

**FIFTH ANNUAL INTERNATIONAL ALTERNATIVE DISPUTE
RESOLUTION MOOTING COMPETITION**

27 JULY – 2 AUGUST 2014

HONG KONG

MEMORANDUM FOR RESPONDENT

TEAM NUMBER 576R

**IN THE CHINA INTERNATIONAL ECONOMIC AND TRADE
ARBITRATION COMMISSION**

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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	UNIDROIT Principles of International Commercial Contracts
UNCITRAL Rules	UNCITRAL Arbitration Rules

INDEX OF AUTHORITIES

Buck, S. *The Global Commons: An Introduction* (Earth Scan Publications Ltd, London, 1998)

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Commentary to Trans-Lex Principles <http://www.trans-lex.org/918000>

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Kawharu, Amokura, The Public Policy Ground for Setting Aside and Refusing Enforcement of Arbitral Awards Comments on the New Zealand Approach, *Journal of International Arbitration* 24(5): 491-513, 2007.

Cited as Kawharu.

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)
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UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010
UNCITRAL Rules	UNCITRAL Arbitration Rules

NY Convention

Convention on the Recognition and Enforcement of
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INDEX OF CASES AND AWARDS

Deutsche Schachtbau-und Tiefbohrgesellschaft mbh v Ras Al Khaimah National Oil Company [1987] 2 Lloyd's Rep 246 ('*Deutsche*').

Egerton v Brownlow (1853) 4 HLC 1 ('*Egerton*').

Leigh v Engle 535 F Supp 418 (1982) ('*Leigh*').

Parsons & Whitemore Overseas Co. v Societe Generale de L'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974) ('*Parsons*').

Re Perry 148 NE Rep 163 (1925) ('*Re Perry*').

Ringrow Pty Ltd v BP Australia Pty Ltd (2005) 224 CLR 656 ('*Ringrow*').

Thames Valley Power Ltd v Total Gas & Power Ltd [2006] 1 Lloyd's Rep 441 ('*Thames*').

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 DOES NOT HAVE JURISDICTION TO DEAL WITH THIS DISPUTE

1.1 THE 12 MONTH NEGOTIATION PERIOD IS A PRE-REQUISITE FOR ARBITRATION

The Arbitral Tribunal does not have jurisdiction to deal with the dispute currently.

Clause 65 of the Agreement between the parties provides that if there is a dispute, the parties are first required to solve the dispute by negotiation. Only after a period of 12 months from the date of the dispute, if the parties are unable to come to a resolution regarding their dispute, may either party submit the dispute for arbitration. The mandatory 12-month period has not been satisfied.

Article 1.7 of the UNIDROIT Principles provides that parties in international trade must act in good faith. The negotiation clause of the Agreement is part of the parties' dealings. As a result, the parties must negotiate in 'good faith'. The failure of the Claimant to respect the negotiation provisions of the arbitration clause demonstrates a lack of good faith, and is inconsistent with their obligations both under the Agreement, and art 1.8 of the UNIDROIT Principles.

II - THE ARBITRAL TRIBUNAL SHOULD ADMIT THE GONDAWANDAN GOVERNMENT'S AMICUS CURIAE BRIEF FOR CONSIDERATION DURING PROCEEDINGS

2.1 THE POSITION OF THE GONDWANDAN GOVERNMENT AND THE SUBJECT MATTER OF THESE PROCEEDINGS PERMITS THE SUBMISSION OF THE AMICUS CURIAE BRIEF

(A) There is an important public interest that merits protection.

In order to permit intervention of amicus curiae, there must be an important public interest that merits protection (*Suez*, 19; *Interagua*, 18). In this case, the important public interest lies in an aspect of the subject matter for consideration of the proceedings – Bill 275. Compliance and adherence to this aspect of the law is an important public interest as it involves public health policy. Gondwana's laws on smoking are an important aspect of these proceedings. Accordingly, the Respondent submits that they are unable to meet their obligations under the Agreement whilst complying with the new laws.

(B) The Gondwandan Government has expertise, experience and independence on an aspect of the subject matter relevant to the proceedings.

In order to be joined as amicus curiae to the proceedings, the party wishing to make an amicus curiae submission must have the expertise, experience and independence relating to the subject matter of the proceedings (*Suez*, 24; *Interagua*, 25). The

Gondwandan Government has the relevant expertise and experience with regards an integral part of the subject matter - the new smoking laws. The purpose of an amicus curiae submission is to have an impartial individual to assist and advise on the interpretation and status of the law, and to assist the Tribunal to achieve justice (*Leigh* at 420-422).

The Gondwandan Government will also be able to assist in the interpretation of the Bill 275, make independent submissions relating to statistical information regarding decline in smoker numbers since the introduction of Bill 275, and provide independent information regarding its policy reasons behind Bill 275.

2.2 THE OPINION OF THE GONDWANDAN GOVERNMENT DOES NOT AMOUNT TO BIAS SUCH AS TO PREJUDICE THE CLAIMANT.

(A) The purpose of the amicus curiae is to assist the court. The opinion of the Gondwandan Government does not impact on the proceedings.

Despite the opinion of the Gondwandan Government is not sufficiently biased so as to prejudice the Claimant. The Gondwandan Government has relevant information that may assist the Tribunal in the facilitation of justice. An amicus curiae party has no similar rights in the proceedings to those of the Parties. The Gondwandan Government is unable to file pleadings or motions, as amicus curiae, they are only there to assist and provide insight into the matter at hand (*Re Perry*, 165).

Additionally, art 18 of the UNCITRAL Model law and art 17 of the UNICITRAL Rules provide for the equal and fair treatment of the parties. The Tribunal is required to comply with these provisions.

III - THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE VITIATED BY THE IMPLEMENTATION OF BILL 275 AND THE GONDWANDAN GOVERNMENT'S NEW REGULATIONS

3.1 THE IMPLEMENTATION OF BILL 275 TRIGGERS THE PRINCIPLES OF FORCE MAJEURE AND HARDSHIP

(A) The principle of force majeure applies to the circumstances

Article 7.1.7 of the UNIDROIT Principles provides that, if there is an impediment outside a party's control that was not reasonably expected at the time the contract was agreed, the non-performance of a party will be excused. In order for a party to invoke the principle of force majeure, the non-performing party must give notice to the other party regarding the impediment and the fact that it is preventing their performance of the contract (art 7.1.7(3) UNIDROIT Principles). Further, the case law suggests that for force majeure to apply, the event must cause a party to be unable to carry out its obligations (Thames, [50]).

In these circumstances, all of the above elements are met. The passing of Bill 275 is an event that was not reasonable to expect the Respondent to consider at the time of entering into the Agreement. At the time of signing the Agreement, Bill 275 had not even been proposed.

When Bill 275 was introduced, the Respondent did attempt to alert the Claimant to possible issues, requesting to renegotiate the Agreement (CE No. 3). The Claimant downplayed the Respondent's concerns, stating that the likelihood of Bill 275 passing into law was minute (CE No. 4). It is clear that both parties did not foresee the implementation of Bill 275 into law.

The Respondent alerted the Claimant when the impact of Bill 275 began to adversely affect their business, and attempted to renegotiate the Agreement (CE No. 6). The Respondent further communicated that they would have to terminate the Agreement, as the selling of the promotional merchandise was rendered illegal by the passing of Bill 275 (CE No. 8).

The Respondent cannot effectively meet their obligations under the Agreement due to the implementation of Bill 275. Section 21 of Bill 275 provides the restrictions on the distribution and promotion of the branded merchandise. The Agreement expressly provides that the Respondent will sell and promote the branded merchandise (CE No. 1), applying *Thames*, the event of Bill 275 being introduced as law is a force majeure event, relied upon by the Respondent.

(B) The principle of hardship applies to the circumstances

The Respondent acknowledges the rule of the binding character of contract under art 1.3 of the UNIDROIT Principles. This applies even in circumstances that would impose heavy losses on either party, or total loss of value on performance on one

party (art 6.2.1(1) UNIDROIT Principles). Exceptions to this rule will apply in circumstances of hardship, as provided in art 6.2.2 of the UNIDROIT Principles. Hardship occurs when there is an event or events, which alters the equilibrium of a contract, by either causing the cost of a party's performance to increase or alternatively, decreasing the value of performance received (art 6.2.2 UNIDROIT Principles).

The passing of Bill 275 into law has had an impact on the fundamental equilibrium of the Agreement due to the significantly diminished value of the Respondent's performance of its obligations. The effect of Bill 275 has decreased the sales of tobacco by 30% across the market in Gondwana and further renders the obligations of the Respondent under the Agreement to promote and sell branded merchandise illegal. Bill 275 has resulted in the Respondent being unable to sell tobacco in the quantities it previously could, and the obligations to display and sell branded merchandise are now impossible to perform legally (RE No. 3).

As per the submissions on force majeure, the event of Bill 275 being made into law could not have been known or reasonably taken into account by the Respondent at the time they signed the Agreement with the Claimant. The Agreement was signed in 2010 and Bill 275 was introduced in 2011. The Respondent acknowledges that there was a change in the health policies in Gondwana starting back in 2001, but it is not reasonable for the Respondent to expect that such a strict law would be implemented. Overall, the implementation of Bill 275 into law is a matter outside the Respondent's control, which it had not assumed the risk of when it signed the Agreement.

IV IF THE ARBITRAL TRIBUNAL DID ISSUE AN AWARD IN FAVOR OF THE CLAIMANT, THERE WOULD BE A RISK OF ENFORCEMENT

4.1 THE ENFORCEMENT OF AN AWARD MAY BE CHALLENGED ON GROUNDS OF PUBLIC POLICY

One purpose of the NY Convention is to encourage the enforcement of awards (*Parsons*). However, the NY Convention provides scope for the enforcement of awards to be challenged in certain circumstances. An award may be challenged on grounds of public policy, as per art V(2)(b) of the NY Convention. The public policy exception in the NY Convention should be enforced when the award would ‘violate the forum state’s most basic notions of morality and justice’ (*Parsons*, 973-974). The UNICTRAL Model law also contains an exception of public policy, found in art 36(2)(b)(ii). The Final Report at para 297 noted that the interpretation of public policy encompassed ‘fundamental notions and principles of justice’.

(A) The enforcement of an award in favour of the Claimant is likely to violate Gondwana’s public policy, in light of the new health reforms.

For the exception to apply, the enforcement of the award must be ‘injurious to the public’ (*Egerton; Deutshe*, 254), and would have to violate Gondwana’s fundamental principles of justice. As a result of the new health reforms and anti-smoking laws, with the use and sale of tobacco being closely monitored and controlled in Gondwana, the enforcement of an award in favour of the Claimant is likely to violate public policy.

The health and safety of the residents of Gondwana are matters of public policy. Although the dispute between the parties is contractual, an integral part of the subject matter of the dispute is compliance with Bill 275. In order for the Respondent to comply and uphold the health policies of Gondwana, they are now in a position where they are being forced to terminate the Agreement. A penalty being enforced on the Respondent by the Claimant for matters of policy outside their control is, in itself, injurious to the public in general. There are aspects of the Agreement between the Parties that the Respondent is unable to maintain, such as the selling of branded merchandise. The Respondent has attempted on several occasions to renegotiate the Agreement, to no avail (RD para 18; RE No. 3; CE No. 4).

(B) To allow an award in favour of the Claimant at the Respondent's loss will undermine Gondwana's sovereign right to regulate and control its own public policy

The enforcement of an award in favour of the Claimant contradicts the health policies and reforms of Gondwana. These policies affect Gondwana as a whole. An award in favour of the Claimant undermines Gondwana's sovereign right to regulate and control its public policy. Sovereignty is the right of a State to have control over its people, its resources and the conduct and policies within the State (Buck, p. 27). The Claimant's actions show disregard for the policies of Gondwana by failing to renegotiate the Agreement at the Respondents' request in response to Gondwana's health reforms (CE No 3). An award in favour of the Claimant further promotes the business, sale and distribution of tobacco, contrary to Gondwana's public policy.