

**THE 5TH INTERNATIONAL ADR (ALTERNATIVE DISPUTE
RESOLUTION) MOOTING COMPETITION**

27th July – 2nd August, 2014

MEMORANDUM FOR THE RESPONDENT

“REAL QUIK CONVENIENCE STORES LTD.”

TEAM CODE: 381R

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Against:

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Case No. M2014/24

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(CLAIMANT)

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LIST OF ABBREVIATIONS

&	And
¶	Paragraph
AA	Arbitration Agreement
AFA	Application for Arbitration
Art.	Article
CE	Claimant Exhibit
CIETAC	China International Economic and Trade Commission Arbitration Rules
CISG	United Nations Convention for International Sales of Goods
Corp.	Corporation
DA	Distribution Agreement
DRC	Dispute Resolution Clause
ed.	Edition
i.e.	that is
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Dispute
Int'l	International
Ltd.	Limited
No.	Number
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
PO	Procedural Order

PSS	Pacta Sunt Servanda
Sec.	Section
SoD	Statement of Defense
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States of America
USD	United States Dollar
v.	Versus

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Commission
1st May 2012
(¶¶ 7, 13, 19)
- CISG* United Nations Convention on Contracts for the International
Sale of Goods, 1980
19 ILM 668 (1980)
10th April 1980
(¶¶ 21, 27, 35)
- CISG-AC Op. No. 7* CISG-Advisory Council Opinion No. 7, Exemption of
Liability for Damages under Article 79 of the CISG, 2007
(¶ 24)
- ILA Report* *Final Report on Public Report as a Bar to Enforcement of
International Arbitral Awards*, International Commercial
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(¶ 37)

NYC

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

7 ILM 1046 (1968)

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(¶¶ 37, 41)

UNCITRAL

United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (with amendments as adopted in 2006)

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(¶ 9)

STATEMENT OF FACTS

1 Conglomerated Nanyu Tobacco Ltd. [CLAIMANT] entered into a ten-year DA with Real Quik Convenience Stores Ltd. [RESPONDENT] on 14.12.2010 for distribution of tobacco products.

2 The Gondwandan Government has over the years introduced stringent regulations to curb sale and use of tobacco products in order to protect the health of its people:

2002	Packaging Requirement: Warning Labels detailing harmful effects of smoking.
2004	National ban on smoking indoors, preventing bars, restaurants and other businesses having smoking areas.
2005	National ban on smoking in public areas.
2009	Expansion on packaging restrictions: mandatory-warning labels including graphic images of diseased lungs and autopsies.

3 On 14.03.2011 the Gondwandan Senator introduced the “Clean our Air” Bill 275/2011. Even though Bill 275 faced controversy and strong opposition, nonetheless it was passed into law on 13.04.2012 as a clear sign of Gondwandan Government’s policy to protect its people’s health.

4 In lieu of passing of the Bill, Gondwana’s tobacco industry suffered an average 30% decline in sales of tobacco products and the CLAIMANT itself suffered a 25% decline in sales.

- 5 On 11.03.2013 RESPONDENT notified the CLAIMANT that it wished to renegotiate the Agreement in the light of the new Governmental regulations. Consequently on 11.04.2013 meeting was held to negotiate the 20% price premium given to the CLAIMANT. Parties were unable to come to an agreement.
- 6 Pursuant to same, the RESPONDENT on 01.05.2013 notified its intention to terminate the agreement effective from 01.06.2013.
- 7 On 01.06.2013, the CLAIMANT sent a letter to the RESPONDENT for payment of USD 75,000,000 for terminating the contract before expiry of 10 years.
- 8 Subsequently on 01.07.2013, 02.08.2013 and 02.09.2013 two notices and a demand letter were sent to the RESPONDENT respectively, demanding the Disputed Sum.
- 9 The RESPONDENT on 26.09.2013 wrote back in reply to all the notices dispatched by the CLAIMANT.
- 10 The CLAIMANT on 12.01.2014 submitted the dispute for arbitration despite the fact that no negotiation took place over the waiting period.

ARGUMENTS ADVANCED

A. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION TO DEAL WITH THIS DISPUTE IN LIGHT OF 12 MONTH NEGOTIATION PERIOD STIPULATED IN THE ARBITRATION AGREEMENT.

1 The Arbitral Tribunal lacks jurisdiction to deal with the dispute between Nanyu Tobacco Ltd. [CLAIMANT] and Real Quik Convenience Stores Ltd. [RESPONDENT] because:

I. *The sanctity of the Dispute Resolution Clause must be upheld.*

2 A paramount feature of contract law is the doctrine of *Pacta Sunt Servanda* [Houtte, 105] which requires that the DRC [Clause 65, DA] be prima facie enforced according to its terms. Hence, the sanctity of the DRC [Kaplan] between CLAIMANT and RESPONDENT is required to be maintained and the DRC is binding under all conditions [Kull, 44].

3 The CLAIMANT by signing the DA agreed to attempt to resolve disputes arising out of the contract by negotiations before commencing arbitration proceedings [BGH Decision 1984; Clause 65, DA] and Clause 65 further requires the parties to wait for a period of 12 months before submitting the dispute to the Arbitral Tribunal.

4 The CLAIMANT has however, failed to show a good cause for departing from it [Channel Tunnel]. Approaching the Arbitral Tribunal before expiry of the time period clearly leads to the conclusion that the legal and contractual prerequisites to arbitration [Biloune] have not been complied with culminating into a breach of the DRC. Thus, the

CLAIMANT is barred from taking a position contrary to its prior acts and representations [Am. Bank].

II. *The CLAIMANT has an obligation to engage in negotiation and consultation.*

5 A detailed perusal of the DRC indicates that neither party can commence arbitral proceedings until going through proper negotiation procedures prescribed in the Clause [BGH Decision 1998]. Furthermore, the contractual language of the DRC indicates strict enforcement of the negotiation clause [Dobbins, 167].

6 It is imperative to note that the CLAIMANT by submitting the dispute to arbitration has deprived the RESPONDENT an opportunity [RJ 1988; Burlington] to negotiate with regards to the disputed agreement.

7 The twelve month “waiting” period provided for is not a mere procedural formality, but rather is “a fundamental requirement” of the DRC which the CLAIMANT has chosen to conveniently ignore [Enron; Georgia; Murphy]. The fact that that the request for arbitration with CIETAC was filed on 12.01.2013, before the lapse of the 12 month period since the dispute arose on 01.05.2012, further substantiates this point [Murphy].

III. *The CLAIMANT has not yet exhausted all available remedies before making the application for arbitration.*

8 Customary International Law provides that before arbitration proceedings are instituted or claims or representations are made, the remedies provided by the DRC should have been exhausted [Kokott, 606].

- 9 The request for arbitration is inadmissible as the parties had agreed in a clear and unequivocal manner to first engage in other steps to resolve the dispute [*Clause 65, DA*] i.e. to negotiate and consult. The waiting period of 12 months was essentially to enable the parties to take positive steps to seek a resolution that may avert the need for arbitration [*Sehreuer, 10*]. The purpose of the multi-tier DRC was to provide an opportunity for the dispute to be resolved outside arbitration, thereby avoiding the financial costs and delays involved in the arbitration process [*RTC 1989*].
- 10 The provision being binding and mandatory determines precisely the stage at which the efforts will be considered exhausted [*Jolles, 336*] i.e. on 01.05.2013 after the requisite time period has already expired.

Conclusion

- 11 As the CLAIMANT has submitted to arbitration before lapse of 12 month period without exhausting all available remedies to resolve the dispute, the Arbitral Tribunal does not have jurisdiction to deal with this dispute.

B. THE ARBITRAL TRIBUNAL SHOULD ADMIT THE GONDWANDAN GOVERNMENT'S *AMICUS CURIAE* BRIEF FOR CONSIDERATION DURING THE PROCEEDINGS.

- 12 *Amicus* participation is ordinarily justified on the basis that a “friend of the court” is in a position to provide the Tribunal its special perspective or expertise in relation to the dispute [*Bartholomeusz, 211*]. It is imperative to note the following arguments in favour of acceptance of the *amicus* brief by the Tribunal:

I. *Procedural rules permit the acceptance of amicus curiae briefs.*

13 The RESPONDENT seeks to rely on Art. 33(1) of CIETAC which empowers Arbitral
Tribunals to conduct the case in any manner it deems appropriate. It must be noted that
Gondwana has also adopted the UNCITRAL and as per Art. 19(2) of UNCITRAL the
Tribunal has the discretion to conduct the arbitration in any manner as it may deem
appropriate.

II. *The Gondwandan Government has a stake in the outcome of the arbitration.*

14 The Gondwandan Government's *amicus curiae* brief must be admitted as a significant
interest of the Gondwandan Government and a public interest is involved in the present
arbitral proceeding [*Schliemann*, 370].

15 A matter is deemed to be of public interest when the final decision in a dispute has the
potential to affect, directly or indirectly, persons beyond those immediately involved as
parties in the case [*Aguas*]. The DA between the parties deals with sale and distribution
of tobacco products and prominently displaying brands and merchandise [¶ 6; *AFA*],
which encourages smoking [*Siegel*].

16 Smoking is injurious to health and is detrimental to the interest of the public [*MMWR*].
The Gondwandan Bill forms part of a comprehensive Government strategy to reduce
smoking rates in Gondwana. The implementation of Bill 275 is a legitimate exercise of
the Gondwandan Government's regulatory powers to protect the health of its citizens
[*Philip Morris*].

17 The arbitration touches on topics of Gondwandan public policy and deals with potential
infringement of Gondwandan law and sovereignty [*Gondwana's Amicus curiae brief*]

Payment of liquidated damages worth USD 75,000,000 would mean validating the Agreement which is in contravention to the law of Gondwana.

III. *The amicus curiae brief will provide assistance to the Tribunal in arriving at a correct decision.*

18 The acceptance of Gondwandan Government's *amicus curiae* brief will bring the following advantages to the proceedings:

a) The *amicus curiae* brief can be used to apprise the Tribunal of the broad-based legal, social, and economic implications of the decision that shall deal with a matter in public domain i.e. smoking and point out its unintended consequences for the Gondwandan public that is not before the Tribunal [*Sandler/Levy*, 331].

b) It provides a voice to the State of Gondwana which though not a party to the arbitration, shall be affected by the decision to a great extent [*Granville*] as this is an arbitration that has arisen due to Governmental regulations to protect public health and involves substantive issues that extend beyond those raised by the usual transnational arbitration between commercial parties [*Methanex*].

Conclusion

19 The Tribunal must accept the *amicus* brief of the Gondwandan Government firstly because Art. 33(1) of CIETAC and Art. 19(2) of UNCITRAL empowers the Tribunal to do so, secondly because the Gondwandan Government has a stake in the outcome of the

arbitration and thirdly because the brief will assist the Tribunal in coming to a correct decision.

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

20 The RESPONDENT's liability to perform any of its obligations under the DA ceases to exist due to *clausula rebus sic standibus* according to which a contract is binding on the parties only when the circumstances remain the same as at the time of the conclusion of the contract. The DA having been concluded on 14.12.2010 [¶ 6, *AFA*], the passing of Bill 275 on 01.01.2013 [¶12, *AFA*] was an unexpected change in circumstances which prevented the RESPONDENT from performance of its contractual obligations [*Tallon*, 590].

21 Furthermore, the RESPONDENT is exempted from payment of damages as per Art. 79 of CISG. It is imperative for the RESPONDENT to satisfy the below-mentioned four elements to avail the said exemption [*Arroyo*, 15]:

I. *Failure of performance is due to an impediment.*

22 In order to take advantage of Art. 79, it must be proven that the impediment is an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness [*Chinese goods*].

23 Bill 275 led to the prohibition of display of promotional merchandise and provision of counter and shelf space required as per the DA and the RESPONDENT was placed in a

position where it could no longer perform its obligations under the Agreement [¶10, *AFA*; *Sec. 21, Bill 275*].

24 It must be noted that the regulatory climate in Gondwana thus, rendered the performance of the DA impossible [¶11, *SoD*]. The RESPONDENT having found itself in a situation of hardship is rightfully entitled to invoke hardship as an impediment under Art. 79 [*CISG-AC Op. No. 7*]. Bill 275 can thus be categorised as an impediment and is the sole reason for the failure of performance by the RESPONDENT.

II. *The impediment was beyond the control of the RESPONDENT.*

25 “Impediment beyond control” under Art.79 includes change of circumstances as an exemption to the RESPONDENT’s liability for a failure to perform [*Arroyo, 2*]. It is imperative to note that the RESPONDENT being a company incorporated in Gondwana is bound by the law of the land [¶ 3, *AFA*].

26 Furthermore, it must be highlighted that the Gondwandan Senate passed Bill 275 and any possibility to control or influence its enactment must be ruled out. The change of circumstances due to Bill 275 aggravated the performance of the RESPONDENT and the Bill becomes an impediment beyond the RESPONDENT’s control. Thus, the Bill exacerbates performance on RESPONDENT’s part and rightfully exempts it from payment of damages.

III. *The RESPONDENT could not reasonably be expected to take the impediment in account at the time of conclusion of contract.*

- 27 For application of Art. 79 (1) of the CISG, the impediment beyond control must be unforeseeable [*Lindstrom*, 8]. The RESPONDENT's liability for performance of contractual obligations is moderated by the fact that the provision limits compensation to only foreseeable loss [*Schwenger/Schlechtriem*, 1018].
- 28 Furthermore, the foreseeability rule limits the RESPONDENT's liability and the extent of damages to the risks which it was able to foresee at the time the contract was concluded i.e. on 14.12.2010 [¶ 6, *AFA*; *Lindstrom*, 15].
- 29 Taking into account the circumstances and the purpose of the contract and considering that the DA was concluded at a time that neither the RESPONDENT nor the CLAIMANT, could have reasonably expected the passing of Bill 275, it can be concluded that the impediment could not have been taken into account at the time of the conclusion of the contract. This is further supported by the fact the Bill was first introduced in the Senate on 14.03.2011; 3 months after the conclusion of the contract [¶10, *AFA*].
- 30 Although the occurrence of an event in the past makes it generally foreseeable, this does not necessarily mean that the breaching party reasonably expected it at the time of contracting [*Enderlein/Maskow*, 322].

IV. *The RESPONDENT could not have avoided the impediment of its consequences.*

- 31 The term "avoid" means "taking all the necessary steps to prevent the occurrence of the impediment" and the meaning of the term "overcome" is taking all the necessary steps to preclude the consequences of the impediment [*Lindstrom*, 9].

- 32 It must be noted that Bill 275 has been passed by the Gondwandan Senate to regulate smoking in the State of Gondwana. The RESPONDENT was obliged to provide counter space for the CLAIMANT's products and also was obliged to sell branded merchandise with the CLAIMANT's trademarks and logos prominently displayed [*Clause 25, DA*]. However, Bill 275 prohibited these actions [¶10, *AFA*; *Sec 21, Bill 275*].
- 33 Compliance of the agreement by the RESPONDENT in this aspect would have resulted in a contravention of the law passed and the RESPONDENT would have had to face the resultant stern consequences.
- 34 Moreover, payment of damages by the RESPONDENT as per Clause 60 of the DA, would have meant tacit conformity with the agreement in clear violation of the law passed by the Senate. Thus, the RESPONDENT could not have reasonably avoided or overcome the said impediment.

Conclusion

- 35 Applying the doctrine of *clausula rebus sic standibus* leads to the conclusion that RESPONDENT's obligations were vitiated by Bill 275 due to an explicit and drastic change of circumstances. Furthermore, the RESPONDENT is eligible to avail the exemption under Art. 79 of CISG as all four requisite elements have been fulfilled.

D. THERE EXISTS A RISK OF ENFORCEMENT IF THE TRIBUNAL PASSES AN AWARD IN THE FAVOR OF CLAIMANT.

- 36 If the Arbitral Tribunal passes an award in favor of the CLAIMANT, Gondwandan court would most likely refuse its enforcement. This proceeds from the following arguments:

I. *An award in favor of the CLAIMANT would be in violation of public policy of Gondwana.*

- 37 The public policy provision set out in Art. V (2) (b) of the NYC, acknowledges the right of a State and its courts to exercise ultimate control over the arbitral process. Public policy of the State of Gondwana includes rules designed to serve essential: political, economic or social interest of the State [*ILA Report 2002*, 6]. Bill 275 has been implemented to protect the social interest of the State of Gondwana. Over the years the Gondwandan Government has introduced and implemented stringent regulations in pursuant to its objective to curb smoking and tobacco consumption [¶ 9, *AFA*].
- 38 Plain packaging measures are regulatory actions of general application designed and adopted by the Gondwandan Government to achieve the most fundamental public welfare objective – the protection of public health from a severe, pervasive and long-standing threat [*Philip Morris*].
- 39 Accordingly, a Gondwandan court would refuse to enforce an award rendered in violation of Gondwandan law as it concerns the preservation of public health [*Jones*, 10.53]. Furthermore, enforcement of the award in favor of the CLAIMANT would be contrary to the principle of *ordre public international* as it would abrogate the integrity of Bill 275 [*Warren*, 494] and thus would violate international public policy [*Saret*].
- 40 It must also be noted that Gondwana being pre-dominantly a civil law country [*Clarification No. 3, PO 2*] follows the principle of *Lois de police* according to which certain laws have mandatory application ahead of any international laws. Thus, in a situation of conflict of laws, Bill 275 shall hold primacy as it forms a fundamental law safeguarding the public health in Gondwana. Payment of damages to the CLAIMANT

would thus, constitute an infringement leading to a manifest breach of a rule of law that is regarded essential in the legal order of Gondwana [*Krombach*].

II. *The Arbitral Tribunal has a duty to render an enforceable award.*

41 The Arbitral Tribunal has a duty to render an enforceable award and it is also imperative for the Arbitral Tribunal to consider the mandatory rules of the country of enforcement i.e. Gondwana as this objective is *raison d'être* of NYC [Art. III, NYC; *Platte*, 309].

42 The importance of enforcement in the present case cannot be underplayed as it constitutes, for the Arbitral award and for the arbitration as a whole, the moment of truth or 'the acid test' [*Horvath*, 135; *Lalive*, 321]. If the Arbitral Tribunal passes an award in favor of the CLAIMANT, there is a definite risk of enforcement of the award in the courts of Gondwana as it would be in contravention of Gondwandan Public Policy [see *supra* ¶¶ 37-40].

43 An award passed in favor of the CLAIMANT would be an unenforceable award and thus, would be worth less than the paper upon which it is written [*Horvath*, 135]. The Arbitral Tribunal must thus consider the award's compatibility with the law of Gondwana [*Italian Supplier*].

Conclusion

44 In light of the Arbitral Tribunal's duty to pass an enforceable award, any award in favor of the CLAIMANT would pose a distinct risk of enforcement as it would 'violate fundamental principles of Gondwandan law' [*Spiegelberger*] and would be against Gondwana's basic notions of justice [*Parsons*].

RELIEF REQUESTED

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

1. The Tribunal should accept the *amicus curiae* brief submitted by the Gondwandan Government;
2. Alternatively, a declaration that the Agreement has been frustrated; and
3. That due to the Agreement being frustrated, that the RESPONDENT is not liable to pay any alleged termination penalty.