsh legislation, given that said legislation is exceptional vis-a-vis the tobacco control measures implemented worldwide. Thus, the Respondent submits that Article 79 prevents the Claimant from seeking damages for non-performance should the Claimant pursue this course of action.

E. An award in favour of the Claimant, if any, will likely not be enforced.

1. The award would be unenforceable as the arbitral procedure violates Clause 65.

27. An award made in favour of the Claimant is unenforceable as it violates Articles 34(2)(a)(iv) and 36(1)(a)(iv) of the UNCITRAL Model Law and Article V(1)(d)

of the New York Convention as the arbitral procedure is not in accordance with Clause 65 of the Agreement [Born Vol. 2, *pp.*2765-2769; Chan, *p.*245].

28. Since the fundamental purpose of these Articles is to "[establish] the supremacy of party autonomy" [Di Pietro, *p.*163], it is of paramount importance to give effect to the clear words of Clause 65.

29. A tribunal's departure from the parties' agreement on arbitral procedural requirements justifies setting aside the award, if such departure is substantially prejudicial to the complaining party [*Karaha Bodas*, *p.*945] and the agreement is explicit and specific [*Food Serv. of Am.*].

30. Thus, an award would be unenforceable, as the Claimant had not complied with Clause 65 and such an award substantially prejudices the Respondent.

2. The award may be denied enforcement due to its inconsistency with Gondwana's public policy.

31. Article V(2)(b) of the New York Convention provides that the competent authority in the country where the recognition or enforcement of an arbitral award is sought may refuse such recognition or enforcement if it "would be contrary to the public policy of that country". Similarly, Article 36(1)(*b*)(ii) of the UNCITRAL Model Law provides that an arbitral award may be denied recognition or enforcement in any State if it "would be contrary to the public policy of [the] State". Article 34(2)(*b*)(ii) states that courts (in the State where the award was rendered) may set aside arbitral awards in conflict with a foreign

state's public policy [Born Vol. 2, *pp.*2623].

A

32. "Public policy" is that which is "of the forum intended for international settings" – while "consistent with applicable international law principles", it is "primarily to be deduced under the *lex fori*" [Born Vol. 2, *pp.*2622, 2837; *Ledee*, *p.*187; *Judgment of 20 Nov*]. Such policies are derived "by reference to the laws and legal precedents [*W.R. Grace*, *p.*766].

B

C

33. The public policy exception can be invoked to resist recognising an award that imposes liability in a manner contrary to public policy [Born Vol. 2, *p.*2623; *Soleimany*, *p.*800], as such an award is based on a substantive claim that is itself contrary to public policy [*United Paperworkers*, *p.*45].

D

34. Therefore, an award in favour of the Claimant may be set aside in Hong Kong for derogation from Gondwana's public policy derived from Bill 275, and in any event, it can be denied enforcement in Gondwana.

E

IV. RELIEF REQUESTED

35. In light of the Respondent's arguments, the Respondent humbly requests the Tribunal to find that:

(i) The Tribunal has no jurisdiction to determine the matter as the Claimant has not followed procedural requirements under Clause 65;

(ii) Even if the Tribunal has jurisdiction, it should dismiss the proceedings on the ground of procedural defect;

(iii) The Gondwandan government's *amicus curiae* brief is admissible as it is

relevant to the Respondent's submissions and material to the final award;

A

(iv) The Respondent's obligations under the Agreement were vitiated as the passage of Bill 275 was unforeseeable and beyond its control and the termination penalties are to be waived for hardship; and

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(v) An award by this Tribunal is unenforceable as it is contrary to Gondwana's public policy and the arbitral procedure violates Clause 65.

Dated this 20th day of June 2014.

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TEAM 328R
COUNSEL FOR THE RESPONDENT

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