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X NLS-TRILEGAL INTERNATIONAL ARBITRATION  
MOOT, 2017

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CASE CONCERNING THE ORDANA PIPELINE MANUFACTURING PLANT

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11<sup>TH</sup> – 14<sup>TH</sup> MAY, 2017

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IN ASSOCIATION WITH



1. Bespoke Engineering Solutions for Technology (BEST) is a small, highly profitable partnership based in the Republic of Blasidia. It specialises in providing engineering consultancy services for state-of-the-art technological projects. BEST is composed of three partners and five assistants. Because of its small size and the importance of the projects on which it provides assistance, it is a recognised fact in the industry that BEST tends to undertake one single project at a time, on a fixed-price contract basis.
2. Orden Oil and Petroleum Supplies (OOPS) is a large manufacturer of pipelines based in Ordana, of which the State of Ordana is a majority shareholder. OOPS is one of Ordana's Crown Jewels, recognised internationally as a leader in its field. As part of one of its most ambitious expansion programmes to date, OOPS is building a new, state-of-the-art manufacturing plant.
3. OOPS approached BEST in relation to providing advice and hands-on assistance regarding the layout of the new plant and its complex pipeline assembling machinery, as well as support in the selection of suppliers of that machinery.
4. OOPS contacted BEST (and two other companies) to request a proposal for engineering services on the Ordana project. When BEST received OOPS's request for proposal, BEST was going through the second, out of 5 stages, of a tender process to provide engineering services to Big Bucks Inc in connection with a new oil refinery that Big Bucks was building in Ordana. BEST had delivered three other projects to Big Bucks previously. The Big Bucks project would have taken approximately one year, and BEST expected to earn €10 million of revenue and generate approximately €5 million of profit. However, having received the request for proposal from OOPS in connection with the Ordana pipeline project, BEST withdrew its offer to Big Bucks. Big Bucks awarded the Ordana refinery contract to Second Best, a competitor of BEST's.
5. On 15 September 2015, OOPS and BEST entered into an agreement (the Agreement). Under the Agreement BEST undertook to provide various engineering consultancy services in accordance with a number of pre-determined milestones specified in the Agreement, each priced at a fixed sum, over two years for a total of €15 million. In addition, OOPS was to pay BEST a retainer of €100,000 within two weeks of entering into the Agreement.

6. BEST expected to generate profits of €7.5-10 million on the Agreement, with most of the profit expected to be generated in the second year of the project. This was consistent with the profitability of other similar projects that BEST had delivered in the past.
7. Milestone 1, dated 30 November 2015, involved the delivery of a Feasibility Study and Budget for which a combination of the frequent presence of BEST's personnel on site, coupled with OOPS's ongoing cooperation, was essential. This had been the subject of intense negotiation between BEST and OOPS in the run-up to the Agreement, and it was the foundation for subsequent deliverables. Milestone 1 was priced at €500,000 payable on delivery of the Feasibility Study and Budget. In order to facilitate speedy communication, BEST and OOPS agreed to use dedicated email addresses exclusively for the project.
8. OOPS paid the retainer on 30 September 2015 and BEST started work towards the Feasibility Study and Budget. Extensive correspondence ensued between the Parties, and BEST representatives made three out of the five site visits to the location of the new plant scheduled for that period. During these visits it became apparent that OOPS had a number of new requirements that had been unanticipated at the time of entering into the Agreement.
9. On 20 October 2015, BEST wrote to OOPS to report on the progress of the Feasibility Study and Budget, stating that, in light of the new requirements, it needed to reassess the parameters for the Budget and that site visits would be interrupted in the meantime.
10. On 26 October 2015, BEST wrote to OOPS to indicate that the new parameters demanded a significant upward revision of the Budget, for which a revised schedule of site visits and meetings would be necessary, and set out a proposed new schedule of dates in early November. There is no record of a written reply by OOPS.
11. On 30 October 2015, a referendum was held in Ordana on the question whether the State should remain a member of the Regional Economic Zone, an association of neighbouring states with reciprocal agreements regarding preferential measures on trade, investment and treatment of nationals of the member states.
12. Press coverage on the referendum was generally to the effect that its outcome would be in favour of continuing membership given the tangible benefits that the Zone brought to Ordana, notably in opening it up to international business. Given that the Orden press tends

to cultivate loyalty to the government, the position against continuing membership was expressed in fringe publications and online discussion groups.

13. To general surprise, the result of the referendum was narrowly in favour of leaving the Zone. The Ordana Government resigned and an interim leadership put in its place to manage the transition. Proponents of the “remain” position took to the streets and protests paralysed the Orden capital for 48 hours. Faced with this, the interim leadership opted to suspend the issuance of visas to enter the country whilst they worked to curb civilian unrest.
14. On 5 November 2015, the Board of OOPS was replaced with a new team put in place by the interim Ordana leadership. The Board assigned new personnel to the manufacturing plant project. Emails from BEST, sent to the usual dedicated address, were met with the following automatic reply, "Thank you for your message. Please bear with us as the new team gets acquainted with OOPS's ongoing projects. We will revert shortly." Telephone calls were not returned.
15. There were unconfirmed reports in the industry that, as a result of the referendum and the transitional leadership, the Big Bucks Ordana refinery project appeared to have slowed down considerably. Further, in the absence of information from OOPS, BEST had to incur additional costs in order to obtain some of the information that it needed for the Feasibility Study and Budget from alternative sources. On 18 November 2015, BEST informed OOPS that the recent circumstances meant that delivery of the Feasibility Study had to be delayed and the Budget reassessed. BEST asked for a meeting by telephone conference to agree a deferred milestone date.
16. On 15 December 2015, without news of OOPS, BEST delivered part of the Feasibility Study. BEST also included its best estimate of a revised Budget, nevertheless acknowledging in the cover letter that, “without the benefit of the necessary site visits and internal information from OOPS, this is tentative and subject to change once the relevant information is made available”. BEST also tendered an invoice for the work completed to date, pro-rated at €400,000.
17. On 20 January 2016, OOPS sent BEST the following email: "Thank you for your message dated 15 December. We are reviewing it and will get back to you." In the meantime, BEST carried on working as best it could on the project. BEST sent several chasing emails in February and March 2016, all of which remained unanswered.

18. On 4 April 2016, BEST sent a formal letter to OOPS declaring the Agreement terminated and claiming payment of the invoice of €400,000, payment of additional costs of €200,000 incurred by BEST between October and December 2015 due to OOPS's failure to perform its contractual obligations in relation to the 1st milestone and loss of profits in respect of the whole contract of €10 million.

19. The Agreement has the following provision:

***“Article 15: Governing Law and Dispute Resolution***

*In the event of any dispute arising under or in relation to this Agreement the Parties will use their best efforts to negotiate an amicable result, the outcome of which shall be approved by the Orden Ministry for Energy Matters.*

*Should negotiations not prove fruitful, any Party may refer the dispute to arbitration under the UNCITRAL Arbitration Rules. The Arbitral Tribunal shall decide the case applying the principles of lex mercatoria and good faith in contractual relations.*

*Any dispute relating to the interpretation of the Agreement shall be decided by the courts of Ordana.”*

20. On 10 June 2016, having heard nothing from OOPS, BEST couriered a Notice of Arbitration to OOPS at its latest known address. This was received and signed for on 15 June 2016. In its Notice of Arbitration, BEST requested the Secretary-General of the Permanent Court of Arbitration to act as Appointing Authority and appoint a sole arbitrator, and to determine the place of arbitration.

21. In its Notice of Arbitration, BEST requested the Arbitral Tribunal to:

1. Declare the Agreement terminated;
2. Order OOPS to pay to BEST €400,000 pursuant to its invoice of 15 December 2015;
3. Order OOPS to pay €200,000 of incremental costs incurred by BEST due to OOPS's failure to perform its obligations under the Agreement;

4. Order OOPS to pay to BEST €10 million in lost profits or, in the alternative, €5 million of profits that BEST undoubtedly would have earned had it pursued the contract with Big Bucks instead of entering into a contract with OOPS; and
  5. Order OOPS to pay interest at 10% per annum, 10% being OOPS borrowing rate (Had OOPS complied with its contractual obligations BEST would have received the damages that it claims on the date of breach; BEST has de-facto given a loan to OOPS, in the amount of damages that BEST seeks, from the date of breach to the date when BEST receives the damages award).
22. On 30 June 2016, the PCA acknowledged receipt of the Notice of Arbitration and invited comments from OOPS as to the designation of the Appointing Authority.
23. On 15 August 2016, having not heard from OOPS nor received indication that emails had bounced back, the PCA appointed Dr Zeynep Baumann as Sole Arbitrator. Dr Baumann is a well-respected arbitrator who lectures frequently at arbitration conferences. Immediately preceding her appointment, she had delivered a series of lectures regarding the probable consequences of Brexit on London as a centre for international arbitration. She had expressed a clear position to the effect that the consequences of Brexit on the business of international arbitration in the U.K. would be devastating.
24. On 19 September 2016, Dr Baumann wrote to the Parties to ask (1) whether BEST wished for its Notice of Arbitration to serve as its Statement of Claim; (2) whether OOPS intended to participate in the proceedings; and (3) whether the Parties had comments on the place of arbitration.
25. On 23 September 2016, counsel for BEST replied that the Notice of Arbitration would serve as its Statement of Claim and that the place of arbitration should be Blasidia on the basis that the obtention of visas for entry into Ordana was burdensome and uncertain. Counsel for BEST also requested that the dispute be decided without a hearing on the basis of the pleadings given OOPS's lack of participation in the proceedings, in order to save costs.
26. On 21 October 2016, having received no reply from OOPS or indication that emails were not being received, Dr Baumann issued **Procedural Order No. 1**, to the effect that:

1. The Notice of Arbitration served as Statement of Claim;
2. The place of arbitration was Blasidia; and
3. The dispute would be decided on the basis of the pleadings and without a hearing. She also declared the pleadings closed and that she would proceed to render an Award.

27. On 31 October 2016, BigWin Law Firm came on record on behalf of OOPS. BigWin stated OOPS' position to the effect that:

1. The Arbitral Tribunal had no jurisdiction to decide the dispute in the absence of prior good faith negotiations;
2. BEST had breached the Agreement by failing to deliver the Feasibility Study and Budget and OOPS's silence was a clear sign that it considered the Agreement had come to an end in light of changed circumstances following the result of the referendum;
3. In any event, OOPS was a State entity immune from liability in matters to do with projects of national significance, such as the new plant;
4. No further sums were due pursuant to the Agreement or at all;
5. No profits were lost given that the new plant project had not progressed; and
6. BEST is not entitled to any interest, or in the alternative, if interest is awarded it should be at 2% (being the rate of interest BEST would have earned on deposits). OOPS counterclaimed for the return of the retainer, as well as damages (to be quantified) caused by BEST's failure to perform its contractual obligations in a timely fashion.

28. On 15 November 2015, counsel for BEST wrote in protest, requesting the Arbitral Tribunal to stand by her Procedural Order No.1, on the basis that BigWin's intervention was out of time and calculated to subvert the arbitration proceedings in bad faith.

**PROCEDURAL ORDER No. 2**

20 JANUARY, 2017

(i) In the Written Submissions and at the Oral Hearings in Bangalore, the Parties are required to address the following issues:

1. Whether the Arbitral Tribunal has jurisdiction to hear the dispute;
2. Whether any Party is in breach of its obligations under the Agreement;
  - a. If it is found that OOPS is in breach, whether it is immune from liability;
3. What sums, if any, are due under the Agreement;
4. Whether BEST is entitled to the loss of profits that it seeks;
5. What is the applicable rate of interest?

(ii) The written submission for the Claimant and Respondent are to be made by 3<sup>rd</sup> April, 2017 in accordance with the Rules of the Moot.

(iii) Any requests for Clarification may be made no later than February 12, 2017 by email at [nlstiam@nls.ac.in](mailto:nlstiam@nls.ac.in)

(iv) The Oral Hearings are scheduled to take place on 11th -14th May, 2017 in Bangalore. Details regarding the time and venue will be provided in due course.