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HONG KONG, SAR
27 July - 2 August 2014

MEMORANDUM FOR CLAIMANT

915C

ON BEHALF OF:

Conglomerated Nanyu Tobacco Ltd
142 Longjiang Drive,
Nanyu City, Nanyu **- CLAIMANT -**

v.

Real Quik Convenience Stores Ltd
42 Abrams Drive
Solanga, Gondwana **- RESPONDENT -**

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INDEX OF AUTHORITIES

ABBREVIATION	FULL CITATION
Statutes and Treaties	
CIETAC	China International Economic and Trade Arbitration Commission Arbitration Rules 2012
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration 2010
ICSID Rules	Rules of Procedure for Arbitration Proceedings (Arbitration Rules), in International Centre for Settlement of Investment Disputes Convention, Regulations and Rules 2003
Model Law	1985 UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
UNCITRAL Digest	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012 Edition)
UNCITRAL Rules	1976 UNCITRAL Arbitration Rules, as revised in 2010
CISG AC No. 7	CISG Advisory Council Opinion No. 7 *Exemption of Liability for Damages Under Article 79 of the CISG* (12 October 2007)
Scholarly Works and Articles	
Born	Gary B. Born International Commercial Arbitration Second Edition, 2014, Kluwer Law
Fouchard	Fouchard, Gaillard, Goldman On International Commercial Arbitration (1999) Emmanuel Gaillard & John Savage eds Kluwer Law International, 253–261
Gilbert	John Gilbert Arbitration in England, with Chapters on Scotland and Ireland 2013, Kluwer Law International

ABBREVIATION	FULL CITATION
Honnold	John O. Honnold Uniform Law for International Sale under the 1980 United Nations Convention, The Hague Kluwer Law International, 3rd ed, 1999
Schwenzer	Hans Stoll & Georg Gruber, in Peter Schlechtriem & Ingeborg Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG) Article 79 2nd ed, Oxford University Press, 2005
Tallon	Denis Tallon Bianca-Bonell Commentary on the International Sales Law Giuffrè: Milan, 1987
Waincymer	Jeffrey Waincymer Procedure and Evidence in International Arbitration 2012, Kluwer Law International

Arbitral Awards

Court of Arbitration of the International Chamber of Commerce

ICC Case 5294/1989	ICC [Final] Award Case No. 1507 Company (Germany) v. a South-East Asian State (1970), JDI 1974
ICC Case 5485/1989	ICC Award No. 3131 of 26 October (1979) Vienna, ICCA Yearbook, 1984
ICC Case 6320/1995	ICC case No. 3131, 1983 Revue de l'arbitrage 525. On the subsequent proceedings, see, e.g., Goldman, Une bataille judiciaire autour de la lex mercatoria: L'affaire Norsolor, 1983 Revue de l'arbitrage 525

Case Law

Belmont v Lyondell Petrochem	Belmont Constr., Inc. v Lyondell Petrochem. Co., 896 S.W.2d 352 Tex. Ct. App. 1995
Bundesgerichtshof	German Federal Supreme Court Bendesgerichtoshof, 1 March 2007
Bulgarian Chamber of Commerce and Industry Award No. 56	Bulgarian Chamber of Commerce and Industry Award No. 56/1995, Macromex Srl. v Globex International Inc

ABBREVIATION	FULL CITATION
Consolidated Edison v Cruz Construction	Consolidated Edison Co. of NY v Cruz Constr. Corp., 685 N.Y.S.2d 683, N.Y. App. Div. 1999
C.C.I.C. Consultech v Silverman	C.C.I.C. Consultech International v Silverman, Court of Appeal of Quebec, Canada, 24 May 1991, 1991 CanLII 2868 QC CA
The Eastern Saga Case	Oxford Shipping Co v Nippon Yesen Kaisha [1984] 2 Lloyd's Rep. 373 (QB)
Fulgensius Mungereza v Africa Central	Fulgensius Mungereza v Africa Central, Supreme Court at Mengo, Uganda, 16 January 2004, [2004] UGSC 9
Hanrei Jiho Case	Judgment of 22 June 2011, X v Y 2116 Hanrei Jiho 64, Tokyo Koto Saibansho
Himpurna California Energy v PT	Himpurna California Energy Ltd. v PT, (Persero) Listruik Negara, Final Award, delivered in seat of Austria on 4 May 1999
IRCP v Lufthansa	International Research Corp PLC v Lufthansa Systems Asia Pacific Pty Ltd and Another [2012] SGHC 226, High Court Originating Summons No 636 of 2012, 5 September – 12 November 2012
Jack Kent Cooke v Saatchi	Jack Kent Cooke Inc. v Saatchi, 635 N.Y.S.2d 611, N.Y. App. Div. 1995
Jagdish Chander v Ramesh Chander	Jagdish Chander v Ramesh Chander & Ors, Supreme Court, India, 26 April 2007
Kemiron v Aguakem	Kemiron Atl., Inc. v Aguakem Int'l, Inc., 290 F.3d 1287, 1291, 11th Cir. 2002
The Methanex Case	Methanex Corporation v United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae of 15 January 2001
NY Plaza v Oppenheim	NY Plaza Bldg Co. v. Oppenheim, Appel, Dixon & Co., 479 N.Y.S.2d 217, N.Y. App. Div. 1984
Rockland County v Primiano	Rockland County v Primiano, 431 N.Y.S.2d 478, 1980
Swiss SC Case No. 4A_46	Swiss Supreme Court, Case No. 4A_46/2011 of 16 May 2011, published in ASA Bulletin, 2011
Ho Fat Sing v Hope Tai	Ho Fat Sing t/a Famous Design Engineering Co. v. Hop Tai Construction Co. Ltd. District Court - Hong Kong Special Administrative Region of China 23 December 2008, HKDC 339.

TABLE OF ABBREVIATIONS

Art / Art.	Article
CIETAC	China International Economic and Trade Arbitration Commission Rules, 1 May 2012
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
Clx	Claimant's Exhibit
DA	Distribution Agreement (2010)
ML/Model Law	UNICITRAL Model Law on International Commercial Arbitration, 1985
No.	Number
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
p.	Pages
para.	Paragraph
PO	Procedural Order
Rx	Respondent Exhibit
SOD	Statement of Defense
UNIDROIT	UNIDROIT Principles, 2010

UNIT 1: THE TRIBUNAL HAS JURISDICTION TO HEAR THE DISPUTE

[1] RESPONDENT submits that Clause 65, inclusive of the negotiation tier, contains a valid arbitration agreement **[1]** and cannot be avoided for either party's failure to strictly to perform the negotiation tier **[2]**. Further, and in the alternative, CLAIMANT submits it has complied with and performed the negotiation tier of Clause 65 which enables it to initiate arbitral proceedings **[3]**, and that if the Tribunal finds that it has jurisdiction to hear the dispute, any award issued to CLAIMANT would be enforceable under ML and the NY Convention **[4]**.

1. Clause 65 is a valid arbitration agreement inclusive of the twelve-month negotiation period.

[2] Clause 65 meets the requirements of a valid arbitration agreement [*CIETAC, Art 5; NY Convention, Art II; ML, Art 7*]. The inclusion of a precondition does not invalidate Clause 65 as an arbitration agreement [*Ho Fat Sing v Hop Tai; Westco Airconditioning v Sui Chong*]. This is consistent with the principle of party autonomy, which is a fundamental principle in commercial arbitration. The parties are free to place conditions upon an arbitration agreement [*Bundesgerichtshof*]. Additionally to validity at formation, procedural missteps after formation relating to a multi-tier dispute resolution clause will not affect the validity of the underlying arbitration agreement in virtually all cases [*Born, p.941*].

2. Noncompliance with a precondition to arbitration does not prevent the arbitral tribunal from finding that it has jurisdiction to hear this dispute.

[3] Many contracts containing dispute resolution clauses require a preliminary step to be taken prior to commencing arbitration, this does not entitle a party to avoid the arbitration process [*Channel Tunnel v Balfour Beatty*].

Inadmissibility of arbitration on the basis of noncompliance is not favoured by the courts; instead, it is preferable to treat the pre-arbitral procedure as a contractual obligation that has been breached which does not impact on the arbitral tribunal's jurisdiction to hear a dispute [*Swiss SC Case No.4A_46*].

[4] Instead, the arbitral tribunal should find that arbitration has been predicated on the uncontradicted affirmation that the dispute was not resolved by negotiation [*Himpurna California Energy v PT*]. The precondition provides parties with prior notice of an imminent reference to arbitration; although negotiation is to be encouraged, a time stipulation cannot obstruct either party's fundamental right to seek a remedy for a claim by obliging it to persevere with negotiations which are fruitless [*Himpurna California Energy v PT*].

[5] Following initial negotiations regarding the dispute, the claimant indicated that it wished to negotiate further [*Clx 7, p.19*] and the respondent ignored this invitation and instead terminated the contract [*Clx 8, p.20*]. This is a clear indication that further negotiation would be fruitless, thus proceeding to arbitration is a valid pursuit by the claimant and the arbitral tribunal should find that it has jurisdiction to resolve the dispute in accordance with the arbitration agreement in Clause 65.

3. In the alternative, the claimant has sufficiently complied with the negotiation component and thus the arbitral tribunal has jurisdiction to hear this dispute

[6] If the arbitral tribunal requires compliance with the negotiation period, this assessment should be made on the basis of sufficient compliance rather than absolute compliance. The arbitral tribunal is entitled to find that it has jurisdiction on the basis of sufficient compliance [*IRCP v Lufthansa*]. The claimant has sufficiently complied with the precondition as Clause 65 holds that the parties 'shall initially seek' resolution through negotiation and consultation [*Clx 1, p.11*] and this resolution was initially sought through negotiation in April 2013 [*Clx 7, p.19*].

[7] Furthermore, as continued negotiation would be fruitless, it is clear that neither party will suffer any material damage from proceeding to arbitration rather than continuing negotiation, this shows sufficient compliance with the negotiation tier of the dispute resolution clause [*Born, p.923; Hanrei Jiho Case*].

4. Any award rendered to the effect that the arbitral tribunal does have jurisdiction would be enforceable [*See UNIT 3, p. 11*].

UNIT 2: THE AMICUS CURIAE BRIEF SHOULD NOT BE ALLOWED

[8] CLAIMANT submits that the Gondwandan government's amicus curiae brief should not be permitted for the following reasons: both parties have not consented to its inclusion **[1]**, its inclusion would adversely affect procedural economy and fairness **[2]**, and in the absolute alternative, the Tribunal should appoint an expert in the place of the Gondwandan government's amicus brief **[3]**.

1. The amicus curiae brief should not be permitted without the consent of all of the parties

[9] The parties explicitly selected and agreed to the rules which govern their arbitration agreement, none of these address admissibility of amicus curiae briefs expressly [*NY Convention; ML; CIETAC*]. CIETAC does address multiple-party proceedings in the context of joinder [*CIETAC, Art 27*], however, outside that limited scope it places a high emphasis on the privacy of arbitral proceedings in relation to 'outsiders' involvement [*CIETAC, Art 36*]. This is consistent with the fundamental concept of privacy in arbitration, which would be undermined by allowing voluntary intervention of third parties [*Eastern Saga Case, 842*].

[10] Consequently, the only way in which participation by an amicus curiae could be permitted would be with the consent of all of the parties to the arbitration, and only then with the tribunal's agreement [*Gilbert, p.467; see also ML Art. 28(3)*].

2. The amicus curiae brief should be excluded as it negatively impacts on procedural economy, fairness and equality between the parties

[11] The impact on the procedural economy of the arbitration involves consideration of timing, delay and added costs. Parties reviewing submissions would need extra time, which means extra costs, and if the submissions proved to be a waste of time the tribunal would have no cost powers against the amicus and either of the parties may end up financially disadvantaged [*Waincymer, p.818*]. Fairness and equality will be undermined, as has been evidenced by Mr Reynolds' letter; the Gondwandan government is wholly supportive of the RESPONDENT by admission [*Letter from Malcolm Reynolds, p.32*]. The arbitral tribunal has and should utilise its discretion to exclude the amicus curiae brief as evidence on this basis [*IBA Rules, Art 9(2)(g)*].

3. If the arbitral tribunal sees the contribution of the Gondwandan government as essential, it should use the more characteristic commercial arbitration method of appointing an expert so that equality and fairness is preserved.

[12] In considering third party participation, a tribunal is also concerned with its general duty to promote arbitration and respect that form of dispute settlement with all its characteristics [*Waincymer, 818*]. Whilst CLAIMANT acknowledges that arbitral Tribunals are enabled to collect any evidence deemed necessary, CLAIMANT contends that the inclusion of an amicus curiae brief from RESPONDENT's state government would compromise procedural fairness and equality.

[13] Independent investigation by the tribunal and expert reports on specific issues can achieve the most helpful outcome of the Gondwandan government's involvement [*CIETAC, Art 41, Art 42*] more so than a biased [*Letter from Malcolm Reynolds, p.32*] account by way of a voluntary, undirected brief. Should the arbitral tribunal appoint the Gondwandan government as an expert instead, it will have the necessary power to direct the information provided instead of accepting a voluntary submission that actively states that it is against the CLAIMANT's position [*Letter from Malcolm Reynolds, p.32*] before viewing any evidence that the arbitral tribunal may see as necessary, outside of the brief, to make such a determination.

UNIT 3: ANY AWARD ISSUED IN FAVOUR OF THE CLAIMANT IS ENFORCEABLE

[14] CLAIMANT submits that Clause 65 of the DA [*Clx 1, p. 11*] is a valid arbitration agreement within the definition of Art. 7(1) ML and has jurisdiction to render an enforceable arbitral award pursuant to Art. 35 ML. In submitting that the Tribunal lacks jurisdiction to hear the dispute and subsequently issue an enforceable award, RESPONDENT relies upon the assumption that the negotiation tier of Clause 65 was not performed by the parties [*SOD, p. 25, para. 7*] and that an arbitral award against it would be contrary to public health policy in Gondwana [*SOD, p. 26, para. 1, 11*]. Should the Tribunal issue an award in favour of CLAIMANT, RESPONDENT would be unable to have it set aside for the following reasons: determinations regarding performance of the negotiation precondition are not reviewable **[1]** and further, Bill 275 does not meet the high threshold required to have an award set aside for violation of Gondwandan public policy **[2].**

1. Determinations regarding performance of the negotiation precondition are not reviewable

[15] CLAIMANT submits that it is only open to the tribunal to determine whether the negotiation precondition was satisfied. This is because the determination is a substantive issue and only procedural errors provide a basis for non-enforcement or annulment [*BG Group v. Argentina; Judgment of 2 April 2002, Swiss Cargill Int'l SA v. Russian CJSC Neftekhimeksport*, No. 5-Г02-23 (Russian S.Ct.]. Therefore, were the tribunal to rule that it has jurisdiction to determine the dispute on the basis of the precondition having been satisfied, this determination would not be reviewable by a state court.

2. Bill 275 does not meet the high threshold required to have an award set aside for violation of Gondwandan public policy

[16] Article 5 of the NY Convention and Article 36 of the Model Law provide that an award may be annulled or enforcement refused on the basis that the award contravenes the relevant state's public policy. However, an award in favour of CLAIMANT would not violate the public policy of Gondwana. The threshold to this public policy is considerably high as it is only intended to protect fundamental, mandatory policies of national legal regimes [Born, p. 2829; UNICITRAL Digest, p. 183]. The threshold to this public policy is considerably high as it is only intended to protect fundamental, mandatory policies of national legal regimes [Born, p. 2829; UNICITRAL Digest, p. 183].

[17] This interpretation of public policy was also applied in Parsons Whittemore Overseas Co Inc v Societe Generale De L'Industrie Du Papier [1974] USCA2 836 the Court held 'enforcement of foreign arbitral awards may be denied on the basis that enforcement would violate the forum State's most basic notions of morality and justice'.

[18] [See also Case 520 – Hong Kong/High Court of Hong Kong: Shanghai City Foundation Works Corp v Sunlink Limited (February 2 2001); Case 37 – Canada/Ontario Court, General Division: Arcarta Graphics Buffalo Limited v Movie (Magazine) Corp. (March 12 1999)].

[19] Laws regulating cigarette smoking would not reach this threshold, particularly considering that cigarette smoking is not prohibited in Gondwana. The particular regulations relevant to this matter only concern plain packaging and promotional material. Therefore RESPONDENT cannot challenge the award on public policy grounds.

UNIT 4: RESPONDENT IS LIABLE FOR LIQUIDATED DAMAGES FOR TERMINATION OF THE AGREEMENT

[20] CLAIMANT submits that RESPONDENT is liable to pay liquidated damages in accordance with Clause 60.2 of the DA as it terminated the contract. RESPONDENT terminated the DA due to: the decrease in sales **[1]**; the twenty percent premium on the DA **[2]**; the unviability of the fixed prices in the DA **[3]**; the unviability of the required amount of stock to be purchased **[4]**; and the change in Gondwandan law [*Clx 6, p. 18; Clx 8, p. 20*].

[21] It was the combination of these issues that resulted in RESPONDENT terminating the DA. Further, RESPONDENT is not entitled to an exemption under Art. 79 of the CISG as it cannot establish each of the required elements of Art. 79.

1. Impediment not outside of RESPONDENT'S control

[22] The notion of impediment under Art. 79 has been deemed to be an insurmountable obstacle or an unexpected event that makes performance of a contract excessively difficult [*CISG AC 7, p. 8*]. It has also been suggested that an impediment under Art. 79 relates to situations where a party's performance has turned extraordinarily burdensome [*CISG AC 7, p. 8; Honnold, 423, p. 472; Tallon, 2.6, p. 578; Schwenzer, p. 715*]. CLAIMANT accepts that there is case law and commentary that supports inclusion of acts of authorities and change in governmental regulation as constituting impediments. CLAIMANT does not contest that illegality would result in contractual obligations becoming burdensome and onerous to perform but suggests that this is not the issue at hand.

2. The impediment was not unforeseeable

[23] A party is responsible even for impediments which lie outside of his sphere of control if he could reasonably have been expected to have taken them into account at the time of the conclusion of the contract. If the impediment was foreseeable at the time of the conclusion of the contract and the promisor made no reservations regarding it, then he should be understood to have assumed the risk that performance may be delayed or prevented by the impediment [*Schwenzer, p. 1068*].

[24] CLAIMANT submits that it is clear from the facts that RESPONDENT was aware of the impediment and foresaw the effect the impediment would have on their ability to perform their obligations under the contract. In a letter to CLAIMANT dated 21 March 2011 RESPONDENT expressed concerns regarding the introduction of a new Senate Bill which would 'increase restrictions on both cigarette and tobacco packaging as well as potentially restrict the sale and display of tobacco branded promotional merchandise' [*Clx 3, p. 15*].

[25] Additionally, the letter goes on to state that RESPONDENT was concerned that the changes will have 'adverse effects on the current Distribution Agreement' and that they would fail to comply with these new laws if they were to be passed and the DA was to remain as it was.

3. The impediment was not unavoidable

[26] Even an impediment that a party could not have taken into account when concluding the contract does not exempt him if overcoming the impediment or its consequences is both possible and reasonable for him. A party can be expected to overcome an impediment in order to perform the contract in the agreed manner, even when this results in him incurring greatly increased costs ad even a loss resulting from the transaction [*Schwenzer, p. 1069*].

[27] CLAIMANT submits that RESPONDENT could reasonably have avoided the impediment and that this requirement of Art. 79 cannot be established. On 11 April 2013 the parties met to re-negotiate the DA in light of the new governmental regulations that entered into force on 1 January 2013. However, on this date negotiations were unsuccessful. It was then on 1 May 2013 that RESPONDENT terminated the agreement, only a month after the failed negotiations. CLAIMANT submits that it was open to further negotiations and discussions in order to resolve the issues and that termination of the DA was avoidable [*Clx 7, p. 19*].

4. The impediment was not the cause of the failure to perform

[28] Exemption of a party under Art. 79 of the CISG requires that the unforeseeable and insurmountable impediment is the sole reason for the failure to perform. However, the party remains liable if a breach of contract is a concurrent cause of the failure to perform [*Schwenzer, p. 1069*].

[29] RESPONDENT did not only terminate the contract due to the change in Gondwandan law but also as a result of a decrease in sales, an unwillingness to continue to pay a twenty percent premium on the DA, apparent unviability of the fixed prices in the contract and apparent unviability in the amount of stock to be purchased. These subsequent issues cannot directly be evinced as the result of the change in regulations and could easily be a result of other contributing factors such as anti tobacco lobbyists and non-government organisations or greater awareness of health risks.

Accordingly, RESPONDENT remains liable for damages as termination of the contract resulting from the abovementioned concurrent causes.

PRAYER FOR RELIEF

For the reasons stated above, Counsel for CLAIMANT respectfully requests the Tribunal to:

1. Find that it has jurisdiction to hear and determine CLAIMANT's request for arbitration;
2. Not allow the Gondwandan government's amicus curiae brief to be admitted as evidence;
3. Determine that any award issued to CLAIMANT would be enforceable;
4. Find that RESPONDENT breached its obligations under the agreement is liable to pay liquidated damages.

Respectfully signed and submitted by Counsel for CLAIMANT on 20 June 2014: