

**BEFORE THE AD-HOC ARBITRAL TRIBUNAL**

**AT THE HAGUE**

***M/s Business Solvables versus Republic of Bath-La & Anr.***

1. Nak Sha and Tra San were citizens of the Commonwealth of Bath-La, and were very close friends. After a successful career as Attorneys for over two decades, in 2014 they decided that they wanted to earn more money which is not possible from a noble profession like Advocacy, and wanted to make a mid-career switch to some highly profitable business. After a year of negotiations, they entered into a partnership on these lines and named it M/s NakSha & TraSan which was registered on 24.1.2015.
2. NakSha was known to be one of the greatest tech lawyers of his time, and he gave tough competition to the CEH Hackers in their job. Given NakSha's prolific achievements in writing applications, the Firm decided to use self-built applications for running the entire incoming supply chain and product sourcing. They decided that the Firm would however sell the products sourced, like any other brick and mortar business. For running the upstream business, at the behest of NakSha, the firm bought a sophisticated server and deployed their applications on the SumerNotes, which deployed containers just like the Kubernetes, but was much inferior to Kubernetes. One of the many areas of inferior functioning of SumerNotes was regarding "Service Discovery and Load Balancing".
3. The Firm commenced its business, and by 2016 it became one of the prominent Ex-Im firms in the area of technology imports and exports from Bath-La.
4. A consignment landed at the Link port of Bath-La on March 12, 2015. It contained box packaged softwares of TRally, manufactured by a Multi-National Company, headquartered in North Korea called M/s Business Solvables. The software was meant for Enterprise Resource Planning [ERP]. It also served as front end and back end accounting software. The contract was entered into at the Bath-La Liaison office of M/s Business Solvables.
5. TRally was known for its strict anti-piracy protocols and it was one of the highest selling ERP softwares in the world and the market leader with over 73% market share in 2014-15.

6. This was the first import of the software into the country, and the deal was a result of arduous negotiations. The import was based on an agreement under which M/s Business Solvables agreed to invest the equivalent of USD One Billion each year for twenty five years into R&D, to customize the software as per the requirements of Businesses of Bath-La; while also making an upfront investment of USD Five Billion. This surprised everyone as the net worth of M/s Business Solvables till 2014 was only USD Fifteen Billion, and their working capital was USD Seven Billion, with a debt-equity ratio of 3:1. The day this contract was entered into, world over the stock prices of M/s Business Solvables dipped by 5-18 %.
7. The agreement posited Ad-hoc Arbitration before an international tribunal as the sole dispute resolution mechanism, and accepted the UNCITRAL as the applicable putative law. The seat of the Tribunal was contemplated at The Hague and both parties assented to resorting to the New York convention for all purposes, other than the ones specifically mentioned in the agreement. Bath-La also entered into a tri-partite sovereign support agreement with M/s Business Solvables and the Firm. This agreement had investment protection clauses as per the Malaysia - United Kingdom BIT (1981) as it stood on date. The agreements had a limitation clause, which required invocation of dispute resolution mechanisms within 180 days of dispute, and in no case later than 189 days.
8. The Bath-La Chambers of Commerce felicitated the Firm and its partners on brining the software into the country, as it will immensely benefit the business community due to its advanced features and ease of use.
9. As soon as the seal of the container was opened by the Customs' officials of Bath-La; Mr. Sha got hold of a package from one of the boxes and opened it. Curiously, while all the other boxes were printed in English, this box was printed in Mandarin. The only words in English were "*License Number- 1983/11/21, Beware: Shrink Wrap, Click Wrap, Browse Wrap-Product of North Korea, All Rights Protected under Applicable Laws*". He took out the CD, leaving the manual and the other papers inside the box, ran it on his handheld Linux notebook computer, which had no anti-virus software or licensed Operating System. He kept on clicking 'OK' on the screen till it reached the EULA page and asked for an internet connection. He connected to the internet, and it opened a website where he again kept on clicking 'OK' in rapid pace. Ultimately he reached the ERP front face of the software, and

was very pleased to operate it. The entire process took him 13 odd minutes.

10. In the meanwhile, the Customs officials sounded an alert that the container contained some boxes which were pirated and non-original version. Mr. Nak and Mr. Sha immediately decided to send the consignment back to the vendor M/s Business Solvables.
11. Soon, pirated copies of TRally were available everywhere and were easily downloadable from a server showing characteristics of use of SumerNotes. All these pirated copies showed *License Number- 1983/11/21*. The location of the server was not traceable and the downloads were possible only via the use DarkNet from the Tor browser. This lead to the legitimate business of M/s Business Solvables coming to a halt and by the close of March, 2015, its revenues dipped by 90%.
12. On or about 23<sup>rd</sup> February 2016, Mr. Nak and Mr. Sha were surprised to receive a notice from the Pyongyang office of Kahn, Bachh & Puch, a renowned law firm having its headquarters at New York invoking Arbitration and nominating Ms Adma Riya as their Arbitrator. The notice stated that the usage of one of the software packets subscribed in name of Mr. Sha & Nak has resulted into piracy due to some hacking activity in Turkmenistan. The License Number- 1983/11/21 has been hacked and thousands of pirated copies have been made out of it. Also, no amounts have been paid by Mr. Nak and Sha towards the said license number ever. The notice also stated that while the clients are contemplating action under the WTO laws; as their clients are facing heavy losses on a day to day basis, therefore it is necessary that immediate damages under the Bath-La laws of license fee for at least ten thousand copies must be paid as an interim measure. A notice on similar lines was also issued to Bath-La through its Attorney General, claiming that M/s Business Solvables has incurred huge loss in its investments in Bath-La, due to lack of enforcement of IPR laws in Bath-La. It further claimed that its business goodwill as well as software patents stand obliterated due to widespread piracy of its software, originating from Bath-La. The notice further raised a grievance against the denial of Return-of-Investment as per the Sovereign Support Agreement (which was demanded by M/s Business Solvables on 21.9.2015 and rejected by Bath-La on 10.1.2016).

13. In response, M/s NakSha & TraSan nominated Ms. San Cheti as their nominated Arbitrator. The two nominated arbitrators met in 1<sup>st</sup> week of February 2016 and decided on Ms. Al Uma as the third and presiding arbitrator; and thus the Ad-Hoc Tribunal stood constituted.
14. In the meanwhile, in the 2<sup>nd</sup> week of February, M/s NakSha & TraSan through their lawyers, instituted a suit in the original side of the Link High Court, in Bath-La; making Bath-La as the 1<sup>st</sup> Defendant and M/s Business Solvables as the 2<sup>nd</sup> Defendant. In the suit, the prayers made were:
  - a) Declare that no contract exists for License Number- 1983/11/21 between the parties;
  - b) Pass an anti-suit injunction or relief of similar nature, against defendant no. 2 not to file any proceeding against the plaintiffs due to absence of any contractual relation; including a prohibition to invoke any BIT/WTO / Arbitral proceedings.
15. Due to the heavy pendency of matters before the Link High Court, the suit came up for hearing only on 8.11.2016. The Attorney General for Bath-La prayed for being deleted as a defendant, which was allowed by the Court. Further, as an interim measure, the Court ordered M/s NakSha & TraSan to pay the amount claimed in cash immediately as an interim measure.
16. M/s NakSha & TraSan delivered the requisite amount in cash to the Link office of M/s Business Solvables. However, on the night of 8.11.2016 at 8 pm, demonetization was imposed by Bath-La, which resulted in all currency given to M/s Business Solvables ceasing to be legal tender.
17. On the next date of hearing, the sole Defendant filed an application to raise a counter-claim in the following terms:
  - a) The Hon'ble Court may refuse to assume jurisdiction of the disputes as there is an Arbitration mechanism contemplated as the sole dispute resolution method; and in alternative;

- b) Hold and declare that there is a valid contract between the parties for License Number- 1983/11/21.
  - c) Further Declare that the original plaintiff is responsible for misuse of License Number- 1983/11/21 which resulted into the counterfeit and pirated copies being made.
  - d) Grant damages to the tune of the exact number of copies pirated, till the date of judgment multiplied by the unit price for each licensed copy.
  - e) Order M/s NakSha & TraSan to take back the invalid currency and pay in legal tender.
18. The High Court rejected the first prayer of M/s Business Solvables, and decided to proceed with the merits of the case. M/s Business Solvables appealed to the Supreme Court of Bath-La claiming that under Kompetenz Kompetenz, the Ad-Hoc Tribunal is competent to rule on its jurisdiction and therefore the proceedings before the High Court must be stayed. Leave was granted to M/s Business Solvables to appeal, and this prayer stood accepted by the Supreme Court granting a stay for twenty weeks, for the Ad Hoc Tribunal to rule on its jurisdiction.

Parties approached the Ad Hoc Tribunal, with the following prayers:

**CLAIMANT-** M/s Business Solvables prayed to declare that:

- I. Tribunal has jurisdiction; and direction by Bath-La Supreme Court to decide in twenty weeks takes away the autonomy of the Ad Hoc Tribunal and is invalid in international law.
- II. There is a valid contract between the parties for License Number- 1983/11/21 and M/s NakSha is responsible for misuse of License Number- 1983/11/21.
- III. M/s NakSha & TraSan and Bath-La are required to grant damages to the tune of the exact number of copies pirated, till the date of judgment multiplied by the unit price for each licensed copy; and Bath-La must make good the investment made by M/s Business Solvables
- IV. Demonetization has resulted in expropriation.

**RESPONDENTS** Bath-La and M/s NakSha & TraSan prayed to declare that:

- I. Above prayers are opposed; and
- II. M/s Business Solvables has already submitted to the jurisdiction of the Link High Court and

therefore the arbitration clause stands superseded; and it has therefore abused the process of law by instituting the arbitration proceedings;

III. Costs must be imposed on Claimants and must be granted in favour of the Respondents.

\*\*\*

**Nota Bene:**

- a. All references, actual, deeming or fictional; are fictional. Assume Link to be London, with all the laws (including subordinate legislation), and judgments applicable in United Kingdom applying to Bath-La. The High Court of Link has same rules as the High Court of Singapore.
- b. Participants stand advised to devise a “litigation strategy”. The issues can be argued in alternative/without prejudice, be divided into sub-issues, **and can be added to or amended upon**. It is permissible to concede issue(s) at the time of oral arguments subject, however, to appropriate explanation readily available on the query of the bench. However, the written submissions must address all the issues.
- c. Any citations, of judgments/ treatises /journals without actual para & page references, will invite negative marking. Unnecessary citations and *passim* references are to be avoided. In case of oral arguments, primary references for all case-laws being referred **is mandatory** and no participant will be allowed to cite a case-law from a secondary source like text-books or commentaries. Primary reference may be made to select treatises which are treated as authorities in their own right.
- d. The moot problem is the way it is, with full application of the principle of “***as is, there is...whatever where is***”. No queries or requests for clarifications will be entertained.
- e. Please avoid use of any plastic materials or binding for the Memorials. Use simple color-paper sheets for identification of respective sides and submit only stapled memorials. Use of **any plastic or binding material** will invite negative marking.

**-Drafted by**

**RISHABH SANCHETI**

**ADVOCATE, SUPREME COURT OF INDIA**