

NIGERIAN BAR ASSOCIATION - YOUNG LAWYERS FORUM

2020 ARBITRATION CHALLENGE

MOOT PROBLEM

November 2020

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3 August 2020

By email and courier

Ms. Gold Audu

Lagos Chamber of Commerce International Arbitration Centre (LACIAC)

1a Remi Olowude Street,
2nd Roundabout, Lekki Phase I,
Lekki-Epe Expressway,
Lagos.

Dear Ms. Audu,

On behalf of my client, Obatis Power Plc, I hereby submit the enclosed Notice of Arbitration pursuant to Article 4 of LACIAC Rules. A copy of the Power of Attorney authorizing me to represent Obatis Power Plc in this arbitration is also enclosed.

The Notice has been served upon Respondent and the registration fee has been paid. The relevant confirmations for service and payment are attached.

The Claimant requests performance of contractual obligations.

The contract giving rise to this arbitration provides that the seat of arbitration shall be Nigeria, the place of arbitration shall be London and the arbitration shall be conducted in English. The arbitration agreement provides for three arbitrators. Obatis Power Plc hereby nominates Frank Adeyemi QC as its arbitrator.

The required documents are attached.

Sincerely yours,

James Faluga

Attachments:

Notice of Arbitration with Exhibits
Power of Attorney (not reproduced)
Proof of Service upon Respondent – Courier Delivery Report (not reproduced)
Proof of Payment of Registration Fee (not reproduced)
cc. Danton Services Ltd

James Faluga
Putin Solicitors
8 Broad Street
Marina
Lagos.
jfaluga@putinlaw.org
+234 0804 634 6430

By courier
Danton Services Ltd
Beaufort House,
15 St Botolph St
London
United Kingdom

Notice of Arbitration

(Pursuant to Article 4 of the Lagos Chamber of Commerce International Arbitration Centre Rules 2016)

in the Arbitral Proceedings

Obatis Power plc v. Danton Services Ltd

Obatis Power Plc
14, Creek Road,
Asaba
Delta State
Nigeria

- CLAIMANT -

Represented by James Faluga

Danton Services Limited
Beaufort House,
15 St Botolph St
London
United Kingdom

- RESPONDENT -

STATEMENT OF FACTS

1. Claimant, Obatis Power Plc, is a market leader in providing pump hydro power plants. It operates in over 100 countries and is well known to build pump hydro power plants in challenging environments conforming to the highest environmental standards.
2. Respondent, Danton Services Ltd, is a world-renowned producer of premium water turbines. It has delivered two of its newest R-27V Francis Turbines to Claimant for Claimant's Idanre Pump Hydro Power Project.

3. Idanre is a city of 100,000 people situated in a remote part of Edo State, Nigeria. Due to the Terranean mountain range, the region is separated from the rest of the country. The main employer is Imperial Manufacturing Limited (**Imperial**), a large company, which produces ecological products such as wetsuits made out of natural rubber or parkas out of plastic bottles. The second main source of employment is sustainable farming.
4. For the last 10 (ten) years Idanre has moved towards being a sustainable community, including adopting a Sustainability Bill of Rights. The latest project to make the city wholly sustainable was to fully switch to renewable energy. In 2011, the Council of Idanre with the support of 82% of the population, adopted a “no-carbon” energy-strategy. The strategy resulted in a massive increase of the wind and solar energy production capacity to meet energy demand.
5. A cornerstone in that strategy was the construction of a pump hydro power plant. Its primary purpose was to make the availability of renewable energy largely independent from the weather conditions which affect the production of wind and solar energy. In times of overproduction, the excess energy produced by the wind turbines and the solar panel is used to pump the water from the lower reservoir into the upper reservoir. From there, the water is then released again to the lower reservoir powering the turbines whenever the demand exceeds the supply of green energy produced by the wind parks and the solar panels. By being able to use a considerable amount of excess energy at times of overproduction and to release energy promptly when needed, the power plant also plays an important role in stabilizing the local Idanre energy grid.
6. In January 2015, the Council of Idanre invited tenders for the construction and operation of the pump hydro power plant necessary to guarantee a consistent power supply in addition to Idanre’s solar and wind energy sources. Claimant participated in the process and submitted a bid. On 15 July 2015, Claimant was awarded the contract. One of the reasons for its successful bid was that Claimant’s pump hydro power plant’s design used Respondent’s newly developed, innovative, and powerful R-27V Francis Turbine. The use of that turbine allowed for a more environmentally-friendly design of the plant since only two turbines were needed to guarantee the needed power of 600 MW.
7. Of at least equal relevance was that according to the information provided by the Respondent, the new turbine, due to its design and the materials used, allowed for longer inspection and maintenance intervals. This was an important consideration since generally each inspection and maintenance results in a reduced availability of the plant of approximately 4-6 weeks. The inspection of each turbine takes around 2-3 weeks, during which only the other turbine is available to manage the supply of energy. Furthermore, for the inspection works at the generator and the penstock the whole plant has to shut down.
8. Thus, during the inspection time, the plant is, at best, only 50% available to store the surplus of energy at peak production times and to release it at times when the demand exceeds the energy produced by the other renewable energy sources. As a consequence, such energy needed would have to come from one of the only two other sources available, i.e. two stacks of powerful batteries of 50 MW each and the coal fired power plant close to the border in the neighbouring town, Odiani which is the only conventional power plant connected to the Idanre grid.

9. To exclude as far as possible the need to buy any energy from the coal fired plant in Odiani, it was planned to schedule all necessary inspections during the vacation time in September/October. In normal years, during the vacation time of eight weeks, the other sources of renewable energy produce sufficient energy to meet the reduced demand. There are very few hours during night- time when the demand exceeds the energy produced. In these few hours the two battery stacks are generally sufficient to provide the required additional quantity of energy. Consequently, even without the power produced by the pump hydro power station, it will then not be necessary to actually purchase energy from the coal fired power plant in Odiani. The latter would only provide reserve energy capacity to guarantee a supply in case of unforeseen events or extreme weather situations. There was, however, the clear expectation that there would be no need to use such reserve capacity.
10. Unfortunately, the two months directly before and directly after the vacation break are the months of peak demand and a high volatility of the energy produced by wind turbines and solar panels. During these four months the pump hydro power plant is operating largely at “full speed” due to the extremely volatile production rates of the other sources of renewables. Any standstill of the hydro power plant or a reduction in production during these four months will definitively result in the need to purchase missing energy from the only further available source of energy connected to the grid in Idanre, the existing old coal fired power plant in Odiani. Also in the remaining months, the energy produced by the power plant is generally required to meet the demand so that in a case of a standstill of the plant it would not have to be replaced by energy from the coal fired plant in Odiani.
11. The local authorities in Idanre made it clear during the tender process that one of the relevant considerations for the selection of the contractor was to avoid or at least minimise the need to rely on such carbon based energy. That was already mentioned in the preamble of the model contract contained in the tender documentation which the successful bidder had to conclude with the Council of Idanre. The councilor in charge of the project, Mr. Afam Akpata, subsequently even insisted on an amendment of the contract to include an express commitment by Claimant to guarantee the availability of the plant for at least 11 months per year for the production of at least 600 MW. Thus, the contract between the Council of Idanre and Claimant now contains a penalty of US\$ 40,000.00 for each day in which the non-availability of the pump hydro power plant makes it necessary to rely on “dirty energy” from Odiani to meet an excess of demand which could not be fulfilled by solar or wind energy.
12. In early March 2015, while preparing its participation in the tender process, Claimant had contacted Respondent to enquire about a potential delivery of two R-27V Francis Turbines to be included into the plant should the contract be awarded to Claimant (Claimant Exhibit C 1). Respondent was very willing to do so and both Parties signed a Sales Agreement on 22 May 2015, according to which Respondent was to deliver and install two R-27V Francis Turbines should Claimant be awarded the tendered contract (Claimant Exhibit C 2).
13. After winning the contract on 15 July 2015, Claimant immediately started with the construction of the pump hydro power plant and managed to finalize it in less than 4 years. Due to a viral pandemic that broke out in Africa on 26th March, 2019 the Respondent was unable to deliver and install the two R – 27V Francis Turbines within

the agreed time frame. **The Respondent hinged its inability to perform its delivery obligations of the two R – 27V Francis Turbines on the viral pandemic and this was covered by Nigerian Trumpet, a leading tabloid, which reported 170,000 deaths across Nigeria in the first few days of its outbreak, as contained in its 27th March, 2019 edition.(Exhibit R1)**

In late spring 2019, Respondent delivered and installed the two R-27V Francis Turbines. The plant started operating on 19 September 2019, after the inspection and approval by the relevant authority, which had included a test run of the turbines.

14. On 29 September 2019, the leading daily newsfeed on renewable energy, the Renewable Daily News, published a report about the start of a major fraud case against the CEO of Trusted Quality Steel, one of Respondent's main suppliers. Apparently, Trusted Quality Steel had delivered steel to its customers with forged documentation concerning the quality control of the steel. The report also mentioned that the late delivery of untested steel of lower quality was also the most likely reason for a disconcerting finding at a turbine produced by Respondent and used in the River hook Tidal Power Plant. The turbine had to be replaced after only two years of operation due to excessive corrosion and cavitation damage. The damage was of such nature that it required immediate action to avoid a complete destruction of the turbine and the threat of further damage to the generator set or the plant itself. The replacement of the turbine took thirteen months and led to a standstill of the plant which only restarted energy production at the beginning of June this year.
15. On 3 October 2019 after having been informed about this and another article, Ms. Katherine Olumbo, Claimant's CEO, immediately contacted Mr. Osahon Phillips, Respondent's chief negotiator, to enquire to what extent the two R-27V Francis Turbines in the Idanre Plant could be affected by the fraud and to query whether their corrosion resistance was compromised. According to the information available, it appears that the characteristics of the special alloy had been altered by heat during the manufacturing process. The change in the characteristics and any 6-month interval or more (i.e. delay) in the use of the turbines would make the blades in the Francis Turbine R-27V more susceptible to corrosion and breakage.
16. On 4 October 2019, Mr. Udo Onyeama, Respondent's CEO, replied and tried to dispel all concerns (Claimant Exhibit C3). He suggested to wait until the first inspection, to be pulled forward from September 2021 to September 2020, to ascertain whether the turbine runner or the blades were produced from steel of inferior quality and then decide upon the necessary action.
17. Ms. Olumbo, who was shocked by the information, immediately contacted the Councilor in charge of the project Mr. Afam Akpata, to discuss the issue and possible containment measures. Mr. Akpata was furious and threatened to terminate the contract between Claimant and Idanre for the operation of the power plant for cause.
18. In the end, Mr. Akpata requested Claimant to ask for the installation of two new R-27V Francis Turbines, i.e. the turbine runner, fit for the purpose set out in the contract between the parties, i.e. with the new alloy for the blades. The exchange was to take place in September-October 2020 during the pulled forward first scheduled maintenance

19. Ms. Olumbo immediately informed Mr. Onyeama of the request. After an exchange of emails, the Parties met on 1 December to discuss and agree to possible solutions for the unfortunate situation created by the inability of Respondent to guarantee the use of a conforming steel. Unfortunately, no agreement could be reached. Respondent was unwilling to agree to the required replacement which would have been necessary to exclude the risk of a longer standstill comparable to that of the Riverhook Plant. Instead, Respondent was merely willing to pull forward the scheduled inspection by one year to examine the status of the turbine and the conformity of the steel used. In an email of 11 December 2019, Mr. Onyeama further offered to make the necessary preparations that upon a finding of corrosion, the blades could be repaired on site or, if necessary, in Respondent's nearest factory (Claimant Exhibit C 4).
20. The repair of the turbine blades, however, is unacceptable. Any repair would mean that the turbine, and by implication - the plant, would be out of operation for at least four months in case of minor findings or even longer should there be greater damages. At the same time, any repair would only address the symptoms and not the cause, the inferior steel quality. Furthermore, the offer is completely inadequate should it turn out at inspection that the turbine has to be replaced immediately, as happened in the Riverhook Plant. That would close down the Idanre plant for at least a year, even if Respondent could start construing the new turbine immediately after the inspection.
21. By contrast to these prolonged standstills, the requested exchange of the Turbines during the scheduled inspection would take approximately only three months and remove all risks. Respondent has created the uncertainty and should bear the consequences resulting from it.
22. In addition to the delivery of the new turbine, the Claimant is entitled to damages for the loss of electricity production for each day the removal and new installation of the new turbine will take.

LEGAL EVALUATION

23. According to the dispute resolution clause in Article 21, the Claimant has the right to refer all disputes in relation to the Sales Agreement to arbitration under the LACIAC Rules. *Article 21 of the Sales Agreement* provides in its pertinent paragraph 2:

“(2) The BUYER has the right to refer any dispute, controversy or claim arising out of, or in relation to this agreement, including any question regarding its breach, existence, validity or termination, or the legal relationships shall be finally resolved by arbitration under the LACIAC Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be three. Each Party has the right to nominate one arbitrator while the presiding arbitrator shall be appointed by LACIAC.

The seat of arbitration shall be Nigeria.

The venue of arbitration shall be London, England.

The language to be used in the arbitral proceedings shall be English.

The substantive law of this Agreement shall be the Contract for International Sale of Goods (CISG)

The Arbitral Proceedings shall be administered according to the LACIAC Rules 2016

24. Claimant has a claim against Respondent for the delivery and installation of two replacement turbines due to the non-conformity of the turbines delivered. Respondent had the obligation to deliver and install two R-27V Francis Turbines into the pump hydro power plant in Idanre. One of the important features of the Francis Turbine was that they were supposed to be extremely corrosion resistant, but the delay in the delivery of the turbines has resulted in the deterioration of the turbines, thus making it less effective. The turbine's blades are shaped in a particular way to minimise the danger of cavitation and, thus, should require less maintenance than standard turbines. These characteristics justify the high price which is 10% above that of any other comparable water turbine with a possible output of 300 MW.
25. The delivered turbines most likely do not comply with the corrosion resistant requirement. As the example of the turbine from the Riverhook Tidal Power Plant shows, there is the serious threat that it will be corroded in a way that requires immediate action in form of replacement. A breakage of a blade due to corrosion and cavitation damages could have detrimental consequences not only for the turbine itself but for the whole plant.
26. Such a threat in itself and the delay in the delivery of the turbines already constitutes a fundamental breach of the Sales Agreement between Claimant and Respondent, given the importance of the continuous availability of the Idanre Pump Hydro Power Plant for the Community of Idanre and its energy supply as well as for the stability of the grid. Those were known to Respondent, or ought to have been anticipated when entering into the Sales Agreement. Due to that importance, immediate action is required and Claimant cannot be requested to wait for a repair of the turbines which would take much longer than their immediate replacement.

REQUEST

26. In light of the above, Claimant asks the Arbitral Tribunal for the following reliefs:
 - a. A DECLARATION that the RESPONDENT breached the Sales Agreement by not delivering the R – 27V Turbines timeously thereby occasioning the decline in efficiency of the Turbine.

Or in the alternative

- b. A DECLARATION that the RESPONDENT breached the Sales Agreement by delivering a Turbine that was not fit for purpose as it did not comply with the Corrosion Resistant requirement.

Having declared the relief as sought above,

- c. An ORDER mandating the RESPONDENT to deliver two substitute R-27V Francis Turbines fit for the purpose set out in the contract between the parties produced;

- d. A DECLARATION that the RESPONDENT is liable for any damages resulting from the exchange of turbines up to the agreed upon limitation.
- e. An ORDER directing the RESPONDENT to pay for any damages resulting from the exchange of turbines up to the agreed upon limitation.

CLAIMANT EXHIBIT C 1

Witness Statement of Johanna Kanipe

Born 4 April 1970

1. I have a degree in physics from the University of Aberdeen and I have worked for Obatis Power since 1 January 2000. Since early 2015, I have been in charge of the Idanre Project. I have been organizing our participation in the tender process and have been negotiating with the companies upon which we wanted to rely for the construction of the Idanre Project, like Danton.
2. One of the determinative factors for awarding the tender was a “guarantee” that the pump hydro power plant will have sufficient availability and capacity to provide the additional energy needed whenever the normal sources of renewable energy would not produce sufficient energy. The local authorities wanted to exclude any need to import energy produced by conventional carbon-based methods, in particular, any need to rely on the coal-fired plant in Odiani. There had been extensive discussions in the local newspapers about the project and possible alternatives. In the end, the crucial element in overcoming the opposition to the construction of the plant was the assurance by the local authorities, that unlike the alternatives, the plant would guarantee a complete reliance on renewable energy. That had been made clear to all participants in the tender process and the relevant documentation and was exactly the reason why we decided to approach Danton Services. Shortly before, it had announced the launch of their new Francis Turbine R-27V.
3. I am not sure whether the relevant persons at Danton Services knew all details of the Idanre Project, including its history concerning a strong opposition against its realisation. I am certain, however, that I shared the tender documents with Mr. Eric Gilkes, the chief engineer and main negotiator of Danton, and Mr. Onyeama, the CEO of Danton. Thus, they must have been aware of the importance attached by the Community of Idanre to the largely non-interrupted availability of the plant. In that context, Mr. Onyeama made suggestions as to the construction of the buildings containing the turbines and the installation of a fixed crane to facilitate inspections and maintenance. In the end, we decided against the installation of such a crane and a larger building which would have cost an additional US\$ 2,000,000.00.

Asaba, 9 June 2020

Johanna Kanipe

CLAIMANT EXHIBIT C 2

SALES AGREEMENT

Whereas the City of Idanre (Idanre) took the decision in 2010 to become a fully self-sustainable community as far as the production and consumption of energy is concerned within the next ten years;

Whereas an important element in Idanre's green energy strategy to satisfy the local energy demand exclusively by renewable sources is the construction of a pump hydro power plant to be able to equalize imbalances in the supply and demand of wind and solar energy by the use of hydro power;

Whereas Idanre has invited tenders for the construction of a pump hydro power plant with a potential to produce 600 MW to support its strategy;

Whereas Obatis Power plc wants to participate in the tender;

Whereas one of the important considerations for awarding the tender will be to minimise the risk of having to rely on energy produced by non-renewable sources by providing a largely uninterrupted supply of hydro energy;

Whereas due to Idanre's strategy stated above, the time period between the repair and the maintenance intervals should be lengthy and conversely the repair and maintenance periods should be short;

Whereas Danton Services Ltd has recently released its new and innovative Francis Turbine R-27V, which due to its characteristics complies with the requirements and considerations as set out in the tender;

The following agreement is concluded:

Article 1: PARTIES

Seller: **Danton Services Ltd**, Beaufort House, 15 St Botolph St London United Kingdom ("**SELLER**").

and

Buyer: **Obatis Power plc**, 14, Creek Road, Asaba, Delta State, Nigeria

("BUYER").

Collectively referred to as "**the Parties**".

Article 2: SELLER'S OBLIGATIONS

1. The SELLER undertakes

- a. to support the BUYER in its participation in the Idanre pump hydro power plant tender by providing the necessary documentations, by making the necessary statements and by confirming its commitment to the project;
- b. to produce and deliver timely to the buyer, two of its newly developed Francis Turbine R-27V of 300 MW power each, with the further characteristics as specified in detail in Annex A, should the project be awarded to the BUYER;

- c. to install the turbines at the plant in Idanre;
- d. to perform the first inspection of the turbines three years after the start of operation at a date to be agreed between the Parties (after the start of the plant) whereby the inspection shall take place during the summer vacation period in Idanre, where the energy produced by the other forms of renewables is normally sufficient to meet the decreased demand;
- e. to provide during the anticipated 40 years-lifetime of the turbines the necessary inspection and maintenance works on the basis of a service contract to be agreed between the parties in a manner ensuring a minimum interruption of the availability of the plant for the production of energy.

Article 3: BUYERS OBLIGATION

1. The BUYER undertakes

- a. to submit a bid for the tender of the Idanre pump hydro power plant with a power generation unit including as turbines two of the SELLER's Francis Turbine R-27V of 300 MW each;
- b. to purchase such turbines from the SELLER at the price of US\$ 20 million each, in case the tender is awarded to it;
- c. to enter into a service contract with the SELLER for the regular inspections and maintenance of the turbines.

Article 4: PURCHASE PRICE

- 1. The purchase price for each of the turbines is US\$ 20 million.
- 2. The BUYER will make an advance payment of US\$ 10 million, i.e. 5 million per turbine, 2 weeks after it has informed the SELLER that it has been awarded the tender.
- 3. Six months thereafter another US\$ 15 million, i.e. US\$ 7,5 million per turbine, will become due.
- 4. The remainder will be paid after installation of the turbine and the passing of the acceptance test.

Article 19: LIQUIDATED DAMAGES and LIMITATION OF LIABILITIES

- 1. Any delay in delivery will entitle BUYER to liquidated damages of US\$ 40,000.00 per day up to an amount of 10% of the purchase price.
- 2. During the guarantee period of 4 years after the acceptance test SELLER shall pay liquidated damages in the amount of US\$ 40,000.00 for any day during which the Idanre Pump Hydro Power Plant is not available to operate with at least 60% of its nominal capacity due to reasons connected with the non-conformity of the turbines or other problems connected with the turbines for which SELLER is responsible. The overall amount of liquidated damages may not exceed US\$ 5 million.
- 3. No liquidated damages are due for up to 50 days of downtimes or reduced production capacity associated with the first regular inspection which should take place in the third year of operation.
- 4. BUYER is entitled to claim and prove higher actual damages.

5. Damage claims for indirect and consequential damages are excluded. Claims for loss of profit are limited to US\$ 10 million.
6. The overall amount of damages, liquidated and actual, is limited to US\$ 20 million.

Article 20: TERMINATION FOR CAUSE

1. BUYER is entitled to terminate the contract in case SELLER commits a fundamental breach of contract.
2. For the avoidance of doubt the following breaches shall be considered to be fundamental
 - a. Inappropriate payments to any employee of Buyer
 - b. Delay in delivery of more than 200 days
 - c. Third failure of the acceptance test
 - d. Other breaches which deprive BUYER of what it is entitled to expect under the contract.

Article 21: DISPUTE RESOLUTION

1. The courts in Nigeria have exclusive jurisdiction over any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, subject to the BUYER's right to go to arbitration pursuant to paragraph 2.
2. The BUYER has the right to refer any dispute, controversy or claim arising out of, or in relation to this agreement, including any question regarding its breach, existence, validity or termination, or the legal relationships shall be finally resolved by arbitration under the LACIAC Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be three. Each Party has the right to nominate one arbitrator while the presiding arbitrator shall be appointed by LACIAC.

The seat of arbitration shall be Nigeria.

The venue of arbitration shall be London, England.

The language to be used in the arbitral proceedings shall be English.

The substantive law of this Agreement shall be the Contract for International Sale of Goods (CISG)

The Arbitral proceedings shall be administered according to the LACIAC Rules 2016.

ARTICLE 22 - FORCE MAJEURE

22.1 For the purposes of this Agreement:

(a) "Force Majeure" means an event which is beyond the reasonable control of a Party, and which makes a Party's performance of its obligations hereunder impossible or so impractical as reasonably to be considered impossible in the circumstances, and includes, but is not limited to, war, riots, civil disorder, safety hazards, earthquake, fire, explosion, storm, flood or other adverse weather conditions, strikes, lockouts or other industrial action (except where such strikes, lockouts or other industrial action are within the power of the Party invoking Force Majeure to prevent), confiscation or any other action by government agencies.

(b) Force Majeure shall not include:

(i) any event which is caused by the negligence or intentional action of a Party or such Party's agents or employees, nor

(ii) any event which a diligent Party could reasonably have been expected to both take into account at the time of the conclusion of this Agreement, and avoid or overcome in the carrying out of its obligations hereunder.

(c) Force Majeure shall not include insufficiency of funds or failure to make any payment required hereunder.

22.2 The failure of a Party to fulfil any of its obligations hereunder shall not be considered to be a breach of, or default under, this Agreement in so far as such inability arises from an event of Force Majeure, provided that the Party affected by such an event has taken all reasonable precautions, due care and reasonable alternative measures, all with the objective of carrying out the terms and conditions of this Agreement.

22.3 Measures to be taken includes:

a) A Party affected by an event of Force Majeure shall take all reasonable measures to remove such Party's inability to fulfil its obligations hereunder with a minimum of delay.

- b) A Party affected by an event of Force Majeure shall notify the other Party of such event as soon as possible, following the occurrence of such event, providing evidence of the nature and cause of such event, and shall similarly give notice of the restoration of normal conditions as soon as possible
 - c) The Parties shall take all reasonable measures to minimize the consequences of any event of Force Majeure.
-

Article 23: MISCELLEANOUS

1. After the successful passing of the acceptance test, both Parties will enter into negotiations for a service contract for the maintenance of the machinery.
2. This document contains the entire agreement between the Parties.

CLAIMANT EXHIBIT C 3

From:
Danton Services Ltd
Sent:
4 October 2019, 8:25 am
To:
Obatis Power Plc
Re:
RE: Report about Riverhead Tidal Power Plant

Dear Ms. Katherine Olumbo,

Thank you very much for your email to Mr. Osahon Phillips, who had earlier forwarded it to me.

I assure you that we take your concerns very seriously and deal with them at management level. You can imagine that we were shocked when the Office for Organized Business Crimes contacted us with the information that we had been defrauded by one of our core suppliers of metals and had been provided with forged examination certificates. We immediately started to investigate which deliveries were affected by that forgery and to trace the turbines in which the steel from the relevant charges had been used.

Unfortunately, it turned out during these investigations that due to falsified documents from our supplier and a mistake in our internal product management system, it is not possible to determine with certainty whether the turbines delivered to you were produced from steel which had been part of the fraud.

We can assure you, however, that there is no need for immediate action, despite the disconcerting findings in turbines at the Riverhook Plant. A team of my engineers is still investigating the root causes for the considerable corrosion and cavitation damages of that turbine. As the turbine had been produced from steel delivered by Trusted Steel Company which had not been tested, it seems very likely that the damages are associated with the quality of the steel.

Even in the worst case scenario that the two Francis Turbines R-27V are produced with the steel from Trusted Quality Steel and that steel is of an inferior quality, the design and the manufacturing process of your turbines make it extremely unlikely that they will be affected by corrosion and cavitation damages to the same extent as the turbine in the Riverhook Plant, which is exposed to salt water.

Consequently, my suggestion to you is that we wait until the first inspection and opening of the turbine which we should pull forward by a year to September 2021 and then examine the turbine and in particular its runner in detail. We would allocate several days more for a thorough investigation of the turbine including detailed metallurgical examinations of the blades. The extra costs for such additional investigation would be borne by us irrespective of the outcome of the investigation.

Pulling forward the next planned inspection by a year instead of taking any immediate action accommodates your well understood interest in a smooth operation of the plant with as little downtimes as possible. At the same time, we do not run any unnecessary risks.

Should the inspection reveal an increased corrosion and cavitation damages, or should the metallurgical examination discover any problems, we could then plan a complete overhaul of the turbine for one of the following years depending on the gravity of the mistakes. For that purpose, the turbine would have to be removed from the building and would have to be transported to our nearest construction site.

I hope that answers your most pressing questions and I will call you at the beginning of next week to answer any further questions you may have.

Sincerely,

Udo Onyeama
Chief Executive Officer
Danton Services Ltd

CLAIMANT EXHIBIT C 4

From:
Danton Services Ltd
Sent:
11 December 2019, 6:09 p.m.
To:
Obatis Power Plc
Re:
Request for Replacement of Turbines

Dear Ms Katherine Olumbo,

I would like to follow up on the discussions we had during our meeting on 1 December 2019 and your requests to replace the two turbine runners during the pulled forward next inspection in September/October 2021.

As I already explained to you during the meeting, the costs for the production of a new runner with blades would be a minimum of 4 million per runner. Furthermore, the production would take around a year, while blocking our production line. We are naturally very sorry about the situation created by the fraud of Trusted Quality Steel. Irrespective of that, you cannot expect us to produce a runner worth 4 million USD as a replacement for a runner which may be perfectly fine, merely because, as of today, it cannot be excluded that the runner or its blades are made of a defective steel and are more prone to corrosion than originally planned.

Thus, we maintain our position that we should first examine during the inspection in September/October 2021 whether the turbine runner shows any signs of unusual corrosion or cavitation damage pointing to problems with the steel used before we take any corrective action. Should the turbines turn out to be defective, and we do not believe they are, we will then decide whether it is required to replace the runner completely or whether the affected blades can be repaired. The latter is certainly our preferred option and the one mandated by the law. In our view, any major repair would have to be carried out in one of our factories. Due to the limited space in the turbine and generator building it is impossible to set up a proper repair shop at the Idanre plant. You are correct in your assumption that any major repair would take between 4 and 7 months depending on the gravity of the damages and the need to move the turbines to our premises.

We very much regret that such a long delay may put you in a very uncomfortable situation due to the history of the plant, the penalty clause in the contract with the Community and the additional loss of revenues from possible energy sales. We can naturally not evaluate whether

your assertion that such a downtime or reduced production due to repair works would lead to losses for you between US\$ 5 and 7 million, other than to note it seems high to us. To a considerable extent, such losses are the result of the unusual penalty clause in your contract with the Community of Greenacre. As we are not party to that contract it cannot affect our direct relationship or determine the selection of suitable remedies.

As I already told you during our meeting, for us, the costs associated with a replacement of the turbine runner would be at least US\$ 1 million higher than those associated with their repair. To what extent that is due to the limitation of liability in Art. 19 of our contract is irrelevant in this context as it is the direct consequence of the Parties' agreement.

I hope you understand our position. I would like to reiterate our offer to pay for any of the costs directly associated with bringing forward of the inspection and the additional metallurgical examinations.

Furthermore, due to an unexpected major delay in another hydro power project for which we were supposed to deliver four turbines of a nearly identical configuration to yours, I can also offer you now to produce for you and at your expense, two turbine runners by August 2020 at a preferential price.

Should the inspection in 2020 then show, against our expectation, that the existing turbine runners have to be replaced, we would rebuy these two new runners from you and install them at our expenses as replacements for the two existing runners at the Greenacre Project. That would at least avoid any further delay.

That offer, however, does not change anything in regard to our evaluation that a replacement of the turbine runners in September/October 2021 is not necessary. Even if defective steel has been used and the runner and the blades are affected by corrosion or cavitation pitting, the risk that the turbine has to be replaced immediately is very limited and below 5%. That is not meant to downplay your concerns that the breaking of blades or other relevant structural parts may destroy the whole turbine and even the generator set which would close down the plant for more than a year. However, we consider such a scenario to be extremely unlikely. Should you have any further question, please do not hesitate to contact me.

Sincerely,

Udo Onyeama

Chief Executive Officer

Danton Services Ltd

JUSTINA ADAMS
Mainstream Partners
14 Capital Road
Ikeja
Lagos
Jadams@mainstream.com

By email and courier

Ms. Gold Audu
Lagos Chamber of Commerce International Arbitration Centre (LACIAC)
1a Remi Olowude Street,
2nd Roundabout, Lekki Phase I,
Lekki-Epe Expressway,
Lagos.

30 August 2020

Obatis Power Plc v. Danton Services Ltd

LACIAC/1982

Dear Ms Audu,

I hereby indicate that I represent RESPONDENT in the above referenced arbitral proceedings.

Please find enclosed RESPONDENT's Response to the Notice of Arbitration, a copy of which has been sent directly to CLAIMANT.

RESPONDENT agrees to communicate with LACIAC by email only. Emails may be sent to Jadams@mainstream.com For the purposes of Art. 6 LCIA Rules, no other nationalities than Nigeria and London, England need to be considered.

RESPONDENT nominates as its arbitrator, Steven Davies, Parkwood Drive, Ikoyi, Lagos

Could you please take the necessary steps for his confirmation.

Kind regards,

Justina Adams

Attachments:

Response to the Request for Arbitration with Exhibits

Power of Attorney (not reproduced)

cc. James Faluga

JUSTINA ADAMS
Mainstream Partners
14 Capital Road
Ikeja
Lagos
Jadams@mainstream.com

Response to the Notice of Arbitration
(pursuant to Article 5 LACIAC Rules 2016)
in the Arbitral Proceedings
Obatis Power plc v. Danton Services Ltd

30 August 2020

Introduction

1. In its Notice of Arbitration, CLAIMANT summarizes the facts largely accurately with some convenient omissions. The conclusions drawn from these facts and CLAIMANT's legal evaluation are, however, devoid of any legal basis.
2. First, the Arbitral Tribunal lacks jurisdiction to hear the case as there is no valid arbitration agreement. Second, CLAIMANT has no claim against RESPONDENT for the delivery of a replacement turbine. CLAIMANT has not even alleged that the two Francis Turbines R-27V installed at the Idanre Pump Hydro Power Plant are affected by extraordinary corrosion and or damages created by cavitation or delay, let alone proven it. Thus, there is at present absolutely no basis for any non-conformity claim. Even if such a claim existed, as it is not the case, CLAIMANT could only require the repair of the turbine and not its replacement by a new turbine.

Facts

3. In early 2015, CLAIMANT approached RESPONDENT to enquire about a possible purchase of two of RESPONDENT's newest models of Francis Turbines, the R-27V. Presented in 2014 to the general public, the R-27V is the top model of RESPONDENT's turbines. Due to the special shape of the blades, the way they are allocated, and the steel alloy used, the turbine has not only a slightly higher efficiency than ordinary turbines but also a higher corrosion and cavitation resistance. Due to this latter feature, the inspection and maintenance intervals for the R-27V could be extended from 2 to 3 years for the short inspections and from 12 to 13 years for the interim inspection while a main inspection should be done every 26 years. (Respondent Exhibit R 1).
4. The turbines were to be included in CLAIMANT's bid for the Idanre Pump Hydro Power Plant. The power plant was supposed to be the final building block in the very ambitious green energy Project which the Idanre Community had decided upon in 2010. Due to

the extensive media coverage of the project, RESPONDENT was very pleased about the enquiry as it provided an ideal showcase for the features of the new Francis Turbine R-27V.

5. The tender documents which were shown to RESPONDENT by CLAIMANT contained no unusual features. It appeared, however, that for the customer, the permanent availability of the plant was an important issue. The preliminary construction plans shown to RESPONDENT's CEO, Mr. Onyeama, however, still had considerable potential to reduce possible negative effects of necessary inspections on the availability of the plant. Mr. Onyeama pointed that out to Ms. Stone and made two concrete proposals. In the end, however, the plant was built as planned
6. Unfortunately, on 26th March, 2019, there was the outbreak of a viral infection in Africa. Information from the National Centre for Disease Control, Nigeria, showed that the deadly virus was widely spreading fast due to its high infectious nature. As a result, economic activities in the Country and especially in Delta State were halted. This led to the delay in delivering the R - 27V Francis Turbines to the Power Plant as at the time expected. **The Nigerian Trumpet, a leading tabloid, which reported 170,000 deaths across Nigeria in the first few days of its outbreak, as contained in its 27th March, 2019 edition (Exhibit R1)**
7. Also, when it became apparent that RESPONDENT probably had been defrauded by Trusted Quality Steel, RESPONDENT took immediate actions to clarify the situation. Unfortunately, it turned out that the use of the different charges of steel provided by Trusted Quality Steel could not be traced with certainty. In particular, it was impossible to determine whether the turbines installed at the Idanre Plant were produced with steel of the required quality.
8. Before RESPONDENT had the time to contact CLAIMANT to discuss further steps to clarify the situation, Ms Olumbo, CLAIMANT's CEO, wrote to Mr. Osahon Phillips asking for the necessary clarification (Claimant Exhibit C 4).
9. Mr. Onyeama answered immediately (Claimant Exhibit C3). He suggested that even in a worst-case scenario, there was no need for immediate action. Thus, he suggested a thorough examination of the turbines at the first regularly scheduled inspection which should be pulled forward by a year to autumn 2021. RESPONDENT was willing to pick up the costs for all the additional work irrespective of the outcome of the inspection.

10. Shortly thereafter, Ms. Olumbo, who had apparently spoken with Mr. Afam Akpata, the Idanre Councillor in charge, came back with the completely unreasonable request that the turbines should be exchanged during that inspection in 2021(Respondent Exhibit R2).
11. RESPONDENT naturally rejected such request as it would already have been difficult for Respondent to produce the new turbine runners required by that time, as at the time no production slots were available. In an effort to find an acceptable solution, RESPONDENT suggested to meet in person at RESPONDENT's premises in Delta State (Respondent Exhibit R 3). The meeting took place on 1 December 2019, but no agreement could be reached.
12. On 9 December 2019, RESPONDENT was informed that due to severe geological problems, one of the projects for which it was supposed to provide four turbines would be delayed by at least two years. As the turbine runner of that project had nearly identical features to that of the Idanre project, there would have been at least the possibility available to produce turbine runners in time for the inspection in September/October 2021. With his email of 11 December 2019, Mr. Onyeama summarized the position of the Parties and informed Ms. Olumbo about the new option (Claimant Exhibit C 4). In the ensuing negotiation, CLAIMANT was unwilling to accept the offer to produce two turbine runners for the account and risk of CLAIMANT and finally initiated these proceedings.

LEGAL CONSIDERATIONS

Lack of Jurisdiction

13. The Arbitral Tribunal lacks jurisdiction to decide the case. The arbitration clause is invalid as it is one-sided and clearly favours CLAIMANT.
14. Asymmetric dispute resolution clauses are highly controversial in law and practice. While such clauses seem to be permissible in England, courts in numerous jurisdictions have considered such clauses to be invalid, as they unduly favour one of the parties. That also applies to the courts in Nigeria, where RESPONDENT is based, RESPONDENT being the party which is negatively affected by the clause.
15. Under the Arbitration and Conciliation Act of Nigeria, there exists no provision on asymmetrical dispute resolution clauses. Nevertheless, the courts in Nigeria have shown in other areas that they consider an equal treatment of the parties to be of crucial importance. In the context of appointment of arbitrators in multiparty situations, the Courts

have emphasized that an equal influence of all parties on the composition of the arbitral tribunal forms part of Nigerian public policy. In **Section 14 of the Arbitration and Conciliation Act**, which adopts **Article 18 of the UNCITRAL Model Law**, explicitly stipulates that in arbitral proceedings, the parties should be treated equally. Why should that be different in relation to jurisdictional issues?

Substance

16. CLAIMANT's claim for replacement of the two turbines is completely baseless. First, the turbines are conforming to the contract. CLAIMANT, who bears the burden of proof has not proven that the turbines are affected by corrosion or that there is an extraordinary amount of cavitation. The mere fact that it cannot be excluded that the turbines may have been produced from a charge of steel that has not been properly examined and is not in line with the required specifications, does not render the turbines non-conforming. The remote possibility of a defect is something completely different than a defect.
17. In addition, CLAIMANT cannot rely on the findings in relation to the turbine at the Riverhook Tidal Plant. That the turbine delivered by RESPONDENT was exchanged as a matter of courtesy after 2 years of operation due to damages caused by corrosion and cavitation does not prove anything in relation to the present turbines. The Riverhook Tidal Plant is a completely different project, involving, for example, the much more corrosive salt-water, relating to a different turbine set up, produced from a different charge of steel.
18. Furthermore, in the present case it is not even certain that the steel came from a charge which had not been examined, let alone that it is defective.
19. Second, even if the inspection would reveal an unusual amount of corrosion, RESPONDENT would only be obliged to repair the turbine. An up-front replacement could not be required under *Article 46 of CISG*. Neither can such an entitlement be deduced from the law nor from the contract.
20. The exclusion of any loss of profit in the contracts speaks more for the opposite.
21. On the other hand, the RESPONDENT finds the CLAIMANT's assertion of a breach of contract due to the delay in the delivery of the Turbines baseless. The CLAIMANT was aware of the pandemic raging through Africa at that point in time and could not have expected the RESPONDENT to risk the lives of its employees in order to fulfil the terms of the Contract.

22. This Viral Pandemic undoubtedly invokes the Force Majeure Clause in the Sales Agreement as the RESPONDENT's efforts to deliver were obviously frustrated by the supervening effect of the Pandemic. Also baseless is the CLAIMANT's position that the delay in the operation and use of the Turbines within a period of time results in the decline in efficiency. This is an untrue and unfounded representation of the RESPONDENT's Turbines.

Requests for Relief

23. In light of the above RESPONDENT requests the Arbitral Tribunal of the following reliefs:
- a. A DECLARATION that the Arbitral Tribunal lacks the jurisdiction to hear and determine the claim before it as the Arbitration Agreement is not valid for being Asymmetrical.
- In the event that the Arbitral Tribunal declares that it has jurisdiction, the Respondent seeks the following:***
- b. A DECLARATION that the delay in the delivery of the Turbines does not amount to a breach of the Sales Agreement.
 - c. An ORDER rejecting the claim for the delivery and installation of two replacement turbines.
 - d. An ORDER directing the CLAIMANT to bear the costs of this arbitration

Respondents Exhibit R1

THE NIGERIAN TRUMPET

27TH MARCH 2020

The COVID-19 pandemic, also known as the coronavirus pandemic, is an ongoing pandemic of coronavirus disease 2019 (COVID-19), caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). The outbreak was first identified in January 2019 in Uganda. The World Health Organization declared the outbreak a Public Health Emergency of International Concern on 30 January 2019 and a pandemic on 11 March. As of 5 August 2020, more than 11 million cases of COVID-19 have been reported in more than 35 countries and territories, resulting in more than 170,000 deaths.

The virus is primarily spread between people during close contact, most often via small droplets produced by coughing, sneezing, and talking. The droplets usually fall to the ground or onto surfaces rather than travelling through air over long distances. However, the transmission may also occur through smaller droplets that are able to stay suspended in the air for longer periods of time in enclosed spaces, as typical for airborne diseases. Less commonly, people may become infected by touching a contaminated surface and then touching their face. It is most contagious during the first three days after the onset of symptoms, although spread is possible before symptoms appear, and from people who do not show symptoms.

The pandemic has caused global social and economic disruption including the largest global recession since the Great Depression and global famines affecting 265 million people. It has led to the postponement or cancellation of sporting, religious, political, and cultural events, widespread supply shortages exacerbated by panic buying and decreased emissions of pollutants and greenhouse gases. Airports, Schools, businesses have been closed either on a nationwide or local basis in over 35 countries, affecting approximately 98.6 percent of the Continent's population.

RESPONDENT EXHIBIT R 2

From:

Obatis Power Plc

Sent:

6 October 2019, 10:25 a.m.

To:

Danton Services Ltd

Re:

Replacement of Turbine

Dear Mr Udo Onyeama,

Thank you very much for replying to my email of 3 October 2018 to Mr. Osahon Phillips. While I understand that you have been defrauded by one of your suppliers, I am shocked that Danton Services Ltd is unable to determine with certainty which charge of steel had been used to produce the two R-27V Francis Turbines included in the Idanre plant.

I immediately informed the relevant persons in Idanre about that fact and discussed the various alternatives to deal with the problem. There was a common view that the only possible solution is to pull forward the first inspection originally planned for 2022 to September/October 2021 and to use the time to replace the turbine delivered by a completely new turbine made out of steel which complies with the requirements of the contract. If the production of complete turbines is not possible by 2021 due to a lack of production slots, at least the turbine runner must be replaced. The runner is the part of the turbine on which a deficient steel will have the greatest impact. The replacement should be possible within a period of 10 to 12 weeks working in 3 shifts and full time.

As the example of the Riverhook turbine shows, it may well be that corrosion and cavitation damages make an immediate replacement in 2021 necessary. In such a case, we cannot wait for another year until you have produced a new turbine runner with the plant being unable to produce any power as the use of the old turbine carries the risk of damaging the generator or the whole plant in a way that would shut it down for an even longer time.

Mr. Afam Akpata, the Idanre councilor in charge of the program, made clear that any other solution than an immediate replacement in 2021 is unacceptable for Idanre and would probably result in the termination of the contract between Idanre and Obatis Power Plc

Kind regards

Katherine Olumbo

CEO

Obatis Power Plc

RESPONDENT EXHIBIT R 3

From:

Danton Services Ltd

Sent:

10 October 2019, 11:38 a.m.

To:

Obatis Power Plc

Re:

Email of 6 October 2019

Dear Ms Olumbo,

Thank you very much for your email of 6 October 2019 to which I would like to reply.

I understand your concerns and your annoyance of having to deal with this matter shortly after a successful start of the Idanre plant.

Nevertheless, you will probably not be surprised that we cannot replace two turbine runners, let alone two complete turbines, each of which is worth US\$ 20 million merely for the remote possibility that they have been produced with steel which has not the promised corrosion stability.

At present, we would physically not be in the position to do so, even if that could be required from us. In September, we have just started the production of the first two turbines for another pump hydro power plant to be finished in early 2022, for which we have to deliver four turbines. Thus, our production capacities are fully booked until at least October 2021. Only thereafter, some production capacity will be available again.

To avoid sending emails forth and back, I would suggest that we meet in person to discuss possible solutions, preferably at our production site, so that I can dispel your concerns that immediate action is necessary. Unfortunately, due to the problems created by the fraud of Trusted Steel Company, I could only offer a date in early November. In my view, it could be a good idea to have Mr. Afam Akpata or any other representative of Idanre participating in the meeting.

Sincerely,

Udo Onyeama

Chief Executive Officer

Danton Services Ltd

James Faluga
Putin Solicitors
8 Broad Street
Marina
Lagos.
jFaluga@putin.org

26th October 2020

By email and courier

Mrs Gold Audu
Lagos Chamber of Commerce International Arbitration Centre
1a Remi Olowude Street,
2nd Roundabout, Lekki Phase I,
Lekki-Epe Expressway,
Lagos.

Dear Mrs Audu,

RE: SUIT No: LD/ 103/19: OBATIS POWER PLC V DANTON SERVICES LTD - NOTIFICATION OF THE EXISTENCE OF INTERIM COURT ORDER

We represent the Claimant/Applicant in respect of the above captioned Suit pending before His Lordship, Hon Justice D.O. Ogbor of the High Court of Lagos State.

We write to inform you that on 3rd July 2019, the Claimant commenced this suit seeking an Ex parte interim injunction preventing the Defendant, Danton Services Ltd from making any sale and delivery of any R – 27V Turbine owned by the Defendant to any third party, pending the hearing and determination of the Arbitral Proceedings.

On 21st July 2019, the Court granted the Interim Injunction restraining the Defendant, Danton Services Ltd from making any sale and delivery of any R – 27V Turbine owned by the Defendant to any third party, pending the hearing and determination of the Arbitral Proceedings, and pending the hearing of the Interlocutory Injunction.

We hope that you will communicate this recent development to the Arbitral Tribunal.

Thank you.

James Faluga

Cc: Justina Adams
Mainstream Partners
14 Capital Road
Ikeja, Lagos

PROCEDURAL ORDER No 1

of 4 October 2020

in the Arbitral Proceedings

Obatis Power Plc v. Danton Services Ltd (LACIAC1982)

- I. Following the receipt of the file from the LACIAC on 20 September 2020 and the Parties' additional submissions of 23 and 27 September 2020, the Arbitral Tribunal held a telephone conference with both Parties on 3 October 2020 discussing the further conduct of the proceedings.
- II. Also, following the receipt of the letter dated 26th October 2020 from Mr James Faluga, informing the Arbitral Tribunal of the existence of the Court Order, The RESPONDENT is aggrieved and seeks to challenge the validity of the Court Order in view of the fact that the Arbitral Tribunal is currently vested with the jurisdiction to grant any Interim Relief.
- III. The Arbitral Tribunal takes note of the fact that in the telephone conference of 3 October 2020 both Parties agreed:
 - to conduct the proceedings on the basis of the LACIAC 2016 Arbitration Rules;
 - that the costs associated with such measures would have to be borne by CLAIMANT should the Arbitral Tribunal reject the claim;
 - to reserve the final decision on costs for a separate cost award.
- IV. In the light of these agreements and considerations the Arbitral Tribunal hereby makes the following orders:
- v. In their next submissions and at the Oral Hearing in Lagos, the Parties are required to address the following issues:
 - a. Does the Arbitral Tribunal have jurisdiction to hear the case or is the Arbitration Agreement invalid?
 - b. What is the validity of the Court Order of Interim Injunction against the RESPONDENT?
 - c. Has the RESPONDENT breached the contract by delivering turbines which are late and non-conforming in the sense of *Article 35 CISG*?
 - d. In case of a breach of contract, is CLAIMANT entitled to request the delivery of replacement turbines?

The Parties are free to decide in which order they address the various issues. No further questions going to the merits of the claims should be addressed at this stage of the proceedings, in particular no questions relating to the claim for damages.