

# TEST CASE WITH LONG TEXT NAME THE INTERNATIONAL COURT OF ARBITRATION VS THE INT

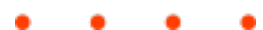
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<a href="#">41</a>		<p>The Claimant’s contention that the termination notice dated 22.11.2022 is mala fide and invalid is misconceived, false and contrary to the record. Clause 44.2 of the GCC</p> <div> Fact Sheet</div>	[ N7   N   <a href="#">1-85</a> ] Exhibit No.	E5_5._EXHIBIT_C-3- A_COPY_OF_THE_CONSORTIUM_AG REEMENT_DATED_10.05.2010.pdf

**BEFORE THE INTERNATIONAL CHAMBER OF COMMERCE  
INTERNATIONAL COURT OF  
ARBITRATION  
SUITE 2, 12/F, FAIRMONT HOUSE, 8, COTTON TREE DRIVE,  
CENTRAL HONG KONG  
ICC Case No. 27146/HTG**

**BETWEEN:**

**PRIMETALS TECHNOLOGIES INDIA PRIVATE LIMITED  
VERSUS  
STEEL AUTHORITY OF INDIA LIMITED AND OTHERS**

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**STATEMENT OF DEFENCE AND COUNTERCLAIM ON BEHALF OF  
RESPONDENT NO. 1**

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03 AUGUST 2023



**TRILEGAL**

Prius Platinum, 1st Floor, A & B Wing

D-3, District Centre, Saket

New Delhi- 110 017

03 AUGUST 2023

Advocates for Respondent No. 1

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ICC Case No. 27146/HTG**

**IN THE MATTER OF:**

**PRIMETALS TECHNOLOGIES INDIA PRIVATE LIMITED**

5<sup>th</sup> Floor, Tower C, DLF IT Park – 1,  
08 Major Arterial Road,  
New Town (Rajarhat),  
Kolkata – 700 256, India.

**...CLAIMANT**

**VERSUS**

**1. STEEL AUTHORITY OF INDIA LIMITED**

Durgapur Steel Plant, Durgapur 713203,  
West Bengal, India.

**...RESPONDENT NO. 1**

**2. POMINI LONG ROLLING MILLS SRL (POMINI LRM)**

Via San Domenico, 1  
20025 Legnano (MI), Italy

**...RESPONDENT NO. 2**

**3. SHRIRAM EPC LIMITED**

4<sup>th</sup> Floor, Futura Bascon SV IT Park,  
Venkatnarayan Road, T. Nagar,  
Chennai 600017, India.

**...RESPONDENT NO. 3**

## STATEMENT OF DEFENCE AND COUNTERCLAIM ON BEHALF OF RESPONDENT NO. 1

### I. INTRODUCTION

1. Respondent No. 1, Steel Authority of India Limited (“**SAIL**” or “**Answering Respondent**”) files the present Statement of Defence in response to the Statement of Claim filed by Primetals Technologies India Private Limited (“**PT India**” or “**Claimant**”) on 11.05.2023 (“**PT India’s Claim**”) and Statement of Counter Claims filed by Shriram EPC Ltd. (“**Shriram EPC**” / “**Respondent No. 3**”) on 07.06.2023 (“**SEPC’s Claim**”). The Answering Respondent also files its Counter Claim. The Statement of Defence and Counter Claim is being filed pursuant to the directions in Procedural Order No. 1 as well as Article 25 of the 2021 ICC Arbitration Rules. Despite being the claimant in this Counter Claim, SAIL is being referred to as the Answering Respondent.
2. This dispute arises under the contract dated 11.05.2010 (“**Contract**”) executed between Steel Authority of India Limited (“**SAIL**” / “**Respondent No. 1**”) and a consortium (“**Consortium**”), comprising Siemens VAI Technologies Pvt. Ltd., India (now known as Primetals Technologies India Pvt. Ltd., the Claimant), Siemens VAI Metals Technologies S.R.L, Italy (subsequently known as Primetals Technologies Srl, Italy and allegedly now known as Pomini Long Rolling Mills S.R.L, Italy) (“**PT Italy**” or “**Respondent No. 2**”) and Shriram EPC for the setting up of a medium structural mill (“**the Facilities**”) at Durgapur Steel Plant (**DSP**) on a turnkey basis. The Contract was executed for a consideration of EUR 44,041,619/- (Euro Forty-Four Million Forty-One Thousand Six Hundred and Nineteen only) and INR 278,05,86,000/- (Rupees Two Hundred and Seventy-Eight Crore Five Lakh Eighty-Six Thousand only) (“**Contract Price**”).



*Claimant's Statement of Claim dated 11.05.2023*

3. By the Statement of Claim, the Claimant has sought inter alia directions invalidating the termination of the Contract by Respondent No. 1, directions against Respondent No. 1 for payment of INR 51,72,26,676/- (Rupees Fifty-One Crore Seventy-Two Lakhs Twenty-Six Thousand Six Hundred and Seventy-Six) along with 18% interest towards 10% of its scope of work under the Contract, which admittedly remains unexecuted and comprises:
  - i. commissioning;
  - ii. establishment of performance guarantee parameters; and
  - iii. issuance of a final acceptance certificate (“**FAC**”).
4. The Claimant also prays for the release of all the bank guarantees furnished by PT India and PT Italy to SAIL as well as for the issuance of the commissioning certificate, performance guarantee certificate (“**PGC**”) and FAC under the Contract, without having achieved any of these milestones.

*Respondent 3's Statement of Counter Claims dated 07.06.2023*

5. By the Statement of Counter Claims, Respondent No. 3 has sought inter alia directions invalidating the termination of the Contract by Respondent No. 1, directions against Respondent No. 1 for payment of INR 98,80,00,000/- (INR Rupees Ninety-Eight Crore Eighty Lakh Only) along with 18% interest from 01.01.2017 till 07.06.2023 and INR 12,56,20,000/- (INR Rupees Twelve Crore Fifty-Six Lakh Twenty Thousand Only) along with 18% interest. Respondent No. 3 also prays for the release of all the bank guarantees furnished by Shriram EPC to SAIL.
6. The Answering Respondent denies each and every averment and contention made in PT India's Claim and SEPC's Claim as being incorrect, devoid of merits and contrary to facts and law. No averment, allegation or contention

made by the Claimant and/or Respondent No. 3 should be deemed to be admitted for non-traversal or otherwise.

## **II. BRIEF FACTS**

### **A. Execution of the Contract and Relevant Provisions**

#### *Tender Process*

7. SAIL is a company incorporated under the Companies Act, 1956 and a government of India enterprise having its registered office at Ispat Bhavan, Lodi Road, New Delhi – 110 003. As aforesaid, SAIL is one of the largest producers of steel in India and produces iron ore and steel at five integrated steel plants, including DSP which specializes in producing liquid steel and TMT bars used in numerous infrastructure projects as well as wheels and axels used by the Indian Railways.
8. In 2007, SAIL desired to set up the Facilities at the DSP as part of its expansion plan, to meet the demand for various grades of steel for numerous construction and infrastructure development programs in India and abroad. The Facilities were to have a rolling capacity of 1.0 MTPA, were to continuously roll cast blooms/billets into wide range of products such as angles, channels, beams, etc. with minimum tolerances in specifications as per market demand. Consequently, SAIL issued tender notice dated 23.10.2007 viz. DSP/PROJ-PUR/EXPN/MSM-01/014 for installation of the Facilities at the DSP on a turnkey basis.
9. A Consortium comprising of PT Italy, PT India and Shriram EPC was one of the three applicants for the tender. The Consortium led by PT Italy emerged as the successful bidder for execution of the Facilities at the DSP based on the technical and financial criteria set out in the tender process and was issued the Letter of Acceptance dated 01.04.2010.

10. Upon completion of the bid process, the Answering Respondent entered into the Contract with the Consortium for setting up the Facilities at DSP on a turnkey basis for the aggregate of EUR 44,041,619/- (Euro Forty-Four Million Forty-One Thousand Six Hundred and Nineteen only) and INR 278,05,86,000/- (Rupees Two Hundred and Seventy-Eight Crore Five Lakh Eighty-Six Thousand only).

*The Contract*

11. The Contract comprises the Contract Agreement and its appendices, the Special Conditions of Contract and the annexures thereto ("**SCC**"), the General Conditions of Contract and the annexures thereto ("**GCC**"), the Contract Technical Specifications, the General Technical Specifications, the Safety Code for Contractors and the Integrity Pact.<sup>1</sup>
12. The Consortium's scope of work includes inter alia design and engineering, civil engineering work, erection work and testing as well as commissioning, demonstration, and establishment of performance guarantee parameters in accordance with the Contract Technical Specifications.<sup>2</sup> Under the Contract, while each member of the Consortium is responsible for its own scope of work, Respondent No. 2 is responsible for the overall performance of the Contract as the leader of the Consortium.<sup>3</sup>
13. Pertinently, the Consortium's scope of work under the Contract included:
- i. basic and detailed design and engineering;
  - ii. manufacture;
  - iii. supply of equipment;

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<sup>1</sup> Contract, 11 May 2010, **R-1**.

<sup>2</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Article 4 r/w GCC, Clause 7.

<sup>3</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Recital F r/w SCC, Clause 17.

- iv. supervision of erection;
  - v. commissioning; and
  - vi. performance guarantee tests.<sup>4</sup>
14. Under Article 5 of the Contract Agreement, the Facilities were originally required to be completed within 28 months from 11 May 2010 i.e., by 10 September 2012. Further, Appendix-2 to the Contract Agreement sets out the schedule for the completion of various milestone activities.<sup>5</sup>
15. By Clause 29 of the GCC, the Consortium guaranteed completion of the Facilities in accordance with Article 5 of the Contract Agreement or within such time that may be extended under Clause 42 of the GCC.<sup>6</sup> Article 9 of the Contract Agreement and Clause 29 of the GCC further specify that if the Consortium fails to attain completion of the Facilities within the time for completion or any extended time under Clause 42, SAIL would be entitled to recover liquidated damages for an amount of up to 5% of the Contract Price plus escalation, excluding relevant taxes and duties. Pertinently each of the Consortium members, including the Claimant, are jointly and severally liable for such liquidated damages.<sup>7</sup>
16. Significantly, Clause 29.2.7 of the GCC provides that Respondent No. 1 is entitled to recover liquidated damages from the Consortium for any delays in the execution of the Contract against any amounts payable towards:
- i. the commissioning certificate;<sup>8</sup>
  - ii. the performance guarantee test;<sup>9</sup>

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<sup>4</sup> Contract, 11 May 2010, **R-1**, Contract Technical Specifications, Part III, Annexure-1.

<sup>5</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Article 5 r/w Appendix-2.

<sup>6</sup> Contract, 11 May 2010, **R-1**, GCC, Clause 29 r/w Contract Agreement, Articles 5 and 9 and GCC, Clause 42.

<sup>7</sup> *Ibid.*

<sup>8</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Appendix-3, Clause 2.1.5.

<sup>9</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Appendix-3, Clause 2.1.6.

- iii. the Final Acceptance Certificate;<sup>10</sup> and
- iv. the Performance Bank Guarantee submitted under Clause 13.2 of the GCC.<sup>11</sup>

Relevant clauses

17. Relevant clauses of the Contract are *inter alia* as follows:

- i. Recital (f) of the Contract read with Clause 17 of the SCC, *inter alia*, provides that the consortium leader, PT Italy, is responsible for the overall execution of the Contract.<sup>12</sup>
- ii. Article 2.2 r/w Appendix-3 of the Contract provides for the terms of payment of the Contract Price. The terms of payment *inter alia* provide for the disbursement of 2.5% of the Contract Price at the time of issuance of commissioning certificate, 5% of the Contract Price at the time of issuance of performance guarantee certificate and remaining 2.5% of the Contract Price at the time of issuance of final acceptance certificate.<sup>13</sup>
- iii. Clause 2.1.8 of the Terms of Payment in Appendix-3 provides for all progress payments to be regarded as payments by way of advance against the final payment and does not preclude defective / imperfect / incomplete facilities to be removed, and will not be considered as an admission by SAIL of the due performance of the contract and shall not preclude, determine or affect any rights under the Contract.
- iv. As per Article 3 of the Contract, the effective date of the Contract is 11.05.2010.<sup>14</sup> Further, as per Article 5 of the Contract, the Facilities

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<sup>10</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Appendix-3, Clause 2.1.7.

<sup>11</sup> Contract, 11 May 2010, **R-1**, GCC, Clause 13.2.

<sup>12</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Recital F r/w SCC, Clause 17.

<sup>13</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Article 2.2 r/w Appendix-3.

<sup>14</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Article 3.

were originally required to be completed within 28 months from the effective date of the Contract i.e., by 10 September 2012.<sup>15</sup>

- v. Article 9 of the Contract stipulates for levy of liquidated damages due to delay in completion of the Facilities and non-fulfillment of performance guarantee parameters of facilities. The overall limit of liquidated damages with respect to Article 9 has been restricted to 10% of the Contract Price plus escalation, if any.<sup>16</sup>
- vi. Article 10 of the Contract mandates for arbitration as a mechanism for dispute resolution. Article 10 is extracted below for convenient reference:

**“Article 10. Arbitration**

**10.1 Arbitration (Reference GCC Clause 6)**

*Any disputes, differences, whatsoever, arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this Contract shall be settled between the Employer and the Contractor amicably. If however, the Employer and the Contractor are not able to resolve their disputes/differences amicably as aforesaid the said disputes/differences shall be settled by Conciliation failing which, through Arbitration.*

***Conciliation shall be resorted to prior to invoking Arbitration.***

*The arbitration shall be governed in accordance with Arbitration and Conciliation Act 1996 (hereinafter referred to as the “Act”) of India. The language of Arbitration shall be English. Arbitration with foreign*

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<sup>15</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Article 5.

<sup>16</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Article 9.

*contractor or in Consortium contracts (including foreign contractor), where the contract value is more than Indian Rs. 20 crores shall be governed by the Rules of Arbitration of International Chamber of Commerce (ICC), Paris. The venue of the arbitral proceedings shall be New Delhi. During the pendency of the Conciliation or Arbitration proceedings both the parties (i.e. the Contractor and the Employer) shall **continue to perform their contractual obligations**.*

*The court of Durgapur, West Bengal, India shall have exclusive jurisdiction over all matters of dispute. Jurisdiction of Court at Durgapur shall be applicable only in matters of dispute not covered under the purview of Conciliation & Arbitration proceedings.”*

18. Relevant clauses of the GCC and SCC are as follows:
- i. Clause 3.9 of the GCC stipulates that “...*The composition or the constitution of the consortium shall not be altered without prior consent of the Employer in writing...*”<sup>17</sup>
  - ii. Clause 3.10 of the GCC states that “...*Any waiver of a party’s rights, powers or remedies under the Contract must be in writing, must be dated and signed by an authorised representative of the party granting such waiver, and must specify the right and the extent to which it is being waived.*”<sup>18</sup>

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<sup>17</sup> Contract, 11 May 2010, **R-1**, GCC, Clause 3.9.

<sup>18</sup> Contract, 11 May 2010, **R-1**, GCC, Clause 3.10.

- iii. As per Clause 11.5 of the GCC, if the delay in completion of the Contract is on account of SAIL, no price variation is allowed in the Contract for any upward variation of price.<sup>19</sup>
- iv. Clause 13.2.2 of the GCC provides for the Bank Guarantee to be automatically null and void after 12 months from the issuance of the commissioning certificate.<sup>20</sup>
- v. Clause 24.6 of the GCC requires the Consortium to remedy any and all outstanding defects immediately after the issuance of the PAC and ensure that the Facilities are fully in accordance with the Contract, failing which SAIL is entitled to undertake such completion of the Facilities at the risk and cost of the Consortium. Clause 24.6 of the GCC is extracted below for convenient reference:

*"24 Preliminary Acceptance*

*...*

*24.6 As soon as possible after issue of Preliminary Acceptance Certificate, the Contractor shall complete all outstanding defects and/or deficiencies so that the Facilities are fully in accordance with the requirements of the Contract, failing which the Employer will undertake such completion and deduct the costs thereof from any money owing to the Contractor."*

- vi. Clause 42 of the SCC provides SAIL with a right to take possession or use any completed or partially completed work and such possession

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<sup>19</sup> Contract, 11 May 2010, **R-1**, GCC, Clause 11.5.

<sup>20</sup> Contract, 11 May 2010, **R-1**, GCC, Clause 13.2.2.



or use does not amount to deemed acceptance of any work done under the Contract.

- vii. As per Clause 41 of the SCC read with Clause 25 of the GCC, the Facilities can only be held to be commissioned when they have achieved 66% of their total production capacity viz., 22,000 tons within 10 days, 2 (two) months of the successful hot rolling of the first bloom. Clause 41 of the SCC is extracted below for convenient reading:

***“41. GCC Sub-Clause 25.3.0 shall be read as***

*Successful completion of Commissioning of the Mill will be when the mill have achieved the commercially accepted production level of output not less than sixty six percent (66%) of the Guaranteed Production Capacity defined as under.*

*When the Mill has achieved the commercially accepted production of 22,000 Tonne in 10 days (3 shifts/day), comprising beams & channels, within 2 (two) months since successful hot rolling of first bloom.”*

Further, Clause 25.3 of the General Conditions of Contract (“GCC”) states as follows:

*“25.3 The Commissioning Certificate shall be issued by the Employer subject to the following:*

- a) *Commissioning test to establish a level of output not less than sixty six percent (66%) of the Guaranteed Production Capacity or as specified in Contract Technical Specification within the contractual*

*completion period indicated in Sub-Clause 1.1 of the Appendix-2, has been successfully completed and the quality of materials produced and other parameters are as per Technical Specifications.”*

*b) The Contractor has submitted all final drawings & documents for the respective Facilities in accordance with the provisions of the Contract as given in Appendix-2.*

*c) The Contractor to the satisfaction of the Employer, has met all the objections/observations, if any, contained in the Preliminary Acceptance Certificate.*

*d) Upon fulfillment of above condition, the Contractor will apply to the Employer to issue the Commissioning Certificate. Within 14 days of receipt of Contractor’s application, Employer will issue the Commissioning Certificate.”*

- viii. Clause 27 of the GCC provides for conditions related to Performance Guarantee Test, the establishment of the performance guarantee parameters and the issuance of the Performance Guarantee Certificate is contingent on the successful commissioning of the Facilities. As per Clause 27.2, *“The Contractor shall notify the Employer upon completion of the necessary changes, modifications and/or additions, and shall request the Employer to allow the Contractor to repeat the performance guarantee test so as to establish the performance guarantee parameters.”*

- ix. Clause 52 of the SCC entitles SAIL to terminate the Contract by giving notice of termination for reasons under Clause 44.2 of the GCC which entitles SAIL to terminate the contract in the following situations:
  - a. Contractor assigns or transfers the Contract or any right or interest therein without SAIL's express prior written consent;
  - b. Contractor becomes insolvent;
  - c. Contractor has abandoned or repudiated the contract;
  - d. Contractor fails to commence work on the Facilities promptly or has suspended the progress of contracted performance for more than 28 days after receiving a written instruction from SAIL to proceed;
  - e. Contractor persistently fails to execute the Contract in accordance with the Contract or persistently neglects to carry out its obligations under the Contract without just cause;
  - f. Contractor refuses or is unable to provide sufficient materials, services or labor (adequate resources) to execute and complete the Facilities as per the program in the Contract at rates of progress that give reasonable assurance to SAIL that the Contractor can attain Completion of the Facilities by the Time for Completion.
- x. Clause 45 of the GCC stipulates that the contractor shall not assign the contract to any third party without the express prior written consent from SAIL except for instances in which the Contractor is allowed in the Contract. Further, by virtue of Clause 53 of the SCC, any

assignments to a company within the Siemens group shall be allowed without any prior approval. However, as per Clause 3.9 of GCC, composition or constitution of the consortium shall not be altered without prior consent of SAIL in writing.

**B. Consortium's failure to perform the Contract**

19. The Facilities, which were to be set up primarily to meet the demand for various grades of steel for numerous construction and infrastructure development programs in India and abroad, were originally required to be completed within 28 months from 11 May 2010 i.e., by 10 September 2012. However, from the commencement of the Contract, the Consortium and its members acted negligently and failed to complete the Facilities within the contractually stipulated timelines, despite repeated requests by SAIL.
20. As is evident from the record, there were substantial delays in the submission of critical designs and drawings by the Consortium. There were also considerable delays in the execution of engineering activities and civil works. Notably, the Consortium partner responsible for the erection and supply of erection accessories, Shriram EPC, was also failing to meet targets. The Consortium failed to coordinate amongst its members and consistently failed to mobilize adequate resources, including equipment and manpower.<sup>21</sup>
21. Moreover, the designs and drawings which were submitted were not in accordance with the Contract Technical Specifications. Consequently, SAIL was constrained to dismantle and redo some of the civil construction executed by the Consortium, at its own cost.

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<sup>21</sup> Letter from SAIL to the Consortium, 06 May 2013, **R-2**; Letter from SAIL to the Consortium, 31 January 2014, **R-3**.

22. The Consortium repeatedly requested SAIL for extensions of time, promising the Answering Respondent that it would complete the Facilities. The Consortium's letters were entirely bereft of reasons.<sup>22</sup> Nonetheless, at the time, without prejudice to its rights and in the interest of expeditious completion of the Facilities, SAIL relied on the Consortium's promises and granted extensions of time while reserving its right to levy liquidated damages for the delay.<sup>23</sup> SAIL also admittedly paid the Claimant towards 90% of its scope of work under the Contract despite the delays and the deficiencies involved, many of which SAIL was constrained to remedy at its own cost.
23. However, the Consortium persisted in its failure to deploy sufficient resources, equipment, and manpower even within the extended time-period, continuing to act negligently and in contravention of the Contract, despite being informed repeatedly that the Answering Respondent is incurring heavy losses for every day's delay.<sup>24</sup> Moreover, the hot trials were plagued with constant breakdown of equipment. Consequently, SAIL was constrained to reduce the scope of Respondent 3's work under Contract on account of significant delays and deficiencies in the work executed as well as delays by all Consortium members, including Respondent No. 3.<sup>25</sup>
24. Pertinently, the erection, testing and trial runs of the individual units of the Facilities were completed only on 15 March 2016. However, as is noted in the preliminary acceptance certificate dated 17 March 2016 (**PAC**), numerous defects and deficiencies remained in the Consortium's work even at this time.

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<sup>22</sup> Letter from Consortium to SAIL, 09 April 2019, **R-4**; Letter from Consortium to SAIL, 10 December 2021, **R-5**.

<sup>23</sup> Letters from SAIL to Consortium, **C-39**.

<sup>24</sup> Letter from SAIL to Consortium, 11 April 2015, **R-6**.

<sup>25</sup> Notice from SAIL to the Consortium, 17 September 2014, **R-7**; Notice from SAIL to the Consortium, 11 November 2014, **R-8**.

25. Consequently, by the PAC, SAIL required the Consortium to liquidate all outstanding defects and deficiencies at the earliest so that the commissioning work could begin.<sup>26</sup> Significantly, there is no reference to the list of defects and deficiencies annexed to the PAC in the Claimant's RFA or Statement of Claim and the said annexure has not been placed on record.
26. The Consortium failed to remedy the defects and deficiencies in the Facilities and persisted in delaying the commissioning on one pretext or another. The first section of the Facilities identified for commissioning was found to be incapable of rolling the requisite type of steel viz. MC 300. It took the Consortium multiple trials over a period of 4 months and over 15,000 tons of trial rolling of blooms to conclude that the Facilities are not capable of rolling the requisite MC-300 steel, which is part of the six sections covered in the performance guarantee tests under the Contract. In fact, the same is yet to be rectified. The Consortium also continued to make several major design changes.<sup>27</sup>
27. Contrary to the Claimants' averments pertaining to SAIL's preference to undertake commercial production over commissioning of the Facilities, SAIL only had to roll other sections of the Facilities to keep the Facilities in a working condition, and to stabilize the other sections as it would have been difficult to bring back the Facilities into the rolling condition after prolonged stoppage.
28. However, as the Consortium consistently requested for commissioning of the Facilities despite its failure to stabilize MC300 along with various other

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<sup>26</sup> PAC issued by SAIL to Consortium, 17 March 2016, **R-9**.

<sup>27</sup> Letter from SAIL to Consortium, 19 March 2017, **R-1/4**, Email from SAIL to Consortium, 2 April 2018, **R-1/5**, Email from SAIL to Consortium, 6 April 2018, **R-1/6**, Email from SAIL to Consortium, 9 April 2018, **R-1/7**, Email from SAIL to Consortium, 12 April 2018, **R-1/8**, Letter from SAIL to Consortium, 02 January 2019, **R-1/9**, Letter from SAIL to Consortium, 22 February 2019, **R-1/10**.

defaults, SAIL agreed to proceed with commissioning despite the ongoing issues, defects, and design deficiencies in the Facilities.<sup>28</sup>

29. The commissioning tests were finally carried out between 15 June 2019 and 26 June 2019. However, the Consortium failed to achieve the requisite production of 22,000 tons in 10 days, producing only 11,970 tons, which is far below the contractual threshold.<sup>29</sup>
30. Even after failure of the Consortium to successfully comply with the contractual requirements for commissioning of the Facilities, SAIL continued to request the Consortium to rectify all the defects and conduct a successful commissioning.<sup>30</sup>
31. Pertinently, the Consortium consistently continued to request SAIL for extension of time to complete the Facilities which were accepted by SAIL without prejudice to its rights under the Contract. The last request was made by the Claimant on 10.12.2021 for an extension up to 31.12.2021 for completion of the Facilities.<sup>31</sup>
32. The Answering Respondent respectfully states that the Consortium was unable to achieve the requisite production and satisfy the contractual parameters for commissioning or even stabilize the MC 300 section. Consequently, the commissioning, which was originally required to be completed on or before 10 September 2012, remained pending for over a decade after the expiry of the contractually stipulated time-period.

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<sup>28</sup> Minutes of meeting between SAIL and PT Italy dated 17 April 2019, **R-1/11**.

<sup>29</sup> Email from SAIL to Consortium, 03 August 2019, **R-1/13**, Email from SAIL to Consortium, 18 July 2019, **R-1/12**, Letter from SAIL to Consortium, 27 August 2019, **R-1/14**, Letter from SAIL to Consortium, 23 September 2019, **R-1/15**, Letter from SAIL to Consortium, 21 January 2020, **R-10**, Letter from SAIL to Consortium, 14 February 2020, **R-1/19**, Email from SAIL to Consortium, 07 March 2020, **R-1/20**.

<sup>30</sup> Letter from SAIL to Consortium, 23 September 2019, **R-1/15**, Email from SAIL to Consortium, 26 September 2019, **R-1/16**, Email from SAIL to Consortium, 5 October 2019, **R-1/17**, Letter from SAIL to Consortium, 21 January 2020, **R-10**, Email from SAIL to Consortium, 2 May 2020, **R-1/18**.

<sup>31</sup> Letters from Consortium to SAIL, **R-1/21**.

### **C. Change in Ownership and Assignment**

33. It is an admitted fact that PT Italy was acquired by M/s Callista Private Equity GmbH, Germany on and was renamed as Pomini Long Rolling Mills Srl (Pomini LRM) i.e., Respondent No. 2 in this Arbitration. It has further been admitted by the Claimant that Respondent No. 2 is not a group company of the Claimant.<sup>32</sup> Subsequently, the rights and liabilities of PT Italy were transferred to PT India.
34. Contrary to the provisions of the Contract, no approval was sought from SAIL prior to such restructuring. Pertinently, SAIL was only informed of the development much later after assignment of the rights and liabilities of PT Italy to PT India.

### **D. Termination of the Contract**

35. Despite the Consortium's attitude towards the completion of the Contract, and its failure to rectify of the pending defects at the Facilities, in the interest of completing the Facilities, by its letter dated 28.09.2022, SAIL requested the Consortium to enter into a supplementary agreement defining all of its outstanding obligations and setting out timelines for their resolution. SAIL further requested the Claimant to withdraw or defer the present arbitration proceedings, in order to effectively negotiate the supplementary agreement. SAIL also informed the Consortium that the Contract shall be deemed to be terminated in the event of its unwillingness to resolve the issues and enter into a supplementary agreement with SAIL.<sup>33</sup>

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<sup>32</sup> Request for Arbitration, 20 July 2022, ¶ 7.

<sup>33</sup> Letter from SAIL to Consortium, 28 September 2022, C-16.



36. Despite the offer of an olive branch by SAIL, the settlement talks bore no results. Indeed, PT India and PT Italy consistently attempted to exclude PT Italy from any contractual obligations under the Contract and failed to discuss the terms of the proposed supplementary agreement. Therefore, SAIL, vide letter dated 26.11.2022 terminated the Contract with effect from 21.10.2022.<sup>34</sup>

## **E. Dispute Resolution**

37. In the meantime, PT Italy and PT India invoked conciliation proceedings against the Answering Respondent purportedly on account of alleged project prolongation, non-issuance of commissioning certificate and related contractual milestone payments.<sup>35</sup>
38. By its letter dated 02.11.2021, SAIL objected to the maintainability of the conciliation proceedings as they had been invoked without the third member of the Consortium i.e., Shriram EPC, in contravention of the provisions of the Contract. However, without prejudice to the above, SAIL also accepted the request for Conciliation and raised counter claims including towards non-liquidation of PAC defects, unsuccessful commissioning, refusal to rectify the deficiencies and abandonment of site.<sup>36</sup> Subsequently, by letter dated 18.07.2022, PT India terminated the conciliation proceedings.
39. Thereafter, by Request for Arbitration dated 20.07.2022, PT India initiated the present arbitration proceedings seeking inter-alia issuance of the commissioning certificate along with 10% of the Contract Price due on issue of commissioning certificate, establishment of performance guarantee test

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<sup>34</sup> Letter from SAIL to Consortium, 26 November 2022, **C-19**.

<sup>35</sup> Letter from PT Italy to SAIL, 18 October 2021, **C-11**.

<sup>36</sup> Letter from SAIL to PT Italy & PT India, 02 November 2021, **C-12**.

and issuance of the Final Acceptance Certificate. In response, the Answering Respondent filed its Answer to the Request for Arbitration dated 07.10.2022.

40. This Hon'ble Arbitral Tribunal comprising of Ms. Kate Parlett, Justice (Retd.) Sudhansu Jyoti Mukhopadhaya and Justice (Retd.) Lavu Nageswara Rao was appointed by the International Chamber of Commerce on 20.01.2023.
41. Pursuant to the directions of this Hon'ble Arbitral Tribunal, a statement of claim was filed by the Claimant on 11.05.2023 ("**PT India's Claim**") and Shriram EPC on 07.06.2023 ("**Shriram EPC's Claim**"), the responses to which are set out hereinafter.

### **III. RESPONSES TO THE CLAIMANT'S CLAIMS:**

#### **A. The Claimant's prayer for a declaration that the present arbitration proceedings are maintainable [*Claim 2*]**

42. The Claimant's contention that the present arbitration proceedings have been invoked in accordance with the provisions of the Contract as well as settled law is denied being false, misconceived, and contrary to the record. SAIL submits that the Claimant's invocation of the present arbitration proceedings is not maintainable as the Claimant is not a party to the arbitration agreement in its individual capacity. The arbitration agreement in the Contract is between the Consortium and Respondent No. 1 and cannot be invoked by a member of the consortium independently. Indeed, the Claimant is not even the lead member of the Consortium, with Respondent No. 2 having the overall responsibility for the performance of the Contract. The Claimant's assertions that the rights and liabilities of Respondent No. 2 have been assigned to it are denied being misconceived and contrary to the record. In any event, any such takeover and/or assignment without SAIL's prior

approval is contrary to the provisions of the Contract. If an arbitration agreement is between a consortium and another party, it cannot be invoked by a member of the consortium independently.

43. Furthermore, in the present case, the Contract has been executed between SAIL and a consortium comprising PT Italy, PT India and Shriram EPC for completion of the Facilities at the DSP. PT Italy is the leader of the Consortium. While all the members of the Consortium are jointly responsible for the execution of the Contract, the consortium leader is responsible for execution of the Contract overall and has the authority to bind the Consortium. The relevant portion of the Contract Agreement is extracted below for convenient reference:

*“f) The consortium leader shall be overall responsible for execution of the Contract. The leader and other members of the Consortium shall be jointly responsible for the execution of the Contract, but will be liable for damages in proportion to respective scope of facilities.”*

44. Therefore, arbitration proceedings under the Contract can only be invoked by the Consortium through its leader viz., PT Italy and not by any of the members in their individual capacity. Indeed, at the time of the execution of the Contract, all communications pertaining to the execution of the Contract including ones related to other consortium members were addressed to PT Italy i.e., the consortium leader.<sup>37</sup>

45. It is submitted that the Claimant’s reliance on Clause 5.5 of the Consortium Agreement dated 10.05.2010 is misplaced and without any merit. It is submitted that as SAIL is not party to the Consortium Agreement, any

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<sup>37</sup> Supra at 21.

stipulation under the Consortium Agreement or any other document executed between the Consortium members is not binding on the Answering Respondent.

46. In any event and without prejudice to the above, clause 6.6 of the Memorandum of Understanding dated 14.08.2008 between PT Italy, PT India and Shriram EPC provides that if any of the consortium members individually pursue a claim, a Power of Attorney is to be executed by the other members of the Consortium in favour of such member.<sup>38</sup>
47. In the present case, no such Power of Attorney as provided in the Memorandum of Understanding was executed by any of the Consortium members in favour of the Claimant. Therefore, the Claimant does not have any authorization to raise the present dispute against SAIL.
48. Therefore, the Claimant's invocation of the present arbitration proceedings is not maintainable as the Claimant is not a party to the arbitration agreement in its individual capacity.

**B. The Claimant's prayer for a declaration that the purported novation of the Contract in its favour is valid and in accordance with law [*Claim 3*]**

49. It is submitted that the purported transfer/assignment of PT Italy's rights and liabilities in favor of the Claimant vide an alleged agreement dated 21.10.2021 is invalid and non-est, being contrary to law and the provisions of the Contract. Clause 45 of the GCC read with Clause 53 of the SCC provides that any right, benefit, obligation, or interest arising out of the Contract may be assigned only after prior written consent from SAIL, unless such assignment is to be made to a company within the Siemens group.

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<sup>38</sup> Memorandum of Understanding, 14 February 2008, C-23.

Clause 45 of the GCC and Clause 53 of the SCC are extracted below for convenient reference (with emphasis supplied):

*“GCC clause 45:*

*45.1 The Contractor shall not, without the express prior written consent of the employer assign to any third party the Contract or any part thereof, or any right, benefit, obligation or interest therein or thereunder, except that the Contractor shall be entitled to assign under the Contract.’*

*SCC Clause 53:*

*GCC Sub-Clause 45.1: Following shall be added as Assignments to a company within the Siemens group should be allowed without any approval.”*

50. It is an admitted fact that PT Italy was acquired by M/s Callista Private Equity GmbH, Germany on 29.10.2021 and was renamed as Pomini Long Rolling Mills Srl (Pomini LRM) i.e., Respondent No. 2 in this Arbitration. Neither company has been part of the Siemens group since 01 October 2019. It has further been admitted by the Claimant that Respondent No. 2 is not a group company of the Claimant.<sup>39</sup> The Claimant admits that PT Italy ceased to exist even as a Primetals group company with effect from 01.11.2021, on which date PT India allegedly took over all of its contractual rights and obligations under the Contract, including the performance its scope of work.<sup>40</sup>

51. Therefore, prior written consent was required from SAIL before any rights and obligations could be assigned by Respondent No. 2 to the Claimant. No

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<sup>39</sup> Supra at 32.

<sup>40</sup> Email from PT India to SAIL, 08 December 2021, C-14.

approval was sought from SAIL prior to such purported assignment, which SAIL was only informed of much later vide email dated 08.12.2021.<sup>41</sup>

52. It is also worth noting that the Claimant is actively seeking Respondent No. 2's direct support for the remaining contractual scope and completion of the Facilities as further rolling and processing at the Facilities is difficult without PT Italy, the mill supplier and technology provider.<sup>42</sup> It is evident that Respondent No. 2 has been actively involved in work at the Facilities even while attempting to avoid direct contractual obligations under the Contract.<sup>43</sup> Indeed, the Claimant and Respondent No. 2 also entered into a purported service agreement effective from 01.01.2022 and a purported Purchase Order issued on 24.02.2022, which were shared with SAIL only on 12.05.2022.
53. SAIL therefore submits that the purported assignment of PT Italy's right to PT India is invalid and contrary to the provisions of the Contract.

**C. The Claimant's prayer for a declaration to the effect that it is not liable for the delay in the commissioning of the Facilities [*Claim 5*]**

54. It is submitted that the delay in commissioning of the Facilities is solely on account of the Consortium and any averments made to the contrary are denied being false, misconceived, and contrary to the record.
55. The Facilities, which were to be set up primarily to meet the demand for various grades of steel for numerous construction and infrastructure development programs in India and abroad, were originally required to be

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<sup>41</sup> Statement of Claim, 11 May 2023, ¶ 48; Email from PT India to SAIL, 08 December 2021, **C-14**.

<sup>42</sup> Email from PT India to SAIL, 08 December 2021, **C-14**, Letter from PT India to SAIL, 17 October 2022, **C-18**.

<sup>43</sup> Supra at 34.

completed within 28 months from 11 May 2010 i.e., by 10 September 2012. However, from the commencement of the Contract, the Consortium and its members acted negligently and failed to complete the Facilities within the contractually stipulated timelines, despite repeated requests by SAIL.

56. As is evident from the record, there were substantial delays in the submission of critical designs and drawings by the Consortium. There were also considerable delays in the execution of the engineering activities and civil works. Notably, the consortium partner responsible for the erection and supply of erection accessories, Shriram EPC and was also failing to meet targets. The Consortium failed to coordinate amongst its members and consistently failed to mobilize adequate resources, including equipment and manpower.<sup>44</sup> SAIL reserves its right and/or craves leave of this Hon'ble Arbitral Tribunal to rely upon, during the course of the present arbitration proceedings, all relevant contemporaneous correspondence and records regarding aforesaid defective designs and drawings provided by the Consortium, and the consequential dismantling and reconstruction of civil works by SAIL.
57. Moreover, the designs and drawings which were submitted were not in accordance with the Contract Technical Specifications. Consequently, SAIL was constrained to dismantle and redo some of the civil construction executed by the Consortium, at its own cost.
58. The Consortium repeatedly requested SAIL for extensions of time, promising the Answering Respondent that it would complete the Facilities. The Consortium's letters were entirely bereft of reasons.<sup>45</sup> Nonetheless, at the time, without prejudice to its rights and in the interest of expeditious

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<sup>44</sup> Supra at 21.

<sup>45</sup> Supra at 22.

completion of the Facilities, SAIL relied on the Consortium's promises and granted extensions of time while reserving its right to levy liquidated damages for the delay.<sup>46</sup> SAIL also admittedly paid the Claimant towards 90% of its scope of work under the Contract despite the delays and the deficiencies involved, many of which SAIL was constrained to remedy at its own cost.

59. However, the Consortium persisted in its failure to deploy sufficient resources, equipment, and manpower even within the extended time-period, continuing to act negligently and in contravention of the Contract, despite being informed repeatedly that the Answering Respondent is incurring heavy losses for every day's delay.<sup>47</sup> Moreover, the hot trials were plagued with constant breakdown of equipment. Consequently, SAIL was constrained to reduce the scope of Respondent 3's work under Contract on account of significant delays and deficiencies in the work executed as well as delays by all Consortium members, including Respondent No. 3.<sup>48</sup>
60. Pertinently, the erection, testing and trial runs of the individual units of the Facilities were completed only on 15 March 2016. However, as is noted in the preliminary acceptance certificate dated 17 March 2016 (**PAC**), numerous defects and deficiencies remained in the Consortium's work even at this time. The Claimant's aforesaid contention is denied being false, misconceived, and contrary to the record and the provisions of the Contract.
61. Contrary to the Claimant's contentions, Clause 24.6 of the GCC requires the Consortium to remedy any and all outstanding defects immediately after the issuance of the PAC and ensure that the Facilities are fully in accordance with the Contract, failing which SAIL is entitled to undertake such

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<sup>46</sup> Supra at 23.

<sup>47</sup> Supra at 24.

<sup>48</sup> Supra at 25.



completion of the Facilities at the risk and cost of the Consortium. Clause 24.6 of the GCC is extracted below for convenient reference:

**“24 Preliminary Acceptance**

...

24.6 *As soon as possible after issue of Preliminary Acceptance Certificate, the Contractor shall complete all outstanding defects and/or deficiencies so that the Facilities are fully in accordance with the requirements of the Contract, failing which the Employer will undertake such completion and deduct the costs thereof from any money owing to the Contractor.”*

62. Consequently, by the PAC, SAIL required the Consortium to liquidate all outstanding defects and deficiencies at the earliest so that the commissioning work could begin.<sup>49</sup> Significantly, there is no reference to the list of defects and deficiencies annexed to the PAC in the Claimant’s Statement of Claim and the said annexure has not been placed on record.
63. The Consortium failed to remedy the defects and deficiencies in the Facilities and persisted in delaying the commissioning on one pretext or another. The first section of the Facilities identified for commissioning was found to be incapable of rolling the requisite type of steel viz. MC 300. It took the Consortium multiple trials over a period of 4 months and over 15,000 tons of trial rolling of blooms to conclude that the Facilities are not capable of rolling the requisite MC-300 steel, which is part of the six sections covered in the performance guarantee tests under the Contract. In fact, the same is yet to be rectified. Moreover, the hot trials were plagued with

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<sup>49</sup> Supra at 26.

constant breakdown of equipment. The Consortium also continued to make several major design changes.<sup>50</sup>

64. Contrary to the Claimants' averments pertaining to SAIL's preference to commercial production over commissioning of the Facilities, SAIL only had to roll other sections of the Facilities to keep the Facilities in a working condition and to stabilize other sections as it would have been difficult to bring back the Facilities into the rolling condition after prolonged stoppage.
65. All allegations of Claimant, viz. that SAIL used the Plant during hot trials to produce saleable products for its own monetary benefit, gave priority to commercial production, did not permit / allow the Consortium to commission the Facilities, introduced arbitrary pre-conditions alien to the contractual terms, unilaterally decided to run the plant at a very low pace because of low demand as per its commercial needs/market requirements, continued to commercially produce non-PGT products which could not be considered are denied.
66. The Answering Respondent denies the contents of the assessment reports at C-36 and C-37 regarding Straightener and regarding Proportional Valve in PDA-III, Hydraulic System in Cooling Bed for being incorrect and irrelevant being prior to the commissioning test.
67. However, as the Consortium consistently requested for commissioning of the Facilities despite its failure to stabilize MC300, SAIL agreed to proceed with commissioning despite the ongoing issues, defects, and design deficiencies in the Facilities.<sup>51</sup>

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<sup>50</sup> Supra at 27.

<sup>51</sup> Supra at 28.

68. The commissioning tests were finally carried out between 15 June 2019 and 26 June 2019. However, the Consortium failed to achieve the requisite production of 22,000 tons in 10 days, producing only 11,970 tons, which is far below the contractual threshold.<sup>52</sup>
69. Therefore, any delay caused in commissioning of the Facilities at the DSP is only on account of the delays on account of the Consortium and any claims contrary to the same must be rejected.

**D. The Claimant's prayer for the issuance of the Commissioning Certificate, Performance Guarantee Certificate and the Final Acceptance Certificate and payment of consequential amounts by SAIL [Claims 6 to 9]**

*Re: Commissioning Certificate*

70. The Claimant has sought to contend that the commissioning of the Facilities is complete and that it is entitled to receive payment towards the same. The Claimant's aforesaid contentions are denied being false, misconceived, and contrary to record and the provisions of the Contract.
71. Pertinently, the erection, testing and trial runs of the individual units of the Facilities were completed only on 15 March 2016. However, as is noted in the PAC, numerous defects and deficiencies remained in the Consortium's work even at this time. The Claimant has sought to contend that the issuance of the PAC signifies that the Facilities were fit for commissioning, with no defects or deficiencies. It is humbly stated that the Claimant's aforesaid contention is denied being false, misconceived, and contrary to the record, including the provisions of the Contract.

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<sup>52</sup> Supra at 29.

72. As aforesaid, Clause 24.6 of the GCC requires the Consortium to remedy any and all outstanding defects immediately after the issuance of the PAC and ensure that the Facilities are fully in accordance with the Contract, failing which SAIL is entitled to undertake such completion of the Facilities at the risk and cost of the Consortium. Consequently, by the PAC, SAIL required the Consortium to liquidate all outstanding defects and deficiencies at the earliest so that the commissioning work could begin.<sup>53</sup>
73. The Consortium failed to remedy the defects and deficiencies in the Facilities and persisted in delaying the commissioning on one pretext or another. The first section of the Facilities identified for commissioning was found to be incapable of rolling the requisite type of steel viz. MC 300. It took the Consortium multiple trials over a period of 4 months and over 15,000 tons of trial rolling of blooms to conclude that the Facilities are not capable of rolling the requisite MC-300 steel, which is part of the six sections covered in the performance guarantee tests under the Contract. In fact, the same is yet to be rectified. The Consortium also continued to make several major design changes.
74. Pertinently, under Clause 41 of the SCC read with Clause 25 of the GCC, the Facilities can only be held to be commissioned when they have achieved 66% of their total production capacity viz., 22,000 tons within 10 days, 2 (two) months of the successful hot rolling of the first bloom. Clause 41 of the SCC is extracted below for convenient reading:

*“41. GCC Sub-Clause 25.3.0 shall be read as Successful completion of Commissioning of the Mill will be when the mill have achieved the commercially accepted production level of*

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<sup>53</sup> Supra at 26.

*output not less than sixty six percent (66%) of the Guaranteed Production Capacity defined as under.*

*When the Mill has achieved the commercially accepted production of 22,000 Tonne in 10 days (3 shifts/day), comprising beams & channels, within 2 (two) months since successful hot rolling of first bloom.”*

Further, Clause 25.3 of the GCC states as follows:

*“25.3 The Commissioning Certificate shall be issued by the Employer subject to the following:*

- a) Commissioning test to establish a level of output not less than sixty six percent (66%) of the Guaranteed Production Capacity or as specified in Contract Technical Specification within the contractual completion period indicated in Sub-Clause 1.1 of the Appendix-2, has been successfully completed and the quality of materials produced and other parameters are as per Technical Specifications.*
- b) The Contractor has submitted all final drawings & documents for the respective Facilities in accordance with the provisions of the Contract as given in Appendix-2.*
- c) The Contractor to the satisfaction of the Employer, has met all the objections/observations, if any, contained in the Preliminary Acceptance Certificate.*
- d) Upon fulfillment of above condition, the Contractor will apply to the Employer to issue the Commissioning Certificate. Within 14 days of receipt of Contractor’s application, Employer will issue the Commissioning Certificate.”*

75. The commissioning tests were finally carried out between 15 June 2019 and 26 June 2019. However, the Consortium failed to achieve the requisite

production of 22,000 tons in 10 days, producing only 11,970 tons, which is far below the contractual threshold.<sup>54</sup>

76. Even after failure of the Consortium to successfully comply with the contractual requirements for commissioning of the Facilities, SAIL continued to request the Consortium to rectify all the defects and conduct a successful commissioning.<sup>55</sup>
77. In this regard, reliance may be placed on a Technical Report conducted on the Facilities at the DSP by LSI Financial Services Private Limited conducted in July 2023 which highlights the issues at the Facilities.<sup>56</sup> The report highlights inter alia the following issues:
- i. A design problem in the capacity of the crop shear collecting bucket.
  - ii. A defect in the control system software where the actual pulling interval of bloom from the preheater is found more than that set in the software.
  - iii. Cutting operation of front and tail end being done downstream in the Mill (Cold Saw) with consequent loss of yield which results in some loss of production.
  - iv. Frequent roll breakages increasing the downtime and setting time, which can have an impact on throughput.
  - v. Delay in the Hot Cut Saw and Sample Recovery Device of 8 to 10 minutes each and leading to production loss opportunity of approximately 30 minutes in a shift.

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<sup>54</sup> Supra at 29.

<sup>55</sup> Supra at 30.

<sup>56</sup> LSI Financial Services Private Limited, Technical Report on 1 Million TPA Medium Structural Mill, Durgapur Steel Plant, SAIL, July 2023, **R-1/23**.

78. The technical findings established that against the contracted capacity of 1.00 million TPA Mill, the effective capacity of the Facilities stands at 0.720 million TPA only due to certain design deficiencies established in the Facilities and its operations.
79. Pertinently, the Consortium consistently continued to request SAIL for extension of time to complete the Facilities, which time was extended by SAIL without prejudice to its rights under the Contract. The last request was made by the Claimant on 10.12.2021 for an extension up to 31.12.2021 for completion of the Facilities.<sup>57</sup>
80. The Claimant's contentions that it should be deemed to have achieved a production of 22,001.04 tons on account of alleged inefficiencies purportedly attributable to DSP or that such commissioning has somehow been delayed by the Answering Respondent are denied in entirety being false, misconceived, and contrary to the record. The Claimant also seeks to contend that the commercial use of the Facilities by the Answering Respondent allegedly reduced the efficiency of the same. The Claimant's aforesaid contention is also denied being false and contrary to the record. The Answering Respondent respectfully submits that under the Contract, commissioning can only be achieved upon production of an output of 22,000 tons in 10 days, which the Consortium has failed to accomplish, notionally or otherwise. In any event and without prejudice to the aforesaid, no notional or deemed production can be considered as satisfying the requirements of Clause 41 of the SCC read with Clause 25 of the GCC.
81. It is submitted that contrary to the assertion of the Claimant, the total commercially accepted production achieved during the commissioning was

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<sup>57</sup> Supra at 31.

11,930 MT as per the results of commissioning test.<sup>58</sup> Therefore, the submission of the Claimant that 13,425 MT was achieved during the commissioning is false and contrary to the record. Therefore, any averments made on the basis of the admitted commissioning to be 13,425 MT must be rejected.

82. It is further submitted that as per the commissioning report, a total delay of 28.30 hours was attributable to SAIL whereas the remaining delay of 117.73 hours for equipment and process delay is attributable to the Consortium.<sup>59</sup> It is only later that contrary to all records that the Consortium challenged the contributions to the delays of 87.7 hours.<sup>60</sup> Therefore, any averments made by the Claimant's on the basis of unassigned delay of 87.7 hours is false and contrary to the record.
83. Respondent No. 1 respectfully states that the Consortium has been unable to achieve the requisite production and satisfy the contractual parameters for commissioning or even stabilize the MC 300 section until date. Consortium also failed to rectify and remedy the defects and deficiencies noted/pointed out earlier including PAC and did not submit all final drawings and documents for the Facilities. Consequently, the commissioning, which was originally required to be completed on or before 10 September 2012, remains pending over a decade after the expiry of the contractually stipulated time-period.<sup>61</sup> The establishment of performance guarantee parameters and issuance of the final acceptance certificate, both of which are undisputedly contingent on commissioning, also consequently remain incomplete. It is denied that SAIL has acknowledged successful commissioning or achievement of stipulated production capacity of MSM in its Annual

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<sup>58</sup> Summary of MSM Hot Commissioning Test Report, **R-1/24**.

<sup>59</sup> Major Contributions to Delays, Annexure III, **R-1/24**.

<sup>60</sup> Minutes of meeting held on 18 December 2019 and 19 December 2019, **C-9**.

<sup>61</sup> Contract, 11 May 2010, **R-1**, SCC, Clause 41 r/w GCC, Clause 25.



Reports. Therefore, the Claimant is not entitled to issuance of the Commissioning Certificate or for any payment towards commissioning or any other milestones under the Contract.

Re: Performance Guarantee Certificate

84. The Claimant has sought to contend that it should be deemed to have completed the performance guarantee tests and that it is entitled to receive payment towards the same. The Claimant's aforesaid contentions are denied being false, misconceived, and contrary to record and the provisions of the Contract. The Claimant's contention that it is entitled to receive payment towards the establishment of the performance guarantee parameters as the performance guarantee tests have been delayed by the Answering Respondent is also denied in entirety being false, misconceived, and contrary to the record.
85. The Claimant's reliance on Clause 27.5 of the GCC in this regard is wholly misconceived and erroneous. Under Clauses 7.10.1 and 27 of the GCC, the establishment of the performance guarantee parameters and the issuance of the PGC are contingent on the successful commissioning of the Facilities. As aforesaid, the Consortium has been unable to achieve the requisite production and satisfy the contractual parameters for commissioning and the same remains pending. Therefore, the Claimant is not entitled to issuance of the PGC or for any payment towards the establishment of the performance guarantee parameters and its claims ought to be dismissed in *toto*.

Re: Final Acceptance Certificate

86. The Claimant contends that it should be issued the FAC as it should allegedly be deemed to have completed the commissioning and the performance guarantee tests despite having failed to satisfy the requirements under the

Contract. The Claimant also claims payment against the issuance of the FAC. The Claimant's aforesaid contentions are denied being false, misconceived, and contrary to record and the provisions of the Contract.

87. As aforesaid, under Clauses 1 and 28 of the GCC, the establishment of the performance guarantee parameters and the issuance of the FAC are contingent on the successful commissioning of the Facilities. Final acceptance can only occur in respect of the Facilities when:

- a. all defects and deficiencies mentioned in the PAC have been rectified/liquidated;
- b. the performance guarantee tests have been successfully completed and the guaranteed output and other parameters are met by the Contractor; and
- c. the Contractor has fulfilled all the obligations under the Contract.

88. Furthermore, under Clause 28.4 of the GCC, payment for final acceptance can only be released on the expiry of 6 months from the date of release of payment against the issue of the Commissioning Certificate and PGC, provided that the performance guarantee tests have been conducted successfully. As aforesaid, the Consortium has been unable to achieve the requisite output and satisfy the contractual parameters for commissioning, which remains pending today. In view of the above, the Claimant's contentions that the Facilities have somehow been commissioned and that it is consequently entitled to the commissioning certificate, the PGC, and the FAC as well as payment towards the aforesaid milestones, are denied being false, misconceived, and contrary to the record as well as the provisions of the Contract and its claims ought to be dismissed in toto.

**E. The Claimant's contention that the termination notice dated 22.11.2022 issued by SAIL is invalid (*Claim 1*)**

89. The Claimant's contention that the termination notice dated 22.11.2022 is mala fide and invalid is misconceived, false and contrary to the record. Clause 44.2 of the GCC provides that the Contract can be terminated by SAIL inter alia if the Contractor:

- (a) assigns or transfers the Contract or any right or interest therein without express prior written consent of the Employer;
- (b) becomes insolvent;
- (c) abandons or repudiates the contract;
- (d) fails to commence work on the Facilities promptly or has suspended the progress of contracted performance for more than 28 days after receiving a written instruction from the Employer to proceed;
- (e) persistently fails to execute the Contract in accordance with the Contract or persistently neglects to carry out its obligations under the Contract without just cause;
- (f) refuses or is unable to provide sufficient materials, services or labor (adequate resources) to execute and complete the Facilities as per the program in the Contract at rates of progress that give reasonable assurance to the Employer that the Contractor can attain Completion of the Facilities by the Time for Completion.

The relevant portion of the Clause 44 is extracted below for convenient reference:

#### **"44.2 Termination for Contractor's Default**

*44.2.1 The Employer, without prejudice to any other rights or remedies it may possess, may terminate the Contract forthwith in the following circumstances by giving a notice of termination and its reasons therefor to the Contractor, referring to this Sub-Clause 44.2 hereof:*

*a) if the Contractor assigns or transfers the Contract or any right or interest therein in violation of the provision of Clause 45 (Assignment) hereof.*

*b) if the Contractor becomes bankrupt or insolvent, has a receiving order issued against it, compounds with its creditors, or, if the Contractor is a corporation, a resolution is passed or order is made for its winding up (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), a receiver is appointed over any part of its undertaking or assets, or if the Contractor takes or suffers any other analogous action in consequence of debt.*

#### *44.2.2 If the Contractor*

*a) has abandoned or repudiated the Contract*

*b) has without valid reason failed to commence work on the Facilities promptly or has suspended the progress of Contract performance for more than twenty-eight (28) days after receiving a written instruction from the Employer to proceed*

*c) persistently fails to execute the Contract in accordance with the Contract or persistently neglects to carry out its obligations under the Contract without just cause*

*d) refuses or is unable to provide sufficient materials, services or labour (adequate resources) to execute and complete the Facilities in the manner specified in the program furnished*

*under **Clause 18** (Program of Performance) hereof, at rates of progress that give reasonable assurance to the Employer that the Contractor can attain Completion of the Facilities by the Time for Completion as per **Clause 8** hereof*

*then the Employer may, without prejudice to any other rights it may possess under the Contract, give a notice to the Contractor stating the nature of the default and requiring the Contractor to remedy the same. If the Contractor fails to remedy or to take steps to remedy the same within fourteen (14) days of its receipt of such notice, then the Employer may terminate the Contract forthwith by giving a notice of termination to the Contractor that refers to this **Sub-Clause 44.2** hereof."*

90. In the present instance, PT Italy, the lead member of the Consortium sought to assign its rights and obligations under the Contract without prior written consent from SAIL. Furthermore, as aforesaid, the Consortium has persistently failed to execute the Contract and fulfill its contractual obligations.
91. Moreover, the Claimant is incapable to execute the works assigned pursuant to the purported assignment which is bore out by the fact that it has engaged the Respondent no. 2 for completion of the Contract. Furthermore, the purported assignment also leads to material change in composition of the Consortium and also leads to exit of foreign contractor requiring reworking of Euro component of price on mutually agreeable exchange rate.
92. It is denied that SAIL ever accepted the purported assignment and/or did not raise any objection to the same.

93. It is noteworthy that SAIL, even after being aggrieved by inter alia the Consortium's attitude towards the completion of the Contract, the Consortium's failure to rectify of the pending defects at the Facilities as well as the change in ownership structure of the consortium leader i.e., PT Italy, gave the Consortium multiple opportunities to complete the Facilities. By its letter dated 28.09.2022, SAIL requested the Consortium to enter into a supplementary agreement defining all outstanding obligations of the Consortium and setting out timelines for their resolution and withdraw or defer the present arbitration proceedings, in order to effectively negotiate the supplementary agreement. In the same communication, SAIL also stipulated that the Contract shall be deemed to be terminated in the event the Consortium was unwilling to resolve the issues and enter into a supplementary agreement with SAIL.<sup>62</sup>
94. Despite the olive branch offered by SAIL, the settlement talks bore no progress. Further, PT India and PT Italy consistently attempted to exclude PT Italy from any contractual obligations under the Contract and failed to discuss the terms of the proposed supplementary agreement. The Consortium also made no attempts to try and complete the Facilities. Therefore, by letter dated 26.11.2022, SAIL was constrained to terminate the Contract under Clause 44, with effect from 21.10.2022.<sup>63</sup>
- F. The Claimant's prayers for the release of the Performance Bank Guarantee dated 26.06.2015 bearing no. PEBBOM505064 issued for an amount of Rs. 8,50,37,434/- (Rupees Eight Crore Fifty Lakh Thirty-Seven Thousand Four Hundred Thirty-Four Only) and Performance Bank Guarantee dated 20.10.2021 bearing no. 0006NDCG00128522**

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<sup>62</sup> Supra at 33.

<sup>63</sup> Supra at 34.

**issued for an amount of € 22,02,080.95 (Twenty-Two Lakhs Two Thousand Eighty Euros) by PT Italy (*Claims 10 and 11*)**

95. The Claimant is not entitled to the release of the Performance Bank Guarantee dated 26.06.2015 bearing no. PEBBOM505064 issued for an amount of Rs. 8,50,37,434/- (Rupees Eight Crore Fifty Lakh Thirty-Seven Thousand Four Hundred Thirty-Four Only) and Performance Bank Guarantee dated 20.10.2021 bearing no. 0006NDCG00128522 issued for an amount of € 22,02,080.95 (Twenty-Two Lakhs Two Thousand Eighty Euros).
96. Clause 13.2.2 of the GCC provides for the expiry of the bank guarantee 12 months from the release of the payment against the commissioning certificate. The relevant portion of Clause 13 of GCC is extracted below for convenient reference:

***"13.2 Performance Bank Guarantee (as per Annexure - I)***

*13.2.2 The Bank Guarantee shall automatically become null and void after twelve (12) months after issue of Commissioning Certificate, provided, however, that if the Defects Liability Period has been extended on any part of the Facilities pursuant to Sub-Clause 30.7 hereof, the Contractor shall issue an additional Bank Guarantee in an amount proportionate to the Price of that part. The Bank Guarantee shall be returned to the Contractor immediately after its expiration, provided, however, that if the Contractor, pursuant to Sub-Clause 30.9 hereof, is liable for an extended warranty obligation, the performance Bank Guarantee shall be extended for the period of 12 months from date of its restoration and up to the amount equal to 10% value of the component/part/equipment."*

97. Clause 28.4 of the GCC also provides that the bank guarantees furnished by the Consortium can only be released after 12 months from the date of release of payment against Commissioning Certificate. The relevant portion of Clause 28 of the GCC is extracted below for convenient reference:

*"28.4 Payment for Final Acceptance to be released on expiry of 6 months from the date of release of payment against issue of Commissioning Certificate, against Bank Guarantee of equal value provided the Performance Guarantee Test has already been successfully conducted. The Bank Guarantee shall be released after 12 months from the date of release of payment against Commissioning Certificate."*

98. Respondent No. 1 respectfully states that the Consortium has been unable to achieve the requisite production and satisfy the contractual parameters for commissioning or even stabilize the MC 300 section until date. Consequently, the commissioning, which was originally required to be completed on or before 10 September 2012, remains pending over a decade after the expiry of the contractually stipulated time-period. On the other hand, the delays and deficiencies in the Consortium's work have delayed the commissioning of the Facilities, causing enormous losses to SAIL. As such, SAIL is entitled to encash the performance bank guarantees furnished by the Claimant.

99. In view of the aforesaid, the Answering Respondent respectfully seeks that the Claimant's prayers for release of its bank guarantees be dismissed.

**G. The Claimant's prayer for a declaration that only SAIL would be liable to make good any losses incurred towards wear and tear of the Facilities**



**as it has allegedly been using the plant unilaterally for commercial production [*Claim 4*]**

100. It is submitted that any claims made on the basis that the Answering Respondent had been using the facilities unilaterally for commercial production are false, misconceived, and contrary to the record.
101. As aforesaid, the Consortium failed to remedy the defects and deficiencies in the Facilities and persisted in delaying the commissioning on one pretext or another. The first section of the Facilities identified for commissioning was found to be incapable of rolling the requisite type of steel viz. MC 300. It took the Consortium multiple trials over a period of 4 months and over 15,000 tons of trial rolling of blooms to conclude that the Facilities are not capable of rolling the requisite MC-300 steel, which is part of the six sections covered in the performance guarantee tests under the Contract. In fact, the same is yet to be rectified. The Consortium also continued to make several major design changes.
102. Therefore, contrary to the Claimants' averments pertaining to SAIL's preference to commercial production over commissioning of the Facilities, SAIL only had to roll other sections of the Facilities to keep the Facilities in a working condition and to stabilize the other sections as it would have been difficult to bring back the Facilities into the rolling condition after prolonged stoppage.
103. The Claimant now contends that at the time of commissioning of the Facilities, they were already affected by normal wear and tear, owing to an alleged lack of maintenance by SAIL. Pertinently, it was PT Italy's responsibility to train SAIL's personnel to operate the Facilities. However, as is borne out by the record, the Consortium persistently failed to perform

its obligations under the Contract as a result of which SAIL's efforts to initiate the production were faced with constant break downs.<sup>64</sup> The Claimant has only placed partial and self-serving correspondence on record and has attempted to mischaracterize the actual dispute before this Arbitral Tribunal. The Answering Respondent vehemently disputes the contents of the correspondence/documents annexed by the Claimant from Exhibit C-26 to Exhibit C-38.

#### **H. The Claimant's claim for interest (*Claim 12*)**

104. As aforesaid, no amount is due and payable to the Claimant, the Consortium or any of its members. Consequently, no interest is payable.
105. In any event and without prejudice to the above, the Claimant's prayer for 18 per cent interest is excessive and contrary to settled law, including the provisions of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). Section 31 (7) of the Arbitration Act provides that an arbitrator may award interest. However, such interest must be reasonable.<sup>65</sup> An award usually carries interest two percent higher than the current rate of interest prevailing on the date of the award. The relevant portion of Section 31 of the Arbitration Act is extracted below for convenient reference:

#### ***"31. Form and contents of arbitral award***

...

*(7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which*

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<sup>64</sup> Letter from SAIL to PT Italy, 27 October 2016, **R-1/2**, Letter from SAIL to PT Italy, 24 October 2016, **R-1/1**, Letter from SAIL to PT Italy, 14 November 2016, **R-1/3**, Letter from SAIL to Consortium, 19 March 2017, **R-1/4**, Letter from SAIL to Consortium, 02 April 2018, **R-1/5**, Letter from SAIL to Consortium, 06 April 2018, **R-1/6**.

<sup>65</sup> V4 Infrastructure (P) Ltd. v. Jindal Biochem (P) Ltd., 2020 SCC OnLine Del 2366, ¶ 11, 24, **R1LA-1**.

*the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made."*

*(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment."*

106. Therefore, it is submitted that Claimant is not entitled to any payments towards interest.

**I. The Claimant's claim for costs of the present arbitration proceedings (Claim 13)**

107. The reliefs sought by the Claimant have no basis whatsoever, in law or under the Contract as the Claimant has failed to complete the work for which it seeks payment. On the other hand, the delays and deficiencies in the Consortium's work have resulted in the Answering Respondent incurring heavy losses as well as a serious setback to major national infrastructure works. Furthermore, the Claimant has failed to disclose material facts and documents, including critical portions of the Contract and correspondence, having selectively placed only self-serving documents on record and its claims ought to be dismissed on this basis alone.

108. Therefore, the Claimant's claim for costs of the present arbitration proceedings ought to be rejected outright.

#### **IV. RESPONSES/ OBJECTIONS TO CLAIMS SUBMITTED BY SHRIRAM EPC**

##### **A. The Claimant's contention that the termination notice dated 22.11.2022 issued by SAIL is invalid (*Claim A*)**

109. The submission of the Respondent No. 3 that the termination notice dated 22.11.2022 is mala fide and non-est vide is denied for being mischievous, false and contrary to the record.
110. As aforesaid, Clause 44.2 of the GCC provides that the Contract can be terminated by SAIL inter alia if the Contractor:
- (a) assigns or transfers the Contract or any right or interest therein without express prior written consent of the Employer;
  - (b) becomes insolvent;
  - (c) abandons or repudiates the contract;
  - (d) fails to commence work on the Facilities promptly or has suspended the progress of contracted performance for more than 28 days after receiving a written instruction from the Employer to proceed;
  - (e) persistently fails to execute the Contract in accordance with the Contract or persistently neglects to carry out its obligations under the Contract without just cause;
  - (f) refuses or is unable to provide sufficient materials, services or labor (adequate resources) to execute and complete the Facilities as per the program in the Contract at rates of progress that give reasonable

assurance to the Employer that the Contractor can attain Completion of the Facilities by the Time for Completion.

111. It is submitted that the Consortium has failed to fulfill its contractual obligations by inter alia failing to commission the Facilities and rectify the PAC defects. It is submitted that there were substantial delays in the submission of critical designs and drawings by the Consortium. There were also considerable delays in the execution of engineering activities and civil works. Notably, the consortium partner responsible for the erection and supply of erection accessories, Shriram EPC, was also failing to meet targets. The Consortium failed to coordinate amongst its members and consistently failed to mobilize adequate resources, including equipment and manpower.<sup>66</sup>
112. Respondent No. 3's contention that the project site was handed over by SAIL after a delay of 3 years is denied being false and misconceived. Under Clause 7 r/w Clause 9 of the GCC, it is the Consortium's responsibility to dismantle existing building, structures & equipment and modification/diversion of the site. The relevant portion of Clause 7 and 9 of the GCC is extracted below for convenient reference:

***"7. Scope of Facilities***

***7.1 Scope of Supplies and Services***

*7.1.1 Unless otherwise expressly limited in the Contract Technical Specifications, the Contractor's obligation cover design & engineering: civil engineering work; dismantling, if any, of existing building. structures & equipment; modification/diversion, if any, of utility/services; fabrication & supply of steel structures; manufacture (including associated purchases and/or subcontracting) & supply of plant & equipment and refractories; Customs & Port clearances; inland transportation; intermediate storage; insurance & handling:*

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<sup>66</sup> Supra at 21.

*erection work; testing; pre-commissioning: start-up & commissioning and demonstration & establishment of performance guarantee parameters of the Facilities as detailed hereafter, in accordance with the plans, specifications, drawings, codes and any other documents as specified in the Contract Technical Specifications.*

...

### ***7.3 Dismantling & Demolition of Existing Building, Structures, Plant & Equipment***

*The Contractor shall be responsible for carrying out dismantling/demolition of necessary existing buildings and structures including foundations, covered works and plant & equipment and stacking and expeditious removal of the debris to the dumping ground to be specified by the Employer*

...

## ***9. Contractor's Responsibilities***

*9.1 The Contractor shall carry out Scope of Facilities as specified in Clause-7 hereof including design & engineering: civil engineering work; dismantling, if any, of existing building, structures & equipment; modification/diversion, if any, of utility/services; fabrication & supply of steel structures; manufacture (including associated purchases and/or sub-contracting) & supply of plant & equipment and refractories; Customs & Port clearances (excluding Customs Duty, and other taxes & duties as per Sub-clause 14.2 & 14.3 and Service Tax/Education Cess on items for which prices are quoted in Foreign currency): inland transportation; intermediate storage; insurance & handling; erection work; testing; pre-commissioning; start-up & commissioning and demonstration &*

*establishment of performance guarantee parameters of the Facilities with due care and diligence in accordance with the Contract."*

113. Therefore, it is the responsibility of the Consortium to make site fit for commissioning. However, the Consortium continued to delay submissions of critical designs and failed to make the site fit for erection until February 2014. Pertinently, on account of Consortium's failure to complete its obligations under the Contract, SAIL made an effort to assist the completion of the Project by handing over the civil front after rectifications and making it fit for erection in excess of its contractual obligations.<sup>67</sup> Accordingly, all averments made to against SAIL pertaining to delay in handing over of the civil front are incorrect and must be rejected.
114. Furthermore, as aforesaid, PT Italy, the lead member of the Consortium sought to assign its rights and obligations under the Contract without prior written consent from SAIL.
115. It is submitted that any transfer/assignment of rights and liabilities of PT Italy in favor of PT India vide a purported agreement dated 21.10.2021 is invalid and non-est for not being in accordance with the Contract.
116. It is noteworthy that SAIL, even after being aggrieved by inter alia the Consortium's attitude towards the completion of the Contract, the Consortium's failure to rectify of the pending defects at the Facilities as well as the change in ownership structure of the consortium leader i.e., PT Italy, gave the Consortium multiple opportunities to complete the Facilities. By its letter dated 28.09.2022, SAIL requested the Consortium to enter into a supplementary agreement defining all outstanding obligations of the Consortium and setting out timelines for their resolution and withdraw or

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<sup>67</sup> Foundation Handover Dates, 29 July 2015, **R-3/1**.

defer the present arbitration proceedings, in order to effectively negotiate the supplementary agreement. In the same communication, SAIL also stipulated that the Contract shall be deemed to be terminated in the event the Consortium was unwilling to resolve the issues and enter into a supplementary agreement with SAIL.<sup>68</sup>

117. Despite the olive branch offered by SAIL, the settlement talks bore no progress. Further, PT India and PT Italy consistently attempted to exclude PT Italy from any contractual obligations under the Contract and failed to discuss the terms of the proposed supplementary agreement. The Consortium also made no attempts to try and complete the Facilities. Therefore, by letter dated 26.11.2022, SAIL was constrained to terminate the Contract under Clause 44, with effect from 21.10.2022.<sup>69</sup> In view of the above, the notice dated 26.11.2022 terminating the Contract with effect from 21.10.2022 is valid in law and must not be set aside.

**B. The Claimant's claim for INR 988 million along with GST and INR 125.62 million along with GST (*Claims B & C*)**

118. Respondent No. 3 has sought to contend that the commissioning of the Facilities is complete and that it is entitled to receive payment towards the same. Respondent No. 3's aforesaid contentions are denied being false, misconceived, and contrary to record and the provisions of the Contract. As aforesaid, the commissioning of the Facilities is not complete. Furthermore, the delay in commissioning of the Facilities is solely on account of the Consortium and any averments made by the Respondent No. 3 which are contrary to the same are denied for being false, misconceived, and contrary to the record.

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<sup>68</sup> Supra at 33.

<sup>69</sup> Supra at 34.



119. The Facilities, which were to be set up primarily to meet the demand for various grades of steel for numerous construction and infrastructure development programs in India and abroad, were originally required to be completed within 28 months from 11 May 2010 i.e., by 10 September 2012. However, from the commencement of the Contract, the Consortium and its members acted negligently and failed to complete the Facilities within the contractually stipulated timelines, despite repeated requests by SAIL.
120. The Consortium repeatedly requested SAIL for extensions of time, promising the Answering Respondent that it would complete the Facilities. The Consortium's letters were entirely bereft of reasons.<sup>70</sup> Nonetheless, at the time, without prejudice to its rights and in the interest of expeditious completion of the Facilities, SAIL relied on the Consortium's promises and granted extensions of time while reserving its right to levy liquidated damages for the delay.<sup>71</sup> SAIL also admittedly paid the Respondent No. 3 towards 90% of its scope of work under the Contract despite the delays and the deficiencies involved, many of which SAIL was constrained to remedy at its own cost.
121. However, the Consortium persisted in its failure to deploy sufficient resources, equipment, and manpower even within the extended time-period, continuing to act negligently and in contravention of the Contract, despite being informed repeatedly that the Answering Respondent is incurring heavy losses for every day's delay.<sup>72</sup> Moreover, the hot trials were plagued with constant breakdown of equipment. Consequently, SAIL was constrained to reduce the scope of Respondent 3's work under Contract on

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<sup>70</sup> Supra at 22.

<sup>71</sup> Supra at 23.

<sup>72</sup> Supra at 24.

account of significant delays and deficiencies in the work executed as well as delays by all Consortium members, including Respondent No. 3.<sup>73</sup>

122. Pertinently, the erection, testing and trial runs of the individual units of the Facilities were completed only on 15 March 2016. However, as is noted in the preliminary acceptance certificate dated 17 March 2016 (**PAC**), numerous defects and deficiencies remained in the Consortium's work even at this time.
123. Consequently, by the` PAC, SAIL required the Consortium to liquidate all outstanding defects and deficiencies at the earliest so that the commissioning work could begin.<sup>74</sup> Significantly, there is no reference to the list of defects and deficiencies annexed to the PAC in the SEPC's Claim and the said annexure has not been placed on record.
124. The Consortium failed to remedy the defects and deficiencies in the Facilities and persisted in delaying the commissioning on one pretext or another. The first section of the Facilities identified for commissioning was found to be incapable of rolling the requisite type of steel viz. MC 300. It took the Consortium multiple trials over a period of 4 months and over 15,000 tons of trial rolling of blooms to conclude that the Facilities are not capable of rolling the requisite MC-300 steel, which is part of the six sections covered in the performance guarantee tests under the Contract. In fact, the same is yet to be rectified. The Consortium also continued to make several major design changes.<sup>75</sup>

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<sup>73</sup> Supra at 25.

<sup>74</sup> Supra at 26.

<sup>75</sup> Supra at 27.

125. Contrary to the Respondent No. 3's averments pertaining to SAIL's preference to commercial production over commissioning of the Facilities, SAIL only had to roll other sections of the Facilities to keep the Facilities in a working condition and to stabilize other sections as it would have been difficult to bring back the Facilities into the rolling condition after prolonged stoppage.
126. However, as the Consortium consistently requested for commissioning of the Facilities despite its failure to stabilize MC300, SAIL agreed to proceed with commissioning despite the ongoing issues, defects, and design deficiencies in the Facilities.<sup>76</sup>
127. The commissioning tests were finally carried out between 15 June 2019 and 26 June 2019. However, the Consortium failed to achieve the requisite production of 22,000 tons in 10 days, producing only 11,970 tons, which is far below the contractual threshold.<sup>77</sup>
128. Therefore, the delay caused in commissioning of the Facilities at the DSP is only attributable to the Consortium. Pertinently, the erection, testing and trial runs of the individual units of the Facilities were completed only on 15 March 2016. However, as is noted in the PAC, numerous defects and deficiencies remained in the Consortium's work even at this time. The Claimant has sought to contend that the issuance of the PAC signifies that the Facilities were fit for commissioning, with no defects or deficiencies. It is humbly stated that Respondent No. 3's aforesaid contention is denied

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<sup>76</sup> Supra at 28.

<sup>77</sup> Supra at 29.

being false, misconceived, and contrary to the record, including the provisions of the Contract.

129. Contrary to Respondent No.3's contentions, Clause 24.6 of the GCC requires the Consortium to remedy any and all outstanding defects immediately after the issuance of the PAC and ensure that the Facilities are fully in accordance with the Contract, failing which SAIL is entitled to undertake such completion of the Facilities at the risk and cost of the Consortium. Consequently, by the PAC, SAIL required the Consortium to liquidate all outstanding defects and deficiencies at the earliest so that the commissioning work could begin.<sup>78</sup>
130. The Consortium failed to remedy the defects and deficiencies in the Facilities and persisted in delaying the commissioning on one pretext or another. The first section of the Facilities identified for commissioning was found to be incapable of rolling the requisite type of steel viz. MC 300. It took the Consortium multiple trials over a period of 4 months and over 15,000 tons of trial rolling of blooms to conclude that the Facilities are not capable of rolling the requisite MC-300 steel, which is part of the six sections covered in the performance guarantee tests under the Contract. In fact, the same is yet to be rectified. The Consortium also continued to make several major design changes.
131. Pertinently, under Clause 41 of the SCC read with Clause 25 of the GCC, the Facilities can only be held to be commissioned when they have achieved 66% of their total production capacity viz., 22,000 tons within 10 days, 2

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<sup>78</sup> Supra at 26.

(two) months of the successful hot rolling of the first bloom. Clause 41 of the SCC is extracted below for convenient reading:

*“41. GCC Sub-Clause 25.3.0 shall be read as Successful completion of Commissioning of the Mill will be when the mill have achieved the commercially accepted production level of output not less than sixty six percent (66%) of the Guaranteed Production Capacity defined as under.*

*When the Mill has achieved the commercially accepted production of 22,000 Tonne in 10 days (3 shifts/day), comprising beams & channels, within 2 (two) months since successful hot rolling of first bloom.”*

Further, Clause 25.3 of the GCC states as follows:

*“25.3 The Commissioning Certificate shall be issued by the Employer subject to the following:*

- e) Commissioning test to establish a level of output not less than sixty six percent (66%) of the Guaranteed Production Capacity or as specified in Contract Technical Specification within the contractual completion period indicated in Sub-Clause 1.1 of the Appendix-2, has been successfully completed and the quality of materials produced and other parameters are as per Technical Specifications.*
- f) The Contractor has submitted all final drawings & documents for the respective Facilities in accordance with the provisions of the Contract as given in Appendix-2.*
- g) The Contractor to the satisfaction of the Employer, has met all the objections/observations, if any, contained in the Preliminary Acceptance Certificate.*

h) *Upon fulfillment of above condition, the Contractor will apply to the Employer to issue the Commissioning Certificate. Within 14 days of receipt of Contractor's application, Employer will issue the Commissioning Certificate."*

132. The commissioning tests were finally carried out between 15 June 2019 and 26 June 2019. However, the Consortium failed to achieve the requisite production of 22,000 tons in 10 days, producing only 11,970 tons, which is far below the contractual threshold.<sup>79</sup>

133. Even after failure of the Consortium to successfully comply with the contractual requirements for commissioning of the Facilities, SAIL continued to request the Consortium to rectify all the defects and conduct a successful commissioning.<sup>80</sup>

134. In this regard, reliance may be placed on a Technical Report conducted on the Facilities at the DSP by LSI Financial Services Private Limited conducted in July 2023 which highlights the issues at the Facilities.<sup>81</sup> The report highlights inter alia the following issues:

- i. A design problem in the capacity of the crop shear collecting bucket.
- ii. A defect has been reported from the control system software where actual pulling interval of bloom from the preheater is found more than that set in the software.

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<sup>79</sup> Supra at 29.

<sup>80</sup> Supra at 30.

<sup>81</sup> Supra at 56.

- iii. Cutting operation of front and tail end is being done downstream in the Mill (Cold Saw) with consequent loss of yield which results in some loss of production.
  - iv. Frequent roll breakages increase the downtime and setting time and that can have an impact on throughput.
  - v. There is a delay in the Hot Cut Saw and Sample Recovery Device of 8 to 10 minutes each and leads to production loss opportunity of approximately 30 minutes in a shift.
135. The technical findings established that against the contracted capacity of 1.00 million TPA Mill, the effective capacity of the Facilities stands at 0.720 million TPA only due to certain design deficiencies established in the Facilities and its operations.
136. Pertinently, the Consortium consistently continued to request for SAIL for extension of time to complete the Facilities which were accepted by SAIL without prejudice to its rights under the Contract. The last request was made by the Claimant on 10.12.2021 for an extension up to 31.12.2021 for completion of the Facilities.<sup>82</sup>
137. It is submitted that the total commercially accepted production achieved during the commissioning was 11,930 MT as per the results of commissioning test.<sup>83</sup> Therefore, Respondent No. 1 respectfully states that the Consortium has been unable to achieve the requisite production and satisfy the contractual parameters for commissioning or even stabilize the

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<sup>82</sup> Supra at 31.

<sup>83</sup> Supra at 58.

MC 300 section until date. Consequently, the commissioning, which was originally required to be completed on or before 10 September 2012, remains pending over a decade after the expiry of the contractually stipulated time-period.<sup>84</sup> The establishment of performance guarantee parameters and issuance of the final acceptance certificate, both of which are undisputedly contingent on commissioning, also consequently remain incomplete. Therefore, the Consortium is not entitled to issuance of the Commissioning Certificate or for any payment towards commissioning or any other milestones under the Contract.

138. It is submitted that all the members of the Consortium including Respondent No. 3 are jointly liable for execution of the Contract. It is Respondent No. 3's assertion that it does not have any obligation pertaining to the commissioning of the Facilities, performance guarantee test and the final acceptance certificate and seeks a direction for payment of remaining 10% of its contractual dues irrespective of completion of the pending obligations under the Contract. Any assertions made by the Respondent No. 3 pertaining to same are denied for being false, misconceived and contrary to the record.
139. In this regard, reliance may be placed on Recital (f) of the Contract read with Clause 17 of the SCC which provides that the all the members of the Consortium are jointly responsible for the execution of the Contract. Relevant portion of the recitals and Clause 17 of the SCC are extracted below for convenient reference:

***"17. GCC Clause 3.9.1 : Following to be added***

*Leader of the Consortium shall be overall responsible for execution of the Contract. The leader and other members of the Consortium*

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<sup>84</sup> Supra at 61.



*shall be jointly responsible for the execution of the Contract, but will be liable for damages in proportion to respective scope of Facilities."*

140. It is submitted that all the members of the Consortium including Respondent No. 3 are jointly liable for execution of the Contract and the Respondent No. 3 cannot be absolved of its obligation pertaining to the commissioning of the Facilities, Performance Guarantee Test and Final Acceptance Certificate.
141. Respondent No. 3's prayer for escalation and overrun costs in respect of its inputs, materials, labor, overheads etc. is false, mischievous and contrary to law. It is submitted that Clause 11.5.1.2 of the GCC states that if the completion of the Facilities is delayed for reasons not attributable to SAIL, no price adjustment is allowed in the Contract Price for upward revisions. The relevant portion of Clause 11 of the GCC is extracted below for convenient reference:

***"11.5 Validity of Price Adjustment***

...

*11.5.1.2 If completion of the Facilities is delayed beyond scheduled "Time for Completion" irrespective of duration of Contractual "Time for Completion", due to the reasons not attributable to the Employer, notwithstanding the extension to the "Time for Completion" is granted, no price adjustment shall be allowed in the Contract Price for any upward variations, whatsoever it may be, arising either during the "Time for Completion" or extended "Time for Completion. Price adjustment, if any, shall be allowed only for that part of the Facilities, which are executed within the scheduled time for completion and the price adjustment will be limited to the price adjustment arising from the Base date of the Contract to the*

*scheduled or actual completion period of the respective items of work (to be indicated in the billing schedule) whichever is earlier. This will however be allowed within the time for completion of the Contract. However, if the completion of facilities is delayed beyond scheduled date of the "Time for Completion" due to reasons attributable to both the parties, then the period for delay attributable to the Employer will be considered as initial delay and the price adjustment shall be applicable during this period as well."*

142. As submitted above, the delay in handing over of the entire Project site including the civil front along with the delay in commissioning of the Facilities is solely attributable to the Consortium. In this regard, reference may be given to submissions made at Response A, B and C.
143. Therefore, the Respondent No. 3 is not entitled to payment of INR 12,56,20,000/- (INR Rupees Twelve Crore Fifty-Six Lakh Twenty Thousand Only) towards escalation and overrun costs in respect of its inputs, materials, labor, overheads etc. and the prayer seeking the same must be rejected.
144. Respondent No. 3's claims lack *bona fides*. SAIL has admittedly paid the Respondent No. 3 towards 90% of its scope of work i.e., INR 98,80,00,000/- (INR Rupees Ninety-Eight Crore Eighty Lakh Only) under the Contract despite the delays and the deficiencies involved, many of which SAIL was constrained to remedy at its own cost. Therefore, prayer (B) of the Respondent No. 3 requesting for a payment of INR 98,80,00,000/- (INR Rupees Ninety-Eight Crore Eighty Lakh Only) is mala fide, wrongful and merely an attempt to receive make unlawful gains through the present arbitration proceedings.

**C. The Claimant's prayers for the release of the Performance Bank Guarantee dated 03.03.2016 bearing no. 0734716BG1000024 issued for an amount of Rs. Rs. 5,40,00,000/- (Rupees Five Crore Forty Lakh Only) (Claim D)**

145. It is submitted that Respondent No. 3's claim to release of the Performance Bank Guarantee dated 03.03.2016 bearing no. 0734716BG1000024 issued for an amount of Rs. 5,40,00,000/- (Rupees Five Crore Forty Lakh Only) must be rejected for being false, misconceived and contrary to the record.
146. It is submitted that Clause 13.2.2 of the GCC provides that the bank guarantee be returned at the time of issuance of commissioning certificate or for expiry of the bank guarantee after 12 months from the release of the payment against the commissioning certificate. Relevant portion of Clause 13 of GCC is extracted below for convenient reference:

***"13.2 Performance Bank Guarantee (as per Annexure - I)***

*13.2.2 The Bank Guarantee shall automatically become null and void after twelve (12) months after issue of Commissioning Certificate, provided, however, that if the Defects Liability Period has been extended on any part of the Facilities pursuant to Sub-Clause 30.7 hereof, the Contractor shall issue an additional Bank Guarantee in an amount proportionate to the Price of that part. The Bank Guarantee shall be returned to the Contractor immediately after its expiration, provided, however, that if the Contractor, pursuant to Sub-Clause 30.9 hereof, is liable for an extended warranty obligation, the performance Bank Guarantee shall be extended for the period of 12 months from date of its*

*restoration and up to the amount equal to 10% value of the component/part/equipment."*

147. It is further submitted that Clause 28.4 of the GCC also provides that the bank guarantees furnished by the Consortium can only be released after 12 months from the date of release of payment against Commissioning Certificate. The relevant portion of Clause 28 of the GCC is extracted below for convenient reference:

*"28.4 Payment for Final Acceptance to be released on expiry of 6 months from the date of release of payment against issue of Commissioning Certificate, against Bank Guarantee of equal value provided the Performance Guarantee Test has already been successfully conducted. The Bank Guarantee shall be released after 12 months from the date of release of payment against Commissioning Certificate."*

148. Respondent No. 1 respectfully states that the Consortium has been unable to achieve the requisite production and satisfy the contractual parameters for commissioning or even stabilize the MC 300 section until date. Consequently, the commissioning, which was originally required to be completed on or before 10 September 2012, remains pending over a decade after the expiry of the contractually stipulated time-period. In this regard, reference may be given to submissions made against Claims 6 to 9 at Response No. E, Responses/Objections to Claimant's Claims.

149. In view of the aforesaid, the Answering Respondent respectfully seeks that the Respondent No. 3's prayer for release of its bank guarantee be dismissed.

**D. Respondent No. 3's claim for interest (*Claim E*)**

150. As aforesaid, no amount is due and payable to Respondent No. 3, the Consortium or any of its members. Consequently, no interest is payable.

151. In any event and without prejudice to the above, Respondent No. 3's prayer for 18 per cent interest is excessive and contrary to settled law, including the provisions of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). Section 31 (7) of the Arbitration Act provides that an arbitrator may award interest. However, such interest must be reasonable.<sup>85</sup> An award usually carries interest two percent higher than the current rate of interest prevailing on the date of the award. The relevant portion of Section 31 of the Arbitration Act is extracted below for convenient reference:

**"31. Form and contents of arbitral award**

...

(7)(a) *Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made."*

(b) *A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment."*

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<sup>85</sup> Supra at 65.

152. Therefore, it is submitted that Respondent No. 3 is not entitled to any payments towards interest.

**E. Respondent No. 3's claim for costs of the present arbitration proceedings  
(Claim F)**

153. The reliefs sought by Respondent No. 3 have no basis whatsoever, in law or under the Contract as Respondent No. 3 has failed to complete the work for which it seeks payment. On the other hand, the delays and deficiencies in the Consortium's work have resulted in the Answering Respondent incurring heavy losses as well as a serious setback to major national infrastructure works. Furthermore, Respondent No. 3 has failed to disclose material facts and documents, including critical portions of the Contract and correspondence, having selectively placed only self-serving documents on record and its claims ought to be dismissed on this basis alone.

154. Therefore, Respondent No. 3's claim for costs of the present arbitration proceedings ought to be rejected outright.

**V. COUNTER CLAIMS**

**A. Brief Facts**

*Contract and Relevant Provisions*

155. The Counter Claim pertains to a dispute having arisen out of Consortium's failure to fulfill its obligations under the Contract *inter alia* failure to fulfill commissioning criteria, failure to cure defects highlighted by SAIL, additional cost to complete the Facilities, cost of repairs, replacements etc.

156. The following provisions of the Contract are relevant for the present Counter Claim:

- i. As per Article 5 of the Contract, time is an important feature of the Contract. The Facilities were to be completed in 28 months from the effective date of the Contract and the facilities shall be considered to be completed as on the date of commissioning.<sup>86</sup>
- ii. Article 9 of the Contract and Clause 29.2 of the GCC provides levy of liquidated damages due to delay in completion of facilities and non-fulfillment of performance guarantee parameters of facilities. The overall limit of liquidated damages under Clause 29 of the GCC has been restricted to 10% of the Contract Price plus escalation, if any (excluding taxes and duties).<sup>87</sup>
- iii. As per Clause 24.6 of the GCC, in the event that the Contractor fails to complete all the outstanding defects highlighted by SAIL at the time of issuance of PAC, SAIL may undertake such completion at the cost of the Contractor.<sup>88</sup>
- iv. Clause 44.2.4 of the GCC provides that in the event of termination of the Contract on account of Contractor's default, SAIL may complete the Facilities at the risk and cost of the Contractor.<sup>89</sup>

*Performance of the Contract*

157. As is evident from the record, there were substantial delays in the submission of critical designs and drawings by the Consortium. There were also

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<sup>86</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Article 5.

<sup>87</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Article 9 r/w GCC, Clause 29.2.

<sup>88</sup> Contract, 11 May 2010, **R-1**, GCC, Clause 24.6.

<sup>89</sup> Contract, 11 May 2010, **R-1**, GCC, Clause 44.2.4.

considerable delays in the execution of engineering activities and civil works. Notably, the consortium partner responsible for the erection and supply of erection accessories, Shriram EPC, was also failing to meet targets. The Consortium failed to coordinate amongst its members and consistently failed to mobilize adequate resources, including equipment and manpower.<sup>90</sup>

158. Moreover, the designs and drawings which were submitted were not in accordance with the Contract Technical Specifications. Consequently, SAIL was constrained to dismantle and redo some of the civil construction executed by the Consortium, at its own cost.
159. The Consortium repeatedly requested SAIL for extensions of time, promising the Answering Respondent that it would complete the Facilities. The Consortium's letters were entirely bereft of reasons.<sup>91</sup> Nonetheless, at the time, without prejudice to its rights and in the interest of expeditious completion of the Facilities, SAIL relied on the Consortium's promises and granted extensions of time while reserving its right to levy liquidated damages for the delay.<sup>92</sup> SAIL also admittedly paid the Claimant towards 90% of its scope of work under the Contract despite the delays and the deficiencies involved, many of which SAIL was constrained to remedy at its own cost.
160. However, the Consortium persisted in its failure to deploy sufficient resources, equipment, and manpower even within the extended time-period, continuing to act negligently and in contravention of the Contract, despite being informed repeatedly that the Answering Respondent is incurring

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<sup>90</sup> Supra at 21.

<sup>91</sup> Supra at 22.

<sup>92</sup> Supra at 23.



heavy losses for every day's delay.<sup>93</sup> Moreover, the hot trials were plagued with constant breakdown of equipment.<sup>94</sup>

161. Pertinently, the erection, testing and trial runs of the individual units of the Facilities were completed only on 15 March 2016. However, as is noted in the PAC, numerous defects and deficiencies remained in the Consortium's work even at this time.
162. Consequently, by the PAC, SAIL required the Consortium to liquidate all outstanding defects and deficiencies at the earliest so that the commissioning work could begin.<sup>95</sup> Significantly, there is no reference to the list of defects and deficiencies annexed to the PAC in the Claimant's RFA and the said annexure has not been placed on record.
163. The Consortium failed to remedy the defects and deficiencies in the Facilities and persisted in delaying the commissioning on one pretext or another. The first section of the Facilities identified for commissioning was found to be incapable of rolling the requisite type of steel viz. MC 300. It took the Consortium multiple trials over a period of 4 months and over 15,000 tons of trial rolling of blooms to conclude that the Facilities are not capable of rolling the requisite MC-300 steel, which is part of the six sections covered in the performance guarantee tests under the Contract. In fact, the same is yet to be rectified. The Consortium also continued to make several major design changes.<sup>96</sup>

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<sup>93</sup> Supra at 24.

<sup>94</sup> Supra at 25.

<sup>95</sup> Supra at 26.

<sup>96</sup> Supra at 27.

164. Contrary to the Claimants' averments pertaining to SAIL's preference to undertake commercial production over commissioning of the Facilities, SAIL only had to roll other sections of the Facilities to keep the Facilities in a working condition, and to stabilize the other sections as it would have been difficult to bring back the Facilities into the rolling condition after prolonged stoppage.
165. However, as the Consortium consistently requested for commissioning of the Facilities despite its failure to stabilize MC300, SAIL agreed to proceed with commissioning despite the ongoing issues, defects, and design deficiencies in the Facilities.<sup>97</sup>
166. The commissioning tests were finally carried out between 15 June 2019 and 26 June 2019. However, the Consortium failed to achieve the requisite production of 22,000 tons in 10 days, producing only 11,970 tons, which is far below the contractual threshold.<sup>98</sup>
167. Even after failure of the Consortium to successfully comply with the contractual requirements for commissioning of the Facilities, SAIL continued to request the Consortium to rectify all the defects and conduct a successful commissioning.<sup>99</sup>
168. Pertinently, the Consortium consistently continued to request SAIL for extension of time to complete the Facilities which were accepted by SAIL without prejudice to its rights under the Contract. The last request was made

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<sup>97</sup> Supra at 28.

<sup>98</sup> Supra at 29.

<sup>99</sup> Supra at 30.

by the Claimant on 10.12.2021 for an extension up to 31.12.2021 for completion of the Facilities.<sup>100</sup>

169. The Answering Respondent respectfully states that the Consortium was unable to achieve the requisite production and satisfy the contractual parameters for commissioning or even stabilize the MC 300 section. Consequently, the commissioning, which was originally required to be completed on or before 10 September 2012, remained pending for over a decade after the expiry of the contractually stipulated time-period.

170. Therefore, the Answering Respondent is submitting the present counterclaim against the Consortium.

**B. Consortium's failure to complete all the outstanding defects highlighted by SAIL at the time of issuance of PAC**

171. It is submitted that the erection, testing and trial runs of the individual units of the Facilities were completed only on 15 March 2016. However, as is noted in the PAC, numerous defects and deficiencies remained in the Consortium's work even at this time. Consequently, by the PAC, SAIL required the Consortium to liquidate all outstanding defects and deficiencies at the earliest so that the commissioning work could begin.<sup>101</sup>

172. However, the Consortium failed to remedy the defects and deficiencies in the Facilities and persisted in delaying the commissioning on one pretext or another. The first section of the Facilities identified for commissioning was found to be incapable of rolling the requisite type of steel viz. MC 300. It

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<sup>100</sup> Supra at 31.

<sup>101</sup> Supra at 26.

took the Consortium multiple trials over a period of 4 months and over 15,000 tons of trial rolling of blooms to conclude that the Facilities are not capable of rolling the requisite MC-300 steel, which is part of the six sections covered in the performance guarantee tests under the Contract. In fact, the same is yet to be rectified. The Consortium also continued to make several major design changes.<sup>102</sup>

173. It is submitted that the Consortium failed to rectify the defects highlighted at the time of PAC. Consequently, SAIL was constrained to dismantle and redo some of the civil construction executed by the Consortium, at its own cost.
174. As per Clause 24.6 of the GCC, in the event that the Contractor fails to complete all the outstanding defects highlighted by SAIL at the time of issuance of PAC, SAIL may undertake such completion at the cost of the Contractor. Clause 24.6 of the GCC is extracted below for convenient reference:

*"24.6 As soon as possible, after issue of Preliminary Acceptance Certificate, the Contractor shall complete all outstanding defects and/or deficiencies so that the Facilities are fully in accordance with the requirements of the Contract, failing which the Employer will undertake such completion and deduct the costs thereof from any money owing to the Contractor."*

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<sup>102</sup> Supra at 27.

175. In order to rectify the defects, SAIL had and or will have to incur INR 23,85,00,000/- (Rupees Twenty-Three Crore Eighty-Five Lakh Only).<sup>103</sup> A detailed break-up of the costs is provided below:

a. Defects which need to be rectified

S. No.	Defects	Approximate Cost (in crores)
i.	PROSCAN inoperative	INR 5.00
ii.	Roll Load cells inoperative	INR 0.50
iii.	Software bugs in automation interbloom calling misrepresentation	INR 15-18
iv.	Level-1 Automation not fully established - auto tension control, load control, speed control etc. absent	
v.	LEVEL-2 automation not in operation	
vi.	Modification of chute of Crop Shear	0.60 – 0.70
	<b>Total</b>	<b>21.10-24.20</b>
	<b>Average</b>	<b>22.65</b>

a. Principal Modifications Carried Out By DSP

S. No.	Principal modifications carried out by DSP	Cost (in Crores)
1.	Section change/Roll change time reduced	-
2.	Stand Assembly system modification by introducing a new tackle for V/Roll assembly	0.005
3.	TCA and Cooling bed carriage lifting Primary rod design changed to stop its frequent failure	0.05

<sup>103</sup> IDBI Capital Markets & Securities Limited, Techno Commercial Assessment Report, July 2023, page 68, R-1/22.

4.	V/Roll modified for easy stabilization of Beams (NPB/WPB)	-
5.	System introduced to have V/R of Stand 14 and 16 of equal sizes so as to have straight head	-
6.	Introduction of trailing cables for Cold saw drives (both feeding and control cables)	0.1
7.	Standby BLV for critical areas installed	0.02
8.	Modification in sensing system of Hot Saw	0.02
9.	Modification in sensing system of stacker inlet	0.02
10.	Cold Saw R/way 10 No's modified to shaft mounted drive from chain drive	0.04
11.	Improvement of drive communication system	0.04
12.	Stand Enerpac redundancy designed and used whenever required	0.02
13.	Saw blade changing process modified	0.005
14.	Manifold blocks for Air-oil modified	0.02
15.	Booster pumping station for stand 12 to 16 roll cooling system	0.80
16.	New local station for stand 15 for parallel working	0.04
17.	New camera at cooling bed with access at cooling bed cabin	0.015
18.	Rolls Guides and tackles modified for 150 and 125 channel stand 13 & 15	0.01
19.	Hydraulic stopper in between transfer carriage and cold saw is inoperative since beginning	-
20.	Modification in rolling schedule for better load distribution	-
21.	Rolls from stand 9 to 12 for angle 90 marking done to aid proper guide placemen	-

	<b>Total</b>	<b>1.20</b>
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176. Therefore, the Answering Respondent seeks a direction from this Hon'ble Arbitral Tribunal to direct the Consortium including the Claimant, Respondent No. 2 and Respondent No. 3 to pay INR 23,85,00,000/- (Rupees Twenty-Three Crore Eighty-Five Lakh Only) on account of failure to rectify the defects at the PAC.

**C. The Consortium failed to commission the Facilities and fulfill the performance guarantee parameters of the Facilities.**

177. It is submitted that the Consortium consistently requested for commissioning of the Facilities despite its failure to stabilize MC300. Therefore, the Answering Respondent agreed to proceed with commissioning despite the ongoing issues, defects, and design deficiencies in the Facilities.<sup>104</sup>

178. The commissioning tests were finally carried out between 15 June 2019 and 26 June 2019. However, the Consortium failed to achieve the requisite production of 22,000 tons in 10 days, producing only 11,970 tons, which is far below the contractual threshold.<sup>105</sup>

179. Even after failure of the Consortium to successfully comply with the contractual requirements for commissioning of the Facilities, SAIL continued to request the Consortium to rectify all the defects and conduct a successful commissioning.<sup>106</sup>

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<sup>104</sup> Supra at 28.

<sup>105</sup> Supra at 29.

<sup>106</sup> Supra at 30.

180. In this regard, reliance may be placed on a Technical Report conducted on the Facilities at the DSP by LSI Financial Services Private Limited conducted in July 2023 which highlights the issues at the Facilities.<sup>107</sup> The report highlights inter alia the following issues:

- i. A design problem in the capacity of the crop shear collecting bucket.
- ii. A defect has been reported from the control system software where actual pulling interval of bloom from the preheater is found more than that set in the software.
- iii. Cutting operation of front and tail end is being done downstream in the Mill (Cold Saw) with consequent loss of yield which results in some loss of production.
- iv. Frequent roll breakages increase the downtime and setting time and that can have an impact on throughput.
- v. There is a delay in the Hot Cut Saw and Sample Recovery Device of 8 to 10 minutes each and leads to production loss opportunity of approximately 30 minutes in a shift.

181. The technical findings established that against the contracted capacity of 1.00 million TPA Mill, the effective capacity of the Facilities stands at 0.720 million TPA only due to certain design deficiencies established in the Facilities and its operations.

182. Pertinently, the Consortium consistently continued to request SAIL for extension of time to complete the Facilities which were accepted by SAIL

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<sup>107</sup> Supra at 56.



without prejudice to its rights under the Contract. The last request was made by the Claimant on 10.12.2021 for an extension up to 31.12.2021 for completion of the Facilities.<sup>108</sup>

183. Article 9 of the Contract and Clause 29.2 of the GCC provides levy of liquidated damages due to delay in completion of facilities and non-fulfillment of performance guarantee parameters of facilities. The overall limit of liquidated damages has been restricted to 10% of the Contract Price plus escalation, if any.<sup>109</sup>
184. The Answering Respondent respectfully states that the Consortium was unable to achieve the requisite production and satisfy the contractual parameters for commissioning or even stabilize the MC 300 section. Consequently, the commissioning, which was originally required to be completed on or before 10 September 2012, remained pending for over a decade after the expiry of the contractually stipulated time-period.
185. Consequently, the Consortium has not been able to fulfill the performance guarantee parameters for them being contingent of the successful commissioning of the Facilities. As aforesaid, the Consortium has been unable to achieve the requisite production and satisfy the contractual parameters for commissioning and the same remains pending. Therefore, the Consortium has failed to fulfill the performance guarantee parameters under Clause 27 the GCC.
186. It is submitted that SAIL has incurred substantial losses due to Consortium's failure to commission the facilities. As per the Techno Commercial Assessment Report prepared by the IDBI Capital Markets & Securities

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<sup>108</sup> Supra at 31.

<sup>109</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Article 9.

Limited, SAIL has incurred total losses amounting to approximately INR 810,31,00,000/- (INR Eight Hundred Ten Crore Thirty-One Lakh Only).<sup>110</sup>

187. Therefore, in view of the Contract, the Answering Respondent seeks a direction from this Hon'ble Arbitral Tribunal to direct the Consortium including the Claimant, Respondent No. 2 and Respondent No. 3 to pay INR 81,03,10,000/- (Rupees Eighty One Crore Three Lakh Ten Thousand Only) on account of failure to commission the facilities and failure to fulfill performance guarantee parameters.

**D. Risk Purchase costs towards the completion of the Facilities**

188. As aforesaid, the Facilities were to be set up to meet the demand for various grades of steel for numerous construction and infrastructure development programmes in India. The Answering Respondent respectfully states that the Consortium is in default of the Contract, having chosen to abandon Facilities and the project site. The deployment of resources including manpower for the execution of the Facilities dwindled continuously and the work has now come to a complete standstill after June 2019.

189. It is submitted that in view of Clause 44 of the GCC, SAIL vide letter dated 26.11.2022<sup>111</sup> terminated the Contract with effect from 21.10.2022 on account of inter alia following violations by the Consortium:

- i. Consortium has assigned the Contract without SAIL's express prior written consent. In this regard, reliance may be given to submissions against Claim 3 at Response No. B, Responses/Objections to Claimant's Claims.

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<sup>110</sup> IDBI Capital Markets & Securities Limited, Techno Commercial Assessment Report, July 2023, page 71, **R-1/22**.

<sup>111</sup> Supra at 34.

- ii. Consortium has failed to fulfill its contractual obligations by inter alia failing to commission the Facilities and rectify the PAC defects. In this regard, reference may be given to submissions made against Claim Nos. 6 to 9 at Response No. E, Responses/Objections to Claimant's Claims.

190. It is further submitted that Clause 44.2.4 of the GCC provides that in the event of termination of the Contract on account of Contractor's default, SAIL may complete the Facilities at the risk and cost of the Contractor. Clause 44.2.4 is extracted below for convenient reference:

*"44.2.4 The Employer may enter upon the Site, expel the Contractor, and complete the Facilities itself or by employing any third party at the risk and cost of the Contractor. The Employer may, to the exclusion of any right of the Contractor over the same, take over and use any Contractor's Equipment owned by the Contractor and on the Site in connection with the Facilities for such reasonable period as the Employer considers expedient for the supply and installation of the Facilities.*

*... "*

191. As per the Technical Report conducted on the Facilities at the DSP by LSI Financial Services Private Limited conducted in July 2023, the effective capacity of the Facilities stands at 0.720 Million TPA against the contracted capacity of 1.00 million TPA.<sup>112</sup> Therefore, to take the overall capacity of the Facilities to 1.00 MTPA, an altogether new 0.28 MTPA identical Mill will have to be set up at an additional cost.

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<sup>112</sup> Supra at 56.

192. As per the Techno Commercial Assessment Report prepared by the IDBI Capital Markets & Securities Limited, SAIL would incur approximately INR 427,00,00,000/- to complete the works at the Facilities. A detailed break up of the costs is provide below:

a. Basis of arriving at Cost of Rs. 427 Crore<sup>113</sup>

S. No.	Particulars	Details
	Capacity Considered	0.45 MTPA
1.	Total weight of supply equipment assumed (A)	14,500 tons
2.	Composite rate of equipment has been considered (B)	INR 2,70,000/- per ton
3.	Estimated cost of supply (A * B)	INR 391,20,00,000/-
4.	Rounded-off (C)	INR 390,00,00,000/-
5.	Add: estimated cost of erection & commissioning (D)	INR 20,00,00,000/-
6.	Add: Estimated cost of design & engineering, training & commissioning assistance (E)	INR 17,00,00,000/-
	<b>Total Estimated Cost of 0.45MTPA (C+D+E)</b>	<b>INR 427,00,00,000/-</b>
	<b>Cost considered for 0.28 MTPA on pro-rata basis</b>	<b>INR 266,00,00,000/-</b>

193. Therefore, the Answering Respondent seeks a direction from this Hon'ble Arbitral Tribunal to direct the Consortium including the Claimant,

<sup>113</sup> IDBI Capital Markets & Securities Limited, Techno Commercial Assessment Report, July 2023, page 67, R-1/22.

Respondent No. 2 and Respondent No. 3 to pay INR 266,00,00,000/- (Rupees Two Hundred Sixty-Six Crore Only) on account of risk and cost for completion of the Facilities.

194. SAIL reserves its right and/or craves leave of this Hon'ble Arbitral Tribunal to rely upon, all any other records that may come up during the course of the present arbitration proceedings.

## **VI. RELIEFS**

195. In view of the above, the Tribunal be pleased to allow the following relief to the Answering Respondent:

- (i) HOLD that the claim is not maintainable as the Claimant is not a party to the arbitration agreement in its individual capacity and cannot invoke the arbitration clause independently;
- (ii) HOLD that the assignment of rights and liabilities of PT Italy to PT India is invalid, non-est and not in accordance with the Contract;
- (iii) HOLD that the members of the Consortium are jointly responsible for the execution of the Contract;
- (iv) DECLARE that the delay in handing over of the entire Project site including the civil front is attributable solely to the Consortium;
- (v) DECLARE that the Respondent No. 1 has not been using the plant unilaterally for commercial production;

- (vi) DECLARE that the Consortium has failed to commission the Facilities and is not entitled to the issuance of the Commissioning Certificate, Performance Guarantee Certificate and the Final Acceptance Certificate, including any corresponding payments whatsoever;
- (vii) HOLD that the termination notice issued by SAIL dated 22.11.2022 terminating the Contract is valid in law;
- (viii) HOLD that Respondent No. 3 is not entitled to any price escalations and over runs;
- (ix) DECLARE that the Consortium is not entitled to the release of the Performance Bank Guarantees;
- (x) DECLARE that the Consortium is not entitled on any award on costs of the present arbitration proceedings;
- (xi) DECLARE that the Consortium is not entitled to any rate of interest as no amount is due and payable;
- (xii) DIRECT the Consortium to pay INR 23,85,00,000/- (Rupees Twenty-Three Crore Eighty-Five Lakh Only) on account of failure to rectify the defects at the PAC;
- (xiii) DIRECT the Consortium to pay INR 81,03,10,000/- (Rupees Eighty-One Crore Three Lakh Ten Thousand Only) on account of failure to commission the facilities and failure to fulfill performance guarantee parameters;

- (xiv) DIRECT the Consortium including the Claimant, Respondent No. 2 and Respondent No. 3 to pay INR 266,00,00,000/- (Rupees Two Hundred Sixty-Six Crore Only) on account of risk and cost for completion of the Facilities;
- (xv) Direct the Consortium to pay interest on sums found due and post Award interest at the same rate or such other rate as the Tribunal may determine;
- (xvi) Costs of the present arbitration proceedings; and
- (xvii) Any other and further reliefs as the Tribunal deems relevant.

Date: 3 August 2023

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