FIFTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION MOOTING COMPETITION

27 JULY – 2 AUGUST 2014

HONG KONG

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:	**AGAINST:**
Conglomerated Nanyu Tobacco Ltd.	Real Quik Convenience Stores Ltd.
CLAIMANT	**RESPONDENT**

TEAM NO. 761

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LIST OF ABBREVIATIONS

Art.	Article
Agreement	Distribution Agreement between Parties
Bill 275	Clear out Air Bill 275/2011
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CLAIMANT	Conglomerated Nanyu Tobacco Ltd.
no.	number
p./pp.	page, pages
RESPONDENT	Real Quik Convenience Stores Ltd.
Tribunal	China International Economic and Trade Arbitration Commission
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

INDEX OF AUTHORITIES

Piltz	The Uncitral Arbitration Rules, Commentary p. 41, 2nd ed., Oxford University Press, 2009 *cited as :* ***Piltz***	**23**
Redfern, A.; Hunter, M.	Law and Practice of International Commercial Arbitration, 3rd ed., London : Sweet & Maxwell, 1999 *cited as :* ***Redfern/Hunter***	**39**
Rimke, J.	Force Majeure and Hardship : Application in International Trade Practice with specific regard to the CISG and UNIDROIT ; Principles of International Commercial Contracts, Pace Review of the Convention on Contracts for International Sale of Goods, Kluwer : 2000 *cited* as: ***Rimke***	**23**
Schlechtriem, P.	Commentary on the UN Convention on the International Sale of Goods (CISG), 2d ed., Oxford University Press, 1998 *cited as:* ***Schlechtriem***	**31**
Schlechtriem, P.; Schwenzer, I.	Commentary on the UN Convention on the International Sale of Goods(CISG), 3rd ed, Oxford, 2010 *cited as:* ***Schlechtriem/Schwenzer***	**23**
Schliemann, Ch.	The Law and Practice of International Courts and Tribunals 12, Martinus NIJHOFF Publishers, 2013	**52**

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ARGUMENT ON JURISDICTION

I. TRIBUNAL HAS JURISDICTION TO DECIDE THE DISPUTE

1. Pursuant to the principle of *kompetenz-kompetenz* tribunal is competent to determine its jurisdiction over an arbitration case [*Art. 6(1), the CIETAC Rules, Sect. 34, CAP 609; Born, pp. 855-856*].
2. Accordingly, Tribunal should find that it has jurisdiction because (**A**) the negotiations should be concluded as fruitless; thus (**B**) a repetition of negotiation for purely formalistic reasons would be unreasonable and against the best interest of Parties; in any event (**C**) non compliance with negotiation requirement does not deprive Tribunal of its jurisdiction.

A. The negotiations should be concluded as fruitless

3. CLAIMANT submits that **a**) RESPONDENT triggered the pre-arbitral step on 11 Mar 2013; but **b**) the attempt to resolve the dispute amicably failed; thus **c**) Tribunal should not let RESPONDENT preclude CLAIMANT from procedural justice.

a) RESPONDENT triggered the pre-arbitral step on 11 Mar 2013

4. RESPONDENT alleges that since this arbitration deals solely with the termination of Agreement which occurred on 1 May 2013 [*Exhibit 8*], CLAIMANT was obliged to conduct consultation and negotiation only from this point on and that it was barred from bringing its claim to arbitration until 1 May 2014 [*St. of Def., para. 6*].

5. CLAIMANT objects to this assertion and argues that according to the facts, the dispute within the meaning of Clause 65 started no later than on 11 Mar 2013[*Exhibit 6*].
6. On this date, RESPONDENT, experiencing problems with operation of Agreement, triggered the pre-arbitral step by sending CLAIMANT the proposal for renegotiation [*Exhibit 6*].

b) The attempt to resolve the dispute amicably failed

7. Parties had attempted to negotiate on 11 Apr 2013 [*Exhibit 7*]. Unfortunately, they were unable to come to terms on a single issue. Of significance is the fact, that there has been no meeting held ever since. Thus, RESPONDENT, insisting on exhaustion of the full 12 month period, showed absolutely no interest to negotiate after the meeting on 11 Apr 2013, thus for approximately 10 months.
8. Therefore, the attempt to try to resolve the dispute amicably was completely fruitless and thus Tribunal should not sent Parties back to negotiations.

c) Tribunal should not let RESPONDENT preclude CLAIMANT from procedural justice

9. There is a general reluctance of national courts and tribunals to conclude that compliance with procedural requirements is a jurisdictional gateway for arbitration [*Born, p. 841*]. This is particularly pronounced where the party resisting jurisdiction was partially or entirely responsible for the failure or non-exhaustion of the pre-arbitral process [*Born, p. 841*].
10. Thus CLAIMANT should have the right to been titled to seek the resolution of the dispute through arbitration.

B. Repetition of negotiation for purely formalistic reasons would be unreasonable and against the best interest of Parties

11. CLAIMANT argues that it would be unreasonable, against the legitimate expectation of Parties, and contrary to the nature of alternative dispute resolution to force Parties to repeat negotiation.
12. When considering the admissibility of jurisdictional objections, tribunals should base their decision on the pragmatic assessment of all relevant facts, placing emphasis on the considerations of efficiency and fairness [*Born, pp. 979-981; Bertrand, p. 141*].
13. In determining whether it is appropriate to insist on pre-arbitral steps, due consideration should also be given to the prior behavior of the parties [*Berger, Arb. Int. 22(1), pp. 10-11*].
14. As has been submitted above, Parties tried to resolve the dispute amicably but completely failed [*Exhibit 7*] and did not attempt to negotiate again. Thus it seems that both Parties are sure of their legal positions, willing to sacrifice any future business opportunities. Furthermore it can be presumed that that their attitudes were even further entrenched by RESPONDENT'S termination of Agreement. It is thus in the best interests of Parties to allow a request for arbitration when it has been quite obvious that their positions are so acrimonious that it would be impossible for them to reach an agreement[*Figueres, p. 72; Award No. 8445*].
15. For all of these reasons, CLAIMANT calls upon this Tribunal to apply a pragmatic approach and refuse to oblige Parties in fruitless proceedings that merely increase the expense and delay of the resolution of the dispute.

C. Non compliance with negotiation requirement does not deprive Tribunal of its jurisdiction

16. Non-compliance with a pre-arbitral step will not generally invalidate an arbitration agreement [*Born 846*]. This is especially true with clauses which do not expressly state that the pre-arbitral tier is a condition precedent.
17. The pre-arbitral step has been held to be compulsory where ,e.g., the contractual clause was entitled '*Mandatory Negotiation*' [*White v. Kampner, para. 264, 266*]. Clause 65 does not state that the first tier is a condition precedent.
18. It is thus CLAIMANTS position that Parties have agreed to consult and to negotiate before proceeding to arbitration, which they did, but that the pre-arbitral requirement is not a mandatory precondition leaving arbitration a dispute resolution mechanism of last resort.

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ARGUMENT ON MERITS

I. CLAIMANT IS ENTITLEDTO LIQUIDATED DAMAGES IN THESUM OF USD $75,000,000

19. Parties in their Agreement stipulated that in the event RESPONDENT terminates Agreement prior to the expiry of the 10 year term, a liquidated damages clause would come into effect providing for the payment of the agreed sum [*Exhibit 1*].
20. Accordingly, CLAIMANT is entitled to the sum of USD $75,000,000because (**A**) RESPONDENT terminated Agreement within 0-3 years from the date of signature; (**B**) RESPONDENT is not exempt under Art 79 CISG; and (**C**) liquidated damages are recoverable under CISG.

A. RESPONDENT terminated Agreement within 0-3 years from the date of signature

21. Agreement was signed on 14 Dec 2010 [*Facts, para. 6*]. On 1 May 2013, RESPONDENT notified CLAIMANT that it would be terminating Agreement, effective from 1 Jun 2013. Thus RESPONDENT is pursuant to Clause 60.2(a) liable to pay liquidated damages in the sum of USD $75,000,000.

B. RESPONDENT is not exempt under Art79 CISG

22. CLAIMANT submits that RESPONDENT is not exempt under Art 79 CISG because **a**) Bill 275 does not constitute an impediment within the meaning of Art 79(1) CISG; **b**) the tobacco regulations, introduced by Bill 275, were something RESPONDENT could have reasonably taken into account; **c**)RESPONDENT failed to do everything it could to overcome the enactment of Bill 275.

a.Bill 275 does not constitute an impediment within the meaning of Art 79(1) CISG

23. Impediments in terms of Art 79 CISG are objective circumstances external to the seller which prevent performance [*Schlectriem/Schwenzer, para 11; Pilts, para. 4-234*]. In the case at hand, no such circumstances occurred, since Bill 275 did not make the performance impossible [*NuovaFucinati S.P.A. v. FondmetallInt'l A.B.,, p.153*] and thus not made Agreement frustrated. Frustration simply discharges the contract, disallowing performance or adaptation of the contract [*Rimke, p. 204*].
24. In our case, Agreement could have still been adjusted to the new situation. This would not even fundamentally changed the original intent of Parties but only bring Agreement in line with current regulations.
25. The essential purpose of Agreement was to distribute tobacco. And although Bill 275 prohibited the distribution of the Tobacco Products in the form agreed by Parties, it did not prohibit the distribution of tobacco *per se*. RESPONDENT could still have distributed tobacco in packaging that would comply with Gondwandan regulations [*Facts, para. 14*].
26. Additionally, the effects of Bill 275 did not even make the performance excessively onerous for RESPONDENT. Both Parties suffered losses thus the equilibrium of Agreement has not changed [*Facts, para. 13*].
27. For this reasons, CLAIMANT submits that the new regulations, introduced by Bill 275, do not constitute an impediment within the meaning of Art 79(1)CISG.

b. The tobacco regulations, introduced by Bill 275, were something RESPONDENT could reasonably have taken into account

28. Starting in 2001, the Gondwandan government began with what can be called as "one of the greatest crusade against smoking in 21st century." Over the course of 9 years,

the Government introduced and implemented various restrictions on the sale and use of tobacco products [*Facts, para. 9*].

29. Since RESPONDENT has been one of the fastest growing convenience store chains in the state of Gondwana [*Facts, para. 3*], it is only reasonable to assume that it should have been aware of such regulations. Moreover, as all impediments are foreseeable to some degree,[*CISG ACO No. 7*]by entering into Agreement, RESPONDENT accepted the risk of not being able to meet its contractual obligation due to regulations such as Bill 275.
30. Therefore, since the consequences of the anti tobacco climate in Gondwana were a part of RESPONDENT'S contractual risk, it cannot qualify for an exemption under Art 79 CISG.

c. RESPONDENT failed to do everything it could to overcome the enactment of Bill 275

31. To be exempted from liability under Art 79 CISG, a party must prove that the impediment was not within its sphere of control [*FCF v. Adriafil; Magnus, p. 987; Ziegler, p. 217*]. Although a government regulations, such as Bill 275, are usually outside a party's control, it is a condition for relief that the promisor took the steps required by the contract or by good faith in order to avoid or overcome the effects of the state's intervention [*Schlechtriem, p. 611*]. Basically, the promisor must make an effort to show its desire to perform.
32. Though it is not certain that RESPONDENT could have influenced the enactment of Bill 275, an effort in this respect must be required. RESPONDENT, however, failed to make such an effort. It was in fact CLAIMANT who challenged Bill 275 and brought the case against Gondwana before its Supreme Court [*Resp. Ex. 2*].

33. RESPONDENT even failed to join the demonstrations that had been held by pro tobacco lobbyist since the announcement of Bill 275 [*Exhibit 5*]. It is of importance to note that Bill 275 passed only by a vote of 52-49 [*Facts, para. 12*]. Thus it is only reasonable to claim that an effective lobby from one of the states dominant player could have made the difference needed to prevent the enactment of Bill 275.
34. For this reason, RESPONDENT should not be exempt from liability per Art. 79 CISG.

C. Liquidated damages are recoverable under CISG

a) The clause dealing with liquidated damages forms a valid part of Agreement

35. Pursuant to Art 6 CISG, Parties may derogate from or vary the effect of any of the provisions of the CISG. Thus Parties by agreeing on liquidated damages modified the damages regime of CISG, which does not provide for the payment of agreed sums.

b) The liquidated damages clause is valid

36. If Parties have included liquidated damages clause into their contract the question of public policy arises whether such a clause is valid [*Zeller/Mohs, p*.2]. As CISG is not concerned with the questions of validity [*CISG Art 4(1)*], the question is left for the UNIDROIT Principles which, according to Parties agreement, serve to supplement matters which are not governed by the CISG [*Zeller/Mohs, p*.2; *Exhibit 1*].
37. The UNIDROIT Principles treats liquidated damages as being valid thus Clause 60 providing for the payment of liquidated damages forms a valid and enforceable part of Agreement.

II.CLAIMANT IS ENTITLED TO SEEK THE COSTS OF ARBITRATION TOGETHER WITH THEEXPENSES FOR LEGAL REPRESENTATION

38. The allocation of costs is a procedural issue determinable by reference to the CIETAC Rules. Art 5(2) of the CIETAC Rules states *"the tribunal has the power to decide in the arbitral award, having regard to the circumstances of the case, that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing the case."*
39. Accordingly, Tribunal is requested to use its powers and order RESPONDENT to pay the costs of arbitration as well as the legal costs incurred by CLAIMANT in pursuing its case, as it is general principle that costs are born by the unsuccessful party [*Derains/Schwartz, p. 342;Redfern/Hunter, p. 407*].

III. CLAIMANT IS ENTITLED TO INTEREST ON THE AMOUNTS SET FORTH IN ISSUE NO (I) AND (II)

40. Art 78 CISG provides *"if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it."*
41. Liquidated damages are a "sum in arrears" on which interest is payable from the date they become due[*Bianca/Bonell, p. 571; Schneider, p. 230*]. Thus CLAIMANT is entitled to interest on damages stipulated in Agreement from 1 June 2013.
42. On the other hand costs for arbitration together with the expenses for legal representation are not a "sum in arrears" until they become due [*Enderlein/Maskow, p. 314*] therefore on the date of judgment.
43. Since the CISG does not stipulate any rate of interest, it is again appropriate to supplement its provisions by the UNIDROIT Principles

[*Enderlein/Maskow/Strohbach, para. 4.2*]. Art 7.4.9(2) of the UNIDROIT Principles provides that the rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place of payment, thus the State of Nanyu.

44. Accordingly, CLAIMANT is entitled to interest on any damages from the date they become due; the rate of Nanyu.

IV. Award in favor of CLAIMANT would not pose a risk of enforcement

45. Award in favor of CLAIMANT would not pose a risk of enforcement. CLAIMANT is not requesting Tribunal to order RESPONDENT a specific performance i.e., distribution of tobacco products in the form stipulated in Agreement thus in violation of Bill 275, but is instead claiming monetary compensation pursuant to the provisions on termination stipulated in Agreement.

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ARGUMENT ON *AMICUS*

II. THE NATURE OF COMMERCIAL ARBITRATION DOES NOT ALLOW FOR ACCEPTANCE OF *AMICUS*

46. CLAIMANT contends that (**A**) CIETAC Rules does not give Tribunal the power to accept *amicus*; if so (**B**) Tribunal must reject *amicus* because commercial arbitration is not subject to the same rules on transparency as investment arbitration; and finally, (**C**) *amicus* violates the basic principles of procedural fairness.

A. CIETAC Rules does not give Tribunal the power to accept *amicus*

47. Nothing in the CIETAC Rules expressly confers upon Tribunal the power to accept *amicus*. Only investment tribunals, exercising their inherent powers as judicial bodies of public international law have been able to find such a power [*Levine, p 200-223*].

B. Tribunal must reject *amicus* because commercial arbitration is not subject to the same rules of transparency as investment arbitration

48. The rules on transparency are applicable only in investment disputes where foreign governments, dealing with the issues of public interest, are directly influenced by the proceedings. This, however, does not apply to commercial arbitration where the issues of privacy prevent disclosing substantial information and the award rendered in the proceedings.

C. *Amicus* violate the basic principle of procedural fairness

49. The term *"amicus curiae"* means friend of the court, not friend of a party. Its role is to offer balanced view on the public interest it represents [*Graham p.11*]. Contrary to this definition, the Gondwandan *amicus* wholly supports the claim of RESPONDENT [*Clarifications, para. 13*] while creating a bias towards the CLAIMANTS case. Thus accepting the *amicus* would clearly be in violation of the definition of the term "*amicus curiae"*.
50. All in all, CLAIMANT submits that *amicus* hold not be admitted for consideration in the merits of the proceedings as Tribunal does not have the power to accept *amicus* and that the nature of commercial arbitration is not suited for its involvement.
51. Should Tribunal find otherwise, CLAIMANT makes following submissions.

III. *AMICUS* DOES NOT FULFILL THE CRITERIA FOR ITS ACCEPTANCE

52. CLAIMANT argues that *amicus* does not fulfill the criteria for its acceptance set forth by investment practice [*Schlieman, pp. 365 - 390*], as(**A**) *amicus* does not deal with a specific issue of public interest within the dispute; (**B**) *amicus* does not bring new and special legal or factual perspective; (**C**) the addressed issue in *amicus* is not within the scope of the dispute.

A. *Amicus* does not deal with a specific issue of public interest within the dispute

53. Although the component of a significant public interest is present i.e. public health, the requirement to submit *amicus curiae* is broader.
54. The applicant must not only demonstrate that the submission deals with an issue of public interest but that the decision would have a potential impact on other groups

beyond the disputing parties. The present case deals with the private commercial relationship between two business entities therefore the decision would not concern any group of people other than Parties.

55. Therefore, accepting *amicus* would not be appropriate in the circumstances.

B. *Amicus* does not bring new and special legal or factual perspective

56. *Amicus* deals with Gondwandan's new tobacco regulation but does not bring any new perspective. It only presents information which is already within the public domain, and information already provided by Parties, thus known by Tribunal. For this reason the amicus does not offer any new perspective but only burdens Tribunal.

C. The addressed issue in *amicus* is not within the scope of the dispute

57. The current proceedings are concern with the dispute between two private entities arising out of their commercial relationship. The issues addressed in *amicus* deal with the public policy of the state of Gondwana and its domestic legislation. Accordingly, submitted *amicus* should not be taken into consideration as the addressed issues do not fall within the scope of the dispute between two private Parties.

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PRAYER FOR RELIEF

58. CLAIMANT respectfully requests Tribunal

- to find that Tribunal has jurisdiction;
- to declare that RESPONDENT is not exempt from liability per Art 79 CISG;
- to order RESPONDENT to pay
    - liquidated damages in the amount of USD $75,000,000;
    - costs of arbitration and expenses for legal representation;
    - interest from the amounts thereof;
- to find that
    - the nature of commercial arbitration does not allow for acceptance of *amicus*;
    - *amicus* does not fulfill the criteria for its acceptance.

Respectfully signed and submitted by counsel on 20 Jun 2014.