

**THE 5<sup>TH</sup> INTERNATIONAL ADR MOOTING COMPETITION 2014**

**27 July – 2 August 2014**

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**MEMORANDA FOR RESPONDENT**

**TEAM CODE: 451R**

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**ON BEHALF OF:**  
REAL QUIK CONVENIENCE STORES LTD.  
42 Abrams Drive  
Solanga  
Gondwana

**AGAINST:**  
CONGLOMERATED NANYU TOBACCO, LTD.  
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Nanyu

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## LIST OF ABBREVIATIONS

Application for Arbitration	Application for Arbitration for Arbitration Commission
Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission's Arbitration Rules
CISG	United Nations Convention on Contracts for the International Sale of Good
DA	Distribution Agreement made on the 14 <sup>th</sup> day of December 2010 between the Parties
Disputed Sum	Liquidated damages in the sum of USD \$75,000,000
FCTC	World Health Organization Framework Convention on Tobacco Control
Ibid.	<i>Ibidem</i>
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 Parties	Both the Claimant and the Respondent
The Respondent	Real Quik Convenience Stores Ltd.
UNCITRAL	UNCITRAL Model Law on International Commercial Arbitration 1985
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010)
UNIDROIT	UNIDROIT Principles of International Commercial Contracts 2010
v.	<i>Versus</i>

## INDEX OF AUTHORITIES

### CASES

*A decision of the German Federal Supreme Court of 1998 Decision BGH*, (1999) Neue Juristische Wochenschrift, Heft 9, pp 647- 648

*Devalk Lincoln Mercury, Inc v. Ford Motor Company* 811 F 2d 326 (7<sup>th</sup> Cir, 1987)

*Dupont Steels Ltd & Ors v. Sirs & Ors* [1980] 1 All ER 529

*Great Elephant v. Trafigura Beheer BV and Others (Crudesky)* [2012] EWHC 1745 (Comm) [2013] EWCA Civ 905

*Harris Adacom Corp v. Perkom Sdn Bhd* [1994] 3 Malayan LJ 504

*Hebei Import & Export Corporation v. Polytek Engineering Co. Ltd* [1999] HKCFA 40

*International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd & Anor* [2013] SGCA 55

*Lee Heng Moy v Christopher Wong Wai Yee & Ors* [2011] 5 Malayan LJ 333

*Methanex Corporation v. United States of America* 44 ILM 1343 (2005)

*Nordsee Deutsche Hochseefisherei v. Reederei Mond Hochseefisherei (Europe)* [1982] ECR 1095

*Parsons & Whittemore Overseas Co. Inc v. Societe Generale de L'Industrie Du Papier (RAKTA)* 508 F.2<sup>nd</sup> 969 (2<sup>nd</sup> Cir. 1974)

*R v. North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213

*Schiedsgericht der Handelskammer Hamburg*, CLOUT case No. 166, Germany, 1996 [Arbitration—Schiedsgericht der Handelskammer Hamburg, 21 March, 21 June 1996]

*The Sussex Peerage Case* (1844) 11 Cl & Fin 85; 8 ER 1034

*United Parcel Service of America Inc v. Government of Canada* (2007) 46 ILM 922

*USA Agencies v. Commercial Tax Officer, Attur (Rural) Accessment Circle, Attur* [2013] 6 Madras LJ 142

## **RULES, CONVENTIONS, TREATIES AND LEGISLATION**

China International Economic and Trade Arbitration Commission (CIETAC)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York, 10 June 1958 (New York Convention 1958)

Restatement (Second) of Contracts, The American Law Institute

UNCITRAL Arbitration Rules (as revised in 2010)

UNCITRAL Model Law on International Commercial Arbitration 1985

UNIDROIT Principles of International Commercial Contracts 2010

World Health Organization Framework Convention on Tobacco Control (FCTC)

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

**ARGUMENTS ADVANCED****Issue 1: The Arbitral Tribunal does not have jurisdiction to deal with this dispute in light of the 12 months negotiation period stipulated in the DA.**

1. This tribunal is competent to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case [*Art. 6, CIETAC*].

**A. This Arbitration Process is a Breach of the Preconditions Under the Arbitration Clause**

2. There are two conditions expressly stated in Clause 65 of DA. First, the parties shall initially seek a resolution through consultation and negotiation if that any dispute arises, and second, the parties may only go for arbitration if a period of 12 months has elapsed from the date on which the dispute arose and the Parties have been unable to come to an agreement [*Clause 65, Claimant's Exhibit No. 1*].
3. According to *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another*,<sup>1</sup> if parties have clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, those preconditions must be fulfilled. In *Devalk Lincoln Mercury, Inc v. Ford Motor Company*,<sup>2</sup> where a specific procedure has been prescribed as a condition precedent to arbitration or litigation, it must be shown to have been complied with.

**(i) The main purpose of this Tribunal is to resolve the dispute of whether the Respondent should pay the Claimant the Disputed Sum.**

4. The Claimant applied for Arbitration with the main and sole purpose of obtaining the Disputed Sum from the Respondent [*Request for Relief, Application for Arbitration*].

The right to claim the Disputed Sum arises after the act of termination and was

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<sup>1</sup> [2013] SGCA 55.

<sup>2</sup> 811 F 2d 326 (7<sup>th</sup> Cir, 1987).

disputed only after termination of DA [*Clause 17 and 18, Application for Arbitration; Claimant's Exhibit No.9*].

**(ii) The Parties have not resort to consultation and negotiation in relation to the dispute in question before this Arbitration.**

5. The precondition for negotiation and consultation should be construed as mandatory according to its nature and ordinary sense. [*USA Agencies v. Commercial Tax Officer, Attur (Rural) Accessment Circle, Attur*<sup>3</sup>; *Lee Heng Moy v Christopher Wong Wai Yee & Ors*<sup>4</sup>; *the Sussex Peerage Case*<sup>5</sup>; *Dupont Steels Ltd & Ors v. Sirs & Ors*<sup>6</sup>]
6. The Claimant opened for further discussion only on the selling of promotional merchandise after the negotiation meeting on 11/04/2013 [*Claimant's exhibit No.7*]. Further, the only negotiation meeting undergone by the Parties was not regarding the issue of the Disputed Sum, which is the sole purpose of the Claimant's application [*Claimant's Exhibit No.8*].

**(iii) The Claimant made an Application for Arbitration before the 12 months period lapse.**

7. The earliest date which the dispute can be said to arise is 01/05/2013, when the Respondent gave a notice of termination [*Claimant's Exhibit No.8*]. However, application for arbitration was made on 12/01/2013, which was only 8 months after the dispute [*Application for Arbitration, p.1*].

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<sup>3</sup> [2013] 6 Madras LJ 142.

<sup>4</sup> [2011] 5 Malayan LJ 333.

<sup>5</sup> (1844) 11 Cl & Fin 85.

<sup>6</sup> [1980] 1 All ER 529.

**B. Arbitration Deprives the Respondent's Right To Legitimate Expectation of 12 Months Period before Proceeding to Arbitration.**

8. In *R v. North and East Devon Health Authority, ex parte Coughlan*,<sup>7</sup> 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.
9. In *a decision of the German Federal Supreme Court of 1998*,<sup>8</sup> the court held that a mutually agreed clause arising out of a contract for settlement negotiations before commencing court proceedings was valid and any claim brought against one of the parties by the other before the courts would be inadmissible if the settlement negotiations had not been commenced and completed.

**C. There Is No Common Intention Between the Parties To Arbitrate.**

10. In the case of *Nordsee Deutsche Hochseefisherei v. Reederei Mond Hochseefisherei (Europe)*,<sup>9</sup> it shows that as in a contract, the arbitrators' power to resolve a dispute is founded solely upon the common intention of the parties. The Tribunal should hold that it has no jurisdiction in resolving the dispute, as it was not constituted according to the Parties' agreement to arbitrate.

**Conclusion**

11. The Tribunal has no jurisdiction as the preconditions to arbitration proceeding are not fulfilled, it would frustrate the legitimate expectation of the Respondent, and there is no common intention between the Parties.

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<sup>7</sup> [2001] QB 213.

<sup>8</sup> Decision BGH, reported in (1999) *Neue Juristische Wochenschrift*, Heft 9, pp. 647- 648.

<sup>9</sup> [1982] ECR 1095.



**Issue 2: The Arbitral Tribunal should admit the Gondwandan government's *amicus curiae* brief for consideration during the proceedings.**

**A. The Tribunal Has Inherent Power to Accept *Amicus Curiae* Brief from Non-Party.**

12. The Tribunal has power to conduct the arbitration in an appropriate manner [Art. 17 (1), *UNCITRAL Rules*].

13. According to *United Parcel Service of America Inc v. Government of Canada*,<sup>10</sup> this power is essential to the very process of dispute settlement by way of arbitration and might be thought to be inherent even if not expressly stated. Besides, it recognizes both the fundamental procedural rights of the parties to a fair proceeding, natural justice or due process, and the other particular requirements of the rule.

**B. The Tribunal Has Duty to Conduct Arbitration Proceeding Equally and Give Full Opportunity to the Parties to Present Their Cases.**

14. The Tribunal has power to conduct arbitration in such manner as it thinks fit and the rights of the parties to be treated equally and to be given a full opportunity to present their cases [Art. 18 and Art. 19(2), *UNCITRAL*]. The Tribunal has to regard to all applicable rules of international law including those that establish the right of all persons to equal and fair treatment before the law.<sup>11</sup>

15. The Tribunal has authority to accord locus to third parties on whatever terms it deems appropriate subject only to the requirement that all parties are treated with equality and given the full opportunity of presenting their case. [Art. 17, *UNCITRAL Rules*].

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<sup>10</sup> 46 ILM 922 (2007).

<sup>11</sup> *Ibid.*

(i) **Gondwandan Government has sufficient interest in the outcome of the arbitration.**

16. Gondwandan Government as a party to the FCTC has a general legal obligation to adopt and implement effective tobacco control in Gondwana in accordance with its national law for prevention and reduction of tobacco consumption. [Art. 5 and Art. 11, FCTC]

(ii) **The Amicus Curiae brief will facilitate the Tribunal's process of inquiry.**

17. In line with Art. 25 (4) of UNCITRAL, Tribunal in *United Parcel Service of America Inc. v. Government of Canada*<sup>12</sup> held that it is within the scope of Art. 15(1) for the tribunal to receive submissions offered by third parties with the purpose of assisting the Tribunal in that process.

18. The Claimant had repeatedly alleged situations in Gondwana which is different from that as stated by the Respondent [*Claimant's Exhibit No.7; Respondent's Exhibit No.3*]. An *amicus curiae* brief by the Gondwandan government is necessary to give the Tribunal with an important and different perspective and the broader consequences that may follow from its determination.

19. In *United Parcel Service of America Inc v. Government of Canada*<sup>13</sup>, it was alleged by the Tribunal that the powers conferred by Art. 17 (1) of UNCITRAL Arbitration Rules is limited to matters of procedure and they are restricted by other relevant rules and by the principles of equality and fairness. This principle for equality of treatment or fairness is extended to include a third party's interest.

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<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

**C. Admitting the amicus curiae brief will not alter the right of the Parties and the legal nature of the arbitration.**

20. Receiving of the *amicus curiae brief* will not deprive the confidentiality of the arbitration [Art. 25 (4), *UNCITRAL Rules*].

21. In *Methanex Corporation v. United States of America*,<sup>14</sup> the Tribunal held that the receiving of such submissions from a third person is not equivalent to making that person a party to the arbitration. The Tribunal has exercised its power to permit that person to make the submission.

**Conclusion**

20. The Arbitral Tribunal has the jurisdiction and should admit the Gondwandan government's *amicus curiae* brief for consideration during the proceedings.

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<sup>14</sup> 44 ILM 1343 (2005).

**Issue 3: The Respondent's obligations under DA were vitiated by the implementation of Bill 275 and the Gondwandan government's new, more stringent regulations.**

**A. The Respondent's Obligations under the DA Were Frustrated By Gondwana's New Rules and Regulations.**

22. The Respondent is not liable for a failure to perform as the failure was due to an impediment beyond its control and the Respondent 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 [*Art. 79(1), CISG; Explanatory Note Part 3F, CISG*].

**(i) Bill 275 and Gondwandan new regulations are impediments to the Respondent's obligation.**

23. According to the arbitration of **Schiedsgericht der Handelskammer Hamburg**,<sup>15</sup> impediment must be "an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness."

24. In the case of **Great Elephant v. Trafigura Beheer BV and Others (Crudesky)**,<sup>16</sup> the court recognised that Force Majeure Clause in the contract shall include the Act of Government's intervention, directive or policy.

25. The new regulations in Gondwana impose restrictions upon the Respondent which are contrary to and preventing the Respondent's contractual duty as a party to the DA [*Claimant's Exhibit No.2, No.3 and No.8; Respondent's Exhibit No.3 and No.6*]. The imposition of such stringent regulation is both an unmanageable risk and an exceptional event.

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<sup>15</sup> CLOUT case No. 166, Germany, 1996.

<sup>16</sup> [2012] EWHC 1745 (Comm), [2013] EWCA Civ 905.

**(ii) These impediments are beyond control of the parties.**

26. Gondwandan government have the duty and sovereignty to implement Bill 275 and other stringent regulations protecting public health and safety, which the parties are in no position to challenge [*Respondent's Exhibit No.2*].

**(iii) It is not reasonable for the Respondent to consider these impediments at the time of conclusion of the contract.**

27. Before the conclusion of the contract, the Respondent had been reasonably convinced by reputable publications as well as specialist in related area that Gondwandan government will be highly unlikely to implement stricter regulations [*Respondent's Exhibit No.1; Problem Clarification No.22*].

28. Even after proposal of Bill 275, experts such as political analysts and the Claimant's advisors continue to believe that these alleged impediments are of no or relatively low risk [*Claimant's Exhibit No.5 and No.4*].

**B. The DA was No Longer Binding Even before Notice of Termination.**

29. The DA was vitiated before Notice of Termination on 01/05/2013 as Bill 275 was enforced on 01/01/2013 [*Claimant's Exhibit No.8; Application for Arbitration, p.5*].

**(i) The Respondent was no longer bound by DA due to hardship Incurred.**

30. All the Respondent's obligations relating to purchasing of material that promoted smoking were no longer binding as hardship arises after these were disallowed for sale in the market, which frustrated the purpose for performance [*Clause 10, Application for Arbitration; Art. 6.2.2 COMMENT 2.b*].

31. Bill 275 causes a drastic change in market conditions and competitions in the market, amounting to a decrease in value of the Respondent's obligation related to purchasing of Claimant's Tobacco products and causing hardship [*Art. 6.2.2 COMMENT 2.b, UNIDROIT*].

32. The fact that Bill 275 became known after conclusion of DA, could not be reasonable taken into account by the Respondent, was beyond the Respondent's control, and was not a risk assumed by the Respondent, amounts to hardship and allow the Respondent to be exempted from the principle of binding contract [*Art. 6.2.1 COMMENT 2 and Art. 6.2.2, UNIDROIT*].

**(ii) The duties of the Respondent under DA were discharged**

33. Where the Respondent's principal purpose is substantially frustrated without his fault by the occurrence of an event, the Respondent's remaining duties to render performance are discharged, unless the contract indicate the contrary [*S.265, Restatement (Second) of Contracts*].

34. The fundamental objective of the DA is for a long-term basis of purchasing and selling of the Claimant's Tobacco Products and Branded Merchandise [*Claimant's Exhibit No.1*].

**C. The Respondent's obligation to pay the Disputed Sum was vitiated by the Claimant's abuse of rights.**

35. 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 [*Art. 1.7 (1), UNIDROIT*]. Abuse of rights, which include the act of exercising a right merely to damage the other party and exercising a right for a purpose other than the one for which it had been granted, is a typical example of behaviour contrary to the principle of good faith and fair dealing [*Art. 1.7 COMMENT 2, UNIDROIT*].

36. The Claimant is aware that the Respondent was left with limited options which will, either way, subject the Respondent to some kind of loss or punishment [*Claimant's Exhibit No.6, No.7 and No.8; Respondent's Exhibit No.3*].

37. The Claimant insisted that the Respondent should continue performance as before [*Claimant's Exhibit No.7, Respondent's Exhibit No.3*]. The Claimant made it clear that the Claimant do not feel responsible to resolve the Respondent's difficulties [*Claimant's Exhibit No.7*].

38. The Claimant could have cooperated and avoided necessary complications. Instead, the Claimant refuses opportunities for a win-win situation and waited for a consequence which is detrimental to the Respondent. The Claimant's right to liquidated damages arises due to the Claimant's insincerity and is exercised merely to cause damage to the Respondent.

**Conclusion**

39. Both obligations of the Respondent to perform the DA and to pay liquidated damages were vitiated.

**Issue 4: If the Tribunal were to issue an award in favour of the Claimant, there would be a risk of non-enforcement.**

**A. Gondwandan Authority Will Find the Tribunal's Award Contrary to Public Policy.**

40. Recognition and enforcement may be refused if the competent authority in Gondwana finds that the recognition or enforcement of the award would be contrary to the public policy of Gondwana [*Art. V (2) (b), NY Convention*].

**(i) Gondwandan authority is determined to view the award as contrary to public policy.**

41. The Gondwandan government and its State Legal Department had made it clear to this Tribunal that any such award held in favour of the Claimant would be contrary to Gondwandan public policy [*Malcolm Reynolds' letter, pp.32-33*].

42. With strong belief from the Gondwandan authorities towards the deleterious impact of an award in favour of the Claimant, it is clear that competent authorities of Gondwana will ensure any such award to be deemed contrary to public policy and therefore refuse to recognise and enforce it if awarded so.

**(ii) There are sufficient grounds to render the award as contrary to public policy.**

43. Several grounds may be relied on by Gondwandan authority in this matter.

44. In the case of *Parsons & Whittemore Overseas Co. Inc v. Societe Generale de L'Industrie Du Papier (RAKTA)*,<sup>17</sup> the court held that the enforcement of an international arbitral award may be denied on public policy grounds if enforcement would violate the forum's state "most basic notions of morality and justice". In *Hebei*

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<sup>17</sup> 508 F.2<sup>nd</sup> 969 (2<sup>nd</sup> Cir. 1974).



*Import & export Corporation v. Polytek Engineering Co. Ltd.*<sup>18</sup> it was generally accepted that the expression “contrary to the public policy of that country” in Art. V (2)(b) means contrary to the fundamental conceptions of morality and justice of the forum.

45. Any award which imposes penalty on the Respondent may be deemed contrary to the Gondwandan notion of morality as it is well established in Gondwana that tobacco consumption and promotion is closely associated with the harmful effect on the public’s health and safety [*Respondent’s Exhibit No.2; Malcolm Reynolds’ letter at pp.32-33*].

46. It may also be argued that such award is unjust as it causes the Respondent to be in a deadlock situation to bear all consequences of the new risk unforeseen by both parties. Furthermore, Gondwandan’s authority may argue that the Respondent’s bona fide act to respect the law of Gondwana should not be met with penalties, which may be deemed as against Gondwana’s principle of justice.

**(iii) There exist other grounds which Gondwandan authority may rely on**

47. Recognition and enforcement of the award may be refused if there is any award in favour of the Claimant, and the Respondent furnishes to the competent authority that the Respondent as one of the parties to the DA were, under Gondwandan law, subject to some form of incapacity [*Art. V(1)(a), NY Convention 1958*]. The Claimant’s locus for its claim arises solely on the Respondent’s act of terminating the DA. However, this is due to the Respondent’s situation that has been legally incapacitated by the Gondwandan regulations [*Claimant’s Exhibit No. 8*].

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<sup>18</sup> [1999] HKCFA 40.

48. *Harris Adacom Corp v. Perkom Sdn Bhd*<sup>19</sup> held that recognising an award coming from arbitration between a Malaysian party and an Israeli party would be contrary to public policy because trade was prohibited. Similarly, Gondwandan Court may hold that an award coming from arbitration between an Agreement to sell and buy tobacco products with illegal duties and requirements would be contrary to Gondwandan public policy as these are prohibited [*Claimant's Exhibit No,2*].

### **Conclusion**

49. It is highly unlikely for the award, if issued in favour of the Claimant, to be enforced in Gondwana.

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<sup>19</sup> [1994] 3 Malayan LJ 504.

**PRAYERS**

In light of the submissions made above, the Respondent respectfully requests the Arbitral Tribunal to hold that:

- I. The Arbitral Tribunal has no jurisdiction to deal with this dispute.
- II. The Arbitral Tribunal should admit the Gondwandan government's *amicus curiae* brief for consideration during proceedings.
- III. The Respondent's obligations to perform the Agreement were vitiated by the implementation of Bill 275.
- IV. If the Tribunal were to issue an award in favour of the Claimant, there would be a risk of non-enforcement.

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

[Total 2,989 Words]