FIFTH ANNUAL INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION MOOTING COMPETITION

27 JULY – 2 AUGUST 2014

HONG KONG

MEMORANDUM FOR CLAIMANT

TEAM NUMBER 576C

IN THE CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

Word Count 2979

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

Agreement	Distribution Agreement
Bill 275	Clean our Air Bill 275/2011
CA	Claimant's Arbitration Application
CE	Claimant Exhibit
CIETAC	China International Economic and Trade Arbitration Commission Arbitration Rules
CISG	United Nations Convention on the Contract for the International Sale of Goods
Final Report	UNCITRAL Report, U.N. Doc. A/40/17 (August 21, 1985)
No.	Number
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
para / paras	paragraph / paragraphs
RD	Respondent's Defence
RE	Respondent Exhibit
Trans-Lex	Commentary to Trans-Lex Principles.

UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
UNIDROIT Principles Contracts	UNIDROIT Principles of International Commercial
UNICITRAL Rules	UNCITRAL Arbitration Rules

INDEX OF AUTHORITIES

NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards

INDEX OF CASES AND AWARDS

Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae of May 19, 2005, para. 13 (available at http://icsid.worldbank.org) ('*Suez*').

Transatlantic Financing Corporation v United States of America 363 F.2d 312 ('*Transatlantic'*).

SUMMARY OF FACTS

Conglomerated Nanyu Tobacco, Ltd. (the Claimant) is the largest tobacco producer in Nanyu. Real Quik Convenience Stores Ltd. (the Respondent) is a fast growing convenience store chain in the state of Gondwana. The Claimant and the Respondent are referred to collectively as "the Parties". The Claimant and the Respondent have had a long lasting business relationship. The usual practise between the Parties has been to sign 10-year distribution agreements. The last agreement between the Parties was signed on 14 December 2010.

In 2001, the Gondwandan Government began to establish a series of different reforms and policies with regards to tobacco products, culminating in Bill 275 being introduced on 14 March 2011. Bill 275 restricts the packaging of tobacco products, and places limitations on the marketing and advertising of tobacco products and branded merchandise. The Respondent wrote to the Claimant on 21 March 2011, expressing concerns at the ramifications of Bill 275 becoming law, and suggesting renegotiation of the Agreement to address this. The Claimant subsequently dismissed the Respondent's concerns.

Bill 275 was passed into law on 13 April 2012, taking effect on 1 January 2013. The Respondent wrote to the Claimant on 11 March 2013, requested a renegotiation of their obligations under the Agreement, as Bill 275 had rendered some of their obligations under the Agreement illegal under Gondwandan law. The renegotiations between the Parties were unsuccessful.

On 1 May 2013, the Respondent wrote to the Claimant, giving notice of termination of the Agreement. The Respondent explained that they were unable to continue the Agreement in light of the new laws. On 1 July 2013, the Claimant wrote to the Respondent, claiming the termination penalty provided for in cl. 60 of the Agreement.

On 26 September 2013, the Respondent wrote back to the Claimant, stating that they were not liable to pay the termination penalty, being forced to terminate the Agreement due to matters outside their control. The Claimant then applied to have the matter referred to arbitration.

I - THE ARBITRAL TRIBUNAL HAS JURISDICTION TO DEAL WITH THIS DISPUTE

1.1 THE ARBITRAL JURISDICTION MAY DETERMINE ITS OWN JURISDICTION

The Tribunal has the power to determine its own jurisdiction over an arbitration case, as provided by Art 6(1) of the CIETAC Rules and Art 16 of the UNCITRAL Model law. The latter provides that the power of the Tribunal to rule on its own jurisdiction extends to the determination of the validity of an arbitration agreement.

1.2 THE COMMON INTENTION OF THE PARTIES IN THE ARBITRATION AGREEMENT IS TO ARBITRATE

The Claimant is relying on cl. 65 of the Agreement, which provides that either party may refer a dispute to Arbitration if they are unable to come to an agreement on the dispute, and if 12 months have elapsed from the date of the dispute. In this case, 12 months had not elapsed from the date of the dispute when the Claimant referred the matter to arbitration. It may be disputed either way if the 12-month period is a pre-requisite to arbitration or a time frame in which the parties can attempt to negotiate. When there are doubts about the intended scope of an arbitration agreement, the principle of in favorem presumption applies, providing that any doubts or disputes are to be resolved in favour of an arbitration (*Kaplan*, 1512).

II - THE ARBITRAL TRIBUNAL SHOLD NOT ADMIT THE GONDAWANDAN'S GOVERNMENT AMICUS CURIAE BRIEF FOR CONSIDERATION DURING PROCEEDINGS

2.1 THE ARBITRAL TRIBUNAL IS NOT REQUIRED TO PERMIT THE SUBMISSION OF THE AMICUS CURIAE IN ARBITRATION

There is no express requirement for the Arbitral Tribunal to permit the submission of the amicus curiae brief during arbitration proceedings. The power is discretionary and provided under art 26 of the UNICTRAL Model law and art 17 of the UNICTRAL Rules. The former provides the Tribunal with discretion to appoint an expert to assist with the proceeding; and the latter gives the Tribunal discretion to conduct the arbitration in the manner it considers appropriate, and to allow for witnesses and the joinder of third parties to the dispute. The discretion is subject to fundamental procedural safeguards (*Methanex*, 27).

2.2 THERE ARE NO GROUNDS ON WHICH TO PERMIT THE SUBMISSION OF THE AMICUS CURIAE BRIEF IN THESE PROCEEDINGS

There are requirements for amicus curiae intervention, none of which are satisfied in this case.

(A) There is no significant public interest that allows the parties to intervene

In order to permit intervention of amicus curiae, there must be an important public interest that merits protection (*Suez*, 19; *Interagua*, 18). There is no such public

interest in this case that merits protection. The health policies of the Gondwandan Government are not in dispute in this case and are not threatened by the outcome. The dispute between the parties is merely contractual and does not concern the intervention of the Government.

(B) The Gondwandan Government does not have the necessary expertise, experience or independence in order to assist the Tribunal with its decision

The Gondwandan Government must have suitable expertise, experience and independence to be joined as amicus curiae to proceedings (*Suez*, 24; *Interagua*, 25). The Gondwandan Government is not an expert in contractual disputes, and does not have the impartiality or independence to assist the Tribunal with the proceedings, as they have stated that they support the submissions of the Respondent. To permit the submission of the amicus curiae brief would be to permit an inherent bias into the proceedings.

If the party to an amicus curiae application is without an impartial view and has a set agenda, then the application should be denied in order to comply with the principle that the amicus must be a 'friend of the court' and 'not a friend to the party to the cause' (*Leigh,* 537). It is clear that the Gonwandan Government is a friend to the Respondent, and not to the court.

III - THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE NOT VITIATED BY THE IMPLEMENTATION OF BILL 275 AND THE GONDWANDAN GOVERNMENT'S NEW STRINGENT REGULATIONS

3.1 THE PRINCIPLES OF FORCE MAJEURE AND HARDSHIP DO NOT APPLY TO THIS CASE

The implementation of Bill 275 does not vitiate the Respondent's obligations under the agreement, as the principles of force majeure and hardship, invoked under art 79 of the CISG do not apply to the circumstances of the present case.

(A) There is no force majeure, due to required elements not being satisfied

The principle of force majeure does not assist the Respondent in the circumstances because two of the three required elements of force majeure, as provided in art 7.1.7 of the UNIDROIT Principles, are not satisfied.

Per art 7.1.7 (1) in the UNIDROIT Principles, the non-performing party must not have reasonably been able to take the impediment it claims is preventing its performance into account at the time that the contract was concluded. Stricter regulations by the Gondwandan government were widely known to be coming into force at the time that the Agreement between the parties was being renegotiated in 2010 (CA para 9).

The fact that legislation had introduced more onerous packaging requirements and restrictions on places where smoking was permitted was well known to both parties prior to the 2010 agreement being signed. Given the stated developments in the law, the Respondent would have reasonably been expected to take into account the impediments resulting from the implementation of Bill 275.

Per art 7.1.7(1) of the UNIDROIT Principles, the non-performing party may be excused if they could not reasonably have avoided or overcome the consequences of an impediment that arises after the contract has been agreed. The Respondent does not meet this test, as they could have avoided the consequences through negotiations prior to the 2010 Agreement being signed. It was open to the Respondent at the time of signing the Agreement to request that contractual terms be included which may have altered their obligations in the event that legislation such as Bill 275 was introduced.

Additionally, force majeure has been held to require something akin to a total ban or prevention of an activity or the supply of goods to meet the test and be invoked in defence of non-performance of contractual obligations (‘*Brauer*’ 151). In this case, there is no suggestion that the sale of tobacco products is prohibited by Bill 275.

(B) There is no hardship

The principle of hardship provides for non-performance and/or renegotiations of agreement in certain circumstances (art 79 CISG). Two necessary elements have not been satisfied by the Respondent for hardship to apply to the circumstances. Article 6.2.2(b) of the UNIDROIT Principles provides that the event in question must have

been such that the disadvantaged party at the conclusion of the contract could not reasonably have taken them into account. Art 6.2.2(d) of the UNIDROIT Principles provides that the disadvantaged party must not have assumed the risk of the events in question.

Given the progression of laws in Gondwana since 2002, the introduction of Bill 275 as law is not outside of the reasonable contemplation of the Respondent at the time the 2010 Agreement was entered into (CA para 9). The Respondent does not satisfy Art 6.2.2(b) of the UNIDROIT Principles.

With respect to Art 6.2.2(d) of the UNIDROIT principles, the Respondent is in a better position than the Claimant to ascertain the developments in Gondwana's domestic politics and public policy due to the fact that it is a Gondwandan company and operates its business in Gondwana. The Respondent as the buyer, in the absence of some problem with the condition of the product(s) in question, assumes the risk of circumstances changing and making the contract more difficult for it to perform (*Ashmore,* 441; *Krell*, 744).

Before hardship will apply as a good defence, something unexpected must have occurred, the risk associated with the event must have been allocated and the event must have rendered the performance of the contract impracticable commercially (*Transatlantic).* In this case, tobacco itself is still legal to sell, so performance of the purchase and on-sale of tobacco is not so affected as to render the contract commercially impracticable. The Claimant's product remains physically the same,

and characteristics such as taste and appearance are unchanged by the packaging requirements.

IV IF THE ARBITRAL TRIBUNAL DID ISSUE AN AWARD IN FAVOR OF THE CLAIMANT, THERE WOULD NOT BE ANY RISK OF ENFORCEMENT

4.1 THE ONLY GROUND IN WHICH THE ENFORCEMENT OF THE AWARD MIGHT BE AT RISK IS REASONS OF DOMESTIC PUBLIC POLICY, WHICH DO NOT ARISE IN THIS CASE

(A) The exception of public policy does not apply in this case

A purpose of the NY Convention is to encourage the enforcement of awards (Parsons). This has impacted upon the interpretation of the public policy exception provided for in art V(2)(b) of the NY Convention. The public policy exception in the NY Convention applies to several classes of public policy; for the purposes of the risk of the enforcement of the award, we are concerned with domestic public policy. For an award to be incapable of being enforced, it must be 'injurious to the public' (*Egerton*; *Deutshe*, 254). The exception is construed narrowly, to uphold the pro-enforcement purpose of the NY Convention (*Parsons*, 973-974). The public policy exception should only be enforced when the award would 'violate the forum state's most basic notions of morality and justice' (*Parsons*, 973-974).

Likewise, the UNICTRAL Model law limits the grounds for the review of awards, contained in art 36, incidentally promoting the finality of awards (Kawharu). On the public policy exception provided for in art 36 (2)(b)(ii) of the UNICTRAL Model Law, the Final Report at para 297 noted that the interpretation of public policy encompassed 'fundamental notions and principles of justice'.

To apply the public policy exception in either the NY Convention or the UNICTRAL Model law, the enforcement of an award in favour of the Claimant would have to violate Gondwana's basic and fundamental notions and disregard principles of justice. The enforcement of the award would have to be injurious to the public. In the circumstances of this case, there is no risk of this occurring, as the enforcement of an award in favour of the Claimant does not disregard the health policies of Gondwana, it merely enforces part of the Parties' Agreement. The enforcement of an award would not violate Gondwana's health policies; it would determine the Parties' dispute within the Agreement. The Parties have not breached Gondwana's health policies, and are complying with the new standards required.

(B) Public Policy has no place as an exception to the enforcement of an award on grounds of political issues

Gondwana's health policies are primarily a political issue. The level of enforcement of the health policies of Gondwana is still in question as it is being presented in this case whether or not the policies are able to dictate the enforceability of contractual clauses, within a private commercial dispute. The public policy defence has no

application to political interests, and should not be used in order to uphold national political interests (*Parsons*, 974).