

Kluwer Arbitration Blog

Arbitrating Complex Infrastructure Contracts: Insights From a Landmark LCIA Case

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In May 2024, an LCIA tribunal issued an award in a multi-million-dollar arbitration involving the construction, operation, and service provision of a coal transportation and storage system. The case, which spanned three years, centered on complex issues of party joinder, cross-claims, and contractual obligations.

On August 23, 2024, the Claimants filed a petition before the U.S. District Court for the Southern District of New York to confirm and enforce the award under the Panama Convention, asserting its applicability and absence of grounds for refusal. On September 5, 2024, they informed Judge Rakoff of the commencement of service on Respondents in Mexico, estimating a six-month timeframe for completion. The recognition and enforcement proceedings are ongoing.

The Tribunal's decision not only clarified the roles and responsibilities of the parties involved, but also set a precedent in the arbitration of intricate infrastructure contracts. The award, with its wide-ranging financial and legal consequences, underscores the evolving nature of international arbitration in addressing disputes where construction, energy, and service sectors intersect.

Below, we address the key discussions arising from this dispute.

The Dispute

The dispute arose from a 2016 Coal Transportation and Storage Services Agreement ("Agreement") between Greenfield SPVI, S.A.P.I. de C.V. ("Greenfield") and the Mexican state enterprise Comisión Federal de Electricidad ("CFE"). Greenfield was tasked with constructing a coal transportation and storage system and overseeing coal deliveries from Port Lazaro Cardenas ("TPP Port"), which was operated by subcontractor Terminales Portuarias del Pacífico, S.A.P.I. ("TPP"), to CFE's thermoelectric plant ("Central-CFE"). TPP was the primary entity responsible for negotiating the terms of the Agreement and played a central role in its execution.

Although the Agreement imposed strict deadlines for construction and commercial operations, delays arose, particularly in the handling of coal shipments. This led to disputes over penalties and vessels and coal overstays. CFE imposed fines on Greenfield for the delays and later executed the Operational Guarantee to collect these penalties. Greenfield contested the charges, attributing the

delays to CFE's premature service requests, defective planning, and safety issues at TPP Port. Additionally, Greenfield and TPP sought compensation for port services under the Agreement's Fixed Annual Quantity ("FAQ") provision, which obligated CFE to pay for a minimum volume of 1,300,000 tons of coal per year, whether or not that quantity was delivered to CFE.

The Arbitration

In April 2021, Greenfield initiated arbitration under the [LCIA Rules](#) against CFE and CFE Generación II EPS ("Respondents"). Greenfield appointed [David Arias](#) as co-arbitrator, and Respondents appointed [Oscar Vázquez del Mercado Cordero](#) in May 2021. The Tribunal was finalized with the appointment by LCIA's Court of [Christian Albanesi](#) as President.

In July 2021, Greenfield requested the joinder of TPP and TMC as additional claimants. After submissions and a hearing, the Tribunal approved the joinder in October 2021, with TPP and TMC (along with Greenfield "Claimants") accepting the constitution of the tribunal. Both sides submitted claims, counterclaims, and replies, leading to hearings and final memorials. The Tribunal issued its award in May 2024.

Amongst other issues detailed below, the Tribunal determined that the Port Services Fees ("PSF") for the minimum FAQ were structured as a use-or-take provision, and thus ordered CFE to pay the claimed USD 31,837,019.88 to TPP for the first three operational years of the Agreement. Even more remarkably, the Tribunal mandated that for the remainder of the Agreement's long-term duration, CFE must continue paying the minimum FAQ if the PSF does not exceed it by the end of each operational year. This ruling is particularly striking given the long-term nature of the Agreement, securing ongoing financial obligations from CFE and guaranteeing the economic viability of the project for TPP, regardless of actual coal deliveries.

Key Issues and the Tribunal's Findings

The Tribunal first determined whether TPP and TMC were parties to the Agreement and had standing to bring claims. It then moved to the merits, examining CFE's obligation to pay the PSF, the justification for overstay fines, and whether Greenfield's liquidated damages covered vessel overstays. The Tribunal also considered whether CFE was justified in executing the Operational Guarantee and should pay liquidated damages for the coal overstay. After addressing the merits, the Tribunal ordered both parties to split arbitration costs 50/50.

1. Are TPP and TMC Parties to the Agreement?

Although not explicitly addressed in the Award, it is understood by the author of this article that the delayed participation of the joining parties (TPP and TMC) was prompted by Respondents raising pivotal issues related to the calculation of the PSF. Such issues, deemed critical to the interests of the joining parties, ultimately drove the decision by Greenfield to seek their inclusion in the proceedings for them to engage with these significant matters directly.

Respondents argued that neither TPP nor TMC were signatories to the Agreement and therefore had no standing in the arbitration. However, the Tribunal agreed with the Claimants by finding that TPP, by expressly obligating itself jointly with Greenfield in its dealings with CFE, was indeed a party to the Agreement. TPP's active and leading involvement in the negotiation and implementation of the project, coupled with an amendment that TPP signed as a party, further solidified its status. Additionally, the Agreement allowed direct payments of the PSF to TPP in the event of early termination, reinforcing its role. Conversely, the Tribunal ruled that TMC was not a party to the Agreement, as it had no significant role in the negotiation or execution of the contract.

2. Do TPP and TMC Have Standing to Claim?

The Respondents argued that TMC and TPP were subcontractors, not parties to the Agreement, and that Clause 4.6(f) limited claims to Greenfield. They further contended that TPP's rights (as subcontractor) under Clause 8.3(e) applied only in cases of early termination, which had not occurred, and emphasized their counterclaim targeted only Greenfield, not TPP or TMC. Claimants countered that Clause 4.6(f) of the Agreement allows Greenfield subcontractors' claims against CFE when caused by CFE's fault, asserting that CFE's failure to pay the PSF under the FAQ triggered the claims by TPP and TMC.

Despite TMC not being a party to the Agreement, the Tribunal concluded that both TPP and TMC had standing to bring claims. It determined that TPP and TMC fell within the Agreement's definition of "Subcontractor", a status acknowledged by CFE. The Tribunal further noted that TMC's non-signatory status did not preclude it from filing a claim under Clause 4.6(f) of the Agreement, which allows subcontractors to bring claims against CFE for issues arising from CFE's fault, thereby granting TMC the benefit of the arbitration agreement. As their claims centered on CFE's failure to pay the PSF based on the FAQ, the Tribunal ruled that both TPP and TMC had standing to pursue their claims.

It is important to highlight that TMC and TPP's claims were aligned with, not duplicative of, those of Greenfield. TPP and TMC made no claims regarding vessel overstays or the improper execution of the Operational Guarantee, which were solely Greenfield's. All three Claimants sought a declaration of CFE's obligation to pay the PSF for 2019-2023 to TPP, either directly or through Greenfield. Similarly, their claims on coal overstays complemented one another, collectively seeking CFE's obligation to compensate TPP. Thus, none of the claims were duplicative.

3. Did CFE Breach Its Psf Payment Obligation Regarding the FAQ?

The Claimants argued that CFE was obligated to pay the PSF based on the FAQ of 1,300,000 tons, regardless of the actual coal delivered (use-or-pay), requiring CFE to cover any shortfall if the annual unloaded amount fell below the FAQ. The Respondents contended that the PSF should only apply to the actual quantity unloaded, with no obligation to cover any shortfall. Greenfield requested the Tribunal to order CFE to pay the outstanding PSF to TPP, with Greenfield's consent. Meanwhile, TMC and TPP requested such payment be made directly to TPP or through Greenfield.

The Tribunal ruled that CFE's obligation was "absolute and unconditional" (a "hell-or-highwater" obligation), requiring payment for the availability of services regardless of interruptions.

Consequently, as requested by the Claimants, CFE was ordered to pay TPP (with Greenfield's consent) the outstanding PSF for 2019-2023, plus moratory interest. As mentioned above, the Tribunal also ruled that CFE must continue paying the minimum FAQ for the remainder of the Agreement if the PSF does not exceed it annually.

4. Were CFE's Vessels Overstay Fines on Greenfield Justified?

Greenfield sought reimbursement of the USD 6,911,333 collected by CFE through the Operational Guarantee for vessel overstay fines, blaming CFE's poor planning. CFE defended the fines, citing Greenfield's failure to meet laytime requirements and the delayed Commercial Operation Date ("COD"). The Tribunal found shared responsibility, with both Greenfield's delays to meet the COD and CFE's planning failures contributing to the overstays, thus finding that the fines imposed on Greenfield by CFE were not justified. Consequently, it ordered CFE to reimburse Greenfield, excluding fines related to one of the vessels, where delays were due to equipment failures at TPP Port. This issue only pertained to claims brought by Greenfield.

5. Do Liquidated Damages Paid by Greenfield Cover Vessel Overstay Losses?

Greenfield argued that the USD 4,350,000 liquidated damages it paid covered all losses, including losses re vessel overstays, due to delays in reaching the COD. CFE, however, asserted that the liquidated damages were separate from overstay penalties. The Tribunal agreed with CFE, concluding that the liquidated damages were strictly tied to delays in reaching the COD and did not cover vessel overstay losses.

6. Was CFE Justified in Executing the Operational Guarantee?

The Tribunal ruled that since CFE executed the Operational Guarantee, it bore the burden of proving its justification. The Agreement stated Greenfield could only be held liable for damages solely attributable to it, without CFE's contribution. Given the Tribunal's finding of shared responsibility for the vessel overstays (see Section 4 above), it deemed CFE's full execution of the Operational Guarantee unjustified. Consequently, the Tribunal ordered partial reimbursement, except for one vessel where notice was sent on time. This issue pertained only to claims brought by Greenfield.

7. Should CFE Pay Liquidated Damages for the Overstay of Coal?

Claimants argued that CFE should pay for coal overstays exceeding the 90-day free storage period. The Tribunal found shared responsibility between CFE and Greenfield—CFE bought excess coal without accounting for maintenance delays and reduced consumption, while Greenfield's delays in reaching the COD and incomplete construction also contributed.

However, the Tribunal noted that Annex 2 exempted CFE from overstay charges if caused by

system failures (in this case by non-availability of the system), provided CFE didn't contribute. As CFE didn't contribute to the non-availability of the system, the Tribunal rejected Greenfield's claim for overstay charges.

Conclusion

This case highlights the complexities of multi-party infrastructure agreements and the potential for unforeseen delays that can lead to disputes over liability and financial obligations. The Tribunal's careful interpretation of the contract terms and its balanced approach underscore the importance of arbitration in resolving sophisticated commercial disputes. Notably, the use-or-take scheme was crucial in the Tribunal's decision, offering reassurance to investors that CFE and other entities will honor long-term contracts.

This precedent boosts investor confidence in Mexico's energy sector by demonstrating that such agreements can be enforced fairly, even in challenging circumstances. We now await the Respondents' answer in the U.S. courts to determine if any issues regarding the recognition and enforcement of the award will be raised.

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