

THE INTERNATIONAL ADR MOOTING COMPETITION 2014

July – August 2014

MEMORANDUM FOR RESPONDENT

TEAM CODE: 970R

ON BEHALF OF

Real Quik Convenience Stores Ltd.,

42 Abrams Drive,

Solanga,

Gondwana

RESPONDENT

AGAINST

Conglomerated Nanyu Tobacco, Ltd.,

142 Longjiang Drive,

Nanyu City,

Nanyu

CLAIMANT

TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	v
INDEX OF AUTHORITIES.....	vi
INDEX OF CASES AND AWARDS	xiv
ARGUMENTS.....	1
I. THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION TO HEAR THE CURRENT DISPUTE.....	1
<i>A. There was no consultation or negotiation.....</i>	<i>Error! Bookmark not defined.</i>
<i>B. The 12 month requirement was not observed.</i>	<i>Error! Bookmark not defined.</i>
II. THE TRIBUNAL SHOULD ADMIT THE GONDWANDAN GOVERNMENT’S AMICUS CURIAE BRIEF FOR CONSIDERATION DURING THE PROCEEDINGS.	2
<i>A. Public policy of Gondwana is involved in the proceeding.....</i>	<i>2</i>
<i>B.The Gondwandan State fulfils the conditions to be amicus curiae in this matter.</i>	<i>3</i>
III. THE RESPONDENT’S OBLIGATIONS UNDER THE AGREEMENT WERE VITIATED BY THE IMPLEMENTATION OF BILL 275 AND THE GONDWANDAN GOVERNMENT’S NEW, MORE STRINGENT REGULATIONS.	4
<i>A. There was an impossibility of performance of the Agreement.</i>	<i>5</i>

i) Bill 275 constituted an impediment beyond Respondent’s control.5

ii) Respondent could not have foreseen the impediment when the Agreement was concluded.....6

iii) The impediments and their consequences could not have been avoided.....6

a.Avoiding the impediment was beyond Respondent’s control.6

b.Overcoming the impediments’ consequences was equally impossible for Respondent.6

iv) Respondent is exempted from paying liquidated damages under Article 79(5) CISG.....7

B.Further performance of the Agreement would have been illegal. 7

i) Mandatory rules of Gondwana are applicable.7

ii)Performance would have infringed the mandatory rules of Gondwana.8

iii)Claimant is not entitled to liquidated damages.8

IV. IF THE TRIBUNAL WERE TO ISSUE AN AWARD IN FAVOR OF THE CLAIMANT, THERE WOULD BE A RISK OF ENFORCEMENT.....9

A. The DA is illegal as it is contradictory to Bill 275.9

B. An award in favor of the Claimant would be against public interest and sovereignty of Gondwana..... 10

RELIEF REQUESTED..... 11

LIST OF ABBREVIATIONS

¶	Paragraph
Bill 275	Bill 275/2011
<i>Cl.</i>	Claimant's
Claimant	Conglomerated Nanyu Tobacco Ltd.
Clarifications	Procedural Order No.2
DA/the Agreement	The Distribution Agreement, Claimant's Exhibit No.1
<i>Exh.</i>	Exhibit
<i>Ill.</i>	Illustration
<i>No.</i>	Number
<i>p.</i>	page
Parties	Conglomerated Nanyu Tobacco Ltd. and Real Quik Convenience Stores Ltd.
<i>Re.</i>	Respondent
Respondent	Real Quik Convenience Stores Ltd.
<i>SoD</i>	Statement of Defense
the Bill/ Bill 275	Bill 275/2011
the State	State of Gondwana

the Tribunal

The Arbitral Tribunal

Sec

Section

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ARGUMENTS

I. THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION TO HEAR THE CURRENT DISPUTE IN LIGHT OF THE 12 MONTH PERIOD STIPULATED IN DA.

1. The Parties, pursuant to Clause 65 of the DA, had agreed to try amicable means of consultation and negotiations for 12 months only on failure of which, arbitration could be resorted to. In the following, it shall be established that the Tribunal lacks jurisdiction due to non-compliance with pre-arbitration requirements.

A. The ‘12 month requirement’ not observed.

1. Claimant has filed the AfA before the stipulated 12 months for consultation and negotiation [*AfA, p.1*] thus violating the principal of *pacta sunt servanda* that requires agreements to be respected [*Transnational Rules*] and is the basis of contractual relationships [*Sapphire case*]. Such requirements would not be an obstacle to jurisdiction only when consultations have been throughout the stipulated time period, without resulting solution [*Alps case*]. CIETAC, it has been observed, is increasingly imposing mandatory, pre-arbitration requirements on parties [*PepsiCo case*]. Tribunal lacked jurisdiction because such consultation requirements were not adhered to before arbitration was initiated [*PepsiCo case; Thorpe/Sun, p.6*]. It also trivializes the ‘cooling off period’ [*Murphy case*].
2. The meeting held on April 11, 2013 does not constitute negotiation on the part of the parties. The definition of negotiation [*Black’s Law Dictionary*] implies the need for compromise by both Parties to reach an amicable resolution and Claimant

refused to negotiate [Cl.Exh.No.7]. Therefore, there was no intent as regards Claimant, hence effectively defeating the purpose of the negotiations requirement.

B. Respondent deprived of opportunity to redress problems itself.

3. A purposive approach is taken to the interpretation of negotiation requirements, holding that the rationale of the clause is “to avoid that a party be brought before a Tribunal all of a sudden...” [Alps case]. This also trivialises the cooling off period [Murphy case], jeopardising party autonomy all of a sudden.
4. Respondent was deprived of the “opportunity to redress problems before arbitration” [Burlington case] and therefore Tribunal lacks jurisdiction [Ludvig, ¶ 4] because this serves to be a mandatory requirement before initiating arbitration proceedings, which was not fulfilled [Honlet, ¶ 17].

II. THE TRIBUNAL SHOULD ADMIT AMICUS CURIAE BRIEF FOR CONSIDERATION DURING THE PROCEEDINGS.

5. The Gondwandan government’s *amicus curiae* brief must be admitted by the Tribunal in the present matter because it fulfils the criteria for such an admission as has been observed in arbitration proceedings over the years [Article 15, UNCITRAL Rules].

A. Public policy of Gondwana is involved in the proceeding.

6. *Amicus curiae* have a role to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the parties litigating may not be able to provide [Schliemann, p.371; UPS case]. In the case of *Methanex*, the Tribunal interpreted Article 15(1) of the UNCITRAL Rules of 1976 as giving power to accept *amicus curiae* briefs.

7. It is further submitted that, in cases involving issues of public interest, courts have accepted the intervention of *amicus curiae* [*Gomez, p.544*]. In the case of *Vivendi* when an *amicus curiae* petition was made, it was held that such submissions must be admitted as the arbitration would involve public interest, based on the conditions laid down in the *InterAguas case*. The Tribunal further noted that matters involving public interest trump obligations of the party that are under dispute.
8. In the present matter, it is “not simply a contract between private parties where the *amicus curiae* would be an officious intermeddlers” [*InterAguas case*] but a contract that involves performance of illegal acts in Gondwana and the issues related to public health. Importantly, even Respondent terminated the DA due to the contradiction of its obligations with the new Bill which was introduced in public interest. Therefore, Respondent chose to give priority to public interest over its contractual obligations as was the case in *Vivendi* where *amicus curiae* submission was allowed.

B. The Gondwandan State fulfils the conditions to be *amicus curiae* in this matter.

9. It has been observed in the *InterAguas case* that those non-parties are accepted as *amicus curiae* that have the expertise, experience and independence to be of assistance in a particular case. Both the parties would undoubtedly agree that the Gondwandan State herein fulfils these three conditions.
10. Further, the lack of definition of the term “public policy” under the Convention implicitly allows enforcement States to define it [*Fry, p.93, ¶ 22*]. The very use of the phrase “...of the country” in Article V(2)(b) of the Convention allows enforcement States to define public policy and thus retain a measure of control over international arbitrations [*Junker, p.228*]. It must be accepted by the Tribunal that there can be no better judge of public policy of a country other than the country itself. The purpose, aims and goals of Bill 275 that conflicts with the DA are best known by the framers of

the Bill themselves that is the Gondwandan State. Therefore, the State can provide expertise in this matter that neither of the parties can offer.

11. The Gondwandan State is also an independent non-party as it only seeks to submit a very straightforward brief that merely exhibits the effect of an award in favour of Claimant. The award will have a deleterious impact on the sale, promotion and consumption of tobacco products in the state of Gondwana. The *amicus curiae* brief would only focus on the issues that affect the Gondwandan people and sovereignty hence maintaining its independence [*Hollis*]
12. It must be accepted by the Tribunal that the DA required Respondent to perform acts against Gondwandan law and State goal of improving public health by curbing smoking among the youth. Passing an award in favor of Claimant would not only be contrary to Gondwandan public policy but also infringe upon sovereignty of the State. The imposition of the Tribunal's own interpretation of Gondwandan public policy and law would be nothing less than an interference with the affairs of the State. Thus, the Tribunal must not decide the present dispute without the State's *amicus curiae* submissions.

III. THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE VITIATED BY THE IMPLEMENTATION OF BILL 275 AND THE GONDWANDAN GOVERNMENT'S NEW, MORE STRINGENT REGULATIONS.

13. The changed political and regulatory climate in Gondwana rendered the Agreement impossible to perform A. and further performance of the Agreement would have been illegal B.

A. There was an impossibility of performance of the Agreement.

14. Respondent is exempted under Article 79, CISG if the failure to perform is due to an impediment which is beyond its control [1] unforeseeable [2] and unavoidable [3] [Schlechtriem/Schwenzer, p.1067, ¶10]. Respondent is consequently exonerated from liability for damages under Article 79(1) CISG [4]. Furthermore, Respondent notified Claimant in accordance with Article 79 (4) CISG [5].

i) Bill 275 constituted an impediment beyond Respondent's control.

15. "Impediment" covers restraints of princes [Comment to PECL] and governmental actions [11th Cir. 1982]. State interventions preventing performances lie outside the parties' sphere of control [Schlechtriem & Schwenger, p. 1071]. Neither party will incur any liability to the other if its performance under the agreement is prevented by any new law, rule, regulation or ordinance [Bund]. A prohibition on the export of coal implemented by the seller's State constitutes an impediment beyond the control of the seller [Coal case]. Similarly, a buyer was exempted from liability for failing to take delivery where the goods could not be imported into the buyer's country because of safety issues [Butter case].

16. Respondent could no longer perform its obligations under the Agreement due to Bill 275. The performance has become excessively onerous for Respondent and it qualifies as an impediment under Article 79(1) CISG [AC 7, ¶3.1]. Standardized packaging decreased the sales. But Respondent had to continuously purchase tobacco products from Claimant resulting in increased levels of inventories. There was no longer any demand and the prices were expected to fall [Chantler, p.45], so paying 20% premium on tobacco products increased the burden of performance of the contract in a disproportionate manner which exempts Respondent under Article 79 (1) CISG [Scafom v Lorraine].

ii) Respondent could not have foreseen the impediment when the Agreement was concluded.

17. Intervening government actions prohibiting performance are the events whose non-occurrence is assumed by the parties [*Bussel*]. The Agreement between the parties was negotiated in 2010 when nobody thought that new, stricter regulation would be implemented within the life of the current Agreement [*Re.Exh.No.1*]. Consequently, the parties were not concerned with regulation of tobacco products in the future. Importantly, Claimant itself was unable to foresee this impediment. It mentioned that similar legislations in other regions have failed to pass and felt that there was no real risk of change in law [*Cl.Exh.No.4*]. Even Gondwanda Herald, a leading newspaper [*Clarifications*] published that it was very unlikely that the new bill will pass [*Re.Exh.No.1, Cl.Exh.No.5*]. Thus Respondent could not have taken the impediment into account when the Agreement was concluded.

iii) The impediments and their consequences could not have been avoided.

a. Avoiding the impediment was beyond Respondent's control.

18. It was impossible for Respondent to avoid the impediment as Bill 275 was directed against all manufacturers, distributors and retailers of tobacco products located in Gondwana. Second, since the Gondwanda government had upheld the constitutionality of Bill 275 [*Re.Exh.No.2*], any further query by Respondent could not have been successful. Therefore it was not possible to overcome the impediment.

b. Overcoming the impediments' consequences was equally impossible for Respondent.

Pursuant to the new Bill, Respondent had to obey the new packaging requirements and withdraw promotional merchandise from their retail outlets. As a result, the sales for the tobacco products dropped significantly and Claimant's products were

commoditized due to required standard packaging (*SoD, p.26*). These consequences could not have been avoided without disregarding Gondwandan law.

i) Respondent notified Claimant in accordance with Article 79(4) CISG.

19. The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform under Article 79(4) CISG. Respondent repeatedly gave sufficient notice of the impediment and its effects and raised these concerns with Claimant in a meeting on April 11, 2013 (*ReExh.No.3, Cl.Exh.No.7*).

iv) Respondent is exempted from paying liquidated damages under Article 79(5) CISG.

20. A party who is excused under Article 79(1) is not liable to pay damages under Article 79(5) CISG. As Respondent is excused under Article 79(1), Respondent is exempted from paying damages under Article 79(5) despite the liquidated damages clause in the Agreement. A liquidated damages clause agreed upon by the parties should be given exempted because damages include ‘liquidated damages’ [*Liu*].

B. Further performance of the Agreement would have been illegal.

21. It is undisputed that for the matters not governed by CISG, UPICC 2010 can be applied. CISG does not deal with the substantive requirements for a valid contract [*Schlechtriem/Schwenzer, p.76*]. In the following, it will be established that [1] Domestic law of Gondwana is applicable; [2] the performance of the obligations would have infringed these rules; and [3] Claimant is not entitled to liquidated damages.

i) Mandatory rules of Gondwana are applicable.

22. Bill 275 was passed as a specific legislation and mentioned the words like ‘must and shall’ [*Article 1.4, Comment 2*]. The parties have to look at the laws of the place

where the contract is to unfold its effect [*Vogenauer & Kleinheisterkamp, pp.130-132*]. Thus it should be applied because there is a sufficient close connection between Gondwana and the Agreement in question [*Article 1.4, Comment 4*].

ii) Performance would have infringed the mandatory rules of Gondwana.

23. A contract infringes mandatory rules by its performance. Performing the contract notwithstanding a supervening embargo on the import of contracted equipment infringes mandatory rules [*Article 3.3.1, Ill.6*]. Bill 275 strictly prohibited the sale of any promotional items, but Respondent was contractually obligated to sell such items. So, the performance of the Agreement in the instant matter, as a result of supervening legislation, would have infringed Bill 275.

iii) Claimant is not entitled to liquidated damages.

24. Claimant may content its right to exercise contractual under Article 3.3.1(2) UPICC. However it is submitted that the criterion to determine the remedy under the same provision will not entitle Claimant to liquidated damages under the Agreement.

25. The determining criterion under Article 3.3.1(3) UPICC are the purpose of the mandatory rule infringed, category of persons to be protected by the rule infringed, the seriousness of the infringement and performance of the contract necessitating the infringement. Awarding damages would mean that Respondent should have performed its obligations to avoid damages. But that would have frustrated the purpose of the new law which intended to reduce tobacco smokers [*Article 3.3.1, Ill.11*]. The new Bill was not targeted towards any specific category but health of Gondwandan population at large [*Article 3.3.1, Ill.12*]. Further, the performance of contract would have resulted in infringement of the rules as obligations to be performed were in direct contravention to what was required by the law. Thus Claimant should not be awarded any remedy.

IV. IF THE TRIBUNAL WERE TO ISSUE AN AWARD IN FAVOR OF THE CLAIMANT, THERE WOULD BE A RISK OF ENFORCEMENT.

26. An award in favour of Claimant would be at a grave risk of enforcement under Article V(2)(b) of the Convention because it would be contrary to the public policy of Gondwana, on the following grounds:

A. The DA is illegal as it is contradictory to Bill 275.

27. The public policy exception prohibits courts from enforcing illegal contracts or contracts that while not illegal per se, are against public interests [*Maloy, p.1143*]. Further, arbitration awards arising from such contracts would be unenforceable as the same principle would invalidate such awards [*Hurd case*]. One must consider that illegality, where operative, acts as a defence to the general right, such as a valid claim for damages for breach of contract or an action for the agreed price, that a party would otherwise have to enforce a contract [*Spry, p.143*].

28. In the case of *Soleimany*, the Tribunal had found that the contract was illegal and engaged public policy and hence the court was right in refusing enforcement of the award which entailed an illegal contract. In the present matter, the Bill is aimed at improving public health by reducing sales of tobacco by diminishing the brand value and attractiveness of the same or in effect ‘commoditizing’ tobacco. It also imposes a ban on sale of branded merchandise that promote sale of branded tobacco indirectly. [*Sec.21,Bill 275/2011; Cl.Exh.No.2*]. The DA, on the contrary, requires Respondent to provide prescribed shelf space to Branded Merchandise and Tobacco Products [*Clause2,DA;Cl.Exh.No.1*] and utter disregard for the governmental regulations has been shown by Claimant [*Cl.Exh.No.7*].

29. When a valid contract is entered into, but a change in the law or the political situation of the State renders performance illegal then the event is one of supervening illegality

[*Biukovic, p.6*]. An award for money due under an indisputably illegal contract is not enforceable as it is contrary to public policy that the arbitrator should ignore palpable and undisputed illegality [*Westacre case*]. The reason for this being that such a change in laws or circumstances would frustrate the contract itself [*Fraser case*]. In such a case, the mere performance of the obligations listed in the contract would lead to illegal act(s) and therefore performance must be prohibited. [*Lemenda case*]. Practically the contract would be dissolved because performance of the contract legally is impossible [*AJU case*].

30. Therefore, passing an award in favour of Claimant entails ignorance, by the Tribunal, of the illegality of the DA which is unfair to Respondent as the latter is the one at monetary loss as well, having bought consequently illegal Branded Merchandise.

B. An award in favor of the Claimant would be against public interest and sovereignty of Gondwana.

31. The scope of the term “public policy” has not been defined in the Convention however the recommendation of the International Law Association [*ILA Resolution*] are increasingly being regarded as reflective of best international practice. [*ICCA’s Guide*]. Clause 1(d)(ii) of the same, states that international public policy of a State would be used to designate the rules designed to serve the essential political, social or economic interests of the State. It has further been stated in *Kromback* that the public policy exception would be granted if the “infringement constitutes a manifest breach of a rule regarded as essential in the legal order of the State where enforcement is sought”.
32. The Gondwandan government has passed the Bill to curb the menace of smoking that is prevalent among Gondwandan youth. Keeping this in view, the DA is a blatant

contradiction to a mandatory rule of Gondwana and hence would be against public policy Gondwana [*Kromback case*].

33. Tobacco consumption has been seen to be the leading cause of death in the world and the State has taken up “tobacco control and restriction as keystone” in its public policy. Imposing the Disputed Sum on Respondent would mean enforcing a contract that violates public policy of Gondwana [*Renusagar case*].

34. Merely because a consequence of penalty has been specified in DA, does not mean that on occurrence of the requisite event, consequence will follow without application of mind. It is the duty of the Tribunal to pass an award that is enforceable [*ICCA Congress Series*], and an award in contravention to the public policy of Gondwana or in favour of Claimant would be at a risk of being rendered unenforceable by courts.

RELIEF REQUESTED

In light of the arguments advanced Respondent requests the Tribunal to find that:

- A. the Tribunal does not have jurisdiction to deal with this dispute;
- B. the Gondwandan government’s *amicus curiae* brief can be admitted;
- C. Respondent’s obligations under DA were vitiated by implementation of Bill 275 and therefore, Respondent is not liable to pay liquidated damages of USD \$75,000,000;
and
- D. if the Tribunal were to issue an award in favor of Claimant there would be risk of enforcement.