5TH INTERNATIONAL ADR MOOTING COMPETITION

28 JULY-02 AUGUST 2014

HONG KONG

Before China International Economic and Trade Arbitration Commission (CIETAC), for Arbitration between

CLAIMANTS	**RESPONDENTS**
Conglomerated Nanyu Tobacco Ltd	Real Quik Convenience Stores Ltd

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LIST OF ABBREVIATIONS

CISG: United Nations Convention on International Sale of Goods

UNIDROIT: Institut International Pour L'Unification du Droit Prive (*French: International Institute for the Unification of Private Law*)

UNCITRAL: United Nations Commission On International Trade Law

CIETAC: China International Economic and Trade Arbitration Commission

INDEX OF AUTHORITIES

Russia

RUSSIA Arbitration Award case No. 123/1992 of 17 October 1995

RUSSIA Arbitration Award case No. 155/1994 of 16 March 1995

RUSSIA High Arbitration Court: Information Letter No. 29 of 16 February 1998

RUSSIA Arbitration Award case No. 155/1994 of 16 March 1995

Bulgaria

BULGARIA Arbitration Award case No. 11/1996 of 12 February 1998

BULGARIA Arbitration Award case No.56/1995 of 24 April 1996

BULGARIA Arbitration Award case No. 11/1996 of 12 February 1998

Germany

GERMANY Oberlandesgericht [Appellate Court] Zweibrücken 31 March 1998

GERMANY Bundesgerichtshof [Federal Supreme Court] 24 March 1999

GERMANY Hamburg Arbitration Award of 21 March / 21 June 1996

GERMANY Oberlandesgericht [Appellate Court] Zweibrücken 31 March 1998

GERMANY Bundesgerichtshof [Federal Supreme Court] 24 March 1999

GERMANY Oberlandesgericht [Appellate Court] Hamburg 4 July 1997

GERMANY Bundesgerichtshof [Federal Supreme Court] 24 March 1998

Netherlands

NETHERLANDS Rechtbank [District Court] -Hertogenbosch 2 October 1998

ICC

ICC International Court of Arbitration, case No. 7197 of 1992

ICC International Court of Arbitration, case No. 6281 of 1989

Belgium

BELGIUM Rechtbank van Koophandel [Commercial Court] Hasselt 2 May 1995

STATEMENT OF FACTS

1. It is submitted that Conglomerated Nanyu Tobacco Ltd., a company incorporated under the laws of Nanyu, is the Claimant and Real Quik Convenience Stores Ltd., a company incorporated under the laws of Gondwana, is the Respondent. Conglomerated Nanyu is the largest producer of tobacco in Nanyu which incepted in 1994. Conglomerated has a big market in Gondwana and other parts of the World as well. Real Quik is one of the fastest growing convenience stores chain in Gondwana. Formed in 1999, Real Quik is estimated to have over 70% market share in Gondwana's convenience store sector. The Claimant has appointed the Respondent as its Distributor in Gondwana since 2000. The parties usually signed 10 year agreements and the last agreement between them was a 10 year agreement signed on 14 December 2010. The terms of the Agreement included provisions for fixed price of the products, prominent counter space for display of products, supply of free promotional materials to Respondents for use in counter displays, providing of promotional merchandise for Respondent to sell in its stores. Also, the Respondent was obligated to pay a 20% price premium for all of the Claimant's products as opposed to its competitors.

2. Conglomerated Nanyu Tobacco applied for Arbitration to the Hong Kong sub-commission of CIETAC (China International Economic and Trade Arbitration Commission) on 12 January 2014, under the Arbitration Clause (Clause 65 of the Distribution Agreement) and under CIETAC Arbitration Rules, against the Respondents. The Claimants applied for the recovery of the claimed amount of USD$ 75,000,000, to be recovered under Clause 60.2 of the Distribution Agreement.

3. The Respondents denied any such right to the Claimants and contended that the contract frustrated as they could not legally perform their duties and obligations under the contract after the transformation of Bill 275 into an Act of Parliament in Gondwana whose violation could result in civil and penal sanctions on the Respondents. They also challenged the jurisdiction of the Arbitration Tribunal pursuant to 12 month requirement under Clause 65 of the Distribution Agreement.

4. The events that ensued after the agreement led to such dispute between the parties. After the Agreement in 2010, a bill was tabled in the Parliament by a Gondwandan senator (Bill 275/2011) commonly known as "Clean our Air" Bill. The Gondwandan government had been keen on reforming tobacco laws. Starting in 2001, the government began to enforce stricter regulations on sale and use of tobacco products. In 2002, new packaging requirements were introduced which required warning labels on all tobacco products. Year 2004 led to a national ban on smoking indoors. In 2005, a further ban on smoking in public areas was implemented by the Gondwandan government. The last regulation before the conclusion of the Agreement between the parties came in 2009 whereby the government expanded its packaging restrictions by adding further requirements on warning labels.

5. The Bill 275 was to introduce such reforms which were to render the contract incapable of being performed. The Bill imposed restrictions on packaging colour, logos/trademarks, identifying marks, etc. Further, aside from tobacco products themselves, any promotional merchandise (which was also a part of Distribution Agreement between the parties) would be subject to same restrictions.

6. The Bill met with opposition and no one believed it would pass the Senate, as shown by an article in Gondwandan Herald. However, the Bill passed into law on 13 April 2012. The Claimants challenged the constitutionality of Bill 275 in the Gondwandan Supreme Court, in April 2011, on the basis of intellectual property rights but their suit failed (judgment on 23 June 2011).

7. After the passage of the Bill, 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.

8. On 11 March 2013, the Respondents expressed wish to renegotiate the contract after the coming into force of the new legislation. A meeting was subsequently held between the parties on 11 April 2013 but no agreement could be reached. On 1 May 2013, the Respondent notified the Claimant of the termination of the Agreement, to be effective from 1 June 2013. The Claimant sent a letter to the Respondent on 1 June 2013 claiming the amount of USD $ 75,000,000 as under Clause 60 of the Agreement which provided for such compensation if the Respondent terminated the Agreement. The Respondent did not reply. On 1 July 2013, the Claimants issued the first Notice of Default to the Respondents, and a final Notice of Default was issued on 2 August 2013. The Respondent did not respond until this time and on 2 September 2013, the Claimants issued a pre-action demand letter to the Respondents threatening to use Clause 65 of the Agreement in case of default. The Respondent replied on 26 September 2013, writing that the termination was due to factors outside the control of the Respondent and thus the Respondent was not liable under Clause 60 of the Distribution Agreement.

LEGAL SUBMISSIONS

On Jurisdiction

A. *The Tribunal has jurisdiction to decide the case*

1. The Tribunal has jurisdiction to hear the matter under Article 3 of the CIETAC Arbitration Rules:

Article 3 Jurisdiction

1. CIETAC accepts cases involving economic, trade and other disputes of a contractual or non-contractual nature, based on an agreement of the parties.

2. The cases referred to in the preceding paragraph include:

(a) International or foreign-related disputes;
(b) Disputes related to the Hong Kong Special Administrative Region, the Macao Special Administrative Region and the Taiwan region; and
(c) Domestic disputes.

2. According to Article 13 (Resort to Arbitral or Judicial Proceedings) of UNCITRAL Model Law on International Commercial Conciliation (2002):

"Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred

arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, ***except*** *to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings".*

3. In case there is a time period stipulated in the agreement, it can be extended by both parties or can be accelerated in case one party is not negotiating. In some cases, one party may unilaterally terminate the process at a time. Sometimes the process can also be terminated after attending first meeting of conciliation (*ICC ADR Rules, Art. 5(1), 6(1)(b); CPR 3(b), and 11(d) of UNCITRAL Model Law*).

4. The rule allows conciliation to be bypassed if 'a specified event' occurs. The UNCITRAL Law does not key termination of the conciliation solely on some temporal deadline, but instead contemplates that the parties may agree to terminate conciliation and proceed to arbitration upon the occurrence of a 'specified event' such as the unilateral decision of a party that it is appropriate to do so. There is also an exception which is if a party considers it necessary to 'preserve its rights'.

5. The Claimant believes that they have rightfully approached the Tribunal for arbitration. Furthermore, the conciliation proceedings would have been futile. The Respondents had terminated the Agreement and were not replying to anything.

6. Without prejudice to the above, it is submitted that the date of oral hearing is 28 July 2014, by which time the 12 month period will be over and thus the Tribunal can decide on the matter.

7. Moreover, the 12 month period under Clause 65, reproduced below, was only a procedural formality and does not affect the tribunal's jurisdiction to decide issue of the disputed sum and the Tribunal is fully competent to hear and arbitrate on the matter:

"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."

8. It is also submitted that there was no explicit mediation clause in the Agreement. It is established position of law that the duty to negotiate in good faith is too vague to be enforced (*Howtek, Inc v. Relisys (958 F.Supp 46, 48(D.N.H. 1997), Channel Home Centers, Div. of Grace Retail Corp. v. Grossman (795 F.2d 291, 293 (3rd Cir. 1989*).

Similarly, as per Lord Denning in *Courtney & Fairbairn Ltd. v. Tolaina Brothers (Hotels) Ltd. ([1975] 1 W.L.R. 297 (C.A.) (Lord Denning)*, "it seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law".

On Merits

A. *Entitlement under Clause 60.2 of the Distribution Agreement*

1. The Claimants are entitled to compensation of USD $75,000,000/- pursuant to Clause 60.2 of the Agreement. Clause 60.2 clearly demonstrates the intention of the Parties. It is reproduced below,

> 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.

B. ***The Contract did not frustrate***

1. It is submitted that the Contract did not frustrate as has been explained by the case law on Article 79(1) of the CISG.

2. Further, the Respondents did not serve a Force Majure Notice rather they did serve a termination notice and thus, under the Contract, are liable for the payment under Clause 60.2 of the Distribution Agreement.

3. In a China International Economic & Trade Arbitration Commission CIETAC (PRC) Arbitration Award: "FeMo" alloy case (2 May 1996), both [Buyer] and [Seller] agreed to resolve the dispute according to the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG), according to the principle of autonomy of the parties, the CISG applies to this case. The Arbitration Tribunal held that there was no legal basis to support frustration of purpose theory as asserted by [Seller]. The Seller asserted that radical change in market price led to frustration of the agreement. And thus, is contended that even radical changes do not render the contract frustrated and the contract is upheld by the courts.

4. In the case of *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* the High Court cited the Singapore Court of Appeal case of Glahe International Expo AG v ACS Computer Pte Ltd and another appeal [1999] 1 SLR(R) 945 ("*Glahe*") in which the Court of Appeal had explained that:

"... The law on frustration is well settled. A contract is considered frustrated when a supervening event (which has not been expressly provided for in the contract) takes place, the consequence of which is that the nature of the parties' (or one party's) obligations is so fundamentally or radically altered that the contract can no longer justly be said to be the same as that which was originally entered into by the parties."

5. In the same case the Court of Appeal also approved of the following statement by Lord Simon of Glaisdale in *National Carriers Ltd v Panalpina (Northern) Ltd*, [1981] 1 AC 675 at 700:

"Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."

Accordingly, *even if* the Sand Ban were unforeseen, "*what matters is whether or not the Sand Ban radically altered the nature of Alliance's obligations under the Contracts or merely made it more expensive or onerous for it to fulfill its obligations to SK*". In this respect, the High Court found that Alliance had not been rendered incapable of performing its obligations under the Contracts at the material time and nothing had occurred that radically altered the obligations undertaken by it under the Contracts.

6. First, even if it would have been more expensive for Alliance to supply the concrete, the legal position is "*that a party who agrees to supply goods or services for a fixed price would, in the absence of terms to the contrary, be deemed to have taken the risk of any increase in the costs of supplying those goods or services*". As such, "*increased costs of performing contractual obligations do not, without more, frustrate a contract*". Second, Alliance's concern about pricing itself showed that it was not impossible for Alliance to supply the concrete to Sato, albeit at an increased cost to itself. The High Court held that "*it is only when the unavailability of sand radically alters the obligations undertaken by Alliance under the Contracts that the question of frustration will arise*". Third, the justice of the case actually favoured Sato. The learned judge noted that while Alliance was happy enough to adopt BCA's suggested price for the concrete post Sand Ban, "*it, unlike [Sato], was unwilling to follow the BCA's cost-sharing arrangement to cope with the increased price of sand*". And crucially, Alliance sought to impose a surcharge on the sand which was six times more than the actual increase of the price of sand.

7. What was particularly damning that despite Alliance's protest that it was doing "*national service*" by selling its concrete below cost, the learned judge pointed out that in 2007, Alliance had in fact made a relatively huge profit of $22.49m after three straight loss making years in the millions.

8. Fourth, the two Singapore cases which Alliance relied on in seeking to justify its refusal to perform the Supply Agreements were "*easily distinguishable from the present case*". Interestingly enough, those two cases similarly involved the same Sand Ban affecting Alliance and Sato and in those cases, frustration was either successfully pleaded or would have been successful if pleaded.

C. ***There was no Impediment***

1. According to the established principles of law, it is submitted that there was no Impediment for the Respondents to perform the Contract.

2. Tribunals have refused to find an exemption suggesting that there was not an impediment within the meaning of article 79(1), although it is often not clear whether the result was actually based on failure of the impediment requirement or on one of the additional elements going to the character of the required impediment (e.g., that it be beyond the control of the party claiming an exemption). Decisions dealing with the following situations fall into this category: a buyer who claimed exemption for failing to pay the price because of inadequate reserves of currency that was freely convertible into the currency of payment, where this situation did not appear in the exhaustive list of excusing circumstances catalogued in the written contract's *force majeure* clause; *(RUSSIA Arbitration Award case No. 123/1992 of 17 October 1995)* a seller who claimed exemption for failing to deliver based on an emergency halt to production at the plant of the supplier who manufactured the goods; *(RUSSIA Arbitration Award case No. 155/1994 of 16 March 1995)* a buyer who claimed exemption for refusing to pay for delivered goods because of negative market developments, problems with storing the goods, revaluation of the currency of payment, and decreased trade in the buyer's industry; *(BULGARIA Arbitration Award case No. 11/1996 of 12 February 1998)* a seller who claimed exemption for failing to deliver because its supplier had run into extreme financial difficulty, causing it to discontinue producing the goods unless the seller provided it a

"considerable amount" of financing *(GERMANY Hamburg Arbitration Award of 21 March / 21 June 1996).*

3. It has been held that this requirement was not satisfied, and thus it was proper to deny an exemption, where a buyer paid the price of the goods to a foreign bank from which the funds were stolen and never received by the seller (*RUSSIA High Arbitration Court: Information Letter No. 29 of 16 February 1998*).

4. It is also submitted that the Impediment was not beyond the control of the Respondents. In a case where the seller's supplier could not continue production of the goods unless the seller advanced it "a considerable amount of cash", however, an arbitral tribunal found that the impediment to the seller's performance was not beyond its control, stating that a seller must guarantee its financial ability to perform even in the face of subsequent, unforeseeable events, and that this principle also applied to the seller's relationship with its suppliers *(GERMANY Hamburg Arbitration Award of 21 March / 21 June 1996)*. And where the seller's supplier shipped to the buyer, on the seller's behalf, a newly-developed type of vine-wax that proved to be defective, the situation was found not to involve an impediment beyond the seller's control: a lower court held that the requirements for exemption were not satisfied because the seller would have discovered the problem had it fulfilled its obligation to test the wax before it was shipped to its buyer; *(GERMANY Oberlandesgericht [Appellate Court] Zweibrücken 31 March 1998)* on appeal, a higher court affirmed the result but rejected the lower court's reasoning, stating that the seller would not qualify for an exemption regardless of whether it breached an obligation to examine the goods *(GERMANY Bundesgerichtshof [Federal Supreme Court] 24 March 1998).* Failure to satisfy this requirement was one reason cited by an arbitral tribunal for denying an

exemption to a seller that had failed to deliver the goods because of an emergency production stoppage at the plant of a supplier that was manufacturing the goods for the seller *(Russia Arbitration Award case No. 155/1994 of 16 March 1995)*.

5. The Respondents should have known the trend of legislation in their country. Therefore, the condition/impediment can be treated as an existing condition too. Several decisions have denied an exemption when the impediment was in existence and should have been known to the party at the time the contract was concluded. Thus where a seller claimed an exemption because it was unable to procure milk powder that complied with import regulations of the buyer's State, the court held that the seller was aware of such regulations when it entered into the contract and thus took the risk of locating suitable goods (*NETHERLANDS Rechtbank [District Court] - Hertogenbosch 2 October 1998.)* Similarly, a seller's claim of exemption based on regulations prohibiting the export of coal (*BULGARIA Arbitration Award case No.56/1995 of 24 April 1996)* and a buyer's claim of exemption based on regulations suspending payment of foreign debts *(ICC International Court of Arbitration, case No. 7197 of 1992)* were both denied because, in each case, the regulations were in existence (and thus should have been taken into account) at the time of the conclusion of the contract. Parties have been charged with responsibility for taking into account the possibility of changes in the market value of goods because such developments were foreseeable when the contract was formed, and claims that such changes constitute impediments that should exempt the adversely-affected party have been denied (*BELGIUM Rechtbank van Koophandel [Commercial Court] Hasselt 2 May 1995*. a significant drop in the world market price of frozen raspberries was "foreseeable in international trade" and the resulting losses were "included in the normal risk of commercial activities"; thus buyer's claim of exemption was denied:

[BULGARIA Arbitration Award case No. 11/1996 of 12 February 1998 (negative developments in the market for the goods "were to be considered part of the buyer's commercial risk" and "were to be reasonably expected by the buyer upon conclusion of the contract); CLOUT case No. 102 *[ICC International Court of Arbitration, case No. 6281 of 1989* (when the contract was concluded a 13.16% rise in steel prices in approximately three months was predictable because market prices were known to fluctuate and had begun to rise at the time the contract was formed; although decided on the basis of domestic law, the court indicated that the seller would therefore have been denied an exemption under article 79 (see full text of the decision).

6. In order to satisfy the prerequisites for an exemption under article 79(1), a party's failure to perform must be due to an impediment that the party could not reasonably be expected to have avoided. In addition, it must not reasonably have been expected that the party would overcome the impediment or its consequences. Failure to satisfy these requirements were cited by several tribunals in denying exemptions to sellers whose non-performance was allegedly caused by the default of their suppliers. Thus it has been held that a seller whose supplier shipped defective vine wax (on the seller's behalf) directly to the buyer (*GERMANY Bundesgerichtshof [Federal Supreme Court] 24 March 1999)*, as well as a seller whose supplier failed to produce the goods due to an emergency shut-down of its plant *(RUSSIA Arbitration Award case No. 155/1994 of 16 March 1995)*, should reasonably have been expected to have avoided or surmounted these impediments, and thus to have fulfilled their contractual obligations. Similarly, it has been held that a seller of tomatoes was not exempt for its failure to deliver when heavy rainfalls damaged the tomato crop in the seller's country, causing an increase in market prices: because the entire tomato crop had not been destroyed, the court ruled, the seller's performance was still possible, and the

reduction of tomato supplies as well as their increased cost were impediments that seller could overcome *(GERMANY Oberlandesgericht [Appellate Court] Hamburg 4 July 1997).*

7. In order to qualify for an exemption under article 79(1), a party's failure to perform must be "due to" an impediment meeting the requirements discussed in the preceding paragraphs. This causation requirement has been invoked as a reason to deny a party's claim to exemption, as where a buyer failed to prove that its default (failure to open a documentary credit) was caused by its government's suspension of payment of foreign debt *(ICC International Court of Arbitration, case No. 7197 of 1992; [BULGARIAArbitration Award case No. 56/1995 of 24 April 1996* (seller's argument that a miners' strike should exempt it from damages for failure to deliver coal rejected because at the time of the strike seller was already in default).). The operation of the causation requirement may also be illustrated by an appeal in litigation involving a seller's claim to be exempt under article 79 from damages for delivering defective grape vine wax. The seller argued it was exempt because the wax was produced by a third party supplier that had shipped it directly to the buyer. A lower court denied the seller's claim because it found that the seller should have tested the wax, which was a new product, in which event it would have discovered the problem *(GERMANY Oberlandesgericht [Appellate Court] Zweibrücken 31 March 1998)*. Hence, the court reasoned, the supplier's faulty production was not an impediment beyond its control. On appeal to a higher court, the seller argued that all vine wax from its supplier was defective that year, so that even if it had sold a traditional type (which it presumably would not have had to examine) the buyer would have suffered the same loss *(GERMANY Bundesgerichtshof [Federal Supreme Court] 24 March 1999).* The court dismissed the argument because it rejected the

lower court's reasoning: according to the court, the seller's responsibility for defective goods supplied by a third party did not depend on its failure to fulfill an obligation to examine the goods; rather, the seller's liability arose from the fact that, unless agreed otherwise, sellers bear the "risk of acquisition", and the seller would have been liable for the non-conforming goods even if it was not obliged to examine them before delivery. The court apparently found that, even if the seller had sold defective vine wax that it was not obliged to examine, the default would still not have been caused by an impediment that met the requirements of article 79.

8. It is submitted that the Respondent cannot rely on this Article as the Claimants have done everything in their power, including meeting and writings. According to Article 77 of the CISG:

> *A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.*

9. The Claimants did cooperate with the Respondents and tried to renogiate the terms on 11 April at their office in Nanyu. According to Article 5.1.3 (CO-OPERATION BETWEEN THE PARTIES):

> *Each party shall co-operate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.*

10. The Claimants also duly served Notices of Default as provided under the Agreement but received no reply until as late as 26th September 2013.

11. The Claimants seek leave to raise further and additional arguments at the time of Arbitration.

RELIEF SOUGHT

The Arbitration Tribunal is requested to grant the following 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.

4. Any other relief that the Tribunal deems fit and equitable.