5TH INTERNATIONAL ADR MOOTING COMPETITION

28 JULY-02 AUGUST 2014

HONG KONG

Before China International Economic and Trade Arbitration Commission (CIETAC), for Arbitration between

CLAIMANTS	**RESPONDENTS**
Conglomerated Nanyu Tobacco Ltd	Real Quik Convenience Stores Ltd

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LIST OF ABBREVIATIONS

CISG: United Nations Convention on International Sale of Goods

UNIDROIT: Institut International Pour L'Unification du Droit Prive (*French: International Institute for the Unification of Private Law*)

UNCITRAL: United Nations Commission On International Trade Law

CIETAC: China International Economic and Trade Arbitration Commission

INDEX OF AUTHORITIES

UNCITRAL MODEL LAW

Article 16(1)

Article 16(2)

UNIDROIT PRINCIPLES

Article 3.2.7

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Article 6.2.3 (4)(a)

STATEMENT OF FACTS

1. It is submitted that Conglomerated Nanyu Tobacco Ltd., a company incorporated under the laws of Nanyu, is the Claimant and Real Quik Convenience Stores Ltd., a company incorporated under the laws of Gondwana, is the Respondent. Conglomerated Nanyu is the largest producer of tobacco in Nanyu which incepted in 1994. Conglomerated has a big market in Gondwana and other parts of the World as well. Real Quik is one of the fastest growing convenience stores chain in Gondwana. Formed in 1999, Real Quik is estimated to have over 70% market share in Gondwana's convenience store sector. The Claimant has appointed the Respondent as its Distributor in Gondwana since 2000. The parties usually signed 10 year agreements and the last agreement between them was a 10 year agreement signed on 14 December 2010. The terms of the Agreement included provisions for fixed price of the products, prominent counter space for display of products, supply of free promotional materials to Respondents for use in counter displays, providing of promotional merchandise for Respondent to sell in its stores. Also, the Respondent was obligated to pay a 20% price premium for all of the Claimant's products as opposed to its competitors.

2. Conglomerated Nanyu Tobacco applied for Arbitration to the Hong Kong sub-commission of CIETAC (China International Economic and Trade Arbitration Commission) on 12 January 2014, under the Arbitration Clause (Clause 65 of the Distribution Agreement) and under CIETAC Arbitration Rules, against the Respondents. The Claimants applied for the recovery of the claimed amount of USD$ 75,000,000, to be recovered under Clause 60.2 of the Distribution Agreement.

3. The Respondents denied any such right to the Claimants and contended that the contract frustrated as they could not legally perform their duties and obligations under the contract after the transformation of Bill 275 into an Act of Parliament in Gondwana whose violation could result in civil and penal sanctions on the Respondents. They also challenged the jurisdiction of the Arbitration Tribunal pursuant to 12 month requirement under Clause 65 of the Distribution Agreement.

4. The events that ensued after the agreement led to such dispute between the parties. After the Agreement in 2010, a bill was tabled in the Parliament by a Gondwandan senator (Bill 275/2011) commonly known as "Clean our Air" Bill. The Gondwandan government had been keen on reforming tobacco laws. Starting in 2001, the government began to enforce stricter regulations on sale and use of tobacco products. In 2002, new packaging requirements were introduced which required warning labels on all tobacco products. Year 2004 led to a national ban on smoking indoors. In 2005, a further ban on smoking in public areas was implemented by the Gondwandan government. The last regulation before the conclusion of the Agreement between the parties came in 2009 whereby the government expanded its packaging restrictions by adding further requirements on warning labels.

5. The Bill 275 was to introduce such reforms which were to render the contract incapable of being performed. The Bill imposed restrictions on packaging colour, logos/trademarks, identifying marks, etc. Further, aside from tobacco products themselves, any promotional merchandise (which was also a part of Distribution Agreement between the parties) would be subject to same restrictions.

6. The Bill met with opposition and no one believed it would pass the Senate, as shown by an article in Gondwandan Herald. However, the Bill passed into law on 13 April 2012. The Claimants challenged the constitutionality of Bill 275 in the Gondwandan Supreme Court, in April 2011, on the basis of intellectual property rights but their suit failed (judgment on 23 June 2011).

7. After the passage of the Bill, between 1 January 2013 and 1 June 2013, the tobacco industry in Gondwana experienced an average 30% decline in sales through all channels. The Claimant in particular suffered an approximate 25% decline in sales as compared to the same period in 2012.

8. On 11 March 2013, the Respondents expressed wish to renegotiate the contract after the coming into force of the new legislation. A meeting was subsequently held between the parties on 11 April 2013 but no agreement could be reached. On 1 May 2013, the Respondent notified the Claimant of the termination of the Agreement, to be effective from 1 June 2013. The Claimant sent a letter to the Respondent on 1 June 2013 claiming the amount of USD $ 75,000,000 as under Clause 60 of the Agreement which provided for such compensation if the Respondent terminated the Agreement. The Respondent did not reply. On 1 July 2013, the Claimants issued the first Notice of Default to the Respondents, and a final Notice of Default was issued on 2 August 2013. The Respondent did not respond until this time and on 2 September 2013, the Claimants issued a pre-action demand letter to the Respondents threatening to use Clause 65 of the Agreement in case of default. The Respondent replied on 26 September 2013, writing that the termination was due to factors outside the control of the Respondent and thus the Respondent was not liable under Clause 60 of the Distribution Agreement.

LEGAL SUBMISSIONS

On Jurisdiction

A. *The Tribunal has no jurisdiction to decide the case*

1. At the outset the Respondents submit that the Tribunal should make a decision on its own competence to decide this case. Article 16 of the UNCITRAL Model Law states,

> *16 (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.*
>
> *(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal Is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.*

2. It is further submitted that in line with the requirements of 16(2), an objection to jurisdiction was taken at the time of submission of statement of defence.

3. Clause 65 is a condition precedent to the arbitration. As per Clause 65 of the Agreement, which is reproduced below, both Parties can only submit an application

for arbitration after a period of 12 months has passed since the date on which the dispute arose. The Clause clearly outlines the process to be followed in case a dispute arises. It is submitted that there is no other justifiable construction of this Clause.

> *"In the event of a dispute, controversy, or difference arising out of or in connection with this Agreement, the Parties shall initially seek a resolution through consultation and negotiation.*
>
> *If, after a period of 12 months has elapsed from the date on which the dispute arose, the Parties have been unable to come to an agreement in regards to the dispute, either Party may submit the dispute to the China International Economic and Trade Arbitration Commission (CIETAC) Hong Kong Sub-Commission (Arbitration Center) for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties. The arbitration shall take place in Hong Kong, China. The arbitration shall be in the English language."*

4. Since the dispute between the Parties arose on 1st May 2013 (at the earliest), none of the Parties could have invoked arbitration before 1st May 2014.

B. ***Clause 65 is legally enforceable***

1. In case the Tribunal assumes jurisdiction to hear the matter, the Tribunal must give effect to an express term in the Agreement not to initiate arbitration during a specified time. Clause 65 clearly maintains that the Parties cannot invoke the jurisdiction of

arbitration unless a time period of 12 months has elapsed since the beginning of negotiations.

2. It was held in *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, **811 F.2d 326, 335-337 (7th Cir. 1987)** that parties to a mediation clause cannot be allowed to circumvent the clause simply by claiming that they had tried to achieve its purposes by other means.

On Merits

A. ***The Claimant is not entitled to the Termination Penalty as the Agreement has been Frustrated***

(i) Failure due to an Impediment

1. As per article 79 of CISG, the Claimants are not entitled to the Termination Penalty because the impediment was beyond the control of the Respondents. Article 79 states that

   (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

2. Several decisions have suggested that exemption under article 79 requires satisfaction of something in the nature of an "impossibility" standard. ***(Germany Oberlandesgericht [Appellate Court] Hamburg 4 July 1997)***. One

decision has compared the standard for exemption under article 79 to those for excuse under national legal doctrines of *force majeure*, economic impossibility, and excessive onerousness ***(Germany Hamburg Arbitration Award of 21 March / 21 June 1996).***

3. As a prerequisite to an exemption, article 79(1) requires that a party's failure to perform be due to an "impediment" that meets certain additional requirements (e.g., that it was beyond the control of the party, that the party could not reasonably be expected to have taken it into account at the time of the conclusion of the contract, etc...). One decision has used language suggesting that an "impediment" must be "an unmanageable risk or a totally exceptional event, such as *force majeure*, economic impossibility or excessive onerousness" (***Germany Hamburg Arbitration Award of 21 March / 21 June 1996***). Yet another decision indicated that a prohibition on exports by the seller's country constituted an "impediment" within the meaning of article 79 for a seller who failed to deliver the full quantity of goods, although the tribunal denied the exemption because the impediment was foreseeable when the contract was concluded (***Bulgaria Arbitration Award case No. 56/1995 of 24 April 1996***). The seller also claimed exemption for failing to deliver the goods (coal) because of a strike by its country's coal miners, but the court denied the claim because the seller was already in default when the strike occurred.

4. Other available decisions apparently have not focused on the question of what constitutes an "impediment" within the meaning of article 79(1). In those decisions in which a party was deemed exempt under article 79, the tribunal

presumably was satisfied that the impediment requirement had been met. The impediments to performance in those cases were: refusal by State officials to permit importation of the goods into the buyer's country (found to exempt the buyer, who had paid for the goods, from liability for damages for failure to take delivery); (***Russia Arbitration Award case No. 155/1996 of 22 January 1997***).

(ii) *Impediment 'beyond the control' of the party*

5. Furthermore, it is submitted that the 'Impediment' was 'Beyond the Control' of the Respondents. Government restrictions have always been found to be such class of Impediments. Thus a buyer that had paid for the goods was held exempt from liability for damages for failing to take delivery where the goods could not be imported into the buyer's country because officials would not certify their safety ***(Russia Arbitration Award case No. 155/1996 of 22 January 1997***). Similarly, an arbitral tribunal found that a prohibition on the export of coal implemented by the seller's State constituted an impediment beyond the control of the seller, although it denied the seller an exemption on other grounds ***(Bulgaria Arbitration Award case No. 56/1995 of 24 April 1996).*** Several decisions have focused on the issue whether a failure of performance by a third party who was to supply the goods to the seller constituted an impediment beyond the seller's control. In one decision, the court found that the fact defective goods had been manufactured by a third party satisfied the requirement, provided the seller had not acted in bad faith (***France Tribunal de Commerce [District Court] Besançon 19 January 1998***).

(iii) *Impediment could not reasonably have been expected at the time of contract and the party could not have avoided or overcome it*

6. It is clear from the facts of the case that the Respondents had no prior knowledge of Bill 275. Therefore, legally they could not have foreseen this impediment.

7. To satisfy the requirements for an exemption under article 79, a party's failure to perform must be due to an impediment that the party "could not reasonably be expected to have taken ... into account at the time of the conclusion of the contract".

8. In order to satisfy the prerequisites for an exemption under article 79(1), a party's failure to perform must be due to an impediment that the party could not reasonably be expected to have avoided. In addition, it must not reasonably have been expected that the party would overcome the impediment or its consequences.

(iv) *Requirement that failure to perform be "due to" the impediment*

9. In order to qualify for an exemption under article 79(1), a party's failure to perform must be "due to" an impediment meeting the requirements discussed in the preceding paragraphs. This causation requirement is satisfied in this case because the Respondents could not perform the Agreement because of the impediment.

B. Miscellaneous Submissions relating to Frustration of Agreement

1. As per Article 77 of CISG a party relying on breach of contract must take such measures as are reasonable in the circumstances. It is submitted that the Claimants aggravated the situation by their acts and/or omissions. All efforts to renegotiate the Agreement were also not accepted by the Claimants. Article 77 states that,

   A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

2. It is also argued that the Respondents provided notices of failure to perform to the Claimants within reasonable time, and therefore complied with all legal duties under the Agreement.

3. Moreover, as per Article 74 of CISG, the Claimants cannot claim USD 75,000,000/-.

4. Furthermore, it is submitted that there was Gross Disparity in the Agreement as it gave unfair advantage to the Claimants of 20% benefits in addition to all other benefits they were deriving from the Agreement. According to the UNIDROIT Principles Article 3.2.7, a party

   A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage.

5. The Claimants are also in violation of Article 5.1.3 of UNIDROIT Principles as they were expected to reasonably co-operate with the respondents after the promulgation of Bill 275. Claimants remained adamant to their position on 11 April meeting and even subsequently.

> *"Each party shall co-operate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations."*

6. The Claimants contravened Article 6.2.3 of the same Principles. The Respondents requested renegotiation pursuant to this article but the Claimants remained adamant in their stance and thus the Arbitration Tribunal is requested to terminate the contract using its powers under Article 6.2.3 (4)(a). The Article is reproduced below,

> *(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.*
>
> *(4) If the court finds hardship it may, if reasonable,*
> *(a) terminate the contract at a date and on terms to be fixed; or*
> *(b) adapt the contract with a view to restoring its equilibrium.*

7. The Respondents seek leave to raise further and additional arguments at the time of Arbitration.

RELIEF SOUGHT

In the event that the Tribunal finds that it has jurisdiction to decide on this dispute, the Respondent claims the following relief:

A. A declaration that this Tribunal has no jurisdiction to decide the dispute between the Parties;

B. Alternatively, a declaration that the Agreement has been frustrated; and

C. That due to the Agreement being frustrated, that the Respondent is not liable to pay any alleged termination penalty