FIFTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION MOOTING COMPETITION

27 JULY – 2 AUGUST 2014

HONG KONG

MEMORANDUM FOR RESPONDENT

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

TEAM NO. 761

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LIST OF ABBREVIATIONS

Art.	Article
Bill 275	"Clear our Air" Bill 275/2011
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CLAIMANT	Conglomerated Nanyu Tobacco Ltd.
Claim. Ex.	Claimant's Exhibit
Exhibit	Respondent's Exhibit
no.	number
p./pp.	page, pages
para.	Paragraph
Parties	CLAIMANT and RESPONDENT
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

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Jolles, A.	Consequences of Multi-tier Arbitration Clauses : Issues of Enforcement 2006 72 Arbitration 329 *cited as:* ***Jolles***	**4, 24, 26, 27**
Lye, K. CH.; Lee, J	A Persisting Aberration: The Movement to Enforce Agreements to Mediate, 4(1); Mediation Newsletter: International Bar Association Legal Practice Division 5-14 *cited as:* ***Lye, Lee***	**14, 26, 27**
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Cap 609 – Arbitration Ordinance. R.2	An Ordinance to reform the law relating to arbitration, and to provide for related and consequential matters of 2014 *cited as:* ***CAP 609***	
CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules 2011 c*ited as:* ***CIETAC Rules***	**1**
CISG	United Nations Convention on Contract for the International Sale of Goods of 1980 *cited as:* ***CISG***	
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 *cited as:* ***NY Convention***	
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985 *cited as:* ***UNCITRAL Model Law***	
UNIDROIT	UNIDROIT Principles of International Commercial Contracts of 2004 *cited as:* ***UNIDROIT***	

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ARGUMENT ON JURISDICTION

I. TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE MERITS OF THE DISPUTE

1. Pursuant to the principle of *kompetenz-kompetenz* a tribunal is competent to determine its jurisdiction over an arbitration case. [*Art. 6(1), the CIETAC Rules, Sect. 34, Arb. Ordinance; Born, pp. 855-856*].
2. RESPONDENT, however, contest the power of Tribunal to adjudicate the merits of this dispute because (**A**) non compliance with an arbitral precondition is a procedural matter depriving Tribunal of its jurisdiction; consequently, (**B**) Tribunal ought to close the proceedings; alternatively, (**C**) Tribunal should stay the proceedings.

A. Non compliance with an arbitration precondition is a procedural matter depriving Tribunal of its jurisdiction

3. Tribunal should find that it does not have a jurisdiction to hear the dispute because **a**) negotiation was condition precedent to arbitration; **b**) negotiation was not properly fulfilled; consequently, Tribunal ought not to proceed to the merits of the dispute; as **c**) negotiation cannot be deemed futile; failing which **d**) an award made in favor of CLAIMANT would not be enforceable.

a) Negotiation was a condition precedent to arbitration

4. Whether a dispute resolution step is enforced as a condition precedent depends on the wording of the clause [*Van den Berger, p. 4*]. Generally, a sufficiently definite and

precise clause drafted in a mandatory fashion should be enforced as a condition precedent [*Jolles, p. 336*].

5. In the present case, Clause 65 of the Agreement is sufficiently precise to form an enforceable condition precedent.

6. The first states: *„...Parties shall initially seek a resolution through consultation and negotiation..."* The obligatory nature is expressed in unqualified term by using the word "*shall*" as opposed to a mere permissive "*may*".

7. In the second part is the agreement preceded by the conditional term "if", *„If,...the Parties have been unable to come to an agreement...either Party may submit the dispute to...for arbitration..."* indicating that Parties have agreed to consult and negotiate before proceeding to arbitration [*Berger, p. 5*].

8. Moreover, Clause 65 sets a clear time limit for exercising the pre arbitral steps before moving to arbitration []. This requirement in conjunction with the mandatory wording clearly indicates the obligatory nature of the pre-arbitral step of Clause 65.

9. Consequently, Tribunal should conclude that the pre-requirement of negotiation isdrafted in a mandatory fashion, making it a condition precedent.

b) Negotiation was not properly fulfilled

10. The time limit for ending consultation and negotiation is fixed. Parties drafted a clear multi-tier arbitration clause that prohibits commencing arbitration unless the dispute is not settled through negotiation within the time period of 12 months [*Claim. Ex. 1*].

11. Since, the current arbitration deals solely with the termination of the Agreement, which occurred on 1 May 2013 [*Claim. Ex. 8*], CLAIMANT was, within the period of 12 months, under the obligation to negotiate. None of this happened.

12. Instead, CLAIMANT brought the claim straight to arbitration on 12 Jan2014, thus clearly violated the regime of Clause 65.

13. Accordingly, Tribunal should make use of its authority to enforce the pre-arbitral step and send Parties to a mandatory negotiation.

c) <u>Negotiation cannot be deemed futile</u>

14. Tribunal may hear the merits of the dispute only if the conditions precedent are so futile that it is a completely hopeless exercise [*Cable &Wireles,s para. 1328; Berger p. 14; Lye/Lee p. 6; File p. 34*]. However, the situation is far from being completely hopeless. It is RESPONDENT'S position that (i) sending Parties back to negotiation would not be fruitless; as (ii) commencing negotiation is in the best interest of Parties.

i. Sending Parties back to negotiation would not be fruitless

15. There is a distinct possibility of compromise considering Parties' long-lasting business relationship.

16. Indeed, even after the introduction of Bill 275, RESPONDENT proposed renegotiation [*Claim. Ex. 3*] and then do it again after Bill 275 entered into force [*Claim. Ex. 6*]. The fact that Parties were unable to come to terms on a renegotiation of the Agreement [*Claim. Ex.* 7] does not mean that there is no chance at reaching a consensual solution.

ii. Commencing negotiation is in accordance with the best interest of Parties

17. Since RESPONDENT is one of CLAIMANT'S largest and most important distribution channels in Gondwana [*Facts para. 5*], and it is more than unlikely that both CLAIMANT and RESPONDENT are prepared to terminate their activities in tobacco business altogether, it is surely in the best interest of Parties to settle the dispute amicably in order proceed with the relationship.
18. Unlike arbitration that is by nature adversary [*Hermann p. 154*] and its outcome is usually the end of the relationship, negotiation is a mean of alternative dispute resolution with ultimate goal to preserve the relationship.
19. Therefore, Tribunal should make use of its power and sent Parties to negotiation, as it is in their best interest to reach the solution amicably.

d) An award made in favor of CLAIMANT would not be enforceable

20. An award in favor of CLAIMANT would be unenforceable as it would be made in violation of the arbitral procedure established by Parties.
21. Art. 36(1)(a)(iv) of the UNCITRAL Model Law and Art. V(1)(d) of the NY Convention, allow enforcement of the arbitral award to be refused if a court finds that the arbitral procedure was not in accordance with the agreement of Parties.
22. In the present matter the arbitration clause is a clear multi-tier agreement which states that consultation and negotiation is the first procedural step in resolving the dispute [*Claim. Ex. 1*].
23. As has been already established, the requirement of negotiation was not fulfilled. Thus the defect in this procedure represents a defect in the entire arbitral process as Tribunal cannot proceed to arbitrate the dispute that was subject to prior negotiation.

24. Accordingly, if Tribunal affirms its jurisdiction, an award made would not be enforceable under both of the terms of the aforementioned statutes [*Jolles, p. 336; Paulsson, p. 613*].

25. Therefore, Tribunal should declare the request for arbitration as inadmissible until complied with the pre-arbitral commitments.

C. Consequently, Tribunal ought to close the proceedings

26. As the precondition to arbitration has not been fulfilled, Tribunal ought to send Parties to a mandatory negotiation. Moreover, Tribunal should prefer to close the proceedings, because maintaining a tribunal can add pressure [*Jolles p. 337*] to the negotiations and sway CLAIMANT to abuse the process [*Lye/Lee p. 11*].

D. Alternatively, Tribunal should stay the proceedings

27. Alternatively, Tribunal may stay the proceedings pending negotiations. As the deadline for pre-arbitral step is set, there is no risk of Parties being indefinitely precluded from arbitration [*Jolles p.337; Lye/Lee p. 11*]. However, Tribunal should not permit negotiation and arbitration to occur in parallel. That would result in unnecessary costs and frustrate any chance of maintaining a positive mindset towards an amicable settlement.

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ARGUMENT ON MERITS

I. RESPONDENT IS EXEMPT FROM LIABILITY UNDER ART 79 CISG

28. Parties signed Agreement on 14 Dec 2010 [*Facts para. 6]*. Pursuant to its provisions, RESPONDENT agreed to sell all of CLAIMANT's products on the terms and subject to the conditions set out in it.

29. In 2011, 2012 and 2013 consecutively, Gondwana introduced, passed, and entered into force Bill 275 which rendered Agreement impossible to perform [*Facts para. 9*]. Due to this fact REPONDENT exercised its right stipulated in Clause 60 and terminated Agreement.

30. And although Clause 60 provides for payment of liquidated damages in the event of such a termination, RESPONDENT claims that is not liable to pay any monetary compensation as it is exempted per Art 79 CISG.

31. RESPONDENT submits that the regulations introduced by (**A**) Bill 275 constituted an impediment within the meaning of Art 79(1) (B) the impediment was beyond RESPONDENT's control; (**C**) RESPONDENT could not be reasonably expected to have taken the impediment into account at the time of the conclusion of Agreement; (**D**) RESPONDENT could not reasonably be expected to have avoided or overcome the impediment or its consequences, and finally (**E**) RESPONDENT fulfilled its obligation and gave proper notice of the impediment and its effects on his ability to perform

A. Bill 275, constituted an impediment within the meaning of Art 79(1) CISG

32. RESPONDNET claims that **a**) Bill 275 rendered the performance absolutely impossible; or alternatively **b**) fundamentally altered the equilibrium of the Agreement.

a) <u>Bill 275, rendered the performance absolutely impossible</u>

33. Impediments in terms of Art 79(1) CISG are objective circumstances external to the seller which prevent performance [*Schlectriem/Schwenzer, para 11; Pilts, para. 4-234*]. As the performance of the obligations stipulated in Agreement would be in violation of Bill 725 RESPODENT, faced and impediment within the meaning of Art 79(1) CISG.

i. RESPONDENT is prohibited from distributing the Tobacco Products in the form defined by the Agreement

34. Since RESPONDNET was under the obligation to sell the Tobacco Products in the form defined by Agreement [*Claim. Ex. 1*] that was not in compliance with the new requirements for retail packaging and appearance of the tobacco products stipulated by Bill 275 [*Claim. Ex. 2*], RESPONDENT was no longer able to perform its obligation.

ii. RESPONDENT is prohibited from distributing promotional material

35. RESPONDENT was under the obligation to display the promotional material [*Claim. Ex. 1*]. Pursuant to the provision of Bill 275, RESPONDENT is prohibited from distributing and thus displaying any material containing or displaying trademarks or

marks associated with tobacco products [*Claim. Ex. 2*]. For this reason RESPONDENT was no longer able to perform its duty under Agreement.

iii. RESPONDENT is prohibited from displaying all CLAIMANT'S products

36. RESPONDENT was under the obligation to display all of the CLAIMANT'S products [*Claim. Ex. 1*]. Similarly, as in the argument (i) and (ii), RESPONDENT is prohibited from distributing and thus displaying any material containing or displaying trademarks or marks associated with tobacco product and is prohibited from distributing the Tobacco Products in the form defined by Agreement. For this reason RESPONDENT was no longer able to perform its duties under Agreement.

iv. RESPONDENT is prohibited from displayed CLAIMANTS logos and trademarks

37. RESPONDENT was under the obligation to secure that all displays should have been prominently displayed the CLAIMANTS logos and trademarks [*Claim. Ex. 1*]. Pursuant to Bill 275 any brand business or company name or any variant name for tobacco products, thus also CLAIMANTS logos and trademarks, may appear only on the surface of cigarettes packs or cartons [*Claim. Ex. 2*]. For this reason RESPONDENT was no longer able to perform its duty under the Agreement.

v. RESPONDENT is prohibited from displaying all the Branded Merchandise

38. RESPONDENT was under the obligation to secure that all Branded Merchandise should have been prominently displayed [*Claim. Ex. 1*].Similarly as in the argument (ii) and (iii), RESPONDENT is prohibited from distributing and thus displaying any

material containing or displaying trademarks or marks associated with tobacco product [*Exhibit 2*].

39. All things considered, the tobacco regulation constituted an impediment within the meaning of Art 79(1) CISG rendering performance completely impossible.

b) <u>Alternatively, Bill 275 fundamentally altered the equilibrium of the Agreement</u>

40. In the event that Tribunal should find that the regulations did not rendered the performance absolutely impossible, RESPONDENT is still exempt from liability as impediments within the meaning of Art 79 CISG need not render performance impossible. It is sufficient that performance is made more onerous [*Honnold/ Flechtner, p. 628; CISG ACO No. 7*].
41. RESPONDENT is exempt from liability due to the impediment rendering the performance excessively onerous.

C. The impediment was beyond RESPONDENT'S control

42. An impediment is to be considered beyond the seller's control if it lies outside its contractual sphere of risk [*BGH, 24March 1999; OLG München, 5 Mar 2008*]. As governmental regulations are typical example of such impediments it is undisputed that Bill 275 was beyond RESPONDENT'S control.

D. RESPONDENT could not be reasonably expected to have taken the impediment into account at the time of the conclusion of the Agreement

43. RESPODNENT could not be expected to have taken into account the possibility of regulation as far-reaching as the one introduced by Bill 275.
44. Prior to 2000, there was little regulation over tobacco products, and smoking was prevalent in Gondwana [*Facts, para. 8*]. In 2001, the Gondwandan government began to try changing this situation and over the course of 9 years implemented stricter regulations and brought Gondwana in line with most major countries [*Facts, para. 9*]. Even according to the analysts' estimation, it was highly unlikely that the Gondwandan will continue to implement stricter regulations especially as far-reaching as Bill 275.
45. Therefore, at the time of the conclusion of the contract, it was reasonably unforeseeable that a reform as severe as Bill 275 would be implemented.

E. RESPONDENT could not reasonably be expected to have avoided or overcome the impediment or its consequences

46. It is unreasonable to expect that RESPONDENT was in a position to counteract the impediment.
47. CLAIMANT himself tried to challenge Bill 275 before Gondwana's Supreme Court shortly after its introduction [*Exhibit 2*]. However, the Court struck down the challenge and declared Bill 275 as constitutional forcing the major companies to "wait and see" [*Exhibit 2*].
48. For this reasons it is highly unreasonable to claim that RESPONDENT was able to rectify this situation and thus avoided or overcome the impediment.

F. RESPONDENT gave proper notice of the impediment and its effect on its ability to perform

49. Although both Parties were aware of the impediment, RESPONDENT nevertheless informed CLAIMANT of its inability to perform and proposed renegotiation of Agreement two months after Bill 275 entered into force. Therefore, RESPONDENT gave proper notice within a reasonable time after RESPONDENT knew of the impediment.

Following the provision of Art 79(5) CISG a successful claim to exemption protects a party from liability for damages. Therefore in the light of above, CLAIMANT assumption that it is entitled to claim liquidated damages in the amount of USD $ 75,000,000 as a consequence of RESPONDENTS non performance is unfounded.

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ARGUMENT ON AMICUS

II. THE NATURE OF COMMERICAL ARBITRATION ALLOWS FOR ACCPETANCE OF *AMICUS*

50. RESPONDENT states that (**A**) Tribunal has the power to accept *amicus* under Art 33(1) CIETAC Rules; and that (**B**) *amicus* does not present any possibility of a burdensome or unfair treatment; (**C**) *amicus* does not compromise the rules of transparency.

A. Tribunal has the power to accept *amicus* under Art 33(1) CIETAC Rules

51. Nothing in the CIETAC Rules deals with the power of Tribunal to accept *amicus [UNCITRAL Rules, Comm.,Art. 17*].
52. Thus, following the decisions of international tribunals, RESPONDENT submits that the power must be inferred from its more general procedural powers. With this in mind, RESPONDENT cites Art 33(1) of the CIETAC Rules that states *"the tribunal shall examine the case in any way it deems appropriate."*Here, an analogy has to be made to Art 17(1) of the UNCITRAL Rules that grants tribunals with the same procedural powers and that has been used as legal bases for accepting *amicus curiae* in many arbitral decisions [*Aguas vs, Argentina, para.33(b); Methanex v United States, para. 47*].
53. Consequently, RESPONDENT urges Tribunal to use its broad discretion to conduct the arbitration and find that it has the power to accept *amicus*.

B. *Amicus* does not present any possibility of a burdensome or unfair treatment

54. According to the Art 33(1) of the CIETAC Rules *"the tribunal shall act impartially and fairly and shall afford a reasonable opportunity to all parties to make submissions and arguments. Amicus* does not wish to undermine these principles. On the contrary, *amicus* shall rather assist Tribunal in making a decision by presenting a new factual perspective.

C. *Amicus* does not compromise the rules of transparency

55. Confidentiality is considered to be one of the crucial features of commercial arbitration. However, in some cases when some specific issue of the dispute might be of interest to group of people other than the parties, or where it may contribute to education purposes or future practice, the rule of confidentiality may be overridden by the one of transparency [*Azzali, para. 2.2*].
56. For all of these reasons, RESPONDENT claims that the nature of commercial arbitration allows for acceptance of *amicus.*

III. *AMICUS* FULFILLS THE CRITERIA FOR ITS ACCEPTANCE IN THE MERITS OF THE PROCEEDINGS

57. It is the work of various international tribunals that have established that the acceptance of *amicus curiae* depends on fulfillment of tree basic criteria *[Paulsson, Petrochilos, p. 71-72]*.
58. Thus, RESPONDENT claiming the acceptance of *amicus* submits that first (A) *amicus* deals with a specific public interest; second (B) *amicus* brings new factual perspective; and third (C) the addressed issue in *amicus* is within the scope of the dispute.

A. *Amicus* deals with a specific public interest

59. Participation of a non-disputing party in commercial arbitration can be utilized in those proceedings where the issue bears upon a public interest. *Amicus* deals with the concept of public health and its protection from the harmful effect of tobacco consumption thus clearly deals with such an interest.

B. *Amicus* brings new factual perspective

60. In the dispute at hand, *amicus* shall provide Tribunal with an insight on factual background of the implementation of Bill 275 that caused an impediment and thus frustrated the possibility to perform the obligation of Agreement.

C. The addressed issue in *amicus* is within the scope of the dispute

61. The current proceedings are concern with the dispute arising out of the tobacco regulations introduced by Bill 275 and thus deal with the public policy of the state of Gondwana.
62. All things considered, submitted *amicus* should be taken into consideration when deciding the dispute.

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PRAYER FOR RELIEF

63. RESPONENT respectfully requests Tribunal

- to find that Tribunal does not have jurisdiction;
- to declare that RESPONDENT is exempt from liability per Art 79 CISG;
- the nature of commercial arbitration allows for acceptance of *amicus*; and
- to find that *amicus* fulfills the criteria for its acceptance.

Respectfully signed and submitted by counsel on 20 Jun 2014.