

THE INTERNATIONAL ADR MOOTING COMPETITION 2014

July-August 2014

MEMORANDUM FOR RESPONDENT

TEAM CODE: 712 R

ON BEHALF OF:

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

AGAINST:

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

TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	4
INDEX OF AUTHORITIES.....	5
INDEX OF CASES AND AWARDS.....	8
ARGUMENTS.....	12
I] The Arbitral Tribunal has no jurisdiction.....	12
A] Negotiations have not taken place.....	12
B] A period of 12 months has not elapsed since the date the dispute arose, before Arbitration was initiated.....	13
II] It is legally permissible for the Arbitral Tribunal to admit an Amicus Curiae brief.....	14
A] Admission of Amicus Curiae brief will ensure an enforceable award.....	15
B] Admission of Amicus Curiae brief will add credibility to the award.....	15
III] The Respondent’s obligations under the Agreement were vitiated by the implementation of Bill 275 and other Gondwandan governmental regulations.....	16
A] Basic obligations under the Agreement were vitiated.....	16
B] Frustration of contract.....	18
IV] Award in favour of claimant cannot be enforced.....	19
A] Public policy of Gondwana.....	20
B] Award would be contrary to Public Policy.....	20

RELIEF REQUESTED.....22

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

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Luke Eric Peterson	<i>Amicus Curiae Interventions: The Tail That Wags The Transparency Dog</i> , < 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
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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
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Southland Corp.	Southland Corp v. Keating, 465 U.S. 1(U.S. S.Ct. 1984)
<i>First Options of Chicago,</i>	<i>First Options of Chicago, Inc.</i> <i>V. Kaplan</i> , 514 U.S. 938, 943 (U.S. S.Ct. 1995)
<i>Steelworkers of Am.</i>	<i>Steelworkers of Am v. Warrior &</i> <i>Gulf Nav. Co.</i> , 363 U.S. 574, 582 (U.S. S.Ct. 1960)
<i>Kaverit Steel & Crane Ltd</i>	<i>Kaverit Steel & Crane Ltd v.</i> <i>Kone Corp.</i> , 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 Lloyd's

Rep. 250 at 253

ARGUMENTS

I] The Arbitral Tribunal has no jurisdiction.

A] Negotiations have not taken place.

1. Arbitration clauses sometimes establish procedural requirements that apply prior to commencement of the arbitral process.¹ For example, parties may be required to negotiate in order to resolve their differences.² In the present case, the dispute resolution clause stipulates a multi-tier dispute resolution process, consisting of two stages. This Clause³ is reproduced verbatim here: “In the event of a dispute, controversy, or difference arising out of or in connection with this Agreement, the Parties shall initially seek a resolution through consultation and negotiation. If, after a period of 12 months has elapsed from the date on which the dispute arose, the Parties have been unable to come to an agreement in regards to the dispute, either Party may submit the dispute to CIETAC...”
2. The use of the word “shall”, denotes the mandatory nature of the negotiation. It is often argued that the claimant’s failure to comply with the procedural requirements of the arbitration agreement constitutes a jurisdictional defect affecting the arbitral proceedings or the arbitration agreement.⁴ That is particularly true where the provision in question is drafted in a mandatory fashion and the right to arbitrate is arguably conditioned on compliance with this requirement.⁵
3. Where a contract contained a “mandatory negotiation” clause and the plaintiff commenced an arbitration where any negotiation could take place, the court annulled the subsequent award on

¹ Berger, Law and Practice of Escalation Clauses, 22 Arb. Int’l 1 (2006).

² Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing 82-84 (2d ed. 2006).

³ Cl.Exhibit 1.

⁴ Varady, The Courtesy Trap Arbitration “If No Amicable Settlement Can Be Reached” 14(4) J. Int’l Arb. 5 (1997).

⁵ G.Born, International Commercial Arbitration, Vol. I, Wolters Kluwer, 842.

the grounds that “the parties were required to participate in the mandatory negotiation session prior to arbitration”.⁶ The current arbitration deals solely with the Respondent’s alleged failure to pay damages on termination of the Agreement. In this regard, no negotiations took place.

4. If the dispute resolution clauses expressly provide that negotiations or other procedural steps are a condition precedent to arbitration, courts require compliance with those provisions.⁷ For example, a U.S. appellate court held that until the conditions precedent prescribing mediation and subsequent notice or arbitration are fulfilled by the parties, an arbitration clause has not been triggered and litigation may proceed in the interim.⁸ There is arbitral authority to the same effect.⁹
5. Where clauses contain provisions such as a limited duration of negotiation or mediation, courts are more likely to enforce them than in the case of open-ended or unstructured obligations to negotiate.¹⁰ In the current Agreement, a limited duration of negotiation, i.e. a period of 12 months, is specified.

B] A period of 12 months has not elapsed since the date the dispute arose, before Arbitration was initiated.

6. The current arbitration deals solely with the Respondent’s alleged failure to pay damages on termination of the Agreement. This dispute occurred on 1st May 2013, at the earliest. On this date, the Respondent notified the Claimant that it would be terminating the Agreement in 30 days. Hence, 12 months did not elapse since the dispute arose, before the Claimant initiated arbitration.

⁶ White v. Kampner, 641 A.2d 1381, 1387 (Conn. 1994).

⁷ Cable & Wireless plc v. IBM United Kingdom Ltd. [2002] 2 All E.R. (Comm.) 1041, 1054 (Q.B.).

⁸ Kemiron Atlantic, Inc. v. Aguakem Int’l, Inc., 290 F.3d 1287, 1291 (11th Cir. 2002)

⁹ Award in ICC Case No. 12739, cited in M. Buhler & T. Webster, Handbook of ICC Arbitration 71 (2005).

¹⁰ See Fluor Enters., Inc. v. Solutia Inc., 147 F.Supp.2d 648, 649 & n.1 (S.D. Tex. 2001)

7. “The arbitration proceedings shall commence on the day on which the Secretariat of CIETAC receives a Request for Arbitration.”¹¹ The Claimant’s application for arbitration was made on 12th January 2014. Hence, the Claimant has failed to comply with the durational requirement by a period of approximately three and a half months.
8. In virtually all cases, procedural missteps in commencing or conducting an arbitration will not affect the validity of the parties arbitration agreement, but instead only the ability of the claimant to pursue a particular submission or reference to arbitration. In general, nothing prevents the claimant who has failed to comply with procedural requirement of an arbitration agreement in one instance from subsequently complying with the applicable procedural requirement and then properly commencing a new or different arbitration.¹²

II] It is legally permissible for the Arbitral Tribunal to admit an Amicus Curiae brief.

9. The question of whether persons not named in an agreement can take advantage of an arbitration clause incorporated therein is a matter which must be decided on a case-by-case basis, requiring a close analysis of the circumstances in which the agreement was made, the corporate and practical relationship existing on one side and known to those on the other side of the bargain, the actual or presumed intention of the parties as regards rights of non-signatories to participate in the arbitration agreement, and the extent to which and the circumstances under which non-signatories subsequently became involved in the performance of the agreement and in the dispute arising from it.¹³
10. Here, the Gondwandan Govt. is deeply intertwined in the dispute between the parties. The public policy of Gondwana is tilted strongly towards tobacco control and regulation.

¹¹ Article 11 of CIETAC Arbitration Rules.

¹² 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).

¹³ Interim Award in ICC Case No. 9517, quoted in B. Hanotiau, Complex Arbitrations ¶ 12 (2005).

Gondwana has acted on this public policy by becoming a party to the FCTC, and passing gradually more stringent anti-tobacco regulations. Eventually, it was only because of Bill 275 that it became impossible for the Respondent to continue to perform its obligations under the Agreement. Hence, it can be reasonably said that the Gondwandan Govt became involved in the performance (or non-performance) of the agreement and in the ensuing dispute that arose from it.

A] Admission of Amicus Curiae brief will ensure an enforceable award.

11. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.¹⁴ Some rules of arbitration contain an express provision that the arbitrator shall ‘make every effort’ to ensure that the award is enforceable.¹⁵ In the light of this responsibility, the tribunal becomes duty bound to accept the amicus curiae brief of the Gondwandan Govt.

12. In the present case, it is apparent that the Gondwandan Govt’s interest in the arbitration proceedings extends only so far as making their position clear to the tribunal is concerned. They have stressed that tobacco control and restriction is a keystone of their public policy.¹⁶ Hence, an award in favour of the Claimant might face a roadblock at the enforcement stage, if the enforcing court finds that such an award is violative of Gondwana’s public policy. The acceptance of the amicus curiae brief will help to ensure that the tribunal delivers an enforceable arbitral award, even if the award in question is decided in favour of the Claimant.

B] Admission of Amicus Curiae brief will add credibility to the award.

¹⁴ Article V (2) (b), NYC

¹⁵ See, e.g., ICC Rules, Art 35.

¹⁶ Moot Prob, p.32-33

13. The acceptance of amicus curiae briefs lead to better tribunal decision-making, and provide for greater legitimacy to the arbitral process.¹⁷ It will only provide validation and credibility to any award that the arbitral tribunal delivers. This in turn, will increase the chances of ensuring the eventual enforcement of the award.

III] The Respondent's obligations under the Agreement were vitiated by the implementation of Bill 275 and other Gondwandan governmental regulations.

A] Basic obligations under the Agreement were vitiated.

14. It is prudent to separate the Distribution Agreement between the parties into 3 basic headings:-

- a) Sale of tobacco products
- b) Sale of branded merchandise
- c) Display of promotional Material

15. Bill 275 directly affects the second and the third obligation. The relevant provision of the Bill reads as follows:- "No manufacturer, distributor, or retailer may distribute or cause to be distributed any material containing or displaying trademarks or marks associated with tobacco products." Under the Agreement, the claimant had to provide to the respondent branded merchandise in the form of t-shirts, key-chains, lighters etc. The same prominently displayed the claimant's trademarks and logos. But the Bill directly makes the sale of these products illegal. Thus, the Bill directly vitiates the sale of branded merchandise. The Agreement also imposed the following obligation on the respondent: "the buyer shall provide space on the register counter whereby promotional material from the seller may be displayed." The same

¹⁷ Luke Eric Peterson, Amicus Curiae Interventions: The Tail That Wags The Transparency Dog, Investment Arbitration Reporter, < <http://kluwerarbitrationblog.com/blog/2010/04/27/amicus-curiae-interventions-the-tail-that-wags-the-transparency-dog/>>.

provision of the Bill made it illegal for the Respondent to fulfill this obligation as well. It is therefore established thus far, that the Bill vitiates two-thirds of the Agreement.

16. We also submit that the Bill vitiates the Respondent's obligation to sell tobacco products. Conglomerated Nanyu Tobacco Ltd. is the largest tobacco producer in Nanyu and has a global presence in the worldwide tobacco market. The sale of tobacco is the essence of the Agreement. The promotion of tobacco is ancillary to this. This is illustrated by the fact that the Claimant refers to the merchandise as "promotional merchandise".¹⁸

17. It is therefore apparent that the purpose of the promotional material, as well as the branded merchandise is only to promote the sale of tobacco products. The principal purpose of the Agreement is therefore, the sale of the tobacco products. As explained above, the display of promotional material, as well as the sale of the branded merchandise is banned. Hence, all promotion of tobacco products has been arrested. This has affected the ability of the Respondent to fulfill its obligation to sell tobacco products. Legal incapability to perform one results in failure to perform the other.

18. Furthermore, the Bill enlists various requirements for the retail packaging and the appearance of tobacco products. The effect of these requirements essentially reduced tobacco products to mere commodities, and vastly diminished the strength of the Nanyu Tobacco brand. Brands are "an indispensable guide for consumers and a means for companies to build a reputation and an image in the market place. A product's brand appeal can be as important for determining competitive success as is quality or price tag."¹⁹ Hence the promotion of a brand

¹⁸ Cl.Ex No.7; CI Application for Arbitration.

¹⁹ World intellectual property report Brands – Reputation and Image in the Global Marketplace, 2013, <http://www.wipo.int/export/sites/www/freepublications/en/intproperty/944/wipo_pub_944_2013.pdf>.

is an integral part of the sale of their products. There is substantial evidence to support the hypothesis that plain and generic packaging makes cigarettes less attractive and appealing.²⁰

19. Therefore, the sale of tobacco products is not only grossly affected by the ban on its promotion, but also by its commoditization. Thus, the Bill vitiates the first part of the Agreement, i.e. the sale of tobacco products (which is the very purpose of the Agreement), and consequently, the entire Agreement is vitiated.

B] Frustration of contract.

20. Article 79 of the CISG exempts a party from liability for damages when that party has failed to perform any of its obligations under the contract. The provision has the following essentials²¹:-

- (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 conclusion of the contract,
- (3) that he could not reasonably have been expected to have avoided the impediment or overcome its consequences.

21. Only objective circumstances beyond the promisor's typical sphere of responsibility are considered as impediments within the meaning of CISG Article 79. In the instant case, the impediment which prevented performance was the Bill passed by the Gondwandan Senate. That the Bill is beyond the control of the Respondent is self-evident.

22. The Bill was not foreseeable at the time of conclusion of the Contract. The judge or arbitrator

²⁰Beede P and Lawson R. Brand image attraction: the promotional impact of cigarette packaging. The New Zealand Family Physician 1991; Centre for Health Promotion. Effects of plain packaging on the image of tobacco products among youth. Toronto: University of Toronto, 1993.

²¹ GUIDE TO CISG ARTICLE 79, Secretariat Commentary.

should neither refer to an excessively concerned "pessimist who foresees all sorts of disasters" nor to a "resolute optimist who never anticipates the least misfortune."²² The Gondwandan Herald, in 2009 reported²³ that analysts found it unlikely that stricter anti-tobacco laws would be forthcoming. The Agreement was concluded on 14th December 2010. Even after this, the Claimant displayed confidence that the Bill would not pass.²⁴ 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. Here, the Respondent accounted for any or all possible impediments via the inclusion of the Dispute Resolution clause in the Agreement.

23. The purpose of the Agreement is also frustrated. Article 79 embodies the CISG's provisions for frustration of purpose and impossibility.²⁵ 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.²⁶ Here, the common purpose of both parties was to distribute tobacco products to the consumers of Gondwana. As these products were commoditized, and their promotion prohibited, the very purpose of the Agreement becomes frustrated. Hence, the Agreement has been frustrated at two levels, namely, the promotion of tobacco products and the purpose of the Agreement.

IV] Award in favour of claimant cannot be enforced.

²² ICC Arbitration Case No. 6281/1989, reprinted in SIGVARD JARVIN, ET AL., COLLECTION OF ICC ARBITRAL AWARDS 1986-1990 249 (1990)

²³ Re.Exhibit No.1

²⁴ Cl.Ex No.4.

²⁵ 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. 279, 280 (1997)

²⁶ 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].

24. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.²⁷

A] Public policy of Gondwana.

25. The State of Gondwana enacted the Bill, which introduced provisions regulating the sale of tobacco in Gondwana. It would be prudent to conclude that the Government wanted to bring down the sales of tobacco products, making this its Public Policy. The letter²⁸ from the State Legal department of the government of Gondwana to the CIETAC clearly states that an award in favour of the claimant would be contrary to their Public Policy.

26. “A recent Dutch decision denied recognition of an arbitral award made in the United States under Art V(2)(b), on the grounds that the parties’ underlying contracts violated EU competition law...”²⁹ Relying upon earlier submissions, the Respondent contends that since the contract was vitiated due to the enactment of the Bill, the impugned award would not be enforced.

B] Award would be contrary to Public Policy.

27. Article V(2) permits non-recognition where giving effect to an award is “contrary to the public policy of that country” i.e., where recognition is sought³⁰. It is very difficult to interpret this

²⁷ Art.V (2) (b), NYC

²⁸ Moot problem, p. 32-33

²⁹ Judgment of 24 March 2005, Mktg. Displays Intn’l v. VR Van Raalte Relcame BV, XXXI Y.B> Comm. Arb. 808 820, (Hague Gerechtshof) (2006)

³⁰ Supra 5, Volume II, 2837

formulation as a reference to purely international sources of law or public policy; had this result been intended, very different language would have been used³¹

28. It was held in Mitsubishi Motors case that: “Having permitted the arbitration to go forward, the nation courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest of the antitrust laws have been addressed”³². Similarly, the Gondwandan judiciary has to ensure that the legitimate interests of its national laws are addressed at the award-enforcement stage.

29. The State of Gondwana is a party to the FCTC, which commits nations to ban all tobacco advertising, promotion and sponsorship and to require large warning labels covering at least 30 percent of the display areas of the cigarette pack. Thus, the Bill was passed to give effect to the FCTC and forms a part of its “international Public Policy”. Also, if such award in favour of the claimant were to be given, it would violate the fundamental principles of justice and morality by undermining the sovereign power of the State.

30. In conclusion, it is stated that any award in favour of the Claimant would be at a major risk of refusal of enforcement by the enforcing court for being contrary to Public Policy of the State of Gondwana.

³¹ Mayer & Sheppard, Final ILA Report on Public Policy as A Bar to Enforcement of International Arbitral Awards, 19Arb. Int'l 249,254-55(2003)

³² Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 638 (U.S. S.Ct 1985)

RELIEF REQUESTED

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

- a. A declaration that this Tribunal has no jurisdiction to decide the dispute between the Parties;
- b. Alternatively, a declaration that the Agreement has been frustrated;
and
- c. That due to the Agreement being frustrated, that the Respondent is not liable to pay any alleged termination penalty.