

NYSBA International Section Global Meeting Tokyo 2019
Mock Arbitration, Wednesday, November 6, 2019

Globoplex Omnicorp v. Ruritania Power

Mock Arbitration Problem¹

I. The Facts

1. Ruritania Power (“RurCo”) is a majority government-owned entity that operates all of the power plants in Ruritania, a civil law country with an unreliable judiciary. RurCo is a Ruritania company with its principal place of business in Ruritania’s ancient capital of Congazosingaz (famous for its mineral waters and charming architecture). Globoplex Omnicorp (“GloboCorp”) is a leading international industrial conglomerate based in Tokyo, with a presence in most developed economies.

2. From about May 2015 to December 2016, GloboCorp’s head of sales, Ms. Ruthless, keen to prove herself by securing a lucrative international deal, courted the CEO of RurCo, Mr. Opportunizt, hoping to persuade him to purchase GloboCorp’s latest turbines for Ruritania’s two newest power plants. Having been told that nothing much happens in Ruritania unless certain people are “courted,” Ms. Ruthless was careful to find herself on a layover in Ruritania and to take Mr. Opportunizt to the finest restaurant in town on GloboCorp’s dime.

3. Over dinner, Mr. Opportunizt expressed doubts about GloboCorp’s new technology. He also observed that Ruritania was getting ready for a national election in January 2017. Should the election lead to a change in government (which seemed likely) there was reason to expect personnel changes at the Ruritania Ministries of Energy, Finance and Commerce, and also in the senior management of RurCo, posts often regarded as political plums. Mr. Opportunizt suggested that the window for a deal was narrowing and that GloboCorp should act quickly to close any deal.

4. Shortly thereafter, Ms. Ruthless invited RurCo’s entire board of directors, many of whom also held positions in Ruritania’s Ministry of Energy, to Monaco for a private “conference,” ostensibly to discuss how GloboCorp’s turbines would benefit Ruritania. After a half-hour presentation on the turbines, the conference featured a networking event on a large yacht for the directors and their invited guests, a shopping spree, a night at the casino, free spa treatments, and even a visit to an exclusive after-hours international law conference at which RurCo’s directors were able to take selfies with NYSBA officers, pop stars, and other celebrities.

¹ **DISCLAIMER:** views espoused by counsel and arbitrators in the mock arbitration should not be taken as representative of their actual views on any questions raised. Nor should this problem be read to imply that its authors hold any particular view of the legal issues raised herein.

5. Then, just days before the Ruritanian election, RurCo and GloboCorp executed a Purchase and Sale Agreement (“PSA”). Ms. Ruthless signed for GloboCorp and Mr. Opportunizt signed for RurCo. Under the PSA, RurCo agreed to buy and GloboCorp agreed to sell two of the latest and most advanced high-performance gas turbines, which were only built and sold by GloboCorp, for Ruritania’s newest power plant. Ruritania’s deputy minister of Energy also signed the PSA for Ruritania, as a sovereign “guarantor” of RurCo’s obligations. In their rush before the election, the parties failed to include a choice of law clause. The PSA was executed in English and Japanese.

6. The gas turbines cost US\$22 million each for a total contract price of US\$44 million. The first turbine (Turbine No. 1) would be installed in June 2017 and the second turbine (Turbine No. 2) in March 2018. On the first turbine, US\$11 million was due upon signing and US\$11 million upon installation. On the second turbine, US\$11 million was due in October 2017 and the rest upon installation in March 2018.

7. Everyone acknowledged that the new powerplants were a major undertaking for Ruritania, representing a significant investment in its energy industry. The financing and purchase of the turbines was the result of numerous meetings amongst Ruritania’s Ministries of Energy, Finance and Commerce. This was also a major undertaking for GloboCorp. Although Ruritania’s laws required the Minister of Finance to approve government contracts worth more than US\$1 million, no one at GloboCorp followed-up on this.

8. Given the sensitivity in the calibrations required for the turbines, GloboCorp offered RurCo a three-year Operation and Maintenance Agreement with GloboCorp’s subsidiary, GloboCorp Maintenance, under which GloboCorp Maintenance would train the plant workers on how to operate and maintain the turbines. RurCo declined this agreement given its expense (an additional US\$6 million) but agreed to have an eight-week training on operating the turbines.

9. If a dispute arose under the PSA, both RurCo and GloboCorp wanted litigation in their home countries. After much negotiation, however, both parties agreed to arbitration, but they disagreed on which arbitral rules to apply. RurCo wanted to apply the Ruritanian Arbitration Center Arbitration “(RuArb)” Rules, while GloboCorp advocated for the application of the rules of arbitration of the International Chamber of Commerce (“ICC”). The result was that the contract in English provided for arbitration under the RuArb Rules and the one in Japanese provided for arbitration under the ICC Rules. The contract helpfully provides that both texts shall be regarded as authoritative.

10. The English version of the PSA contains the following arbitration clause:

Any dispute arising out of or in connection with this contract, shall first be referred to each party’s Board of Directors who will have 60 days from the date of notification to resolve the dispute amicably. If unable to amicably resolve the dispute, the dispute shall be finally resolved by arbitration applying the arbitration rules of the Ruritanian Arbitration Center then in effect. The seat of arbitration shall be New York, New York and the official language shall be English.

11. The Japanese language version of the PSA is identical, except that it provides for arbitration under the ICC rules.
12. The PSA stated that a certain type of high-quality fuel had to be used in the gas turbines, otherwise the blades would corrode, and the machine would become inoperable. A little over six months after the first turbine was installed, in January 2018, Turbine No. 1 experienced a minor explosion and became inoperable such that RurCo was unable to supply energy to a major portion of Ruritania for three weeks.
13. An immediate investigation conducted by RurCo, the responsible agencies of the Ruritanian government and GloboCorp, discovered that the blades of the turbine were heavily corroded. This was unprecedented in a turbine with just over six months of operation.
14. RurCo claims GloboCorp sold it a defective turbine. GloboCorp denies selling a defective turbine and claims that RurCo substantially failed to perform its obligations in numerous respects, including by using poor quality fuel in the turbines.
15. After months of pressure from the Ruritania government and its citizens, in March 2017, RurCo filed a lawsuit in Ruritania Court of First Instance against GloboCorp for, among other things, fraud, requesting cancellation of the PSA, a refund of the US\$33 million already paid, and damages of US\$2 million caused by the incident. In response, GloboCorp filed a Request for Arbitration with the ICC requesting an injunction against RurCo continuing the Ruritanian lawsuit and enforcement of the PSA. GloboCorp also named the Ruritania Government as a respondent in the arbitration while accusing RurCo of concealing and withholding critical information regarding the low-quality discount fuel it was purchasing for the turbines, which GloboCorp claims was a direct cause of the corrosion.

II. Hearing on Jurisdictional Objections

16. RurCo disputes the ICC tribunal's jurisdiction and has asked the Tribunal to dismiss the case based on the following: (1) the dispute is not ripe for resolution by arbitration as the parties' Boards of Directors have not yet engaged in the 60-day negotiations of the dispute required by the PSA; (2) even assuming the dispute is not premature, the proper forum is a RuArb tribunal in accordance with the English version of the PSA; (3) the Tribunal lacks jurisdiction over the Ruritania Government as it was not a valid signatory to the PSA; and (4) GloboCorp corruptly induced RurCo into entering into the Agreements and therefore the dispute is properly before the courts in Ruritania and GloboCorp's request for an anti-suit injunction should be denied.

III. Hearing on Substantive Claims

17. Assume that in a partial award, the arbitral tribunal ruled that it had jurisdiction. In the ensuing time, the parties engaged in disclosure and hired experts. RurCo's expert report indicates that the cause

of the accident was due to the metal alloy of the turbine blades. GloboCorp's expert report indicates that all evidence points to erosion of the turbine blades caused by low quality fuel. GloboCorp requested RurCo to provide it with documentation of the fuel it used in the engines, but RurCo claims that those documents had been destroyed as part of its routine document retention and destruction policy. GloboCorp requested a witness statement from engineer, Mr. Kantbe Found, who was responsible for making the fuel purchases, but was told that he no longer worked for RurCo and RurCo did not have any information concerning his current location. RurCo's counsel is aware of Mr. Found's whereabouts, but under her ethical rules is under no obligation to reveal this information.

18. GloboCorp hired an investigator to locate Mr. Found and believe they discovered him living in Bali under an assumed name. When approached, this individual denied that he was Mr. Found and threatened police action if not left alone.

19. In the final hearing, RurCo has argued that because the PSA had to be signed by the Ruritanian Government but wasn't, it is not enforceable, and all moneys paid under the PSA should be returned. RurCo had also argued that the PSA was obtained through corruption and should not be enforced under public policy grounds, noting that Japan and Ruritania are both parties to the U.N. Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

20. GloboCorp denies RurCo's allegations and responds, inter alia, that the PSA should be enforced; that RurCo should pay it the remaining balance and that the Tribunal should find GloboCorp not liable for the engine failure due to spoliation of evidence by RurCo.