**THE 5TH INTERNATIONAL ADR MOOTING COMPETITION 2014**

**27 July – 2 August 2014**

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# MEMORANDA FOR CLAIMANT

# TEAM CODE: 451C

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**ON BEHALF OF:**
CONGLOMERATED NANYU TOBACCO, LTD.
142 Longjiang Drive
Nanyu City
Nanyu

**AGAINST:**
REAL QUIK CONVENIENCE STORES LTD.
42 Abrams Drive
Solanga
Gondwana

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| Application for Arbitration | Application for Arbitration for Conglomerated Nanyu Tobacco, Ltd |
| Art. | Article |
| CIETAC | China International Economic and Trade Arbitration Commission |
| CISG | United Nations Convention on Contracts for the International Sale of Goods |
| DA | Distribution Agreement made on the 14th day of December 2010 between the Parties |
| Disputed Sum | Liquidated damages in the sum of USD $75,000,000 |
| NY Convention | Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York, 10 June 1958 (New York Convention 1958) |
| p. | Page |
| pp. | Pages |
| The Claimant | Conglomerated Nanyu Tobacco Ltd |
| the Respondent | Real Quik Convenience Stores Ltd |
| The Parties | Both the Claimant and the Respondent |
| UNIDROIT | Unidroit Principles of International Commercial Contracts 2010 |
| UNCITRAL | UNCITRAL Model Law on International Commercial Arbitration 1985 |
| UNCITRAL Rules | UNCITRAL Arbitration Rules (as revised in 2010) |
| v. | Versus |

## CASE ABBREVIATIONS

| | | |
|---|---|---|
| ***AID*** | : | Advocates for International Development Paper on *amicus curiae* (2012) |
| ***Bastin*** | : | Cambridge Law Journal's Amicus curiae Investor-State Arbitration Paper by Lucas Bastin (1)3:208-234 (2012) |
| ***Coughlan*** | : | *R v. North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 |
| ***Jolles (2006)*** | : | The Chartered Institute of Arbitrators "Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement" (2006) 72 Arbitration 329–338 by Alexander Jolles |
| ***Leofelis*** | : | *Leofelis SA & Anor v. Londsdal Sports Ltd & Ors* [2010] EWHC 323 |
| ***Merrill*** | : | *Merrill & Ring Forest L.P v. Canada* 25 (NAFTA Arb. 2008) |
| ***Methanex*** | : | *Methanex Corporation v. United States of America* 31 ELR 10986 (7 August 2005) |
| ***Navjyoti*** | : | *Navjyoti Co-Op. Group Housing Society v. Union of India* **[**1992] 4 SCC 477 |
| ***Nuovo Fucinati*** | : | *Nuovo Fucinati SPA v. Fondmetall International*, AB No: R.G. |

| | | |
|---|---|---|
| | | 4267/88 (1993) |
| ***Ryan*** | **:** | *Ryan v. Commodity Futures Trading Comission*, 125 F.3d 1062 (7th Cir. 1997) |
| ***Scherk*** | **:** | *Scherk v. Alberto-Culver Co*, 417 U.S. 506 (1974) |
| ***Steel Bar*** | **:** | *Steel Bar Case*, No: 6653 of 1993 (26 March1993) |
| ***UPS I*** | **:** | *United Parcel Service of America Inc v. Government of Canada* 17 (NAFTA Arb. 2001) |
| ***UPS II*** | **:** | *United Parcel Service of America v. Canada Mexico* 46 ILM 922 (2007) |
| ***X. v. Y.*** | **:** | *X. GmbH v. Y. Sàrl* 4A 46/2011 |

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### LEGISLATION

Unidroit Principles of International Commercial Contracts 2010

United Nations Convention on Contracts for the International Sale of Goods (CISG)

**JOURNAL ARTICLES**

Camillia Graham "Amicus Curiae & Investment Artibitrations Part Two" Advocates for International Development (Lawyers Eradicating Poverty) (2012)

Lucas Bastin "The Amicus Curiae in Investor-State Arbitration" Cambridge Journal of International and Comparative Law (1)3: 208-234 (2012)

Alexander Jolles "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement" The Chartered Institute of Arbitrators (2006) 72 Arbitration 329–338

## ARGUMENTS ADVANCED

**Issue 1: The Arbitral Tribunal has jurisdiction to deal with this dispute in light of the 12 month negotiation period stipulated in the arbitration agreement.**

**A. The Tribunal has power to rule on its own jurisdiction.**

1. Art. 16 of UNCITRAL Model Law adopt the international doctrine of *Kompetenz-Kompetenz* whereby the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

2. Pursuant to Art. 6 of CIETAC rules, it empowers the Tribunal to determine the existence and validity of an arbitration agreement. Art. 6.2 of CIETAC rules provides that if an arbitration agreement exists, the Tribunal shall have jurisdiction to proceed with the arbitration.

3. Presently, Clause 65 in the DA serves as an evidence of the existence of an arbitration agreement concluded by both Parties. This empowers the Tribunal to decide it has jurisdiction. [*Claimant Exhibit No. 1*] Hence, the Tribunal has jurisdiction to hear this matter.

**B. The 12 months negotiation period is merely a recommendation period.**

**(i) Relationship between both Parties had deteriorated to a point that arbitration is the only recourse left.**

4. In ***X v.. Y.***,[1] the Tribunal held that a failure in a meeting confirmed that the relationship between Parties had deteriorated to a point there is no other possibility than arbitration.

5. The failure of the Parties to come to an amicable settlement in a meeting in Nanyu City and the Respondent's deliberate termination of the DA showed that relationship between Parties had deteriorated to a point that arbitration is the only possible recourse [*Claimant Exhibit No. 7 & 8*].

**(ii) The Respondent is barred from exercising the right to 12 month negotiation period as it contradicts the principles of good faith and fair dealings.**

6. It is mandatory for the Claimant to act in accordance with good faith and fair dealing in international trade. This is the case even if the DA did not expressly state so [*Art1.7 (1), UNIDROIT*]. Abuse of rights, which include exercising a right for a purpose other than the one for which it had been granted, is a typical example of behavior contrary to the principle of good faith and fair dealing [*Art. 1.7 COMMENT 2, UNIDROIT*].

[1] 4A 46/2011.

7. The underlying intention of Clause 65 is to provide for a two-tiered dispute resolution mechanism to resolve disputes between Parties. The purpose of 12 months negotiation period is to facilitate a dispute resolution mechanism to achieve amicable settlement between Parties. [*Claimant's Exhibit No. 1*]

8. In the present case, due to the deteriorated relationship between both Parties, it would be impossible to reach to an amicable settlement even if the 12 months negotiation period is granted. Strict application of the 12 months negotiation period essentially defeats the purpose of Clause 65 as no amicable settlement could be achieved.

**C. Duty to negotiate is not inherent to the validity of the Tribunal's jurisdiction.**

**(i) The demand for a negotiation does not interfere with the Tribunal's jurisdiction.**

9. According to ***Jolles (2006)***, failure to satisfy negotiation or mediation requirements does not affect the tribunal's jurisdiction unless the Parties have explicitly provided that a failure to comply with the pre-arbitral stages excludes the tribunal's jurisdiction.[2] Clause 65 does not expressly state that failure to satisfy the duty of negotiation will affect the Tribunal's jurisdiction.

[2] 72 Arbitration 329–338 (2006).

10. Furthermore, the Claimant has fulfilled the duty of negotiations depicting from the meeting in Nanyu City and exchanging correspondences. [*Claimant's Exhibit No. 7*]

**Conclusion**

11. The Tribunal clearly has jurisdiction to deal with this dispute.

**Issue 2: The tribunal should not accept the Gondwandan's Government *amicus curiae.***

**A. An *amicus curiae* is unnecessary in this case.**

12. Traditionally, where sufficient information could be provided for the tribunal, the tribunal has no obligation to accept an *amicus curiae*. As found in ***UPS I*** where the issue of third party intervention has either been ignored, or given very low priority by those crafting the international law.[3] Further, the tribunal is obligated to ensure that the *amicus curiae* can bring a different perspective to the factual and legal background of the case.

**(i) Both Parties have already provided sufficient information for the case rendering the amicus curiae redundant to a private commercial contract.**

13. In this case, considering that both Parties are in a private contract and there has been no dispute as to the validity of the facts, it is needless to bring in *amicus curiae.*

14. ***Merrill***[4] states that "*care must be given when accepting amicus curiae as if it is accepted liberally thus proceedings would quickly become unmanageable*." In ***UPS II*** which states "*amicus curiae should only be submitted in the event that the tribunal determines the disputing Parties are unable to provide the necessary assistance and materials needed to decide the dispute*."[5] Therefore, the tribunal has no duty to accept the *amicus curiae*.

[3] 17 (NAFTA Arb. 2001).
[4] 25 (NAFTA Arb. 2008).
[5] 46 ILM 922 (2007).

**(ii) It would delay proceedings and incur superfluous cost to both Parties.**

*15.* According to Art. 17 of UNCITRAL, an Arbitration Tribunal shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties' dispute. The cost and time taken would be increased substantially with the acceptance of the *amicus curiae*. In ***Merrill*** where it is quoted: *"It would be unfair and costly to the disputing Parties, who would be called upon to respond to potentially voluminous material."*[6] It is also quoted in the ***Bastin*** that "*the primary concern regarding the admission of amici curiae is the increase in cost and delay for the Parties. It is axiomatic that acceptance of the amicus curiae, will accordingly increases the cost and duration of the arbitration*."[7] In a similar guideline by ***AID*** on *amicus curiae* also states that "*Time and cost are important issues to the disputing Parties. Arbitration is not cheap and amicus involvement inevitably increases costs. This will be a matter of concern for the Tribunal and the Parties."*[8]

**B. The acceptance of *amicus curiae* would merely give an unwarranted leverage to the Respondent that could compromise the equality of judgment.**

16. Art. 17(1) of the UNCITRAL Arbitration Law stipulates that Parties should be treated fairly and with equality. Presently, the Respondent is given an unfair leverage as the document is wholly supportive of them. Art. 17(5) further states that the tribunal may disallow a third party to be a part of the

[6] 25 (NAFTA Arb.2008).
[7] (1)3:208-234 (2012).
[8] *Advocates for International Development Paper* on *amicus curiae* (2012).

proceedings if it should prejudice any of the Parties at hand. If the tribunal accepts the *amicus curiae,* it would tilt the balance of the proceeding in favour of the Respondent.

**(i) The Gondwandan government has clear intention to use the amicus curiae to support the stance of the Respondent.**

17. The government's intention is clear in the present case. In ***Methanex*** which states: "*Any amicus submissions from these Petitioners are more likely to run counter to The Claimant's position and eventually to support the Respondent's case. This factor has weighed heavily with the Tribunal; and it is concerned that The Claimant should receive whatever procedural protection might be necessary".*[9] Thus, the tribunal should protect the rights of both Parties. the Respondent would garners leverage and protection when the tribunal admits *amicus curiae* [*Letter by Gondwandan State Legal Department, p.32; Problem Clarification No. 13*].

18. Further in the ***Ryan*** case on *amicus curiae* it is stated that *"……The vast majority of amicus briefs are filed by allies of litigants and duplicate the arguments made in the litigants' amicus curiaes, in effect, merely extending the length of the litigant's amicus curiae, such amicus briefs should not be allowed. They are an abuse."*[10] This justifies that accepting *amicus curiae* is unnecessary. Each party must have proper and equal standing.

[9] 31 ELR 10986 (7 August 2005).
[10] 125 F.3d 1062 (7th Cir. 1997).

**Conclusion**

19. The Gondwandan Government's *amicus curiae* should not be accepted as it is unnecessary and would give an unwarranted leverage to the Respondent that would compromise the equality of judgment.

**Issue 3: The Respondent's obligation under the DA was not vitiated as the essential part of the DA can still be performed.**

**A. The fundamental obligation of the Respondent has not been vitiated.**

20. Presently, the sale of tobacco is permitted and The Claimant being a tobacco company would like to emphasize that the main product is tobacco. the Respondent's is not fully incapacitated due to frustration as the essential part of the DA can still be performed [*Claimant's Exhibit No. 1*].

**(i) The substantial part of the DA here can still be performed.**

21. The DA is on the subject of tobacco which amounts to "consideration" that is a fundamental element of every valid contract.[11] Accordingly, it constitutes substantial and essential part of the contract.

22. In ***Alumina*** case**,** it was ruled that "*the change in law and regulation did not fully prohibit the importation of goods and thus this regulation did not render the buyer unable to perform its duty, it could still have taken the delivery of goods".*[12] Similarly, the acceptance of tobacco to Gondwandan is still allowed as well as the sale of tobacco rendering the essential part of the DA performable.

**(ii) The DA can still be performed with effort given by the Respondent to find a commercially reasonable substitute.**

[11] 840 S.W.2d 702 (1992).
[12] Alumina Case CISG/2003/10 (26 June 2003).

23. The Respondent is obligated to look for a commercially reasonable substitute in the situation before claiming to be incapacitated. This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events, which might later justify his non-performance.[13] This rule also indicates that a party may be required to provide a commercially reasonable substitute for the performance under the contract. Therefore, the burden lies on the Respondent to prove that all was done in this matter rather than premature termination of the DA.

**B. The impediment of frustration claimed by the Respondent does not fall under the hinges of the exemption of Art. 79 of the CISG.**

24. Art.79 clearly states that in order to fall under the exemption for the non-compliance of obligation of performance, there are three elements to fulfil. They are that there should be an impediment, the impediment cannot be controlled by the Parties and lastly is that an impediment must not be reasonable to be taken into account when the contract is made. The third element is not fulfilled.

25. Presently, there has already been a noticeable pattern over the years before the contract was entered into on the enforcements regarding the usage of Tobacco. It could not be totally disregarded as not having been even a small warning to further rules being implemented. As per ***Steel Bar*** case where "*... the seller could be relieved of the obligation in cases of frustration of the contract if the*

[13] *Macromex Srl v. Globex International Inc.* Case No. 50181T 0036406 (2007).

*increase in the market price was, in fact, neither sudden nor substantial nor unforeseeable – a trend that continued between the conclusion of the contract and the exercise of the option*".[14] Accordingly, the laws restricting tobacco had also been modified progressively from the year 2001 to 2009.

26. In ***Nuovo Fucinati***,[15] the products price fluctuated. It cannot be said to be unreasonable or unforeseeable during the signing of the DART. Similarly, there was progressive change in the previous years on the usage of tobacco. However the buyer still entered into a 10 year contract with The Claimant disregarding the pattern of the rules on tobacco. This impediment was reasonably foreseeable.[*Application for Arbitration, p. 4*]

**C. The obligation of the Respondent to pay the Disputed Sum is not vitiated.**

27. According to Clause 60 of the DA, the Respondent is liable to pay the Disputed Sum due to the termination of contract by the Respondent within the 3 to 5 years as stated in the DA. There is nothing that vitiates the termination clause.

28. Repudiation of contract essentially weighs the load on the person who repudiates. Based on ***Leofelis***,[16] since the breach committed by the Respondent, that is their termination of contract, amounts to the manifestation of their intention not to be bound by the terms of the contract, the breach will be treated as repudiatory and may be accepted as such by the innocent party.

[14] No: 6653 of 1993 (26 March1993).
[15] No: R.G. 4267/88 (1993).
[16] EWHC 323 [2010].

As such, The Claimant is forced to treat the contract as the end and thus, according to the termination clause, the Respondent is liable to pay the Disputed Sum.

**Conclusion**

29. Since the essential part of the DA can still be performed, the impediment of frustration claimed by the Respondent does not fall under the exemption of Art. 79 of the CISG and the obligation of the Respondent to pay the Disputed Sum is not vitiated, thus, the Respondent's obligation under the DA was not vitiated.

**Issue 4: If the Tribunal were to issue an award in favour of the Claimant, there would be no risk of enforcement.**

**A. Arbitral Awards are recognized as binding and enforceable in Gondwandan under the NY Convention.**

30. Gondwandan as a contracting state which had ratified the NY Convention shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. [*Art. III, NY Convention; Respondent's Statement of Defence, p.33*]

31. In ***Scherk's***[17] case**,** the State Courts ruled in consistent with the goals of the Convention because the refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate goals of the Convention, but would invite unseemly and mutually destructive jockeying by the Parties to secure tactical litigation advantages.

32. Gondwana made a commercial reservation which is allowed by the Convention, whereby Gondwanan Government is bound by NY Convention on any commercial disputes [*Art. I (3) NY Convention; Problem Clarification No. 29*].

[17] 417 U.S. 506 (1974).

33. UNCITRAL interprets "commercial" broadly to cover matters arising out from all relationships of a commercial nature, which includes distribution agreements [*Art. 1(1), UNCITRAL*].

B. Gondwandan government will not interfere the arbitral award as the government will not have interest in the outcome of arbitral award.

34. The DA concluded between both Parties is a private commercial contract which only binds the Parties. The relief requested by the Claimant is limited to monetary claims [*Application of Arbitration, p.7*].

35. If the award is in favour of the Claimant, it will not cause interference to the government's law, sovereignty or other interest. Therefore, Gonwandan Government has no valid reason to refuse an arbitral award which is in favour of the Claimant.

C. Gondwandan government's refusal to enforce the arbitral award would deprive the Claimant from legitimate expectation.

36. In ***Coughlan***,[18] the court held that the standard requirement of legitimate expectation was that there must be a clear and unambiguous promise made that led to reliance or a detriment.

[18] QB 213 [2001].

37. The terms in the DA is clear, that any act of termination by the Respondent shall be followed by liquidated damages. Due to this, the Respondent is entitled to a legitimate expectation of the Disputed Sum.

38. The doctrine of legitimate expectation imposes in essence a duty on the public authority of act fairly by taking into consideration that the authority ought not to act to defeat the legitimate expectation as in ***Navjyoti***[19] case. The award shall be carried out immediately by the Parties if no time limit is specified. In event one Party fails to carry out the award, the other Party may apply to a competent court for enforcement of the award in accordance of the law. This further gives right to the Claimant to ensure there is enforcement of an award. [*Art. 53 CIETAC*]

**Conclusion**

39. There would be no risk of enforcement if the Tribunal were to issue an award in favour of the Claimant.

[19] 4 SCC 477 (1992).

## PRAYERS

In light of the submissions made above, the Claimant respectfully requests the Arbitral Tribunal to grant the relief of the following: –

I. Liquidated damages in the sum of USD $75,000,000 pursuant to Clause 60 of the Agreement;

II. The Respondent to pay all costs of arbitration, including the Claimant's expenses for legal representation, the arbitration fee paid to CIETAC, and the additional expenses of the arbitration as set out in Art. 50, CIETAC Arbitration Rules;

III. The Respondent to pay the Claimant interest on the amounts set forth in items 1 and 2 above, from the date of those expenditures were made by the Claimant to the date of payment by the Respondent.

*Respectfully signed and submitted by the Claimant's counsel*

[Total 2,825 words]