

**FIFTH INTERNATIONAL  
ALTERNATIVE DISPUTE RESOLUTION  
MOOTING COMPETITION  
27 JULY – 2 AUGUST 2014  
HONG KONG**

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ON BEHALF OF  
RESPONDENT

AGAINST  
CLAIMANT

REAL QUICK CONVENIENCE  
STORES LTD.

CONGLOMERATED NANYU  
TOBACCO LTD.

42 ABRAMS DRIVE  
SOLANGA  
GONDWANA

142 LONGJIANG DRIVE  
NANYU CITY  
NANYU

**MEMORANDUM FOR RESPONDENT**

**TEAM NO. 568 R**

### List of Abbreviations

Abbreviation	Content
¶	Paragraph
AfA	Application for Arbitration
<i>Art.</i>	Article
Bill 275	Godwandan Senate Bill 275/2011
Branded Merchandise	Branded merchandise provided by Conglomerated Nanyu Tobacco Ltd
CIETAC	China International Economic and Trade Arbitration Commission
<i>CIETAC Model Clause</i>	China International Economic and Trade Arbitration Commission Model Arbitration Clause
<i>CIETAC Rules</i>	China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules
CISG	International Sale of Goods (CISG) & Related Transactions, 1980
<i>Cl. Ex.</i>	Claimant's Exhibit
<b>CLAIMANT</b>	Conglomerated Nanyu Tobacco Ltd
<i>Clarifications</i>	Procedure Order No.2
Clause 65.1	The Dispute Resolution Clause of PARITES Agreement (Can be found at p.11 of the record)
<i>FCTC</i>	WHO Framework Convention on Tobacco Control

<i>Gondwandan Letter</i>	Letter from Gondwandan Department of State to CIETAC
HK	Hong Kong
<i>HK. Arb. Ord.</i>	Chapter:609 Hong Kong Arbitration Ordinance
<i>IBA Rules</i>	International Bar Association, Rules on the Taking Evidence in International Arbitration
LCIA	London Court of International Arbitration
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006
n.	footnote
<i>No.</i>	Number
<i>NY Convention</i>	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
<i>p.</i>	page
<b>PARTIES</b>	Conglomerated Nanyu Tobacco Ltd. and Real Quick Convenience Stores Ltd.
Res. Ex.	Respondent's Exhibit
<b>RESPONDENT</b>	Real Quick Convenience Stores Ltd
<i>Sec.</i>	Section
SoD	Statement of Defense
Sub.	Subsection
the Agreement	The distribution agreement between Conglomerated Nanyu

	Tobacco Ltd. and Real Quick Convenience Stores Ltd.
the Tribunal	Ms.Sara Fan, Pro. John Worthington and Mr. Richard Castle(chief).
Tobacco Products	Licensed tabacoo products provided by Conglomerated Nanyu Tobacco Ltd.
UNIDROIT Principle	Unidroit Principle of International Commercial Contract, 2010

## Table of Authority

### Book

Cited As	Content	Citing Paragraph
<i>Black's Law Dictionary</i>	Bryan A. Garner, Editor in Chief, Black's Law Dictionary, Fourth pocket Edition, West Publish (2011).	5
<i>Born</i>	Gary B. Born, International Commercial Arbitration, Second Edition, Kluwer Law International (2014).	5
<i>BRUNNER</i>	Christoph Brunner, Force Majeure and Hardship under General Contract Principles, Kluwer Law International (2008).	22
<i>Kröll et.al</i>	Kröll,, Loukas A Mistelis & Pilar Perales Viscasillas Stefan, UN Convention on Contracts for the International Sale of Goods (CISG) : [commentary] , Beck/Hart (2011).	22
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<i>Gómez</i>	Katia Fach Gómez, <i>Rethinking the Role of Amicus Curiae in International Investment Arbitration : How to Draw the Line Favorably For the Public Interest</i> , 35 FORDHAM INTERNATIONAL LAW JOURNAL 510(2012).	17
<i>Jones</i>	Doug Jones, <i>Dealing with Multi-tiered Dispute Resolution Process</i> , 75 Arbitration 188(2009).	7,
<i>Kayali</i>	Didem Kayali, <i>Enforceability of Multi-tiered Dispute Resolution Clauses</i> , 27 JOURNAL OF INTERNATIONAL ARBITRATION 551(2010).	6,7
<i>Koneru</i>	Phanesh Koneru, <i>The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles</i> , 6 MINNESOTA JOURNAL OF GLOBAL TRADE 105(1997)	29

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<i>Pineiró</i>	Alvaro Lopez De Argumedo Pineiró, Multi-Step Dispute Resolution Clause, <i>in</i> Miguel Angel Fernandez-Ballesteros and David Arias(eds), Liber Amicorum Bernardo Cremades(2010).	6

### Internet Resource

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<i>CISG Commentary</i>	CISG Database, <i>GUIDE TO CISG ARTICLE 79</i> , available at : <a href="http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-79.html">http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-79.html</a> .	27
<i>CISG Digest</i>	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2012 Edition, available at <a href="http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf">http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf</a>	29
<i>ILA Report</i>	International Law Association, Committee on International Commercial Arbitration, New Delhi Conference (2002), <i>Final Report on Public Policy as a Bar to Enforcement of International Arbitral Award</i> , available at: <a href="http://www.ila-hq.org/en/committees/index.cfm/cid/19">http://www.ila-hq.org/en/committees/index.cfm/cid/19</a> .	32,33
<i>Liu Article</i>	Chengwei Lui, <i>Force Majeure Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law</i>	24

	[2nd edition: Case annotated update (April 2005)],available at: <a href="http://www.cisg.law.pace.edu/cisg/biblio/liu6.html">http://www.cisg.law.pace.edu/cisg/biblio/liu6.html</a> .	
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<i>Macromex v. Globex</i>	American Arbitration Association (Case No. 50181T 0036406), Macromex Srl. v. Globex International Inc., available at: <a href="http://cisgw3.law.pace.edu/cases/071023a5.html">http://cisgw3.law.pace.edu/cases/071023a5.html</a> (2007).	24
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<b><u>ICSID</u></b>		
<i>Biwater Case</i>	International Centre for Settlement of Investment Disputes, (ICSID CASE NO. ARB/05/22) BIWATER GAUFF (TANZANIA) LTD., CLAIMANT V. UNITED REPUBLIC OF TANZANIA, RESPONDENT(2008).	17
<i>Suez Case</i>	International Centre for Settlement of Investment Disputes Washington D.C (ICSID Case No. ARB/03/17) Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. (Claimants) and The Argentine Republic (Respondent)(2006).	17
<b><u>Netherland</u></b>		
<i>Malaysia v. Dairex</i>	Rechtbank's-Hertogenbosch rolnr., (9981 / HA ZA 95-2299) Malaysia Dairy Industries Pte. Ltd. v. Dairex Holland BV, available at: <a href="http://www.unilex.info/case.cfm?id=443">http://www.unilex.info/case.cfm?id=443</a> (1998).	22

<b><u>Singapore</u></b>		
<i>HSBC v. Toshin</i>	Singapore High Court, (Originating Summons No 376 of 2011) HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd(2012). available at : <a href="http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/14964-hsbc-institutional-trust-services-singapore-ltd-trustee-of-starhill-global-real-estate-investment-trust-v-toshin-development-singapore-pte-ltd-2012-sgca-48">http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/14964-hsbc-institutional-trust-services-singapore-ltd-trustee-of-starhill-global-real-estate-investment-trust-v-toshin-development-singapore-pte-ltd-2012-sgca-48</a>	6
<b><u>Switzerland</u></b>		
<i>Swiss case</i>	<i>Swiss Federal Supreme Court</i> 26 ASA Bulletin Not indicated v. Not indicated, Ière Cour de droit civil(2007).	6
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<i>Methanex Case</i>	United Nations Commission on International Trade Law, IN THE MATTER OF AN INTERNATIONAL ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES, METHANEX CORPORATION v. UNITED STATES OF AMERICA (2001).	12
<i>United Parcel Case</i>	United Nations Commission on International Trade Law, AN ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT BETWEEN THE UNITED PARCEL SERVICE OF AMERICA INC AND GOVERNMENT OF CANADA DECISION OF THE TRIBUNAL ON PETITIONS FOR INTERVENTION AND PARTICIPATION AS AMICI CURIAE(2001).	12
<b><u>United Kingdom</u></b>		
<i>Dunlop v. New Garage</i>	Court of House of Lords, (AC 79) <i>Dunlop Pneumatic Tyre Company Ltd v. New Garage and Motor Company Ltd</i> (1915).	28

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**ARGUMENTS**

**I. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE LIQUIDATED DAMAGES CLAIM.**

1. **RESPONDENT** submits that Clause 65.1 of the Agreement, a two-tiered dispute resolution clause, provided a pre-arbitral condition precedent before commencing arbitration. **CLAIMANT** failed to satisfy the required condition.

Therefore, the CIETAC [*CIETAC Rule Art.6*] should decline jurisdiction.

2. The first-tier of Clause 65.1 sets forth two requirements before either party is allowed to submit the dispute for arbitration: one, consultation and negotiation being sought; two, the fulfillment of a 12-month waiting period.
3. Since **[A]** The first-tier of the dispute resolution clause is a condition precedent for arbitration, **[B]** non-compliance of the condition precedent defeats jurisdiction, and **[C]** **CLAIMANT** failed to comply with the condition precedent, the Tribunal does not have jurisdiction over the claim.

**A. THE FIRST-TIER OF THE DISPUTE RESOLUTION CLAUSE IS A CONDITION PRECEDENT TO ARBITRATE.**

4. The first tier of Clause 65.1 is a condition precedent because **[a]** the context

demonstrates the mandatory nature of the Clause, and [b] the first-tier of the dispute resolution clause is enforceable.

**a. The Context Demonstrates the Mandatory Nature of the Clause.**

5. Clause 65.1 reads, “In the event of a dispute, controversy, or a difference arising out of or in connection with this Agreement, the Parties *shall* initially seek a resolution through consultation and negotiation.”(*emphasis added*) The word “shall” means “be required to,” which drafters typically intend and courts typically uphold to be of a mandatory character [*Black's Law Dictionary*]. A number of ICC Tribunals concluded that, “when a word expressing obligation, such as 'shall' is used in connection with amicable dispute resolution techniques, such provision is binding upon parties” [*Born, p.925 n.1550*]. In addition, the clause was drafted in a conditional formula which reads, “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 to the CIETAC ... for arbitration . . . .” The structure and the context is a signal showing **PARTIES'** intent to treat the requirements as condition precedent [*Berger, p.4; ICC Award No.9977*].

**b. The First-Tier of the Clause is Enforceable.**

6. To serve as an enforceable condition precedent, the conditions should be sufficiently certain [*Kayali*, p.569]. In the present case, the agreement to negotiate in good faith is certain [*HSBC v. Toshin*] and of a filtering effect [*Pineiró*, p.732]. The scope of the dispute that can be brought into arbitration was limited to those that had been negotiated by **PARTIES**. Besides, the Clause 65.1 sets a definite time limit [*Swiss case*], i.e., a timetable for future dispute resolution [*Res. Memo* 95]. The formula of this clause is clear, and thus enforceable.

**B. NON-COMPLIANCE TO THE CONDITION PRECEDENT DEFEATS****JURISDICTION.**

7. The failure to comply with condition precedent affects jurisdiction, since the success of objection to such failure negates the consent to the Tribunal [*Paulsson*, p.616]. In the current dispute, **CLAIMANT'S** non-compliance of the condition precedent negates the **RESPONDENT'S** consent to arbitrate. When signing the dispute resolution clause, **PARTIES** expected the Tribunal to refuse to resolve the dispute before the exhaustion of the contracted condition precedent [*Kayali*,

*p.559*]. Besides, jumping hastily into the arbitration only decreases the advantage of the multi-tier clause, i.e., cost reduction and better business relationship [*Jones, p.188-189*]. The Tribunal has no jurisdiction because of the violation of the condition precedent set out in the Clause 65.1.

8. Furthermore, the arbitration agreement establishes a clear formula. The award risks annulment if the Tribunal does not pay full respect to the formula [*Sec.81(1) HK. Arb. Ord.*].

**C. CLAIMANT HAD FAILED TO FULFILL THE CONDITION PRECEDENT SET OUT IN THE CLAUSE 65.1.**

9. **RESPONDENT** submits that the day this dispute arose is 1 May 2013. On 11 April 2013, **CLAIMANT** raised claims for the liquidated damages [*p.18-19, Cl. Ex. No.6&7*]. The liquidated damages claim stemmed from the termination of the Agreement on 1 May 2013, and it was this day that the specific dispute arose.
10. **PARTIES** had never negotiated for the liquidated damages claim.  
  
**CLAIMANT** applied for arbitration on 12 January 2014 [*p.1, AfA*], roughly 7 months after 1 May 2013. In this sense, **CLAIMANT** had failed to comply with the agreement to negotiate and the 12-month waiting period.

11. Alternatively, even if the Tribunal considers otherwise, the date on which the dispute arose shall be 11 March 2013, on which **RESPONDENT** proposed to renegotiate after the Bill 275 entering into force [*p.18, Cl. Ex. No.6*]. As a result, either **PARTY** may submit to CIETAC only after 11 March 2014. In conclusion, the Tribunal has no jurisdiction.

**II. THE TRIBUNAL SHOULD TAKE INTO ACCOUNT THE *AMICUS CURIAE* BRIEF FROM THE GONDWANDAN GOVERNMENT.**

**A. THE TRIBUNAL HAS THE COMPETENCE TO ACCEPT THE *AMICUS CURIAE* BRIEF.**

**a. The Tribunal Can Use Its General Conducting Power of the Proceeding to Accept the *Amicus Curiae* Brief**

12. The Tribunal is free to admit an *amicus curiae* brief submitted by a non-disputing third party upon its general power to conduct the proceedings [*Methanex Case; United Parcel Case; Waincymer, p.603*]. Under the rules applicable to **PARTIES**, the Tribunal could exercise its discretion to accept the *amicus curiae* brief.

**a) The Tribunal has the Competence to Accept the *Amicus***

***Curiae Brief under IBA Rules.***

13. **PARTIES** had adopted the *IBA Rules* specified for the evidence taking [p.35, *Clarifications*, ¶6] if there is no conflicting provision in mandatory rules [Art.1 *IBA Rules*], the *IBA Rules* should be applied.

14. Under *IBA Rules*, the Tribunal has the discretionary power to take any step to obtain documents from any person or organization [Art. 3.10(iii), *IBA Rules*] by all appropriate means. The tribunal's power is a broad one. Accordingly, in the present case, the Tribunal is able to accept the brief under *IBA Rules*.

**b) The Tribunal has the Competence to Accept the Amicus**

***Curiae Brief under CIETAC Rules.***

15. Here, *CIETAC Rules* applies to **PARTIES**. The Tribunal is granted the general power of conducting the proceeding [Art.33 *CIETAC Rules*], and under *CIETAC Rules* the Tribunal may undertake investigations and collect evidence on its own initiative as it consider necessary [Art.41 *CIETAC Rules*]. Under the rules adopted by **PARTIES**, the Tribunal has the competence to accept the brief.

**c) The Tribunal has the Competence to Accept the Amicus**

***Curiae brief under HK Arbitration Ordinance.***

16. As **PARTIES** had their place of arbitration set in Hong Kong, the *lex arbitri HK Arbitration Ordinance* should apply. Under *HK Arbitration Ordinance*, the Tribunal is granted the conducting power of proceeding [Sec. 47(2) *HK. Arb. Ord.*]. In addition, the Tribunal can accept evidence that it considers relevant to the arbitral proceedings [Sec. 47(3) *HK. Arb. Ord.*]. *HK Ordinance* especially enables the Tribunal to determine whether and to what extent it can take initiative in ascertaining law and facts relevant to the proceeding [Sec. 56 *HK. Arb. Ord.*]. The general conducting power of the Tribunal ensures the legitimacy of the acceptance of the *amicus curiae* brief.

**B. THE TRIBUNAL SHOULD TAKE INTO ACCOUNT THE *AMICUS CURIAE***

**BRIEF**

- a. The *Amicus Curiae* Brief is Assistive and Necessary for the Tribunal to Render a Comprehensive Award as it Provides the Interpretation of Bill 275.**

17. The *amicus curiae* brief, which provided a factual, legal and technical opinion of the Bill 275, would offer the Tribunal with a short-cut to knowledge, thus improves the quality of the award made [Gómez, p.545]. The brief could make

great contributions to the Tribunal since it is the independent opinion of a neutral non-disputing party [*Suez Case; Biwater Case*]. Moreover, the brief could help the Tribunal be familiar with Bill 275. It is warranted as the implementation of Bill 275 is essential to the resolution of the current dispute.

18. The content of the brief provided by Gondawandan Government was alleged to be merely a straightforward description of the content of Bill 275 [p.32, *Gondwandan Letter ¶5*]. It was not the case. Since some of the phrases contained in Bill 275 such as “the scope of trade mark” or “ the “displaying trademark or marks associated with tobacco products” remain ambiguous and vague [p.9, *Cl.Ex.No.2*], the interpretation from the state legal department would be of high reference value for the Tribunal.

**b. Taking Into Account the *Amicus Curiae* Brief Will Help the Tribunal Avoid Unenforceable Award.**

19. As the current dispute touches the **RESPONDENT’S** state public policy issues [p32, *Gondwandan Letter*], the Tribunal should to take into account the *amicus curiae* brief. Under *NY Convention*, the enforcement of the award is at risk if it is contrary to the public policy of the contracting state [*Art. V, NY Convention*].

20. If the Tribunal were to render the award without referring to the opinion given by Gondwandan government, the award would possibly be unenforceable since the public policy will not be fully evaluated by the Tribunal. To avoid the risk of an unenforceable award, the Tribunal should take into account the brief.
21. To conclude, the Tribunal has the competence and should accept the *amicus curiae* brief from the Gondwandan Government.

**III. RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE VITIATED BY THE IMPLEMENTATION OF BILL 275.**

22. **RESPONDENT** submits that, Bill 275 should be regarded as a legal impediment under *Art. 79 CISG*. It therefore exempts the obligations of **RESPONDENT**, since the non-compliance of the obligations were beyond **RESPONDENT**'s control. Acts of public authority is a kind of impediment contained in *Art.79 CISG* [*BRUNNER*, p. 265; *Kröll et.al*, p.1072; *Malaysia v. Dairex*]. Bill 275 prohibits the distribution of promotional materials containing trademarks or marks associated with tobacco products [*p.14, Cl. Ex. No.2, ¶4*]. It directly handicapped the ability of **RESPONDENT** to purchase and display Branded Merchandise, such impediment is uncontrollable to **RESPONDENT**.

23. Moreover, [A] **RESPONDENT** could not reasonably be expected to foresee the outcome at the time of the conclusion of the Agreement. [B] **RESPONDENT** could not reasonably be expected to avoid Bill 275 and its economical consequences. Furthermore, the termination of the Agreement was forced by the implementation of Bill 275, [C] the liquidated damage obligation under the Agreement was also vitiated.

**A. RESPONDENT COULD NOT REASONABLY BE EXPECTED TO FORESEE THE  
OUTCOME AT THE TIME OF CONCLUSION OF THE AGREEMENT.**

24. The date the impediment occurs should be taken into consideration when determining foreseeability [*Liu Article*]. In the present case, Bill 275 was introduced after the conclusion of the Agreement, **RESPONDENT** could not foresee such Bill will come into force during the term of the Agreement [*Macromex v. Globex*]. Besides, the Gondwandan government's action prior to 2009 only enforced the requirements of warning label and graphic images [*p.4, AfA, ¶9*], which was different than that of the regulations enacted in Bill 275. Bill 275 prohibits the appearance of trademarks and marks on the retail packaging of tobacco products, and unifies the design of retail packaging, cigarette pack or

cigarette carton [p.13, Cl. Ex. No.2, ¶¶1,2], which impairs the significance of the branding and makes it commoditized. In consideration the value of Nanyu brand, **RESPONDENT** agreed to enter the Agreement; if **RESPONDENT** could foresee the regulation of Bill 275, **RESPONDENT** would have not agreed terms contained in the Agreement.

**B. RESPONDENT COULD NOT REASONABLY BE EXPECTED TO AVOID**

**BILL 275 AND ITS ECONOMICAL CONSEQUENCES.**

25. Obligation can be vitiated under *Art. 79 CISG* only if the party could not be reasonably be expected to have avoided or overcome the impediment or its consequences, i.e., the unavoidable factor. Whether it is avoidable depends on whether there exists “commercially reasonable substitute” [*CISG Commentary*].
- Purchase and Display of Branded Merchandise could not be achieved by any “commercially reasonable substitute”, because **RESPONDENT** cannot be reasonably expected to violate the regulation for achieving contractual obligations.
26. The consequence of the implement of Bill 275 includes the depreciation of Nanyu’s brand and the commoditization of its Tobacco Products, which makes

**RESPONDENT** economically impossible to continue to perform the purchasing obligations. The value of brand and commoditization were not controlled by **RESPONDENT**, and it's not reasonable to expect **RESPONDENT** to overcome or avoid such consequences.

**C. THE OBLIGATION TO PAY FOR THE LIQUIDATED DAMAGE DOES NOT OCCUR OR WAS VITIATED.**

27. The obligations under the Agreement have been vitiated under *Art.79 CISG*, and the non-performance of obligations left no choice for **RESPONDENT** but to terminate the Agreement [*p.20, Cl. Ex. No.8 ,¶4*]. This cannot be described as an exercise of termination right pursuant to Clause 60.2. Accordingly, the liquidated damage prescribed under the Clause did not even occur, as **RESPONDENT** did not terminate the Agreement based on that Clause.
28. Alternatively, should the Tribunal hold that Clause 60.2 applies, the obligation to pay for the liquidated damage is nonetheless vitiated, since the alleged liquidated damage falls within the term “damages” under *Art. 79(5) CISG*. Certainly, this provision exempts the damages within the meaning of *Art. 74 CISG* arose from the non-performance. **RESPONDENT** submits that even though “liquidated

damages clause” at issue may not be identical to what is prescribed under *Art. 74 CISG*, the clause pre-assesses the amount of damages by the parties at the moment the contract is concluded, which is different from a “penalty damages clause” [*Dunlop v. New Garage*]. Therefore, the damages referred in the Clause 60.2 have the same character under *Art. 74 CISG*.

29. To elaborate, it is well established that **PARTIES** may derogate from any provision in *CISG* by agreement pursuant to *Art. 6 CISG* [*Koneru, pp.141-42*]. Here, **PARTIES** agree to derogate from *Art. 74* [*CISG Digest, pp.25&346*]. Therefore, the amount of liquidated damage need not be identical to *Art. 74. Art. 79(5) CISG* applies as the pre-assessment of damages character is demonstrated in the liquidated damage clause of termination [*p.10, Cl. Ex. No.1, Clause 60.2*].
30. To conclude, Bill 275 results in the non-performance of the obligations and forced **RESPONDENT** to terminate the Agreement, resulting in the claimed liquidated damage. Therefore, the liquidated damage obligation is likewise vitiated by *Art.79 CISG*.

**IV. THERE WILL BE A RISK OF ENFORCEMENT SHOULD THE TRIBUNAL ISSUE AN AWARD IN FAVOR OF THE CLAIMANT.**

31. Under the *NY Convention*, **PARTIES** are obliged to recognize and enforce foreign awards as they are made unless there are grounds for refusal of enforcement provided in *Art. V*. In the present case, **RESPONDENT** submits that the enforcement of the award constitutes a violation to public policy of Gondwana, therefore, should the Tribunal issue an award in favor of the **CLAIMANT**, there will be a risk of non-enforcement.
32. The public policy exception set out on *Art. V(2)(b)* of *NY Convention* is an acknowledgment of the right of a State and its courts to exercise ultimate control over a foreign award [*ILA Report*]. In the case at hand, **[A]** Gondwana is a party to the FCTC, WHO's Framework Convention on Tobacco Control, and Bill 275 serves as a rule of essential social interests to Gondwana, and **[B]** the enforcement of the award would threaten the public policy of Gondwana, it constitutes a valid ground for refusal of enforcement under the *NY Convention*.

**A. GONDWANA IS A PARTY TO THE FCTC, AND BILL 275 SERVES AS**

**RULE OF ESSENTIAL SOCIAL INTERESTS TO GONDWANA.**

33. Gondwana is a Party to the WHO's Framework Convention on Tobacco Control [*p.37, Clarifications ¶16* ], which establishes minimum levels of standards to

oblige Parties to implement a wide range of regulatory measures related to tobacco products. Parties are left with ample room to set forth and implement more extensive and stricter measures than the minimum standard, as they consider appropriate [Art. 2.1 *FCTC*]. In fact, the *FCTC* encourages and recognizes **PARITES'** "right" to regulate tobacco control measure within its discretion as long as the measures are compatible with the *FCTC* and international law. It represents that Bill 275 and its intended effects belong to the policy space of Gondwana permitted under international law. The measures adopted in Bill 275 reflected the significant commitments made by the State of Gondwana to better protect public health. It falls within the scope of 'public policy' as provided in Art. V (2)(b), which includes rules designed to serve the essential political, social or economic interests of the State [*ILA Report, Recommendation 3(d)*].

34. Starting from 2001, the Gondwandan government has been introducing reforms to tobacco regulation. It can be inferred that the Bill 275 was an important achievement of Gondwandan government in the aim of protecting public health, thus should be seen as a fundamental policy that serves essential social interests.

**B. THE ENFORCEMENT OF THE AWARD WOULD THREATEN THE PUBLIC****POLICY OF GONDWANA.**

35. Bill 275 was meant to reduce the appeal of tobacco products by removing the value of the products' branding. Should the Tribunal issue an award in favor of **CLAIMANT**, it demonstrates that the Tribunal is prone to honor the full performance of the Agreement. Distributors, such as **RESPONDENT**, who attempts to avoid high damage claims, would seek ways to dodge the regulations in Bill 275 by increasing the value of the branding—the very target of the legislation—in order to fulfill the obligations under such Agreement. In this sense, the enforcement of the award would prevent future anti-tobacco policy enforcement, and would seriously harm the public policy of Gondwana.
36. Therefore, **RESPONDENT** submits that there will be a high risk of non-enforcement of the award should it favor **CLAIMANT** because it is against the essential public policy of Gondwana.

**REQUEST FOR RELIEF**

**RESPONDENT** hereby submits that the Tribunal Should Render the Award in Favor of **RESPONDENT** that

- A. The Tribunal has No Jurisdiction over the Liquidated Damage Claim.**
- B. The Tribunal Should Take Into Account the *Amicus Curiae* Brief Submitted by the Gondwandan Governement.**
- C. RESPONDENT is Not Liable for the Liquidated Damage.**
- D. There Will be a Risk For the Tribunal to Render An Unenforceable Award.**