



1ST INTRA-AFRICA AWARD WRITING COMPETITION

Case Study

Pensbury Luxury Vacation Limited (“**Pensbury**” or the “**Claimant**”) entered into a Power Purchase Agreement (“**PPA**”) with Jikular Energy Projects Ltd (“**Jikular**” or the “**Respondent**”) on 20 October 2013, wherein the Respondent agreed to sell and the Claimant agreed to buy from the Respondent a contractual power capacity (“**CPC**”) up to 10 Megawatts (“**MW**”) of electric power, pursuant to the terms and subject to the conditions contained in the PPA. The Claimants and Respondent are hereinafter referred to as “**the Parties**”.

The essence of the PPA was the supply, installation and operation by Jikular of a power generation station (“**PGS**”) at the Pensbury Facility in Lekki, Lagos State, Nigeria. The PGS has the capacity of providing up to 14.2 MW of electric power. On 11 November 2013, the Parties entered into an Addendum. Jikular’s obligation to make electric power available to the Pensbury Facility was with effect from the commercial operations date (“**COD**”) and for the duration of the global minimum charge period (“**GMCP**”). Under Clause 1.2 of the PPA, the COD is expressed as 18 April 2014, or such other date as agreed by the parties for the GMCP. However, with the Addendum, the COD was 02 June 2014 and the PPA was to expire on 01 June 2024 (10 years after the COD).

Pensbury contends that its obligations were wholly fulfilled before Jikular commenced operations - that by virtue of the provisions in Clause 2.1.4 of the PPA, Jikular was under the obligation to provide a gas fired module, 12 months from the date of the provision of the payment guarantee by the Pensbury. Pensbury alleged that it provided the required payment guarantee of Ten Million, Two Hundred and Twenty-Six Thousand Dollars. (US\$10,226,000), which was paid to Jikular by Pensbury’s parent company, Lakesbury, on its behalf.

It is also Pensbury’s contention that the services provided by Jikular were fraught with series of breakdowns and power outages which caused severe damage to the Claimant’s facilities and loss of income. As a result of the poor performance, the Respondent was warned severally. Instead of curing the defects, the Respondent shut down power supply unceremoniously on 9 November 2015. The Claimant had no option but to terminate the PPA on 02 February 2016.



Therefore, Pensbury contends that Jikular is in serious breach of its obligations under the PPA. Jikular denied the claim and counter-claimed against Pensbury.

Consequently, by letter dated 5 February 2016, Claimant's solicitors – Barry Ikogo LLP on behalf of the Claimant invoked the provisions of Article 19 of the PPA to request that both parties “submit to an arbitration panel to determine the dispute which has arisen”.

In its Request for Arbitration, Pensbury claims as follows:

- a. A declaration that the action of the Respondent in unceremoniously shutting down power supply to the Claimant's facility at Pensbury Luxury Vacation Limited, without notice, is against the intent and purpose of the PPA and its subsequent Addendum.
- b. A declaration that the unilateral shutting down of power supply by the Respondent without notice has automatically vitiated the contract between the Parties.
- c. The sum of Seven Hundred and Sixty-Three thousand Dollars (\$763,000) being income lost by the Claimant for days from the 09 November 2015 when the Respondent shut down power supply to the 02 February, 2016 when the Claimant was able to arrange alternative power supply.
- d. The sum of Four Hundred Thousand Dollars (\$400,000) being expenses incurred by the Claimant in fixing their damaged machines and equipment caused by the fluctuating nature of the Respondent's service.
- e. 10% interest per annum on the claimed sums from 02 February 2016 until an award is made by the Tribunal.
- f. 10% interest per annum on the sum awarded until the same is finally defrayed.

Upon receiving the Request for Arbitration, the Respondent filed its Answer to the Request for Arbitration and Counterclaim, wherein it contends as follows.

First, the Claimant is in breach of its material obligations to the Respondent as spelt out in Clauses 2.1 of the PPA, which states in relevant part that the financial commitments of the Claimant was made up of (i) an Advance Capacity Payment of \$1,000,000.00, (ii) a Discountable Payment Guarantee of \$1,500,000.00 and another Payment Guarantee of \$12,829,169.06. Whilst the Claimant paid the Advance Capacity Payment of \$1,000,000.00 and another \$1,500,000.00 for the Discountable Payment Guarantee in accordance with the PPA, it failed to pay the Payment Guarantee of \$12,829,169.06 as required under Clause 2.1 of the PPA;



Second, by failing to make the Payment Guarantee of \$12,829,169.06, the Claimant was in breach of a material obligation pursuant to Clause 6.1 of the PPA, which provides that the Respondent is not obliged to honour its supply obligations to supply electric power to the Claimant in such instances. In other words, the Respondent was justified in withdrawing the supply of electric power to Pensbury Facility following the Claimant's failure to pay the Payment Guarantee of \$12,829,169.06.

Third, the Claimant failed to meet its payment obligations under Clause 9.1 and such delays trigger commercial interest as per the London Interbank Offered rate (LIBOR) plus the lowest rate offered by any of the top five commercial banks in Nigeria. The Respondent alleges that as at December 2016, a total of \$12,829,169.06 was outstanding and due to the Respondent as the Fixed Capacity Charge (FCC) under the PPA.

Finally, the Respondent contends that the Claimant unlawfully terminated the PPA under Clause 11.2 of the PPA, which sets out the consequences of improper termination of the PPA and the limited conditions under which the Respondent can withhold further performance. According to the Respondent, by failing to satisfy the Payment Guarantee of \$12,829,169.06, the Claimant breached the take-or-pay provision contained at Clause 8.4, which provides the service provider (the Respondent in this case) with an assured income stream to cover its operating costs and enable a reasonable return on the investment in consideration of the risks it is exposed to.

The Respondent denies that the Claimant is entitled to any relief and urges the Arbitral Tribunal to rule in this regard. In consequence, the Respondent counterclaims as follows:

- a) An Award ordering Pensbury to pay the \$12,829,169.06 being the amount outstanding and due to the Respondent as the Fixed Capacity Charge (FCC) under the PPA – given the take-or-pay commitment in Clause 8.4 of the PPA.
- b) An Award of \$6,008,169.06 being commercial interest charges on the delayed payments of Fixed Capacity Charge as provided under Clause 8.2 of the PPA.
- c) An Award of punitive damages in the amount of \$15,000,000.
- d) 10% interest per annum on the sum awarded till same is finally defrayed.

Arbitration Agreement

Article 18.2 of the PPA provides thus:

18.2.1 all other disputes or claims between the Parties arising under this Agreement [not required to be submitted to Expert Determination] shall be referred to arbitration.



- 18.2.2 the arbitral tribunal shall be composed of a sole arbitrator appointed in accordance with the provisions of the UNCITRAL Arbitration Rules (as revised in 2010).
- 18.2.3 where the parties fail to agree on appointment of the sole arbitrator, then reference shall be made to the Secretary General, Permanent Court of Arbitration for the appointment.
- 18.2.4 the dispute shall be settled by arbitration in accordance with the provisions of the UNCITRAL Arbitration Rules (as revised in 2010), and the arbitration proceedings shall be conducted in the Lagos Court of Arbitration, Lagos, Nigeria. Where necessary, the IBA Rules and Guidelines may also be applied in the proceedings.
- 18.2.5 the decision of the arbitrator shall be final and binding upon the Parties.

Issues for Determination

The Claimant formulated an issue for determination:

Whether the contract between the parties in this arbitration has not been frustrated by reason of the Respondent abandoning its material obligation of supplying power to the Claimant's facility, thereby causing damage to the Claimant's facility in total disregard to the provisions of the PPA between the parties.

The Respondent formulated the sole issue for determination:

Whether the Claimant is entitled to the reliefs sought and [if answered in the negative], whether the Respondent's Counterclaim should not be granted

Proceedings:

Pursuant to the Arbitration Agreement, the parties have nominated you to act as the sole arbitrator over the dispute. At the first preliminary meeting, the Claimant disclosed that it has received funding from CarCas Global Funding Inc., a third-party litigation funder based in Pretoria, South Africa. On this ground, the Respondent's counsel urged the tribunal to dismiss the claimant's case because funding by an external party to arbitration or court proceedings is champertous and not allowed in Nigeria. The Respondent also argued that the CEO of CarCas is a partner in your law firm, giving rise to a justifiable doubt that the tribunal will be independent and impartial.

Upon agreement of counsel, the parties agreed that all issues should be determined together in the final award, and that the Respondent's objection should be determined first before any decision on the substantive issues is made.



Question:

You are required to prepare a final award on the Respondent's objection and substantive issues. You are however at liberty to decline deciding the substantives issues if you find merits in the Respondent's objection.

Rules:

All awards must not exceed 15,000 words, and must be typed in Times New Roman, font size 12, single line spacing. Participants must not exceed the age of 40 by the date of submission of the draft award.

For more information or clarifications, please contact abayomi.okubote@queensu.ca, ademola.bamgbose@hoganlovells.com, anita.omonuwa@templars-law.com, sebere@omniastrategy.com and Ngo-Martins.Okonmah@aluko-oyebode.com