FIFTH ANNUAL

INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

27 JULY – 2 AUGUST 2014

HONG KONG

MEMORANDUM FOR RESPONDENT

Team Code: 806R

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

WORD COUNT: 2926

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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.
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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	(The Hague; London; Boston: Kluwer Law Internation, 2000) [**Cited as:** *RIMKE (2000)*] [**Para. 19**]
SCHLECHTRIEM, P., **SCHWENZER, I**	Commentary on the UN Convention on the International Sale of Goods (CISG), Oxford University Press, 2010 [**Cited as:** *SCHELECHTRIEM/ SCHWENZER (2010)*] [**Paras. 21, 23**]
TALLON,D	Comments on Article 79 CISG [Exemption], in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 572-595 [**Cited as:** *BIANCA/BONELL/TALLON (1987)*] [**Para. 23**]
UNCITRAL	'Digest of Article 79 case law', 2012 UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods [**Cited as:** *CISG CASE DIGEST (2012)*] [**Para. 19**]

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BELGIUM	Hof Van Cassatie, Belgium, 19 June 2009 (Scafom International BV v Lorraine Tubes S.A.S) [**Cited as:** *HOF VAN CASSATIE, BELGIUM, 19 JUNE 2009, BELGIUM SUPREME COURT*] [**Para. 19**]
BULGARIA	Bulgarian Chamber of Commerce and Industry, Bulgaria, 4 April 1996, Unilex [**Cited as:** *BULGARIAN CHAMBER OF COMMERCE AND INDUSTRY, BULGARIA,4 APRIL 1996*] [**Para. 21**]
GERMANY	Amtsgericht Charlottenburg, Germany, 4 May 1994 [**Cited as:** *GERMANY AMTSGERICHT CHARLOTTENBURG, 4 MAY 1994*] [**Para. 19**]
UNITED KINGDOM	Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd, 21 January 1993, House of Lords [**Cited as**: *CHANNEL TUNNEL GROUP LTD. V BALFOUR BEATTY CONSTRUCTION LTD, 1993 AC 334*] [**Para. 4**]

INDEX OF ARBITRAL AWARDS

COURT OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE	CLOUT case No.102 [Arbitration Court of the International Chamber of Commerce, 1989 (Arbitral award No.6281)] [**Cited as**: *TRIBUNAL OF INTERNATIONAL COMMERCIAL ARBITRATION AT THE RUSSIAN FEDERATION CHAMBER OF COMMERCE, RUSSIAN FEDERATION, 22 JAN 1997 (ARBITRAL AWARD NO, 155/1996)*] [**Paras. 21, 26**] Methanex Corporation v. United States, (2001) [**Cited as:** *METHANEX CORPORATION V. UNITED STATES (2001)*] [**Paras. 9, 15**] United Parcels Service Of America v. Government Of Canada, (2001) [**Cited as:** *UNITED PARCELS SERVICE OF AMERICA V. GOVERNMENT OF CANADA (2001)*] [**Para. 9**]

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CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules 2011 [**Cited as:** *CIETAC Rules*] [**Paras. 2, 9, 14, 36**]
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980 [**Cited as:** *CISG*] [**Paras. 18, 19, 28**]
Hong Kong Arbitration Ordinance	Hong Kong Arbitration Ordinance (Cap 609) [**Cited as:** *Hong Kong Arbitration Ordinance*] [**Paras. 9, 10, 14, 36**]
New York Convention	Convention on the Recognitiion and Enforcement of Foreign Arbitral Awards 1958 [**Cited as:** *New York Convention*] [**Paras. 33, 34, 35, 36**]
IBA Rules on the Taking of Evidence in International Arbitration	IBA Rules on the Taking of Evidence in International Arbitration (2010) [**Cited as***: IBA Rules on the Taking of Evidence in International Arbitration*] [**Para. 11**]

ARGUMENTS

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

1. The Arbitral Tribunal (**Tribunal**) does not have jurisdiction to hear the dispute because (A) the 12-month period in Clause 65 is a pre-condition for arbitration; (B) CLAIMANT failed to comply with the pre-condition by applying for arbitration on 1 January 2014; and (C) the Tribunal does not have power to override parties' agreement on the 12-month period as the pre-condition for arbitration.

A. THE 12-MONTH PERIOD IN CLAUSE 65 IS A PRE-CONDITION FOR ARBITRATION

2. Clause 65 of the Agreement states that the parties shall initially seek a resolution through consultation and negotiation and that either party may submit the dispute to the CIETAC after 12 months have elapsed from the date on which the dispute arose [*CLAIMANT'S EXHIBIT NO. 1, CLAUSE. 65, P. 11*]. The word "*may*" suggests that parties are allowed to apply for arbitration only after 12 months have elapsed from the date on which the dispute arose. Thus, the 12-month period is a mandatory pre-condition and parties are not permitted to apply for arbitration within 12 months after the dispute arose.

B. CLAIMANT FAILED TO COMPLY WITH THE PRE-CONDITION BY APPLYING FOR ARBITRATION ON 1 JANUARY 2014

3. In this case the dispute is breach of contract. The alleged breach arose on 1 May 2013, when the RESPONDENT gave the CLAIMANT the Notice of Termination of the Distribution Agreement [*CLAIMANT'S EXHIBIT NO. 8, PARA. 1, P. 20*]. Either party may apply for arbitration on 1 May 2014 at the earliest. The CLAIMANT failed to comply with the pre-condition by applying for arbitration on 1 January 2014.

C. THE TRIBUNAL DOES NOT HAVE POWER TO OVERRIDE PARTIES' AGREEMENT ON THE 12-MONTH PERIOD AS THE PRE-CONDITION FOR ARBITRATION

4. Party autonomy is "*the very basis of arbitration*". [*KARL-HEINZ BOCKSTIEGEL, P.49*] and is one of the fundamental principles of international commercial arbitration. In an English House of Lords case, *CHANNEL TUNNEL GROUP LTD. V BALFOUR BEATTY CONSTRUCTION LTD, 1993 AC 334, a two-tiered dispute resolution procedure as agreed by the parties was enforced* "*despite its 'potential weakness'*" as noted by the court.

5. It would be an intrusion to party autonomy if the Tribunal were to retrospectively override parties' agreement on a 12-month pre-condition for arbitration. The Tribunal does not have power to override Clause 65 and ought to give effect to the common intention of the parties and enforce the 12-month pre-condition for arbitration.

6. Conclusion: The Tribunal does not have jurisdiction to hear the dispute because CLAIMANT failed to comply with the 12-month waiting period as the pre-condition for arbitration, which is an explicit agreement between the parties that the Tribunal does

not have power to override.

II. THE TRIBUNAL SHOULD ADMIT THE GONDWANDAN GOVERNMENT'S AMICUS CURIAE BRIEF

7. The Tribunal should allow the Gondwandan government's *amicus curiae* brief (**Brief**) because (A) in the absence of parties' agreement, the Tribunal has the authority to admit the Brief; (B) the Brief is not only relevant but also material to the outcome of the dispute; and (C) admitting the Brief will assist the Tribunal in making a fair and just award which will result in overall savings of both money and time.

A. IN THE ABSENCE OF PARTIES' AGREEMENT, THE TRIBUNAL HAS THE AUTHORITY TO ADMIT THE GONDWANDAN GOVERNMENT'S AMICUS CURIAE BRIEF

8. RESPONDENT asserts that in the absence of parties' agreement, the Tribunal has the authority to admit the Brief because (1) the Tribunal has the power to conduct the arbitration in a manner as it considers appropriate and (2) both parties will be treated equally and given an opportunity to respond to the Brief and present their case.

(1) The Tribunal has the power to conduct arbitration in a manner as it considers appropriate

9. Both the CIETAC Rules and the Hong Kong Arbitration Ordinance (Cap. 609) have given the Tribunal a general and broad power to conduct arbitration in a manner

as the Tribunal considers appropriate as long as it treats the parties equally [*ART. 22, CIETAC RULES; SEC. 46(C), HONG KONG ARBITRATION ORDINANCE (CAP. 609)*]. The Tribunal's power to admit *amicus curiae* briefs in international arbitration can be inferred from these provisions [*UNITED PARCELS SERVICE OF AMERICA V. GOVERNMENT OF CANADA (2001)*]. As the master of the procedure, the Tribunal can follow a procedure that they deem fit to the arbitration as long as it does justice to the parties [*METHANEX CORPORATION V. UNITED STATES (2001)*]. Neither the CIETAC Rules nor the Hong Kong Arbitration Ordinance (Cap. 609) explicitly precludes the Tribunal's power to admit *amicus curiae* briefs.

(2) Both parties will be treated equally and given an opportunity to respond to the Brief and present their case

10. The Tribunal's general and broad power to conduct arbitration in a manner as it considers appropriate is only subject to one mandatory law requirement as set out in section 46(c) of the Hong Kong Arbitration Ordinance (Cap. 609). The Tribunal has the power to admit *amicus curiae* briefs so long as it gives both parties an equal opportunity to present their case. In this case, the Gondwandan government's intention to submit its Brief has been made clear to all parties concerned [*LETTER FROM GONDWANDAN DEPARTMENT OF STATE, PARA. 3, P. 32*]. To ensure the observance of due process and natural justice in this international arbitration, it is only fair and prudent to admit the Brief so that both parties can be given equal opportunities to examine the full contents of the Brief and present their case.

B. THE GONDWANDAN GOVERNMENT'S AMICUS CURIAE BRIEF IS RELEVANT AND MATERIAL TO THE OUTCOME OF THE DISPUTE

11. According to Art. 3.9 IBA Rules on the Taking of Evidence in International Arbitration (2010), which applies to this arbitration [*PROCEDURAL ORDER NO. 2, CLARIFICATION 6, P. 35*], the Tribunal can admit documents that it considers to be relevant and material to the case.

12. Since the dispute between the parties arises from the impediment caused by the legislation enacted by the Gondwandan government, its Brief on the said legislation and its public policy is relevant and material to the outcome of the case.

C. ACCEPTING THE GONDWANDAN GOVERNMENT'S AMICUS CURIAE BRIEF WILL ASSIST THE TRIBUNAL IN MAKING A FAIR AND JUST AWARD AND RESULT IN OVERALL SAVINGS OF BOTH MONEY AND TIME

13. Accepting the Gondwandan government's Brief will (1) assist the Tribunal in making a fair and just award; and (2) result in overall savings of both money and time.

(1) The Brief will assist the Tribunal in making a fair and just award

14. The Tribunal has a duty to render a fair and just award [*ART. 47, CIETAC RULES; SEC. 56(7), HONG KONG ARBITRATION ORDINANCE*] and take into account all relevant facts. In this case, admitting the Brief will allow the Tribunal to understand the bigger

picture and wider implications of their decision. In particular, how the new legislation and the public policy prevented RESPONDENT from further performing its contractual obligations is at the center of the dispute. Admitting the Brief will enable the Tribunal to utilize the Gondwandan government's expertise on its public policy and to gather all the relevant facts in addition to the submissions made by both parties.

(2) The Brief will result in overall savings of both money and time

15. Any potential burden or prejudice that the Brief may cause on either party may be resolved by setting restrictions on the form and content of the Brief. The Tribunal has the power to place such restrictions in order to ensure the procedure is conducted in a fair manner without delay of proceedings [*METHANEX CORPORATION V. UNITED STATES (2001)*].

16. The Brief will save the parties' further expense and time to be spent in the enforcement proceedings. It would be a waste of time and money if the Tribunal rendered an award that would be contrary to the public policy of the Gondwandan government and could not be recognized and enforced there eventually.

17. CONCLUSION: The Tribunal should admit the Gondwandan government's *amicus curiae* brief because the Tribunal has the authority to accept the Brief, which is relevant and material to the outcome of the case, and will assist the Tribunal in rendering a fair, just and enforceable award.

III. THE RESPONDENT IS EXEMPTED FROM ANY LIABILITY FOR DAMAGES

18. The RESPONDENT asserts that its liability under Clause 60 is exempted pursuant to Article 79 of the CISG, because (A) RESPONDENT'S failure to perform its obligations was due to an impediment beyond its control; and (B) RESPONDENT could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract; and (C) RESPONDENT could not have avoided or overcome the impediment or its consequences.

A. RESPONDENT'S FAILURE TO PERFORM ITS OBLIGATIONS WAS DUE TO AN IMPEDIMENT BEYOND ITS CONTROL

(1) The implementation of Bill 275 constitutes an impediment

19. The impediment under Article 79 is '*more lenient than impossibility*'. [*AMTSGERICHT CHARLOTTENBURG, GERMANY, 4 MAY 1994; SCAFOM INTERNATIONAL BV v LORRAINE TUBES S.A.S, BELGIUM SUPREME COURT*]. The impediment may include changed circumstances that have made a party's performance excessively onerous ('*hardship*'), even if performance has not been rendered literally impossible. [*CISG-AC OPINION NO. 7, PARA 3.1*].

20. The commoditization of the tobacco products caused by the new regulation has rendered it impossible for the RESPONDENT to sell the products as expected. Further

and alternatively, the effects of the new government regulations have made RESPONDENT'S performance excessively onerous ('*hardship*'). Thus, the implementation of Bill 275 is an impediment under Article 79.

(2) The impediment is beyond the control of the RESPONDENT

21. Change of state regulations that prevent a party's performance could be found as an impediment beyond the control of the party. [*SCHLECHTRIEM/SCHWENZER(2010),1071; TRIBUNAL OF INTERNATIONAL COMMERCIAL ARBITRATION AT THE RUSSIAN FEDERATION CHAMBER OF COMMERCE, RUSSIAN FEDERATION, 22 JAN 1997 (ARBITRAL AWARD NO, 155/1996 ; BULGARIAN CHAMBER OF COMMERCE AND INDUSTRY, BULGARIA, 4 APRIL 1996*]. The Gondwandan government's implementation of the Bill 275 was beyond the control of the RESPONDENT.

(3) The RESPONDENT'S non-performance was due to the impediment.

22. The impediment has rendered some key obligations of the RESPONDENT illegal. Moreover, the impediment has caused a significant decline of demand in tobacco products and economic hardship on the RESPONDENT, which in turn lead to the non-performance of the contract. Therefore, RESPONDENT'S non-performance is due to the impediment.

B. RESPONDENT COULD NOT REASONABLY BE EXPECTED TO HAVE TAKEN THE IMPEDIMENT INTO ACCOUNT AT THE TIME OF THE CONCLUSION OF THE CONTRACT

23. The decisive test is whether a reasonable person in the shoes of the promisor, under the actual circumstances at the time of the conclusion of the contract and taking into account trade practices, ought to have foreseen the impediment's initial or subsequent existence. [*BIANCA/BONELL/TALLON, ART 79, NOTE 2.6.3; SCHLECHTRIEM & SCHWENZER (2010),1068*]

24. The Gondwandan government has already introduced packaging restrictions in 2009. In addition, analysts have estimated that since the regulations in 2009 have brought Gondwana in line with most major countries, it is highly unlikely that stricter regulation will be implemented [*RESPONDENT EXHIBIT NO.1, PARA 4, P. 28*]. Therefore, at the time of the conclusion of the contract on 14 December 2010, it is reasonable for RESPONDENT to expect that no stricter regulation would be implemented [*CLAIMANT'S EXHIBIT NO.4, PARA .2, P. 16*]. s

C. RESPONDENT COULD NOT HAVE AVOIDED OR OVERCOME THE IMPEDIMENT OR ITS CONSEQUENCES.

25. The RESPONDENT contends that the consequences of the impediment cannot be avoided because the RESPONDENT'S obligations to provide counter displays and sell branded merchandise are rendered illegal.

26. Supervening regulations which render the performance illegal could be granted exemption since it cannot be avoided or overcome. [*TRIBUNAL OF INTERNATIONAL COMMERCIAL ARBITRATION AT THE RUSSIAN FEDERATION CHAMBER OF COMMERCE, RUSSIAN FEDERATION, 22 JAN 1997 (ARBITRAL AWARD NO, 155/1996)*]

27. In present case, the new government regulations have rendered it illegal and impossible for RESPONDENT to provide counter displays for the CLAIMANT's products and to sell branded merchandise with the CLAIMANT's trademarks. These consequences cannot be avoided and are also impossible to be overcome by the RESPONDENT because continuing performance would violate the law.

28. CONCLUSION: Since all the requirements under Art 79 of CISG are fulfilled, the RESPONDENT'S liability to pay damages under clause 60 is exempted.

IV. THE RISK OF ENFORMCEMENT IF THE AWARD IS IN FAVOR OF THE CLAIMANT

29. The RESPONDENT asserts that (A) the Tribunal has a duty to render an enforceable award, and (B) there is a risk that the award favoring the CLAIMANT would contravene Gondwandan public policy; and (C) enforcement of the award would potentially be denied for irregularities in the arbitral proceedings.

A. THE TRIBUNAL HAS A DUTY TO RENDER AN ENFORCEABLE AWARD

30. The RESPONDENT submits that the Tribunal has the duty to ensure the final award is enforceable because (1) rendering an enforceable award is the Tribunal's fundamental function and (2) is an implied term of the arbitration agreement. As the award in favour of the CLAIMANT is not enforceable in Gondwana, the tribunal should not rule in favour of the CLAIMANT.

(1) Rendering an enforceable award is the fundamental function of the Tribunal

31. It is a core element of arbitral function to render an enforceable award. If the award is not enforceable, the Tribunal has failed the responsibility vested on it [*LEW (1978), 537*]. Enforceability is the "reason of existence of the arbitration process"; "ultimate goal of arbitral process…is an award enforceable at law" [*DERAINS/SCHWARTZ (1998), 353*].

(2) Rendering an enforceable award is an implied term of the arbitration agreement

32. The arbitrator's duties and rights come from the arbitration agreement [*MUSTILL/BOYD (1989), 220*]. When the parties agree on arbitration to resolve disputes, they have in mind an award they can enforce. [*LEW (1978), 538*] The purpose of the arbitration process is to put an end to the dispute, which is expected to be accomplished by the finality and enforceability of the award. Dr. Julian Lew, QC, noted that "the award is the "raison d'etre' of every arbitration; if the award is unenforceable the whole arbitration proceeding will have been a waste of time and energy" [*LEW (1978), 537*].

B. THERE IS A RISK THAT THE AWARD FAVORING THE CLAIMANT WOULD BE CONTRARY TO THE PUBLIC POLICY OF GONDWANA

33. There is a high risk that the award in favor of the CLAIMANT would contravene Gondwandan public policy and would be refused enforcement under New York Convention Art. V (2)(b). The award undermines the public policy of Gondwandan government to reduce tobacco consumption and promotion. [*LETTER FROM GONDWANDAN DEPARTMENT OF STATE, PARA. 5, P. 32*] It is a public policy to safeguard the public health and prevent further casualties [*LETTER FROM GONDWANDAN DEPARTMENT OF STATE, PARAS. 5, 7, P. 32*]. The enforcement of the arbitration award would only serve to undermine the Gondwandan government's sovereign right to regulate and control its public policy [*LETTER FROM GONDWANDAN DEPARTMENT OF STATE, PARA. 5, P. 32*].

C. THERE IS A RISK THAT THE ENFORCEMENT OF THE AWARD WOULD BE DENIED FOR IRREGULARITIES IN THE ARBITRAL PROCEEDINGS

34. The RESPONDENT submits that there is a risk that the enforcement of the award would be denied for irregularities in the arbitral proceedings pursuant to Art. V (1)(d) of the New York Convention, because (1) the Tribunal failed to observe the pre-condition of the arbitration, and (2) the Tribunal failed to give the RESPONDENT a fair opportunity to present its full case.

(1) The Tribunal failed to observe the pre-arbitration condition as agreed by the parties in the arbitration agreement

35. As submitted in argument I.1.(A) above, the arbitration agreement provides for a 12-month period from the date the dispute arose as a pre-condition for arbitration. As also submitted in argument I.1.(B) above, the CLAIMANT failed to comply with the pre-condition by applying for arbitration on 1 January 2014. In the event that the tribunal found that it has jurisdiction to hear the dispute despite the non-adherence to the pre-condition as agreed by the parties, enforcement of the award may be denied because the arbitration was not conducted in accordance to parties' agreement under Art. V(1)(d) of New York Convention.

(2) The Tribunal failed to give the RESPONDENT a fair opportunity to present its full case

36. The Tribunal is obligated to make a fair and just decision, and take into account all relevant facts [Art. 47(1) CIETAC Rule; S. 46 (3) HK Arbitration Ordinance]. In the event that the Tribunal refuses to admit the Gondwandan government's *amicus curiae* brief, the RESPONDENT asserts that the Tribunal will have failed to give the RESPONDENT a fair opportunity to present its full case and the RESPONDENT is substantially prejudiced. This constitutes another irregularity in the arbitration procedures. Therefore, enforcement could be denied under Art. V(1)(d) of New York Convention.

37. CONCLUSION: The Tribunal has a duty to render an enforceable award. There is a risk that the award favoring the CLAIMANT would not be enforced, because it contravenes the public policy of Gondwana and is tainted by irregularities in the arbitral proceedings.

PRAYER FOR RELIEF

38. In light of the arguments advanced, RESPONDENT respectfully requests the Tribunal to:

a. Deny jurisdiction to decide the claims raised by CLAIMANT;

b. Alternatively, admit the Government's *amicus curiae* brief for consideration during the proceedings;

c. Find that the RESPONDENT is exempted from any liability for damages;

d. Find that there would be risk of enforcement if the Tribunal were to issue an award in favor of the CLAIMANT.