



Arbitration Weekly Update

October 12, 2018

Transocean Drilling Services (India) Pvt. Ltd. v. Oil & Natural Gas Corporation Ltd.¹ (25 September 2018)

INTRODUCTION

In this case, the Bombay High Court (“**HC**”) was called upon to examine whether a party could make successive references to arbitration, given an arbitration clause which mandated that all disputes and amounts claimed would have to be specified in the notice of arbitration, and not thereafter.

The HC evaluated the possible interpretations of the arbitration clause, and concluded that when a particular dispute arose after the arbitration was invoked, the party would have the right to raise the same in a subsequent notice of arbitration, and thus make a successive reference.

FACTUAL BACKGROUND

Transocean Drilling Services (“**Applicant**”) and ONGC (“**Respondent**”) entered into a contract for Charter Hire of the Applicant’s Drilling Unit (“**Contract**”). The arbitration clause under the Contract provided that:

“...

A party wishing to commence arbitration proceeding shall invoke Arbitration Clause by giving 60 days notice to the other party. The notice invoking arbitration shall specify all the points of disputes with details of the amount claimed to be referred to arbitration at the time of invocation of arbitration and not thereafter. If the claim is in foreign currency, the claimant shall indicate its value in Indian Rupee for the purpose of constitution of the arbitral tribunal.” (emphasis supplied)

When disputes arose between the parties, the Applicant invoked arbitration by a notice in March 2015 (“**First Notice**”). The arbitral proceedings in respect of the First Notice were conducted and concluded. Thereafter, the Applicant again invoked arbitration by a notice in December 2015 (“**Second Notice**”), and an arbitral tribunal was constituted in furtherance of this notice. Fresh disputes – related to withheld contractual payments – arose yet again between the parties, the Applicant sought to invoke arbitration by another notice in March 2017 (“**Third Notice**”). The Respondent replied to the Third Notice by a letter which sought consent of the Applicant to refer the disputes thereunder to an Outside Expert Committee (“**OEC**”) before the same could be referred to arbitration.

The Applicant did not wish to consent to referral of disputes to the OEC, and therefore approached the HC through the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (“**Act**”), for appointment of an arbitrator on behalf of the Respondent.

ISSUES & FINDINGS

The issue which arose for the HC’s consideration was whether the Applicant could have resorted to successive references to arbitration in light of the language of the arbitration clause of the Contract.

The Respondent contended that the arbitration clause under the Contract could be invoked only once, as the said clause mandated that all points of dispute had to be specified at the time of issuing notice of arbitration, and not thereafter. The Respondent submitted that it had raised the same objection before the arbitral tribunal which had been constituted after the Second Notice, under Section 16 of the Act, and its application was pending for hearing.

The Applicant, on the other hand, brought to the HC’s notice the fact that in its reply to the Third Notice, the Respondent had not denied the arbitrability of the disputes, but had merely suggested referring the same to an OEC before arbitration.

The Respondent sought to rely on the Supreme Court’s judgment in *United India Insurance Co. Ltd. v. Hyundai Engineering and Construction Co. Ltd.*², stating that the Supreme Court had given a strict interpretation to a similar arbitration clause, and had denied reference to arbitration. In that case the arbitration clause contained in the insurance policy provided that disputes will not be referable to arbitration if the insurer disputed or did not accept liability under or in respect of the policy. However, in the present case, the HC took the view that although the arbitration clause under the insurance policy had made use of the words “not thereafter”, it was not the issue at hand in the *United India* judgment, and therefore the judgment could easily be distinguished in the present case.

The HC opined that if it were to agree with the Respondent’s contention, the Applicant would necessarily have to wait till completion or termination of the Contract, before it could invoke arbitration in respect of all disputes concurrently. Such an interpretation did not sit well with the HC, and instead it interpreted the clause in a manner which simply prohibited the Applicant from raising any claims before the arbitral

tribunal which had not been included in the arbitration notice. This, however, would not in any manner preclude the Applicant from making more than one reference to arbitration.

Further, with regard to the case at hand, the HC noted that the disputes which the Applicant had sought to refer to arbitration through the Third Notice had indeed arisen after the issuance of the Second Notice. Thus, such issues could not possibly have been included in the Second Notice or the second set of arbitration proceedings.

Hence, the HC found it appropriate to refer the disputes under the Third Notice to arbitration and appoint an arbitrator on behalf of the Respondent.

ELP ANALYSIS

Apart from the *prima facie* conclusion that successive references to arbitration are not barred, this judgment also reinforces the idea that not only can arbitration clauses be diverse in their form of incorporation into contracts, but also in their method of invocation. While in *ad hoc* arbitrations the general practice is not to specify precise claims in the notice of arbitration, in this particular case the language of the arbitration clause necessitated the inclusion of claims which had already arisen. Failing this, a party could, conceivably, be considered to have waived a particular claim. And given that ONGC and other PSUs tend to execute contracts based on largely standard terms and conditions, such an arbitration clause may not be particularly uncommon.

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Email: elplaw@elp-in.com

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¹ Commercial Arbitration Application No. 131 of 2018, Bombay High Court.

² 2018 SCC Online SC 1045.