THE INTERNATIONAL ADR MOOTING COMPETITION 2014

July-August 2014

MEMORANDUM FOR CLAIMANT

TEAM CODE: 712 C

ON BEHALF OF:

Conglomerated Nanyu Tobacco Ltd
142 Longjiang Drive,
Nanyu City,
Nanyu

AGAINST:

Real Quik Convenience Stores Ltd
42 Abrams Drive, Solanga,
Gondwana

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LIST OF ABBREVIATIONS

Art.	Article
Cl.EX	Claimant Exhibit
Re.EX	Respondent Exhibit
Agreement	Distribution Agreement between Claimant and Respondent
Model Law	UNCITRAL Model Law on International Commercial Arbitration,1985
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
NYC	New York Convention
UNCITRAL	United Nations Commission on International Trade Law
Bill	Clean Our Air Bill
FCTC	Framework Convention on Tobacco Control

ILA	International Law Association
Govt.	Government
p.	Page
¶	Paragraph
V	Volume

INDEX OF AUTHORITIES

BOOKS/COMMENTARIES

	(2008) Cited as: Lookofsky
Schlechtriem	Commentary on the UN Convention on the International Sale of Goods (CISG) Cited as: Schlechtriem
Redfern	Redfern and Hunter on International Arbitration Fifth Edition, Oxford University Press
Anson	Anson's Law of Contract, 24th ed., Oxford University Press
David Brainbridge	Intellectual Property, 5th ed., Pearson Education
Randy E. Barnett	Contracts, Cases and Doctrines, 4th ed., Wolters Kluwer
D. Caron, L. Caplan	*The UNCITRAL Arbitration Rules: A Commentary* (2006)
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Trietel	The Law of Contract, 10th ed., Sweet and Maxwell
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I.A. Blanco White	Kerly's Law of Trade Marks and Trade Names
Luke Eric Peterson	*Amicus Curae Interventions: The Tail That*

Wags The Transparency Dog, <http://kluwerarbitrationblog.com/blog/2010/04/27/amicus-curiae-interventions-the-tail-that-wags-the-transparency-dog/>.

Henry D. Gabriel A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code", 7 *Ind. Int'l & Comp. L. Rev.*

CONVENTIONS/RULES

China International Economic and Trade Arbitration Commission (CIETAC)

United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG)

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (NYC)

UNIDROIT Principles of International Commercial Contracts, 2010 (PICC)

International Law Association Recommendations, New Delhi Resolution 2/2002 (ILA)

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The Vienna Convention For The International Sale Of Goods

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White v. Kampner, 641 A.2d 1381, 1387 (Conn. 1994).

Cable & Wireless *Cable & Wireless v. IBM United Kingdom Ltd.* [2002] 2 All E.R. (Comm.) 1041, 1054 (Q.B.).

Kemiron Atlantic, Inc. *Kemiron Atlantic, Inc v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002)

Waste Mgt, Inc. v. Mexico *ICISD Award No. ARB (AF)/00/3 (NAFTA) (30 April 2004)*, 43 Int'l Legal Mat. 967, ¶¶70 *et seq.* & 118 *et seq.* (2004).

Mktg. Displays Intn'l Mktg. Displays Intn'l v. VR Van Raalte Relcame BV, XXXI Y.B> Comm. Arb. 808 820, (Hague Gerechtshof) (2006)

Mitsubushi Motors Corp Mitsubushi Motors Corp v. Soler Chrysler-Polymouth

	Inc., 473 U.S. 614, 638 (U.S. S.Ct 1985)
Southland Corp.	Southland Corp v. Keating, 465 U.S. 1(U.S. S.Ct. 1984)
First Options of Chicago,	*First Options of Chicago, Inc. V. Kaplan*, 514 U.S. 938, 943 (U.S. S.Ct. 1995)
Steelworkers of Am.	*Steelworkers of Am v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (U.S. S.Ct. 1960)
Kaverit Steel & Crane Ltd	*Kaverit Steel & Crane Ltd v. Kone Corp.*, XIX Y.B. Comm. Arb. 643 (Alberta Court of Appeal 1992)
Shin Satellite Public	Shin Satellite Public vs M/S Jain Studios Limited on 31.1.06, SC of India, Arbitration Petition1 of 2005

Congimex Companhia	Congimex Companhia Geral, etc., S.A.R.L. v. Tradax Export S.A. [1983] 1 Llyod'd Rep. 250 at 253

ARGUMENTS

I] The Arbitral Tribunal has jurisdiction to deal with this dispute.

A] The purpose of Arbitration clause.

1. International arbitration is designed with the objective of avoiding the formalities and technicalities associated with many national litigation systems.[1] Parties choose arbitration in order to provide commercially sensible and practical resolutions to cross-border commercial disputes. This requires dispensing with many procedural protections that are designed for domestic litigation, and instead adopting procedures that achieve commercially practicable results.[2]
2. Courts have upheld agreements to negotiate only where there is a reasonably clear set of substantive and procedural guidelines against which a party's negotiating efforts can be meaningfully measured.[3]
3. Clauses that require efforts to reach amicable settlement, before commencing arbitration, "are primarily expressions of intention" and "should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute.[4]

B] Illegality of underlying contract does not affect arbitration clause.

4. Various courts have held that even if an underlying contract is illegal, it would not affect the validity of an arbitration clause associated with that contract.[5] Arbitral tribunals have reached similar conclusions.[6]
5. Arbitration clauses sometimes establish procedural requirements that apply prior to commencement of the arbitral process.[7] Generally, courts and tribunals have been reluctant to conclude that compliance with contractual procedural requirement is a jurisdictional condition for commencing arbitration.[8]

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[1] G.Born International Commercial Arbitration, Wolters Kluver, Vol II, 1743
[2] Ibid
[3] *Fluor Enters., Inc. v. Solutia Inc.*, 147 F.Supp.2d 648, 651 (S.D. Tex. 2001).
[4] Final award in ICC case no. 8445, XXVI Y.B. Comm. Arb. 167 (2001)
[5] Mayer, The limits of Severability of the Arbitration clause, in A. van den Berg, 40 years of Application of the NYC 261,265(ICCA Congress Series No.9 1999)
[6] Interim Award, ICC Case no.4145, XII Y.B.Comm.Arb.

6. National Courts have also been reluctant to reach such conclusions, especially where the party resisting the jurisdiction was partially/entirely responsible for the failure or non-exhaustion of negotiating process.[9]
7. Courts and Tribunals have not always given jurisdictional effect to negotiation clauses even where negotiation was characterized as a condition precedent to arbitration.[10]

C] All procedural requirements have been fulfilled.

8. The Respondent communicated on 11th March 2013[11] that they have difficulty in continuing with their obligation under the contract and asked to "meet and discuss on the current situation." This was followed by negotiations on 11th April 2013. The Claimant communicated 12th April 2013[12] that the Nanyu brand is strong and not a commodity as the respondents claimed.
9. Thus, the correspondence of 11th March and 12th April acknowledge the existence of the dispute. In the view of the Respondents, Nanyu went from being a brand to a "commodity" since the Bill was enforced. In conclusion, the dispute arose on 1st of January 2013.
10. Subsequently, the Respondent terminated the contract stating that they were unable to perform their obligations because of the Bill. The application for arbitration was filed on 12th January 2014, which is more than 12 months since the dispute arose.
11. This chain of events fulfills the requirements of the multi-tier arbitration agreement.
12. Alternatively, if the tribunal does not accept that 12 months have lapsed, it is contended that waiting for the completion of the stated period will unnecessarily prolong the procedure. No fruitful negotiations can take place during the short subsisting period.
13. Where a party attempts to delay arbitration by insisting on enforcement of a negotiation requirement, courts may decline to assist that party in its delay efforts. Thus, even where the contract included "a

[7] G.Born International Commercial Arbitration, Wolters Kluver, Voll I, 841
[8] Supra 7, 842
[9] Judgment of 15 March 1999, 20 ASA Bull.373,374(2002)
[10] Final award in ICC case no. 8445, XXVI Y.B. Comm. Arb. 167 (2001)
[11] Cl.Ex 6
[12] Cl.Ex 7

term requiring mediation...as a condition precedent to arbitration," a court held that "a party may not be allowed to prolong resolution of a dispute by insisting on a term of the agreement that reasonably construed can only lead to further delay."[13]

14. The purpose of inserting the multi-tier clause in the Agreement has failed. If a party wishes to start arbitration proceedings it must first negotiate in order to reach an amicable solution to the dispute.[14] Thus, the parties intended to settle the dispute amicably and conserve their long-term relationship. Since the contract has already been terminated, conserving their relationship becomes otiose.

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

A] The arbitral tribunal does not have the jurisdiction to admit the amicus curiae brief.

15. The Agreement limits the jurisdiction of the Arbitral Tribunal to a "dispute, controversy, or difference arising out of or in connection with this Agreement." Arbitration is a way to resolve – only those disputes – that the parties have agreed to submit to arbitration.[15] In this case, we submit that the question of whether an amicus curae brief should be considered or not, falls outside of the ambit of the dispute resolution clause. This is not a dispute which arises out of or is in connection with the Agreement.

16. A Canadian decision, with regard to the ICC's model clause ("All disputes arising out of or in connection with the present contract"), reasoned: "A dispute meets the test by the submission if either claimant or defendant relies on the existence of a contractual obligation as a necessary element to create the claim, or to defeat it."[16]

17. Here, there is no such contractual obligation in existence.

[13] Southland Corp. v. Keating, 465 U.S. 1(U.S. S.Ct. 1984)
[14] DAVID ST JOHN SUTTON, JUDITH GILL & MATTHEW GEARING, RUSSELL ON ARBITRATION (2007),p. 48
[15] *First Options of Chicago, Inc. V. Kaplan*, 514 U.S. 938, 943 (U.S. S.Ct. 1995) (emphasis added).
[16] *Kaverit Steel & Crane Ltd v. Kone Corp.*, XIX Y.B. Comm. Arb. 643 (Alberta Court of Appeal 1992) (1994).

18. Furthermore, as per Article V(1)(c) of the NYC, if the tribunal decides to admit the amicus curae brief, there will be a risk of the award not being enforced by the enforcing court.

B] Enforceability of award outside the scope of Gondwandan Government.

19. Enforceability is a matter to be decided by the Gondwandan Judiciary, which is distinct from the Gondwandan Government. The amicus of the Government cannot speak for the Judiciary.
20. The Gondwandan Government's intention is to ensure that its views are known to the arbitral tribunal, with regards to the enforceability of the award.[17] Since enforceability is decided by the enforcing court, and not by the tribunal, it is incorrect to make such a petition to the tribunal.

C] Acceptance of the amicus brief would result in violation of the principles of Confidentiality & Privacy.

21. CIETAC states that, "Hearings shall be held in camera. Where both parties request an open hearing, the arbitral tribunal shall make a decision."[18] The ICC Rules contain a similar provision.[19]
22. "Privacy", under virtually all national arbitration statutes and institutional rules, refers only to the fact that parties to the arbitration agreement – and not third parties – may attend arbitral hearings and otherwise participate in the arbitral proceedings.[20] The privacy of the arbitration serves to prevent interference by third parties in the arbitral process (for example, by making submissions in the arbitration or by seeking to participate in the arbitral hearing).[21]

III] The Bill does not vitiate the Agreement:-

A] The Bill does not vitiate the obligations under the Agreement.

23. The Agreement entered into by the parties has 2 major obligations-

(i) Sale of tobacco products

(ii) Sale of branded merchandise and display of promotional material

[17] Moot Problem pp. 32-33
[18] Article 36 (1) of CIETAC
[19] Article 21 (3) of ICC Rules
[20] D. Caron, L. Caplan & M. Pellonpaa, *The UNCITRAL Arbitration Rules: A Commentary* 33 (2006)
[21] Supra 1, 2251.

(i) Sale of tobacco products:-

24. The Bill does not ban the sale of tobacco products. Since the enforcement of the Bill, tobacco sales have declined. But, in a commercial contract, decline of sales is a mere business risk that a party assumes. Several courts have expressly commented that a party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract.[22] In conclusion, the bill does not vitiate the first obligation.

(ii) Sale of branded merchandise and display of promotional material:-

25. Under the Agreement, the Claimant has to provide the Respondent with branded merchandise. The provision of the Bill reads as : "No manufacturer, distributor, or retailer may distribute or cause to be distributed any material containing or displaying trademarks or marks associated with tobacco products".

26. The Agreement draws a distinction between branded merchandise and promotional material. The Claimant was selling branded merchandise at a fixed price and providing promotional material for free. This indicates that branded merchandise was not provided for promotion of the tobacco products but because the Claimant intended to venture into a new line of products. Hence despite the trademarks and logos, the branded merchandise would no longer be associated with tobacco products but with the Nanyu brand.

27. Although the Bill prohibits the display of promotional material, this is not a core part of the Agreement and can be severed without affecting the contract's validity. It is the duty of the court to severe a trivial

[22] See [BULGARIA Bulgarian Chamber of Commerce and Industry, 12 February 1998]

or technical part by retaining the substantial part and giving effect to the latter if it is legal, and enforceable. The Court must consider whether the parties could have agreed on the valid terms of the agreement had they known that the other terms were invalid or unlawful. If the answer to this question is in the affirmative, the doctrine of severability would apply.[23]

B] Contract not frustrated.

The non-performing party is exempt from liability if he proves :-

(1) that the failure to perform was due to an impediment beyond his control,

(2) that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, or

(3) that he could not reasonably have been expected to have avoided the impediment or its consequences.[24]

If an impediment within the meaning of Art.79(1) of CISG was foreseeable, the defaulting party should, in the absence of any contrary contractual provision, be considered as having assumed the risk of its realization[25]. In the assessment of foreseeability, other circumstances need to be taken into consideration like the existence of early signs of the impediment.[26]

In this case, the respondent could have reasonably taken the impediment into account at the time of conclusion of the contract. This is because the Gondwandan government made the restrictions on tobacco progressively stringent from 2001. The Respondent, therefore, should have expected such a law to pass at some point of time in a ten year Agreement. Furthermore, Gondwana is a party to FCTC.[27] Article 13 of FCTC is regarding a

[23] Shin Satellite Public Co. Ltd vs M/S Jain Studios Limited on 31.1.06, SC of India, Arbitration Petition 1 of 2005.

[24] Art. 79(1) CISG
[25] Chengwei Liu , Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law [2nd edition: Case annotated update (April 2005)]
[26] In ICC Arbitration Case No. 7197/1992,
[27] Clarification No.16.

comprehensive ban on tobacco promotion and associated activities which would have the effect, or likely effect of promoting a tobacco product or tobacco use either directly or indirectly.[28]

It is reasonable to foresee that a regime of stricter national laws would follow.

An unforeseeable impediment exempts the non-performing party only if he can prove that he could neither avoid the impediment, nor by taking reasonable steps, overcome its consequences. Avoidance should take place in the most effective manner from an economic point of view, that is,…with the insertion of special clauses in the contract of sale, or other similar provisions.[29] In this case, despite the duration of the Agreement, no stabilization clauses were inserted in it.

Furthermore, the Bill has not frustrated the core purpose for which the Agreement was made. The common purpose of the parties to the contract remains intact despite the Bill.

When the doctrine of frustration of purpose is applied, the most important test is to determine whether the frustrated purpose was the common purpose of both parties…the sole fact that the seller knew about the intended use of goods/services does not mean that such use constituted the 'common purpose' of the parties within the ambit of the doctrine. Rather, it must be proven that the common purpose was the main incentive for the parties to conclude the contract. The mere goal of obtaining profit is usually not considered the common purpose of the contract[30]. The courts have held that "the frustrated expectations and intentions of one party to a contract do not usually lead to the frustration of that contract.[31]

[28] Art.13, FCTC.
[29] P. Kornilakis Et Al., H Súmbasê Tes Viennes Gia Tes Diethnes Poleseis Kineton [The Vienna Convention For The International Sale Of Goods] At 60 (2001).
[30] Crystal, N. M.; Crystal, F. G. Contract Enforceability During Economic Crisis: Legal Principles and Drafting Solutions [interactive]. Global Jurist. 2010, 10(3): 2 [accessed 2011-09-30]. <http://www.bepress.com/gj/ vol10/iss3/art3>.
[31] Congimex Companhia Geral, etc., S.A.R.L. v. Tradax Export S.A. [1983] 1 Llyod'd Rep. 250 at 253.

In this case, the purpose was to extend the scope of the brand, which is distinct from the purpose with which the respondent entered the contract.

We therefore conclude that the Bill did not vitiate the contract.

IV] Award in favour of claimant can be enforced.

Amidst several possible interpretations, courts should choose the meaning that favours recognition and enforcement. This implies that the grounds for refusing enforcement specified in Article V should be construed narrowly.[32]

Even if grounds for refusal of recognition and enforcement of an award are proved to exist, the enforcing court is not obliged to refuse enforcement. The opening lines of paragraphs (1) and (2) of Article V say that enforcement 'may' be refused. The language is permissive, not mandatory.[33]

A] Duty on the parties to carry out enforcement of the award

Applying the NYC[34] to this case, either party would be bound to enforce the award. The NYC is clear about the fact that recognition and enforcement is not an option, but is mandatory.

Also, "The parties shall automatically carry out the arbitral award within the time period specified in the award. If no time limit is specified in the award, the parties shall carry out the award immediately."[35]

B] The instant case not within the purview of exceptions under NYC

[32] Van den Berg, The New York Arbitration Convention of 1958 (Kluwer Law International, 1981) 267 and 268.

[33] Redfern And Hunter On International Arbitration, pg 639.
[34] Art. III of the NYC.
[35] Art. 53(1), CIETAC Rules.

As far as the grounds for refusal for enforcement of the Award as enumerated in Article V are concerned, it means that they have to be construed narrowly.[36]

The NYC lays down certain specific grounds under which, parties can seek refusal of an arbitral award. Bearing in mind the purpose of the Convention, namely to "unify the standards by which ... arbitral awards are enforced in the signatory countries"[37], its drafters intended that the grounds for opposing recognition and enforcement of Convention awards should be interpreted and applied narrowly and that refusal should be granted in serious cases only.[38]

A U.S. case discussed this defense in Parsons & Whittemore Overseas Co. v. RAKTA. Parsons sought to have the U.S. courts refuse enforcement on the ground that the award was contrary to U.S. public policy. The court reviewed the history of the Convention, noting that "extensive construction of this defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement." The court concluded that the Convention's public policy defense should be construed narrowly and that enforcement of foreign arbitral awards may be denied on this basis only when enforcement would violate the forum state's most basic notions of morality and justice.[39]

(a) Article V(2)(b) of NYC

A mere perusal of Article V(2)(b) would lead us to conclude that it permits a court in which recognition or enforcement is sought to refuse to do so if it would be "contrary to the public policy of that country". [40]

[36] Supra 32

[37] House of Lords, 17 October 2007 (*Fili Shipping Company Limited (14th Claimant) and others v. Premium Nafta Products Limited (20th Defendant) and others*) [2007] UKHL 40, para. 12; Yearbook Commercial Arbitration XXXII (2007) pp. 654-682 at [45] (UK no. 77).

[38] **Request for the Recognition and Enforcement of an Arbitral Award**, ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, (International Council for Commercial Arbitration 2011) pp. 68 - 111

[39] 508 F.2d. 969 and 973(2d Cir. 1974).

[40] NYC Art.V(2)(b).

(b) What is Public Policy?

International public policy of any State includes:

a. fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned;
b. rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules"; and
c. the duty of the State to respect its obligations towards other States or international organizations. [41]

The concept of "public policy" in the international domain is much narrower than it is in the domestic domain. The ILA recommends that "public policy" should be interpreted as "international public policy" of that state.[42]

(c) Bill 275 is not International Public Policy of Gondwana

The number of matters considered to fall under public policy in international cases is smaller than that in domestic cases. What constitutes public policy in domestic relations does not constitute public policy in international relations. The distinction is justified by the differing purposes of domestic and international relations.[43]

The Bill represents the domestic public policy of the Gondwandan Government. It only regulates tobacco laws within its boundaries and has no impact whatsoever on its foreign policy or other international relations.

Thus, an award in favour of the Claimant would in no circumstance be at the risk of refusal of enforcement.

[41] ILA Recommendations, Resolution 2/2002, Clause 1 (d),
[42] ILA Recommendations, Resolution 2/2002, clause 1(a) and (b).
[43] Supra 32,360

RELIEF CLAIMED

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

a. Liquidated damages in the sum of USD $75,000,000 pursuant to Clause 60 of the Agreement;

b. The Respondent to pay all costs of the arbitration, including the Claimant's expenses for legal representation, the arbitration fee paid to CIETAC, and the additional expenses of the arbitration as set out in Article 50, CIETAC Arbitration Rules;

c. The Respondent to pay the Claimant interest on the amounts set forth in items 1 and 2 above, from the date those expenditures were made by the Claimant to the date of payment by the Respondent.