

Attachments for Procedure CA/69

SL/CA 69/ 01 – NOTICE OF ARBITRATION

To: Project Manager

Notice of Arbitration

In the Matter of an Arbitration between _____ (Claimant) and

_____ (Respondent)

Claimant :

Respondent: _____ (Contractor)

Contract :

Arbitration Agreement:

Arbitration Agreement is consisted of following Sub-Clauses/provisions in the Contract:

1. Sub-Clause 20.6 (subject to amendments in 2 and 3 below) Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:
 - (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
 - (b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
 - (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

2. Sub-Clause 20.6 of Particular Conditions (superseded by amendments in 3 below)
Sub-Clause 20.6 of Particular Conditions has superseded parts of the Sub-Clause 20.6 of the General Conditions of the Contract.
3. Item 7 of the Annex 3 of the Contractor's letter _____ dated _____

Provisions in Item 7 of the Annex 3 of the Contractor's letter P230605– GF/CHG dated _____ have superseded Sub-Clause 20.6 of Particular Conditions and Sub-Clause 20.6 of General Conditions of Contract.

Sub-Clause 20.6 of General Conditions of Contract has been amended in the Particular Conditions and subsequently amended again in the Item 7 of the Annex 3 of the Contractor's letter P230605– GF/CHG dated _____ (page 14 of the Contract document) accepting the award of the Contract and in Item 7 of the Annex 3 of the Claimant (Employer)'s letter of acceptance _____ dated _____ (page 23 of the Contract document) to read as "The dispute shall be finally settled in terms of the Arbitration Act No.11 of 1995 and the arbitration should be under the UNCITRAL Rules and take place in Colombo, Sri Lanka."

4. Sub-Clause 20.4 _____, 6th paragraph of which states "Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 _____"

, neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.”

5. Sub-Clause 20.8

If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

(a) Sub-Clause 20.4 and Sub-Clause 20.5 shall not apply, and

(b) the dispute may be referred directly to arbitration under Sub-Clause 20.6

6. Sub-Clause 1.4

The Contract shall be governed by the law of the country (or other jurisdiction) stated in the Appendix to Tender.

If there are versions of any part of the Contract which are written in more than one language, the version which is in the ruling language stated in the Appendix to Tender shall prevail.

The language for communications shall be that stated in the Appendix to Tender. If no language is stated there, the language for communications shall be the language in which the Contract (or most of it) is written.

General Nature of the Claim/Dispute:

1. The Contract for , was awarded to and the Contract was signed on . The Contractor has provided his Performance Guarantee from [Name of the Bank] of through its branch in Sweden. The Works in the Contract was commenced in and progressed without any interruptions but behind the agreed schedule.
2. When the Works in the Contract, was about 90% completed, lead partner of the Joint Venture constituting the Respondent , was adjudicated bankrupt thus creating complication in management of the contract due to controlling of the lead partner's bank accounts by trustees appointed by the court as all bank accounts which were used for transactions related to the Contract, were owned by the lead partner. Also all sub contracts and supply contracts have not been signed with the Joint Venture, but with the lead partner, making the execution of the project more complicated if not impossible. When the Claimant was trying to help the Respondent by acceding to some of his requests for extra-contractual concessions to complete the Works (such as reducing the amount of performance guarantee), the Respondent attempted to

terminate the Contract with effect from _____, invoking provisions under Sub-Clause 16.2 of the General Conditions of Contract, alleging that the Claimant became insolvent. The Claimant while rejecting the Respondent's entitlement to terminate the Contract under the Sub-Clause 16.2 of GCC, terminated the Contract with effect from _____ by notifying in accordance with sub paragraph (b) of Sub-Clause 15.2 [Termination by Employer] of the General Conditions of Contract, as the Respondent abruptly stopped execution of the Works with effect from _____ and as it was clear that the Respondent was not going to continue the performance of the Contract until completion. Therefore a dispute has arisen with regard to whether the Claimant or the Respondent is entitled for termination of the Contract.

3. Upon the termination of the Contract, the Claimant demanded the _____ which issued the Respondent's Performance Guarantee, to pay the amount guaranteed under the said Performance Guarantee. _____ Bank, instead of paying the guaranteed amount, advised the Claimant (Employer) to return the Performance Guarantee to the Respondent. Since the said Performance Guarantee is an unconditional on-demand guarantee which states "we undertake to pay you, upon your first written demand, and without cavil or argument, any sum or sums within the limits of _____ as aforesaid, without your needing to prove or to show grounds or reasons for your demand or the sum specified therein", the said bank should have paid the Claimant upon his demand to pay. It is clear that the said bank's refusal to honour the Performance Guarantee was on the instructions from the Respondent. Therefore another dispute has arisen with regard to the payment of amount guaranteed under the Performance Guarantee.
4. At time of termination the Respondent's unfulfilled contractual obligations included:
 - (a) Works which were partially completed,
 - (b) Works yet to be commenced,
 - (c) Rectification/replacement of defective works
 - (d) Testing at completion of works
 - (e) Testing and commissioning of Plants
 - (f) Training of staff involved in operation and maintenance of Plants
 - (g) Operation and maintenance of Plants for a period of 12 months
 - (h) Rectification or compensating for of damages suffered by third parties, which remained unsettled.

- (i) Rectification or compensating for of damages to utilities, which remained unsettled.
- (j) Rectification or compensating for of damages to roads and road structures, which remained unsettled.

Interim Relief Sought:

The Claimant requests the Arbitral Tribunal to direct the Respondent to refrain from disposing any Goods (including materials, Contractor’s Equipment and Temporary Works) without the specific approval of the Claimant in order to maintain the status quo, in accordance with [insert rules of procedure as may be relevant to the Contract Agreement for example] Article 26 of the UNCITRAL Arbitration Rules.

Relief/Remedy Sought:

1. The Claimant requests the Arbitral Tribunal to declare that the Claimant’s termination in accordance with sub paragraph (b) of Sub-Clause 15.2 [Termination by Employer] of the General Conditions of Contract, with effect from _____ is Contractually valid and to declare that the Respondent’s purported termination under the Sub-Clause 16.2 _____ of the General Conditions of Contract, with effect from _____ is Contractually invalid.
2. The Claimant requests the Arbitral Tribunal to declare that the Respondent (Contractor) has breached the Contract by instructing its bank _____ to refuse payment guaranteed under the Performance Security, when the Claimant (Employer) demanded the said payment and the Claimant further requests the Arbitral Tribunal to direct the Respondent :
 - a. to instruct his bank _____ to pay the Claimant an amount of _____ as the amount guaranteed under the Performance Guarantee: or
 - b. to pay the Claimant an amount of _____
3. The Claimant requests the Arbitral Tribunal to declare that :
 - a. the Claimant (Employer) is entitled to complete the Works itself and/or arrange for any other entities to do so
 - b. The Claimant (Employer) and entities arrange by it are entitled to use any Goods (including materials, Contractor’s Equipment and Temporary Works), Contractor’s Documents and other design documents made by or on behalf of the Contractor.

4. The Claimant requests the Arbitral Tribunal to direct the Respondent (Contractor) to:
 - a. Refrain from disposing any Goods without the specific approval of the Claimant
 - b. Hand over all Goods (including materials, Contractor's Equipment and Temporary Works) required by the Claimant in completing the Works.
5. The Claimant requests the Arbitral Tribunal to direct the Respondent to :
 - a. Pay the Claimant losses and damages suffered or to be suffered by it and any additional/extra costs incurred or to be incurred by it in completing the Works.
 - b. Indemnify the Claimant of all claims for losses and damages suffered by third parties, road authorities and utility agencies by rectifying such losses/damages or paying compensation for such damages in lieu of rectification.
6. The Claimant) requests the Arbitral Tribunal to direct the Respondent (Contractor) to pay the Claimant costs of this arbitration
7. Any other relief the Arbitral Tribunal may think reasonable.

Appointment of Arbitrators

We hereby appoint _____ as one of the co-arbitrators [if it's a sole arbitrator state so] in accordance with [insert rules of procedure for example] the Item 4(c) of [Article 3 and Article 9 of the UNCITRAL Rules and we hereby request you to appoint a co-arbitrator in accordance with the Item 2(d) of Article 4 and Article 9 of the UNCITRAL Rules as may be relevant to the Contract Agreement.

Thanking you.

Yours faithfully,

Chairman

cc:

- 1.
2. Hon. Attorney General
- 3.
- 4

- 5.
- 6.

SL/CA 69/ 02 – STATEMENT OF CLAIM

To:

Chairman, Arbitral Tribunal

Co-arbitrator

Co-arbitrator

In the Matter of an Arbitration between _____ (Claimant) and _____ (Respondent) under (insert rules of procedure relevant to the Contract Agreement/ rules

Claimant :

Respondent:

Contract : Contract No. _____ for _____ dated _____

Background:

1. The Contract for _____, was awarded to _____ and the Contract was signed on _____. The Contractor has provided his Performance Guarantee from _____ of _____ through its branch in _____. The Works in the Contract was commenced in _____ and progressed without any interruptions but behind the agreed schedule.
2. When the Works in the Contract, was about 90% completed, lead partner of the Joint Venture constituting the Respondent (Contractor), _____, was adjudicated bankrupt thus creating complication in management of the contract due to controlling of the lead partner's bank accounts by trustees appointed by the court as all bank accounts which were used for transactions related to the Contract, were owned by the lead partner. Also all sub contracts and supply contracts have not been signed with the Joint Venture, but with the lead partner, making the execution of the project more complicated if not impossible. When the Claimant (Employer) was trying to help the Respondent (Contractor) by acceding to some of his requests for extra-contractual concessions to complete the Works (such as reducing the amount of performance guarantee), the Respondent (Contractor) attempted to terminate the Contract with effect from _____, invoking provisions under Sub-Clause 16.2 of the General Conditions of Contract, alleging that the Claimant (Employer) became insolvent. The Claimant (Employer), while rejecting the Respondent (Contractor)'s entitlement to terminate the Contract under the Sub-Clause 16.2 of GCC, terminated the Contract with effect from _____ by notifying in accordance with sub paragraph (b) of Sub-

Clause 15.2 of the General Conditions of Contract, as the Respondent (Contractor) abruptly stopped execution of the Works with effect from

and as it was clear that the Respondent (Contractor) was not going to continue the performance of the Contract until completion. Therefore a dispute has arisen with regard to whether the Claimant (Employer) or the Respondent (Contractor) is entitled for termination of the Contract.

3. Upon the termination of the Contract, the Claimant (Employer) demanded the which issued the Respondent's (Contractor's) Performance Guarantee, to pay the amount guaranteed under the said Performance Guarantee. Bank, instead of paying the guaranteed amount, advised the Claimant (Employer) to return the Performance Guarantee to the Respondent (Contractor). Since the said Performance Guarantee is an unconditional on-demand guarantee which states "we undertake to pay you, upon your first written demand, and without cavil or argument, any sum or sums within the limits of as aforesaid, without your needing to prove or to show grounds or reasons for your demand or the sum specified therein", the said bank should have paid the Claimant (Employer) upon his demand to pay. It is clear that the said bank's refusal to honour the Performance Guarantee was on the instructions from the Respondent (Contractor). Therefore another dispute has arisen with regard to the payment of amount guaranteed under the Performance Guarantee.
4. At time of termination the Respondent's (Contractor's) unfulfilled contractual obligations included:
 - (a) Works which were partially completed,
 - (b) Works yet to be commenced,
 - (c) Rectification/replacement of defective works
 - (d) Testing at completion of works
 - (e) Testing and commissioning of Plants
 - (f) Training of staff involved in operation and maintenance of Plants
 - (g) Operation and maintenance of Plants for a period of 12 months
 - (h) Rectification or compensating for of damages suffered by third parties, which remained unsettled.
 - (i) Rectification or compensating for of damages to utilities, which remained unsettled.
 - (j) Rectification or compensating for of damages to roads and road structures, which remained unsettled.

Interim Relief Sought:

5. The Claimant (Employer) requests the Arbitral Tribunal to direct the Respondent (Contractor) to refrain from disposing any Goods (including materials, Contractor's Equipment and Temporary.

Claimants (Employer) Position:

6. The Claimant (Employer) wishes to assert that the Respondents purported termination is not contractually valid as his allegation to the effect that Employer became insolvent/bankrupt, base on which he tried to terminate the contract was not legally valid as:
 - a. In accordance with the Sri Lankan law only a court has authority to declare an entity become insolvent/bankrupt.
 - b. There is no provision in the Sri Lankan law, _____, as a state entity, to become insolvent/bankrupt.
7. The Claimant (Employer) rejects the Respondents allegation that Claimant had failed to respond to his request for Employer's financial arrangements as the Claimant responded to that request through the letter _____ dated _____ which is attached to this statement as WB/01. Furthermore, the Claimant wishes to point out that he has proved that his financial arrangements were intact by making an interim payment to the Respondent subsequent to his request to provide Employer's financial arrangements.
8. The Claimant (Employer), without prejudice to his above position, asserts that, even if the Claimant failed to provide evidence for his financial arrangements, termination of the Contract base on that grounds require Respondent to give 14 day notice prior to such termination, which the Respondent failed to carry out.
9. The Claimant (Employer) reiterates that the Respondents purported termination of the Contract was contractually and legally invalid as shown above.
10. The Claimant (Employer) emphasizes that his termination of the Contract was the legally and contractually valid termination as it was valid grounds in accordance with the Contract.

Relief/Remedy Sought:

11. The Claimant (Employer) requests the Arbitral Tribunal to declare that the Claimant's (Employer's) termination in accordance with sub paragraph (b) of Sub-Clause 15.2 _____ of the General Conditions of Contract, with effect from _____
_____ is Contractually valid and to declare that the Respondent's (Contractor's) purported termination under the Sub-Clause 16.2 _____ of the General Conditions of Contract, with effect from _____ is Contractually invalid.
12. The Claimant (Employer) requests the Arbitral Tribunal to declare that the Respondent (Contractor) has breached the Contract by instructing its bank ; _____ to refuse payment guaranteed under the Performance Security, when the Claimant (Employer) demanded the said payment and the Claimant (Employer) further requests the Arbitral Tribunal to direct the Respondent (Contractor):

- a. to instruct his bank to pay the Claimant (Employer) an amount of as the amount guaranteed under the Performance Guarantee: or
 - b. to pay the Claimant (Employer) an amount of USD 9,065,048.50
13. The Claimant (Employer) requests the Arbitral Tribunal to declare that :
- a. the Claimant (Employer) is entitled to complete the Works itself and/or arrange for any other entities to do so
 - b. The Claimant (Employer) and entities arrange by it are entitled to use any Goods (including materials, Contractor's Equipment and Temporary Works), Contractor's Documents and other design documents made by or on behalf of the Contractor.
14. The Claimant (Employer) requests the Arbitral Tribunal to direct the Respondent (Contractor) to:
- a. Refrain from disposing any Goods without the specific approval of the Claimant (Employer).
 - b. Hand over all Goods (including materials, Contractor's Equipment and Temporary Works) required by the Claimant (Employer), in completing the Works.
15. The Claimant (Employer) requests the Arbitral Tribunal to direct the Respondent (Contractor) to :
- a. Pay the Claimant (Employer), losses and damages suffered or to be suffered by it and any additional/extra costs incurred or to be incurred by it in completing the Works.
 - b. Indemnify the Claimant (Employer) of all claims for losses and damages suffered by third parties, road authorities and utility agencies by rectifying such losses/damages or paying compensation for such damages in lieu of rectification.
16. The Claimant (Employer) requests the Arbitral Tribunal to direct the Respondent (Contractor) to pay the Claimant (Employer) costs of this arbitration
17. Any other relief the Arbitral Tribunal may think reasonable.
- Documents Annexed to the Statement of Claim
18. Documents marked "C1" to "C..."

Chairman/

cc:

(Respondent)

SL/CA 69/ 03 – STATEMENT OF DEFENCE OF THE RESPONDENT

CASE NO:

IN THE MATTER OF AN ARBITRATION
UNDER THE

RULES

STATEMENT OF DEFENCE

To:

Chairman, Arbitral Tribunal

Co-arbitrator

Co-arbitrator

In the Matter of an Arbitration _____ (Claimant) and
(Respondent)

Claimant :

Respondent: _____ (Contractor)

Contract : Contract No. _____ dated _____

Introduction:

1. The Respondent (Employer) wish to inform that he would respond to each and every paragraph of the Claimant's Statement of Claim (SOC), referring to paragraph numbers but using his own series of paragraph numbers.
2. If the Respondent needs to refer to any supporting documents which is not marked by the Claimant, those documents would be marked and attached to the attached Statement of Defence. In case the Respondent needs to rely on a document already submitted by the Claimant, the Respondent will refer to that document using the serial number assign to that document by the Claimant.

Respondent's Position on Claimant's Contentions in his Statement of Claim

3. The Respondent admits the content of Paragraph 1 of the SOC that a Contract for _____, was awarded to the Claimant and a valid contract exists between the Claimant and the Respondent.

4. Responding to the Paragraphs 1 to 3 of the SOC, the Respondent rejects the Claimants assertion that there was a delay of 30 days in handing over the possession of the site to the Claimant
5. While rejecting the contention of the Claimant in Paragraph 4 of the SOC that he is entitled for an EOT of 30 days, the Respondent emphasize that the delay was due to unavailability of adequate resources for which the Claimant was responsible.
6. The Respondent wishes to point out that the Claimant is trying to mislead the Honorable Tribunal by providing wrong information in Paragraph 5 of the SOC that he has notified the Engineer and as evidence we submit the Engineer's letter dated

marked as
7. Accordingly the Respondent out rightly reject the Claimant's contention in Paragraph 6 of the SOC that he is entitled for an EOT and/or associated prolongation costs.

Counter Claims:

8. The Respondent asserts that he is entitled for Liquidated/Delay Damages amounting to Rs. for the Claimant's 30 days delay in completing the Works.

Relief/Remedy Sought:

9. 1. The Respondent requests the Honourable Arbitral Tribunal to declare that the:
 - a) The Claimant is not entitled for any EOT and/or prolongation costs with regard to his claims referred for this arbitration.
 - b) The Claimant is not entitled for any other costs whatsoever including costs of this arbitration and any interest for delayed payments
2. The Respondent requests the Honourable Arbitral Tribunal to direct the Claimant:
 - i. to pay the Respondent an amount of Rs. as Liquidated/Delay Damages for the Claimant's 30 days delay in completing the Works.
 - ii. To pay the costs incurred by the Respondent in this arbitration.

/

Chairman/

cc:

(Claimant)

SL/CA 69/ 04 – Statement of Reply of the Claimant

To:

Chairman, Arbitral Tribunal

Co-arbitrator

Co-arbitrator

STATEMENT OF REPLY OF THE CLAIMANT

In the Matter of an Arbitration between _____ (Claimant) and
_____ (Respondent)

Claimant :

Respondent:

Contract : Contract No. _____ for _____ dated _____

STATEMENT OF REPLY OF THE CLAIMANT ABOVE NAMED

1) The Claimant denies all and singular the averments contained in the Statement of Defence save and except for those that are hereinafter specifically admitted.

2) Responding to the averments contained in paragraphs _____ of the Statement of Defence, the Claimant reiterates the averments contained in paragraphs _____ of the Statement of Claim.

3) Responding to paragraph _____ of the Statement of Defence, the claimant states that [was in fact due from the Respondent to the Claimant at the time of termination of the Contract Agreement].

4) While disputing the matter stated in paragraphs _____ of the Statement of Defence, the Claimant puts the Respondent to the strict proof thereof and reiterates the averments contained in paragraphs _____ in the Statement of Claim.

5) The Claimant further states that it is unaware of the correctness of the matters stated under paragraphs _____ contained in the Statement of Defence and puts the Claimant to the strict proof thereof.

6) By way of further reply, the Claimant states that –

a) The Respondent has wrongfully and wilfully defaulted the payment of _____ due to the Claimant.

WHEREFORE the Claimant prays that the Tribunal be pleased to:

- a) Reject or dismiss the Statement of Defence of the Respondent;
- b) Grant the relief prayed for in the Statement of Claim; and
- d) For costs and any other relief as to this Tribunal may deem fit, just and equitable.