



Mock Arbitration Compromis

Nadi Construction v. Tokyo Biotechnology Company

1. The Parties

Nadi Construction ("**Nacon**") is a leading Fijian developer with significant experience in construction projects in the South Pacific region. Mr. **John Mamanuca** is its CEO / Director.

Tokyo Biotechnology Company ("**Tobio**") is a Japanese biotechnology company engaged in the design and construction of biomass power plants. Mr. **Natoshi Sakamoto** is its CEO / Director.

2. Background Facts: The Biomass Power Plant Project

In 2015, Nacon took a high-level management decision to diversify the company into the field of energy construction, and in particular the construction of biomass power plants in Fiji, which could convert existing forestry and agricultural waste products into electricity. Nacon saw an opportunity to generate significant value from such waste products and also reduce Fiji's reliance on imported fossil fuels.

However, Nacon did not have expertise in the construction of biomass power plants. It therefore sought to identify and work with an experienced contractor with experience in the design and construction of biomass power plants. In December 2015, after identifying and procuring a suitable plot of land for the plant in Namara, Fiji, Nacon approached Tobio and a number of other biotechnology companies to design and construct a biomass power plant. From initial discussions, Nacon was impressed by Tobio's extensive experience with similar projects in Central and East Asia. However, Tobio charged a significantly higher price than the other companies. Tobio also had no work experience in the South Pacific, and Nacon had doubts about whether Tobio would be able to work effectively in Fiji.

At the same time, Nacon was in discussions with agricultural companies in Fiji regarding the supply of sugar cane straw and bagasse, waste products left over after the extraction of sugar cane juice. Nacon was also in discussions with the Fiji Electricity Authority regarding the sale of electricity through the Fijian main grid. The Fiji Electricity Authority was keen to sign a power purchase agreement with Nacon, but indicated that a number of its existing contracts were expiring in June 2017 and that Nacon would be well-positioned if it could complete the construction and commissioning of the biomass power plant in advance of June 2017.

In February 2016, Tobio became Nacon's first-choice contractor when, during discussions, Mr. Sakamoto assured Mr. Mamanuca that, if Nacon signed the contract by March 2016, he was confident of completing the biomass power plant within 12 months of the contract. He assured me this was the case because Tobio was working on a similar project in Indonesia, which had stalled, and so many of the biomass power plant parts, including boilers, chippers, turbines and condensers, had already been fabricated and ready to ship. Tobio could simply divert them to Fiji by shipping them and having them assembled locally.

On the basis of this information, Nacon decided to go with Tobio. The typical lead time for a biomass project, based on other discussions with biotechnology companies, was about 20 to 24 months. It would be a very large advantage if Tobio could complete the project 8 to 12 months earlier. This would allow Nacon to meet the timeline set out by the Fiji Electricity Authority. It would justify paying Tobio the extra US\$2 million it was demanding in comparison to other competitors.

3. The Construction Services Agreement

On 17 March 2016, Nacon and Tobio entered into a bespoke Construction Services Agreement (“CSA”) for the design and construction of a biomass power plant in Namara (the “**Namara Power Plant**”). Nacon was not advised by lawyers in drafting the agreement as it wished to save the expense. Tobio advised Nacon that it had entered into similar agreements previously and decided that their contract could simply be based on similar terms as in such previous agreements.

The CSA had the following key terms and conditions (Tobio being the “Contractor”):

Clause 6

The Contractor estimates that it shall complete the construction of the Namara Power Plant within 12 months, i.e. by 17 March 2017 latest. This timing is reasonable because many of the component parts of the Power Plant have already been fabricated.

...

Clause 8

This contract shall be governed by English law.

...

Clause 10

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore Intercontinental Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The Tribunal shall consist of 3 arbitrators. The presiding arbitrator should, to the extent possible, be qualified both as a construction engineers and a lawyer in suitable disputes.

The language of the arbitration shall be English. The seat of the arbitration shall be Fiji.

...

Clause 22

In no event, including the negligent act or omission on its part, shall the Contractor be liable, whether under the Agreement or otherwise in connection with it, in contract, tort, breach of statutory duty or otherwise, in respect of any losses or expenses including (without limitation), losses arising from delays caused by any subcontractor(s) or government regulations.

Provided that this clause 22 shall not exclude or limit the Contractor's liability for:

- (a) death or personal injury caused by the Contractor's negligence; or
- (b) fraud or fraudulent misrepresentation.

There were no other terms in the CSA regarding the timetable or timeline for the project. Confident of meeting the June 2017 timeline, Nacon entered into a power purchase agreement with the Fiji Energy Authority for the supply of 20MW per day of electricity starting on 1 June 2017.

4. The Dispute

As it turned out, completion of the project was delayed by 11 months and the Namara Power Plant was only completed and commissioned on 25 November 2017.

Nacon commenced SIAC arbitration against Tobio in December 2017, seeking recovery of damages for the delay and/or a rescission of the contract for misrepresentation.

Tobio claims that it was not liable for any delay. In any event, Tobio argues that it delivered the Namara Power Plant within a reasonable time. Tobio also relies on Clause 22 of the CSA which excludes its liability for any delays caused by sub-contractors.

5. The Proceedings

Nacon and Tobio nominated Ms. Sae Youn Kim and Mr. Christopher Stephens as their respective party-nominated arbitrators. Ms. Sae Youn Kim and Mr. Christopher Stephens then agreed on Mr. Gary Born as the presiding arbitrator. The tribunal of three arbitrators (the “**Tribunal**”) was thus constituted.

The mock arbitration first depicts a hearing before the Tribunal. Ms. Ana Tuketei is counsel for Nacon, the Claimant. Ms. Ofa Solimailagi is counsel for Tobio, the Respondent.

In the second part of the mock arbitration, Ms. Ofa Solimailagi will seek to set aside the award in Fiji court proceedings before Justice R.G.S. Suresh Chandra.