THE 5th INTERNATIONAL ADR (ALTERNATIVE DISPUTE RESOLUTION) MOOTING COMPETITION

MOOT PROBLEM 2014

27 July – 2 August 2014

City University of Hong Kong, Hong Kong

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12 January 2013
Secretariat
China International Economic and Trade Arbitration Commission (CIETAC)
6/F, CCOIC Building,
No. 2 Huapichang Hutong,
Xicheng District, Beijing, 10035,
People's Republic of China

Dear Ms. Secretary,

Application for Arbitration

I represent Conglomerated Nanyu Tobacco Ltd., and I am writing to you to submit our Application for Arbitration against Real Quik Convenience Stores Ltd. Enclosed, please find a copy of my power of attorney to represent Conglomerated Nanyu Tobacco Ltd. in this arbitration.

The total value of relief claimed in this arbitration is USD 75,000,000 plus interest and costs. In terms of RMB, at the exchange rate of the day of this letter of 6.05 RMB per USD, the claim is RMB 453,750,000. The Bank of Nanyu has already transferred the requisite arbitration fee in RMB to your account in Beijing.

The arbitration clause agreed between the parties provides that the seat of arbitration is Hong Kong, China, applying the CIETAC Rules and that the arbitration shall be conducted in English.

The Claimant nominates Ms. Sara Fan as its party-appointed arbitrator.

If anything further is required, please do inform me.

Sincerely,

Adam Mayfair

Attached:

Application for Arbitration for Conglomerated Nanyu Tobacco, Ltd.
Certified copy of Power of Attorney for Adam Mayfair

Application for Arbitration

Parties to the Arbitration

Claimant

Conglomerated Nanyu Tobacco Ltd., a company incorporated under the laws of Nanyu
Business address: 142 Longjiang Drive, Nanyu City, Nanyu
Head of Company: Marcus Chow, CEO
Tel: (902) 357 4298
Fax: (902) 358 4298
E-mail: info@nanyu.com

Respondent

Real Quik Convenience Stores Ltd., a company incorporated under the laws of Gondwana
Registered Address: 42 Abrams Drive, Solanga, Gondwana
Head of Company: Charles Mancuso, CEO
Tel: (916) 2465 9283
Fax: (916) 2466 9283
E-mail: contact@gondtel.com

Arbitration Clause

The Arbitration agreement relied upon by Conglomerated Nanyu Tobacco Ltd. to support the present Application for Arbitration is found in Clause 65 of the Distribution Agreement executed between Conglomerated Nanyu Tobacco Ltd. and Real Quik Convenience Stores Ltd., which reads as follows:

> "*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.*"

Facts

1. Conglomerated Nanyu Tobacco, Ltd. ("**the Claimant**") is the largest tobacco producers in Nanyu and has a global presence in the worldwide tobacco market. The Claimant has tobacco products in all segments of the tobacco industry and sells its product to convenience stores and specialist tobacco retailers all over the world.

2. Prior to the creation of Conglomerated Nanyu Tobacco Ltd., the tobacco industry in Nanyu was fragmented between various different tobacco growers and suppliers. However, since the formation of Conglomerated Nanyu Tobacco Ltd. in 1994, the tobacco production and supply in Nanyu has been consolidated. Tobacco production and supply in Nanyu now makes up a significant portion of Nanyu's export economy.

3. Real Quik Convenience Stores Ltd. ("**the Respondent**") is one of the fastest growing convenience store chains in the state of Gondwana. Formed in 1999, the Respondent now owns over 500 stores in Gondwana and is continually expanding. The Respondent is a dominant player and it is estimated that the Respondent has over 70% market share in Gondwana's convenience store sector.

4. The Claimant and Respondent will hereafter be referred to as "**the Parties**".

5. The Claimant and Respondent have a long-lasting business relationship. The Claimant has used the Respondent as a distributor since 2000, and the Respondent is one of the Claimant's largest and most important distribution channels in Gondwana. The usual practice between the Parties has been to sign 10 year Distribution Agreements whereby:

6. The last Distribution Agreement between the Parties was signed on 14 December 2010 ("**the Agreement**"). The Agreement is attached to this Application for Arbitration as **Claimant's Exhibit No. 1** and provided for, *inter alia*:

   a. The Claimant would sell all of its products to the Respondent to display and sell in the Respondent's stores at a fixed price;

   b. The Respondent would provide prominent counter space to display the Claimant's variety of products

   c. The Claimant would supply the Respondent with free promotional materials for use in counter displays;

   d. The Claimant would provide promotional merchandise for the Respondent to sell in its stores in the form of posters, t-shirts, lighters, keychains, and other miscellaneous items;

   e. The Respondent would ensure that the Claimant's merchandise would be prominently displayed within the Respondent's stores.

7. Considering the Claimant's dominant position in the worldwide tobacco market, the negotiated price in the Agreement was 20% higher than similar distribution agreements signed between the Respondent and other smaller tobacco companies or wholesalers.

8. Prior to 2000, there was little regulation over tobacco products. Smoking was prevalent in Gondwana, and it is estimated that roughly 35% of the population smoked some form of tobacco product and could be classified as a regular smoker.

9. Starting in 2001, the Gondwandan government began researching methods of curbing this percentage, and began to enforce stricter regulations on the sale and use of tobacco products. These regulations took place as follows:

    a. In 2002, the Gondwandan government implemented new packaging requirements which would require all tobacco packaging to carry warning labels detailing the harmful effects of smoking;

    b. In 2004, the Gondwandan government implemented a national ban on smoking indoors, preventing bars, restaurants, and other businesses from having smoking areas;

    c. In 2005, the Gondwandan government implemented a national ban on smoking in public areas, such as city parks;

    d. In 2009, the Gondwandan government expanded its packaging restrictions, now requiring that the mandatory warning labels include graphic images of diseased lungs and autopsies in an effort to discourage people from purchasing packaged tobacco products. Additionally, labels would now have to take up over 33% of any tobacco packaging.

10. On 14 March 2011, a Gondwandan senator introduced the "Clean our Air" Bill 275/2011 ("**Bill 275**"). Bill 275 would introduce far-reaching reforms to tobacco regulation in Gondwana. Among these reforms was the introduction of "plain packaging" requirements for all forms of tobacco. These requirements included, *inter alia*:

    a. All tobacco products would now be placed in generic olive green packaging designed by the governmental regulatory authorities;

    b. This generic packaging would eliminate all trademarks, images, designs, colors, and/or structural elements;

    c. The word "TOBACCO" would be printed in bold print on the front of all packaging, to be included with extensive warning labeling detailing the harmful effects of smoking;

    d. The only identifying mark for tobacco products would be the printing of the brand or company's name. Similar to the regulation of the design of the packaging, the printing of the brand or company name would be dictated heavily by governmental requirements;

e. Aside from tobacco products themselves, design of any promotional merchandise or any material that promoted smoking would be subject to similar requirements. No tobacco trademarks, images, designs, or other identifying brand marks would be allowed.

11. Bill 275 met with strong opposition from members of the Gondwandan Senate, and almost all major tobacco producers and distributors. Immediately after Bill 275 was introduced, demonstrations were held in front of the Senate building, and discussion about Bill 275 dominated press coverage for the next several weeks **(Claimant's Exhibit No. 5)**.

12. Despite the controversy, the Gondwandan Senate passed Bill 275 into law on 13 April 2012 by a vote of 52-49. The requirements as stated under Bill 275 subsequently entered into force on 1 January 2013. Bill 275 is attached to this Application as **Claimant's Exhibit No. 2**.

13. 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.

14. The need to create specific tobacco packaging that would comply with Gondwandan regulations also led to the Claimant incurring further developmental and manufacturing costs.

15. On 11 March 2013, the Respondent notified the Claimant that it wished to renegotiate the Agreement in the light of the new governmental regulations (**Claimant's Exhibit No. 6**). A meeting was subsequently held between the Parties' representatives on 11 April 2013. At that meeting, the Respondent noted that due to the elimination of all trademarks from Gondwandan tobacco packaging, that the Respondent no longer saw a need for the Claimant to require a 20% price premium over its competitors. However, the Parties were unable to come to an agreement and in the end the Agreement remained the same (**Claimant's Exhibit No. 7**).

16. On 1 May 2013, the Respondent notified the Claimant that it would no longer be able to perform its duties under the current Agreement, and that as a result it would be terminating the Agreement, effective from 1 June 2013 (**Claimant's Exhibit No. 8**). The Respondent noted that due to the new governmental regulations, it would be impossible for the Respondent to comply with provisions of the Agreement that required the Respondent to provide shelf and counter space for the Claimant's displays, and that it would be impossible for the Respondent to provide branded merchandise in compliance with the new regulations.

17. Pursuant to Clause 60 of the Agreement, if the Respondent was to terminate the Agreement prior to the expiry of the 10 year term, a liquidated damages clause would come into effect, providing for the payment of the sum of USD $75,000,000 to the Claimant ("**the Disputed Sum**"). The Claimant subsequently sent a letter to the

Respondent on 1 June 2013 notifying the Respondent that due to the early termination of the Agreement that it was required to pay the Disputed Sum. The Respondent did not provide any response.

18. On 1 July 2013, the Claimant issued its first Notice of Default ("**the 1st Notice**") under the Agreement noting that the Disputed Sum remained outstanding and that the Respondent was required to pay the Disputed Sum within 30 days. The Respondent did not provide any response (**Claimant's Exhibit No. 9**).

19. On 2 August 2013, the Claimant issued a final Notice of Default ("**the 2nd Notice**") under the Agreement and gave notice to the Respondent that if the Disputed Sum was not paid to the Claimant within 30 days that the Claimant would have to take action to reclaim the Disputed Sum (**Claimant's Exhibit No. 10**).

20. On 2 September 2013, the Claimant issued a pre-action demand letter ("**the Demand Letter**") to the Respondent indicating that unless payment of the Disputed Sum was made immediately, that the Claimant would initiate arbitration pursuant to Clause 65 of the Agreement (**Claimant's Exhibit No. 11**).

21. On 26 September 2013, the Respondent wrote back to the Claimant and stated that as the termination of the Agreement was due to factors outside of the control of the Respondent, namely the new governmental regulations preventing the sale of branded merchandise and the need for plain packaged tobacco products, that the Respondent was not liable for the payment of liquidated damages under Clause 60 of the Agreement. The Respondent also noted that under Clause 65 of the Agreement that the Parties were to undergo negotiation and consultation before arbitration could commence.

22. The Claimant argues that the Parties had already attempted to negotiate on 11 April 2013, and that as that negotiation was fruitless, there would be no point in waiting for a full 12 months after the dispute arose to submit its claim to arbitration. Furthermore, the need for negotiation and consultation was a procedural formality anyways, and does not affect the jurisdiction of the Tribunal to decide on the Disputed Sum.

Applicable Law

23. The relevant governing law clause is found in Clause 66 of the Agreement, which states:

> "*This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG), supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts 2010*."

24. Nanyu and Gondwana are both parties to the CISG and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**the New York Convention**"). All countries involved have adopted the UNCITRAL Model Law with the 2006 amendments.

Request for Relief

1. Liquidated damages in the sum of USD $75,000,000 pursuant to Clause 60 of the Agreement;

2. The Respondent to pay all costs of the arbitration, including the Claimant's expenses for legal representation, the arbitration fee paid to CIETAC, and the additional expenses of the arbitration as set out in Article 50, CIETAC Arbitration Rules;

3. The Respondent to pay the Claimant interest on the amounts set forth in items 1 and 2 above, from the date those expenditures were made by the Claimant to the date of payment by the Respondent.

Signed on the 12th of January, 2014

Adam Mayfair

Claimant's Exhibit No. 1

Distribution Agreement Excerpts

THIS AGREEMENT IS MADE THE 14TH DAY OF DECEMBER 2010

BETWEEN:

(1) Conglomerated Nanyu Tobacco Ltd., 142 Longjiang Drive, Nanyu City, Nanyu ("the Seller")

(2) Real Quik Convenience Stores Ltd., 42 Abrams Drive, Solanga, Gondwana ("the Buyer")

The Seller and Buyer together shall be referred to as "the Parties".

WHEREAS:

(I) The Seller provides licensed tobacco products in the form of:

a. The "Zeroes Gold" brand cigarette;
b. The "Zeroes Mild" brand cigarette;
c. The "Zeroes Super Light" brand cigarette;
d. The "Zeroes Menthol Blast" brand cigarette;
e. The "Duck" brand cigarette;
f. The "Nanyu Essence" brand cigarette;
g. The "Wild Johnny" brand flavored cigar in strawberry, apple, and mint flavors;
h. The "Rohaba" brand cigar in various sizes;
i. The "Super Chew" brand of chewing tobacco sold in various sizes;
j. The "Cyber-Smoke" brand of electronic cigarette; and
k. The "Cyber-Smoke" brand of liquid nicotine cartridges

Together known as the "Tobacco Products".

(II) The Seller provides branded merchandise in the form of:

a. "Zeroes", "Duck", and "Nanyu Essence" branded T-shirts and polo shirts;
b. "Zeroes", "Duck", and "Nanyu Essence" branded keychains;
c. "Zeroes", "Duck", and "Nanyu Essence" branded lighters;
d. "Zeroes", "Duck", and "Nanyu Essence" branded posters; and
e. Other "Zeroes", "Duck", and "Nanyu Essence" merchandise as developed by the Seller.

Together known as the "Branded Merchandise".

(III) The Buyer is desirous of purchasing the Seller's Tobacco Products and Branded Merchandise on a long-term basis for sale in its retail outlets.

NOW IT IS HEREBY AGREED as follows:

1. Sale and Purchase of Tobacco Products

1.1 The Seller agrees to sell to the Buyer, and the Buyer agrees to buy from the Seller, the Tobacco Products listed in this Agreement on the terms and subject to the conditions set out in this Agreement.

1.2 The Buyer commits to purchase from the Seller a minimum quantity of Tobacco Products according to the following:

a. Minimum quantity: 10,000,000 cartons and/or packages of Tobacco Products per year in any combination;

b. Fixed price as follows:

i. All “Zeroes” branded Tobacco Products at USD$5.00 per carton;

ii. All “Duck” branded Tobacco Products at USD $4.50 per carton;

iii. All “Nanyu Essence” branded Tobacco Products at USD $7.00 per carton;

iv. All “Wild Johnny” branded Tobacco Products at USD $5.00 per pack of three cigars;

v. All “Rohaba” branded Tobacco Products at USD $12.00 per cigar;

vi. All “Super Chew” branded Tobacco Products at USD $9.00 per package;

vii. All “Cyber-Smoke” branded electronic cigarettes at USD $20.00 per package;

viii. All “Cyber-Smoke” branded nicotine cartridges at USD $5.00 per pack of three cartridges.

c. Minimum interval: Purchase orders from the Buyer are to be received no later than 3 months (90 days) after the submission of the previous purchase order.

2. Sale and Purchase of Branded Merchandise

2.1 The Seller agrees to sell to the Buyer, and the Buyer agrees to buy from the Seller, the Branded Merchandise listed in this Agreement on the terms and subject to the conditions set out in this Agreement.

2.2 The Buyer commits to purchase from the Seller a minimum quantity of Branded Merchandise according to the following:

a. Minimum quantity: 2,000,000 Stock Keeping Units ("SKU") in any combination;

b. Fixed price as follows:

i. All branded t-shirts and polo shirts at USD $7.50 per shirt;

ii. All branded keychains at USD $0.75 per keychain;

iii. All branded lighters at USD $1.00 per lighter;

iv. All branded posters at USD $0.75 per poster.

c. The price of all Branded Merchandise not listed above shall be subject to negotiation between the Parties.

d. Minimum Interval: Purchase Orders from the Buyer are to be received no later than 3 months (90 days) after the submission of the previous purchase order.

25. Display Requirements

25.1 The Buyer shall display the Tobacco Products in all retail shops in a prominent location and in any event not less than 6 feet away from any register.

25.2 The Buyer shall provide space on the register counter whereby promotional material from the Seller may be displayed.

25.3 The Buyer shall provide shelf space in the main section of its retail shops in the direct vicinity of its tobacco products for display of all of the Seller's products. This shelf space shall not be less than 3 feet horizontal shelf space or 4 feet vertical shelf space.

25.4 All displays shall prominently display the Seller's logos and trademarks. No part of the display may be obscured.

25.5 All Branded Merchandise shall be prominently displayed within the immediate vicinity of the Tobacco Products.

25.6 The Seller shall provide all counter display and promotional display materials to the Buyer free of charge.

60. Termination

60.1 The Seller has the right to suspend or terminate this Agreement at any time if the Respondent substantially breaches a material obligation, representation, or warranty, including the failure to make any payment when it is due or the failure to provide a Purchase Order within the specified Minimum Interval. In the event of such a breach, the Seller shall provide the Buyer written notice of the breach and shall provide the Buyer a period of 30 days after receipt of the notice in which to either rectify or cure the breach or provide reasonable evidence that the breach did not occur;

60.2 The Buyer has the right to suspend or terminate this Agreement at any time by giving written notice to the Seller. In the event that the Buyer terminates this Agreement, it shall be liable to pay liquidated damages according to the following scale:

a. Within 0-3 years from the Date of Signature for this Agreement – USD $75,000,000;

b. Within 3-6 years from the Date of Signature for this Agreement – USD $50,000,000;

c. Within 6-9 years from the Date of Signature for this Agreement – USD $25,000,000;

d. Within 9-10 years from the Date of Signature for this Agreement – USD $5,000,000.

65. Dispute Resolution

65.1 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

66. Governing Law

66.1 This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG), supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts 2010.

Claimant's Exhibit No. 2

Excerpts from Gondwandan Senate Bill 275/2011

Part II: Requirements for retail packaging and appearance of tobacco products

Section 21

Retail packaging of all tobacco products

(1) The retail packaging of tobacco products must comply with the following requirements:
   a. The outer surfaces and inner surfaces of the packaging must not have any decorative ridges, embossing, bulges or other irregularities of shape or texture, or any other embellishments, other than as permitted by the regulations;

(2) A cigarette pack or cigarette carton must comply with the following requirements:
   a. The pack or carton must be rigid and made of cardboard, and only cardboard;
   b. When the pack or carton is closed:
      i. Each outer surface of the pack or carton must be rectangular; and
      ii. The surfaces of the pack or carton must meet at firm 90 degree angles;
   c. All edges of the pack or carton must be rigid, straight and not rounded, beveled, or otherwise shaped or embellished in any way, other than as permitted by the regulations.

Colour and Finish of Retail Packaging

(1) All outer surfaces and inner surfaces of the retail packaging, and both sides of any lining of a cigarette pack must be in matte finish; and
   a. If regulations are in force prescribing a colour – must be that colour; and
   b. Otherwise must be drab olive green.

(2) The above section shall not apply to the health warnings, relevant legislative requirements, or text of the brand, business, or company name for the tobacco products.

Prohibition on Trademarks and Marks generally appearing on Retail Packaging

(1) No trade mark may appear anywhere on the retail packaging of tobacco products, other than as permitted by subsection (3).

(2) No mark may appear anywhere on the retail packaging of tobacco products, other than as permitted by subsection (3).

(3) The following may appear on the retail packaging of tobacco products:

   a. The brand, business or company name for the tobacco products, and any variant name for the tobacco products;
   b. The relevant legislative requirements;
   c. Health warnings.

Requirements for brand, business, company or variant name

(1) Any brand, business or company name, or any variant name, for tobacco products that appears on the retail packaging of those products:
   a. Must not obscure any relevant legislative requirement; and
   b. Must not appear more than once on any of the following outer surfaces of the pack or carton:
      i. For a cigarette pack – the front, top and bottom outer surfaces of the pack;
      ii. For a cigarette carton – the front outer surface of the carton, and the 2 smallest outer surfaces of the carton; and
   c. May appear only on the surfaces mentioned in paragraph (b); and
   d. Must appear across one line only; and must appear:
      i. Horizontally below, and in the same orientation as, the health warning; and
      ii. In the centre of the space remaining on the front outer surface beneath the health warning.

Restrictions on sale and promotion of tobacco products

(1) No manufacturer, distributor, or retailer may distribute or cause to be distributed any free samples of cigarettes, smokeless tobacco, or other tobacco products;

(2) No manufacturer, distributor, or retailer may distribute or cause to be distributed any material containing or displaying trade marks or marks associated with tobacco products.

Claimant's Exhibit No. 3

Real Quik Convenience Stores Ltd.
42 Abrams Drive
Solanga, Gondwana
Tel: (916) 2465 9283
Fax: (916) 2466 9283
E-mail: contact@gondtel.com

21 March 2011
142 Longjiang Drive
Nanyu City
Nanyu

Dear Mr. Chow

Pending Gondwandan packaging legislation

As you are no doubt aware, the Gondwandan Senate has proposed a new Senate Bill that would increase restrictions on both cigarette and tobacco packaging as well as potentially restrict the sale and display of tobacco branded promotional merchandise.

We feel that if the Senate Bill passes, this may have adverse effects on our current Distribution Agreement, as we are currently contractually obligated to provide shelf and counter space for your products. We also believe that if the plain packaging legislation does go through, that there is an inherent risk of commoditization and that this may affect our sales numbers going forward. This may have an impact on the agreed upon minimum quantities and intervals in the Distribution Agreement.

The Senate Bill is still in its early stages, so we hope for the best. However, in the event that the Bill does pass, we may have to renegotiate certain terms of the Distribution Agreement so as to comply with the new governmental regulations.

Sincerely,

Charles Mancuso
(Charles Mancuso, CEO)

Claimant's Exhibit No. 4

Conglomerated Nanyu Tobacco, Ltd.
142 Longjiang Drive
Nanyu City
Nanyu
Tel: (902) 357 4298
Fax: (902) 358 4298

5 April 2011
42 Abrams Drive
Solanga
Gondwana

Dear Mr. Mancuso

Re: Pending Legislation

I refer to your letter of 21 March 2011.

The Senate Bill in Gondwana has been brought to my attention. However, both my advisors and myself feel that the risk of this legislation passing is relatively low. Similar legislation in other regions have failed to pass, and in other regions where such legislation has been attempted, such legislation has been found to be unconstitutional. At the present moment, we are not convinced that there is a real risk that the legislation in Gondwana will change, nor do we believe that it would impact current sales and/or operations in Gondwana.

As we had just recently renegotiated our current Distribution Agreement, I believe the best course of action will be to continue with the performance of the Distribution Agreement and deal with any potential influential factors if and when they arise.

As a long time business partner, I value your input and opinions. However, at the present moment, we are not willing to renegotiate the current Distribution Agreement.

Yours truly,

Marcus Chow
(Marcus Chow, CEO)

Claimant's Exhibit No. 5

Excerpts from the Gondwandan Herald

1 April 2011

"Gondwandan plain packaging legislation – Big Tobacco to go up in smoke?"

The introduction of Senate Bill 275, otherwise known as the "Clean Our Air" Bill, has met with strong opposition from almost all major tobacco distributors, with most claiming that such stringent regulation would cause massive disruptions in their operations and could amount to a complete eradication and expropriation of their trademarks and brand images.

…

Demonstrations have been held daily in front of the Senate Building since the Bill was announced by both pro and anti tobacco lobbyists. The Bill has been hailed by some as a great step forward in public health regulation, while others fear that the Bill may be a massive overstep by the government, in a move that would make the tobacco market in Gondwana one of the most stringently regulated markets in the world.

…

Political analysts state however, that the "Clean Our Air" Bill may have more bark than bite, and that many feel that the regulatory bill is simply a PR move by the Gondwandan government, in an attempt to appease anti-tobacco NGOs, and that the final Bill will look nothing like what has been proposed. Analysts also point to the recent amendments to the Gondwandan government's tobacco legislation in 2009 which expanded packaging restrictions, and state that a more stringent bill this soon after is unlikely to pass.

Claimant's Exhibit No. 6

Real Quik Convenience Stores Ltd.
42 Abrams Drive
Solanga, Gondwana
Tel: (916) 2465 9283
Fax: (916) 2466 9283
E-mail: contact@gondtel.com

11 March 2013
142 Longjiang Drive
Nanyu City
Nanyu

Dear Mr. Chow

Proposed Renegotiation of the Distribution Agreement

At the present moment, we cannot justify the current operation of our Distribution Agreement. Sales for tobacco products have dropped significantly ever since Bill 275 has come into force. Moreover, we have had to withdraw promotional merchandise from our retail outlets in order to comply with the new Gondwandan regulations.

Although we value you as our long-term business partner, the current situation is untenable. We cannot continue performing in this manner without running afoul of either our obligations under the Distribution Agreement, or facing governmental sanction for violating Gondwandan regulations.

Furthermore, as I am sure you are aware, the fixed prices that were established in the Distribution Agreement are no longer viable. The truth of the matter is that tobacco in Gondwana has now been commoditized. We are currently paying your company a 20% premium for what is essentially now a commodity.

We must sit down and discuss this if we are to continue this relationship. I will be in Nanyu City on 11 April. If that date is amenable to you, I suggest that we meet to discuss the current situation.

Sincerely,

Charles Mancuso
(Charles Mancuso, CEO)

Claimant's Exhibit No. 7

Conglomerated Nanyu Tobacco, Ltd.
142 Longjiang Drive
Nanyu City
Nanyu
Tel: (902) 357 4298
Fax: (902) 358 4298

12 April 2013
42 Abrams Drive
Solanga
Gondwana

Dear Mr. Mancuso,

Meeting in Gondwana on 11 April 2013

It was unfortunate that we were unable to come to an agreement in the meeting at our offices held on 11 April 2013.

Although we respect that you have encountered difficulties in your operations due to the Gondwandan legislations, I must reiterate that we do not feel that this was in any way due to our conduct.

Moreover, we do not feel that we are, as you say, dealing with a "commodity" product. The Nanyu brand is strong, and despite the Gondwandan legislations, we are seeing no significant change in our market share in Gondwana.

We appreciate that you may have difficulties with selling the promotional merchandise as required under the Agreement. I would be open to further discussion on this aspect, but at the present moment, we are unable to come to terms on a renegotiated Distribution Agreement.

We urge you to continue performing the Distribution Agreement as you have been doing, until we can reach a mutually beneficial solution.

Yours truly,

Marcus Chow
(Marcus Chow, CEO)

Claimant's Exhibit No. 8

Real Quik Convenience Stores Ltd.
42 Abrams Drive
Solanga, Gondwana
Tel: (916) 2465 9283
Fax: (916) 2466 9283
E-mail: contact@gondtel.com

1 May 2013
142 Longjiang Drive
Nanyu City
Nanyu

Dear Mr. Chow

Notice of Termination of the Distribution Agreement

I write to inform you that effective from 1 June 2013, we will be terminating the Distribution Agreement between our two companies.

I am sorry that things have come to this point, but we are left with no choice. Continued performance of our obligations under the Distribution Agreement would result in us breaching Gondwandan laws, and I would rather terminate the Agreement than face a governmental fine or possibly jail.

Gondwandan regulations clearly prohibit the sale of any promotional items, which is something that we are contractually obligated to sell under the current Distribution Agreement. We simply cannot sell branded merchandise.

Due to the current market environment, we also cannot justify the prices that we are paying and the current amounts that we are purchasing. We cannot move enough stock to justify the minimum order intervals. The product is simply piling up in our stockrooms.

As a result, we are left with no choice but to terminate our Distribution Agreement.

Sincerely,

Charles Mancuso
(Charles Mancuso, CEO)

Claimant’s Exhibit No. 9

Conglomerated Nanyu Tobacco, Ltd.
142 Longjiang Drive
Nanyu City
Nanyu
Tel: (902) 357 4298
Fax: (902) 358 4298

1 July 2013
42 Abrams Drive
Solanga
Gondwana

Dear Mr. Mancuso

Notice of Outstanding Termination Fee

We refer to your letter of 1 May 2013 terminating the Distribution Agreement between your company and Conglomerated Nanyu Tobacco, Ltd.

This letter serves to inform you that as of 30 June 2013, the **Termination Penalty** as stipulated in the Distribution Agreement has not yet been paid. As you have terminated the Distribution Agreement within 3 years of its signature, according to Clause 60 of the Distribution Agreement, you are obligated to pay a sum of USD $75,000,000.

Please make payment of the above sum to our company within 30 days, or in any event, before 1 August 2013.

Yours faithfully,

Nancy Pun

(Nancy Pun)
Accounts and Collections

Claimant's Exhibit No. 10

Conglomerated Nanyu Tobacco, Ltd.
142 Longjiang Drive
Nanyu City
Nanyu
Tel: (902) 357 4298
Fax: (902) 358 4298

2 August 2013
42 Abrams Drive
Solanga
Gondwana

Dear Mr. Mancuso

Final Notice of Outstanding Termination Penalty

We refer to our letter dated 1 July 2013.

As of 1 August 2013, we still have not received the **Termination Penalty** in the sum of USD $75,000,000.

Please remit the above sum within the next 30 days or in any event by 1 September 2013. If the above sum is not paid to us, we will be forced to take action against you to recover this amount.

Yours faithfully,

Nancy Pun

(Nancy Pun)
Accounts and Collections

<u>Claimant's Exhibit No. 11</u>

DCH and Associates, LLP
11/F, The Baxter Building
14 Park Street, Nanyu City
Nanyu
Email: amayfair@dchnanyu.com
Tel: (902) 246 8272
Fax: (902) 246 8999

2 September 2013
42 Abrams Drive
Solanga
Gondwana

Dear Mr. Mancuso

<u>Pre-Action Demand Letter</u>

I represent Conglomerated Nanyu Tobacco Ltd.

You have been served with two Notices of Default in regards to a termination fee of USD $75,000,000. I have been advised that you have not responded to any inquiries or requests to pay this sum.

I am instructed to take action against you and your company pursuant to Clause 65 of the Distribution Agreement unless you remit the above-mentioned sum to Conglomerated Nanyu Tobacco Ltd. immediately.

If you do not respond immediately, we will be forced to commence arbitration proceedings against you.

Yours faithfully,

Adam Mayfair

(Adam Mayfair)
Counsel for Conglomerated Nanyu Tobacco, Ltd.

John Worthington
GTH LLP
26 Hill Square
Solanga
Gondwana
Email: jworthington@gth.com.gw
Tel: (916) 2318 9245
Fax: (916) 2319 9265

12 February 2014
Secretariat
China International Economic and Trade Arbitration Commission (CIETAC)
6/F, CCOIC Building,
No. 2 Huapichang Hutong,
Xicheng District, Beijing, 10035,
People's Republic of China

Dear Ms. Secretary,

Answer and Statement of Defense from
Real Quik Convenience Stores Ltd.

I am the legal counsel representing Real Quik Convenience Stores Ltd., the Respondent in the arbitration brought by Conglomerated Nanyu Tobacco, Ltd. I have enclosed in this letter a certified copy of my power of attorney to represent Real Quik Convenience Stores Ltd. in all matters regarding this arbitration.

Attached to this letter, please find the Respondent's Statement of Defense.

Yours faithfully,

John Worthington

(John Worthington)

Att:

Statement of Defense from Real Quik Convenience Stores Ltd.

Certified copy of the Power of Attorney for John Worthington

Statement of Defense

1. In reply to the Claimant's Application for Arbitration, the Respondent contests the jurisdiction of the Tribunal to decide on this dispute. In the event that the Tribunal finds that it has jurisdiction, the Respondent also contests the Claimant's claim for the early termination penalty and denies that the Claimant is entitled to any relief.

2. Unless otherwise expressly stated:

    a. References herein to the numbered paragraphs are references to the corresponding paragraphs in the Application for Arbitration;

    b. The Respondent adopts the defined terms in the Application for Arbitration.

3. We nominate Prof. John Worthington as our arbitrator for this dispute concerning the early termination of the Agreement. This nomination shall in no way be construed as an acceptance of the Tribunal's jurisdiction.

Objection to the Jurisdiction of the Tribunal

4. The Respondent objects to the jurisdiction of the Tribunal on the basis of the proper construction of Clause 65 of the Agreement, the Dispute Resolution Clause.

5. Clause 65 of the Agreement clearly states that any dispute *shall* be settled through consultation or negotiation. Clause 65 further states that either party may only commence arbitration if 12 months have elapsed since the date the dispute arose.

6. Since this current arbitration deals solely with the alleged termination of the Agreement, which occurred on 1 May 2013 (at the earliest), the Claimant was contractually obligated to conduct negotiations and consultations in good faith. The Claimant was barred from bringing this claim to arbitration until a period of 12 months had passed since the dispute arose, i.e. 1 May 2014.

7. The arbitration agreement as construed in Clause 65 of the Agreement would not arise until 1 May 2014. As a result, the Tribunal lacks jurisdiction to decide on this dispute, as it has not been constituted in accordance with the arbitration agreement.

8. The Respondent therefore requests that the Tribunal immediately terminate the arbitration so that negotiation and consultation can commence immediately between the Parties.

Defense on Merits

9. In the event that the Tribunal decides that it does have jurisdiction to decide the dispute, the Respondent also contests the merits of the Claimant's Application for Arbitration.

10. The Claimant's Application for Arbitration lays out a factual scenario that they claim is very straightforward. However, that is far from the truth.

11. In reality, the Claimant's attempt to reclaim an alleged termination penalty ignores the fact that the changing political and regulatory climate in Gondwana essentially rendered the Agreement between the Parties impossible to perform.

12. When the Agreement was negotiated in 2010, the Gondwandan government had already introduced packaging restrictions in 2009. Nobody thought that new, stricter regulation would be implemented within the life of the current Agreement (**Respondent's Exhibit No. 1**). As a result, when negotiating the 2010 Agreement, the Parties were not concerned about whether the products in question would be prohibited in the future. Unfortunately, two years later, the Gondwandan Senate introduced Bill 275, which was exactly what both Parties had reasonably assumed would not happen.

13. The Claimant's products, although previously popular in Gondwana, were essentially commoditized by Bill 275, which eliminated all trademarks and logos, and forced all tobacco manufacturers to use standardized packaging. The Claimant's brand strength was significantly diminished by the new Gondwandan regulations, and the end consumer was less inclined to buy the Claimant's product in the Respondent's retail stores as opposed to other, lesser-known brands.

14. The Claimant has been well aware of the development of these regulations. The Claimant has also taken measures to try and curtail these regulations, going so far as to challenge the constitutionality of Bill 275 before the Gondwandan courts. In April 2011, the Claimant took action before Gondwandan courts challenging the constitutionality of Bill 275, claiming that the Bill would eliminate the Claimant's intellectual property. However, the Court decided in its judgment on 23 June 2011 that Bill 275 was within the sovereign rights of Gondwana to protect public health and safety (**Respondent's Exhibit No. 2**).

15. Following the passage of Bill 275, the sales of the Claimant's products dropped significantly throughout the Respondent's retail outlets, leading to the Respondent building up a massive inventory of the Claimant's products. The Respondent was forced to continue buying the Claimant's products under the Agreement, but there was no longer any demand.

16. To make matters worse, under the Agreement, the Respondent was obligated to pay a 20% price premium for all of the Claimant's products as opposed to its competitors. The Respondent was also required to make not only minimum orders, but was required to place those orders at a minimum interval of three months.

17. More disturbing was the fact that under the Agreement, the Respondent was obliged to provide counter displays and shelf space for the Claimant's products. The Respondent was also obliged to sell branded merchandise with the Claimant's trademarks and logos prominently displayed. Bill 275 prohibited these actions, and when it passed, the Respondent was placed in a position where it could no longer perform its obligations under the Agreement.

18. The Respondent attempted to raise these concerns with the Claimant multiple times (**Respondent's Exhibit No. 3, Claimant's Exhibit No. 4**). The Respondent further

raised these concerns with the Claimant in a meeting between the Parties' representatives on 11 April 2013, but the Claimant took an ironclad position that it would not budge from. The Claimant, in short, could not accept the realities of the situation in Gondwana and the fact that renegotiation of the Agreement was not only desirable for both parties, but a necessity.

19. The Respondent had no choice but to suspend its performance of the Agreement in light of the new Gondwandan tobacco regulations.

20. As the termination of the Agreement was due to factors outside of the Respondent's control, which could not have been foreseen at the time the Agreement was signed, the Agreement is thus frustrated, and the Respondent is not liable to pay any alleged termination penalty.

Relief Requested

21. 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.

Respondent's Exhibit No. 1

Excerpts from the Gondwandan Herald

22 June 2009

"New Tobacco Regulations criticized – Too Little, Too Late?"

Anti-tobacco lobbyists are roundly criticizing the Gondwandan government's latest round of tobacco regulations, stating that the restrictions put into place do not do enough to dissuade the purchase and sale of tobacco products, particularly to minors.

…

The current regulations would require tobacco manufacturers to place extensive health warnings on all cigarette packages, and that these health warnings prominently display graphic images such as diseased lungs and patients dying of lung cancer. The new regulations would require health warnings to take up at least 1/3 of all tobacco packaging to ensure their visibility.

…

Anti tobacco lobbyists argue that the regulations, although a step in the right direction, do not do enough to dissuade young smokers from purchasing tobacco, stating that the tobacco companies are getting around this requirement by pushing brightly coloured packages that appeal to the younger demographic as well as by heavily advertising flavoured cigarettes and cigars in an attempt to draw in new smokers.

…

Analysts estimate however, that despite the criticism, it is highly unlikely that the Gondwandan government will continue to implement stricter regulations, and that since the current regulations bring Gondwana in line with most major countries, there is unlikely to be a strong push for stronger regulation in the future.

Respondent's Exhibit No. 2

Excerpts from the Gondwandan Herald

23 June 2011
"Gondwandan court strikes down challenge to Bill 275 – Big Tobacco Panics"

Today, the Gondwandan court struck down a constitutional challenge to Bill 275, the infamous "Clean Our Air" Bill, stating that Bill 275 was constitutional as it was a proper exercise of the Gondwandan state's sovereign powers and was in compliance with its duty to safeguard the public health.

Tobacco companies have been in a panic since the announcement of Bill 275 in March 2011. Conglomerated Nanyu Tobacco, Ltd. launched the first salvo against the Bill less than a month after the announcement, bringing the case of *Conglomerated Nanyu Tobacco Ltd. v. The State of Gondwana* in April 2011.

In May 2011, the Supreme Court of Gondwana heard arguments from both Conglomerated Nanyu Tobacco Ltd. (one of the largest and most popular brands in Gondwana) and representatives from the Gondwandan Department of State.

In its 120 page judgment, the Supreme Court struck down Conglomerated Nanyu Tobacco Ltd.'s challenge, stating that not only did the Gondwandan government have the power to institute regulations protecting public health and safety, but that it had the duty to do so as a sovereign power. Bill 275 would therefore fall within the government's purview and was constitutional.

The judgment marks a major setback for tobacco manufacturers doing business in Gondwana as they now face the possibility of plain packaging and the elimination of their trademarks and brand images.

Bill 275 is scheduled to be tabled before the Senate and voted on sometime next year. Until then, major tobacco companies are forced to "wait and see".

Respondent's Exhibit No. 3

Real Quik Convenience Stores Ltd.
42 Abrams Drive
Solanga, Gondwana
Tel: (916) 2465 9283
Fax: (916) 2466 9283
E-mail: contact@gondtel.com

19 April 2013
142 Longjiang Drive
Nanyu City
Nanyu

Dear Mr. Chow

Re: Meeting in Gondwana on 11 April 2013

I refer to your letter of 12 April 2013 recounting the events of our meeting at your offices in Nanyu City on 11 April 2013.

Whilst I appreciate your attention to the matter, I am deeply concerned that you are misunderstanding the situation here in Gondwana.

Under our current agreement, we are obligated to purchase not only 10,000,000 cartons of cigarettes per year from you, but to place these orders in intervals of no less than three months. Given the current environment in Gondwana, that is an impossible task. We are not seeing anywhere near that level of demand, and the stock is just piling up in our storerooms.

This is not even going into the fact that we are currently on the hook to buy 2,000,000 pieces of branded merchandise from you this year, which we cannot legally sell!

We have raised these issues with you in our letter in March 2013, and again at the meeting at your offices at 11 April 2013, and you continue to fail to acknowledge the reality.

If you continue down this path, we will have no choice but to suspend our performance, in which case, neither of us benefits.

I urge you to reconsider.

Yours truly,

Charles Mancuso

(Charles Mancuso, CEO)

Secretariat
China International Economic and Trade Arbitration Commission (CIETAC)
6/F, CCOIC Building,
No. 2 Huapichang Hutong,
Xicheng District, Beijing, 10035,
People's Republic of China
Email: info@cietac.org
Tel: (009) 5569 8769

(sent by fax)

19 February 2014
11/F, The Baxter Building
14 Park Street, Nanyu City
Nanyu

Dear Mr. Mayfair and Mr. Worthington,

Notice on the Formation of Arbitral Tribunal Case No. M2014/24

Concerning the captioned arbitration case between Conglomerated Nanyu Tobacco Ltd. and Real Quik Convenience Stores Ltd., Conglomerated Nanyu Tobacco Ltd. appointed Ms. Sara Fan as their arbitrator, while Real Quik Convenience Stores Ltd. appointed Prof. John Worthington as their arbitrator. Both parties have jointly appointed Mr. Richard Castle as the presiding arbitrator.

The Secretariat has received the three arbitrators' Declarations of Independence and transferred them to the parties. According to the Arbitration Rules, the aforementioned three arbitrators formed the arbitral tribunal on 19 February 2014 to hear this case.

As the Parties have requested that the CIETAC Hong Kong Sub-Commission administer this case, this case is now transferred to the offices of CIETAC Hong Kong for administration.

Sincerely,

Secretariat
China International Economic and Trade Arbitration Commission

CC: GTH LLP; CIETAC Hong Kong

Malcolm Reynolds
Department of State
2/F, 1 Senate Square
Solanga
Gondwana
Email: Reynolds@statedepartment.gov.gw
Tel: (916) 0010 2410
Fax: (916) 0010 2411

25 February 2014
Secretariat
China International Economic and Trade Arbitration Commission (CIETAC)
6/F, CCOIC Building,
No. 2 Huapichang Hutong,
Xicheng District, Beijing, 10035,
People's Republic of China

Dear Ms. Secretary,

Pending Arbitration between Conglomerated Nanyu Tobacco Ltd
And Real Quik Convenience Stores Ltd.

I write to you as a representative of the Gondwandan Department of State, as part of the State Legal Department.

It has come to our attention that there is a pending arbitration between Conglomerated Nanyu Tobacco Ltd. and a Gondwandan retail chain known as Real Quik Convenience Stores Ltd. As we understand the situation, the Claimant in this case is Conglomerated Nanyu Tobacco Ltd, who is attempting to claim against the Gondwandan Respondent.

The State of Gondwana is highly interested in the progress and outcome of this arbitration. The State of Gondwana is further interested in submitting an *amicus curiae* brief in this matter to the Arbitral Tribunal.

As you are well aware, this arbitration touches on topics of Gondwandan public policy, and may well deal with potential infringements of Gondwandan law and sovereignty. As such, the Gondwandan government wishes to submit its *amicus curiae* brief in this matter to establish its position and to ensure that its views are understood by the Arbitral Tribunal.

The content of the *amicus curiae* brief will be relatively straightforward. The Gondwandan government has made it a point to reduce tobacco consumption and promotion. Tobacco consumption is one of the world's leading causes of death, and its harmful effects are well documented. The Gondwandan government is fulfilling its duty to its citizens by implementing regulations that will safeguard the public health and prevent further casualties in the future.

The Claimant's arbitration proceedings in this matter will only serve to undermine Gondwana's sovereign right to regulate and control its public policy. As such, the

Tribunal should strongly consider the effect of an award in the Claimant's favor, and the deleterious impact that it would have on the sale, promotion, and consumption of tobacco products in the state of Gondwana.

As a separate, but connected matter, we wish to reiterate on the behalf of the Gondwandan government, that tobacco control and restriction is a keystone of our public policy this term. If the Arbitral Tribunal is inclined to issue an award in favor of the Claimant, any such award would be contrary to Gondwandan public policy. Although Gondwana is a party to the New York Convention, we are also aware that any enforcement of an award must be in line with our public policy.

It would be appreciated if you would forward this communication to the relevant arbitral tribunal for their consideration.

Yours faithfully,

Malcolm Reynolds

(Malcolm Reynolds)

(Note: This letter was subsequently forwarded on to CIETAC Hong Kong who then supplied copies of this letter to the Arbitral Tribunal and the Parties)

Procedural Order No. 1

1. On a conference call between the Parties' representatives and the Arbitral Tribunal on 27th February 2014, the Arbitral Tribunal decided that the presiding arbitrator would be authorized to make procedural decisions subject to later confirmation by the full tribunal.

2. The Parties came to an agreement on a schedule for proceedings. The agreed schedule will render it impossible for the Arbitral Tribunal to comply with Article 46(1) of the CIETAC Arbitration Rules. The Tribunal will request a further extension of time pursuant to Article 46(2) at a later stage.

3. The Parties agreed that jurisdiction and merits issues should be dealt with in a single hearing.

4. The letter from the Gondwandan State Department was discussed at the preliminary conference call. The Respondent noted that it had no objections to the admission of an *amicus curiae* brief by the state of Gondwana, and noted the Gondwandan government's statement regarding enforcement of the award. The Claimant objected to any admission of the *amicus curiae* brief and the government's statements regarding enforcement of the award. The Tribunal decided to reserve full arguments on these two issues for the jurisdiction and merits hearing.

5. Taking into account the arguments raised by the Claimant and Respondent in their respective Application for Arbitration and Statement of Defense, as well as the issues raised by the Gondwandan government, the Tribunal found that the following four issues should be addressed by counsel at the jurisdiction and merits hearing:

    a. Whether the Arbitral Tribunal has jurisdiction to deal with this dispute in light of the 12 month negotiation period stipulated in the arbitration agreement;

    b. Whether the Arbitral Tribunal should admit the Gondwandan government's *amicus curiae* brief for consideration during the proceedings?

    c. Whether the Respondent's obligations under the Agreement were vitiated by the implementation of Bill 275 and the Gondwandan government's new, more stringent regulations;

    d. If the Tribunal were to issue an award in favor of the Claimant, would there be a risk of enforcement?

6. The Parties agreed that any arguments in relation to interest or costs would be deferred to a later hearing, so that the Tribunal may focus on the issues listed in paragraph 5 above only.

Richard Castle
(Richard Castle)
Presiding Arbitrator
27 February 2014