THE 5TH ANNUAL INTERNATIONAL ADR MOOTING COMPETITION

2014

MEMORANDUM FOR CLAIMANT

CLAIMANT:

Conglomerated Nanyu Tobacco, Ltd.

142 Longjiang Drive,

Nanyu City, Nanyu

Tel. (902) 357 4298

Fax. (902) 358 4298

Email: info@nanyu.com

RESPONDENT:

Real Quik Convenience Stores Ltd.

42 Abrams Drive,

Solanga, Gondwana

Tel. (916) 2465 9283

Fax. (916) 2466 9283

Email: contact@gondtel.com

Counsel for CLAIMANT:

TEAM 607

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ARGUMENT

I. THE JURISDICTION OF THE ARBITRAL TRIBUNAL IS NOT BARRED

1. The principle of *kompetenz-kompetenz* is no longer controversial and is now widely accepted and applied in international arbitral proceedings. [Born, p.1059] Pursuant to this, questions involving fulfilment of pre-arbitration procedures fall well within the jurisdictional competence of the arbitral tribunal itself. In fact, it is well settled that questions regarding the validity and compliance with pre-arbitration procedures are intended for determination by the arbitral tribunal itself. [Born, p.935]

2. The Claimant submits *first,* **[1]** that the pre-arbitration negotiation and consultation requirement in Clause 65 is invalid. *Arguendo* **[2]** it is valid, it is merely a non-mandatory procedural requirement, and not a mandatory, jurisdictional requirement. *Alternatively*, **[3]** the pre-arbitration negotiation and consultation procedure specified in Clause 65 of the Agreement was duly complied with.

[1] The Pre-Arbitration Negotiation and Consultation Requirement in Clause 65 is Invalid.

3. It is well settled across common and civil law jurisdictions that pre-arbitration requirements to negotiate and consult will only be valid if they demonstrate a requisite amount of certainty in their terms. This implies the existence of a suitable threshold which may be used to measure a party's performance of the requirement. [*Mocca Lounge*] A mere agreement to negotiate prior to arbitration and to only proceed to arbitration if negotiations fail has been held to be invalid as a condition precedent to arbitration. [*Itex Shipping*] Therefore, in the absence of

any qualifiers, the pre-arbitration requirement in Clause 65 is too uncertain and therefore invalid.

[2] *Arguendo* It Is Valid, Clause 65 of the Agreement is Merely A Non-Mandatory, Procedural Requirement.

4. The Respondent may contend that the requirement to consult and negotiate under Clause 65 was a mandatory requirement, non-compliance with which would directly impact the jurisdiction of the arbitral tribunal. However, as has been observed in several decisions as well as by leading authorities such as Professor Gary Born, such a situation is unlikely in the absence of concrete evidence to the contrary. When parties agree to arbitrate, it is presumed that they intend for the resolution of their disputes through one, centralised and holistic dispute resolution mechanism. In order to impute any contrary intention requiring pre-arbitration procedures to be jurisdictional in nature would require concrete evidence. In the absence of such evidence, it is then presumed that parties intended for the requirements to be merely procedural in nature. [Born, p.936]

5. In this case, Clause 65 merely specifies that parties must engage in pre-arbitral negotiation and consultation. However, there is no evidence to suggest that the parties intended for this requirement to be binding in nature or to prevent either party from proceeding to arbitration even in the absence of compliance. Consequently, in the absence of any such evidence, it must be presumed that the parties only intended Clause 65 to be a mere procedural requirement. Non-compliance with this procedure would therefore not act as a jurisdictional bar for the arbitral tribunal to adjudicate upon the merits of the dispute.

[3] *Alternatively*, the Procedures Outlined in Clause 65 of the Agreement Were Duly Complied With.

6. In the event of a dispute, Clause 65 of the Agreement requires parties to initially engage in consultation and negotiation, before proceeding for arbitration. Admittedly, Clause 65 also stipulates that parties may proceed for arbitration if no resolution has been reached at the end of 12 months. However, it merely specifies the *maximum* time period for which negotiation and consultation may occur but does not outline any *minimum* period for which parties must necessarily negotiate and consult with each other. Further, an agreement to negotiate does not imply an agreement to reach a consensus, but merely to engage in discussion. [*Hillas*] It would be absurd and against commercial prudence if parties were to wait before proceeding to arbitration, even though earlier negotiations have broken down. [*Figueres*]

7. In this case, the dispute was regarding the Respondent's non-performance and subsequent termination of the Agreement. When the parties met on 11 April, 2013, they attempted to negotiate and consult. However, they were unable to reach an agreement. Consequently, the requirement in Clause 65 was duly fulfilled by virtue of this negotiation and consultation. The Respondent contends that the dispute deals solely with the termination of the Agreement and therefore any such prior negotiations do not count towards fulfilment of Clause 65. However, the dispute began with the non-performance of the Agreement and a subsequent failure to arrive at a suitably re-negotiated contract. Therefore, the negotiations that took place between parties are sufficient to fulfil the requirements of Clause 65.

II. THE ARBITRAL TRIBUNAL SHOULD NOT ADMIT THE GONDWANDAN GOVERNMENT'S AMICUS CURIAE BRIEF FOR CONSIDERATION DURING THE PROCEEDINGS

8. The Claimant objects to admission of the *amicus curiae* brief and the government's statements regarding enforcement of the award. To this effect, it is humbly submitted that **[1]** the arbitral tribunal has no jurisdiction to entertain *amicus curiae*, **[2]** the State of Gondwana does not qualify as an expert and that **[3]** admitting amicus curiae briefs would violate principles of confidentiality and equality.

[1] The Tribunal has no jurisdiction to entertain amicus curiae

9. Arbitration has traditionally been regarded as a *private and confidential* proceeding strictly focused on the resolution of disputes between two or more parties to an arbitration agreement. There is no obvious place for third parties, such as the State of Gondwana, in this process because the arbitral tribunal only has jurisdiction over the parties to the privately concluded arbitration agreement. Unless parties agree otherwise, third parties cannot make oral or written submissions before the tribunal or attend hearings. [Blackaby/Richard]

10. The acceptance of amicus curiae submissions is not explicitly countenanced within the applicable procedural rules. Accordingly, it could be argued that acceptance of such submissions goes beyond the tribunal's mandate. [CIETAC]

[2] Alternatively, the State of Gondwana does not qualify as an expert to submit amicus curiae briefs

11. Alternatively, arbitral tribunals may consult '*experts*' to gain clarity on certain issues of the case. However, the central issues pertaining to this case are

contractual & commercial in nature. The State of Gondwana cannot be an expert on commercial matters and is thus precluded from qualifying as an expert since it is incapable of presenting any unique or useful perspective to this particular dispute. [Art. 42, CIETAC]

12. Moreover, in certain circumstances, tribunals may believe that there is significant benefit, in at least considering the acceptance of *amicus* submissions in disputes involving a strong public interest dimension such as investor-state or competition law disputes. However, this instant dispute is *private, commercial & contractual* in nature and does not have any public interest dimension which would merit any third-party interference. [Kasolowsky] [*OIAETI*]

13. Anyway, under applicable procedure, the arbitral tribunal under can only consult an expert that it has solicited advice from. [Article 42.1, CIETAC] In other words, unsolicited *amicus* cannot be admitted and a conservative approach needs to be adopted when evaluating the same. [*Shrimp*]

[3] Alternatively, admitting amicus curiae briefs would violate principles of confidentiality and equality

14. Though arbitral tribunals have complete discretion to determine the admissibility, relevance, materiality and weight of amicus submissions, it must be subject to paramount principles of equality and fair-hearing to disputing parties.

15. Firstly, equal, free and mutual consent of all parties involved in a dispute is the cornerstone of any arbitration. [Born, p.2779] *Amicus* are required where disputes wherein transparency is paramount i.e. investment arbitration. This is not the case in commercial arbitration where confidentiality and discretion is paramount. [Art. 36, CIETAC] The opportunity to decide commercial disputes behind closed doors, away from the attention of third parties, is an important reason why parties resort

to arbitration in the first place, allowing *amici* strikes at the core of such motivation.

16. Secondly, participation of *amicus curiae*, inevitably, places additional burden on the parties to the proceedings. If accepted, submissions require consideration and a response from parties and the tribunal. This results in additional costs for the parties. Moreover, they often side with one of the disputing parties thereby, infringing upon principles of equality and fair-hearing to disputing parties. [Waincymer][1]

III. THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE NOT VITIATED BY THE IMPLEMENTATION OF BILL 275 AND THE GONDAWANDAN GOVERNMENT'S NEW, MORE STRINGENT REGULATIONS

17. The Claimant submits that obligations under the Distribution Agreement were not vitiated by the implementation of Bill 275 and the Gondwandan Government's new, more stringent regulations because **[1]** there is no fundamental breach of obligations, **[2]** the agreement was not impractical and finally, **[3]** the agreement was not affected by hardship.

[1] There was no fundamental breach of obligations

18. The *nature of contractual obligation* is one factor in determination of fundamental breach. Such obligation may be inferred from the language of the contract, course of dealing between parties, etc. [Clausson]

19. Also, the *purpose of the contract* has been frustrated by the breach. The buyer purchased goods for a certain purpose and when the intended use of goods is *impossible*, it is a fundamental breach. [Huber]

[1] **Part II: The Process of an Arbitration, Chapter 7: Complex Arbitration*** in Jeff Waincymer , *Procedure and Evidence in International Arbitration*, Volume (© Kluwer Law International; Kluwer Law International 2012) pp. 495 - 608

20. Another consideration in the determination of fundamental breach is the party's *ability to perform*. [Koch] In circumstances, wherein performance is objectively impossible, fundamental breach is established. [Schlechtriem]

21. In the instant case, the law which called upon tobacco companies to sell with generic packaging did not create conditions which amount to a fundamental breach. Regardless, Nanyu Tobacco may still sell its goods in the market; there is no bar on its sale whatsoever. [*Benetton II*] Alternatively, the 'Nanyu Tobacco' brand which was central to the agreement is still maintained since the generic packaging of goods still holds its brand-name. Thus, fundamental breach is not established. [Claimant's Exhibit No.2] [Zeller]

[2] Agreement was practical

22. The Convention on International Sale of Goods provides exemption when the failure to perform was due to occurrence of an external impediment which was unforeseeable and unavoidable, in recognition of the principle of *pacta sunt servanda* and thus establishing *force majeure*. [Article 79, CISG] The use of the word impediment shows that the Convention seeks to exclude defective performance resulting from a party's personal performance. [Honnold]

23. Bill 275 and the stricter regulations which impose generic packaging on all tobacco products was a legislative development was beyond the scope of control for both parties and unavoidable. However it was not unforeseeable. The Claimant had repeatedly reached out to the respondents since 21 March 2011 and called upon them to factor in the changing regulatory landscape. Since, the three ingredients to establish exemption are not satisfied; therefore the agreement stands to be practical.

[3] The agreement was not affected by hardship

24. The mere fact that performance has been rendered more onerous that could reasonably have been anticipated at the time of the conclusion does not exempt the obligor from performing the contract.[Schwenzer] Hardship can only be found if the performance of the contract has become *excessively* onerous or, if the equilibrium of the contract has been fundamentally altered. [Art. 6.2.2., UNIDROIT Principles]

25. Furthermore, even an impediment that the aggrieved party could not foresee at the time of the conclusion of the contract does not exempt it if overcoming the impediment is both possible and reasonable. [Stoll] In this instant case, the changing legislative landscape was foreseen since 2011 and the claimant had reached out to the respondent in good faith. Moreover, enactment of Bill 275 with its strict regulations did not render the execution of the contract commercially unviable since the tobacco products *could still be sold* in Gondwana. Thus, the agreement was not affected by hardship.

IV. THE AWARD RENDERED BY THE ARBITRAL TRIBUNAL WILL BE ENFORCEABLE IN GONDWANA

26. An Arbitral Tribunal, unlike a court of law, is not bound by the *lex fori* [Beda Wortman, Manziruman]. In fact, while arriving at the award, *the tribunal can account for practical considerations* and devise a rule it deems befitting to the situation [Mark Blessing, Pierre Mayer, ICC 177-1999].

27. It is admitted that arbitration can be an expensive process for the parties involved. Therefore, undoubtedly, enforceability of the award should be a criterion that the Arbitral Tribunal takes into account while deciding the choice of law rule. Additionally, the Arbitral tribunal must account for enforceability while deciding

on the arbitral award, as it is a general duty cast upon the tribunal, so as to not render the whole process useless [Born]. However, it is submitted in the given instance that an award in favour of the CLAIMANT will not face the risk of unenforceability in the Claimant state of Gondwana.

28. Art. V(2)(b) of the New York Convention and Art. 36 of the UNCITRAL Model Law clearly stipulate that a state may choose to deny enforcement a foreign arbitral award if it violates the public policy of that state [Kronke, Nacimiento, p. 360]. It is submitted that the notion of public policy should not be construed broadly, and does not includes specific rules that are designed to protect the interests of the state concerned such as commercial interests. Instead, the term "against public policy" has traditionally been construed broadly to mean violation of justice or morality on the face of it, or grave violations of law such as human rights violations [Redfern and Hunter].Here, it is submitted that the various regulations and requirements that were formulated by the country of Gondwana, 2002 onwards, do not form a part of public policy of the country. This is because these are specific commercial laws that are particular to a state, depending on its special circumstances and framework. Granting these laws the status of public policy would render the arbitration process infructuous, as it would effectively amount to mandatorily imposing substantive rules of law upon a contract that may be governed by a wholly different set of rules. This strikes against party autonomy, which is one of the core values of arbitration [Born]. Therefore, although Gondwana is a party to the New York Convention, and enforcement is likely to likely to happen in accordance with Article V, there is no chance of rendering the award unenforceable.

29. Respondent may argue that in the given instance, the requirement forms a part of mandatory law of Gondwana. However, it is submitted that mandatory law requirements under the UNIDROIT principles are applicable to as to determine party autonomy only, and not to determine post facto enforceability. At the time of entering into the contract, the parties were not in derogation of any mandatory law of any state. The subsequent change in amendment cannot be considered to be a mandatory law under the original contractual framework. Therefore, this alteration should not be considered as a criterion while determining the enforceability of the award. Allowing for subsequent changes in circumstances surrounding the contract to form mandatory laws would render arbitration processes useless and would unnecessarily subject them to the laws of one particular nation.

RELIEF REQUESTED

30. In light of arguments advanced, CLAIMANT respectfully requests the Tribunal to find that:

I. The Tribunal has jurisdiction to deal with this dispute in light of the 12-month negotiation period stipulated in the arbitration agreement;

II. The Tribunal should not admit the Gondwandan government's *amicus curiae* brief for consideration during the proceedings;

III. The Respondent's obligations under the Agreement were not vitiated by the implementation of Bill 275 and the Gondawandan government's new, more stringent regulations;

IV. The award rendered by the arbitral tribunal will be enforceable in Gondwana.

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