

IIAM INTERNATIONAL ARBITRAL AWARD WRITING COMPETITION

Competition Problem

1. Cordania, a country of 1 Billion people, situated on the south-western ranges of the Himalayas at an average altitude of 2000 metres above the mean sea level. It extends along the ridge with seven spurs. Due to the Himalayas mountain range it is separated from the rest of the continent. Over the past two decades it has experienced an economic boom and has been gradually establishing its prominence as an economic superpower. Cordania is member to various international conventions and treaty obligations, similar to that of Japan.
2. In spite of its increasing prominence, Cordania as a state is largely dependent for its power supply on its neighbouring state, Jhina, an economic giant and Cordania's major competitor in the sub-continent. Cordania over the past few years has moved towards becoming a sustainable and a self-reliant community. In its attempt to achieve the same the Prime Minister of the country has announced various projects including the Central Cista project. The Central Cista project is an attempt to make the country of Cordania, self-reliant in terms of its power supply, as through this government plans to build the biggest power plant of the continent in the country.
3. In July 2019 BELH, a PSU with its place of business in Cordania, engaged TSPS Energy Pvt. Ltd co., with its place of business in Bryanta, (Member to various international conventions and treaty obligations, similar to that of Singapore) for furnishing and assembling of materials for construction of the power plant. The contract for construction and maintenance of the power plant was given to another company named RILI Pvt. Ltd. RILI was instructed to complete the work by March 2020 and therefore TSPS had to complete its work accordingly. The terms of the contract provided for the payment of Rupees 500 crores by BELH for the supply and assembly of goods.
4. While the work for the development of the power plant was being done, various media outlets started running the news as to how in a clandestine manner, a

company (RIL Pvt. Ltd.) with almost no experience in the field of construction of power plants has been given the responsibility of country's biggest and most awaited Central Cista project. The opposition parties also did various campaigns against the government, making allegations as to how the quality of the work is being compromised in order to provide benefit to the companies of the close allies of the Prime Minister. Mr. Rangha, Director BELH, issued a statement ensuring that there's been no compromise being made as to the quality of the products and work being put in the construction of the power plant.

5. On 10th December 2019, a day after issuing a clarification statement, Mr. Rangha, sent an e-mail to Mr. Lebron James, CEO of TSPS Pvt. Ltd., informing him about the concerns of the media and people of the country in respect of the quality of the products and services being taken. In the e-mail it was asked to ensure that "only the best quality product used in the industry shall be furnished for the power plant in all possible circumstances". In light of the same, he requested for modification of the contract between the two companies to include a clause with respect to the specification of the goods. Mr. James, agreed to his demands and for the modification of the contract as well. The following clause was added:

Specification Clause

The products shall comply to the industry standards and shall be fit for purpose.
[...]

6. Thereafter, in February 2020, the construction and all other ancillary work was completed by the RIL Pvt. Ltd. On inspection of the power plant the officials of the BELH found the goods supplied and the work done by the companies as satisfactory and hence they were paid their due. Subsequently, in March 2020 the power plant was inaugurated.
7. On 11th May 2020 a fire occurred at the plant. BELH was insured by PEWC Pune under a primary policy, with reinsurance and retrocession agreements involving retention of some risk in companies within the PEWC. The insurance company paid BELH 100 crores Rupees in respect of damage caused by the fire and so became subrogated or substituted to all the rights which BELH might have against the TSPS Energy Pvt, Ltd as a liability to BELH due to the fire.

8. The tragic event of a power plant, touted to be as the biggest of the continent, being burnt in fire just in the first month of its existence became a talking point all over the country. Hence, headlines in almost all national dailies and electronic media included how a power plant built under the aegis of a government agency met such an ill-fated end and that too within such a short time period. The government ordered an investigation as to the circumstances which lead to the accident. The investigation report released on 1 July found that the fire had been caused due to the defects in the quality of the fuel oil pipelines.
9. After the revelation of the reasons behind the fire, PEWC made a representation to the TSPS Pvt Ltd. asking it for the payment of Rs. 100 crores which it had paid to the BELH as an insurer. PEWC sought reliance on the communication between the parties before the inclusion of the Specification clause as well as Clause 1 of the contract which had the following terms:

Limitation of Liability Clause:

- A. Any delay in delivery and assembly of goods shall entitle BELH liquidated damages of Rs. 10,00,000 per day upto an amount of 10% of the purchase price.
- B. Neither party will be liable for damages that are remote or speculative, or that the breaching party could not reasonably have foreseen on entry into this agreement.
- C. During the period of 5 years after the completion of the contract and inspection of the power plants, wherein the goods used and assembled are found satisfactory, any disruption caused in the functioning of the power plant and destruction of the building & machinery of the power plant due to non-conformity of in the goods supplied and assembled shall make TSPS liable to the extent of damage caused. The overall amount of liquidated damages may not exceed Rs. 200 Crores.
10. In the negotiation stage, TSPS Pvt. Ltd. denied any such liability for the defects in the fuel pipelines. According to TSPS Pvt. Ltd., it had ordered the best quality of

pipelines used in power plants for installation purposes from Buhan, Dragonia. However, late in January 2020 it was informed that the order had been cancelled due to the spread of novel coronavirus in that city causing stoppage of any kind of travel or exports from that city. Due to the time limitations it was not possible for the company to explore alternative countries from which it can buy the said quality of pipes and so it decided to use the pipes available in Cordania, which though did not meet the best quality standards, but were used in industries and were available within the time limitation in which the contract had to be completed. Thus, TSPS Pvt. Ltd. in its defence relied upon clause 6 of the contract which had the following terms:

Force Majeure:

Neither party shall be in breach of this contract nor liable for delay in performing, or failure to perform any of its obligations under this contract if it is prevented or delayed in those obligations by an event of force majeure or by events beyond its reasonable control.

11. Further, the company also relied on the Specification clause to state that the supply of the products and services was only to meet the industry standards and hence the company had discharged its duty and complied with same by providing the fuel oil pipelines available within the stipulated time. Moreover, TSPS has asserted that the fire was caused in the fuel pipelines due to the inefficient handling and installation by RILI Ltd.
12. The negotiations between the parties failed as the parties were firm on their stance.
13. The contract between BHEL and TSPS Pvt. Ltd. provided for an arbitration agreement in clause 12 of the contract with the following terms;

Dispute Resolution Clause:

- A. The Parties undertake to make in good faith every reasonable effort to resolve any dispute or disagreement arising from or in connection with this Agreement by means of negotiations between themselves. However, if the

negotiations fail any of the parties to the contract can refer the dispute to international arbitration, which include:

- (i) Any dispute pertaining to or in connection with the contract including breach, enforceability etc., shall be resolved by international arbitration.
- (ii) The Dispute shall be finally settled under the Rules of Arbitration of the Asia Pacific Centre for Arbitration and Mediation.
- (iii) The Dispute shall be settled by three arbitrators appointed in accordance with these Rules,
- (iv) The arbitration shall be conducted in the English language, and
- (v) The place of arbitration shall be Hong Kong.
- (vi) The parties further agree to incorporate the IBA Rules on taking of Evidence in International Commercial Arbitration.

Governing Law clause:

Both Parties agree that the issues arising out of this agreement will be subject to the Vienna Convention on International Sale of Goods 1980. The substantive law governing the contract will be that of Cordania (Same as that of India)

14. Amidst all this, a newspaper published documents, in partial form which suggested that the contract for construction and other works of the power plant was given to RILI Pvt. Ltd without following the mandated procedure, proper environmental clearances and other due diligence requirements. Further, questions were also raised over the price which was being given to the company for the design and construction of the plant. A Right to Information application was filed by one of the members of the opposition parties seeking answers to questions relating to the formation of the contract. The information pertaining to the same was denied. This became a burning issue in the entire country since it was not an unknown fact that the owner of the RILI Pvt. Ltd had been a close aide of the various key personnel's of the government. A senior advocate and two leaders of the opposition party filed a petition before the Hon'ble Supreme Court of Cordania demanding a probe into all the contracts relating to the construction of the power plant and the events that lead to the destruction of the power plant.

The Supreme Court has commenced the hearings of the matter and has listed it next on 3rd November 2020.

15. In the meanwhile, as the negotiations between the two parties failed, PEWC commenced arbitration on 1st August 2020. The tribunal was constituted by 30th August 2020. The parties had a procedural conference on 4th September 2020 and the hearing was conducted from 08-09-2020 to 15-09-2020 in Hong Kong.
16. PEWC (Claimant) filed its statement of claims highlighting the following points:
 - The fire was caused mainly due to the improper quality of good supplied by TSPS Ltd. Mr. Rangha in his witness statement claimed that through the e-mail sent on 10th December 2019, it had been clearly reinstated that in all possible circumstance the best quality of goods shall only be used. Even though the clause entered was general in nature, however, the relevant circumstances and the negotiations between the parties indicated that the parties agreed to ensure that the goods shall not just be meeting the industry standards.
 - PEWC also submitted as the report provided by the government of Cordania which showcased as to how the fire was caused due to the fault in fuel oil pipelines. The duty to supply of which was given to TSPS Ltd.
 - PEWC also requested the tribunal to ask the Respondent for production of all documents, statements etc. pertaining to the contract for better ascertainment of the intentions of the parties. Further, it also requested the tribunal for making everything submitted as a part of the proceeding be made public in light of the inherent public interest involved and in order to ensure its own good will in the market.
 - In all PEWC stated that due to the fire the BELH had to bear the loss of 100 crores which it paid to the company as an insurer. Hence, is now entitled to the same from TSPS Ltd. since the fire was caused due to its fundamental breach of the contract.

17. TSPS Pvt. Ltd. (Respondent) filed its statement of defence highlighting the following points:

- The company has vehemently objected to the claims made by the Claimant. As per TSPS, firstly the tribunal lacks the requisite jurisdiction to try the dispute as the Supreme Court of Cordania is already looking into the matter.
- Further, it has objected to the demands of production of all documents and statement etc. before the tribunal as they are commercially and technologically sensitive. Thus, it has stated that the confidentiality of the same shall be violated if they are presented before the tribunal since the Claimant in light of the public interest involved has asked for the arbitration proceedings to be made public.
- The Company has also asserted that the contract was for furnishing and assembly of goods, thus, the predominant and substantial part of the contract involved services rather than sale. Therefore, CISG does not apply. The contract shall be interpreted according to the terms and clauses rather than as per pre-contractual and post-contractual circumstance and negotiations between the parties.
- Thus, as per the Specification clause it was only required to meet the industry standards and the duty of which it had discharged. Moreover, it intended to provide the best quality of goods however, it could not do so as the prevailing events has become beyond its reasonable control, which eventually prevented it from achieving the said objective.
- In all TSPS has denied PEWC's claim for Rs. 100 Crores stating that is had not breached the contract and has acted in accordance with the terms of the contract. Moreover, it has submitted various newspaper articles as documents highlighting that PEWC's client had given the contract for construction to a naïve company and thus, the fire caused was due to their improper installation and handling rather than due to the fault in the products supplied by them.

18. PEWC in its arguments has set aside the theory advanced by the Respondent as irrelevant and has stated that the documents presented by the Respondents have no sufficient materiality to the outcome of the case. Moreover, it has asserted that the Respondent cannot rely on the Force Majeure clause since the line in the clause “by events beyond its reasonable control” have to interpreted according to the ejusdem generis rule and thus necessarily have to be an act of god. The outbreak of the novel virus and various travel restrictions were due to human controlled reasons and causations. In light of the same, the tribunal has to pronounce an award with respect to the following three issues:
- a) First, since there are questions with respect to the formation and existence of the contract itself and the Supreme Court of Cordania is already looking into them, whether this tribunal has the requisite jurisdiction to hear this matter and address issues as to the existence of the contract.
 - b) Secondly, whether as requested by the claimant the tribunal should order the Respondent for production of all documents and statements relating to the contract in order to determine the true intention of the parties behind the contract. Moreover, if the tribunal shall order the same should the tribunal make the arbitration proceedings (documents, statements, evidences etc.) public in light of the public interest involved or as pleaded by the respondent they should be kept confidential as mandated by the APCAM Arbitration Rules.
 - c) Lastly, whether the respondent is liable as per Clause 1 of the contract and hence it should make the payment to the claimant or it isn't and hence it should not make the payment.