THE 5TH ANNUAL INTERNATIONAL ADR MOOTING COMPETITION

2014

MEMORANDUM FOR RESPONDENT

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TEAM 607

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ARGUMENT

I. THE JURISDICTION OF THE ARBITRAL TRIBUNAL IS BARRED

1. The Respondent does not dispute the application of the principle of *kompetenz-kompetenz* to the question of jurisdiction of the arbitral tribunal. It is submitted however, that the arbitral tribunal does not have jurisdiction to adjudicate upon this dispute because the requirement to negotiate and consult prior to commencing arbitration, as set out in Clause 65 of the Agreement, **[1]** is a mandatory requirement and **[2]** has not been sufficiently complied with.

[1] The Requirement in Clause 65 of the Agreement is a Mandatory, Jurisdictional Requirement.

2. When parties enter into any agreement, it is presumed that they fully and consciously intended to agree upon all the terms stipulated therein. Therefore, in interpreting any part of a contractual agreement, paramount importance must be given to the intention of the parties and the language used by them in drafting the terms of the agreement itself. [Born, p.935] The Claimant contends that the pre-arbitration requirement to negotiate and consult, as set out in Clause 65 of the Agreement is merely procedural in nature and does not bar the jurisdiction of the arbitral tribunal to adjudicate upon this dispute. However, the presumption in favour of such a requirement being procedural is inapplicable in this case.

3. This presumption stems from the fact that many pre-arbitration requirements involve elements of the arbitral process itself and are therefore intended to merely outline the manner in which particular steps ought to be carried out. [Born, p.937] However, when the requirement is for another form of dispute resolution to be undertaken prior to commencing arbitration proceedings, the underlying basis of

the presumption is eroded. It would be absurd and against commercial prudence to presume that parties intended to engage in a specified alternative dispute resolution mechanism for a specific period merely as a procedural formality leading up to the actual arbitration. In fact, multi-tiered dispute resolution mechanisms are common and evidence an intention to allow for multiple opportunities for parties to resolve their disputes amicably. [Cooke]

4. Furthermore, the language of Clause 65 itself clarifies the mandatory nature of this requirement. The phrase employed is "s*hall* initially seek resolution through consultation and negotiation". [Born, p.939] Ordinarily, the use of *shall*, instead of *may*, is suggestive of an intent to make the requirement mandatory and binding in nature. [*Figueres*] In the absence of any evidence to the contrary, it cannot be presumed that the pre-arbitration negotiation and consultation is merely a procedural requirement. Therefore, it is necessary for the requirement in Clause 65 of the Agreement to be fulfilled prior to commencing arbitration and failure to do so would impact the jurisdiction of the arbitral tribunal, as is affirmed by decisions in both common law and civil law jurisdictions. [*Peyrin*]

[2] The Requirement in Clause 65 of the Agreement Was Not Complied With.

5. The Claimant contends that the meeting of 11 April, 2013 is sufficient to fulfil the requirement to engage in negotiations and consultation prior to arbitration. However, it must be borne in mind that this requirement must be fulfilled with respect to the same dispute that is sought to be arbitrated upon. In this case, the dispute before the arbitral tribunal concerns the termination of the Agreement and any damages payable as a result thereof. However, the event of termination itself took place *subsequent* to the meeting of 11 April, 2013. And there were no negotiations or consultations that took place after the termination of the

Agreement. Therefore, it cannot be contended that the requirement outlined in Clause 65 was fulfilled with regard to the dispute that is currently in question. Consequently, the jurisdiction of the arbitral tribunal is barred as a mandatory, jurisdictional requirement has not been fulfilled in this case.

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

6. The Respondent does not have any objections to the admission of an *amicus curiae* brief by the State of Gondwana. Moreover the government's statements regarding the enforcement of the award are duly noted. Thus, it is humbly submitted that **[1]** the Tribunal has jurisdiction to entertain *amicus curiae,* **[2]** the State of Gondwana qualifies as an expert and that **[3]** admitting *amicus curiae* briefs would help ensure a high-quality, transparent and enforceable award.

[1] The Tribunal has jurisdiction to entertain amicus curiae

7. CIETAC Rules of Arbitration, 2012 govern this instant arbitral tribunal. These rules afford broad and wide discretion to the arbitral tribunal to conduct proceedings, "*in any way that it deems appropriate*", in order to ensure that any expert perspectives are properly appreciated. [Art. 58 , Art 33.1, CIETAC]

8. Thus, it is clearly within the jurisdiction and scope of the tribunal to accept the State of Gondwana's request to submit an *amicus curiae* brief that would outline its concerns in this dispute.

[2] The State of Gondwana qualifies as an expert to submit amicus curiae briefs

9. *Amicus curiae* or the non-disputing party submission would ordinarily assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.[Waincymer]

10. State policy and public interest viz. sale of tobacco products is intrinsic to the dispute and thus, substantive issues raised in the arbitration are *beyond* those raised in usual international arbitration between commercial parties. It is pertinent that the expert opinion of the State of Gondwana is obtained in order to achieve the tribunal's mandate of resolving the dispute through a high quality, enforceable award.

[3] Admitting amicus curiae briefs would help ensure a high-quality, transparent and enforceable award

11. Admission of *amicus curiae* could benefit the arbitral tribunal by being perceived as transparent. Moreover, it assists the tribunal's process of inquiry into understanding of and resolving the dispute and delivering a high-quality and well-rounded award. [Born]

12. Conversely, the arbitration would be harmed as withholding consent to submit would be perceived as unduly secretive. Since the arbitral tribunal must have at its disposal to effectuate an *enforceable* award, these *amici* will only help it in this direction. [Waincymer]

13. It is a well-settled position of law that confidentiality and discretion is paramount in any arbitration. [Art. 36, CIETAC] However, it needs to be noted that the *amicus curiae* has only requested to submit a brief to the arbitral tribunal; it has not made a request for access to submissions made by disputing parties and neither has it requested to make oral submissions to the tribunal. Therefore, it cannot be claimed that admitting amicus curiae would violate principles of confidentiality.

14. Moreover, *amici curiae* have been permitted to participate in other international commercial arbitrations on the basis that such arbitration proceedings involve

public interest, any special expertise they may possess and the benefit derived from being perceived as more open or transparent. [*Methanex*]

III. THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE VITIATED BY THE IMPLEMENTATION OF BILL 275 AND THE GONDAWANDAN GOVERNMENT'S NEW, MORE STRINGENT REGULATIONS

15. The Respondent submits that its obligations under the Distribution Agreement were vitiated by the implementation of Bill 275 and the Gondwandan Government's new, more stringent regulations because **[1]** there is a fundamental breach of obligations, moreover **[2]** the agreement was impractical and finally, **[3]** the agreement was affected by hardship.

[1] There was no fundamental breach of obligations

16. 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]

17. 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, for example when goods do not possess features necessary for a purpose, it is a fundamental breach. [Huber]

18. Another consideration in the determination of fundamental breach is the party's *ability to perform*. [Koch] In circumstances, wherein performance is objectively impossible i.e. the object of the transaction is *unique* and has been *destroyed*, fundamental breach is established. [Schlechtriem]

19. In the instant case, the brand value of Nanyu Tobacco was essential to the contract, this is evident from the substantial premium that was paid to them for its prominent goodwill in the market. A law which called upon tobacco companies to

sell with generic packaging effectively creates conditions which amount to a fundamental breach, since it struck at the heart of the 'Nanyu Tobacco' brand which was central to the agreement. Thus, fundamental breach is established. This is reiterated by the subjective test by relying upon communication between parties which confirm that the intent of the parties to engage in the sale of specific brand, not generic cigarettes. [Claimant's Exhibit No. 6 dated 11 March 2013] [Zeller]

[2] <u>Agreement was impractical and attracts *force majeure*</u>

20. 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]

21. The use of the word impediment shows that the Convention seeks to exclude defective performance resulting from a party's personal performance. [Honnold]

22. Bill 275 and the stricter regulations which impose generic packaging on all tobacco products was a legislative development beyond the scope of control for either party, unforeseeable and unavoidable in nature. Since, it strikes at the heart of the essence of the contract as discussed, the agreement stands to be impractical.

[3] The agreement was not affected by hardship

23. Despite the fundamental principle that a valid contract is binding, the UNIDROIT Principles expand the concept of exemption beyond that in the CISG since it recognises contexts in which a party's duty of performance is excused i.e. hardship. [Schwenzer]

24. Hardship requires change in circumstances so *severe* and *fundamental* that a promisor cannot be held to its promise in spite of the possibility of performance. If an unforeseeable event, not within the control of either party, the occurrence of

which was not a risk assumed by the parties, occurs or becomes known after contracting, and the equilibrium of the contract is fundamentally altered for either party because of an increased cost of performance or the decrease in value of the performance to be received, hardship results. [Perillo]

25. The principal purpose in such instances "must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense." [Art. 6.2.2, UNIDROIT]

26. In this instance case, the principal purpose of such distribution agreement was to sell 'Nanyu Tobacco' brand products. The enactment of Bill 275 with its strict regulations rendered the execution of the contract, commercially unviable which translates into hardship.

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

27. 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].

28. Arbitration can be an expensive process for the parties involved. Therefore, 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].

29. 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]. The notion of public policy includes rules that are designed to protect the interests of the state concerned, including commercial interests [Dirk Otto, Omaia Elvan, p.364].Here, it is submitted that the various regulations and requirements that were formulated by the country of Gondwana, 2002 onwards, form a part of public policy of the country. This is because they directly impact the commercial activities of the state, which are sought to be regulated by this rule. Additionally, the extensive nature of these regulations is indicative of a concentrated effort on behalf of the Gondwandan state to regulate and structure their nation as one that does not support or promote the use of tobacco, which can only be construed as a public policy motivation. Further, Gondwana is a party to the New York Convention [Zeller]. Therefore, if enforcement is sought in Gondwana, it is highly likely that domestic courts of Gondwana would refuse the enforcement of the award on grounds of violation of public policy. In light of the above, RESPONDENT submits that the Arbitral Tribunal should decide in favour of Gondwana domestic law.

30. In addition, the Arbitral Tribunal may also decide the issue of enforceability by establishing a stronger economic link of the contract with either of the two parties [Cam Quyen]. In the given instance, it is obvious that the stringer economic ling lies with the state of Gondwana, as the enforcement of the award, if any, will need to be carried out in Gondwana. Additionally, it is submitted that the contract in question cannot override mandatory provisions of law, as provided under the UNIDROIT principles. Any such violation would further render the award unenforceable in the state whose mandatory rules are being violated. Under Art. 1.4 of the UNIDROIT Principles, the contract between the parties cannot prevail

over mandatory domestic rules [UNIDROIT Principles, p. 12]. It is further submitted that in accordance with Art. 1.4 of the UNIDROIT principles, 'mandatory rules' are construed in a broad fashion to include specific legislation as well as general notions of public policy. In addition, the UNIDROIT principles also expressly promote adherence with mandatory rules in order to ensure that the award rendered is enforceable [UNIDROIT, Art. 1.4.2]. Therefore, the domestic law of Gondwana should be especially considered by the arbitration tribunal in order to ensure that the award given is enforceable in the state of Gondwana.

RELIEF REQUESTED

31. In light of arguments advanced, RESPONDENT respectfully requests the Tribunal to find that:

I. The Tribunal does not have jurisdiction to deal with this dispute in light of the 12-month negotiation period stipulated in the arbitration agreement;

II. The Tribunal should admit the Gondwandan government's *amicus curiae* brief for consideration during the proceedings;

III. The Respondent's obligations under the Agreement were 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 not be enforceable in Gondwana.

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