

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

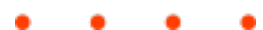
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By Jaswant patel

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**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**

**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**

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**ANSWER TO REQUEST  
FOR ARBITRATION  
07 OCTOBER 2022**

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## I. INTRODUCTION

1. The Claimant, Primetals Technologies India Private Limited (“**Primetals**” / “**Claimant**”), has initiated the captioned arbitration proceedings under contract dated 11 May 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) (“**Respondent No. 2**”) and Shriram EPC Ltd. (“**Shriram EPC**” / “**Respondent No. 3**”) for the setting up of a Medium Structural Mill (“**the Facilities**”) at Durgapur Steel Plant (**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) (“**Contract Price**”)
2. In accordance with Article 5 of the ICC Arbitration Rules effective 01 January 2021 (“**ICC Rules**”), SAIL submits this Answer to the Request for Arbitration (“**RFA**”) dated 20 July 2022 filed by the Claimant.
3. By the RFA, the Claimant has sought inter alia 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 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 the Consortium 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.
5. At the outset, it is stated and submitted that the contentions and averments made by the Claimants are false, misleading, and contrary to the record. The Answering Respondent disputes all averments, contentions and allegations made by the Claimant in its RFA, except in so far as they relate to matters of record. No averment, allegation or contention made by the Claimant should be deemed to be admitted for non-traversal or otherwise.
6. Briefly stated, the Answering Respondent is one of the largest producers of steel in India and DSP is one of its largest production units, producing liquid steel which is cast into billets, blooms and rounds. DSP also produces parallel beams, TMT bars as well as wheels and axles for the Indian Railways.
7. 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.
8. Nonetheless, in the interest of completion of the Facilities and relying in good faith on the Consortium’s promise that going forward it would perform its obligations under the Contract, SAIL, without prejudice to its rights, granted multiple extensions of time to the Consortium at its request. SAIL also admittedly paid the Claimant towards 90% of its scope of work under the

Contract despite the delays and the deficiencies in the Claimant's work, many of which SAIL was constrained to remedy at its own cost.

9. However, the Consortium has persisted in its failure to perform its obligations under the Contract and a significant portion of its scope of work, including the successful commissioning of the Facilities, remains pending even a decade after the expiry of the originally stipulated time-period. Moreover, there are multiple defects and deficiencies in the work carried out by the Consortium, which defects are yet to be rectified despite multiple requests from SAIL over the years.
10. It is humbly stated that SAIL has incurred heavy losses on account of the substantial delay in the commissioning of the Facilities as well as the defects in the work executed so far, both of which are wholly attributable to the Consortium and its members, including the Claimant. However, instead of working to complete the Facilities within the extended time-period, the Claimant has abandoned the project site and seeks inter alia payment for the contractual milestones it has evidently failed to complete so far.
11. SAIL respectfully 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 said arbitration agreement 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 and that Respondent No. 2 has allegedly been taken over by a German company, Callista Private Equity GmbH, are denied being false and contrary to the record. No such documents of takeover or assignment have been placed on record. In any event, any such takeover and/or assignment without SAIL's prior approval is contrary to the provisions of the Contract.

12. In any event and without prejudice to the aforesaid, 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, and has selectively placed only self-serving documents on record.
13. Accordingly, Respondent No. 1 respectfully requests that the Tribunal dismiss the reliefs sought by the Claimant, including payment of INR 51,72,26,676/- (Rupees Fifty-One Crore Seventy-Two Lakhs Twenty-Six Thousand Six Hundred and Seventy-Six) along with interest, and instead direct the Claimant, Respondent 2, and Respondent No. 3 to take all necessary steps, jointly and severally, to complete the balance work and perform all their obligations under the Contract forthwith.
14. The remainder of this Answer is structured as follows:
  - (i) Section II provides particulars of the Answering Respondent and its counsel;
  - (ii) Section III briefly sets out SAIL's response to Primetals' claim;
  - (iii) Section IV briefly sets out SAIL's counterclaim;
  - (iv) Section V deals with procedural matters in this arbitration;
  - (v) Section VI sets out the Answering Respondent's prayer for relief; and
  - (vi) Section VII contains the Answering Respondent's reservation of rights.

## II. PARTICULARS OF THE ANSWERING RESPONDENT AND ITS COUNSEL

### A. Answering Respondent

15. 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. The contact details of the Answering Respondent are as follows:

Address: Durgapur Steel Plant,  
Durgapur- 713 203,  
West Bengal India  
Telephone: +91 343 2574346  
Email: [sanjay.isp@sail.in](mailto:sanjay.isp@sail.in)  
[Vikas.gill@sail.in](mailto:Vikas.gill@sail.in)  
[Sumit.gehlot@sail.in](mailto:Sumit.gehlot@sail.in)  
[Sumant.mathur@sail.in](mailto:Sumant.mathur@sail.in)  
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[m.agarwal@sail.in](mailto:m.agarwal@sail.in)/ [magarwalsail@gmail.com](mailto:magarwalsail@gmail.com)  
[koirobibiswas2@gmail.com](mailto:koirobibiswas2@gmail.com)

### B. Counsel

16. The answering Respondent is represented in this arbitration by Trilegal. All correspondence and notices to the answering Respondent in this arbitration should be addressed to:



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Shivani Khandekar  
Ishan Bisht  
Gokul Holani

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[gokul.holani@trilegal.com](mailto:gokul.holani@trilegal.com)

### **III. ANSWER TO PRIMETALS' CLAIMS**

17. Pursuant to Article 5 of the ICC Rules, the Answering Respondent sets out below its answer to the claims in RFA. As aforesaid, Respondent No. 1 denies all allegations and adverse observations made against it in the RFA and nothing therein ought to be deemed to have been admitted by it for the lack of specific traversal or otherwise.

#### **A. FACTS**

##### **1. Contract**

18. This arbitration arises from the Contract dated 11 May 2010 executed between Respondent No. 1 and the Consortium comprising the Claimant, Respondent No. 2, and Respondent No. 3 for the setting up of the Facilities 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).<sup>1</sup>
19. The Contract was awarded to the Consortium pursuant to a global tender dated 23 October 2007 for the installation of the Facilities and, comprises the Contract Agreement and its appendices (“**Contract Agreement**”), 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>2</sup>
20. 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>3</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>4</sup>
21. 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**, Contract Agreement, Article 2.

<sup>2</sup> Contract, 11 May 2010, **R-1**.

<sup>3</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Article 4 r/w GCC, Clause 7.

<sup>4</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>5</sup>
22. Under Article 5 of the Contract Agreement, the Facilities, including the Claimant's above scope of work, 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>6</sup>
23. 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>7</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, is jointly and severally liable for such liquidated damages.<sup>8</sup>
24. 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>9</sup>
  - (ii) the performance guarantee test;<sup>10</sup>

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<sup>5</sup> Contract, 11 May 2010, **R-1**, Contract Technical Specifications, Part III, Annexure-1.

<sup>6</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Article 5 r/w Appendix-2.

<sup>7</sup> Contract, 11 May 2010, **R-1**, GCC, Clause 29 r/w Contract Agreement, Articles 5 and 9 and GCC, Clause 42.

<sup>8</sup> *Ibid*

<sup>9</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Appendix-3, Clause 2.1.5.

<sup>10</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Appendix-3, Clause 2.1.6.

- (iii) the Final Acceptance Certificate;<sup>11</sup> and
- (iv) the Performance Bank Guarantee submitted under Clause 13.2 of the GCC.<sup>12</sup>

## **2. Consortium's persistent failure to perform the Contract**

25. Pertinently, from the commencement of the Contract, the Consortium failed to mobilize adequate resources and persistently failed to execute the work in accordance with the contractually specified timelines despite repeated reminders and requests from the Answering Respondent. However, even after the expiry of the contractually stipulated time-period, the Consortium had failed to make any significant progress in setting up the Facilities. The Consortium and the Claimant have sought to cover-up their lapses by falsely seeking to place the blame for the delay on SAIL and has also falsely sought to contend that the production trials at the Facilities have resulted in steel products which are purportedly acceptable under BIS standards. All of the Claimant's averments in this regard are denied being false and contrary to the record.
26. 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. The Consortium failed to coordinate amongst its members and consistently failed to mobilize adequate resources, including equipment and manpower.<sup>13</sup>
27. 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>11</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Appendix-3, Clause 2.1.7.

<sup>12</sup> Contract, 11 May 2010, **R-1**, GCC, Clause 13.2.

<sup>13</sup> Letter from SAIL to the Consortium, 06 May 2013, **R-2**; Letter from SAIL to the Consortium, 31 January 2014, **R-3**.

28. 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>14</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>15</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.
29. 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>16</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>17</sup>

## **B. CLAIMS REGARDING COMMISSIONING OF THE PLANT**

30. 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.

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<sup>14</sup> Letter from Consortium to SAIL, 09 April 2019, **R-4**; Letter from Consortium to SAIL, 10 December 2021, **R-5**.

<sup>15</sup> Letters from SAIL to Consortium, **Claimant's Exhibit D (Colly)**.

<sup>16</sup> Letter from SAIL to Consortium, 11 April 2015, **R-6**.

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

31. 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 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.
32. 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 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."*

33. 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>18</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.

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<sup>18</sup> PAC issued by SAIL to Consortium, 17 March 2016, **R-9**.

34. 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.
35. 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 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."*

36. 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>19</sup>
37. 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.

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<sup>19</sup> Letter from SAIL to Consortium, 21 January 2020, **R-10**.



38. 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.<sup>20</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 Claimant is not entitled to issuance of the Commissioning Certificate or for any payment towards commissioning or any other milestones under the Contract.

#### **C. CLAIMS REGARDING PERFORMANCE GUARANTEE TESTS**

39. 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.
40. 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

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<sup>20</sup> Contract, 11 May 2010, **R-1**, SCC, Clause 41 r/w GCC, Clause 25.

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*.

#### **D. CLAIMS REGARDING FINAL ACCEPTANCE CERTIFICATE**

41. 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.
42. 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:
  - (i) all defects and deficiencies mentioned in the PAC have been rectified/liquidated;
  - (ii) the performance guarantee tests have been successfully completed and the guaranteed output and other parameters are met by the Contractor; and
  - (iii) the Contractor has fulfilled all the obligations under the Contract.
43. 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.

44. Furthermore, 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. In view of the aforesaid, the Answering Respondent respectfully seeks that the Claimant's prayer for release of its bank guarantees be dismissed.
45. Moreover, 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 said arbitration agreement 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 and that Respondent No. 2 has allegedly been taken over by a German company, Callista Private Equity GmbH are denied being false and contrary to the record. No such documents of takeover or assignment have been placed on record. In any event, any such takeover and/or assignment without SAIL's prior approval is contrary to the provisions of the Contract.
46. In any event, 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.

#### **IV. ANSWERING RESPONDENT'S COUNTERCLAIM**

47. 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.
48. At this time, a significant portion of the Claimant's scope of work, including the commissioning and the establishment of the performance guarantee parameters remains pending. Moreover, as aforesaid there are multiple defects and deficiencies in the work carried out by the Consortium, which defects are yet to be rectified despite multiple requests from SAIL over the years. Pertinently, the Contract requires all parties, including the Consortium and its members, to continue to perform their contractual obligations even during the pendency of any conciliation or arbitration proceedings.<sup>21</sup> It is humbly stated that SAIL is incurring heavy losses for every day's delay. Accordingly, the Answering Respondent respectfully prays for a direction to the Consortium comprising the Claimant, Respondent 2 and Respondent 3 to complete the balance work under the Contract and perform all its obligations forthwith.

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<sup>21</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Article 10 r/w GCC, Clause 6.

49. Pertinently, Clauses 37 and 44.2 entitles SAIL to terminate the Contract, without prejudice to its rights and at the risk and cost of the Consortium, in the event inter alia that the Consortium and/or the Claimant:
- (i) Assign or transfer the contract or any right of interest therein without SAIL's prior approval;
  - (ii) Abandon or repudiate the Contract;
  - (iii) Suspend the progress of the Contract for more than 28 days after receiving a written instruction from SAIL to proceed; or
  - (iv) Persistently fail to execute the Contract or neglect to carry out their obligations.<sup>22</sup>
50. Respondent No. 1 respectfully states that is amply clear that the delays in the execution of the Contract are solely on account of the Consortium's negligence, including its failure to allocate the requisite resources and remedy the defects in its work. The Answering Respondent continues to incur heavy losses as a result of the Consortium's persistent failure to execute the Contract and perform its obligations. The Consortium and Claimant have also acted contrary to the Contract if the rights and liabilities of Respondent No. 2 have been assigned to the Claimant and if Respondent No. 2 has been taken over Callista Private Equity GmbH without prior approval from SAIL.<sup>23</sup>
51. Nonetheless, in the interest of expeditious completion of the facilities, by its letter dated 28 September 2022, SAIL has offered the Consortium a final opportunity to commission and complete the Facilities. However, unless the Consortium undertakes to perform its obligations under the Contract, the Answering Respondent will be constrained to terminate the same at the risk and cost of the Consortium. Such risk purchase amount can only be crystallized upon execution of the contracts for completion of the balance work. Furthermore, SAIL may also be constrained to claim damages towards compensation for the

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<sup>22</sup> Contract, 11 May 2010, **R-1**, SCC, Clause 3.9.1 r/w GCC, Clauses 37 and 44.2.

<sup>23</sup> Contract, 11 May 2010, **R-1**, SCC, Clause 3.9.1 r/w GCC, Clause 45.

significant losses incurred on account of the Consortium's delays as well as the defects and deficiencies in its work.

52. In view of the above, the Answering Respondent expressly reserves its rights to submit counterclaims (including, without limitation, for damages) as and when the same can be quantified and/or to amend its prayer for relief. This response does not contain the Answering Respondent's Statement of Defence, and is without prejudice to the Answering Respondent's right to amend and supplement this Answer and the defences, claims and particulars set out above.

## **V. MATTERS RELATING TO THE ARBITRATION**

### **A. Constitution of the Tribunal**

53. By its email dated 06 September 2022, and in accordance with Article 5(2) of the ICC Rules, the Answering Respondent has confirmed that it has no objection to the appointment of a three-member arbitral tribunal in the captioned proceedings. Accordingly, under Article 12(4) of the ICC Rules, SAIL has nominated:

Arbitrator: Justice (Retired) L. Nageswara Rao  
 Address: 304, Sector 15-A, Noida, Uttar Pradesh, India - 201 301  
 Telephone: +91-9810035984/ +91-9810559984  
 Email: [lnrao.office@gmail.com](mailto:lnrao.office@gmail.com)/ [justicelnrao.arb@gmail.com](mailto:justicelnrao.arb@gmail.com)

54. The Claimant has nominated:

Arbitrator: Justice (Retired) Mr. Sudhansu Jyoti Mukhopadhyaya  
 Address: 1<sup>st</sup> Floor, Block C-470, Defence Colony,  
 New Delhi – 110024

Telephone: +91-9810035984/ +91-9810559984

Email: [sjmukhopadhaya@gmail.com](mailto:sjmukhopadhaya@gmail.com)

55. The Answering Respondent requests the International Court of Arbitration (the “**Court**”) to confirm the appointment of the Answering Respondent’s nominee and appoint the third arbitrator in accordance with Article 12(5) of the ICC Rules. As the dispute in the captioned proceedings is governed by Indian law, Respondent No. 1 respectfully requests the Court to appoint a retired judge of the Hon’ble Supreme Court of India as the third arbitrator.

#### **B. Governing Law, Rules, and Seat of the Arbitration**

56. The Answering Respondent notes that the Contract is governed by and must be construed in accordance with the law of India.<sup>24</sup>
57. The Answering Respondent agrees that the ICC Rules of Arbitration, 2021 shall apply to the arbitration.<sup>25</sup>
58. The Answering Respondent submits that the venue of the arbitral proceedings is New Delhi and the seat/place of the arbitration is Durgapur, West Bengal, India as the courts of Durgapur have exclusive jurisdiction over all matters pertaining to the Contract.<sup>26</sup>

#### **C. Language of the Arbitration**

59. The Answering Respondent agrees that the language of the arbitration shall be English.

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<sup>24</sup> Contract, 11 May 2010, **R-1**, GCC, Clause 5.

<sup>25</sup> Contract, 11 May 2010, **R-1**, Contract Agreement, Article 10 r/w GCC, Clause 6.

<sup>26</sup> *Ibid.*

**VI. PRAYER FOR RELIEF**

For the reasons outlined above, the answering Respondent respectfully requests that the Tribunal:

- (a) DISMISS the Claimant's claims in their entirety;
- (b) DIRECT the Claimant, Respondent No. 2 and Respondent No. 3 to take all necessary steps, jointly or severally, to complete their balance work and perform their obligations under the Contract forthwith;
- (c) DIRECT the Claimant to pay all costs and fees for this arbitration and all related proceedings on a full indemnity basis, including the administrative fees and costs incurred, the fees and expenses of the Tribunal and of any experts appointed by it, and the answering Respondent's legal costs (both internal and external) and disbursements for this arbitration; and
- (d) ORDER such other and further reliefs as the Tribunal may deem appropriate.

**VII. RESERVATION OF RIGHTS**

The Answering Respondent expressly reserves all its rights in full, including its right to raise jurisdictional objections, to seek interim relief from the Tribunal, to submit additional counterclaims (including, without limitation, for damages) and/or to amend its prayer for relief. This response does not contain the Answering Respondent's Statement of Defence, and is without prejudice to the Answering Respondent's right to amend and supplement this Answer and the defences, claims and particulars set out above.

Date: 07 October 2022





**Jafar Alam**

**Shivani Khandekar**

**Ishan Bisht**

**Gokul Holani**

Advocate for Respondent No. 1

**TRILEGAL**

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