THE ARBITRATION DIGEST

Bibliographic Information:

Contemporary Developments in Arbitration law, Vol. 1, December 2023, pp. 20-27

M/s. Oasis Projects Ltd. v Managing Director, National Highway and Infrastructure Development Corporation Ltd.- An Unwanted Deviation?

Nikhilesh Koundinya

M/s. Oasis Projects Ltd. v Managing Director, National Highway and Infrastructure Development Corporation Ltd.- An Unwanted Deviation? [4]

INTRODUCTION

Being a case, which was filed merely for the appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "**Act**"), this case was another deviation by the Indian Courts in not recognizing the mandatory nature of pre-arbitral steps. The case comment seeks to analyze the basis for the decision in the said case and seeks to address the differing thoughts on the mandatory/directory nature of pre-arbitral steps under the Indian legal landscape and advocates for how parties can construe provisions within their contracts and agreements to make pre-arbitral steps binding.

The case was instituted seeking appointment of an arbitrator under Section 11(6) of the Act for adjudicating disputes which had arisen between the parties in relation to remaining work for four laning of NH-39 in the state of Nagaland. The Petitioner by way of notice dated 17.08.2022 sought to terminate the contract which was also intended by the Respondent as indicated by its notice dated 16.11.2022. To resolve the pending dispute, the Petitioner invoked Arbitration which found place under Clause 26 of the Agreement. The Respondent indicated its unwillingness to resort to arbitration since pre-arbitral steps were found mentioned within the said clause. For ease of comprehension, parts of the clause are reproduced:

[4] ***Nikhilesh Koundinya is an Associate at M.V. Kini & Co., Mumbai working with High Court Team.***

"26.1 (i) Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement between the parties, and so notified in writing by either party to the other party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure with the conciliation procedure set forth in Clause 26.2."

"26.2 In the event of any Dispute between the Parties, either Party may call upon the Authority's Engineer, or such other person as the Parties may mutually agree upon (the "Conciliator") to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention of the Conciliator, either party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 business days from the date of reference to discuss and attempt to amicable resolve the Dispute……If such Dispute is not resolved…… either party may refer the Dispute to arbitration in accordance with the provisions but before resorting to such arbitration, the parties agree to explore conciliation by the Conciliation Committees of Independent Experts ("CCIE") set up by the Authority in accordance with the procedure decided by the panel of such experts and notified by the Authority on its website including its subsequent amendments…….In case of failure of the conciliation process either party may refer the Dispute to arbitration in accordance with the provisions."

ARGUMENTS YIELDED AND ANALYSIS BY THE COURT

It was primarily argued by the Respondent that pre-arbitral steps as indicated in Clause 26.2 [as partly reproduced above] were not followed while the Petitioner averred that the said Clause when read intently revealed its nature being directory and not mandatory. It was further argued by the Petitioner that it had attempted to solve the disputes amicably, but this attempt was unsuccessful furthering which the method of arbitration was sought.

This being the primary issue in the said case, the court while entertaining supplementary issues mainly observed the above conundrum by tilting the arrow towards the Petitioner's end. The

Court while upholding the contentions raised by the Petitioner came to the following conclusions:

1. As per the facts of the case, resorting to alternate modes of settlement was a choice and not a compulsion. As mentioned in Clause 3.1 of the OM, the matters to be referred to the CCIE would be done only when both parties consent to the same. Further, reading of the clause indicates that the contractor would decide as to whether the said dispute must be referred to the committee [¶14].

- The Court concluded that when immediate initiation of arbitral proceedings is necessary to preserve the rights of a party, the said party can invoke arbitration during pendency of conciliation proceedings [¶16].

On the basis of these two expositions, the Court agreed to the contentions as raised by the Petitioner and held that the Arbitration Agreement and due invocation thereof is established and there is no impediment in the appointment of an arbitrator.

THE PROBLEM BEGINS: READING OF AN AGREEMENT/CONTRACT

While the Court made an endeavor above to prove that the nature of conciliation is directory, it did so by reading outside the provisions of the contract as entered into between the contesting parties. In Paragraph 12 of the judgment, the court wrongly concluded the following, ***"Conciliation expresses a broad notion of a voluntary process, controlled by the parties and conducted with the assistance of a neutral third person or persons. It can be terminated by the parties at any time as per their free will."*** The reliance or analysis of the court which led it to make such a statement has not been quantified within the judgment. Furthermore, the court sought to explain conciliation as a process while not addressing the basis of a mandatory pre-arbitral step as agreed upon by the parties. This indicates that the court has tried to swoop into unguarded territory and rewrite the contract as entered into between the contesting parties which is not permitted and is in fact detested by the law as being against party autonomy.

The Supreme Court in United India Insurance Co. Ltd. v Harchand Rai Chandan, held categorically that, parties are bound by the clauses enumerated in the policy and the court does

not transplant any equity to the same by rewriting a clause. Similarly in Newton Engineering and Chemicals Ltd. v Indian Oil Corporation Ltd. & Ors**.,** the court recognized that when there is an express, clear and unequivocal arbitration clause the court has no power to appoint an arbitrator for resolution of the disputes [¶7]. Hence as per these precedents and others as yielded by the Apex Court, when an express provision was enunciated within the Agreement mandating conciliation, the court should not have interfered allowing for appointment of an arbitrator as the same undermines the entire working of arbitration and party autonomy.

CASES IN THE INDIAN HEMISPHERE DIRECTING PRE-ARBITRAL STEPS TO BE MANDATORY

The Apex Court in M.K Shah Engineers & Contractors v State of M.P**,** cleared the air by holding that pre-arbitral steps were mandatory in nature. While referring to the foundation of pre-arbitral steps, the court referred to the Halsbury Laws of England whereby arbitration agreements which contained a clause requiring a certain act to be completed within a specified period and if not done held the commencement of arbitration to be barred were referred to as "Atlantic Shipping" clauses [¶14]. Having set out this, the court further enunciated on pre-arbitral steps by holding that the steps preceding the operation of arbitration are essential. The court carved out an exception by stating that this mandatory requirement can be waived of at the instance of the party who is not at fault. Considering the present factual matrix, the Petitioner is clearly in the wrong and hence the attempt to leapfrog the pre-arbitral step would have only been acceptable had the Respondent done it [¶17 -18]. The Kerala High Court in Nirman Sindia v Indal Electromelts Ltd., Coimbatore & Ors., while adhering to the precedent as established above held that due to the request for arbitration being filed without resorting to or complying with or exhausting the prerequisites for the enforcement of the arbitration clause, the same is not maintainable as being premature [¶12]. The factual matrix would indicate that negotiation as a mechanism was provided for and the court while interpreting the same to be directory held in favor of appointment of arbitrator which is squarely against the prevailing thought in the Indian legal landscape.

It would be ideal to look at another jurisdiction where from our thought on arbitration found steam, i.e., Singapore. Interestingly, the Hon'ble High Court at Singapore in two cases has favored the path as adopted by the Supreme Court and Kerala High Court as shown above.

THE SINGAPOREAN OUTLOOK

The case of International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd & Anr., was a case where the Hon'ble High Court was asked to adjudicate on whether clause 37.2 which sought for mediation prior to arbitration being instituted was mandatory or directory. The Court in Paragraph 100 of the judgment emphatically observed that ***"since clause 37.2 was drafted in a mandatory fashion and clause 37.3 provides that all disputes "which cannot be settled by mediation pursuant to clause 37.2" shall be settled by arbitration, I would have independently concluded that clause 37.2 was a condition precedent to the commencement of arbitration."***

In the above factual matrix, it was clearly provided as per clause 26.1 that all disputes will be resolved in the first instance amicably as indicated in clause 26.2 which sought conciliation. Hence, the Hon'ble Court should have dismissed the Petition in the first instance having looked at the mandatory nature of negotiation/conciliation as enumerated within the agreement.

The Court also looked at several foreign judgments including Smith v Martin (1925) 1 KB 745 and HIM Portland LLC v Devito Builders Inc., where the Courts at United Kingdom and United States of America in unison ruled that until the condition precedent to the commencement of arbitration is fulfilled, neither party to the arbitration agreement is obliged to participate in the arbitration. In the same vein, an arbitral tribunal would not have jurisdiction before the condition precedent is fulfilled.

As the factual matrix presently reveals the court did not consider the mandatory nature of conciliation and ruled blindly in favor of the Petitioner despite it invoking the arbitration at a pre-mature stage.

The second case pertaining to the Singapore hemisphere is PT Selecta Bestama v Sin Huat Marine Transportation Pte Ltd., The case while wholly supporting the analysis of the previous bench as indicated above held that multi-tiered dispute resolution clauses contain a precondition

to the commencement to arbitration the same must be followed and if they are not, the arbitral tribunal would have no jurisdiction to try the matter [¶34-36].

ANALYSIS OF THE JUDGMENT

The present case is an exception to the norm even if it is assumed that the exception can be allowed for once. While this sets a dangerous precedent due to the presence of conflicting judgments, it is noteworthy to see that the Hon'ble Delhi High Court chose to consider irrelevant submissions as advanced by the Petitioner to rule in its favor. Firstly, the Court held that conciliation is a voluntary process which can be entered into and exited at any time by either party. While this is the general landscape of the meaning, the court failed to consider that the Agreement sought to define conciliation differently by mandating for its invocation prior to arbitration. Hence, in the present case, the Court failed to consider the mandatory nature of conciliation as agreed upon by the contesting parties which the Court ought not to have interfered with.

Secondly, the Court in the judgment indicated that the Petitioner had tried to settle the matter which was not effective and hence appointment of arbitrator was allowed, while no evidence or pleading to the same was mentioned. In SPML Infra Ltd. v NTPC Ltd., the court noted that the Petitioner had written representations to the Respondent seeking appointment of an adjudicator and in absence of any response proceeded with arbitration. The present factual matrix barring an averment presents no cognizable attempt made by the Petitioner to resolve the dispute amicably.

Thirdly and most importantly, there was a mandated requirement to approach the conciliator furthering failure of which, arbitration could be invoked. The Court or the Petitioner did not contend that such a provision was a figment of imagination of the Respondent. Having been drafted in such clear terms, the parties should have proceeded for conciliation prior to invoking arbitration. The Court went on to state that if any emergency arises, conciliation could be done away while adopting arbitration proceedings but a coordinate bench judgment of the Delhi High Court in SBS Logistics Singapore Pte Ltd. v SBS Transpole Logistics Pvt. Ltd., conclusively held that where there are clear wordings in the agreement obtaining between parties that pre-arbitration steps are required to be taken before triggering the arbitration mechanism, a

recalcitrant party cannot wriggle out of such obligation by treating such a provision directory. The court went on to hold that if such an objection was taken by another party, the concerned tribunal is required to ascertain whether steps on that behalf were taken [¶19.4]. In the present case, the objection of the Respondent was not paid heed to, and the court went on to attest the factual matrix as presented by the Petitioner which fails the very purpose of arbitration law and the basis on which the contract/agreement was entered into between the contesting parties.

DRAFTING AN ARBITRATION CLAUSE

While there are several reasons presented above for the judgment being perverse, the allowance of interpretation to the wordings of the contract was presented to the judge by the contesting parties themselves. If one observes the disputed clause, it will remotely present itself open to interpretation and this is the leeway the court used in the present matter to hold in favor of the Petitioner. While legally, the judgment can be questioned and critiqued, the larger question to address would be how can parties in today's legal landscape enter into agreements with a full proof arbitration clause which mandates pre-arbitral steps? The answer is self-explanatory and finds mention in the question itself. The clause as drafted by parties must enunciate on the pre-arbitral step being mandatory. Gary Born in his treatise International Commercial Arbitration vol 1 (Kluwer, 2009) has amplified the answer by stating that, where a contract contains a "mandatory procedure" clause and the party commenced arbitration before following the said procedure, the court would annul the subsequent award on this ground alone. Hence, it is rather important for parties to categorically mention that upon failure to adhere to the multi-tier dispute resolution system, the award will be illegal and against public policy as enumerated within the Act.

CONCLUSION

The judgment of the Hon'ble Delhi High Court is nothing more than an aberration to the prevailing thought of the mandatory nature of pre-arbitral steps. The judgment is questionable on multiple grounds including the reading down of a contract by the Court, extinguishing the mandatory nature of the arbitration clause with reference to occurrence of conciliation prior to invocation of arbitration and holding conciliation to be optional and not as defined in the

contract. It is contended that the said decision does not represent the adequate position of law which in fact holds the parties accountable to the contract that they entered into. In fact, a close reading of arbitration law would reveal that mandatory clauses must be extinguished prior to invoking arbitration and if the same is not done, the alternate modes of dispute resolution which includes methods such as mediation and conciliation will wither away.