

Usha: National Arbitration Moot Competition 2023 2023

in collaboration with 'Lakshmikumaran & Sridharan'

MOOT PROPOSITION

1. Los Pollos Hermanos Group, Inc. is a company owned by the Salamanca family which is engaged in the business of operating restaurants which specializes in a certain pink coloured fried chicken and is situated in the state of Asgard. The history of the company dates back to 1950s when Mr. Hector Salamanca had set-up a roadside food-cart in the name of 'Los Pollos Hermanos' which sold the pink-coloured fried chicken as 'Pinkman Chicken'. The unique colour and texture of the fried chicken gained significant popularity, because of which Mr. Hector Salamanca decided to diversify the market by challenging the established dominance of various other fast-food restaurants selling fried chicken.
2. In order to expand the business, Los Pollos Hermanos Group, Inc. started to develop a fast-food restaurant chain that specialized in 'Pinkman Chicken' and was known for its unique taste and texture. The chain also came up with a tagline "*The best ingredients. The spiciest spices. All prepared with loving care! And always delivered with a friendly smile.*" The logo of the restaurant chain with the name of 'Los Pollos Hermanos' had two chicken faces in a pink background. By the year 2000, Los Pollos Hermanos had restaurants in 14 locations in Asgard, making these food joints one of the major tourist attractions in Asgard.
3. Subsequently, Los Pollos Hermanos started expanding outside the state of Asgard as well, and by the end of 2010, it had notable number of restaurants even in the states of Midgard, Alfheim, Vanaheim, and Nidavellir.
4. Somewhere in the year 2012, Mr. Hector Salamanca left for his heavenly abode. Mr. Hector Salamanca was survived by his two sons – Marco and Tuco Salamanca. Since Marco and

Tuco Salamanca were also owners and members of Los Pollos Hermanos Group, Inc., the business operations of Los Pollos Hermanos restaurants were being carried out by them after the demise of Late Mr. Hector Salamanca. Marco and Tuco Salamanca had been involved in this family run business since late 1990s, and therefore the company - Los Pollos Hermanos Group, Inc. was being run smoothly even after the demise of Mr. Hector Salamanca, with no significant fluctuations in its profit margins.

5. While the business of the Los Pollos Hermanos Group, Inc. was being run smoothly and there was no difficulty in running the multiple outlets of Los Pollos Hermanos in all five states, certain personal differences and disputes arose between the two brothers who then decided to divide the business of the Los Pollos Hermanos Group, Inc. into two family factions - Marco Group and Tuco Group and run their respective business separately.
6. In order to effectuate the division of business of Los Pollos Hermanos Group, Inc., the two brothers entered into a Memorandum of Business Division on 24.08.2020 ('**MOBD 2020**') by which the terms and conditions as well as the manner in which the business of Los Pollos Hermanos Group, Inc. was to be divided was conceptualized.
7. By way of the MOBD 2020, the Salamanca brothers contemplated division of each and every asset and liability of Los Pollos Hermanos Group, Inc. into two divisions – local division and international division. It was decided that the Marco Group will take over the local division of Los Pollos Hermanos Group, Inc. while the international division would be taken over by the Tuco Group. The process of division was to be carried out in two segments – internal division by which all the assets and liabilities were to be equally divided and necessary conveyances were to be executed for any transfer, sale and like transactions; and court division thereafter, for obtaining a court order effectuating the division of Los Pollos Hermanos Group, Inc. as per the internal division and mutual consent of the Salamanca brothers.
8. It was decided between the Salamanca brothers that till the time the second segment of the division is completed and there is a court order to that effect, Los Pollos Hermanos Group, Inc. would be jointly run by them. The local business of the company would be managed by Marco Salamanca while the international business was to be managed by Tuco

Salamanca. Terms and conditions for operation of the business of Los Pollos Hermanos Group, Inc. were also provided for in the MOBD 2020. Salamanca brothers were to run the business of Los Pollos Hermanos Group, Inc. in the manner as provided in the MOBD 2020 from the date of entering into the MOBD 2020 till the division process is complete, and in the event of any dispute or difference or violation of provisions of MOBD 2020, the MOBD 2020 provided for reference to dispute to arbitration.

9. Since 'Los Pollos Hermanos' is a registered trademark in the name of Los Pollos Hermanos Group, Inc., it was decided between the Salamanca brothers that Marco Salamanca of the Marco Group would be the exclusive owner and proprietor of the intellectual property of the Company including trademarks, trade names, product names, copyrights, 'Los Pollos Hermanos' word and logo design on the packaging design and brand promotional and marketing materials within Asgard. Similarly, Tuco Salamanca of Tuco Group was contemplated to be the exclusive owner and proprietor of the intellectual property of the Company including trademarks, trade names, product names, copyrights, 'Los Pollos Hermanos' word and logo design on the packaging design and brand promotional and marketing materials outside the state of Asgard. However, both the Salamanca brothers and their respective groups were entitled to use the know-how, technology and other information pertaining to the business of the Company for development and furtherance of the business of their Groups.
10. Similarly, it was also decided between the brothers that after the process of division of business of Los Pollos Hermanos Group, Inc. is complete, the Tuco Group is not going to use the trademark 'Los Pollos Hermanos' in any of its entities operating in Asgard in any business whatsoever, and Marco Group would not use the trademark 'Los Pollos Hermanos' in any of its entities operating in Midgard, Alfheim, Vanaheim, and Nidavellir in any business whatsoever. The Tuco Group was free to operate in the local market of Asgard with any other name till the time the name of the entity and its restaurant did not have 'Los Pollos Hermanos' in it, and the restaurant was not serving 'Pinkman Chicken'. Similar arrangement was provided for Marco Group wherein its entities was free to operate in the international market with any other name till the time the name of the entity and its

restaurant did not have ‘Los Pollos Hermanos’ in it, and the restaurant was not serving ‘Pinkman Chicken’.

11. To effectuate this arrangement with respect to the intellectual property, Los Pollos Hermanos Group, Inc., Tuco Salamanca and Marco Salamanca executed a Deed of Assignment on 11.02.2021 which governed all terms, conditions, rights and liabilities of the parties to the Deed, as regards all intellectual property rights, whether registered or unregistered, owned or held by Los Pollos Hermanos Group, Inc. By this Deed, Los Pollos Hermanos Group, Inc and Tuco Salamanca assigned to Marco Salamanca, their ownership and rights regarding the trademark ‘Los Pollos Hermanos’ along with the trade names, product names, copyrights, ‘Los Pollos Hermanos’ word and logo design on the packaging design and brand promotional and marketing materials within Asgard. While the dispute resolution clause in the Deed of Assignment conferred exclusive jurisdiction in the courts of Asgard, it did not contemplate for the reference of dispute to arbitration.
12. After the execution of the Deed of Assignment and during the process of division of the business of Los Pollos Hermanos Group, Inc. as per the MOBD 2020, Marco Salamanca was informed by one of his clients, Saul Goodman, that certain pink coloured frozen chicken nuggets were being sold by one of the group companies of Tuco Salamanca in Asgard and had the name of Los Pollos Hermanos Group, Inc. mentioned in the ‘manufactured by’ section of the packaging. According to Marco Salamanca, the usage of the name of Los Pollos Hermanos Group, Inc. in the products being sold by Tuco Salamanca group in Asgard was in gross violation of the terms of Deed of Assignment.
13. On 24.09.2021, a Board Meeting was held between the Directors of Los Pollos Hermanos Group, Inc. which included the Salamanca brothers, their wives and two independent directors – Ms. Skyler White and Ms. Marie Schrader. In this board meeting, Tuco Salamanca and his wife – Mrs. Andrea Cantillo sought to pass a resolution to the effect that while Tuco Group will incorporate a new entity to carry out the international business of Los Pollos Hermanos Group, Inc., Marco Salamanca should set-up a new entity as well to operate the local business of Los Pollos Hermanos Group, Inc. and wind-up the existing company. This proposal was not agreeable to the remaining directors, who were of the view

that while a new entity is to be incorporated by the Tuco Group, the existing company - Los Pollos Hermanos Group, Inc. could be retained by the Marco Group for the local division of the company. Based on the majority, a resolution was passed to the effect that the Tuco Group will be separated from Los Pollos Hermanos Group, Inc. and will thereafter carry out the international division through a new entity which would be incorporated by the Tuco Group for this purpose. On the other hand, the existing entity of Los Pollos Hermanos Group, Inc. would be retained by the Marco Group to operate the local division, however, with a different name.

14. Apprehending that the two independent directors were actually biased towards Marco Salamanca, Tuco Salamanca initiated proceedings for oppression and mismanagement of Los Pollos Hermanos Group, Inc by Marco Salamanca, his wife Mrs. Gretchen Schwartz and the two independent directors - Ms. Skyler White and Ms. Marie Schrader. In these proceedings before the Company Law Tribunal, Tuco Salamanca sought for (i) removal of the independent directors from the Board of Los Pollos Hermanos Group, Inc., (ii) expedited division of the business of Los Pollos Hermanos Group, Inc as per the MOBD 2020 and (iii) winding-up of Los Pollos Hermanos Group, Inc. thereafter.
15. During the pendency of these proceedings, and in order to stabilize his business, Marco Salamanca started to conduct majority of the local business of operating restaurant chains and alike, through his other group companies in Asgard. Since the intellectual property in relation to 'Los Pollos Hermanos' in the state of Asgard rested with Marco Salamanca, it was being used by the Marco Group to carry out the business, which substantially affected the business and profits of Los Pollos Hermanos Group, Inc. which was to be operated by the both the Salamanca Brothers in normal course. The churn being generated by the local business of the company substantially decreased, bringing it closer to none.
16. Aggrieved by the actions of Marco Salamanca, Tuco Salamanca on 03.12.2022 issued a notice to Marco Salamanca, Gretchen Schwartz, stating the violations of the terms of the MOBD 2020 for not carrying out the business of Los Pollos Hermanos Group, Inc. in its accordance and terminating the MOBD 2020. It was also stated in the notice that the Marco Group is liable to pay Mr. Tuco Salamanca, damages to the tune of Rs. 5 Crores on account

of breach, which, if not paid with 15 (fifteen) days, would amount deemed consent to refer the disputes to arbitration.

17. In response to this notice, Marco Salamanca stated that there had been no violation of the MOBD 2020 by him or his Group and it was infact, Tuco Salamanca who had violated the terms of the Deed of Assignment in using Los Pollos Hermanos Group, Inc as a manufacturer of its product in the packaging which sold pink-coloured frozen chicken nuggets. Therefore, the Tuco Group was supposed to pay compensation to the tune of Rs. 10 Crores on account of loss of profit due to infringement of intellectual property rights.
18. Since Marco Salamanca was reluctant to refer the dispute to arbitration, Tuco Salamanca approached the local courts of Asgard seeking (i) interim relief to the extent that the subject matter of the dispute is protected and Los Pollos Hermanos Group, Inc is run in its ordinary course of business and (ii) appointment of an Arbitral Tribunal. When the arguments were being heard on this petition, Marco Salamanca agreed to appointment of an Arbitral Tribunal but with the liberty that he may approach the Arbitral Tribunal to decide on the validity of the agreement and arbitrability of the dispute. Based on this submission on behalf of the counsel for Marco Salamanca, the court on 18.01.2023, passed an order to the following effect:
 - I. The matter be referred to arbitration under the aegis of Narsee Monjee Arbitration Centre ('NMAC') which shall appoint the Arbitral Tribunal based on the Narsee Monjee Arbitration Centre Rules, 2018 ('NMAC Rules');
 - II. The parties are free to approach the Centre under the Rules as well as the Arbitral Tribunal to decide on the validity of the arbitration and arbitrability of the disputes which issue shall be decided at the very first instance; and
 - III. The subject matter of the dispute is to be protected and Los Pollos Hermanos Group, Inc. is to run in the normal course of business, however, this issue is to be raised before the Arbitral Tribunal as well under the law. Therefore, the interim relief was to operate till the time the Arbitral Tribunal decides on the application for interim relief.

19. Based on this order dated 18.01.2023, Tuco Salamanca approached the NMAC for appointment of an Arbitral Tribunal on 24.01.2023 by filing a reference request. In response to this reference request, Marco Salamanca filed a reference request challenging the validity of the arbitration agreement and arbitrability of disputes on 28.01.2023.
20. The NMAC has now referred the disputes to arbitration by appointing an Arbitral Tribunal. Since the reference request of Marco Salamanca required in-depth analysis of law, the reference request has been forwarded to the Arbitral Tribunal and the parties have been directed to put forth their case regarding the arbitrability and validity of the agreement before the Arbitral Tribunal.

Enclosure I – Relevant provisions of the MOBD 2020

Clause 1: DIVISION OF THE COMPANY

1.1 The Parties, as soon as reasonably practicable and in accordance with the respective timelines set out for each action within this MOBD, and in any case not later than 18 (eighteen) months from the date of execution of this MOBD ('Execution Date') or any mutually extended period, complete all actions and obligations, to the satisfaction of the other Parties, in the manner set out herein and as may be required under the applicable law, in order to give effect to the following business division within the Company ('Division of Business'):

- (a) The local business of the Company ('Local Business') shall be taken over by the Marco Group;
- (b) The international business of the Company ('International Business') shall be taken over by the Tuco Group;

The Division of Business shall take effect on and from the date when all actions under this MOBD for the same are completed by both the Groups or at the end of 18 (eighteen) months from the Execution Date, whichever is later.

1.2 After the Division of Business as set out at Clause 1.1 above, the Parties shall within 90 (ninety) days, or within such further period as may be mutually agreed between

the Groups, file a scheme for Division of Business of the Company in the court of competent jurisdiction to obtain an order to that effect ('Court Division').

1.3 On and from the completion of Division of Business till the Court Division:

- (a) Both the Groups shall work independent of each other, save and except in the manner as may be otherwise stated in the MOBD, and any support shall only be on a mutually agreed basis between the Groups; and
- (b) Each Group shall be responsible for its respective business operations, profit and loss and shall have no claim on the revenue/profit and loss streams of the other Group.

1.4 In the event of any liability arising on the Company pertaining to any matter, in relation to the period prior to the completion of Division of Business, such liability shall be the joint responsibility of both the Groups and shall be addressed accordingly jointly by both the Groups.

1.5 The Parties agree that in the event the scheme for Court Division is disapproved or not approved within a period of 12 (twelve) months from the date of filing of the scheme for Division of Business or such other period as may be agreed by the Parties, adequate steps may be jointly taken by the Parties for the sale of the entire Company at a fair market value.

Clause 2: COVENANTS AND OBLIGATIONS

2.1 For the purpose of Division of Business in the manner contemplated in Clause 1 above, the Groups shall undertake the following:

2.1.1 Company Name

The Marco Group undertakes to use a name different than the one of the Company i.e., Los Pollos Hermanos Group, Inc., for the entity through which the Local Business shall be carried out by the Marcos Group post Court Division of the Company. The Marco Group also undertakes that post Court Division of the Company, the Marco Group shall ensure that the Marco Group shall not use the name of the Company in its current form for any matter relating to the Marco

Group, including marketing materials or communications, save and except in the limited manner it may be required under applicable law.

Similarly, the Tuco Group undertakes to use a name different than the one of the Company i.e., Los Pollos Hermanos Group, Inc., for the entity through which the International Business shall be carried out by the Tuco Group post Court Division of the Company. The Tuco Group also undertakes that post Court Division of the Company, the Tuco Group shall ensure that the Tuco Group shall not use the name of the Company in its current form for any matter relating to the Tuco Group, including marketing materials or communications, save and except in the limited manner it may be required under applicable law.

2.1.2 Employees

The employees of the Company shall be divided between the Local Business and the International Business in the manner as may be decided between the Parties. Such division shall come into effect from the date of Division of Business and all employee related loans and other payables/dues including provident funds, gratuity etc. shall be segregated among the Local Business and International Business as per employee allocation.

2.2 The Parties shall ensure that, in addition to the obligations and covenants of the respective Party as set out in Clause 2.1 above, till the completion of Division of Business, the operations of the Company are carried out in an efficient manner and the understanding reached in this MOBD including the following is given effect to.

2.2.1 Working of the Company

Till the Court Division of the Company takes place as agreed under the MOBD, all other workings of the Company shall be conducted in the ordinary course of business, in a manner not prejudicial to the interest of the Local Business and the International Business and all decisions relating to the same, other than as set out in the MOBD, shall be undertaken jointly and mutually by both the Groups.

2.2.2 Trademark, Trade Name, Copyright, Logo and packaging design rights/restrictions

The Parties have agreed that the Parties shall take all steps to facilitate the finalization of the arrangement for transfer / sharing / assignment / sale of the trademark, trade name, copyright, logo, and packaging design rights / restriction of and related to the Company and for which, appropriate conveyance would be executed. The conveyance to be executed between the Parties shall alone contain and govern all terms, conditions, rights and liabilities of the Parties as regards all intellectual properties, whether registered or unregistered, owned or held by the Company.

2.2.3 During the period from the Division of Business till Court Division, except for the purpose of giving effect to the transactions and arrangements contemplated in the MOBD, the Parties shall ensure in relation to the Company that the Company shall not, other than with the consent of the Marco Group and Tuco Group:

- (a) enter into any financial transaction other than in the ordinary course of business of the Company;
- (b) enter into any off-balance sheet transaction, arrangement or commitment;
- (c) undertake any action which adversely impacts the profits of the Company.

Clause 3: GOVERNING LAW, DISPUTE RESOLUTION AND JURISDICTION

3.1 All disputes arising out of or in connection with the present contract, including any question regarding its existence, operation, validity or breach thereof, shall be referred to and finally resolved by Arbitration in accordance with the Narsee Monjee Arbitration Centre Rules, 2018 of the Narsee Monjee Arbitration Centre which are framed in accordance with the Arbitration & Conciliation Act, 1996.

3.2 The Parties are free to agree on whether the dispute has to be referred to a Sole Arbitrator or an Arbitral Tribunal consisting of three members. In the event that the Parties agree to appoint a Sole Arbitrator, it has to be with the consensus of both the Groups. However, for a 3-member Tribunal, each party shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator. In case

of failure of the parties to appoint the Arbitrator(s), the same shall be done in accordance with the Arbitration & Conciliation Act, 1996.

3.3 The place of arbitration shall be Asgard. The language of arbitration shall be English and the disputes are to be governed by the laws of Asgard.

3.4 Subject to the above, the courts of Asgard shall have exclusive jurisdiction to try all disputes arising in relation to this MOBD.

NOTA BENE

1. The laws of Asgard are in Pari Materia with the laws of India. Therefore, the Arbitration & Conciliation Act, 1996 referred to in the proposition is the Arbitration statute enforced in India along with its amendments till February, 2023.
2. Similarly, the Narsee Monjee Arbitration Centre Rules, 2018 are in Pari Materia with the Arbitration Rules of the Mumbai Centre for International Arbitration (MCIA Rules 2nd Edition, 15.01.2017).
3. Counsels for both the sides are required to address the arguments on the following issues:

Jurisdiction

Issue 1: Whether or not the disputes arising out of the MOBD 2020 can be referred to arbitration?

- (a) *The MOBD 2020 is an unstamped and unregistered document*
- (b) *Dispute with respect to the oppression and mismanagement of the Company is pending before the Company Law Tribunal*

Issue 2: Whether or not the dispute under the deed of assignment can be referred to arbitration?

- (a) *The Deed of Assignment does not contain an arbitration clause*
- (b) *The subject matter of dispute is not arbitrable in nature.*

Issue 3: Whether or not the independent directors – Ms. Skyler White and Ms. Marie Schrader are necessary parties to the present arbitration.

Merits

Issue 4: Breach of the terms of the MOBD 2020

- (a) *Whether Mr. Marco Salamanca is in breach of terms of the MOBD 2020?*
- (b) *Can Mr. Tuco Salamanca Terminate the MOBD 2020 in the absence of a termination clause in the MOBD 2020?*
- (c) *Is Mr. Tuco Salamanca entitled to damages of Rs. 5 Crores on account of breach of the terms of MOBD 2020 by Mr. Marco Salamanca and his Group entities?*

Issue 5: Breach of the terms of Deed of Assignment

- (a) *Whether Mr. Tuco Salamanca is in breach of terms of the Deed of Assignment?*
- (b) *Whether Mr. Marco Salamanca can seek a relief for mandatory injunction, injuncting Mr. Tuco Salamanca and his Group entities from using 'Los Pollos Hermanos' Group Inc. as a manufacturer of its product in the packaging which sold pink-coloured frozen chicken nuggets?*
- (c) *Whether Mr. Marco Salamanca is entitled to a sum of Rs. 10 Crores as compensation for loss of profits due to infringement of his intellectual property rights?*

4. **Counsels are free to frame any other issues arising out of this factual situation.**

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