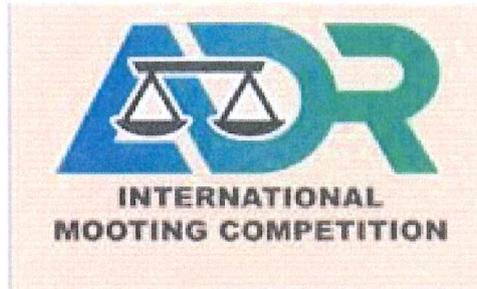


**5<sup>TH</sup> INTERNATIONAL ADR MOOTING COMPETITION**

**HONG KONG 2014**



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**MEMORANDUM FOR CLAIMANT**

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**TEAM CODE: 429C**

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**IN THE MATTER OF:**

**NANYU TOBACCO LTD.**

**...CLAIMANT**

**v.**

**REAL QUIK CONVENIENCE STORES LTD.**

**...RESPONDENT**

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&	And
¶/¶¶	Paragraph/Paragraphs
A.D.2d	New York's Appellate Division Reports
AC	Appeals Cases
All ER	All England Report
Am.	America
Am. J. Int'l L	American Journal of International Law
Anr.	Another
Ark.	Arkansas
Art./Arts.	Article/Articles
BG	Bundesgericht
BGH	BundesGerichtshof
Boston U.L. Rev.	Boston University Law Review
C.L.R	Commonwealth Law Reports
Cal.	California
Cal. 4 <sup>th</sup>	California Reports (4 <sup>th</sup> Series)
Cal. App.	California Appellate Reports
Cal. Rptr.	California Reporter
Ch App	Chancery Appeal Cases
CIETAC	China International Economic and Trade Arbitration Commission
Cir.	Circuit
CISG	Convention on the International Sale of Goods
Cl. Ex.	Claimant's Exhibit
CLOUT	Case Law on UNCITRAL Texts
Co.	Company
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Columbia J European L	Columbia Journal of European Law
Comm.	Commission
Comm. Arb.	Commercial Arbitration
Cornell L.Q.	Cornell Law Quarterly

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Corp.	Corporation
E.D.N.Y	Eastern District of New York
Ed.	Edition
eds.	Editors
et. al.	And others
EWCA	England and Wales Court of Appeal
EWHC	High Court of England and Wales
F.2d	Federal Reporter, Second Series
F.3d	Federal Reporter, Third Series
F.Supp.	Federal Supplement
FCR	Federal Court Reports
Fordham Int'l L.J	Fordham International Law Journal
FSA	Framework and Sales Agreement
FSR	Fleet Street Reports
Ger.	Germany
Govt.	Government
HG	Handelsgericht
I.L.Pr	International Litigation Procedure
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IHR	Internationales Handelsrecht
Inc.	Incorporated
Ins.	Insurance
Int'l	International
Int'l & Comp. L.Q.	International and Comparative Law Quarterly
Int'l Law.	International Lawyer
J.D.I (Clunet)	Journal de droit international
J.Law& Commerce	Journal of Law and Commerce
L. Rev.	Law Review
L.J.	Law Journal
La. L. Rev.	Louisiana Law Review
LG	Landgericht
Loy. L.A. Int'l &	Loyola of Los Angeles International and Comparative Law Review

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Comp. L. Rev.	
LR	Law Reports
Ltd.	Limited
N.D. III	District Court, Northern District of Illinois
N.E.	North Eastern Reporter
No.	Number
Oct.	October
OGH	Oberster Gerichtshof
OLG	Oberlandesgericht
p./pp.	Page/Pages
Pace Int'l L. Rev	Pace International Law Review
Pr. Or.	Procedural Order
Res. Ex.	Respondent's Exhibit
Rev. Arb.	Revue de l'arbitrage (Review of Arbitration)
S.D. Tex.	Southern District of Texas
S.W.	South Western Reporter
SCC	Supreme Court Cases
SGCA	Singapore Court of Appeals
SLA	Sales and Licensing Agreement
Switz.	Switzerland
U.K.	United Kingdom
U.S.	United States
U.S. Dist.	United States District Court
UKHL	United Kingdom House of Lords
UN	United Nations
UNCITRAL	UNCITRAL Model Law on International Commercial Arbitration
v.	Versus
Vindobona J. of Int'l	Vindobona Journal of International Commercial Law & Arbitration
Vol.	Volume
W.D. Okla.	Western District of Oklahoma
WL	Westlaw
Y.B.	Yearbook
YBCA	Yearbook Commercial Arbitration

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TITLE	SHORTENED FORM	¶
I. TREATISES		
A. G. GUEST, BENJAMIN'S SALE OF GOODS (6th ed. 2002) Sweet & Maxwell, London	<i>Guest</i>	1
A. TWEEDDALE& K. TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES – INTERNATIONAL AND ENGLISH LAW AND PRACTICE (2005) Oxford University Press	<i>Tweeddale</i>	3
BENJAMIN'S SALE OF GOODS (6th ed. 2002) Sweet & Maxwell, London	<i>Benjamin</i>	8
E. ALLAN FARNSWORTH, CONTRACTS (3rd ed. 1999) Aspen Publishers	<i>Farnsworth</i>	29
ENDERLEIN, F., MASKOW, D. AND STROHBACH, H., INTERNATIONALES KAUFRECHT (1991) Haufe, Berlin	<i>Enderlein/Maskow/Strochbach</i>	16
FRITZ ENDERLEIN AND DIETRICH MASKOW, INTERNATIONAL SALES LAW (1992) Oceana Publications	<i>Enderlein/Maskow</i>	32
GARY B. BORN, INTERNATIONAL ARBITRATION: LAW& PRACTICE (2012) Kluwer Law International	<i>Born 2012</i>	07

## 5TH INTERNATIONAL ADR MOOTING COMPETITION

---

HARRY M. FLECHTNER, DRAFTING CONTRACTS UNDER THE CISG (Harry M. Flechtner, Ronald A. Brand and Mark S. Walter, eds. 2008) Oxford University Press	<i>Flechtner</i>	11
J. LEW, L. MISTELIS& S. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (2003)  Kluwer Law International	<i>Lew/Mistelis/Kröll</i>	19
J. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION-A STUDY IN COMMERCIAL ARBITRATION AWARDS (1978) Oceana, Dobbs Ferry	<i>Lew</i>	14
JEAN-FRANCOIS POUDRET& SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION (2nd ed. 2007) Sweet & Maxwell	<i>Poudret&amp;Besson</i>	30
JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALE UNDER THE 1980 UNITED NATIONS CONVENTION (3rd ed. 1999) The Hague: Kluwer Law International	<i>Honnold</i>	15,19

## 5TH INTERNATIONAL ADR MOOTING COMPETITION

---

JULIUS VON STAUDINGER, ULRICH MAGNUS, BÜRGERLICHES GESETZBUCH (13th ed.1994) Sellier de Gruyter	<i>Staudinger/Magnus</i>	37
LANDO, O AND BEALE, H (eds) PRINCIPLES OF EUROPEAN CONTRACT LAW (2000) Kluwer Law	<i>Lando, Principles of European Contract Law</i>	20
LAWRENCE W. CRAIG, WILLIAM W. PARK, & JAN PAULSSON, ICC ARBITRATION (2nd ed. 1990) Oceana Publications	<i>Craig</i>	41
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MARTIN KAROLLUS, UN-KAUFRECHT (1991) Vienna/New York	<i>Karollus</i>	37

## 5TH INTERNATIONAL ADR MOOTING COMPETITION

---

- N. BLACKABY, C. PARTASIDES, ET. AL. REDFERN AND  
HUNTER ON INTERNATIONAL ARBITRATION (2009)  
Oxford University Press *Redfern& Hunter 3,13,43*
- OMRI BEN SHAHAR& ARIEL PORAT, FAULT IN  
AMERICAN CONTRACT LAW (2010) Cambridge  
University Press *Shahar/Porat 51*
- PIERO BERNARDINI, LA COMPRAVENDITA  
INTERNAZIONALE, IN RAPPORTI CONTRATTUALI NEL  
DIRITTO INTERNAZIONALE (Milan, 1991) *Bernardini 61*
- R. GRAVESON, E. COHN& D.GRAVESON, THE UNIFORM  
LAWS ON INTERNATIONAL SALES ACT, 1967: A  
COMMENTARY (1st ed. 1968) London Butterworths *Graveson/Cohn/Graves 50*
- ROLAND LOEWE, INTERNATIONALES KAUFRECHT  
(1989) Vienna *Loewe 9,11*
- ROLF HERBER, *Art 1, in* KOMMENTAR ZUM  
EINHEITLICHEN UN-KAUFRECHT (Peter Schlechtriem  
ed. Munich 1995) *Herber 53*

## 5TH INTERNATIONAL ADR MOOTING COMPETITION

---

SCHLECHTRIEM AND SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (3rd ed. 2010) Oxford University Press	<i>Schlechtriem/ Schwenger</i>	47
SCHLECHTRIEM-FERRARI, KOMMENTARZUM EINHEITLICHEN UN KAUFRECHT CISG (3rd ed. 2000)	<i>Schlechtriem-Ferrari</i>	19,28
SCHMIDT-KESSEL, M. IN SCHLECHTRIEM, P. AND SCHWENZER, (EDS), KOMMENTAR ZUM EINHEITLICHEN UNKAUFRECHT, (4th ed. 2004) C. H. Beck	<i>Schmidt-Kessel</i>	51
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WITZ, W., SALGER, H.-C. AND LORENZ, M., INTERNATIONAL EINHEITLICHES KAUFRECHT (2000)	<i>Witz,</i>	14,19,25

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---

## II. CASES

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---

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BayindirInsaatTurizmTicaretveSanayi A.S. v. Islamic *ICSID Case No.*

Republic of Pakistan, ICSID Case No. Arb/03/2 *Arb/03/2* 5

SaliniConstruttori S.P.A and italstrade v. Kingdom of *Salini* 5

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Morocco, ICSID Case No. Arb/00/4

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### TANZANIA

BiwaterGauff (Tanzani) Ltd. v. United Republic of

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### UNITED NATIONS COMMISSION ON

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American Safety Equipment Association v. J.P

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Cobb v. Lewis, 488 F.2d 41 (5<sup>th</sup> Cir, 1974) *Cobb* 62

Cumberland and York Distributors v. Coors Brewing  
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Fotochrome v. Copal Co. , 517 F.2d 512, (2<sup>nd</sup> Cir,  
1975) *Fotochrome* 63

Imperial Ethiopian Govt. v. Baruch Fester Corp. 535 F  
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Iowa Electric Company v. Atlas Corp. 467 F. Supp. 139 *Atlas Corp.* 42

Parsons & Whittemore Overseas Co. v. RAKTA 504  
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Publicker Industries v. Union Carbide Corp. 17 U.C.C  
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Ronald S. Lauder v. The Czech Republic ,

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Mike Cambell and William Cambell v. The Republic of

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- BurghardPiltz, *Der Anwendungsbereich des UN-Kaufrechts*, ANWALTSBLATT57 (1991) *Burghard* 13
- Claude Samson, “*La Convention des Nations Unies sur les contrats de vente internationale de marchandise: Etude comparative des dispositions de la Convention et des règles de droit québécois en la matière*,” 23 CAHIERSDEDROIT927 (1982) *Samson* 14
- Ferrari, “*Auslegung von Parteierklärungen und-verhalten nach UN-Kaufrecht Internationales Handelsrecht*”, IHR 13 (2003) *Ferrari (2003)* 13
- Paul m. Sandler & Andrew d. levy, *Appellate practice for the maryland lawyer : state and federal : Amicus Briefs* 331 *Sandler & Levy*
- Gusztáv Bacher, *Application of the CISG in Hungary and the effect of the CISG on Hungarian Law*, 30 UIA – BUCHAREST October (2008) *Bacher*
- Hans Hoyer, *Der Anwendungsbereich des Einheitlichen Wiener Kaufrechts*, in DAS EINHEITLICHE WIENER KAUFRECHT. NEUES RECHT FÜR DEN INTERNATIONALEN WARENKAUF (Hans

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---

Hoyer & Willibald Posch eds., Vienna 1992)

Judith L. Holdsworth, *Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (CISG [1]), DEKIEFFER

*Holdsworth*

La Spada, *The Law Governing the Merits of the Dispute and Awards ex Aequo et Bono*, in G. LajosVekas, *Zumpersonlichen und des UN-Einheitskaufrechts, Recht Der Internationalen Wirtschaft* 342 (1987)

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Mary-Christine Sungaila, *Effective Amicus before the United states Supreme Court ; A Case Study*, 8 S. CAL REV. L. & WOMENS STUDY. 187, 190 (1999)

*Mary Christine Singaila*

MichealRustad& Thomas Koenig, *The Supreme Court and Junk Social Science : Selective distortion in Amicus briefs*, 72 N.C.L REV. 91, 100 (1993)

*Rustad& Koenig* 6

Sanders, *A Twenty years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Tribunals*, 13 INT'L LAW. 269 (1979)

*Sanders* 6

Aksen, *Application of the New York Convention by the United States Courts*, IV Y.B. COM. ARB. 341, 345 (1979)

*Aksen*

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**ARGUMENTS ADVANCED**

**1. THE ARBITRAL TRIBUNAL HAS JURISDICTION TO DEAL WITH THE DISPUTE.**

1. The jurisdiction of the Arbitral Tribunal is determined by *I.1* The existence of a valid Arbitration agreement, *I.2* Its own jurisdiction over the question of Negotiation and *I.3* Principle of Kompetenz- Kompetenz [*Guest*].

**1.1. THERE EXISTS A VALID ARBITRATION AGREEMENT BETWEEN THE PARTIES**

2. The Claimant has instituted Arbitral proceeding against the Respondent, under the Distribution Agreement [*Claimant's Exhibit No. 1*]. The Claimant is a Tobacco producing Company incorporated in the state of Nanyu and selling its products in the State of Gondwana in accordance with the Distribution Agreement and the above valid arbitration agreement confers the power on the tribunal to address the dispute between the Claimant and the Respondent.

**1.2. NON COMPLIANCE WITH A PRE-ARBITRAL STEP WILL NOT INVALIDATE AN ARBITRATION AGREEMENT.**

3. Non-compliance with a pre-arbitral step will not generally invalidate an arbitration agreement [*Born, International Commercial Arbitration*]. A negotiation clause in the Arbitration agreement will not be an obstacle to its jurisdiction where the claimant has taken reasonable steps to resolve the matter amicably or where negotiations are bound to be futile, no purpose would be served by suspending the arbitration and, even less so, by forcing the claimant to re-start the proceeding [*Alps Finance*].

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4. A tribunal does not force the parties to adhere strictly to the terms of the negotiation clause if it is not cost-effective and could potentially allow a party who does not really wish to negotiate to obstruct and delay arbitration proceedings [*Ethyl; Salini; Czech Republic; Bayindir ; Ecuador*]. Where a party attempts to delay arbitration by insisting on enforcement of a negotiation requirement, courts may decline to assist that party in its delay efforts. [Cumberland]. The compliance with procedural mechanisms in an arbitration agreement is not ordinarily a jurisdictional prerequisite [*Am. Mfg. & Trading*].

5. In the present case, the claimant had attempted to actively negotiate with the Respondent prior to appearing for arbitration and the Respondent had shown no interests in pursuing the Claimants' proposals. The aforementioned negotiation between the parties concluded to be fruitless to the parties and resulted in an inordinate delay of time to the claimants. Furthermore, the parties' 'legal positions' are entrenched to the extent that a recurring negotiation process might not be of utility, it is in the best interest of time and cost for the dispute to be arbitrated. Whereas a decision of the Arbitral Tribunal would bind the parties, that of a negotiation settlement would not [*Brown & Arthur, pp. 62; Gaillard & Savage, p. 15*]

### **1.2.1 IN THE GIVEN CIRCUMSTANCE, ONLY ARBITRATION CAN RESOLVE THE DISPUTE.**

6. Further, the positions of the parties are antagonized to the extent that negotiation is unlikely to be successful [*Fansworth*]. The highest chance of a successful negotiation exists if the conflict is addressed before it has ripened into an actual dispute and before the parties positions have hardened [*Goldsmith & Pointon, p. 145*]. When an amount in dispute has reached a certain level, negotiation is pointless since even a compromise is too expensive [*Association Suisse De l' Arbitrage Bulletin, pp. 190-198*].

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7. In the present case, the dispute is not only in regard to the contract between the Claimant and Respondent but also involves the payment of liquidated damages to the Claimant. The Claimant needs a fast and effective dispute settlement because of its current financial disadvantage. This can only be reached by arbitration.

### **1.3. THE TRIBUNAL IS COMPETENT TO DETERMINE ITS OWN JURISDICTION**

8. The trend in modern International Law is to expressly state the tribunal's competence to decide upon its own competence i.e. *Competence de la Competence*. [ICC Case No. 4355] Kompetenz-Kompetenz is a basic principle of international commercial arbitration. [UNCITRAL Model Law, Art. 16(1); see also, ICC Case No. 6515; ICC Case No. 6516; ICC Case No. 5294; Hoyer, *la Spada*]. The competence-competence doctrine dictates that the arbitral tribunal has authority to determine whether it has jurisdiction to evaluate the validity of the agreement.

9. Article 6.1 of the CEATAC Rules expressly enables the CEATAC to delegate the power to an Arbitral Tribunal to determine the existence and validity of an Arbitration agreement. Also, Article 16(1) of the Model Law provides that a 'Tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement' [Endelein]. This article also codifies the universally accepted doctrine of competence-competence [Fouchard & Goldman, p.398]. Competence-Competence vests in the tribunal the power to determine its own jurisdiction, which extends to the determination of arbitration agreement and the parties thereto [Yukio & Gotanda, p. 35]

10. Therefore, it is amply clear that the dispute between the Claimant and the Respondent is within the scope of the Arbitral Tribunal and under the mandate of the Arbitration agreement entered between the parties involved in the present dispute. The tribunal is competent to

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arbitrate the present dispute and any objection by the Respondent challenging the jurisdiction of the Arbitral Tribunal shall stand baseless.

### **2. THE ARBITRAL TRIBUNAL SHOULD NOT ADMIT THE GONDWANDAN GOVERNMENT'S AMICUS CURIAE BRIEF FOR CONSIDERATION DURING THE PROCEEDINGS.**

11. The legal standard applicable to *amicus* participation has been discussed in *Rathkamp v. Department of Community Affairs* case. They are: (1) *Amici* must have taken permission either from the arbitration tribunal or from the both parties of the dispute to submit an *Amicus Curiae* brief. (2) Prospective *amici* should bring a new and special legal or factual perspective. (3) And finally the party which is giving the *Amicus Curiae* brief has no vested interest in either of the parties to the dispute.

#### **2.1. THE GONDWANDAN GOVERNMENT DID NOT TAKE PERMISSION EITHER FROM THE ARBITRAL TRIBUNAL OR FROM BOTH THE PARTIES OF THE DISPUTE TO SUBMIT AMICUS CURIAE BRIEF.**

12. *Suo Motu* applications on behalf of the party requesting appointment as *Amicus Curiae* have not been provided with in UNCITRAL Model Law [*Campbell*]. For a brief to be considered as *Amicus Curiae* brief, prior permission either from the tribunal or from both the parties is a must [*Biwater Gauff*].

13. In the present case, the brief by the state of Gondwana [*Moot Proposition Page No. 32*] was submitted without taking prior permission from the Tribunal or from both the parties [*Moot proposition, Page No. 32&33*]. Also no such *Amicus Curiae* brief was asked from them by the arbitral tribunal. Hence, any submission of an *Amicus Curiae* brief on the part of Gondwana shall be held to be in contravention to the settled law and should be disallowed by the Arbitral Tribunal.

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### **2.2. THE AMICUS CURIAE BRIEF BY THE GONDWANDAN GOVERNMENT DOESN'T BRING ANY NEW AND SPECIAL LEGAL OR FACTUAL PERSPECTIVE.**

14. In arbitral decisions, it is held that *Amici* may provide a particular insight on the issues under dispute, on the basis of either substantive knowledge or relevant expertise or experience that goes beyond, or differs in some respect from, that of the disputing parties [*Augas de Barcelona; Sanders*]. The perspective is new and special when it is different from, rather than a repetition of, what the parties have argued [*Vindobona Journal*].

15. The *Amicus Curiae* brief submitted by the state of Gondwana talked only about the already known facts regarding new regulations and policies implemented in the state to reduce tobacco consumption and promotion and lacked any new, special, legal or factual perspective on the issues under dispute. Also the brief submitted lacked substantive knowledge and relevant expertise which could go beyond, or differed in some respect from that of the disputing parties.

### **2.3. THE STATE GIVING THE AMICUS CURIAE BRIEF RAISES A PRESUMPTION THAT IT HAS VESTED INTERESTS IN THE RESPONDENT COMPANY.**

16. Applicant cannot be a “friend of the court” if he cannot be perceived as independent from the parties and participants in the case [*Slobodan*]. The *ad hoc* tribunals have clarified that *Amicus Curiae* must not be “linked” or “affiliated” with any party to the case [*Kayishema*]. And also are required not to “repeat[s] the task undertaken by the [...] Chamber and the parties in their submissions” [*Gotovina*]. Furthermore, “[t]he amici do not act as representatives of the Accused at trial, but solely as assistants to the Trial Chamber” [*Slobodan*].

17. In the present dispute between two parties, the government is submitting the *Amicus Curiae* brief *suo motu* which raises a presumption that Gondwana has vested interest in the Respondent company [*Lando*].

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18. Hence, Gondwandan Government's Amicus Curiae brief doesn't comply with the legal standard applicable to amicus participation and should not be considered during the proceedings.

### **2.4. ARGUENDO, THE AMICUS CURIAE BRIEF WOULD NOT AFFECT THE MERIT OF THE CASE IN FAVOUR OF THE CLAIMANT.**

19. In the present case the claimant has only claimed compensation to be paid because of the early termination of the contract by the Respondent as per clause 60.2 of the Distribution agreement [Claimants Exhibit No.1]. The arbitration would have related to Gondwandan Public Policy only if the Claimant had forced the Respondent to continue with the agreement sans abiding by the new regulations and policies implemented by the state of Godwana.

20. The claimant is claiming the contractual obligation of the Respondent that is the compensation to be paid as already agreed upon. Hence, this matter in no way relates to the Gondwandan Public Policy.

### **3. THE RESPONDENT'S OBLIGATIONS UNDER THE AGREEMENT WERE NOT VITIATED BY THE GONDWANDAN REGULATIONS.**

21. The Respondent's obligations under the contract were not vitiated as a result of the Gondwandan regulations enforced during the term of the contract because the regulations were not unforeseeable [*Varandy*] [3.1.1], the regulations do not alter the equilibrium of the contract between the parties [3.1.2] and the regulations can be reasonably overcome by the Respondent [*Karollus*].

#### **3.1. THE RESPONDENT FAILED TO PERFORM ITS OBLIGATIONS AS PER THE AGREEMENT.**

22. Non-performance is failure by a party to perform any of its obligations under the contract [*Article 7.1.7 of the PICC*].

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23. The Respondent has not upheld its contractual obligations as per clause 60.2 of the Distribution Agreement [*Claimant's exhibit 1*]. As per clause 60.2 of the Distribution Agreement, in the event that the Buyer terminates the Agreement, he shall be liable to pay liquidated damages. The Respondent has not met with the contractual requirement as per which it had to pay a sum of \$75,000,000 as liquidated damages for termination of the contract with the Claimant.

24. A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences [*Article 79 of CISG*]. At hand, the Respondent has suspended the performance of the agreement in light of the new Gondwandan Tobacco regulations [*Claimant's Exhibit No. 8*]. The regulations enforced by the Gondwandan government were a foreseeable impediment for the Respondent. Moreover, the Respondent could have overcome the alleged impediment.

### **3.1.1. THE REGULATIONS COULD HAVE BEEN REASONABLY EXPECTED BY THE RESPONDENT.**

25. In order to assess the reasonable foreseeability of an impediment, an objective standard applies is Considering the understanding of a reasonable person of the same kind as the party in question in the same circumstances [*Article 8 (2) of CISG*].

26. Respondent could have reasonably been expected to avoid, overcome or take the impediment into account at the time of the Contract's conclusion [*Art. 79(1) CISG*]. Furthermore, "Nearly all potential impediments to performance – even wars, fires, embargoes and terrorism are increasingly 'foreseeable' in the modern commercial environment," [*Lookofsky*].

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27. It has been held by the Arbitral Tribunal that even if some economic difficulties are unprecedented, they can still be foreseeable [*Himpurna California*]. Moreover, It has been held that changes in law in the duration of a long term agreement, even sudden and significant, is not exceptional and, a fortiori, is not an unforeseeable event [*Société Romay*].

28. In the instant case, the government of Gondwana in its endeavour to curb the consumption of tobacco, the government had begun to enforce stringent regulations on the sale and use of tobacco products at regular intervals [*Statement of Facts, ¶9*]. These regulations were an indication of the Government's intention to curb and decrease the consumption of Tobacco and Tobacco products in the state. Hence the regulations could have been reasonably expected by the Respondent.

### **3.1.2. THE IMPEDIMENT DOES NOT ALTER THE EQUILIBRIUM OF THE CONTRACT.**

29. In order to be exempted under Article 79 of CISG, the impediment must fundamentally alter the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished [*Robert Brunner*]

30. A cost increase of something less than 100% would not make performance of a contract implacable for any party to the contract [*Publicker Industries*]. An increase in the cost of performance of 50%-58% was held to be not enough to bring about discharge. [*Atlas Corp*]. It has been held by the Arbitral Tribunal that even if difficulties are unprecedented, they can still be foreseeable [*California Energy*].

31. In the instant case, the Tobacco industry in Gondwana suffered an average 30 % decline in sales through all channels. The claimant in particular suffered an approximate decline of 25 % decline in sales and also incurred further developmental and manufacturing costs

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[*Statement of Facts, ¶13*]. The Respondent had a market share of 70 % in the Gonwandan Convenience store sector and could easily overcome the losses it has incurred due to the foreseeable changes in regulations of Tobacco products.

32. Thus, the Respondent is not absolved from his liability to pay for the Claimant's damages as the contract between the Respondent and claimant was not frustrated in accordance with Article 79 of CISG.

**4. IF THE TRIBUNAL WERE TO ISSUE AN AWARD IN FAVOUR OF THE CLAIMANT, THERE WOULD BE NO RISK OF ENFORCEMENT.**

33. Article V of the New York Convention establishes seven grounds on which enforcement of an award may be challenged. In the present case all the seven grounds on which enforcement of an award may be challenged are absent and hence there is no risk of enforcement. They are as follows:

**4.1. THE PARTIES TO THE AGREEMENT WERE, UNDER NO INCAPACITY, AND THE SAID AGREEMENT IS NOT INVALID UNDER THE LAW TO WHICH THE PARTIES ARE SUBJECTED.**

34. In the present case, both the claimant and the respondent are under no incapacity and also the said agreement is not invalid under the law to which the parties have subjected it.

**4.2. THE PARTY AGAINST WHOM THE AWARD IS INVOKED WAS GIVEN PROPER NOTICE OF THE APPOINTMENT OF THE ARBITRATOR OR OF THE ARBITRATION PROCEEDINGS AND ALSO WAS ABLE TO PRESENT HIS CASE.**

35. The Respondent in this case was given proper notice of the appointment of the arbitrator and the arbitration proceedings [*Claimant's Exhibit No.11*].

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**4.3. THE AWARD CONTAINS DECISIONS IN LIMIT OF THE ARBITRAL TRIBUNAL'S AUTHORITY.**

36. Clause 60.2 of the agreement talks about the compensation to be paid that is USD \$ 75,000,000 in case the Respondent terminates the agreement within 0-3 years from the date of signature for this agreement. *[Claimant's Exhibit No 1]* The arbitration agreement is absolutely valid and hence the same decision would fall under the scope of the arbitration agreement and the matters submitted to it by the parties *[Samson]*.

**4.4. THE COMPOSITION OF THE ARBITRAL AUTHORITY OR THE ARBITRAL PROCEDURE WAS IN ACCORDANCE WITH THE AGREEMENT OF THE PARTIES, OR, FAILING SUCH AGREEMENT, WAS IN ACCORDANCE WITH THE LAW OF THE COUNTRY WHERE THE ARBITRATION TOOK PLACE.**

37. In the present case the composition of the arbitral authority and the arbitral procedure is in accordance with the agreement of the parties. *[Claimant's Exhibit No1]*.

**4.5. THE AWARD IS BINDING ON THE PARTIES, AND HAS NOT BEEN SET ASIDE OR SUSPENDED BY A COMPETENT AUTHORITY OF THE COUNTRY IN WHICH, OR UNDER THE LAW OF WHICH, THAT AWARD WAS MADE.**

38. Here in the present case the award is binding on the parties *[Claimant's Exhibit No 1]*, and it has neither been set aside nor suspended by the competent authority of the country, in which or under the law of which, the award was made.

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### **4.6. THE SUBJECT MATTER OF THE DISPUTE IS CAPABLE OF SETTLEMENT BY ARBITRATION UNDER THE LAW OF GONDWANA.**

39. The subject matter of dispute is absolutely valid according to Article 1 of CISG, New York, 2010 and is capable of settlement by arbitration under the law of the country.

### **4.7. THE RECOGNITION OR ENFORCEMENT OF THE AWARD IS NOT CONTRARY TO THE PUBLIC POLICY OF GONDWANA**

40. Public policy is that principle of law which holds that no subject can lawfully do, which has a tendency to be injurious to the public or against the public good, which may be termed, the policy of the law or public policy in relation to the administration of the law [*Witz*] [*Inland Water*]. Theory and practice agree that public policy reflects some moral, social, economic or legal principles “sacrosanct as to require their maintenance at all costs and without exception [*Geoffrey*]”.

41. Article V(2)(b) of the NYC provides that a court may refuse to recognize a foreign arbitral award if it deems that enforcing that arbitral award may interfere with the ‘public policy’ of the state in which the award is sought to be enforced [*Cobb*].

42. The Convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice. [*Parsons 2*]

43. In the present dispute, the claimant is claiming compensation because of the early termination of the contract by the Respondent. The enforcement of the award here would lead to the payment of USD \$ 75,000,000 to the claimant by the Respondent. This award by no means would be contrary to the public policy of the state of Gondwana.

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44. Hence it is contented now that all the seven grounds on which the enforcement of an award may be challenged are absent here and there would be no risk of enforcement if the tribunal issues an award in favour of the Claimant.

**REQUEST FOR RELIEF**

In light of the above submissions, Counsels for the CLAIMANT respectfully request the Honourable Arbitral Tribunal to find that:

- The Liquidated damages in the sum of USD \$ 75,000,000 pursuant to clause 60 of the agreement be paid to the Claimant
- The Respondent to pay all costs of the Arbitration, including the Claimant's expenses for legal representation, Arbitration fee paid to CIETAC and the additional expenses of the arbitration as set out in Article 50 of the CIETAC rules.
- 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 to the Claimant to the date of payment by the Respondent.

*Respectfully signed and submitted by counsel on 20<sup>th</sup> June 2014*