

I.1.3 Request for Arbitration

(Request Combined with an Application for an Interlocutory Order)

Place of arbitration: Paris

Arbitration rules: Ad hoc

Nationality of parties: African and Indian

Nationality of counsel: English

Applicable law: Indian

Subject matters: - breach of agreement to pledge shares;
- urgent interlocutory order;
- specific performance, alternatively declaration of breach of contract and damages.

The dispute forming the subject of this case arises out of an agreement to pledge shares between parties from an island state and Indian parties (alleged breach of the agreement by the pledgers). A sole arbitrator was appointed by the Indian Supreme Court pursuant to the Indian Arbitration and Conciliation Act 1996.

Claimant is represented by an English law firm.

This document is drafted in a common law style. It is a request for arbitration, although called 'Claimant's Summary of the Disputes'. It includes an application for an urgent interlocutory order to (i) forbid the respondent to mortgage, encumber, dispose of or otherwise alienating certain shares, (ii) disclose certain documents, (iii) grant specific performance, alternatively declare that Respondent committed a breach of contract and award damages.

Ad Hoc Versus Institutional Arbitration

This Form is an example of a request for arbitration in an ad hoc arbitration. When agreeing on arbitration, the parties can choose between institutional/supervised arbitration and ad hoc arbitration, both of which have their advantages and disadvantages.¹ Institutional arbitration means that the proceedings are administered by an organization (e.g., ICC, LCIA, AAA/ICDR, DIS, CIETAC, SCC, SIAC, HKCIA), usually in accordance with its own rules of arbitration.

An ad hoc arbitration is not administered or supervised by any arbitral institution. The parties can:

- (i) create their own procedure by drafting a set of rules;

1. More generally, see for example G. Born, *International Commercial Arbitration*, Chapter 1, 2nd ed., Kluwer 2014, p. 169; G. Aksen, 'Ad Hoc Versus Institutional Arbitration', ICC Bull. June 1991, Vol. 2, n° 1, p. 8.

- (ii) select a pre-existing set of procedural rules to govern the proceedings, e.g., UNCITRAL Arbitration Rules; or
- (iii) agree that the arbitral tribunal fixes its own procedure.

Arbitrator Selection

In the present case, as the parties failed to agree upon the constitution of the arbitral tribunal, a sole arbitrator was finally appointed by the Supreme Court of India pursuant to Section 11(5) of the Indian Arbitration and Conciliation Act 1996 as provided in the arbitration agreement.

In principle, parties are free to agree on the procedure for the selection of the arbitrator, or arbitrators. If parties fail to select the arbitrator(s), they may agree on an appointing authority which will make the choice of the arbitrator(s), e.g., ICC,² or – like in the present case – a national court in the country where the arbitration shall take place.

Urgent Relief

Interlocutory or interim measures are orders requiring the other party to do or to refrain from doing something on a temporary basis, i.e., to preserve the *status quo* pending the resolution of the dispute by the arbitrators. An application for interim measures can be submitted to a national court or to an arbitral tribunal, depending on the circumstances:

- (i) *National courts.* Before the arbitral tribunal has been constituted, the party has no alternative but to submit the application to a national court. Even after the constitution of the arbitral tribunal, a party may favour an application to a court since a court order has efficient enforcement qualities.
- (ii) *Arbitral tribunal.* As soon as the arbitral tribunal has been put in place, a party may seek an interlocutory order from the arbitrators. This may be preferable, compared to an application to a court of law, since the arbitral proceedings are deemed to be private and will not be known to the press, (unless there is a leakage). An application may be made – as in the example – with the request for arbitration.³ The drawback with the arbitrator-ordered measure is that the arbitrator has no direct enforcement powers. In case the party disobeys the arbitrator's order, the other party must seek an injunction by the court or with the bailiff competent to enforce arbitral orders.

2. See *Rules of ICC as Appointing Authority* (January 2004), <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Appointing-authority/Rules-of-ICC-as-Appointing-Authority/Rules-of-ICC-as-Appointing-Authority-in-several-languages>.

3. See G. Born, 'Chapter 17: Provisional Relief in International Arbitration' in *International Commercial Arbitration* (2014), *supra.*, p. 2424; J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration*, 2nd ed., Sweet & Maxwell 2007, § 6.3, p. 518.

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In the present case, claimant submits an application for urgent relief with his request for arbitration. Arbitration rules and national arbitration laws provide no guidance for the drafting of a such an urgent request and the parties can seek inspiration in the standards set forth in the 2006 UNCITRAL Model Law (Article 17).⁴

The requesting party should show the following:

- (i) prima facie jurisdiction of the arbitral tribunal over the parties;
- (ii) existence of an irreparable and imminent harm that cannot be subsequently remedied by a damages award, if the measure is not granted;
- (iii) existence of a valid claim that will likely succeed on the merits;
- (iv) an order is no pre-judgement of the case.⁵

The claimant seeks, in addition to the interim relief, an award for specific performance, alternatively damages if respondent fails to perform.

Finally, where urgent relief is needed before the arbitral tribunal is appointed, there are other tools available to the parties in institutional arbitrations:

- (i) The Emergency arbitrator provisions contained nowadays in most of the modern arbitration rules.⁶
- (ii) The ICC Rules for a Pre-arbitral Referee Procedure.⁷

These alternatives are obviously only available where the parties have chosen an arbitral institution in their agreement; not in ad hoc situations.

4. 2006 UNCITRAL Model Law On International Commercial Arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

5. See §§ 47–48 of the commented case.

6. See for example, Art. 29 and Appendix V of the ICC Rules 2012; Appendix II of the SCC Arbitration Rules 2010; Art. 9B LCIA Rules 2014, Schedule I of the SIAC Rules 2016.

7. See ICC Pre-arbitral Referee procedure (1990), <http://www.iccwbo.org/products-and-services/arbitration-and-adr/pre-arbitral-referee>; see also J.-Y. Garaud & C. H. de Taffin, 'The ICC Rules for a Pre-Referee Procedure', ICC Bull. 2005, Vol. 16, n° 1, p. 33.

Form I.1.3

IN THE MATTER OF AN AD HOC ARBITRATION

BETWEEN:

COMPANY A (country)

Claimant

and

1. COMPANY B (country)

2. COMPANY C (country)

3. COMPANY D (country)

4. COMPANY E (country)

5. COMPANY F (country)

Respondents

CLAIMANT'S SUMMARY OF THE DISPUTE

Date _____

CLAIMANT'S SUMMARY OF THE DISPUTE

INTRODUCTION

1. This Summary is served on behalf of the Claimant, "COMPANY A" in accordance with the Order of the Honourable Mr Justice ____ (...), (sitting in the Supreme Court of ____), dated _____. It contains background information regarding the parties and disputes forming the subject of this arbitration, and is provided without prejudice to the rights and contentions to be raised in the full Statement of the Case which Claimant anticipates serving in due course pursuant to a timetable fixed by the Arbitrator.
2. The dispute forming the subject of this arbitration arise out of an agreement to pledge shares, dated _____, made between Claimant and the Respondents (the "Agreement to pledge"). References in this Summary to "Clauses" are to clauses of the agreement to Pledge unless otherwise stated.
3. A copy of the Agreement to Pledge is contained at Annex __. Copies of the other key documents referred to in this Summary are provided in the other Annexures hereto.

THE PARTIES

4. COMPANY A is a company incorporated under the laws of the ____ and having its registered office at

5. Claimant is a wholly owned subsidiary of α Group (formerly known as _____) (" α Group"), a company incorporated under the laws of England and Wales. α Group seeks to encourage (through its various overseas subsidiaries and offices) productive investment in the private sectors of developing countries.

Claimant's address for notices and other communications:

6. All notices and other communications in this arbitration should be sent to Claimant's legal representatives:
Law firm _____
Address _____

Respondents

7. There are five Respondents in this arbitration:
 - (1) COMPANY B, a company incorporated under the laws of Republic of India and having its registered office at:
(...)

- (2) COMPANY C, a company incorporated under the laws of Republic of India and whose address is stated in agreement to Pledge as being:
(...)
 - (3) COMPANY D, a company incorporated under the laws of Republic of India and whose address is stated in agreement to Pledge as being:
(...)
 - (4) COMPANY E, a company incorporated under the laws of Republic of India and whose address is stated in agreement to Pledge as being:
(...)
 - (5) COMPANY F, a company incorporated under the laws of Republic of India and whose address is stated in agreement to Pledge as being:
(...)
8. The Respondents, referred to in the Agreement to Pledge as the “Pledgors”, are Indian shareholders of β Company (formerly known as _____) (“ β Company”). β Company, which is incorporated under the laws of the Republic of India, is engaged in the telecommunications business, including the operation of mobile cellular services in certain circles in _____, and carries on and conducts its business through its subsidiaries.
9. Together with Claimant and the Respondents, COMPANY G (“G”), which was also an Indian shareholders of β Company, and β Company itself, are parties to various agreements (discussed below) related to the Agreement to Pledge (but not the Agreement to Pledge itself). G and β Company were included as Respondents to the petition for the appointment of the Arbitrator (which was filed with the Supreme Court of _____). However, as they are not parties to the Agreement to Pledge (which, as explained below, contains the arbitration agreement) and no claim has been or is advanced against them, they are not made parties to this arbitration.

Respondents’ address for notices and other communications

10. Pursuant to Clauses ___ and ___:

“(…) All notices or other communications to be given under this Agreement shall be made in writing and by letter or facsimile transmission (save as otherwise stated) and shall be deemed to be duly given or made when delivered (in the case of personal delivery), when dispatched (in the case of facsimile transmission, provided that the sender has received a receipt indicating proper transmission) or, in the case of a letter, ten days after being deposited in the post (by the quickest mail available), postage prepaid, to such party at its address or facsimile number specified in Clause ___ (sic – should say ___), or at other address or facsimile number as such party may hereafter specify for such purpose to the other by notice in writing.

(…) The addresses referred to in the preceding Clause are as follows:

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- in the case of a notice to Claimant ... (address)
- in the case of a notice to the Pledgors –
- (address)

11. By facsimile to Mr. x. (copied to the Arbitrator) dated _____, we requested confirmation as to whether the Respondents still require notices and other communications to them in this arbitration be sent to Mr. x. at the above address or whether they should now be sent to the Respondents' legal advisers (at contact detailed to be provided). We have not received a reply.
12. We note that certain correspondence from Claimant's lawyers in _____ addressed to the Respondents in accordance with Clause ____ has been responded to by Mr. y. who describes himself as an authorised signatory for the Respondents. We have therefore included Mr. y. on the distribution list for this Summary.
13. It is also noted that by facsimile to the Arbitrator dated _____, the Deputy Registrar of the Supreme Court of _____ stated that the Respondents had been represented before the Court in the proceedings giving rise to the Order by:
Ms. z. ..., Advocate
(address)
14. However, on _____, we spoke to Ms. z.'s office and Ms. o., Advocate, who also represented the Respondents in the proceedings before the Supreme Court of _____, confirmed that neither Ms. z. or herself were representing the Respondents in this arbitration.

THE AGREEMENT TO ARBITRATE

15. The agreement to arbitrate is contained in Clauses ____ and ____ which state:

"(...) All disputes, controversies and questions directly or indirectly arising under, out of, or in connection with, or in relation to, this Agreement (or the subject matter of this Agreement), including, without limitation, all disputes, controversies, and questions relating to the validity, interpretation, construction, performance, and enforcement of this Agreement shall be finally, exclusively settled by arbitration under the Indian Arbitration and Conciliation Act, 1996.

(...) The arbitration proceedings shall be construed in the English language. The arbitration proceedings shall be conducted in, and any arbitral award shall be made in Paris, France. The laws of England shall govern the arbitration agreement contained in this clause and the arbitration proceedings and any award that may be made thereon".

16. Accordingly, the seat of the arbitration is Paris, France and the language of the arbitration is English.

GOVERNING LAW OF THE AGREEMENT TO PLEDGE

17. Clause ___ states:

“This Agreement shall be construed in accordance with and shall be governed by the laws of India”.

THE ARBITRATOR

18. As the parties did not agree upon the constitution of an arbitral tribunal, Claimant filed a petition before the Supreme Court of _____, under Section 11(5) of the Indian Arbitration and Conciliation Act 1996, for the Court to appoint the arbitral tribunal.
19. By Order dated _____, the Supreme Court of _____ appointed Mr p., member of the Paris bar, having an office at _____ (address), to act as the sole arbitrator in this arbitration.

THE NATURE AND CIRCUMSTANCES OF THE DISPUTE

20. By a written agreement dated _____ (the “Ordinary Share Agreement”), Claimant, the Respondents, G, β Company and Mr C. (another shareholder) agreed that G would sell and Claimant would purchase (x number) ordinary shares in β Company for US\$ _____. A copy of the Ordinary Share Agreement is contained at Annex _____.
21. By a second written agreement dated _____ (the “Preference Share Agreement”), Claimant, the Respondents, G and β Company agreed that G would sell and Claimant would purchase (x number) preference shares in β Company for US\$ _____. A copy of the Preference Share Agreement is contained in Annex _____.
22. Clause ___ of the Preference Share Agreement granted the Respondents (and Astra) a call option to purchase Claimant’s preference shares in β Company at a defined price (the “Option Price”).
23. A corresponding put option for Claimant to sell its preference shares in β Company to the Respondents (and G) at the Option Price was provided by Clause ___ of the Preference Share Agreement.
24. The completion of the transaction under the Preference Share Agreement took place on _____ (the “Completion Date”).
25. By the Agreement to Pledge (also dated _____), Claimant and the Respondents agreed that the redemption of Claimant’s preference shares by β Company and the payment of the Option Price by the Respondents (and G) to Claimant under the Preference Share Agreement, would be secured by a pledge to Claimant of ordinary shares in β Company held by the Respondents.

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26. The Agreement to Pledge was therefore entered into as an inducement to Claimant to enter into the Ordinary Share and Preference Share Agreements.

27. By Clause ____, the Respondents agreed "... promptly to enter into a pledge ..." of the relevant number of shares in favour of Claimant on the date (the "Effective Date") on which Claimant certified that:

"2.2.1. Two years have elapsed since the Completion Date (as defined in the Preference Share Agreement) and the call option set out in section __ of the Preference Share Agreement has not been exercised in respect of all of Company A's Preference Shares; or

2.2.2 [β Company] has at any time declared or paid any dividend on the Company A's Preference Shares, or in any other way prevented Company A from being able to exercise such number of votes in general meeting as equate to the part value of the COMPANY's Preference Shares; or

2.2.3 The [Respondents] are in breach of a material provision of the Agreement to Pledge, including, without limitation, non-creation of a pledge in accordance with the terms hereof, or disposal of Ordinary Shares held by the [Respondents] in breach of clause __; or

2.2.4 Company A has served a valid Put Notice on one or more of the [Respondents] in accordance with the terms of section __ of the Preference Share Agreement and the relevant [Respondents] has not paid the Option Price to Company A on or before the Settlement Date".

28. By Clause ____, each of the Respondents undertook:

"... not to mortgage, encumber, dispose or otherwise alienate a sufficient number of Ordinary Shares (...)"

29. By Clause ____, the Respondents:

" (...)"

30. By Clause ____, the Respondents were obliged, on the Effective Date, to deliver the certificates for ordinary shares in β Company forming the subject of the pledge, together with signed transfers, to the custodian nominated by Claimant (the "Custodian").

31. By Schedule ____ of the Agreement to Pledge:

(1) after three (but no more than four) years from the Completion Date, the number of shares to be pledged by the Respondents was (x number); but

(2) once four years had passed, the number of shares to be pledged increased to (x number).

32. By Clause ____, the increase in the number of shares to be pledged by the Respondents took place automatically with the passage of time. Clause ____ states:
“ (...)”
33. Accordingly, as it is now more than four years since the Completion Date, provided that the Effective Date has arisen (which, as explained below, it has), the Respondents are obliged to pledge (x number) ordinary shares in β Company in favour of Claimant.
34. By a written notice to the Respondents date ____ (the “Effective Notice”), Claimant certified that:
“... *the Effective Date has occurred, in that two years have elapsed since the Completion date and the call option set out in Section __ has not been exercised ...*”.
35. The Effective Date Notice required the Respondents to send their shares certificates and executed transfer deeds in respect of (x number) ordinary shares in β Company (the correct number at that time) to [law firm] being the Custodian for the pledged shares appointed by Claimant. Copies of the Effective Date Notice and the other correspondence referred to in this Summary are contained at Annex ____.
36. In breach of the Agreement to Pledge, the Respondents did not send the relevant share certificates and transfers to the Custodian. Despite reminders from the Custodian by letters dated ____, ____ and ____, the Respondents have still not pledged their shares to Claimant or provided the relevant share certificates and transfers to the Custodian.
37. By letter to the Respondents dated ____, the Custodian, as Claimant’s legal adviser (under instruction from and on behalf of Claimant), invoked the arbitration agreement under the Agreement to Pledge.
38. By letter dated ____, the Respondents purported to advise Claimant and its legal advisers that they had:
- (1) pledged “*a substantial portion*” of their shares to arrange funding for β Company;
 - (2) provided a “*non-disposal undertaking*” to ____ as part of a transaction to secure a loan from that institution; and
 - (3) “*pledged our shares for obtaining short term loans for β Company*”. “*As a result ...*”, it was said, Claimant was “*all aware that we have no shares left with us to pledge*”.
39. Claimant has no such knowledge, and has been provided with no evidence that what the Respondents say on this point is true. If it is, of course, it is the clearest possible breach of the Agreement to Pledge and would itself give rise (pursuant to

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Clause ___) to a right for Claimant to call for the Respondents to pledge (x number) ordinary shares in β Company in favour of Claimant.

40. In addition, Claimant has been prevented "... from being able to exercise such number of votes in general meeting as equates to the par value of the Company A's S Preference Shares" (Clause ___), again giving rise to a right for Claimant to call for the Respondents to pledge (x number) ordinary shares in β Company in favour of Claimant.
41. By Clause ___, the parties agreed that:

"In the event that the Respondents fail to enter into a valid pledge in accordance with this Agreement, the Respondents agree that in the event of an arbitral award in favour of Claimant, the amount of the Option Price is a genuine pre-estimate of the loss which would be suffered by Claimant by such non-performance by the Respondents on the basis that Claimant will no longer be able to exercise the put option or foreclose the pledge in order to recover its due ..."
42. By Clause ___, "Option Price" has the meaning stated in the Preference Share Agreement.
43. Clause ___ of the Preference Share Agreement defines "Option Price" as:

"... an amount per Company A's Preference Share in US Dollar equal to (...)"
44. For the sake of completeness, we should note that, in their letter dated ___, the Respondents intimated that they regard the Agreement to Pledge as being unenforceable and/or not binding upon them. This was immediately refuted in strong terms in a letter from Claimant's legal advisor dated ___, and it remains Claimant's position that the Respondents' allegations are wholly without foundation. Indeed, the allegations contradict previous express assurance by the Respondents that the Agreement to Pledge is binding upon them under the applicable law.
45. In the absence of a reply to their letter of ___, by letter to the Respondents dated ___, Claimant's legal advisor formally referred the disputes relating to the Agreement to Pledge to arbitration on behalf of Claimant.
46. The conduct of the Respondents in seeking to deny that they are bound by their obligations under the Agreement to Pledge is part of a wider strategy which they have adopted of minimising the influence of Claimant over affairs of β Company (...).
47. Accordingly, Claimant requires urgent relief in order to safeguard the ordinary shares in β Company which the Respondents agreed to pledge to Claimant as security for the redemption of Claimant's preference shares in β Company.

RELIEF SOUGHT

48. Claimant seeks an urgent interlocutory order that the Respondents:
- (1) comply with Clauses ___ and ___ of the Agreement to Pledge and that they be forbidden from mortgaging, encumbering, disposing of or otherwise alienating any ordinary shares in β Company held by them and that they remain the legal and beneficial owners of at least (x number) ordinary shares in β Company until full repayment of all sums owing to Claimant under the Preference Share Agreement and the redemption of Claimant's preference shares in β Company; and
 - (2) disclose forthwith all documents evidencing the pledges and undertakings alleged to have been given by the Respondents to other institutions.
49. Claimant seeks specific performance of the Respondents' obligation, under Clauses __ and __, to enter into a pledge of (x number) ordinary shares in β Company and to deposit the relevant share certificates and signed transfers with the Custodian.
50. Alternatively, Claimant seeks:
- (1) a declaration that the Respondents have failed to enter into a valid pledge in accordance with the Agreement to Pledge; and
 - (2) damages, calculated in accordance with Clause ___ or otherwise.
51. Claimant also seeks interest, at a commercial rate, upon all sums awarded to it and costs.

Counsel for Claimant