

**1<sup>ST</sup> NLIU – JUSTICE R.K.TANKHA INTERNATIONAL MOOT**

**ABPL V. GOVERNMENT OF BARBARIA**

**MOOT PROPOSITION**

1. Ambrister & Bathind Pvt. Ltd. (ABPL) is a company incorporated under the laws of the Great Dominion of Novelia, having its registered office at the capital- Dondon. It specializes in the supply, distribution and transmission of Energy products, renewable and non-renewable, within the USA and also in few European & Asian countries. BAPL, a fully owned subsidiary of ABPL operating from Sayman Islands.
2. Optical Commitments Pvt. Ltd. (OCPL) is a company registered under the Barbarian Companies Act, having its registered office at Sombay. It is a trading company which also provides Services within the Republic of Barbaria.
3. ABPL got a patent regarding a new use of Muon tomography by virtue of which it made hand held guns which use cosmic ray muons to generate three-dimensional images of particle-matter volumes using information contained in the Coulomb scattering of the muons. This found novel uses in the industry like the exact quantity and quality of coal lying in trenches in old coal mines could be predicted. The predictions were 100 % accurate, and proved a boon to safeguard the mine workers from the hazards of toxic gases hidden in trenches and of caving mines.
4. Mr.Ambrister happened to meet Mr. Shaw, one of the Directors' of OCPL, in the Global Energy Summit at Dondon in March 2012. After elaborate discussions, Mr.Ambrister saw a business opportunity in the Coal sector of Barbaria, which he found to be an emerging market with great potential. This was also due to the regime of General Aldi Elmin who had a penchant for human rights, and had enforced strict labour welfare measures, whereunder coal mines which had even one recorded incident of casualty to any mine worker, were closed forever.
5. Mr.Shaw, gauging the inclination, floated the idea of entering in a business partnership for providing High Calorific Value coal from the best mines of Barbaria, based on the Muon Tomography technique.

Mr. HariBrook whose place of birth was Barbaria, and who was a senior employee of BAPL was designated to finalise the contractual nuances. Incidentally, the patent of the hand held gun was also in name of Mr. HariBrook and was licensed to its corporate users with inherent field-of-use limitation clauses, sequentially through ABPL and BAPL. Several emails were exchanged between Mr. Haribrook and Mr. Shaw. The contractual design was such that ABPL will purchase coal from OCPL which will be transported through BAPL, and for this purpose BAPL will enter into a separate contract of affreightment with OCPL. It is a matter of record that BAPL had acted as a carrier even for competitors of ABPL.

6. It is also a matter of record that the parties had several differences over the ownership structure of the SPV for running the business, financing, as well as the dispute resolution clause. However, Mr. Haribrook and Mr. Shaw developed intimate relations and were able to reach some sort of understanding over the charter party contract. To take away the adverse effect of the differences regarding the Technology Transfer Contract concerning use of Muon Tomography and the main contract regarding supply of coal; both of them decided that the contract of affreightment will not be limited to the coal meant for ABPL but will also include Coal meant for distant ports like Australia, Africa, and Asian destinations including China and Indonesia.
7. During one of their interactions, Mr. Shaw and Mr. Haribrook realized that BAPL had a previous three year multi-location contract of affreightment dated 4.2.2007 which was discharged on 8.7.2009. Therefore, they decided to base all their negotiations taking the contract dated 4.2.2007 as the base contract.
8. Mr. Bathind sought telephonic instructions from the other Directors of ABPL and on March 31, 2012 while at Dondon, called up Mr. Shaw to give up his insistence on the dispute resolution clause of the main contract given the fact that Mr. Haribrook and Mr. Shaw had successfully finalized the Technology Transfer Contract concerning Muon Tomography. However, Mr. Shaw insisted that the final picture from the end of ABPL regarding the main contract must come in writing and that the entire transaction was “one whole package, meaningless in parts”. Another point insisted by Mr. Shaw

was regarding introduction of a special clause in the contract to take the benefit of the “Make in Barbaria” scheme, whereunder all technology import, and resultant export of goods, was exempt from all taxes levied by the Government of Barbaria on payment of a one time tax (OTT) of 0.01 % ad valorem on the total turnover. This scheme was generally applauded by the global business houses, and brought in huge investments in technology and exports originating from Barbaria grew like never before. To avoid any bureaucratic delays, a strict time line was brought in place for all government approvals through a single window. There was a sovereign indemnity and guarantee entered into by the Barbarian State in favour of any foreign investor to safeguard the investment as permissible under the law subject to full compliance with all laws of Barbaria as a tripartite contract. For all purposes, the UNCITRAL Model and the CISG were adopted as the governing laws for the contract and dispute emanating therefrom.

9. Vide email dated 1.4.2012, Mr. Ambrister wrote to Mr. Shaw with a “clean fix” copy of the main contract and stated that:
- a. Contract is final from their end, subject only to their satisfaction regarding last three year audited balance sheets of OCPL certified by an authorized auditor as per governing laws.
  - b. Dispute resolution clause shall be the same, as contained in the previous contract of affreightment.
  - c. Owners management Subs: Contract to come into operation after approval of Board of Directors or Management of OCPL by ABPL.
  - d. Sub agreeing all other port rates/ Increased / decreased load discharge Rates: matter of finer detail, which can be mutually finalized by parties.
  - e. All other terms shall be the same, mutatis-mutandis, subject to changed rates, fuel cost, and other circumstances.
  - f. Rates for the Indonesian ports was attached as Appendix to the draft contract.

10. In the meanwhile, OCPL was able to implement the Muon Tomography so successfully in mines across Barbaria that the Finance Minister of Barbaria made a public statement on September 21, 2012 that their mines are not yielding coal, but giving gold. This success of OCPL was looked at with suspicion by several activists, one of which was Mr. Sap Ansowal. Mr. Sap Ansowal demanded a public enquiry into the output of mines of Barbaria run by OCPL based on the public-trust doctrine, and took out processions where he received a lot of public support. Taking cue from his allegations, one Mr. Kur Delwal filed Freedom of Information applications and was able to establish that OCPL has been involved in corrupt practices. Such practices included under-reporting of coal output, to pay lesser royalty to Government; bribing the officials of State to get extra transport permits, paying no export-duties etc. In one of the responses received dated Oct 1, 2012, it was noted that all such coal was being sent to respective destinations via Cayman Islands, and the cargo and freight was being paid by one Mr. Haribrook, who was not a Barbarian citizen while no OTT was paid @ 0.1 %.
11. This resulted in an immediate press meet being called jointly by ABPL and BAPL on Oct 2, 2012, where Mr. Ambrister stated that he is authorized to convey that their companies or their employee Mr. HariBrook - have not done anything illegal, and have also not indulged in bribing or violation of any laws; and truth alone will eventually triumph.
12. However, on Oct 3, 2012 the enforcement agencies of Barbaria raided the premises of OCPL and recovered a huge amount of cash in various foreign currencies. Admissions of several OCPL employees were recorded regarding money laundering and bribing of public officials. One of the documents recovered was an email dated Aug 21, 2012 containing a credit note of US \$ 50 million, with meticulous details of amounts paid to government offices which was sent by <haribhook@bappl.org> Forensic investigation revealed that the said email address was fake and the email originated from server of BAPL. Despite strenuous effort, the location of the server could not be known.

13. The media immediately published news items connecting BAPL with the raid and a series of such publications forced the Chief of Enforcement of Barbaria to reveal on Oct 5, 2012 that they had received tip-off regarding illegal activities of OCPL from none other than BAPL. The matter was widely reported in the international press for an entire week and led to the 'Ease of Business' ranking of Barbaria being reduced by 9 points by Nov 2012.
14. On Dec 1, 2012 the Government of Barbaria froze all assets of ABPL and BAPL in the State of Barbaria which were in excess of US \$ 100 billion, and declared all their personnel as persona-non-grata and cancelled their work permits with immediate effect. It also issued a notice of International Arbitration on Dec 2, 2012 to ABPL claiming sovereign defamation due to the activities of ABPL, its affiliates and corporate subordinates in the territory of Barbaria leading to violation of laws and lowering the image and esteem of the Sovereign State of Barbaria before the international community. It adduced proof to ABPL in the form of certain audio and video clips sent by certain honest officials establishing efforts by OCPL to bribe them to reopen closed mines swiftly. One of the audio clips had a specific statement by an OCPL employee regarding money received from BAPL being offered to an official.
15. While denying the arbitrability of the dispute sought to be raised by the Government of Barbaria, ABPL issued a counter notice to the Government of Barbaria seeking International Arbitration regarding the freezing of assets as amounting to expropriation, and the cancellation of work permits as hostile and illegal behavior. It was also specifically stated that the dispute regarding defamation involves public law aspects, which cannot be settled before a private law forum like Arbitration.
16. Separately, ABPL and BAPL also issued a joint notice seeking Arbitration with OCPL claiming damages for use of technology without authorization, accounts and profits earned thereby. In addition, damages were also sought regarding the conduct of OCPL in bribing public officials and thereby causing loss of image and esteem to ABPL. ABPL demanded OCPL to appoint the sole arbitrator as per the procedure designated.

17. After the notice was dispatched for OCPL, but before it could reach OCPL; an anti suit injunction was obtained by OCPL against ABPL claiming that there was no finalized contract between ABPL and OCPL. This was challenged by ABPL before the superior courts, however it has remained pending for over two years.
18. In the meantime, ABPL invoked the conciliatory mechanism under the Joint Nations (JN) Treaty of Conciliation, and ABPL and the Government of Barbaria attempted to solve their disputes by way of mediation. Initially it seemed that a resolution will be reached, however by June 2015 it was clear that there is no conciliation possible.
19. Realizing that the judicial system of Barbaria is highly understaffed and lacks infrastructure, ABPL pleaded before the Arbitral Tribunal to amend its claim and have two additional points inserted, as follows:
- a. That the State of Barbaria has failed to maintain an effective dispute resolution mechanism domestically, by not granting proper funding to the judicial wing of the government, and not catering to its infrastructural needs; and therefore it has led to a great delay of two years in efforts of ABPL to recover its just-dues by way of judicial due process; and its judge to population ratio is 13 judges per million people, which is worse than several underdeveloped nations of the world;
  - b. That consequently upon the finding of failure of domestic judicial mechanisms, as urged; the State of Barbaria is liable to pay damages payable by OCPL by way of sovereign indemnity;
20. The State of Barbaria did not protest the amendment being allowed, keeping it subject only to their right to claim that the relief demanded in the amendment claim is non-arbitrable.
21. The matter is now listed for arguments including argument based on *kompetenz –kompetenz* before the Id. Arbitral Tribunal.

***Nota Bene:***

- a. All references, actual, deeming or fictional; are fictional.
- b. Participants stand advised to devise a “litigation strategy”. Issues can be argued in alternative/without prejudice, be divided into sub-issues, **and can be added to or amended upon**. It is permissible to concede issue(s) at the time of oral arguments subject, however, to appropriate explanation readily available on the query of the bench. However, the written submissions must address all the issues. After the submission of the memorials is complete, a list of issues that can be argued by either side will be published on the competition web-page.
- c. Any citations, without actual para/page references, will invite negative marking. Unnecessary citations and *passim* references are to be avoided. In case of oral arguments, primary references for all case-laws being referred **is mandatory** and no participant will be allowed to cite a case-law from a secondary source like text-books or commentaries. Primary reference may be made to select treatises which are treated as authorities in their own right.
- d. The moot problem is the way it is, with full application of the principle of “***as is, there is...whatever where is***”. No queries or requests for clarifications will be entertained.
- e. Please avoid use of any plastic materials or binding for the Memorials. Use simple color-paper sheets for identification of respective sides. Use of any plastic, or binding material will invite negative marking.

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