FIFTH ANNUAL INTERNATIONAL

ALTERNATIVE DISPUTE RESOLUTION

MOOTING COMPETITION

27 JULY - 2 AUGUST 2014

HONG KONG

In the matter of:

Conglomerated Nanyu Tobacco Ltd.

v.

Real Quik Convenience Stores Ltd.

MEMORANDUM FOR CLAIMANT

Team No. 849C

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission
CISG	Convention on Contracts for International Sale of Goods
Ex.	Exhibit
i.e.	That is
ICC	International Chamber of Commerce
No.	Number
p.	Page
para.	Paragraph
pp.	Pages
PRC	People's Republic of China
R.	Rule
SA	South Africa
U.S	United States
U.S.A	United States of America
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UPS	United Parcel Service
USD	United States Dollar/ American Dollar
v.	Versus

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ARGUMENTS

I. THE NEED FOR NEGOTIATION AND CONSULTATION DOES NOT AFFECT THE JURISDICTION OF THE TRIBUNAL.

A. The matter in question is one concerning the Tribunal's jurisdiction and can be adjudicated upon by the Tribunal

1. There is a broad international consensus that an alleged non-conformity with a mandatory contractual pre-arbitral process is a question concerning the tribunal's jurisdiction *[Berger, para 6; Born, para 844; Pryles, para 160]*.

2. The tribunal's authority to consider and decide on its own jurisdiction, i.e. the principle of Competence-Competence, is considered as a generally accepted principle in international arbitration *[Born, pp 855-856; Redfern/Hunter, para 5-39]*. Said principle is also codified in Art 23.1 of the UNCITRAL Arbitration Rules and Article 6.1 of CIETAC, the applicable procedural rules in the case at hand and Art 6 of CISG, the applicable lex arbitri.

B. The agreement to negotiate contained in Clause 65 is not enforceable

3. RESPONDENT's contention that the Clause 65 negotiation and consultation procedure has not been properly fulfilled *[Statement of Defense, para. 6]*, presumes

that the need for negotiation and consultation is enforceable. It is submitted by the claimant that it is unenforceable for the following reasons-

a. Agreement to negotiate is not a condition precedent.

4. Non-determinative procedures such as negotiation, are considered unenforceable and not constituting a condition precedent to the tribunal assuming jurisdiction *[Naughton]*.

5. A bare agreement to negotiate has no legal content. *[Hooper Bailie, p. 208]* Therefore, since the parties failed to provide clear and certain guidelines for the negotiation and consultation proceeding, this tier should be read as permissive, rather than as a condition precedent.

b. The agreement does not provide for a clear detailed procedure, and hence is ambiguous and uncertain, therefore unenforceable.

6. Multi-tiered ADR clauses today are not sufficiently standardized and therefore are likely to raise ambiguities concerning the parties' intentions as regards legal enforceability *[van den Berg]*. The process or at least a model of the process should be set out so that the detail of the process is sufficiently certain *[Holloway & Holloway, para 81]*.

7. Clause 65 does not meet the test for certainty. The terms of the clause must be "sufficiently detailed to be meaningfully enforced" *[Aiton v. Transfield; Elizabeth v. Boral]*.

8. It has been held in England that an agreement to negotiate is by its very nature unenforceable for lack of *certainty [Paul v. H & S International, p. 131; Courtney v. Tolaini; Walford v. Miles]*. Even in less uncompromising jurisdictions such as the U.S., France, and The Netherlands, agreements to conciliate, mediate or negotiate in good faith are unenforceable unless they are sufficiently certain, since consent to arbitrate might derive from this process *[Pryles, p. 167–8; Howtek v. Relisys, p. 48; Poiré v. Tripier, p. 368; NJ Kort]*. The same considerations appear to apply in civil law jurisdictions *[Palmer/Lopez, pp. 289–90]*.

C. Since prior attempts at negotiating were fruitless, the 12 month "cooling-off" period can be done away with.

9. In the present case, an interpretation of the parties' behaviour based on good faith and on the sense and purpose of such clauses leads to the result that it would be a mere formality to force the parties to initiate ADR proceedings that quite obviously have no prospects of success *[Berger]*.

10. When there had already been “acrimonious” correspondence between the parties, the tribunal, in the past too, has held that the proceedings had not been commenced prematurely as there was no obligation for the claimant to carry out “further efforts at amicable settlement. *[ICC Case No. 8445]*

11. If the parties have agreed that negotiation is a precondition to arbitration, a party’s refusal to initiate negotiation- for instance the party goes directly arbitration- makes it self-evident that the negotiation has already come to an end. Therefore, the existence of a negotiation or conciliation clause should not impede commencement of an arbitration *[van den Berg]*.

12. The Tribunal, in a Swiss Supreme Court decision *[Case No. 4A_46/2011]*, had found that when an informal meeting between the parties had taken place and the parties had not settled their dispute, showing the deterioration of their relationship, as a last resort, arbitration was the only solution. Given the irreconcilable positions taken by the parties, the tribunal held that it would be ‘excessively formalist’ to declare the request for arbitration inadmissible on grounds of alleged violation of the impugned provision.

D. Respondent has waived its right to object

13. In determining whether the ADR process has a reasonable prospect of success, the tribunal must take an objective perspective and must take into account not only the nature of the dispute but also the parties 'willingness to compromise and the reasonableness of their attitudes *[Halsey v. Milton]*.

14. The RESPONDENT'S conduct, wherein they failed to reply to the default notices and demand letter, and chose to terminate the agreement pre-maturely without any further negotiations with respect to the dispute, clearly highlights their unwillingness to comply with the pre-arbitral procedure and reach a compromise *[Claimant Ex. 8]*. By failing to initiate negotiation, the Respondent party clearly demonstrates that the negotiation is bound to be futile, and that a forced negotiation will not bring success *[van den Berg]*.

15. A party cannot impede the institution of arbitral proceedings if, in the preliminary phase, it continually gave the other party the impression that it would not attach any importance to the mandatory requirement of initiating preliminary ADR proceedings as provided for in the escalation clause, but then seeks to rely on the plea of failure to comply with these escalation levels with respect to the action before the state court or arbitral tribunal *[Voser, p.381]*.

II. AMICUS CURIAE BRIEF SHOULD NOT BE ACCEPTED BY THE TRIBUNAL

16. Tribunals obtain the power to admit an amicus curiae from the procedural rules governing the arbitration *[Bastin, p. 208]*. The CIETAC Rules, like the current version of the UNCITRAL Rules, do not deal with this issue. PRC law, which is the law of the seat of arbitration, is also silent on this issue.

A. Intervention by amicus curiae defeats the purpose of International Commercial Arbitration

17. The concept of amicus curiae has no clear expression or reflection in international commercial arbitration *[Mistelis, p. 212]*.

18. Confidentiality and privacy are main characteristics of international commercial arbitration *[Pyles, Gomez at p.526]*. Opting for arbitration as a mean of a dispute resolution is to exclude third persons and be subject to private and confidential proceedings *[Voser]*.

19. The same can be gathered from the CIETAC Rules which expressly provides that arbitration proceedings will be held in-camera unless both parties request an open hearing *[CIETAC Rules, Article 36]*. Thus, confidentiality is the norm.

20. The participation of states, state entities, sub-divisions and agencies of states in international disputes can be a matter of general public interest and violates the

requirement of privacy and confidentiality in International Commercial Arbitration proceedings [Mistelis, p.206], thereby defeating its very purpose.

B. **Amicus briefs cannot be accepted until both parties consent to it**

21. The consensual nature of arbitration proceedings is highly valued by parties and is an essential feature of arbitration. *Amicus* intervention undermines the very arbitration regime it is supposed to strengthen, primarily since such intervention erodes the traditional basis of arbitral proceedings, namely the consent of the parties *[Vifluales, p. 75]*. Permitting intervention, can negatively affect the parties' degree of autonomy and control over their arbitration *[Gomez, p. 551]*.

22. Therefore, even if one of the parties does not accept amicus briefs, the arbitrators should not be able to authorize the intervention of the non-party. *[Sabater]*

23. Citing the consensual nature of arbitration proceedings, arbitral tribunals in the past have come to a conclusion that they lack the power to allow any form of third-party intervention when there is lack of consent of the parties *[Aguas dal Tunari SA v. Bolivia]*.

C. Allowing the submission of the amicus brief is prejudicial to the Claimant's interests

24. For acceptance of amicus briefs, another essential criterion considered in the decisions handed down by tribunals *[Glamis Gold v USA; Pacific Rim v El Salvador; UPS v Canada; Sociedad General. v. Argentine Republic]* requires *amicus curiae* not to create an undue burden on or unfair prejudice to one of the parties.

25. The Gondwandan Department of State, in its letter, has strongly urged the tribunal to consider the effect of an award in the Claimant's favour and has adopted a stance contrary to that of the Claimant's *[Moot Problem, p. 32-33]*. Intervention by the Gondwandan Department of State would cause the tribunal to favour one party to the dispute and thus, must not be permitted *[Tienhaara, p. 239]*.

26. Moreover, Article 33 of the CIETAC as well as Article 17 of UNCITRAL provide that the arbitral tribunal is to act impartially and fairly under all circumstances. The Acceptance of the amicus brief that strongly contradicts the stance of the claimant would be unfair and result in partiality, and hence must not be permitted.

III. THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE NOT VITIATED BY THE IMPLEMENTATION OF BILL 275

27. The RESPONDENTS's obligations under the Agreement were not vitiated by the implementation of Bill 275 and the Gondawandan government's new, more stringent regulations because (I) the situation would not fall within the meaning of impediment

under the ambit of Article 79 of CISG; (II) the situation only made it more onerous for the RESPONDENT to perform their obligations under the agreement; and (III) frustration of part of the agreement would not render the whole agreement vitiated.

A. The situation would not fall within the meaning of impediment under the ambit of Article 79 of CISG.

28. The term "impediment" was used in the drafting of the Convention to denote an external force that objectively interferes with performance of the agreement and renders performance impossible *[Dionysios; Tallon, p. 592; Honnold, p. 427]*. The RESPONDENT must be unable to perform its obligations under the Agreement after the passing of Bill 275 for the agreement to be vitiated under the new circumstances.

29. The contract was performed for a period of 6 months after Bill 275 was passed making it clear that it was not impossible to perform the agreement. *[Claimant's Ex. 8]* Article 79 provides only for release from a duty if the same is made impossible by a supervening impediment *[Nuova Fucinati]*. That is that the impediment must prevent performance of the agreement *[Honnold, p. 483]*.

B. The situation only made it more onerous for the RESPONDENT to perform their obligations under the agreement.

30. Bill 275 of Gondawandan made the sale of Tobacco merchandise illegal but does not create any restrictions with regard to the sale of Tobacco products *[Claimant's Ex. 2]*. It is not disputed by the CLAIMANT that a part of the agreement was frustrated. In fact, the CLAIMANT was willing to have discussions with regard to clause 2 of the Agreement *[Claimant's Ex. 7]*. The RESPONDENT's increase in the burden of performing the contract does not ipso facto vitiate the agreement *[Claimant's Ex. 6; Fontaine]*.

31. It is submitted by the CLAIMANT that the situation is not even one of economic hardship. However, if the Tribunal holds that it is, economic hardship cannot be said to be an 'impediment' under Article 79 of CISG *[Carla Spivack; Honnold p. 431,432]*. Article 79 CISG only governs impossibility of performance and a situation which does not fully exclude performance, but makes it considerably more onerous cannot be considered as an impediment *[Dionysios; Tallllon p. 592;]*.

32. A view can be taken that economic hardship would be included within the meaning of impediment but the same must be done under very narrow conditions *[Schlechtriem, p.101]*. This view is taken to avoid gap filling by the courts and invoke domestic laws and their widely divergent solutions [*Schlechtriem p. 101*]. Nevertheless, the parties have agreed to apply the UNIDROIT Principles for the purpose of gap filling if the situation is not governed by the CISG *[Distribution Agreement, Clause 79]* which would remove the danger of gap filling by domestic laws and also lays down a definite solution with regard to the procedure to be followed in case of hardships.

Under these principles, a situation of hardship would not vitiate the contract or even exempt the RESPONDENT completely from its obligations under the agreement.

33. Alternatively, if the Tribunal was to take the view that situations of hardship fall within the ambit of Article 79, even a 100% cost increase would be insufficient to exempt the RESPONDENT from its obligations under the agreement *[Schlechtriem; Girsberger; Brunner]*.

C. Frustration of part of the agreement would not render the whole agreement vitiated.

34. The Bill 275 passed by the Gondawandan government did not frustrate the entire agreement as it only rendered clause 2 of the agreement invalid. Thus it is submitted by the CLAIMANT that performance of the rest of the agreement was still possible *[Claimant's Ex. 8]*.

35. If only a part of the agreement was frustrated due to the impediment, it does not frustrate the whole agreement and the rest of the agreement must still be performed. Article 79 does not speak of nullity of "the agreement" but instead provides that a party is not liable for failure to perform "*any*" of its "*obligations*". Even if the respondent is exempt from performing the part of the agreement that has been frustrated under article 79, the claimant is still entitled to require performance of the

remaining contract and can claim damages for non-performance of the same. *[Honnold p.491]*.

IV. AN AWARD IN FAVOR OF THE CLAIMANT WOULD NOT SUFFER FROM ANY RISK FOR ENFORCEMENT

36. If the Tribunal were to issue an award in favor of the CLAIMANT, there would be no risk for enforcement because (I) enforcement of the award would not violate any law of Gondawandan; (II) if it is found that the enforcement would violate the law of Gondawandan, the same would not be a violation of the public policy of Gondawandan; and (III) if only part of the award was against public policy, it would not render the whole award unenforceable under the New York Convention.

A. Enforcement of the award would not violate any law of Gondwana

37. It is important to note that, under Article V(2), the "recognition or enforcement of the award" must violate public policy for it to be exempt from enforcement *[Kronke, p. 365]*. An enforcing court should not determine whether the entire award violates public policy, but must only consider whether the enforcement itself would produce a result that violates public policy *[Kronke, p. 366]*.

38. The Bill 275 prohibits the sale of Tobacco merchandise but does not illegalize the sale of tobacco or tobacco products *[Claimant Ex 2]*. If the award is issued in favor of

the CLAIMANT, the Tribunal is in no way endorsing the view that the frustrated part of the contract should have been performed by the RESPONDENT. The award would only be an interpretation of the termination clause of the agreement which issues a penalty of USD 75,000,000 *[Clause 60]*.

39. The award would be in violation of Bill 275 if the Tribunal would have calculated the quantum of damages and held that the RESPONDENT should have sold the Tobacco merchandise. But an award for damages is mere enforcement of the contract as intended by the Parties.

B. If it is found that the enforcement would violate the law of Gondwana, the same would not be a violation of the public policy of Gondwana

40. Public policy under Article V of the New York Convention refers to a concept of "international public policy," the scope of which is narrower than domestic public policy *[van den Berg]*.

41. Violation of public policy under Article V can be said to include (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or

"public policy rules"; (iii) the duty of the State to respect its obligations towards other States or international organizations *[New Delhi Conference, R. 1(d)]*.

42. A state's "international public policy" or "ordre public international" is that which affects the essential principles governing the administration of justice in that country and is essential to the moral, political, or economic order of such country *[Kersa Holding]*.

43. The policy must be stated with reference to the laws and legal precedents and not from general considerations of supposed public interest *[Brian]*. The scope of public policy is limited to certain fundamental issues, so that a mere violation or incompatibility with local laws cannot cause an award to violate public policy [*van den Berg*].

44. Therefore only if there is a violation of international public policy would the award fall under the ground laid down in Article V(2)(b). Therefore a violation of Bill 275, would not amount to a violation of the international public policy under the grounds laid down in Article 5(2)(b).

C. If only part of the award was against public policy, it would not render the whole award unenforceable under the New York Convention

45. Notwithstanding any of the contentions put forth earlier, it is submitted that even if the Tribunal takes the view that if the award is passed in favor of the CLAIMANT would violate the public policy of Gondawandan, only a part of the award would violate the public policy.

46. In such situations, segregation must be made within the award, if possible, as to what harms the international public policy and what does not. On the basis of this, the court would enforce the part of the award which does not violate the public policy of the State *[Southwire; in J.J. Agro; Westman International]*. Similarly, the court in Gondawandan can, if it finds that the award is in violation of international public policy, segregate the award and enforce the award that conforms to it.

RELIEF REQUESTED

In light of the arguments advanced, CLAIMANT respectfully requests the Tribunal to find that:

1. The Tribunal has requisite jurisdiction to deal with this dispute.
2. The amicus curiae brief submitted by the Gondwandan Department of State is inadmissible.
3. Bill 275 did not vitiate the contract.
4. There is no risk of enforcement if the award is issued in favour of the CLAIMANT