

SIME DARBY ENGINEERING SDN. BHD.

v.

ENGINEERS INDIA LTD.

(Arbitration Petition No. 3 of 2009)

JULY 22, 2009

[ASHOK KUMAR GANGULY, J.]

ARBITRATION AND CONCILIATION ACT, 1996:

ss.2(1)(d), (f), 10(2) and 11 – International Commercial Arbitration – Appointment of arbitral tribunal – Number of arbitrators – Dispute regarding – Held: In the instant case, the relevant arbitration clause of agreement is silent about the number of arbitrator – Therefore, s.10(2) squarely applies – In view of the arbitration clause read with s.10(2), clear that arbitral tribunal in the instant case would be consisting of a sole arbitrator – Policy decision that for contracts costing over a particular amount a committee of arbitrators would be composed of, cannot change the contractual clause – Besides, the policy decision coming into force after the contract between the parties had been entered into, the said policy decision cannot override the contract – UNCITRAL Model Law on International Commercial Arbitration – Articles 2(b) and 10(2)—Administrative Law—Policy decision vis-a-vis contractual clause.

s.10(2) – Number of arbitrators – Held: Parties' autonomy in the arbitration agreement must be given due importance in construing intention of parties – Parties have freedom to change the number of arbitrators even after the contract has been entered, and by mutual consent parties may amend the contract – Interpretation of commercial arbitration agreements.

Redfern and Hunter, Law and Practice of International Commercial Arbitration, IV Edition, 2004, page 185 and Mustil

A *and Boyd on Commercial Arbitration, 2nd Edition, page 174, referred to.*

CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 3 of 2009.

B Petition Under Section 11 Sub section (5) r/w Sub section (12) of The Arbitration & Conciliation Act, 1996.

Dipankar Gupta, Anil Bhatnagar, Amit Dhingra, Aman Leekha and Dua Associates for the Petitioners.

C Mukul Rohtagi, Syed Naqvi, Namrata Kapoor Sharma, Diksha Rai Ninad Laud, Nikhil Rohtagi and Surya Kant for the Respondents.

The following Order of the Court was delivered

D

ORDER

E 1. This petition has been filed under Section 11 of Arbitration and Conciliation Act 1996 (hereinafter referred "the said Act") by the petitioner praying for appointment of the arbitral tribunal to adjudicate the claims and disputes between the petitioner and the respondent.

F 2. The petitioner is a company incorporated and existing under the laws of Malaysia and is engaged in the business of fabrication of all types of offshore and onshore structures and complexes. The respondent on the other hand is the company incorporated under the (Indian) Companies Act, 1956 and is *inter alia* engaged in the business of providing engineering and related technical services for petroleum refineries and other industrial projects.

G

H 3. The necessary facts of the case are that Oil and Natural Gas Corporation Limited (ONGC) invited a tender vide notification dated November 17, 2003 for carrying work of Survey, Design, Engineering, Procurement, Fabrication,

H

Anticorrosion and Weight coating, Laying of submarine pipeline, Installation of SPM, Load out, Tie-down/Sea-fastening and various other jobs in respect of Mumbai High South Field offshore site. A

4. In connection with the said tender issued by ONGC, respondent and petitioner entered into a Business Agreement on 22/01/2004 by which it was agreed that the respondent shall quote as a bidder against the said Tender with the petitioner as a sub-contractor for identified scope of work. The tender was awarded by ONGC to the respondent by notice dated 10/03/2004 for the said fabrication and installation of D-1 Well-Cum-Water Injection Platform at Mumbai High South field Off-shore site on a turnkey basis for a sum of US \$ 62,3000,000/- and thereafter an agreement between the respondent and ONGC was entered into. Then, the respondent entered into a subcontract with the petitioner which was signed on 29th of October 2004 and for Fabrication, Load Out and Transportation of Jacket, Piles, Conductors and Deck for D-1 Well-Cum-Water Injection Platform Project of ONGC at Bombay High South field off-shore site for a lump sum subcontract price of US \$ 20,162,460/-. In terms of the said subcontract the petitioner carried out its scope of work in terms of its contractual obligations. As it did not receive the full payment from the respondent disputes and differences between them cropped up. These disputes between the parties remained unresolved despite some joint negotiations between them. B
C
D
E
F

5. The petitioner by its Advocate's notice on 19/02/2008 invoked the arbitration clause and referred all disputes and differences between them and respondent to arbitration including its claim of US \$ 14,244,812.02 and claim for loss and damage on account of financing charges and foreign exchange and such other damages. In the said letter the petitioner also suggested the names of a few arbitrators. The respondent by its letter dated 26/02/2008 did not accept the stand of the petitioner and stated that petitioner's stand to G
H

A proceed with arbitration is premature and the respondent requested the petitioner to withdraw the Notice Invoking Arbitration and come out with a viable proposal to create a joint settlement mechanism to settle the dispute amicably.

B 6. However, the learned counsel for the petitioner tried to show before this Court that several meetings were held between the parties for settling the dispute amicably but the said efforts ultimately did not succeed. However before this Court the learned counsel for the respondent fairly accepted the position but disputes between the parties virtually cannot be resolved amicably anymore and the matter should be resolved through arbitration.

C 7. Learned counsel for the respondent submitted that he does not dispute that there are arbitrable disputes between the parties. Nor does he dispute that the petitioner has invoked the arbitration clause between the parties. The only point on which the case is argued is that in this case the arbitration panel must consist of three arbitrators, one is to be nominated by each party and the third arbitrator is to be chosen by the nominated arbitrators. Learned counsel for the petitioner on the other hand did not accept the said stand of the learned counsel for the respondent and submitted that in terms of the agreement in this case dispute can be decided by the sole arbitrator. Matter was actually heard before this Court on the aforesaid controversy.

F 8. Learned counsel for the petitioner submitted that admittedly the arbitration clauses in the contract which govern the rights of the parties in the matter of arbitration are as follows:

G "12.1 This Subcontract shall be governed by and construed in accordance with the Laws of India. The Courts at Delhi shall have sole jurisdiction.

H 12.2 The Parties shall endeavour to resolve any dispute or difference amicably through joint negotiation and when necessary by reference to the Chief Executive of EIL and

SSE. If any dispute or difference, which cannot be mutually resolved by the parties, the same shall be referred to arbitration in accordance with the provisions contained in Indian Arbitration and Conciliation Act, 1996 which is generally in accordance with UNCITRAL rules. A

12.3. The arbitrator(s) shall give reasoned award in respect of each dispute or difference referred to him. The award as aforesaid shall be final, conclusive and binding on all the Parties of this Subcontract in accordance with the Law. B

12.4. The venue of the arbitration shall be at New Delhi, India." C

9. By relying on para 12.2, learned counsel submitted that the said clause does not indicate about the number of arbitrators to be appointed while reciting that the matter be referred to arbitration in accordance with the provisions contained in the Indian Arbitration and Conciliation, 1996, which is generally in accordance with the UNCITRAL rules. D

10. Learned counsel also referred to and relied on Section 10 of the said Act which deals with the composition of Arbitral Tribunals under Chapter III of the said Act. Section 10 (1) and 10 (2) are as under:- E

"10. Number of arbitrators. – (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number. F

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator."

11. Relying on Clause 12.2 and Section 10, learned counsel submits that it is clear that arbitration in this case shall be held by a sole or a single arbitrator. He particularly emphasised Clause 12.2 of the agreement and Section 10(2) of the Act which says that failing the determination referred to in sub-section 1, the Arbitral Tribunal shall consist of a sole H

A arbitrator.

12. Learned counsel submits that in the instant case Clause 12.2 does not indicate the number of arbitrators and in that event Sub-section (2) of Section 10 would apply.

B 13. Learned counsel further submits that the matter should not be referred to three arbitrators as that would prolong arbitration proceedings as three arbitrators would have to adjust their timings. Apart from that the same would result in considerable escalation of cost.

C 14. Learned counsel has referred to a judgment of this Court in support of his contention that it has been judicially recognized that reference of a dispute to a panel of three arbitrators escalates the cost and more so it is very time consuming.

D 15. Learned counsel for the respondent on the other hand submits that reference of the matter to a panel of three arbitrators is not ruled out if the arbitration clause is properly construed alongwith Section 10 of the said Act.

E 16. Learned counsel admitted that Clause 12.2 is silent about the number of arbitrators but Clause 12.3 refers to an expression 'arbitrator(s)'. By relying on the said expression in Clause 12.3 learned counsel submits that the arbitration clause thus postulates the appointment of more than one arbitrator. As there cannot be two arbitrators which is an even number, the minimum number of arbitrators other than one would be three.

F 17. Learned counsel also submitted that while clause 12.2 stipulates that the arbitration between the parties would be governed under the said Act it also says in clause 12.2 that it shall generally be in accordance with UNCITRAL rules.

G 18. Learned counsel also submitted that they have a policy that in matters involving high stakes above Rupees ten crores, H it should be referred to a Committee on panel of arbitrators. In

support of this submission, learned counsel referred to a Standard Contract Clauses which have been disclosed in the counter affidavit filed by the respondent and reliance was placed on the following clause:- A

"The Arbitration shall be conducted in accordance with the Indian Arbitration and Conciliation Act, 1996. For Contracts costing upto Rs.10 Crores, a Sole Arbitrator should be appointed. For Contracts costing over Rs.10 Crores, a Committee of Arbitrators should be appointed composed of one Arbitrator to be nominated by the Contractor, one to be nominated by the Owner and the third Arbitrator, who will act as a Chairman but not as umpire, to be chosen jointly by the two nominees. The decision of majority of Arbitrators shall be final and binding on both parties." B C D

19. Learned counsel also relied on a passage from Redfern and Hunter, Law and Practice of International Commercial Arbitration, Fourth Edn., 2004, page 185, which is as under:-

"In modern practice, despite the advantages of a sole arbitrator, particularly in arbitrations involving heavy stakes, preference is for appointment of three arbitrators, albeit not without rationale. Particularly, in the area of "international commercial arbitration" involving complex problems peculiar to special types of disputes, eg, engineering, construction, maritime and international trading disputes, a sole arbitrator, many a time may not be suitable for resolution of such disputes. In such situations, the common practice is to appoint a tribunal comprising of three arbitrators. Even though it may involve more expense and delay than a sole arbitrator arbitration, it is still preferred as it is more effective. 'An arbitral tribunal of three arbitrators is likely to prove more satisfactory to the parties, and the ultimate award is more likely to be accepted to them.'" E F G H

A 20. The learned counsel argued if the aforesaid stipulations in clauses 12.2 and 12.3 of the agreement and Sections 10(1) and 10(2) are read harmoniously with UNCITRAL model rules, the appointment of a panel of three arbitrators in this case cannot be ruled out.

B 21. These being the rival contentions of the parties, I am unable to accept the contentions put-forth by learned counsel for the respondent for the reasons discussed hereinbelow.

C 22. If one looks at the Clause 12.2 of the agreement it should be clear if the disputes and differences are not resolved mutually, the same shall be referred to arbitration in accordance with the provisions of the said Act. Clause 12.3 stipulates the requirement on the part of the arbitrator(s) to give reasons.

D 23. The Arbitration Tribunal as defined under Section 2(d) of the Act means "a sole arbitrator or a panel of arbitrators".

E 24. Section 10(2) of the Act is very relevant in order to resolve the controversy in this case in as much as Section 10(2) makes it very clear where the number of arbitrator is not determined, the arbitral tribunal shall consist of a sole arbitrator. In this connection if UNCITRAL rules are referred the position will remain the same. UNCITRAL model law on International Commercial Arbitration also accepts the same definition of Arbitration Tribunal in Article 2(b). Article 10 of those rules is almost identical with Section 10 of the said Act. Article 2(b) and Article 10 of those rules are extracted hereinbelow:-

"Article 2. Definition and rules of interpretation – For the purposes of this Law:

G (a) xxx xxx

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators."

H *"Article 10. Number of arbitrators - (1) The parties are free*

to determine the number of arbitrators.

A

(2) Failing such determination, the number of arbitrators shall be three."

25. Therefore, the definition of Arbitral Tribunal in Section 2(1)(d) of the said Act is verbatim the same as in Article 2(b). Article 10 of the UNCITRAL model law has close similarity with Section 10 of the said Act.

B

26. Section 10 deviates from Article 10 of the UNCITRAL law only in the sense that Section 10(1) of the Act provides that despite the freedom given to the parties to determine the number of arbitrators such numbers shall not be even number. But in default of determination of the number, Section 10(2) provides the tribunal is to consist of a sole arbitrator. Therefore, scheme of Section 10(2) of the Act is virtually similar to Article 10.2 of the UNCITRAL model law.

C

D

27. In the instant case Clause 12.2 of the Arbitration clause is silent about the number of arbitrator. Therefore, Section 10(2) of the said Act squarely applies.

E

28. The learned counsel for the respondent has referred to a passage at page 185 para 4-18 of Redfern and Hunter, Law and Practice of International Commercial Arbitration, Fourth Edn. But looking at the said book this Court finds that the said passage was not been properly quoted. In paragraph 4-15 of the said book it has been provided as follows:-

F

"A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise, or unless the LCIA Court determines that in view of all the circumstances of the case a three-member tribunal is appropriate."

G

29. In the said paragraph it has also been stated that there are distinct advantages of referring a dispute to a sole arbitrator on grounds of speed and economy. "A sole arbitrator does not need to 'deliberate' with others, without having to spend time

H

A in consultation with colleagues in an endeavour to arrive at an agreed or majority determination of the matters in dispute.” (Page 184)

B 30. Similar opinion has been expressed in Russell on Arbitration 23rd Edition. At page 129, paragraph 4-035 with reference to arbitration it has been said “Where no choice is made, the law implied a reference to a tribunal consisting of a sole arbitrator.” In fact Section 15(3) of the (English) Arbitration Act, 1996 provides for the same.

C 31. Mustil and Boyd on Commercial Arbitration, 2nd Edition also contains the same statement of law. At page 174 of the said book it has been provided that “an arbitration agreement calls for a reference to a single arbitrator, either if it contains an express stipulation to that effect, or if it is silent as to the mode of arbitration.”

D

E 32. In the instant case, the arbitration clause 12.2 is silent as to the number of arbitrator. The said clause read with Section 10(2) of the Act makes it very clear that arbitral tribunal in the instant case would be consisting of a sole arbitrator.

F 33. The learned counsel for the respondent has referred to its policy decision which has been quoted hereinabove. Such policy decision cannot change the contractual clause. In any event the contract between the parties was entered into in 2004. The said policy decision came into effect in 2005. Therefore, the said policy decision cannot in any way override contract between the parties.

G 34. The parties autonomy in the arbitration agreement must be given due importance in construing the intention of the parties. In so far as reference to the expression ‘arbitrator(s)’ in clause 12.3 is concerned, the same does not in any way affect the intention of the parties in clause 12.2.

H 35. It is noted in this connection that parties have freedom

to change the number of arbitrator even after the contract has been entered and by mutual consent the parties may amend the contract. If that takes place, in such an eventuality clause 12.3 provides that the arbitrator or arbitrators have to give reasoned award in respect of each dispute and difference referred. Here also the expression which has been used is 'him' which also points to a sole arbitrator.

36. It is clearly provided in the said Act that an arbitral tribunal can, if necessary, take the help of experts in terms of Section 27 of the said Act. If the sole arbitrator requires the assistance of an expert it can always take such assistance.

37. Mr. Mukul Rohtagi, learned counsel for the respondent has fairly submitted that if his argument is not accepted by the Court then his client has no objection to the appointment of Hon'ble Mr. Justice D.P. Wadhwa, a former Judge of this Court, to be the sole arbitrator in this case. The name of Justice Wadhwa also finds place in the list of names suggested by the petitioner. Therefore, appointment of Justice Wadhwa is fairly by consensus.

38. Since I am unable to accept the argument of learned counsel for the respondent, I accordingly appoint Justice D.P. Wadhwa, a former Judge of this Court, the sole arbitrator in this case.

39. The Hon'ble arbitrator is requested to decide the dispute as early as possible and preferably within a period of six months from the date of entering upon the reference. The terms of arbitration proceeding are left to be decided by learned arbitrator.

40. The petition is allowed accordingly. No order as to costs.

R.P.

Petition allowed.

H