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HONG KONG, SAR
27 July - 2 August 2014

MEMORANDUM FOR RESPONDENT

915R

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

CLOUT case No. 371	*CLOUT case No. 371* [Hanseatisches Oberlandesgericht Bremen, (2) Sch 4/99, Germany, 30 September 1999
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

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 ABBREVATIONS

App for Arb	Application for Arbitration
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 DOES NOT HAVE JURISDICTION TO HEAR THE DISPUTE

[1] RESPONDENT submits that Clause 65 is invalid due to the discretionary language contained therein **[1]** and subsequent non-performance of the negotiation pre-condition **[2]**, which causes Clause 65 in its entirety to become inoperable **[3]**. Further, and in the alternative, RESPONDENT submits that if the Tribunal finds that it has jurisdiction to hear the dispute, any award issued would be unenforceable due to breach of the ML and the NY Convention **[4]**.

1. The discretionary language used in Clause 65 invalidates the arbitration agreement.

[2] Clause 65 states that the parties 'may submit the dispute' to preface the arbitration agreement [*Clx 1, p.11*]. This indicates that the parties are not bound to arbitrate and may opt to litigate their dispute. In this regard, the arbitration agreement is non-exclusive and therefore cannot be considered an arbitration agreement within the definition of Article 7(1) of the Model Law [*C.C.I.C. Consultech v Silverman; Jagdish Chander v Ramesh Chander*].

[3] Indeed, the existence of a negotiation component within the agreement is a further demonstration of its non-exclusivity. For both of these reasons, Clause 65 does not grant the tribunal the jurisdiction to determine the parties' dispute and any award rendered would be unenforceable under the NY Convention [see *infra* at p.X].

2. CLAIMANT has not complied with the twelve-month negotiation period pre-condition and is thus barred from commencing arbitration.

[4] RESPONDENT submits that the parties have not performed the negotiation tier of Clause 65 and this extinguishes the right of either party to initiate arbitral proceedings.

[5] The parties are not entitled to compel arbitration if a precondition in a multi-tier dispute resolution clause has not been met [*Kemiron v Aguakem; Consolidated Edison v Cruz Construction; Jack Kent Cooke v Saatchi*]. RESPONDENT submits that non-performance of the precondition constitutes a barrier to the tribunal's jurisdiction. We respectfully requests that the Tribunal not seek to determine the dispute until the precondition is been met and its jurisdiction satisfied[*Belmont v Lyondell Petrochem; Sucher v Realty; NY Plaza v Oppenheim; Rockland County v Primiano*].

[6] The dispute arose in March 2013 at the earliest [*Clx 8, p. 18*]. This is evidenced by the notice of termination of the DA, which confirms all issues involved in the dispute [*Clx 8, p.20*]. RESPONDENT objected to CLAIMANT's assertion that the Tribunal had jurisdiction [*SOD, p.25*] and arbitration commenced in January 2014 [*App. for Arb. Letter, p.1*]. As the twelve-month mandatory precondition has not been met, the Tribunal cannot find that it has jurisdiction to hear the dispute until the precondition is satisfied. The RESPONDENT seeks to commence consultation and negotiation immediately [*SOD, p. 26*].

[7] **3. Any award issued by the Tribunal would be unenforceable and set aside for not falling within the terms of the submission to arbitration [***See UNIT 3, p. 10*]

UNIT 2: THE AMICUS CURIAE BRIEF SHOULD BE ALLOWED

[8] Amicus curiae briefs are not expressly provided for in the applicable rules, however the right to allow evidence is generally provided for in various international commercial arbitration instruments and rules [*CIETAC, Art 41(1); ML, Article 19(2)*].

[9] Absent explicit guidance from the applicable law, general principles from external rules surrounding the admissibility of amicus curiae briefs in hearings should be utilised including the ICSID Rules **[1]** and the ML **[2]**.

1. ICSID Rules

[10] The ICSID Rules require three criteria to be met for such a brief to be deemed admissible by the Tribunal. The first is that a brief will only be admitted if it assists in determination of a factual or legal issue [*ICSID Rules, Rule 37(2)(a)*], which, in the present matter, has been satisfied as the Gondwandan government can give uniquely authoritative information regarding the policy considerations behind the Bill [*Clx No. 2*] and information on the future of public policy considerations.

[11] The second is that the brief must address a matter within the scope of the dispute [*ICSID Rules, Rule 37(2)(b)*], which has presently been satisfied as the Gondwandan government explicitly communicated that the brief would provide information on public policy regarding public health [*Letter from Malcolm Reynolds, p32*] which could impact enforceability of an award in favour of the claimant [*PO No. 1, p. 34(5)(d)*].

[12] The third and final requirement is that the party seeking to admit a brief must have a significant interest in the proceeding [*ICSID Rules, Rule 37(2)(c)*], and presently, this has been satisfied because it has been communicated by the Gondwandan government that it fears if Gondwandan public policy is ignored that it would have a ‘deleterious impact’ on the sale, promotion and consumption of tobacco products in Gondwana [*Letter from Malcolm Reynolds, p. 33*]. It is therefore clear that the amicus curiae brief should be admitted so that the arbitral tribunal’s decision is a full informed one.

2. UNCITRAL Rules

[13] These rules contain a broad provision for arbitral tribunals to conduct arbitrations in any way that they see as appropriate, providing that the process remains fair and equal [*UNCITRAL Rules, Art 17(1)*]. This mirrors the broad power granted to the tribunal and equally limitation within the Model Law [*ML, Art 19(2); ML, Art 18*]. The aforementioned provision in the UNCITRAL Rules has been broadly interpreted to allow for amicus curiae briefs to be admitted in the past to assist in issues of public concern [*Waincymer, p.603/The Methanex Case*].

[14] The arbitral tribunal should apply the same broad interpretation of their discretionary power to admit the Gondwandan government's amicus curiae brief. As this information will assist greatly in the determination of how an award may impact Gondwana's public policy, it cannot be suggested that an inequality is created by assisting the arbitral tribunal to have access to factual information that impacts on the enforceability of an award specifically addressing the public policy links between public health interest and tobacco sales in Gondwana.

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

[15] RESPONDENT submits that the Tribunal lacks jurisdiction to hear the dispute and subsequently issue an enforceable award because the negotiation tier of Clause 65 was not performed by the parties [*SOD, p. 25, para. 7*] **[1]**; and an arbitral award against RESPONDENT would be contrary to Gondwandan public policy [*SOD, p. 26, para. 1, 11*] **[2]**.

1. Award must be set aside for breach of arbitral procedure agreed to by both parties

[16] Both CLAIMANT and RESPONDENT negotiated the terms of the DA and specifically the dispute resolution article at Clause 65. The negotiation pre-condition provides for a mandatory period within which the parties must resort to negotiation to resolve disputes between them [*Clx 1, p. 11*]. RESPONDENT submits that breach of this essential provision should automatically result in the remainder of the clause being inoperable due to both the failure of performance of the negotiation tier and further; the discretionary language used in the arbitration agreement, which CLAIMANT purports, is a valid agreement.

Both the ML and NY Convention provide recourse for an aggrieved party to have an award set aside if a Tribunal does not follow the agreed arbitral procedure, as is the case in the present matter. Both ML and NY Convention provide recourse by way of identical provisions [*ML, Art. 36(1)(iv); NY Convention Art.* 5] which states *inter alia* that:

> Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only at the request of the party against whom it is invoked, if that party furnishes proof to the competent court where recognition or enforcement is sought proof that the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

[17] This has been applied broadly including in an arbitration where it was held that the refusal to hold a hearing does not prevent the enforcement of an award, where the applicable arbitration rules give the tribunal discretion to do so [*CLOUT case No. 371*]. As the language of the negotiation precondition is mandatory, and observance of the parties' dispute resolution clause is provided for in the applicable rules, the Tribunal does not have discretion to enforce an award if it hasn't observed the parties duty to perform the negotiation hearing. Accordingly, RESPONDENT submits that any award issued to CLAIMANT in violation of the parties agreed negotiation precondition constitutes a breach of arbitral procedure.

2. Any award issued against RESPONDENT would be contrary to Gondwandan public policy

[18] RESPONDENT submits that any award rendered in favour of CLAIMANT would be unenforceable because it would not be recognised in Gondwana on the basis that such an award would be contrary to Gondwandan public policy. CLAIMANT conceded itself that Bill 275 was a 'far-reaching reform to tobacco regulation in Gondwana' [*App. for Arb. p. 4, para. 10*] and further, was supplied with a copy of the proposed amicus curiae brief which outlined that 'the Gondwandan government is fulfilling its duty to citizens by implementing regulations that will safeguard the public health and prevent further casualties in the future.' RESPONDENT submits that CLAIMANT is aware that Gondwandan public health policy is paramount to the interests of the RESPONDENT state and thus, would acknowledge that any award rendered to it by a Tribunal would conflict with that interest.

[19] It is settled that states hold an inherent sovereign power to regulate items in the public interest and that such laws provide for refusal of enforceability of private arbitral awards [*Peng Wang p. 24; Rabi Abdullahi v. Pfizer, Inc.*].

[20] In the 2006 US Second Circuit Court of Appeal case of *Rabi Abdullahi v. Pfizer, Inc.*, it was held that, 'federal courts retain a limited power to "adapt the law of nations to private rights" by recognizing "a narrow class of international norms" to be judicially enforceable through our residual common law discretion to create causes of action.' RESPONDENT submits that its State would be enabled to disregard the private rights of CLAIMANT in favour of the public health of its citizens, which accords with the narrow class of international norms referred to in *Rabi Abdullahi v. Pfizer, Inc.*

UNIT 4: THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT ARE VITIATED BY GODWANDAN TOBACCO LEGISLATION

[21] RESPONDENT submits that the changed political and regulatory climate in Gondwana vitiated the contract and therefore rendered the DA between the parties impossible to perform [*SOD, p. 26*]. RESPONDENT submits that the Gondwandan government's new, more stringent regulations classify as an exemption of liability for damages [*CISG, Art. 79*].

[22] In establishing its performance exemption, RESPONDENT submits that it satisfies the requirements under Art. 79 of CISG in that its failure to perform: was due to an impediment which was beyond its control **[1]**; it could not reasonably be expected to have taken the impediment into account or to avoid or overcome the impediment or its consequences **[2]**; and that the impediment was the cause of the failure to perform [*Honnold, 432.1, p. 483*] **[3]**.

1. Gondwandan tobacco legislation constitutes an impediment

[23] Art. 79 of the CISG does not provide a definition for the term 'impediment' however, the members of the CISG Working Group have deemed the term 'impediment' to constitute an insurmountable obstacle which is a totally unexpected event and makes performance excessively [*CISG AC 7, p. 8*]. Further, Art. 79 commentary confirms that impediment relates to situations where a party's performance has become extraordinarily burdensome [*Honnold, 423, p. 472; Tallon, 2.6, p. 578; Schwenzer, p. 715*].

[24] RESPONDENT submits that the Gondwandan legislation constitutes an extraordinary burden and this accords with case law confirming that Acts of public authorities may be deemed an impediment when the elements of Art. 79 are satisfied [*Bulgarian Chamber of Commerce and Industry Award No. 56*].

1.1 Hardship as an impediment

[25] In the event the Tribunal does not accept that a change in the Gondwandan law may be considered an impediment under Art. 79, RESPONDENT submits that economic hardship impeded its ability to perform the DA. It is now widely accepted that both physical and economic impossibility can exempt a party from liability for damages. Economic impossibility arises when there is a change in economic circumstances that affects the performance of the contract [*Honnold, 432.2, p. 485*].

[26] In this matter, RESPONDENT submits that the significant decline of sales of cigarettes, in addition to the requirement to pay a twenty percent premium on goods that have essentially been commoditised results in a comparable unfairness between the parties amounting to economic hardship [*Clx 6, p. 18*]. Between 1 January 2013 and 1 June 2013 the tobacco industry in Gondwana experienced an average thirty percent decline in sales through all channels and the CLAIMANT itself suffered a loss of an approximate twenty-five percent in sales compared to the previous year [*App. for Arb., p. 5*].

1.2 Gap-filling and the CISG

[27] Although the aforementioned circumstances have been held to constitute an impediment under Art. 79, the Tribunal may not be satisfied with these definitions and accordingly it will be necessary to resort to gap filling as per Art. 7(2) of the CISG.

If the CISG applies then in pre-empts other, potentially applicable domestic rules. But if the question cannot be settled, the alternative is to resort to domestic legal rules [*CISG AC 7, p.10*].

[28] The majority of modern commentators accept the doctrine of *rebus sic stantibus*. This doctrine has been further translated into the legislation under a host of related concepts [*CISG AC 7, p.8*]. On the international level, a number of international awards have also applied the doctrine of *rebus sic stantibus* as a general principle of international trade. Of more particular relevance, rules dealing with *force majeure* or hardship have been incorporated into the Uniform Sales Law, the CISG and the UNIDROIT Principles of International Commercial Contracts (2010) ('UNIDROIT Principles').

[29] Under these doctrines a change in legal circumstances, regulations or state intervention constitutes an impediment, therefore if the Tribunal finds that definitions under Art. 79 of the CISG are not definitive enough, domestic and other international instruments support the RESPONDENT'S submission [*Honnold, 423, p. 472; Schwenzer, p. 1071*].

2. The impediment was unforeseeable

[30] The RESPONDENT is responsible for an impediment which lies outside of its sphere of control if it could reasonably have been expected to have taken it into account at the time of the conclusion of the contract [*Schwenzer, p. 1068*]. In this matter, the RESPONDENT could not have foreseen that the Gondwandan government would introduce Bill 275. When the DA was negotiated in 2010, the Gondwandan government had already introduced packaging restrictions in 2009. The RESPONDENT did not foresee or even consider that new, stricter regulations would be implemented within the life of the current DA. As a result, when negotiating the 2010 DA, the parties were not concerned about whether the products in question would be prohibited in the future [*RSOD, p 26*].

3. The impediment was unavoidable

[31] Even an impediment that the RESPONDENT could not have taken into account when concluding the contract does not exempt it if overcoming the impediment or its consequences is both possible and reasonable for it. An exemption may only be granted when the ultimate 'limit of sacrifice' has been exceeded [*Schwenzer, p. 1069*]. RESPONDENT submits that it was unable to avoid the impediment, as it must abide by Gondwandan law otherwise it risks sanction [*Clx 8, p. 20*].

4. The impediment was the cause of the failure to perform

[32] Exemption of RESPONDENT under Art. 79 of the CISG requires that the unforeseeable and insuperable impediment is the sole reason for the failure to perform. However, RESPONDENT remains liable if a breach of contract is a concurrent cause of the failure to perform. It is clear that the change in Gondwandan law was the cause in the termination of the contract as demonstrated in the letter to the CLAIMANT dated 21 March 2011 [*Clx 3, p15*] and the letter to the CLAIMANT dated 11 March 2013 [*Clx 6, p18*]. Furthermore, there was no concurrent reason for termination.

5. Liquidated Damages Clauses

[33] If the non-performance is due to an impediment that fulfills the conditions set forth in Art. 79(1) of the CISG, RESPONDENT is relieved from its obligation to pay damages. This includes liquidated damages as well as penalties, unless the parties have provided otherwise in their contract [*Schwenzer, p. 720*].

PRAYER FOR RELIEF

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

1. Find that it does not have jurisdiction to hear and determine CLAIMANT's request for arbitration;
2. Allow the Gondwandan government's amicus curiae brief to be admitted as evidence;
3. Determine that any award issued to CLAIMANT would be unenforceable;
4. Find that RESPONDENT's obligations under the agreement are vitiated by the Gondwandan government's tobacco legislation

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