FIFTH ANNUAL
INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION
MOOTING COMPETITION

27 JULY – 2 AUGUST 2014
HONG KONG

MEMORANDUM FOR CLAIMANT

Team Code: 806C

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

Word count: 2990

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LIST OF ABBREVIATIONS

Art.	Article/articles
Brief	Gondwandan government's *amicus curiae* brief
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
CISG-AC Opinion No.7	CISG Advisory Opinion No.7, Exemption of Liability for Damages under Article 79 of the CISG
CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules 2011
CLAIMANT	Conglomerated Nanyu Tobacco Ltd.
Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1985
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
No.	Number
p./pp	Page/pages
Para(s).	Paragraph/paragraphs
Sec(s)	Section/ Sections
RESPONDENT	Real Quik Convenience Stores Ltd.
Tribunal	The Arbitral Tribunal
v.	Versus

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MISTELIS, L. A.	"Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corporation v. United States", (2005) *Kluwer Law International*, Vol. 21, 211-231. [**Cited as:** *MISTELIS (2005), P. 213, 221, 230, 231*] [**Para. 11**]
REDFERN, A., **HUNTER, J.**	International Arbitration, Oxford University Press, (2009) [**Cited as:** *REDFERN/HUNTER (2009, PARA. 5.67)*] [**Para. 17**]
SCHLECHTRIEM, P., **SCHWENZER,I.**	Commentary on the UN Convention on the International Sale of Goods (CISG), (2010) 3rd edn, Oxford University Press, p.1084, 1087 [**Cited as:** *SCHLECHTRIEM (2010), P.1068*] [**Para. 25**]

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IRELAND	Doyle v Irish National Insurance Company plc, 30 January 1998, The High Court of Ireland [1998] IEHC 13 [**Cited as:** *DOYLE V IRISH NATIONAL INSURANCE CO PLC [1998], THE HIGH COURT OF IRELAND*] [**Para. 2**]
UNITED KINGDOM	Walford v Miles, 23 January 1992, House of Lords [1992] 2 AC 128 [**Cited as:** *WALFORD V MILES [1992] 2 AC 128*] [**Para. 3**]
UNITED STATES OF AMERICA	Inc v. Copal Company Ltd, 517 F.2d. (2d Cir. 1975), United States Court of Appeal, Second Circuit [**Cited as:** *INC V COPAL CO. (1975), US COURT OF APPEALS*] [**Para. 39**] Parsons & Whittemore Overseas Co. v. Société General de L'Industrie du Papier (1974). US Court of Appeals [**Cited as:** *PARSONS & WHITTEMORE OVERSEAS CO. V. SOCIÉTÉ GENERAL DE L'INDUSTRIE DU PAPIER (1974). US COURT OF APPEALS*] [**Para. 37**]

INDEX OF ARBITRAL AWARDS

AMERICAN ARBITRATION ASSOCIATION	Macromes Srl v. Globex International Inc, American Arbitration Association, 23 October 2007, CISG-online 1645 [**Cited as:** *MACROMES SRL v. GLOBEX INTERNATIONAL INC, (2007)*] [**Para. 27**]

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CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules 2011 [**Cited as:** *CIETAC Rules*] [**Paras. 17, 34**]
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980 [**Cited as:** *CISG*] [**Paras. 20, 31**]
Hong Kong Arbitration Ordinance	Hong Kong Arbitration Ordinance (Cap 609) [**Cited as:** *Hong Kong Arbitration Ordinance*] [**Paras. 17, 34**]
New York Convention	Convention on the Recognitiion and Enforcement of Foreign Arbitral Awards 1958 [**Cited as:** *New York Convention*] [**Paras. 33, 34, 35, 36**]

ARGUMENTS

I. THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE

1. The Arbitral Tribunal (**Tribunal**) has jurisdiction over the dispute pursuant to Clause 65 of the Agreement [*CLAIMANT'S EXHIBIT NO. 1, SEC. 65.1, P. 11*], because (A) the first paragraph of Clause 65 is unenforceable under the governing law; (B) CLAIMANT has complied with the 12-month waiting period from the date on which the dispute arose; and (C) staying the arbitration proceedings will serve no purpose except causing further delays and waste of costs.

A. THE FIRST PARAGRAPH OF CLAUSE 65 IS UNENFORCEABLE

2. An arbitration agreement is independent from the underlying contract (*DOYLE V IRISH NATIONAL INSURANCE CO PLC [1998], THE HIGH COURT OF IRELAND*). Except where the parties agree otherwise, the arbitration agreement is governed by the law of the seat of arbitration [*BORN (2014), PARA. 8.01*]. Thus, Hong Kong law will govern the validity and interpretation of Clause 65.

3. An agreement to negotiate in good faith is unenforceable under Hong Kong law (*WALFORD V MILES [1992] 2 AC 128, HOUSE OF LORDS*). The Hong Kong Court of Appeal found that an agreement that disputes "*will be resolved*" by party representatives was unenforceable for lack of certainty (*HYUNDAI V. VIGOUR [2005] 1 HKC 579, HONG KONG COURT OF APPEAL*). Applying *Hyundai* to the first paragraph of Clause 65, CLAIMANT submits that it is an agreement to negotiate without any specified procedures. It is uncertain and therefore unenforceable.

B. CLAIMANT HAS COMPLIED WITH THE 12-MONTH WAITING PERIOD FROM THE DATE ON WHICH THE DISPUTE AROSE

4. CLAIMANT submits the dispute arose on 1 January 2013, when Bill 275 became effective. Since RESPONDENT alleged that the termination of the Agreement was a result of the implementation of the Bill [*STATEMENT OF DEFENSE, SEC. 9-20, P. 25-27*], 1 January 2013 was the date on which the "*dispute, controversy, or difference arising out of or in connection with this Agreement*" occurred and hence is "*the date on which the dispute arose*", as provided in the second paragraph of Clause 65 [*CLAIMANT'S EXHIBIT NO. 1, SEC. 65.1, P. 11*]. Thus, the CLAIMANT's application for arbitration on 12 January 2014 was after the expiration of the required 12-month waiting period.

C. STAYING THE ARBITRATION PROCEEDINGS ON THE DATE OF THE HEARING WILL SERVE NO PURPOSE EXCEPT CAUSING FURTHER DELAYS AND WASTE OF COSTS

5. Even if the Tribunal agreed with RESPONDENT that the dispute arose on 1 May 2013, more than 12 months would have elapsed anyway by the time of the hearing on 28 July 2014.

6. In any event, neither the CIETAC Arbitration Rules (2012) nor the Hong Kong Arbitration Ordinance prohibits parties from continuing negotiation and seek settlement of dispute after the arbitration commences. Parties have the freedom to negotiate and settle their dispute even after the CLAIMANT applied for arbitration on 12 January 2014. RESPONDENT has failed to engage in any negotiation with

CLAIMANT since 12 January 2014 [*CLAIMANT'S EXHIBIT NO. 6, PARA. 4, P. 18; CLAIMANT'S EXHIBIT NO. 7, PARA. 1, P. 19*].

7. Since there is no prospect for the parties to reach settlement, arbitration is the best forum for resolution of the current dispute. Staying the arbitration proceedings on the date of the hearing for any technical reason will only cause further unnecessary delays and waste of costs.

8. Conclusion: The CLAIMANT has complied with the 12-month waiting period from the date on which the dispute arose. The Tribunal has jurisdiction to hear the dispute pursuant to Clause 65. In any event, staying the proceedings will serve no purpose except causing further delays and waste of costs.

II. THE TRIBUNAL SHOULD NOT ADMIT THE GOVERNMENT'S AMICUS CURIAE BRIEF

9. The CLAIMANT objects to any admission of the Gondwandan government's *amicus curiae* brief (**Brief**) because (A) the Tribunal does not have the mandate to admit the Brief; (B) alternatively, the Gondwandan government has no significant interest in the dispute and its Brief is irrelevant and immaterial to the outcome of the dispute; and (C) the Tribunal should reject the Brief for the preservation of fairness and efficiency of the arbitration.

A. THE TRIBUNAL DOES NOT HAVE THE MANDATE TO ADMIT THE GOVERNMENT'S BRIEF

10. CLAIMANT asserts that the Tribunal does not have the mandate to admit the Brief because (1) there is no agreement between the parties to allow third party intervention and (2) neither CIETAC Rules nor Hong Kong Arbitration Ordinance (Cap. 609) authorizes the Tribunal to admit the Brief.

(1) There is no agreement between the parties to allow third party intervention

11. The foundation of international commercial arbitration is the parties' agreement to arbitrate and their procedural autonomy [*BORN (2014), PARAS. 1.02[A][2], 1.02[B][6], 2.01[B][2]; LEW/BOR (2013), PARA. 22-1*]. Since there is no agreement between the parties to allow third party intervention [*CLAIMANT'S EXHIBIT NO. 1, SEC. 65, P. 11*], the Tribunal should not impose upon the parties a procedure without the consent of all the parties [*LEW/BOR (2013), PARAS. 22-37*]. In the absence of any intention of the parties to allow third party intervention under their arbitration agreement, the Tribunal cannot accept the Gondwandan government's Brief. [*HANOTIAU (2006), PARA. 429; MISTELIS (2005), P. 221*].

(2) Neither CIETAC Rules nor Hong Kong Arbitration Ordinance (Cap. 609) authorizes the Tribunal to allow the Brief

12. Furthermore, neither the CIETAC Rules nor the Hong Kong Arbitration Ordinance (Cap. 609) contains any provision that authorizes the Tribunal to admit the Brief. Therefore, the Tribunal does not have the mandate to admit the Brief.

B. THE GOVERNMENT HAS NO SIGNIFICANT INTEREST IN THE DISPUTE AND ITS AMICUS CURIAE BRIEF IS IRRELEVANT AND IMMATERIAL TO THE OUTCOME OF THE DISPUTE

13. Alternatively, even if the Tribunal has the general mandate to admit the Brief, the Tribunal should reject the Brief in this particular case because the Gondwandan government has no significant interest in the dispute and its Brief is irrelevant and immaterial to the outcome of the dispute.

14. The present dispute is a private commercial one between CLAIMANT and RESPONDENT. At its very core, the dispute revolves around a contractual termination by RESPONDENT and its liability to pay liquidated damages [*CLAIMANT'S EXHIBIT NO. 1, SEC. 60.2, P. 11; APPLICATION FOR ARBITRATION, PARA. 1, P. 7*].

15. The Gondwandan government's sovereign right to legislate for the benefit and protection of the public health [*LETTER FROM GONDWANDAN DEPARTMENT OF STATE, PARA. 6, P. 32; PROCEDURAL ORDER NO. 2, PARA. 13, P. 37*] is not in dispute in this arbitration. Its Brief on the government's position and views on how to safeguard the public health are irrelevant and immaterial to the outcome of the current dispute, which arises purely from the private commercial contractual arrangement between the parties.

16. In any event, the public policy of the Gondwandan government has already been sufficiently provided by the parties in their exhibits [*CLAIMANT'S EXHIBIT NO. 5, P. 17; RESPONDENT'S EXHIBIT NO. 1, P. 28; RESPONDENT'S EXHIBIT NO. 2, P. 29*]. It is unnecessary to admit the Brief to help the Tribunal to understand the current public policy issues in the state of Gondwana.

C. THE TRIBUNAL SHOULD REJECT THE AMICUS CURIAE BRIEF FOR THE PRESERVATION OF FAIRNESS AND EFFICIENCY OF THE ARBITRATION PROCEEDINGS

17. The Tribunal has a duty to ensure the arbitration is conducted in a fair and efficient manner [*ARTS. 22, 47, CIETAC RULES; SECS. 46(2), 46(3), HONG KONG ARBITRATION ORDINANCE (CAP. 609); REDFERN/HUNTER (2009), PARA. 5.67*]. Allowing the Brief will unfairly favor the RESPONDENT at the expense of the CLAIMANT [*PROCEDURAL ORDER NO. 2, PARA. 13, P. 37*].

18. In addition, allowing the Brief will result in extra costs and further delays in the arbitration. In its letter to CIETAC [*LETTER FROM GONDWANDAN DEPARTMENT OF STATE, PP. 32, 33*], the Gondwandan government merely expressed its interest in submitting the Brief without stating the time frame for its preparation and submission. If the Brief were admitted, the whole arbitration would be further delayed, and an unfair and undue burden would be placed on the CLAIMANT by increasing the CLAIMANT'S costs in the preparation for, and response to, the Brief.

19. CONCLUSION: The Tribunal should not admit the Gondwandan government's Brief as the Tribunal does not have the mandate to accept *amicus curiae* briefs. Alternatively, the Gondwandan government has no significant interest in the dispute and its Brief is irrelevant and immaterial to the outcome of the dispute. The Tribunal should reject the Brief for the preservation of fairness and efficiency in the arbitration proceedings.

III. THE RESPONDENT IS LIABLE FOR DAMAGES

20. The CLAIMANT submits that RESPONDENT'S failure to perform any of its obligations can be exempted only if RESPONDENT proves that all the conditions and requirements under Art. 79 CISG have been met.

21. The obligations that RESPONDENT has failed to perform include the provision of shelf and counter space for the CLAIMANT'S displays as well as provision of branded merchandise. [*APPLICATION FOR ARBITRATION, PARA. 16, P. 5*] The sole impediment THAT THE RESPONDENT seeks to rely upon is the implementation of Bill 275.

22. The CLAIMANT asserts that RESPONDENT is liable for damages because (A) the RESPONDENT'S failure to perform its obligations was not due to an impediment beyond its control; (B) the RESPONDENT could reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract; (C) the RESPONDENT could reasonably be expected to have avoided or overcome the

impediment or its consequences; and (D) the RESPONDENT is liable for the liquidated damages in the sum of USD $75,000,000 pursuant to Clause 60 of the Agreement.

A. THE RESPONDENT'S FAILURE TO PERFORM HIS OBLIGATIONS WAS NOT DUE TO AN IMPEDIMENT BEYOND ITS CONTROL

23. The RESPONDENT terminated the contract because it was unable to sell the product due to the lowered level of demand that caused stockpiles in its storeroom. [*CLAIMANT'S EXHIBIT NO. 8, P. 20*] The significant decrease of the tobacco product sales and decrease in profit can be due to the customer's increased awareness of the negative effect of smoking. This change and fluctuation of customers' demand is a commercial risk that RESPONDENT ought to bear.

24. Therefore, the CLAIMANT asserts that there is no causation between RESPONDENT'S non-performance and the alleged impediment.

B. THE RESPONDENT SHOULD HAVE TAKEN THE IMPEDIMENT INTO ACCOUNT AT THE TIME OF THE CONCLUSION OF THE CONTRACT

25. The standard is whether a reasonable person would consider the impediment foreseeable at the time of the conclusion of the contract. [*SCHLECHTRIEM (2010), P.1068*] The Gondwandan government has consistently and gradually increased the strictness of the policies on tobacco and related products. [*APPLICATION FOR ARBITRATION, PARA. 9, P. 4*] Hence, a reasonable person would consider it reasonably foreseeable that the government would continue to implement stricter regulations.

Thus, the new and more stringent regulation is reasonably foreseeable at the time of the conclusion of the contract.

26. In any event, it is more reasonable to expect RESPONDENT to bear the risks associated with the change of regulation in its place of business and the RESPONDENT *should b*e responsible for taking that risk and its consequences into consideration at the time of conclusion of the contract.

C. THE RESPONDENT SHOULD BE EXPECTED TO HAVE AVOIDED OR OVERCOME THE IMPEDIMENT OR ITS CONSEQUENCES

27. It is for the RESPONDENT to prove that the alleged impediment and its consequences are unavoidable. An increment in costs or a risk of suffering loss is not a hurdle that the RESPONDENT cannot overcome. [*MACROMES SRL V. GLOBEX INTERNATIONAL INC (2007)*] Despite the implementation of Bill 275, performance of the contract is still possible.

28. Although no tobacco trademarks, images, designs, or other identifying brand marks will be allowed, [*APPLICATION FOR ARBITRATION, PARA 10 (e), P. 4*] the most important element, i.e., the brand name, is still allowed. [*APPLICATION FOR ARBITRATION, PARA 10(d), P. 4*] Thus, identification of tobacco products of the CLAIMANT'S brand is still possible.

29. Bill 275 does not impose any restrictions on display requirements. [*APPLICATION FOR ARBITRATION, PARA 10, P. 4*] Despite the fact that the CLAIMANT'S products do

not have eye-catching or noticeable packaging as before, putting the CLAIMANT'S products in some prominent position, e.g., at eye-level of shelf space, can still help gain customers' attention.

D. THE RESPONDENT IS LIABLE FOR LIQUIDATED DAMAGES PURSUANT TO CLAUSE 60 OF THE AGREEMENT

30. Upon termination of the Distribution Agreement by the RESPONDENT on 1 May 2013, RESPONDENT is liable for the liquidated damages under Clause 60, even if it is not at fault. Since the RESPONDENT'S liability cannot be exempted under Article 79, it is liable for the liquidated damages of USD $75,000,000.

31. CONCLUSION: The RESPONDENT'S liabilities are not exempted under Art. 79 CISG and RESPONDENT is liable to pay liquidated damages according to Clause 60 of the Agreement.

IV. THE RISK OF ENFORCEMENT OF AN AWARD THAT IS IN FAVOR OF THE CLAIMANT

32. The CLAIMANT asserts that (A) the risk of enforcement of an award that is in favour of the CLAIMANT is not greater than that of an award in favour of the RESPONDENt; (B) enforceability of the award is a matter to be decided by the enforcement court, not the arbitral tribunal; and (C) in any event, an award that is in favour of the CLAIMANT does not necessarily contravene the Gondwandan public policy.

A. THE RISK OF ENFORCEMENT OF AN AWARD THAT IS IN FAVOUR OF THE CLAIMANT IS NOT GREATER THAN AN AWARD THAT IS IN FAVOUR OF THE RESPONDENT

33. Whether an award will be enforced depends on various factors, including, for example, where the award is to be recognized and enforced. Although the RESPONDENT would argue that an award in favour of the CLAIMANT contravenes the Gondwandan public policy and runs the risk of non-enforcement, such an award is unlikely to contravene the public policy of Hong Kong, for example, the seat of arbitration.

B. WHETHER THE AWARD WILL BE ENFORCED IS A MATTER TO BE DECIDED BY THE ENFORCEMENT COURT, NOT THE ARBITRAL TRIBUNAL

34. According to both Art. 47(1) CIETAC Rules and s.46 of the Hong Kong Arbitration Ordinance, the arbitral tribunal shall independently and impartially render a fair and reasonable arbitral award. The Tribunal does not otherwise have any positive obligation to ensure the enforcement of an award.

35. Given that the award is a New York Convention award and the CLAIMANT can seek enforcement in potentially all 149 contracting states, the award enforcement should be decided by each of the enforcement court, not by this arbitral tribunal.

C. IN ANY EVENT, AN AWARD THAT IS IN FAVOUR OF THE CLAIMANT DOES NOT NECESSARILY CONTRAVENE THE PUBLIC POLICY OF GONDWANA

36. The CLAIMANT submits that an award in favour of the CLAIMANT does not necessarily contravene the public policy of Gondwana because (1) the public policy exception under the New York Convention as well as the Model Law is to be applied narrowly; (2) even violation of Bill 275 does not necessarily contravene the public policy of Gondwana; and (3) an award in favour of the CLAIMANT does not necessarily violate the Bill 275.

(1) The public policy exception under the New York Convention as well as the Model Law is to be applied narrowly

37. The enforcement court should apply the public policy exception narrowly. Despite that each State is entitled to define its content of public policy, which permits it to adopt the "national public policy" definition, many legislatures, courts and scholars have undertaken to internationalize the public policy standard [*PARSONS & WHITTEMORE OVERSEAS CO. V. SOCIÉTÉ GENERAL DE L'INDUSTRIE DU PAPIER (1974), US COURT OF APPEALS; KARAHA BODAS CO. V. PERUSHAN PERTANBANGAN MINYAK DAN GAS BAM NEGARA (2009), HONG KONG COURT OF FINAL APPEAL]* This pro-enforcement bias points toward a narrow reading of the public policy defense. It promotes the uniformity and reduces the risk associated with national public policy standards [*BECK (2012), PARA. 355*].

(2) Even violation of Bill 275 does not necessarily contravene the public policy of Gondwana

38. In MISR INSURANCE COMPANY V. ALEXANDRIA SHIPPING AGENCIES COMPANY (1991), the Egyptian Court of Cassation applied an international public policy in recognizing and enforcing an international award, despite the award contradicted the domestic Code of Civil and Commercial Procedure.

39. The Hong Kong Court of Appeal held that public policy refers to "most basic notions of morality and justice" [*GAO HAIYAN V. KEENEYE HOLDINGS LTD., (2012), HKCFA; INC V. COPAL CO (1975), US COURT OF APPEALS]*.

40. Since the reduction and control of tobacco consumption is not a fundamental principle regarding morality or justice, even violation of Bill 275 does not necessarily contravene the public policy of Gondwana.

(3) An award in favour of the Claimant does not necessarily violate Bill 275

41. The CLAIMANT seeks liquidated damages instead of specific performance of the contract. Thus, an award in favour of the CLAIMANT's claim for liquidated damages will not contravene Bill 275. In any event the Bill does not prohibit the sale of tobacco in Gondwana.

42. CONCLUSION: The CLAIMANT submits that the risk of enforcement of an award that is in favour of the CLAIMANT is not greater than that of an award that is in

favour of the RESPONDENT. In addition, whether the award will be enforced or not is a matter to be decided by the enforcement court, not the arbitral tribunal. Furthermore, an award for liquidated damages in favour of the CLAIMANT does not contravene the public policy of Gondwana.

PRAYER FOR RELIEF

43. In light of the arguments advanced, CLAIMANT respectfully requests the Tribunal to:

a. Find that the Tribunal has jurisdiction over the dispute;

b. Deny the admission of the Government's the Brief for consideration during the proceedings;

c. Find that the RESPONDENT is liable for damages according to Clause 60 of the agreement;

d. Find that a\n award for liquidated damages in favour of the CLAIMANT does not contravene the public policy of Gondwana.