

GD Goenka-CI Arb(India) International Commercial Arbitration Competition 2019

MOOT PROPOSITION

1. Palladium Club (hereinafter referred to as the “Club”) is one of the oldest exclusive social clubs in Siri, the capital of Indo and has been in existence since 1929. The Club was formed for the mutual benefit of its members and it is a not for profit and non-commercial organization incorporated under Section 8 (old Section 25) of the Companies Act. The Club is located in the heart of Siri and has excellent dining and entertainment facilities, an excellent library, three resto-bars, six tennis courts, a 50m swimming pool, a gymnasium, a walking track and a golf course. In recent times the Club was facing difficulties to cater to the needs of the growing headcount of its members. Accordingly, the Club unanimously passed a resolution on 10th January 2018 to construct an Annex building within the Club’s premises which will include two restaurants, four badminton courts, four squash courts, a ball room, gymnasium and stay facilities (hereinafter referred to as the “Project”). The Project was estimated by the Club to cost Rupees 100 crores.
2. Hershel Gibbons Properties (hereinafter referred to as “HG Properties”) is a HoongKeang based internationally renowned real estate conglomerate. The operations of HG Properties span to around 100 cities in 30 countries. Backed by 50 years of experience in construction and infrastructure, HG Properties has created some of the world’s most iconic, large scale modern integrated projects and is renowned for its expertise in understanding precise quality of raw materials, its unique design construction planning and outstanding execution with timely delivery. With the growing real estate market in Indo, the CEO of HG Properties Mr. Andy Goffin announced recently that the company was making a beeline to enter the Indo market.

3. The Joint Secretary of the Club, Mr. Sandeep Chaitanya owns a cement manufacturing company named Dharma Cements Pvt. Ltd (hereinafter referred to as “Dharma Cements”) and frequents to Hoong Keang for his business. During his visit to Hoong Keang in January 2018, he had met Mr. Andy Goffin in a networking event, and they had discussed HG Properties’ zeal to enter Indo’s real estate market. Since Mr. Sandeep knew that the Club was having discussions with various developers both from Indo and overseas to take up the Project, he decided to rope in HG Properties as a potential business partner to complete the Project.
4. The office bearers of the Club met with Mr. Andy Goffin on 29-1-2018 and discussed the Project and the various commercials associated with it. The office bearers were extremely pleased with the pitch given by Mr. Andy and were particularly impressed with the assurance given by him pertaining to the quality and time frame within which the Project will be completed. The Club informed Mr. Andy that was planning to have its centenary celebration on 10-2-2019 and was hoping to host the same in the ball room of the new building which will be built as a part of the Project. The Club further informed Mr. Andy that the Club was opening its gate for permanent memberships after 5 years and are planning to induct 100 new members into the Club who will exclusively use the new premises that will be built under the Project.
5. Mr. Andy Goffin informed them that it was absolutely possible to complete the Project by January 2019 and informed them that total consideration payable would be Rs.120 crores. While the Club was impressed by HG Properties’ extensive experience in real estate, they were somewhat sceptical by the significantly higher price that was quoted in comparison to the competition. However, Mr. Andy assured the office bearers of the Club that HG Properties’ quality of work was impeccable and that they could definitely complete the project in good time. After careful deliberations, the Club decided to award the contract to HG Properties for completion of the Project.

6. Since Mr.AndyGoffin was scheduled to leave to HoongKeangin two days, he informed that he would like to sign the contract the very next day. Mr.RohitPatel, alawyer hired by the Club and Mr.RogerHopkin, the in-house legal counsel of HG Properties met on 30-1-2018 and convened negotiations over HG Properties' standard Development Agreement. The main issue for concern for Mr.Rohit was the dispute resolution clause which stated:

"Any dispute arising from or in connection with this contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) HoongKeang Arbitration Center for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration.

The seat of arbitration and venue of oral hearing shall be HoongKeang. The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English."

7. Mr.RohitPatel instead suggested a CIETAC administered arbitration with the seat and venue being Siri, Indo. After careful deliberations, both parties agreed to Mr.Rohit's suggestion.
8. Mr.Rohit further referred to a clause which specified that *"the cement for the Project shall be procured only from Dharma Cements and Palladium Club hereby consents to the same and shall waive conflicts, if any"*. He immediately consulted the President and Secretary of the Club regarding the said clause and advised them against using materials supplied by members of the Club. However the President and Secretary being very close friends of Mr.Sandeep informed that they did not have any problem in waiving any such conflict.
9. Accordingly the Development Agreement was signed on 1-2-2018 between the Club and HG Properties. The Project was scheduledto be completed by 5-1-2019 and it was

agreed that the total consideration of Rs.120 crores will be paid in 4 equal instalments. It was further agreed that the time was the essence of contract (excerpts of Development Agreement is available in Addendum).

10. HG Properties subsequently requested a total of 5000 bags of cement from Dharma Cements which was to be delivered in three instalments i.e., (i) 1500 bags on 5-2-2018, (ii) 1500 bags on 5-4-2018 and (iii) 2000 bags on 5-6-2018. HG Properties signed a one page Purchase Agreement with Dharma Cements which prescribed the time schedule for delivery of cement, quantity, price and a reference that the cement will be used for the Project. While there were no specifications as to the quality of cement, a clause gave liberty to HG Properties to test the cement within one week of its receipt and return the same in the event of issues in respect to quality. The Purchase Agreement further contained an arbitration clause which was exactly analogous to that of the Development Agreement.
11. HG Properties commenced its work in the Project immediately after receiving Rs.30 crores being the first instalment of consideration and was proceeding with it as per schedule. Dharma Cements supplied 1500 bags of cement on 5-2-2018 as mandated under the Purchase Agreement. However the cement bags were returned on 10-2-2018 by HG Properties along with an email alleging that the cement was of inferior quality and was not compatible for the Project. HG Properties further specified the quality and composition of cement that it required, and requested Dharma Cements to supply the same at the earliest. This was a serious blow for Dharma Cements, which was already facing a decline in the business for the last few months. Under protest, Dharma Cements started manufacturing different batch of cement as per the standards requested by HG Properties. However Dharma Cements was able to supply only 500 bags of the new batch of cement on 5-4-2018 and requested HG Properties for further time to deliver the rest. On 5-6-2018, Dharma Cements supplied an additional 750

bags of cements As a result HG Properties was not able to reach the target it aimed by the end of June 2018.

12. HG Properties repeatedly requested Dharma Cements to supply the remaining cement bags at the earliest, to enable HG Properties to meet the timeline specified in the Development Agreement. However Dharma Cements repeatedly sought for further time to supply the balance materials. On 10-7-2018, HG Properties sent an email to Dharma Cements stating that if Dharma Cements fails to supply the remaining cement bags, HG Properties will be constrained to approach an alternate supplier to procure the required cement. Dharma Cements who were already suffering losses did not want to let go of such a big Order and requested HG Properties for further time.
13. Dharma Cements immediately moved the High Court of Delhi under Section 9 of Arbitration and Conciliation Act, 1996 against HG Properties restraining them from purchasing cement from any other supplier, citing that an exclusivity clause under the Development Agreement mandates HG Properties to solely buy cement from Dharma Cements for the Project. The said application came up for admission on 25-7-2018 and High Court of Delhi ordered notice to the HG Properties. HG Properties appeared before the High Court of Delhi on 27-8-2018 and filed its Counter. However the roster of judges changed in the subsequent month and the said matter was not listed thereafter.
14. In the meanwhile, HG Properties terminated the Purchase Agreement with Dharma Cements and procured 500 bags of cement from a different supplier and continued work on the Project. However by 5-1-2019, the Project was hardly near completion with more than 70% of the work still remained to be completed in spite of HG Properties receiving further consideration of Rupees 60 crores. HG Properties sent an email on 5-1-2019 to the Club seeking further extension of 10 months to complete the Project.

15. The Club had already received payments for new memberships from 100 applicants and was apprehensive that they might face some problems due to the delay in completion of the Project. As predicted, few applicants terminated their applications and took refunds of the membership fees that were paid to the Club. Furthermore a local newspaper elaborately covered the debacle surrounding the delay in the Project.
16. The Club sent a letter to HG Properties on 10-1-2019 terminating the Development Agreement with immediate effect claiming back the entire payment of Rs.90 crores that was made including damages to the tune of Rs.10 crores as stipulated under the Development Agreement. The Club further engaged the services of another Indo based developer Durg Estates Pvt. Ltd. to complete the remaining work in the Project.
17. HG Properties replied through a letter dated 25-1-2019 that they are neither bound to refund the payments made by the Club, nor liable for any damages. HG Properties further insisted that they are ready and willing to complete the Project and insisted on the Club to revoke the termination of the Development Agreement.
18. The Club submitted a request to initiate arbitration against HG Properties along with a Statement of Claim to the China International Economic and Trade Arbitration Commission (CIETAC) on 20-2-2019 and nominated Mr. Sarangdeep Ranchod, a Senior Advocate at the Supreme Court of India as an Arbitrator.
19. The Statement of Claim primarily alleged that:
- i. HG Properties has breached the Development Agreement by significantly delaying the Project.
 - ii. The Club was right in terminating the Development Agreement.
 - iii. HG Properties is, (i) liable to refund the consideration of Rs.90 crores that was paid by the Club and also (ii) liable to pay damages of Rs.10 crores.
 - iv. HG Properties shall further be liable to pay the costs of arbitration, expenses for legal representation and any other payments that the Tribunal may so order.

20. HG Properties filed its Statement of Defense on 5-3-2019 and nominated Mr.DaveWoakes, a Partner at Enfield's law firm, HoongKeang, as its Arbitrator. The Statement of Defense primarily alleged that:

- i. HG Properties has not breached the Development Agreement since the delay was caused by Dharma Cements. In any event, the cause of delay falls under the Force Majeure clause of the Development Agreement.
- ii. The Club is liable to specifically perform its obligations under the Development Agreement and permit HG Properties to complete the Project after receiving the balance consideration.
- iii. In the alternative, the Development Agreement ought to be rescinded and the Club is liable to pay damages of Rupees 10 crores to HG Properties; and
- iv. HG Properties is neither liable to refund the consideration received, nor is liable to pay any damages to the Club.

21. Subsequently both parties nominated Ms.CatherineLancy, a Professor and Arbitrator at BPL University, London on 10-3-2019 as the presiding arbitrator.All three arbitrators declared that they have no conflict of interest to proceed with the arbitration.CIETAC accordingly confirmed the nomination of all the three arbitrators.

22. On 15-3-2019, HG Properties submitted a request to CIETAC to initiateanarbitration against Dharma Cements along with its Statement of Claim, alleging that Dharma Cements'failure to supply the cement bags as per the Purchase Agreementwas the result for the delay in the Project. CIETAC accepted the request for arbitration from HG Properties.

23. However on 22-3-2019, the Club having come to know about the second arbitration against the Dharma Cements, submitted a request to CIETAC for consolidation of both the arbitrations, on the ground that both the arbitrations are intrinsically

connected. Both HG Properties and Dharma Cements consented for consolidation of the arbitrations. Dharma Cements further consented towards proceeding before the existing arbitrators appointed in the arbitration between the Club and HG Properties. Consequently CIETAC ordered consolidation of both the arbitrations. Dharma Cements subsequently filed its Statement of Defense on 1-4-2019 denying HG Properties' allegations and further stated that the delay was owing to HG Properties' demand to supply fresh batch of cement with different composition. In fact Dharma Cements alleged that it has suffered great financial loss because of the fiasco with HG Properties and further reserves its right to file a Counter Claim after ascertaining the actual damages.

24. On 5-4-2019, Mr. Sarangdeep Ranchod disclosed in writing that he was engaged as a Counsel to appear against Dharma Cements before the National Company Law Tribunal, Sri in two unrelated matters last year. All the parties through emails expressly waived their right to challenge Mr. Sarangdeep Ranchod to continue as an arbitrator. However CIEATC on 15-4-2019 removed Mr. Sarangdeep without stating any reasons and sent an email requesting the Club to nominate a substitute arbitrator. The Club replied through an email on 25-4-2019 that the removal of Mr. Sarangdeep was unnecessary and against party autonomy. CIETAC on 5-5-2019, appointed Mr. Derek Wei, Partner at DW Law Chambers, Singapore, as the substitute arbitrator. The Club filed an application on 20-5-2019 challenging the appointment of Mr. Derek Wei.

25. HG Properties filed an interim application on 20-6-2019 before the arbitral tribunal stating that an application filed by an Operational Creditor under Section 9 of Insolvency and Bankruptcy Code was admitted by the National Company Law Tribunal, Sri on 16-6-2019 and the NCLT has accordingly initiated insolvency process against Dharma Cements. Consequently HG Properties sought for a stay of the consolidated arbitration proceedings pending moratorium.

26. The Club on 30-6-2019, filed its reply against the said interim application stating that there is no bar to proceed with arbitration between the Club and HG Properties pending moratorium of Dharma Cements.
27. A conference call was held between the arbitrators and the Counsels of the Club and HG Properties on 20-8-2019. Dharma Cements remained absent after the initiation of insolvency process in spite of several email communications from the Tribunal. Accordingly Dharma Cements was set ex parte by the Tribunal due to its failure to appear in the arbitration proceedings. Due to conflicting calendars, the oral hearing is scheduled to be held on 9-11-2019 at Siri. The Tribunal issued a Procedural Order as follows:

PROCEDURAL ORDER

- i. Both the arbitrations i.e., (i) Palladium Club vs. HG Properties and (ii) HG Properties vs Dharma Cements shall be heard together.
- ii. The parties have chosen not to let in oral evidence.
- iii. The Tribunal shall hear all the issues raised by the parties together on the same day.
- iv. The Arbitral Tribunal shall hear the following issues:
 - a) Is the challenge against the appointment of Mr.Derek Wei as an arbitrator, sustainable?
 - b) Should the consolidated arbitrations be stayed during the moratorium period in the insolvency process of Dharma Cements?
 - c) Has HG Properties breached the Development Agreement and accordingly, is HG Properties liable to refund the consideration paid by the Club along with damages claimed for alleged breach of Development Agreement. Also is the delay attributable to Dharma Cements?
 - d) Is HG Properties entitled to the relief of specific performance against the Club, thus allowing HG Properties to complete the Project? In the alternative, should the Development Agreement be rescinded and should damages be awarded in favour of HG Properties?
- v. Laws of Indo are Parimateria to the laws of India
- vi. Laws of HoongKeang are Parimateria to the laws of Hong Kong

Addendum
Development Agreement (excerpts) (1-2-2018)

1. Time Schedule:

The Project shall be completed on or before 5-1-2019. Time is the essence of this Agreement.

2. Consideration

The total consideration payable by the Club to HG Properties shall be Rupees 120 crores, which shall be paid in four equated instalments as provided below:

1-2-2018	Rupees 30 crores
1-6-2018	Rupees 30 crores
1-10-2018	Rupees 30 crores
1-1-2018	Rupees 30 crores

6. Procuring materials

HG Properties shall be at liberty to procure raw materials for the Project from any third party that it deems fit. However the cement for the Project shall be procured only from Dharma Properties and Palladium Club hereby consents to the same and shall waive conflicts, if any.

14. Breach & Termination :

If either party at any time during the Term of the Agreement shall : (i) fail to provide consideration specified under the Agreement; (ii) fails to observe or perform any of the covenants, agreement or obligations under the Agreement, the non-defaulting party may give a written notice to the defaulting party to terminate this Agreement.

16. Limitation of Liability

Neither party shall be liable to the other for any special, consequential, incidental, punitive, or indirect damages arising from or relating to any breach of this Agreement, regardless of any notice of the possibility of such damages. The aggregate liability of the either party, its directors, officers, employees, agents, sub-contractors in respect of any claims, losses, costs or damages arising out of or related to this Agreement shall in any event be restricted to Rs.10,00,00,000/- (Rupees Ten crores).

17. Force Majeure

Neither party is responsible for any failure to perform its obligations under this contract, if it is prevented or delayed in performing those obligations by an event of force majeure. Force Majeure event shall include riot, war, invasion, civil war, rebellion, earthquakes, flood, fire or other physical natural disaster, strikes, industrial disputes, actions of its subcontractors or its suppliers and which affect an essential portion of the works and judicial proceedings.

20. Governing law and Dispute Resolution

- i. This Agreement shall be governed by the laws of Indo.
- ii. Any dispute arising from or in connection with this contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration.

The seat of arbitration and venue of oral hearing shall be at, Siri, Indo. The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English.