# 5TH INTERNATIONAL ADR MOOTING COMPETITION

## HONG KONG 2014

# MEMORANDUM FOR RESPONDENT

**TEAM CODE: 429R**

**IN THE MATTER OF:**

**NANYU TOBACCO LTD.** **...CLAIMANT**

**V.**

**REAL QUIK CONVENIENCE STORES LTD.** **...RESPONDENT**

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| | |
|---|---|
| & | And |
| ¶/¶¶ | Paragraph/Paragraphs |
| A.D.2d | New York's Appellate Division Reports |
| AC | Appeals Cases |
| All ER | All England Report |
| Am. | America |
| Am. J. Int'l L | American Journal of International Law |
| Anr. | Another |
| Ark. | Arkansas |
| Art./Arts. | Article/Articles |
| BG | Bundesgericht |
| BGH | BundesGerichtshof |
| Boston U.L. Rev. | Boston University Law Review |
| C.L.R | Commonwealth Law Reports |
| Cal. | California |
| Cal. 4th | California Reports (4th Series) |
| Cal. App. | California Appellate Reports |
| Cal. Rptr. | California Reporter |
| Ch App | Chancery Appeal Cases |
| CIETAC | China International Economic and Trade Arbitration Commission |
| Cir. | Circuit |
| CISG | Convention on the International Sale of Goods |
| Cl. Ex. | Claimant’s Exhibit |
| CLOUT | Case Law on UNCITRAL Texts |
| Co. | Company |
| Colum. J. Transnat'l L. | Columbia Journal of Transnational Law |
| Columbia J European L | Columbia Journal of European Law |
| Comm. | Commission |
| Comm. Arb. | Commercial Arbitration |
| Cornell L.Q. | Cornell Law Quarterly |

| | |
|---|---|
| Corp. | Corporation |
| E.D.N.Y | Eastern District of New York |
| Ed. | Edition |
| eds. | Editors |
| et. al. | And others |
| EWCA | England and Wales Court of Appeal |
| EWHC | High Court of England and Wales |
| F.2d | Federal Reporter, Second Series |
| F.3d | Federal Reporter, Third Series |
| F.Supp. | Federal Supplement |
| FCR | Federal Court Reports |
| Fordham Int'l L.J | Fordham International Law Journal |
| FSA | Framework and Sales Agreement |
| FSR | Fleet Street Reports |
| Ger. | Germany |
| Govt. | Government |
| HG | Handelsgericht |
| I.L.Pr | International Litigation Procedure |
| ICC | International Chamber of Commerce |
| ICSID | International Centre for Settlement of Investment Disputes |
| IHR | InternationalesHandelsrecht |
| Inc. | Incorporated |
| Ins. | Insurance |
| Int'l | International |
| Int'l & Comp. L.Q. | International and Comparative Law Quarterly |
| Int'l Law. | International Lawyer |
| J.D.I (Clunet) | Journal de droit international |
| J.Law& Commerce | Journal of Law and Commerce |
| L. Rev. | Law Review |
| L.J. | Law Journal |
| La. L. Rev. | Louisiana Law Review |
| LG | Landgericht |
| Loy. L.A. Int'l & | Loyola of Los Angeles International and Comparative Law Review |

| | |
|---|---|
| Comp. L. Rev. | |
| LR | Law Reports |
| Ltd. | Limited |
| N.D. III | District Court, Northern District of Illinois |
| N.E. | North Eastern Reporter |
| No. | Number |
| Oct. | October |
| OGH | ObersterGerichtshof |
| OLG | Oberlandesgericht |
| p./pp. | Page/Pages |
| Pace Int'l L. Rev | Pace International Law Review |
| Pr. Or. | Procedural Order |
| Res. Ex. | Respondent's Exhibit |
| Rev. Arb. | Revue de l'arbitrage (Review of Arbitration) |
| S.D. Tex. | Southern District of Texas |
| S.W. | South Western Reporter |
| SCC | Supreme Court Cases |
| SGCA | Singapore Court of Appeals |
| SLA | Sales and Licensing Agreement |
| Switz. | Switzerland |
| U.K. | United Kingdom |
| U.S. | United States |
| U.S. Dist. | United States District Court |
| UKHL | United Kingdom House of Lords |
| UN | United Nations |
| UNCITRAL | UNCITRAL Model Law on International Commercial Arbitration |
| v. | Versus |
| Vindobona J. of Int'l | Vindobona Journal of International Commercial Law & Arbitration |
| Vol. | Volume |
| W.D. Okla. | Western District of Oklahoma |
| WL | Westlaw |
| Y.B. | Yearbook |
| YBCA | Yearbook Commercial Arbitration |

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## IV. LEGAL INSTRUMENTS

| TITLE | SHORTENED FORM | ¶ |
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| *Convention on the Recognition an Enforcement of Arbitral Awards, 1958* | New York Convention | 12-15 |
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# ARGUMENTS ADVANCED

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

1. The Arbitral Tribunal does not have the requisite jurisdiction to determine the present dispute as (1.1.) There exists a valid Arbitration agreement between the parties with a pre condition to negotiate for a period of 12 months and (1.2.) The Arbitral Tribunal is competent to direct the parties to hold negotiation.

### 1.1. THERE EXISTS A VALID ARBITRATION AGREEMENT BETWEEN THE PARTIES WITH A PRE-CONDITION TO NEGOTIATE

2. If dispute resolution clauses expressly provide that negotiations or other procedural steps are a condition precedent to arbitration; courts require compliance with those provisions.[ *Cable case; SocietePolyclinique Case* ] In general, the Claimant who has failed to comply with procedural requirements of an arbitration agreement may have to subsequently comply with the applicable pre-conditions and commence arbitral proceedings afresh.[*Waste Mgt Case*]
3. The claimant's failure to comply with the procedural requirements of the arbitration agreement constitutes a jurisdictional defect affecting the arbitral proceedings or the arbitration agreement. [*Varady*]. The parties' inability to complete mediation was held to be a bar to commencement of arbitration in a multi-tier dispute resolution clause [*Belmont*]. When a request for Arbitration was premature, and arbitration was dismissed rather than being stayed, because of failure to complete pre-arbitral dispute resolution steps [*ICC Case No. 12739/2005*]

4. Where clauses contain provisions such as limited duration of negotiation or mediation such clauses are more likely to be enforced than in the case of open-ended or unstructured obligations to negotiate.[ *Fluor Case*]
5. In the present dispute, the Claimant has instituted Arbitral proceedings under Clause 65 of the Distribution Agreement entered between Conglomerated Nanyu Tobacco Ltd. and Real Quik Convenience Store Ltd. The Agreement stipulates a period of 12 months of negotiation and consultation prior to the commencement of arbitral proceedings whereas there has been only one meeting wherein the Parties had tried to negotiate their claims. In the present case as per the escalation clause attached to the agreement, the negotiation conducted between the Parties is deemed to be insufficient.
6. Hence it may be conveniently construed that there is a violation of pre-conditions stipulated in the agreement for arbitration.

## 1.2. THE TRIBUNAL IS COMPETENT TO DIRECT THE PARTIES TO NEGOTIATION

7. An alternative approach is for an arbitral tribunal to direct the parties to participate in pre-arbitration mediation and/or other contractual dispute resolution steps, either prior to or in parallel proceeding with the arbitration [*Jacob, 2004*]. As the pre-conditions which from an interpretation of the agreement were structured mandatorily there cannot be any diversion from the clause, hence the tribunal may direct the Parties to resort to negotiation and consultation before commencing arbitration.

### 1.2.1. THE PARTIES ARE NOT UN –CONCILIATORY

2. There is a distinct possibility of compromise [*Alco Steel*] considering the parties lengthy business relationship over more than one year and constant emphasis on maintaining a healthy business relationship. It is no hindrance that the parties are sure of their legal positions. Negotiation is not futile merely because Claimant considers it

so; [*Daniels; Bankers Case; Sherman, 1992*] such process of negotiation manipulates the parties into agreement, achieving results quite beyond the powers of lawyers. Unlike Arbitration, negotiation is not merely constrained to the party's legal rights.

3. Respondents request for conciliation is not an abuse of process or a dilatory tactic. Negotiation is expeditious and on average is five per cent the cost of arbitration. [*Soudrin*] Even if negotiation fails the parties may proceed to arbitration unimpeded because evidence revealed during negotiation is confidential [Klause].

#### 1.2.2. CONSEQUENTLY, THE TRIBUNAL OUGHT TO CLOSE THE PROCEEDINGS

As the precondition to arbitration has been fulfilled, the Tribunal ought to require Claimant negotiate before commencing a new arbitration. The Tribunal should prefer to close the proceedings because maintaining a Tribunal on the expectation that the negotiation will fail adds unwelcome pressure to the negotiation and is thus susceptible to abuse of process by Claimant.

4. Hence in the present case it may be argued that the tribunal has got the jurisdiction to deal with the matter at hand and direct the parties to participate in pre-arbitration mediation and/or other contractual dispute resolution steps as it is a case of a multi-tiered arbitration clause.

## 2. THE ARBITRAL TRIBUNAL SHOULD ADMIT THE GONDWANDAN GOVERMENT'S AMICUS CURIAE BRIEF FOR CONSIDERATION DURING THE PROCEEDINGS.

### 2.1 THERE IS SPECIFIC PROVISIONS REGARDING THE SUBMISSION OF AMICUS CURIAE BRIEF ENSHRINED IN THE PROVISIONS OF THE *CIETAC* ARBITRATION RULES.

The amicus curiae brief is to establish the position and to ensure that the views of the Gondwandan government are understood by the arbitral tribunal. Moreover, the brief expresses on behalf of the Gondwandan government, that tobacco control and restriction is a keystone of public policy this term *[Moot Proposition, Page No. 32&33]*.

5. Furthermore, pursuant to *CIETAC* Rules, the arbitral tribunal may, on its own initiative, undertake any necessary investigations and collect evidence as it considers fit *[Article 37, CIETAC Rules; Lew]*.
6. Thus the amicus curiae brief is to guide the tribunal and negate any potential infringement of law and sovereignty of the State of Gondwana *[Honnold]*.

**2.2 THE ARBITRAL TRIBUNAL SHOULD ACCEPT THE *AMICUS CURIAE* BRIEF, IN ORDER TO PASS AN AWARD, IN ACCORDANCE WITH THE PUBLIC POLIY OF STATE OF GONDWANA.**

7. Tobacco consumption has been well documented for its harmful effects on the human body; and is amongst the leading causes of death globally. To curb the ill effects of tobacco consumption the government of Gondwana, as part of its public policy in order to control the sale, promotion, consumption of tobacco products and to protect its citizen's health, implemented regulations which detrimentally affect the rights of the parties to the dispute *[Moot Proposition, Page No. 32&33]*.
8. Thus, it necessitates an amicus curiae brief, though not a party to the dispute would participate on behalf of the Gondwandan government, to reiterate its position that tobacco control and restriction is a keystone of public policy*[Moot Proposition, Page No. 32&33]*. The State of Gondwana has a significant interest in this case as the potential ramifications of an award favouring the claimant would undermine

Gondwandan law and sovereignty with respect to its right to regulate and control its public policy *[Moot Proposition, Page No. 32&33]*.

9. Furthermore, pursuant to CIETAC rules, the arbitral tribunal may, on its own initiative, undertake any necessary investigations and collect evidence as it considers fit *[Article 37, CIETAC Rules, Lando]*. An arbitral tribunal would need to take care to ensure that these steps are carried out so as to avoid any challenge to an award on the basis that the award is contrary to public policy.

## 2.3 THE ARBITRAL TRIBUNAL HAS ALL THE POWER TO CONSIDER THE *AMICUS CURIAE* BRIEF ON THE GROUND THAT THE MATTER RELATES TO THE PUBLIC POLICY OF THE STATE OF GONDWANA.

10. In the matter of dispute between two private parties even the state can give an amicus curiae brief if the matter relates to the public policy of that state *[Amadio]*.
11. National courts permit arbitrators to initially consider public policy claims *[Mitsubishi]*. Arbitral tribunals have routinely considered claims and defences based upon alleged public policies *[Bank of Wash]*.
12. Under this view the parties will have granted the arbitrator the authority to resolve all disputes, including mandatory law or public policy disputes and unless some specific legislative act forbids that grant, it should be enforced *[Mitsubishi]*.
13. The Gondwandan government has reflected upon its public policy by virtue of passing Bill 275 into law on 13th April 2012. The requirements as stated under Bill 275 subsequently entered into force on 1 January 2013 *[Moot Proposition, Page 5, ¶12]*.
14. It often turns out that the country is one, or at least one of several, exercising a de facto control over the situation; it is not reasonable to disregard its attitude *[Mayer]*.

**2.4 IT IS A SETTLED LAW THAT AN AWARD OF THE ARBITRAL TRIBUNAL MUST BE IN CONSONANCE WITH PUBLIC POLICY.**

15. Insofar as arbitrators are requested to make a binding arbitral award through an adjudicative process, either awarding monetary sums or declaratory relief, it is a vital precondition to the fulfilment of this mandate that they consider and decide claims that contractual agreements are invalid, unlawful or otherwise contrary to public policy *[Born, Chapter 18, and Page 2183]*.
16. Without such consideration and decision, the tribunal cannot make an award that decides the parties substantive legal rights in a binding manner; that is, a tribunal is incapable of deciding that Party A is legally obligated to pay $1000, or to hand over specified property, to Party B without considering public policy objections to the existence of such an obligation *[Born, Chapter 18, and Page 2183]*.
17. Inherent in the legally-binding resolution of a dispute and the making of a legally-binding award is the duty to consider and resolve public policy objections *[Born, Chapter 18, and Page 2183]*. Thus an objection raised by the claimant before the tribunal to prevent the inclusion and consideration of an amicus curiae brief is unsustainable since it touches upon public policy. Without such consideration and decision, the tribunal cannot make an award that directs the respondent to pay USD $75,000,000 as per clause 60.2 of the agreement.

## 3. THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE VITIATED BY THE GONDWANDAN REGULATIONS.

31. The Respondent's obligations under the contract were vitiated as a result of the Gondwandan regulations enforced during the term of the contract because the regulations were unforeseeable *[3.1.1],* the regulations altered the equilibrium of the contract between the parties *[3.1.2]*

### 3.1. THE RESPONDENT IS EXEMPT FROM LIABILTY UNDER ARTICLE 79 OF CISG

32. The Respondent is exempt from liability for the non fulfilment of it's contractual obligations as per the distribution agreement as the change in law was an impediment within the meaning of Article 79 of CISG

34. A party is not liable for a failure to perform any of his 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 *[Article 79 of CISG].* At hand, the Respondent has suspended the performance of the agreement in light of the new Gondwandan Tobacco regulations *[Claimant's Exhibit No. 8].* The regulations enforced by the Gondwandan government were a foreseeable impediment for the Respondent. Moreover, the Respondent could have overcome the alleged impediment.

#### *3.1.1. THE REGULATIONS COULD NOT HAVE BEEN REASONABLY EXPECTED BY THE RESPONDENT.*

35. In order to assess the reasonable foreseeability of an impediment, an objective standard applies is Considering the understanding of a reasonable person of the same kind as the party in question in the same circumstances *[Article 8 (2) of CISG].*

36. Unforeseeable changes of law and policy are typically beyond the obligor's sphere of control, that risk should not be automatically be deemed to have been assumed by the obligor [*Schwenzer*].

If at the time of contracting there was no indication that the law would undergo a change, then the type and extent of a subsequent change in law would not be foreseeable. [*Jollieville Case]*

39. In the instant case, the government of Gondwana in its endeavour to curb the consumption of tobacco, the government had begun to enforce stringent regulations on the sale and use of tobacco products at regular intervals *[Statement of Facts, ¶9]*. These regulations were an indication of the Government's intention to curb and decrease the consumption of Tobacco and Tobacco products in the state. Hence the regulations could have been reasonably expected by the Respondent.

### *3.1.2. THE IMPEDIMENT ALTERS THE EQUILIBRIUM OF THE CONTRACT.*

40. In order to be exempted under Article 79 of CISG, the impediment must fundamentally alter the equibilirium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished *[Robert Brunner]*

42. A cost increase of something less than 100% would not make performance of a contract implacable for any party to the contract *[Publicker Industries]*.

Impediments within the meaning of Art. 79 CISG need not render performance impossible; it is sufficient that performance is made exceedingly more onerous [Honnold 628; Lindström]. RESPONDENT is not expected to go beyond the limits of reasonableness to avoid the impediment or overcome its consequences. In the circumstances, RESPONDENT could not

reasonably be expected to have avoided the change in law because there was no indication that a change in law would take place.

### 3.1.3. THE RESPONDENT COULD NOT HAVE OVERCOME THE IMPEDIMENT

63. Neither could RESPONDENT reasonably be expected to have overcome the consequences of the law and the massive building up of inventory.

The seller is exempt from liability if the cost increase to overcome the impediment is excessive [Brunner 322].

Generally, the threshold increase of at least 100% of the cost of performance is deemed a fundamental change [Brunner 428; Enderlein/Maskow, Art. 79 CISG ¶6.3; Publicker Industries] which grants a party exemption from liability. Continuing with the contract and performing the obligations would have entailed an excessive 100% increase of the original price for the required material.

Furthermore, the degree of likelihood that the measures in question will in fact overcome the impediment or its consequences is relevant [Brunner 322].

44. In the instant case, following the passage of Bill 275, the sales of the Claimant's products dropped significantly throughout the Respondent's retail outlets, leading to the Respondent building up a massive inventory of the Claimant's products as opposed to its competitors. Tobacco industry in Gondwana suffered an average 30 % decline in sales through all channels. *[Statement of Facts, ¶13]*. Therefore, the change in the law had defeated the purpose of the distribution agreement entered between the Respondent and the Claimant.

45. Thus, the Respondent is absolved from his liability to pay for the Claimant's damages as the contract between the Respondent and claimant is frustrated in accordance with Article 79 of CISG.

**4. IF THE TRIBUNAL WERE TO ISSUE AN AWARD IN FAVOUR OF THE CLAIMANT, THERE WOULD BE A RISK OF ENFORCEMENT.**

Article V of the New York Convention establishes seven grounds on which enforcement of an award may be challenged. In the instant case, the ground mentioned in Article V (2) (b) which is "*Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country [New York Convention]* is present and hence there would be risk of enforcement if the tribunal issues an award in favour of the Claimant.

**4.1 THE PRESENT MATTER RELATES TO THE PUBLIC POLICY OF THE STATE OF GONDWANA.**

Tobacco consumption has been well documented for its harmful effects on the human body; and is amongst the leading causes of death globally. To curb the ill effects of tobacco consumption the government of Gondwana, as part of its public policy in order to control the sale, promotion, consumption of tobacco products and to protect its citizen's health, implemented regulations which detrimentally affect the rights of the parties to the dispute *[Moot Proposition, Page No. 32&33]*.

Thus, it necessitates an amicus curiae brief, though not a party to the dispute would participate on behalf of the Gondwandan government, to reiterate its position that tobacco control and restriction is a keystone of public policy*[Moot Proposition, Page No. 32&33]*. The State of Gondwana has a significant interest in this case as the potential ramifications of an award favouring the claimant would undermine Gondwandan law and sovereignty with respect to its right to regulate and control its public policy *[Moot Proposition, Page No. 32&33]*.

Going through the above mentioned lines of the amicus curiae brief submitted by the State of Gondwana one could easily avert that the instant matter which relates to sale of Tobacco and Tobacco related merchandises relates to the most basic public policy of the state of Gondwana.

Also in letter sent by the Claimant to the Respondent, even the Claimant Company has appreciated the difficulties faced by the Respondent Company due to the major change in the Public Policy which is the introduction of the Bill 275 in the State of Gondwana *[Moot Proposition, Claimant's Exhibit No.7]*.

***4.1.1 THE SALE OF TOBACCO PRODUCTS AND MERCHANDISES WOULD BE CONSIDERED A MATTER OF PUBLIC POLICY IN THE STATE OF GONDWANA.***

An enforcement state's public policy consists of principles and regulations that pertain to justice or morality or serves the fundamental socio-political and economic interests of that state *[Harris ;scherk]*.

Public policy cannot be defined with precision because each state has its own notion of what constitutes public policy *[Westrace]*.

And hence by going through the Bill 275 and the amicus curiae brief it is pretty evident that the State of Gondwana had made it clear that restricting the sale of Tobacco products and their Merchandises would be the major Public Policy of the State.

**4.2. IT IS A WELL SETTLED LAW THAT THE COURT OF THE SIGNITORY STATES HAS THE POWER TO REFUSE TO ENFORCE A FOREIGN ARBITRAL AWARD THAT VIOLATES THE "PUBLIC POLICY" OF THE STATE.**

The New York Convention permits the courts of the signatory states to refuse to enforce a foreign arbitral award that violates the "public policy" of the state *[UN Convention; UNCITRAL; Brower; Kawharu]*.

The concept of "public policy" has been equated with the social public interests *[Arbitrazh]*.

In *Renusugar Power Co v General Electric Company***,** the Indian Supreme Court held that enforcement of a foreign award would be declined if enforcing the award would contravene the fundamental policy of Indian Law, the interests of the state of India and justice or morality.

*In O&Y Investments Ltd V O.J.S.C Bummash*, the Court on the believe that the enforcement of the award would be contrary to the public policy of that state, denied from taking Cognizance.

In *Parsons V Whittemore*, the contention of the defendant was that if the award is enforced, it will contravene US public policy due to the strained relationship between the US and Egypt as a result of the 1967 Arab-Israeli war and the court didn't enforce the award on the ground that it would actually contravene with the US public policy.

Hence it is crystal clear that the present matter relates to the public policy of the state of Gondwana and hence there would be risk of enforcement if the tribunal issues an award in favour of the claimant.

# REQUEST FOR RELIEF

In light of the above submissions, Counsels for the RESPONDENT respectfully request the Honourable Arbitral Tribunal to find that:

- A declaration that this tribunal has no jurisdiction to decide the dispute between the parties.
- Alternatively, a declaration that the agreement has been frustrated; and
- That due to the agreement being frustrated, that the Respondent is not liable to pay any alleged termination penalty.

*Respectfully signed and submitted by counsel on 20th June, 2014*