

# INDORE INSTITUTE OF LAW

(AFFILIATED TO D.A.V.V. & BAR COUNCIL OF INDIA, NEW DELHI)

## LEX BONANZA 2K22

Chapter- XIV

### MOOT PROPOSITION

#### **INSTRUCTIONS:**

1. This is the final stage of an appeal under Section 37 of the Arbitration and Conciliation Act, 1996. The Presiding Judge has declared that the pleadings are complete, and the parties are now to present their final arguments for final disposal of the case at motion stage itself.
2. The case is entirely fictional. Teams should confine themselves to the facts supplied. Neither the Appellant nor the Respondent may introduce new facts. The Moot Problem includes all the facts supported by the evidence that has been presented before the Court. Teams may nonetheless draw reasonable inferences from the facts produced. They may also question the credibility or weight of the Statute.
3. Teams should not hand anything to judges unless asked to by a Judge.
4. The problem is not intended to raise questions of procedure before the Court. Procedural questions should be ignored.
5. The problem is not intended to raise questions relating to the power of SPL to get into a sub contract. Although issues of admissibility are not normally dealt with at such later stages in Arbitration, counsels may in this instance address issues regarding the admissibility of the case if relevant.

The Court may apply principles and the rules of law as interpreted in previous decisions of Indian Courts.

## **BACKGROUND:**

Isepor is a union of Island States that recently declared their independence from a long termed occupancy by Mordor, a close neighbor of India. Mordor had a Federal System of Governance and Isepor was the hub for its seafood industry and shared 65% of total sea based resource exports. While under the occupation, Mercantile Laws of Mordor enabled various exporters with discounted logistics and hence many industries grew exponentially over the past decade. The high rate of profits and alluring geographical location for trade attracted many corporates to setup their establishments in Isepor.

SPL is a company registered under The Companies Act, 2001 of Mordor, indulging in various infrastructure development projects. While Isepor was still under administrative control of Mordor, SPL was awarded the tender for restructuring of the entire Arabian Coast Highway connecting Kofland to Edowood by the Federal Government of Isepor. The Conditions of Contract contained the following Settlement of Dispute Clause:

### ***“12. SETTLEMENT OF DISPUTES***

- 12.1 All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the Claimant to the "Chief Engineer" through "Notice of Dispute". The parties shall try to achieve an amicable solution to the dispute.
- 12.2 In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, shall demand in writing by means of Notice of Arbitration.
- 12.3 The arbitration proceedings pertaining to the dispute or differences shall be conducted before "Minister of Roadways, Government of Isepor" and administered under the Arbitration and Conciliation Act, 1996.

- 12.4 The parties may waive off the applicability of Sub-Section 12(5) of Arbitration and Conciliation Act, 1996, if they agree for such waiver in writing, after dispute having arisen between them, in the format given under Annexure XV of these conditions.
- 12.5 The number of arbitrators shall be one, nominated/appointed in concurrence with clause 12.3 of this agreement.
- 12.6 The language of arbitration proceedings shall be English.
- 12.7 The Arbitration proceedings shall be assumed to have commenced from the day, Notice of Arbitration is received by the Defendant.
- 12.8 Seat of Arbitration: The Seat of Arbitration would be within the geographical limits of the Isepor where the cause of action arose with the written consent of both the parties.
- 12.9 Obligation During Pendency of Arbitration: Work under the contract shall, unless otherwise directed by the Supervising Engineer, continue during the arbitration proceedings, and no payment due or payable by either parties shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.”

Moonlit is a firm registered under The Companies Act, 1956 specialising in electrification work. SPL's field of expertise was limited to 'Civil Work' therefore, for the purpose of electrification of the Highway, SPL decided to delegate the partial work to Moonlit.

Before the sub-contract was signed and the work order issued in favour of Moonlit, the revolt broke out in Isepor and the existing Mordor Government fell rendering Isepor free from occupation. The newly formed Government of Isepor decided to gradually reform its legal structure highly influenced by the one existing in India. The foreign policies of Isepor also granted India the status of most favoured nation. Thereafter, SPL and Moonlit entered into a Works' Contract (hereinafter referred as the "**Contract**") aimed towards completion of electrification work

on the Highway in three phases spanning over a period of 3 years. The Settlement of Disputes Clause was reiterated in the Contract as present in the main contract.

Over the period of next year Moonlit finished the Phase-I of Contract and the amount for the same was due to be paid to Moonlit. SPL could not fulfil the promise of partial payment in favour of Moonlit at the time, stating that the payment was awaited from the Government of Isepor. After receiving reasonable assurances of delayed payment, Moonlit continued the work as per the conditions of contract without any objections. Over the period of next six months Moonlit could not carry out the work order pertaining to Phase-II due to insufficiency of funds and could not continue further developing the Highway.

Moonlit vide its communication conveyed the difficulties faced by the firm to SPL in response to which SPL paid the dues partially, enough for Moonlit to carry its further obligations towards the contract. Moonlit with dwindling trust refused to commence the work unless the entire payment for Phase-I was made. SPL irate of delay, imposed a penalty on Moonlit for delayed progress of Phase-II. Thereafter, Moonlit served the Notice to Arbitration seeking the following relief:

*“9. It is most respectfully prayed that –*

- a. Payment of arrears be made in full with 12% interest.*
- b. Penalties levied by SPL be revoked being unlawful and arbitrary.”*

SPL in reply to the Notice of Arbitration submitted that penalty for delayed work progress is well within the provisions of the Contract and interest sought on the payment of arrears is not payable, since Moonlit had not objected to the affirmed request of delayed payment. Thereafter, the Arbitral Tribunal was setup and proceedings initiated on behest of the claimant - Moonlit. Moonlit filed the Statement of Claims and filed an application under Section 17 of the Arbitration and Conciliation Act, 1996 during the pendency of Arbitral proceedings, praying for the following interim relief:

*“Execution of the Contract be stayed and Moonlit be protected from illegal termination of Contract till the pendency of arbitral proceedings.”*

Moonlit prayed for the exact same relief alongwith other relief(s) that the Tribunal might deem fit and proper under the facts and circumstances of the case on grounds that (i) the penalty imposed

on Moonlit is arbitrary and exhibits colorable exercise of authority (ii) payment of arrears is not only the right of Moonlit but essential to completion of the Contract and (iii) the delay caused in completion of Phase-II is not on accord of Moonlit.

SPL filed the Statement of Defence and raised the same objections as in the Reply to Notice to Arbitration. The Arbitration Tribunal while deciding the Application for Interim Relief did not find substance in the Claim and rejected the application on grounds raised by the defendant stating that the interim relief sought by Moonlit adversely affects third party interests. Further the Tribunal held that cessation of work is in violation of the terms of contract and ruled in favour of SPL while simultaneously directing Moonlit to pay the penalties and resume work pertaining to Contract.

Aggrieved by the award Moonlit moved an application under Section 34 for setting aside the Award raising the grounds of challenging the arbitrator as he is a direct party to the main contract. Among other objections raised was the inability of Moonlit to operate under the terms of contract because the delayed payment affected the procurement of essential raw materials to continue the operation of the Contract. Further Moonlit averred that the Award infringes its fundamental rights enshrined in the Constitution of Isepor. In the meanwhile, SPL moved an application for enforcement of the Award wherein the court satisfied from the prospects of SPL successfully defending the appeal ordered Moonlit to deposit security amount with the Legal Services Authority of Isepor and stayed the enforcement proceedings. SPL in response to the objections of Moonlit stated that the application under Section 34 of the Arbitration and Conciliation Act, 1996 was not maintainable under the Jurisdiction of Isepor since the main contract is governed by the Arbitration Laws of Mordor and hence the court cannot entertain a petition within the territorial jurisdiction of Isepor. Further the Arbitrator correctly rendered the Award in favour of SPL since the dispute arose out of non fulfilment of contractual obligations by Moonlit.

The court while setting aside the award of Arbitrator held that the award stands in violation of the public policy of Isepor and the dispute is appropriately covered under the its jurisdiction as the agreement between SPL and Moonlit is distinct from the Main Contract. The court further held that primary violation of obligations was on accord of SPL when the payment was not made to Moonlit. The court also upheld the contentions raised by Moonlit pertaining to the competence of Arbitrator for the reasons of him being a vicariously interested party in the completion of Main contract.

Based on the legal opinion received from its advocates, SPL has moved to appeal before Hon'ble High Court of Edowood. The High Court on perusal of facts had issued notices to Moonlit and the matter is listed for final disposal at motion stage.

**PREPARATION OF THE BRIEF:**

In preparing the brief, the counsels for both Appellant and Respondent are expected to establish the following points: -

The law that is applicable to the present case;

The elements of dispute for each of the two instances that have to be established by the Respondent for the purpose of dismissal of appeal;

Applicable law and policy and supporting authorities. Written and oral arguments on behalf of the Appellant and Respondent are limited to the provisions of Arbitration and Conciliation Act, 1996 unless the Act allows for derivatives from different Statutes.

Questions relating to authority over entering a sub-contract shall not be raised unless they are linked to the substance or the merits of the case.

The laws of Isepor are *pari materia* with the laws of India.

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