
FIFTH ANNUAL
INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION
MOOTING COMPETITION

MEMORANDUM FOR
CLAIMANT

CLAIMANT

RESPONDENT

Conglomerated Nanyu Tobacco, Ltd.

Real Quik Convenience Stores Ltd.

142 Longjiang Drive, Nanyu City

42 Abrams Drive, Solanga

Nanyu

Gondwana

TEAM 509C

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TABLE OF DEFINITIONS

Agreement	Distribution Agreement signed on 14 December 2010 between the Claimant and the Respondent
Amicus Curiae	Proposed amicus curiae submitted by the Government on 25 February 2014
Award	Potential award rendered in favour of the Claimant
Bill 275	The “Clean our Air” Bill 275/2011
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Rules	CIETAC Arbitration Rules effective as of 1 May 2012
CISG	United Nations Convention on Contracts for the International Sale of Goods
Claimant	Conglomerated Nanyu Tobacco Ltd., a company incorporated under the laws of Nanyu
Dispute	Dispute between the Parties as set out in Application for Arbitration dated 12 January 2014, Answer and Statement of Defence dated 12 February 2014 and narrowed by procedural Order No.1 dated 27 February 2014
Government	Gondwandan government

ICSID	International Centre for the Settlement of Investment Disputes
ICSID Rules	ICSID Rules of Procedure for Arbitration Proceedings effective as of 10 April 2006
Merchandise	Branded merchandise to be provided by the Claimant to the Respondent as described in Clause 2 of the Agreement
Moot Problem	The Fifth International Alternative Dispute Resolution Mooting Competition Moot Problem 2014
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Parties	Claimant and Respondent collectively
PCIJ	Permanent Court of International Justice
Respondent	Real Quik Convenience Stores Ltd., a company incorporated under the laws of Gondwana
Secretariat Commentary	Secretariat Commentary Guide to CISG 1978 Draft
Tobacco Products	Tobacco products to be provided by the Claimant to the Respondent as described in Clause 1 of the Agreement
USD	United States dollars

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Fouchard/Gaillard/Goldman	Emmanuel Gaillard and John Savage (eds), <i>Fouchard Gaillard Goldman on International Commercial Arbitration</i> (Kluwer Law International, 1999)	[16]
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Schliemann	Christian Schliemann, ‘Requirements for Amicus Curiae Participation in International Investment Arbitration’ (2013) 12 <i>The Law and Practice of International Courts and Tribunals</i> 365	[20]
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<i>Stolen Car Case</i>	<i>Stolen car case</i> , Oberlandesgericht München [München Court of Appeal], 5 March 2008, CISG-Online 1686	[28]
Hong Kong		
<i>A v R</i>	<i>A v R (Arbitration: Enforcement)</i> [2009] 3 HKLRD 389	[40]
<i>Astel-Peiniger v Argos</i>	<i>Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd</i> [1994] HKCFI 276	[11]
<i>Fai Tak v Sui Chong</i>	<i>Fai Tak Engineering Co Ltd v Sui Chong Construction & Engineering Co Ltd</i> [2009] HKDC 141	[11]
<i>Heibi v Polytek</i>	<i>Hebei Import & Export Corp v Polytek Engineering Co Ltd</i> (1999) 2 HKCFAR 111	[40]
<i>Hercules v Koywa</i>	<i>Hercules Data Comm Co Ltd v Koywa Communications Ltd</i> [2000] HKCFI 71	[11]
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SUMMARY OF SUBMISSIONS

The Claimant makes four submissions.

- I.** The Tribunal has jurisdiction to hear the Dispute.
- II.** The Tribunal should not admit the Amicus Curiae.
- III.** The Respondent's obligations under the Agreement were not vitiated.
- IV.** The Award will be enforced.

I. THE TRIBUNAL HAS JURISDICTION TO HEAR THE DISPUTE

1. The Tribunal has jurisdiction to hear the Dispute in light of: (A) the requirement to negotiate; and, (B) the 12 month “cooling-off” period.

A. The Tribunal has jurisdiction to hear the Dispute in light of the requirement to negotiate

2. The Tribunal has jurisdiction because: (a) the Claimant satisfied the requirement to negotiate; alternatively, (b) the Claimant was not required to negotiate; and, in any event, (c) the Tribunal has jurisdiction to resolve the Dispute.

(a) The Claimant satisfied the requirement to negotiate

3. Negotiation does not require more than indicating an availability to exchange views about a dispute. Negotiating does not impose an obligation to compromise, change views, or otherwise engage in bargaining with another party.¹ In this context, international courts and tribunals have held that short periods of negotiations satisfy a pre-requisite to negotiate, particularly when it is clear that the parties will not reach an agreement.²
4. The Claimant satisfied the negotiation requirement because it indicated an availability to exchange views about a dispute when it met with the Respondent on 11 April 2013 to renegotiate the terms of the Agreement.³ Further, it became clear from 11 April 2013 that the Parties would not reach an agreement.

¹ Born, 932.

² *Mavrommatis*, 13; *ICC Case No 6276*, 79.

³ Moot Problem, 19.

(b) The Claimant was not required to negotiate

The Claimant was not required to negotiate because: (i) Clause 65 was not sufficiently certain; or, (ii) the Respondent was responsible for the failure to negotiate; or, (iii) negotiations were futile.

(i) Clause 65 was not sufficiently certain

5. An enforceable negotiation agreement must set out the parties' obligations with sufficient certainty.⁴ Courts have held that sufficient certainty is obtained when clauses specify the number of negotiation sessions required,⁵ or the designated negotiation participants.⁶
6. Clause 65 does not specify the number of negotiation sessions required or the individual participants obligated to participate.⁷ Clause 65 is not sufficiently certain, and is therefore unenforceable.

(ii) The Respondent was responsible for the failure to negotiate

7. A party cannot rely on a pre-arbitral negotiation requirement as a bar to the tribunal's jurisdiction when that party is partly to blame for the requirement not being satisfied.⁸
8. On 11 April 2013 the Claimant commenced negotiations with the Respondent.⁹ On 12 April 2013 the Claimant invited the Respondent to continue to negotiate and also

⁴ *Hyundai v Vigour*, [95], [98].

⁵ *White v Kampner*, 479.

⁶ *Fluor v Solutia*; Born, 919.

⁷ Moot Problem, 2.

⁸ *Judgment of 15 March 1999*.

⁹ Moot Problem, 19.

stated that the Claimant was open to further discussion.¹⁰ Nonetheless, the Respondent refused to negotiate and on 1 May 2013 caused to terminate the Agreement.¹¹

(iii) Negotiations were futile

9. Parties are not required to engage in fruitless negotiations or to delay an orderly resolution of the dispute.¹² Arbitral tribunals frequently rely on the asserted futility of negotiations or discussions to justify the rejection of either jurisdictional or admissibility objections to a party's claim.¹³
10. After meeting on 11 April 2013 to try and resolve the Dispute, the Claimant invited the Respondent to negotiate further and also urged the Respondent to continue to perform its obligations under the Agreement.¹⁴ The Respondent terminated the Agreement, stating that it simply could not continue to perform.¹⁵ The Respondent's conduct made it unequivocally clear that the Parties' negotiations were futile.

(c) The Tribunal has jurisdiction to resolve the Dispute

11. There are two principal reasons why the Tribunal should exercise jurisdiction regardless of the negotiation requirement. First, tribunals should not deny parties access to adjudicative proceedings on the basis of non-compliance with procedures that, even if enforceable, are unlikely to resolve the parties' dispute.¹⁶ Second, a negotiation requirement is typically regarded as a contractual obligation and not a condition

¹⁰ Moot Problem, 19.

¹¹ Moot Problem, 20.

¹² *ICC Case No 8445*, 168; *Ad-hoc Case of 4 May 1999*; *ICC Case No 10256*; *ICC Case No 11490*.

¹³ Born, 933.

¹⁴ Moot Problem, 19.

¹⁵ Moot Problem, 20.

¹⁶ *X v Y*.

precedent.¹⁷ This is so even when the requirement is described as mandatory. It follows that a breach of a contractual obligation only entitles the wronged party to damages, not to prevent arbitration.¹⁸

12. The negotiation requirement is a contractual obligation and not a contractual precondition. Consequently, the Tribunal has jurisdiction to hear the Dispute even if the negotiation requirement has not been met.

B. The Tribunal has jurisdiction to deal with the Dispute in light of the 12 month “cooling-off” period

13. A party should not be prevented from exercising its right to commence arbitration because of a requirement to wait a specified period of time; this is so even when the requirement is connected to an obligation to negotiate.¹⁹ Parties cannot prolong the resolution of a dispute by insisting on the terms of an agreement where those terms only lead to further delay.²⁰
14. The “cooling-off” period is 12 months. Given that negotiations between the Parties are futile, the proper resolution of the Dispute will only be delayed by the enforcement of the “cooling-off” period. This arbitration should continue despite the “cooling-off” period having not yet passed.

¹⁷ Born, 930.

¹⁸ *Fai Tak v Sui Chong*; *Hercules v Koywa*; *Astel-Peiniger v Argos*; *ICC Case No 11490*; Born, 930.

¹⁹ *Biwater v Tanzania*, [343].

²⁰ *Cumberland v Coors*, 6.

II. THE TRIBUNAL SHOULD NOT ADMIT THE AMICUS CURIAE

15. The Tribunal should not admit the Amicus Curiae because: (A) the Government is not a party to the Agreement; and (B) there is no body of law that permits amici curiae in private international commercial arbitration; or in the alternative, (C) the circumstances of the Amicus Curiae do not permit it.

A. The Government is not a party to the Agreement

16. International commercial arbitration is born from contract. It arises between privately contracting parties.²¹ Parties can only be joined to an arbitral dispute through a contractual agreement.²² Intervention by a third-party requires the consent of all parties.²³
17. The Government is not a party to the Agreement. The Claimant does not consent to the Amicus Curiae.²⁴ The Government should not be heard at a dispute that involves two privately contracting parties.

B. There is no body of law that permits amici curiae in private international commercial arbitration

18. Commercial arbitration should be distinguished from investor-state arbitration. Although amici curiae are occasionally permitted in investor-state arbitrations, there is no practice of allowing them in private international commercial arbitrations. This is

²¹ Fouchard/Gaillard/Goldman, 29.

²² Fouchard/Gaillard/Goldman, 29.

²³ Redfern/Hunter, [2.52].

²⁴ Moot Problem, 34.

because the rationale for allowing amici curiae in investor-state disputes is not applicable to commercial arbitration.²⁵

19. There are three primary reasons that demonstrate why the rationale does not apply in commercial arbitration. First, adverse decisions rendered against states invariably affect tax payers;²⁶ whereas the Award only affects the Respondent.²⁷ Second, state citizens whose rights are affected may have substantial legal interests in the dispute;²⁸ whereas here it is only the Parties' rights that will be affected by the Award. Third, greater transparency is often desired in investor-state arbitration;²⁹ whereas here the Parties have agreed to private and confidential arbitration.³⁰

C. The circumstances of the Amicus Curiae do not permit it

20. In the event that the Tribunal seeks a set of rules to determine the admissibility of the Amicus Curiae, Rule 37 of the ICSID Rules is typically used in investor-state arbitrations.³¹
21. Pursuant to this rule, the test is whether the Government would: first, bring an additional perspective, particular knowledge or insight to that of the Parties; second, address a relevant matter within the scope of the Dispute; and, third, have a significant interest in the proceedings.³² In addition, the Tribunal should ensure that the Amicus

²⁵ Levine, 205.

²⁶ Choudhury, 809.

²⁷ Moot Problem, 7.

²⁸ *Methanex v United States*; Triantafilou.

²⁹ Choudhury, 807-821.

³⁰ Moot Problem, 2; CIETAC Rules, Article 36.

³¹ Schliemann, 370.

³² See ICSID Rules, Rule 37(2).

Curiae does not disrupt the proceedings or unduly burden or unfairly prejudice either party.³³

22. The Government fails on all grounds. First, the Government will not bring any perspective, particular knowledge or insight that is additional to the facts that are known by the Parties. Second, the Amicus Curiae outlines the consumption and effect of tobacco in Gondwana; it does not address any of the four issues identified in Procedural Order No.1.³⁴ Third, the Government does not have an interest in the relief requested by the Claimant. Finally, the Amicus Curiae is unfairly prejudicial to the Claimant because it wholly supports the claim of the Respondent.³⁵

³³ See ICSID Rules, Rule 37(2).

³⁴ Moot Problem, 34.

³⁵ Moot Problem, 37.

III. THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE NOT VITIATED

23. Bill 275 did not vitiate the Respondent's obligations under the Agreement because: (A) the Respondent breached its obligations under the Agreement; and, (B) Bill 275 does not create an exemption. Consequently, (C) the Claimant is entitled to liquidated damages.

A. The Respondent breached its obligations under the Agreement

24. Pursuant to the CISG, the buyer must pay the price for the goods and take delivery of them as required by the contract.³⁶ If the buyer fails to perform an obligation under the contract, the seller may exercise its rights or claim damages.³⁷
25. A condition is a primary obligation of the contract, which one party guarantees will be fulfilled.³⁸ Failure by a promisee to perform a condition is considered to be a failure to perform the contract itself.³⁹ A warranty is a secondary obligation of the contract.⁴⁰ The breach of a warranty by one party may give rise to a claim for damages.⁴¹
26. By Clauses 1 and 2 of the Agreement, the Respondent agreed to buy the Tobacco Products and the Merchandise from the Claimant (**Primary Obligation**).⁴² By Clause 25 of the Agreement, the Respondent agreed to display the Tobacco Products

³⁶ CISG Article 53.

³⁷ CISG Article 61.

³⁸ Beale, 827; *Hong Kong Fir v Kawasaki*.

³⁹ *Wallis v Pratt*, 1012.

⁴⁰ Beale, 831; *Hong Kong Fir v Kawasaki*.

⁴¹ *Hong Kong Fir v Kawasaki*.

⁴² Moot Problem, 9-10.

and Merchandise in its retail shops (**Secondary Obligation**). The Respondent breached these obligations when it caused to terminate the Agreement on 1 June 2013.⁴³

B. Bill 275 does not create an exemption

27. Bill 275 does not create an exemption because: (a) Bill 275 is not an impediment; (b) Bill 275 was foreseeable; (c) the effect of Bill 275 was avoidable; or, (d) Bill 275 was not the sole reason for the failure to perform.

(a) Bill 275 is not an impediment

28. A party is not liable for the failure to perform its contractual obligations if it proves that the failure was due to an impediment beyond its control.⁴⁴ An impediment is an objective circumstance or event that is external to the parties and which renders the performance of the contract impossible or radically different.⁴⁵

29. Bill 275 is not an impediment because it does not prohibit the Primary Obligation. Bill 275 only impedes the Secondary Obligation. Therefore, Bill 275 does not render the Agreement impossible or radically different.

(b) Bill 275 was foreseeable

30. The relevant test for foreseeability, when applied to the facts, is whether a reasonable person in the shoes of the Respondent, under the actual circumstances at the time of the conclusion of the Agreement and taking into account the relevant trade practices, ought to have foreseen Bill 275's initial or subsequent existence.⁴⁶

⁴³ Moot Problem, 20.

⁴⁴ CISG Article 79(1).

⁴⁵ *Stolen Car Case*; Schlechtriem/Schwenzer, Article 79 [11]; *Taylor v Caldwell*.

⁴⁶ See CISG Article 79(1); Schlechtriem/Schwenzer, Article 79 [13].

31. Prior to the introduction of Bill 275, the Government passed four increasingly restrictive legislative amendments designed to ultimately shut down the use of tobacco products in Gondwana. Specifically, the Government implemented increasingly restrictive requirements in 2002, 2004, 2005 and 2009.⁴⁷ Notably, the 2002 and 2009 amendments specifically pertained to packaging requirements. In these circumstances, a reasonable person in the Respondent's shoes would have taken the possibility of future state intervention into account.

(c) The effect of Bill 275 was avoidable

32. A party is liable for its failure to perform if it can avoid or overcome the impediment but does not.⁴⁸ A party is obligated to take commercially reasonable measures to avoid an impediment.⁴⁹ In the *Tsakiroglou* case, the United Kingdom Appeals Court held that an impediment is avoidable even if the possible alternatives would result in greatly increased costs for the party.⁵⁰ This principle was reflected in the *Iron Molybdenum Case*, where it was held that the triplication of the cost for the party was not enough to make the impediment unavoidable.⁵¹

33. The effect of Bill 275 could have been avoided. First, the Respondent could have continued to purchase the Tobacco Products and Merchandise. Second, Bill 275 did not prevent the sale of the Tobacco Products, it only established packaging and domestic distribution restrictions.⁵² Third, given that the Tobacco Products were already marked, the Respondent was only required to re-mark them in compliance with Bill 275. Fourth,

⁴⁷ Moot Problem, 4.

⁴⁸ CISG Article 79(1); *Tsakiroglou v Noble*.

⁴⁹ Secretariat Commentary, Article 65; *Macromex v Globex*; *Hilaturas v Iraq*.

⁵⁰ *Tsakiroglou v Noble*.

⁵¹ *Iron Molybdenum Case*.

⁵² Moot Problem, 13-4.

the Respondent could continue to display the re-marked Tobacco Products and Merchandise. All of these actions, while coming at a greater cost to the Respondent, would comply with the Agreement and Bill 275.

(d) Bill 275 was not the sole reason for the failure to perform

34. A party is liable for its failure to perform if the impediment is one of multiple concurrent causes that results in the failure to perform.⁵³
35. The Respondent terminated the Agreement for two reasons. First, because the sale of the Tobacco Products was no longer commercially viable for the Respondent.⁵⁴ Second, because the Respondent was prohibited from selling the Merchandise after the enactment of Bill 275.⁵⁵ Critically, the first reason is unrelated to Bill 275. The Respondent fails to fulfil this element.

C. The Claimant is entitled to liquidated damages

36. A party is entitled to damages when the other party breaches the contract.⁵⁶ The Respondent terminated the Agreement.⁵⁷ The Claimant is entitled to liquidated damages under Clause 60.2 of the Agreement.

⁵³ *Schlechtriem/Schwenzer*, Article 79 [15].

⁵⁴ Moot Problem, 20.

⁵⁵ Moot Problem, 20.

⁵⁶ CISG Article 74.

⁵⁷ Moot Problem, 20.

IV. THE AWARD WILL BE ENFORCED

37. The Award will be enforced because: (A) the Government has no clearly defined public policy; or, alternatively, (B) the Award is not contrary to the Government's public policy.

A. The Government has no clearly defined public policy

38. It has been held that for the public policy exception to apply, the policy in question must be explicit, well-defined and dominant.⁵⁸

39. The Government has publicly stated that it is seeking to regulate and safeguard the health of the Gondwandan people and that this is the impetus behind Bill 275.⁵⁹ There are two primary reasons why the Government's public policy is not clearly defined. First, it fails to specify the means by which it will safeguard public health from harmful tobacco consumption. Second, it neglects to define any objectively assessable or determinative goals.

B. The Award is not contrary to the Government's public policy

40. A country may refuse to enforce an award where it goes against that country's public policy.⁶⁰ The public policy exception is to be interpreted narrowly,⁶¹ and should only be relied on by courts in the most extreme cases. This position has been recognised by multiple national courts.⁶² Courts have held that the public policy exception must not

⁵⁸ *WR Grace v Local Union*, 766.

⁵⁹ Moot Problem, 32.

⁶⁰ NYC, Article V(2)(b).

⁶¹ *Shanghai v Pulmuone*, [14]; *Steel Corp v International Steel*, 694.

⁶² *Hebei v Polytek; A v R*, [16]-[25]; *Parsons & Whittemore v Societe Generale*, 973-74; *Profilati v PaineWebber*.

be seen as a catch-all provision to be used whenever convenient, it is limited in scope and is to be sparingly applied.⁶³

41. The Award comprises of liquidated damages, interest and costs payable by the Respondent for terminating the Agreement.⁶⁴ The purpose of Bill 275 is to regulate and safeguard the health of the Gondwandan people.⁶⁵ The Award will only bind two private companies and will not affect the health of the Gondwandan people. The Award will not fall within the scope of the public policy exception.
42. Finally, courts retain the discretion to enforce awards even when the ground for refusing enforcement is established.⁶⁶

⁶³ *Qinhuangdao v Million Basic Co*, [178]; cited in *Shanghai v Pulmuone*, [14].

⁶⁴ Moot Problem, 7.

⁶⁵ Moot Problem, 32.

⁶⁶ *IPCO v Nigerian Petroleum*, [11].

REQUEST FOR RELIEF

The Claimant respectfully asks the Tribunal to adjudge and declare that:

- I. The Tribunal has jurisdiction to hear the Dispute;
- II. The Tribunal should not admit the Amicus Curiae;
- III. The Respondent's obligations under the Agreement were not vitiated; and,
- IV. There is no risk that the Award will be not be enforced.

The Claimant respectfully requests the Tribunal to award that:

1. Liquidated damages in the sum of USD \$75,000,000 pursuant to Clause 60 of the Agreement.
2. The Respondent pay all costs of the 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 CIETAC Arbitration Rules Article 50.
3. The Respondent pay the Claimant interest on the amounts set forth in items 1 and 2 above, from the date those expenditures were made by the Claimant to the date of payment by the Respondent.

Respectfully Submitted

Counsel for the Claimant