FIFTH ANNUAL INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION MOOTING COMPETITION 2014

27 JULY 2014 – 02 AUGUST 2014

CITY UNIVERSITY OF HONG KONG

MEMORANDUM FOR THE CLAIMANT

TEAM CODE: 693C

In the arbitration between

Conglomerated Nanyu Tobacco Ltd.	**AND**	Real Quik Convenience Stores Ltd.
142 Longjiang Drive,		42 Abrams Drive,
Nanyu City,		Solanga,
Nanyu		Gondwana
CLAIMANT		**RESPONDENT**

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LIST OF ABBREVIATIONS

Agreement	The Distribution Agreement, signed 14 December 2010
Art	Article
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Convention on Contracts for the International Sale of Goods of 1980
CLAIMANT	Conglomerated Nanyu Tobacco Ltd
IBA	International Bar Association
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention)
p./pp.	page/pages
para	paragraph

RESPONDENT	Real Quick Convenience Stores Ltd
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	UNIDROIT Principles of Commercial Contracts 2010

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Cited as: Schoffman v Cent. States Diversified

INDEX OF LEGAL INSTRUMENTS

Arbitration Rules	CIETAC Arbitration Rules 2012
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration 2010
New York Convention (NYC)	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
CPL of China	Civil Procedure Law of the People's Republic of China
UNCITRAL Arbitration Rules 2010	UNCITRAL Arbitration Rules (as revised in 2010)
UNCITRAL Arbitration Rules 1976	UNCITRAL Arbitration Rules (1976)
UNCITRAL Model Law	UNCITRAL Model Law

CISG	United Nations Convention on Contracts for the International Sale of Goods of 1980
UNIDROIT	UNIDROIT Principles of International Commercial Arbitration (1985), with amendments as adopted in 2006
Bill 275	Gondwandan Senate Bill 275/2011

A. The Arbitral Tribunal has jurisdiction to deal with this dispute, notwithstanding the 12-month negotiation period stipulated in the arbitration agreement.

1. **1)** The arbitral tribunal has jurisdiction to deal with the dispute (Art.13 UNCITRAL Model Law) on the following grounds: **a**. Generally, failure to comply with negotiation requirements does not affect the tribunal's jurisdiction; **b**. in any case the Parties had attempted to negotiate and further negotiations would have been futile; **c**. even if a strict approach is applied, the Parties have had a significant amount of email exchange over the past 12 months which does constitute a genuine negotiation attempt; **d**. there are no certain or meaningful legal consequences of failing to comply with a negotiation procedure - only unnecessary hassle may be caused by an attempt to impose consequences; and **e**. no clear procedural or substantive guidelines were ever established between the parties regarding the negotiation requirement, which renders it unenforceable, following the common logic of many courts.

2. **2) Failure to comply with negotiation requirements does not affect tribunal's jurisdiction** unless the parties have explicitly provided that a failure to comply with the pre-arbitral stages excludes the tribunal's jurisdiction (Jolles, p.335).

3. **3) The CLAIMANT submits that the Parties had a negotiation on 11 April 2013** (Claimant's Exhibit No.7), when they were unable to come to an agreement and in the end their Agreement remained the same as before the

negotiation. Any further negotiations would lead to the same result so there is no point of waiting for 12 more months.

4. **4)** It is not uncommon to see arbitration clauses that require some sort of attempt at negotiation or amicable settlement before arbitration proceedings can be commenced (IBA Arbitration Guide, China). Despite applying a strict approach as to enforcing pre-arbitration negotiation requirements, CIETAC will now generally ask the CLAIMANT to provide evidence showing that the parties have attempted to settle the dispute by way of negotiation for the requisite time period. There has been a significant amount of email exchange between the CLAIMANT and the RESPONDENT, which proves that there was an attempt to settle on 11 April 2013 (Claimant's Exhibit No.7), but it did not succeed.

5. **5)** Moreover, Arbitration Law does not specifically provide for the consequences if one party fails to comply with the negotiation procedure before commencing arbitration proceedings. If any settlement was possible, the parties are likely to explore this possibility in any event at the time the dispute arises and, if it is not, the pre-arbitral tiers simply delay and obstruct the launch of determinative proceedings (Redfern and Hunter, p.115).

6. English courts have held that particular agreements to negotiate are unfortunately too vague and indefinite so as to be enforceable. US Courts have generally upheld agreements to negotiate only when there is a reasonably clear set of substantive and procedural guidelines against which

the party's negotiating efforts can be meaningfully measured (e.g. *Schoffman v Cent. States Diversified*). In this Agreement between the Parties there were no such guidelines.

B. The Gondwandan government's amicus curiae brief should not be admitted for consideration during this commercial arbitration

7. Third parties, or non-disputing parties, can participate in arbitration as 'amicus curiae', which can be roughly translated as 'friend of the court'. Amicus curiae can participate in a number of ways, including attending hearings, reading documentation relating to the arbitration and submitting their own written submissions/evidence (sometimes called an amicus curiae brief). Amicus curiae participation is ordinarily justified on the basis that the amicus curiae is in a position to provide the arbitral tribunal with its expertise or special perspective in relation to the dispute (Levine; Greenberg, Kee and Weearmantry, p. 518).

8. It is submitted that the Gondwandan government's amicus curiae brief should not be admitted into the present arbitration. This is, firstly, as there is a lack of agreement between the parties on the issue, with the claimant expressly objecting. Admitting Gondwana's brief in the face of this objection would violate the fundamental arbitral principle of party autonomy and consent. Secondly, the parties' chosen procedural rules (the CIETAC and IBA Rules) also do not explicitly address the issue of amicus curiae briefs, meaning that it is necessary for the tribunal to decide whether it is 'appropriate' to allow Gondwana's evidence. It is submitted that it would be inappropriate in this case as: **a**. party autonomy and confidentiality would be violated; **b**. it would promote inequality between the parties; **c**. it would increase cost and delay; and **d**. is unnecessary.

1) Express Agreement Between the Parties

9. Amicus curiae briefs can be submitted during the arbitration if the parties have expressly agreed to this. This is due to the fundamental importance of and emphasis on party autonomy and consent in arbitration. The 'foundation stone' of arbitration is party consent (Baetens, pp. 22-23; Vinuales; Bastin, p.225; Moses, pp.2-3). This means that no third party should be allowed to intervene in arbitral proceedings without the consent of both parties (Redfern and Hunter, pp.105-106).

10. In the present case, however, the parties have not expressly agreed to the submission of amicus curiae briefs. In fact, the claimant objects to the admission of Gondwanda's written evidence. It is, therefore, submitted that Gondwanda's brief should not be admitted as this would constitute a serious violation of the principle of party autonomy.

2) Provision in the Procedural Arbitration Rules

11. If the parties have not explicitly and specifically agreed to the submission of amicus curiae briefs, the arbitral tribunal may still have jurisdiction to admit amicus curiae briefs if the procedural arbitration rules adopted by the parties so provide (Baetens; Redfern and Hunter, para.2.52).

12. The parties in the present case have decided that the arbitration should be conducted in accordance with the CIETAC Arbitration Rules 2012 ('CIETAC Rules'). They have also agreed to adopt the IBA Rules on the Taking of

Evidence in International Arbitration ('IBA Rules'). If both sets of rules are silent on the issue, the arbitral tribunal has to decide whether it is 'appropriate' to accept amicus curiae briefs, in line with the general principles of the IBA Rules (Art 1(5) IBA Rules).

13. There are no explicit provisions in relation to amicus curiae in either the CIETAC Rules or the IBA Rules (unlike other procedural rules, such as the ICSID Arbitration Rules: Fach-Goméz, pp.539-541; Kasolowsky and Harvey, pp.10-12; Redfern and Hunter, pp.105-106; Born, 2014, p.892). It is therefore necessary to consider whether it is 'appropriate' for the arbitral tribunal to allow the submission of amicus curiae briefs.

14. It is submitted that it is not appropriate to accept amicus curiae briefs for the following reasons:

(i) Violation of Party Autonomy and Confidentiality:

15. Firstly, the submission of amicus curiae briefs should not be permitted as this would violate party autonomy and confidentiality.
16. As stated above, the admission of Gondwana's brief regardless of the objections of the claimant would violate the fundamental arbitral principle of party autonomy.
17. A further reason to reject Gondwana's application to submit an amicus curiae brief is as another foundational principle of arbitration, that arbitral proceedings should remain confidential between the disputing parties, could also be undermined (Fach-Goméz; Moses, pp.3-4; Born, 2014, p.878). For

example, arbitral tribunals applying the UNCITRAL Arbitration Rules 2010 ('UNCITRAL Rules') have decided that amici curiae need a certain amount of information about the proceedings in question in order to provide the tribunal with focussed and helpful submissions. Allowing an amicus curiae brief in the present case may also therefore involve the sharing of confidential information with third parties, which would violate the fundamental arbitral principle of confidentiality and may lead to other negative consequences for the parties involved, such as adverse publicity or loss of future business (Fach-Goméz; Poudret and Besson, pp.316-317).

18. Furthermore, amicus curiae briefs have mainly been permitted to date in arbitrations concerning investor-state disputes, such as international investment arbitration, rather than disputes between two private parties, such as international commercial arbitration. As the former frequently concern the public services sector and/or public welfare issues, the protection of the general public must be weighed against the parties' desire for confidentiality and privacy, and means that the intervention of third parties and the resulting breach of autonomy and consent is more readily justifiable (Levine, pp.205-206). As the current dispute is, however, a commercial dispute between two private parties, it is submitted that the arbitral tribunal should give greater weight to the protection of the parties' autonomy and confidentiality, and decide that it would not be appropriate for Gondwana to submit an amicus curiae brief.

(ii) Inequality between the Parties

19. Another fundamental principle is that the parties to the arbitration are treated equally. For example, Art 22 CIETAC Rules states that '[a]n arbitrator shall not represent either party, and shall be and remain independent of the parties and treat them equally.' If an amicus curiae fully supports one party but not the other, allowing it make written submissions in the arbitration would lead to the parties being treated 'unequally' (Bastin, p.226).
20. In the present case, Gondwana's amicus curiae brief 'wholly supports the claim of the Respondent' (Clarification No.13). It is submitted therefore that, in order to ensure that both parties are treated equally during arbitral proceedings, it would not be appropriate for such a brief to be admitted.

(iii)Additional Cost and Delay

21. The submission of amicus curiae briefs also lead to an increase in cost and delay for the parties. This is as, once an amicus submission has been made, the parties must analyse and respond to this as well as to the submissions of the opposing party (Born, 2014, p.878). This may in turn negatively impact upon the popularity of arbitration as a dispute resolution process, given that 'speed and economy are two of arbitration's main characteristics which lead the parties to prefer this mechanism rather than going through the courts' (Fach-Goméz).
22. Furthermore, the party opposing the amicus submission is likely to bear a greater proportion of the increased costs, which, again, introduces inequality between the parties (Bastin, p.225; Kasolowsky and Harvey; Born, 2014, p.878).

23. Thus, the additional cost and delay also suggests that the submission of amicus curiae briefs would be not be appropriate.

(iv)Not Necessary

24. Gondwana should also not be permitted to submit an amicus curiae brief in the current arbitral proceedings as it is not necessary. This is, firstly, as there are many ways in which the tribunal can gather the information needed to resolve the dispute, other than by amicus curiae briefs (Fach-Goméz). For example, the IBA Rules permit the appointment of witnesses of fact (Art 4), party-appointed experts (Art 5), and tribunal-appointed experts (Art 6), and the CIETAC Rules permit the arbitral tribunal to undertake investigations and collect evidence on its own initiative (Art 41), and appoint experts or appraisers (Art 42).

25. A second reason is that the information which the Gondwandan government wishes to provide, concerning the harmful effects of tobacco consumption and that the current arbitration may undermine Gondwana's law in relation to tobacco, does not involve the provision of any expert information but is in fact self-evident and general knowledge.

26. Therefore, this also suggests that the submission of an amicus curiae brief by Gondwana is not appropriate in the present case.

Conclusion

27. Based on the above arguments, the Gondwandan government should not be permitted to submit an amicus curiae brief in arbitral proceedings between Conglomerated Nanyu Tobacco Ltd and Real Quik Convenience Stores Ltd.

C. The RESPONDENT's obligations under the Agreement were not vitiated by the implementation of Bill 275 and the Gondwandan government's new more stringent regulations.

28. The RESPONDENT's actions amounted to a fundamental breach of the Agreement which entitles the CLAIMANT to declare the contract avoided (Art 49 CISG) and claim damages (Art 61 CISG), because the case does not fall within the ambit of Art 79 CISG.

29. The RESPONDENT's obligations under the Agreement were not vitiated by the implementation of Bill 275 and the Gondwandan government's new more stringent regulations, and is thus liable to pay the liquidated damages claimed, on the grounds that: **a**. There was no impediment beyond the RESPONDENT's control; and/or **b**. the impediment could "have been reasonably taken into account" by the RESPONDENT "at the conclusion of the contract"; and/or **c**. the impediment or the consequences of the impediment could "have been reasonably avoided or overcome"; and/or **d**. the non-performance was not due to such an impediment (Art 79 CISG. See also *Macromex*); and/or **e**. the RESPONDENT failed to inform the CLAIMANT of the impediment in a timely manner (Art 79 CISG. See also *Steel bar case*).

30. **1) No impediment: The law**

Art 79 of the CISG provides that a party can be exempt from liability for failure to perform, inter alia, if the failure was due to an impediment beyond its control. Although the Belgian Supreme Court (Hof van Cassatie) decided in *Scafom* that hardship that affects the contractual equilibrium could possibly

constitute an impediment within the language of CISG Art 79, as noted by Momberg Uribe, “legal doctrine is divided on this and the case law is too thin on the ground to give a definitive answer” (Dewez et al, p.126). In fact, it has been stated by Flambouras that the majority of academic opinion support that only impossibility and not hardship, economic impossibility or commercial impracticability is captured by Art 79 CISG. Therefore, *Scafom* should not be seen as carrying a lot of weight.

31. Assuming however that the Tribunal finds this case of significant importance, more detail is provided about it. The Court decided that the impact of hardship cannot be resolved by reference to Art 79 alone and therefore Art 7.2 of the CISG operates, in the view of the Court, so as to require reference to general principles of international commercial law that are contained in particular in the UNIDROIT Principles. Arts 6.2.1–6.2.3 of the UNIDROIT Principles provide that the disadvantaged party (in this case the RESPONDENT) must make a request of renegotiation, which the other party must meet in good faith (Dewez et al, pp.132-133).

1) No impediment: Application of the law to the facts

32. If, as it has been argued above, the RESPONDENT can only rely on impossibility in order to benefit from the operation of Art 79 CISG, then the RESPONDENT cannot allege that the fact that the new regulations made it economically or commercially impractical and/or burdensome for it to perform its obligations constituted an “impediment”.

33. As regards the sale of promotional material, the CLAIMANT understands how that was rendered impossible due to illegality. The RESPONDENT had

informed the CLAIMANT that they had withdrawn the promotional merchandise from their retail stores. Although that was a fundamental breach of contract, the CLAIMANT chose not to avoid the contract for that reason, was keen to continue with the rest of the contract and was open to discuss matters regarding the promotional merchandise with the RESPONDENT (Claimant's Exhibit No. 7). Therefore, the RESPONDENT was obliged to continue with the performance of the rest of its contractual obligations, since there was no impediment to frustrate those. The Gondwandan legislation did not prohibit the performance of any other contractual obligation.

34. Assuming that "hardship" can constitute an "impediment", then, on the facts of this case, although some difficulties were caused to the RESPONDENT due to the new regulations, the contractual equilibrium was not significantly affected so as to put Art 79 in operation. It could not be supposed that any imbalance between the parties could constitute an impediment. The market environment is full of contingencies and commercial parties are always bound to suffer from fluctuating imbalances. It can only be in exceptional cases that the party who terminates the contract because of hardship is free from liability. Otherwise, the essence of a contract would be stripped of all meaning in a market economy and an uncertain world, making it even more uncertain.

35. In this case the demand for the CLAIMANT's products fell approximately by 25%. It cannot be considered that this percentage reflected an exceptionally high change in demand that made it exceptionally burdensome for the RESPONDENT to perform its contractual obligations. Contrast this case with the facts in *Scafom* where it was a 70% rise in the cost of steel which created sufficient hardship so as to amount to an impediment. A 70% rise in cost can

be considered as an exceptionally big change, while a 25% reduction in demand, which effectively translates into a 25% rise in cost, is a very minimal change in comparison.

36. Even assuming that the hardship experienced by the RESPONDENT did amount to an "impediment", the CLAIMANT did engage with the RESPONDENT's request to renegotiate in good faith so that it is not for the CLAIMANT but for the RESPONDENT to sustain the loss resulting from the impediment. The CLAIMANT did meet the RESPONDENT on 11 April 2013 as requested by the RESPONDENT. The fact that they were not able to renegotiate the terms on that day is irrelevant. The CLAIMANT did make it clear to the RESPONDENT that they were open to further negotiations (Claimant's Exhibit No. 7) but the RESPONDENT did not make any further requests for renegotiation. Given that *Scafom* effectively decides that there is a duty to make a request for renegotiation in the case of hardship for Art 79 CISG to operate, and that the RESPONDENT allocated only one day for such an enormous task and made no further requests, it is barred from relying on Art 79.

37. **2) Assuming that the RESPONDENT's difficulties to buy the quantities as provided in the Agreement was due to an "impediment", the RESPONDENT could be reasonably expected to have taken the impediment into account at the time of the conclusion of the contract.**

    i. There was a clear trend building up in public policy in Gondwana with numerous pieces of legislation aiming to limit tobacco consumption, in 2002, 2004, 2005 and 2009.

ii. Moreover, it was clear, as reported in the leading newspaper the Gondwandan Herald, that the regulations in 2009 were considered by anti-tobacco lobbyists to be “too little, too late” and that further regulations should be introduced, especially to ensure that Tobacco companies do not draw in younger populations by the packaging they use or by heavy advertising (Respondent’s Exhibit No. 1).

iii. It was clearly obvious therefore, at the time the contract was concluded, that there was a high possibility of more stringent regulations to follow soon. Such regulations would have obvious effects on the amounts that the RESPONDENT would be economically comfortable to buy. However, the RESPONDENT turned a blind eye to this trend and proceeded with an agreement which fixed minimum quantities and time intervals, as well as a premium at a high level, without making a request for an adaptation clause.

38. **3) The RESPONDENT could have avoided or overcome the impediment and its consequences by introducing a relevant adaptation clause into the contract, at the time it was being concluded.**

39. **4) It is not at all clear that it was the impediment which caused the failure of performance.**

This is so because the RESPONDENT continued to buy the agreed quantities at the agreed time frames for almost a whole year without complaining. The

real cause might have been insufficient storage space or anything else. It is for the RESPONDENT to prove causation on this issue (*Powdered milk case*).

40. **5) The RESPONDENT did not give notice to the CLAIMANT of the impediment and its effect on its ability to perform, within a reasonable time after knowledge or constructive knowledge of the impediment, in accordance with Art 79 CISG.** As a result, the RESPONDENT should be responsible for all loss caused by the impediment (*Steel bar case*).

    i. The RESPONDENT waited almost a year before informing the CLAIMANT of the difficulties it faced due to the impediment, as the legislation came into force on 13 April 2012 and the RESPONDENT only wrote to the CLAIMANT on 11 March 2013 (Claimant's Exhibit No. 6).

    ii. If time was needed to assess the effect of the new regulations, a few months would be sufficient because it is sooner rather than later that the new regulations would have the biggest bite.

    iii. Thus, the CLAIMANT did know or ought to have known by the time a few months had passed after the 13 April 2012 that the new regulations were making their contractual obligations excessively difficult for them to perform and should have informed the CLAIMANT at that time.

D. If the Tribunal were to issue an award in favour of the Claimant, there would be no risk of enforcement

37. As a party to the New York Convention (NYC), Gondwana is under an obligation to recognise and enforce the CIETAC award (Art I(1) and III NYC). Gondwandan courts may refuse enforcement if the recognition or enforcement of the award would be contrary to the public policy of Gondwana (Art V(2)(b) NYC).

38. The CLAIMANT submits that **a.** Art V(2)(b) applies only to violations of international public policies and excludes domestic public policies, **b.** public policy defence is exceptional in nature and Art V(2)(b) requires something more than a mere violation of mandatory national law, and **c.** the pro-enforcement policy of the NYC towards international arbitral awards should be respected. Therefore, the present award does not violate Gondwandan public policy and Art V(2)(b) cannot be invoked by Gondwandan courts to refuse enforcement of the award.

1) Art V(2)(b) applies only to violations of international public policies

39. The CLAIMANT submits that public policy defence under Art V(2)(b) has a narrow concept and it can only be invoked if the enforcement of the foreign award violates international public policy.

(i) Art V(2)(b) requires an infringement of international public policy and it excludes domestically oriented public policies (*Parsons and Whittemore v RAKTA*; Born, 2009, p.2834). An infringement of international public policy is taken to mean a violation of the enforcement state's "most basic notions of morality and justice"

(*Parsons;* see also *Karaha Bodas Co LLC; Renusagar Power v General Electric*).

An arbitration agreement which includes obligations to sell, display and promote tobacco products may be against the enforcement state's domestic policy ('Tobacco control and restriction is a keystone of Gondwana's public policy' (Letter from the Gondwandan Department of State)). However, Gondwandan courts in considering whether or not to refuse enforcement of a foreign award must give an international dimension to their notions of public policy (Redfern and Hunter, pp.656-658; Van Den Berg, p.502). The regulation of tobacco consumption does not constitute a principle of international public policy because selling and promoting tobacco products cannot possibly affect the notions of morality and justice of any nation-state in the world.

(ii) Some states may refuse enforcement of an award if there is a violation of 'public interest' instead of 'public policy' (Art 258 China's CPL). While 'public interest' is broad enough to include threats to public health, e.g. tobacco consumption, this does not have any real impact on any consideration to refuse enforcement of an award based on violation of 'public policy' because, in practice, the circumstances under which 'public interest' is applied follow the circumstances of the principle of public policy (IBA Arbitration Guide, China; Redfern and Hunter, p.660). This is evidenced from the fact that there have only been two reported cases where enforcement of an award has been refused on this ground (IBA Arbitration Guide, China).

2) Art V(2)(b) requires something more than mere contradiction of the award with national law

40. The CLAIMANT submits that public policy defence is exceptional in nature and this exception is not satisfied merely because the foreign arbitral tribunal reached a result which is contrary to that provided by domestic law.

41. For example, English courts require a degree of seriousness in the illegality of the award for the public policy defence to be invoked. An award which is legal under the governing law chosen by the parties but illegal in the country of enforcement can still be enforced provided that the illegality does not involve universally condemned activities such as terrorism, drug trafficking, corruption or prostitution (*Westacre Investments v Jugoimport*; see also *Deutsche Schachtbau-und v. Ras Al Khaimah*). Similarly, a foreign award may violate the law of the enforcement state if it so fundamentally offensive to the State's notions of justice that national courts cannot reasonably be expected to overlook the objection (*Judgment of 12 July 1990 (German Case); Hebei Import v Polytek*).

42. Gondwandan courts cannot refuse enforcement of the award merely because the outcome of the award is contrary to Bill 275. Rather, direct and serious violations of the enforcement state's most fundamental and mandatory laws are required (Born, 2009, p.2843). The award does not directly touch upon issues of public policy because the subject matter of the award is of contractual nature and the dispute is between two private commercial parties. But, even if the award does involve public policy issues, the degree of illegality is not high enough to invoke the defence of Art V(2)(b) because an award in favour of the CLAIMANT does not mean that future contracting

parties will be able to defy the Gondwana's laws regarding tobacco sale and promotion.

3) Pro-enforcement policy of the NYC

43. The CLAIMANT submits that, consistent with the decisions of other national courts, the pro-enforcement policy of the NYC towards international arbitral awards should be respected.

44. In interpreting and applying the public policy exception, courts in most jurisdictions strongly favour the recognition and enforcement of international awards (*Parsons;* Born, 2009, pp. 2848-2849). Pro-enforcement, in itself, is viewed as a public policy of the NYC and the courts should not interpret public policy defence in a way that violates the basic principles of fairness and finality of the award (*Oil Prod. Ass'n v United World Trade*).

45. Even if tobacco control is established as a fundamental issue of public policy, a balance must be struck between this policy and the public policy of sustaining international arbitral awards (*Westacre Investments;* Redfern and Hunter, 2009 pp.657). If Gondwandan court refuses enforcement of the award, this is likely to adversely affect the decisions of courts in other jurisdictions, given the significance of the CLAIMANT'S position in the worldwide tobacco market. Parties, in submitting disputes to arbitration, need to be confident that arbitral awards are final and binding, and that they are likely to be enforced by national courts except in very extreme cases (Ozumba).

46. Therefore, refusal of enforcement of this award would undermine the stability and predictability in the resolution of international arbitration disputes and, for

this reason, even if public policy defence is established, the court should use its discretion and deny refusing enforcement of the award (*Schreter v Gasmac Inc*).