

Law School Mediation Case Study

Guest Presentation Series
By: Christopher J. Webb, J. D.

JOINT VENTURE DISPUTE

In 2000, AXELCO, a publicly-traded global durable goods manufacturer, entered into a joint venture agreement with one of India's largest privately-held conglomerate corporations named INDIACO.

AXELCO's negotiating team consisted of top business and technical representatives from its international subsidiary. The team reported directly to AXELCO's CEO and was under considerable pressure to conclude an agreement so that AXELCO could achieve a presence in India and obtain a low-cost manufacturing supplier for one of its core patented products, AXEL MAGIC®.

AXEL MAGIC® is sold on a sole-source, non-competitive basis to AXELCO's key automotive customer. AXELCO's has been under increasing customer pressure to reduce its pricing or face the prospect of competitive bidding for future procurement. Given the commercial realities facing AXELCO, the final-negotiated joint venture agreement was signed off by AXELCO's legal department without revision.

The Pre-incorporation Memorandum of Understanding for formation of the joint venture (MOU) contained the following key provisions:

1. "AXELCO and INDIACO shall be equal owners of the joint venture with management of its daily operations being entrusted exclusively to INDIACO."
2. "AXELCO and INDIACO agree to consult jointly with respect to significant business decisions adversely affecting the joint venture."
3. "AXELCO hereby grants to INDIACO an exclusive license under its existing know-how, technology and patents to design, build and sell its AXEL MAGIC product line."
4. "AXELCO agrees for the life of this Agreement to purchase its manufacturing requirements from INDIACO."

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5. “INDIACO agrees to use its best efforts to provide AXELCO with competitive pricing for its services and supply to AXELCO.”
6. “Each party shall have the right to sell their interest in the joint venture to the other or to a third party with permission after five (5) years from the date of this Agreement.”
7. “This Agreement shall terminate upon the expiration of ten (10) years unless otherwise extended by consent of the parties hereto.”
8. “This Agreement shall be governed under the laws of India.”
9. “In the event of any conflict between this Agreement and any other understanding between the parties, this Agreement shall govern.”
10. “The parties to this Agreement agree to submit any and all disputes arising hereunder to non-binding mediation. In the event the parties are unable to resolve their difference through mediation, the parties further agree to proceed with binding arbitration under the rules and procedures of the International Chamber of Commerce Paris.”

Through an exchange of correspondence, AXELCO through its International Director has insisted that INDIACO unilaterally reduce its pricing by 25% effective retroactively to the beginning of 2006. INDIACO has responded that such a price reduction would result in operating losses for the joint venture and has asked that the pricing dispute be submitted to mediation in accordance with the MOU. As a result the parties agreed to submit the matter to mediation.

AXELCO FACT SHEET

Mediation Team:

International Vice President
Associate General Counsel
Outside Legal Counsel

Since 2004, pricing from INDIACO has been steadily increasing and has been a cause of concern on the part of AXELCO. Business pressure is building to find another supplier for competitive bidding purposes. Patents for AXEL MAGIC[®] are about to expire. Worse, recent rumors in the marketplace suggest that INDIACO may be offering comparable services to one of AXELCO's toughest competitors. AXELCO's Executive Committee has instructed you to negotiate and obtain the following results:

- At least a 10% cut in INDIACO's current pricing effective immediately;
- AXELCO's right to buy from others in India, if pricing is not maintained for three (3) years;
- INDIACO agreement not sell to AXELCO's competitors.

Finally, the Executive Committee advised that unless agreement with the above is not reached in the mediation, AXELCO intends to sell its entire stake in the joint venture to a third party.

AXELCO's general counsel who reviewed originally the pre-incorporation agreement has informally advised you that that arbitration should be viewed as a last resort remedy due to time and cost given AXELCO's present financial condition.

INDIACO FACT SHEET

Mediation Team:

Chief Executive Officer & Founder
Local Indian Legal Counsel
Outside US Counsel

Recent board meetings with representatives from AXELCO have been testy and none of the original party representatives from AXELCO attend. Some have left AXELCO through retirement and terminations. Lack of business communication has led to a number of disagreements. The most serious concerns at present are the decline in orders from AXELCO and delinquent payments from AXELCO on existing orders often exceeding 120 days after shipment of product. These events have contributed to the need for increased pricing by INDIACO to cover its resulting costs. You have heard rumors that AXELCO may be considering bankruptcy like so many other US firms.

In consulting with your long-time Indian legal counsel, you understand that a number of the pre-incorporation agreement provisions favor and protect your interests and importantly give you sufficient proprietary rights in AXEL MAGIC ® to permit sales to others.

Recently, orders from AXELCO have been declining and you are concerned that the profitable level of business you enjoyed in the past will not continue. While you prefer to sell to AXELCO only, lack of business may require sales to others to maintain the financial strength of the joint venture. A price freeze is a realistic business option if current order levels from AXELCO are maintained. If order levels were increased by 5%, you could consider a reasonable price reduction on the additional orders above your present bookings. Greater pricing flexibility would be possible on all orders if AXELCO paid on a net-30 day basis after shipment.

After considerable thought and consultation with your business colleagues, you, as the CEO of the joint venture and founder of one of the original parties to the joint venture agreement, decided that it would be best to submit the dispute to mediation in the hopes the current disagreements can be resolved.