

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 410/2013

AIR LIQUIDE NORTH INDIA PVT. LTD. Petitioner
Through: Mr. Atul Chitale, Senior Advocate with
Mrs. Sanyukta Mukherjee, Advocate.

versus

INOX AIR PRODUCTS PVT. LTD. Respondent
Through: Mr. Rajiv Bansal with
Mr. Saurabh Suman Sinha and
Ms. Arpita, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
21.01.2015

1. This is a petition under Section 11 of the Arbitration and Conciliation Act ('Act') seeking the appointment of an Arbitrator to adjudicate the disputes between the parties.
2. The facts that are not in dispute are that a Sale and Purchase agreement dated 14th/19th December 2009 (hereafter 'Agreement') was entered into between the Petitioner and the Respondent with the Petitioner being the Seller and the Respondent being Buyer in respect liquid Oxygen and liquid Nitrogen which were to be supplied to the Buyer at its manufacturing facility in Panipat.
3. Relevant to the present petition is the following clause occurring in the Agreement:

"This Agreement and the General Conditions constitute the

entire Agreement between the parties concerning its subject matter."

4. Appended to the Agreement was the document titled "General Conditions'. It begins with the following paragraph:

"These General conditions shall form as integral part of the supply agreement executed among the parties and shall be effective for the duration as mentioned in the said agreement. The word "Agreement" wherever used hereinafter shall mean the agreement executed between the parties mentioned hereinabove.

5. The 'General Conditions contained an arbitration clause which reads thus:

"10.1 In the case of any dispute or difference arising between the Seller and the Buyer as to the construction of the contract or the rights, duties or obligations of either party hereunder or any matter arising out of or concerning the same, which cannot be solved amicably, every such dispute or matter in difference shall be settled by Arbitration before a sole Arbitrator agreeable to both parties and he decision of the arbitrator shall be final and binding upon the parties."

6. Clause 10.2 of the General Conditions provided that the venue of arbitration would be Delhi. Clause 10.3 stated the governing law to be of India and that both parties had submitted to the exclusive jurisdiction "of the Courts in Delhi only."

7. Subsequently an Addendum No.1 to the aforesaid agreement was entered into between the parties extending the original agreement upto 30th April, 2012. The relevant para of the said Addendum states:

"This addendum updates the original Agreement between the

parties. All other terms and conditions of the original Agreement and the General Conditions remain unchanged.”

8. Disputes arose between the parties out of the aforesaid Agreement and Addendum. The Petitioner issued a notice dated 10th July 2013 invoking the arbitration clause and proposing the name of the sole arbitrator. It sought the concurrence of the Respondent. In its reply dated 8th August 2013 the Respondent declined the request on the ground that there was no subsisting agreement between the parties entitling reference of the disputes to arbitration. This led to the Petitioner filing the present petition under Section 11 of the Act.

9. The principal contention of Mr. Saurabh Sinha, learned counsel for the Respondent, is that the wording of the paragraph of the Agreement by which the General Conditions are sought to be incorporated are qualified by the words “concerning its subject matter”. Reference has been made on the decisions in *M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd. (2009) 7 SCC 696* and *Owners and Parties Interested in the Vessel M.V. “Baltic Confidence” v. State Trading Corporation of India Ltd. (2001) 7 SCC 473*. It is contended that the above qualifying words reflect the intention of the parties not to incorporate the entire General Conditions into the Agreement but only such clauses which concern the subject matter i.e., the supply of gas by the Seller to the Buyer. It is submitted that for the purposes of Section 7(5) of the Act, there must be a reference to another contract which should be in writing so as to make that arbitration clause part of the contract. In other words, unless it is expressly stated that the

arbitration clause in the General Conditions shall stand incorporated, such clause does not get incorporated since it does not concern the subject matter.

10. In the considered view of the Court, the above submission proceeds on an incorrect reading of Section 7(5) of the Act. The said provision reads as under:

“7. Arbitration agreement. (1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship , whether contractual or not.

.....

.....

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

11. Section 7(5) first requires that there must be a contract in writing. That contract must make reference to another document which contains an arbitration clause. The reference in the first contract must be “such as to make the arbitration clause part of the contract”. Consequently, the wording of the clause making the reference is crucial. Does it merely refer to the other contract or does it make the arbitration clause in the other contract part of the first contract?

12. In the present case, the crucial clause of the Agreement i.e the main contract incorporates the General Conditions as part of itself. It states that the Agreement and General Conditions “constitute the

entire agreement between the parties concerning its subject matter”. The General Conditions do concern the subject matter which is the supply of gas by the Petitioner to the Respondent. As long as the General Conditions concern such subject matter, there can be no doubt that the entire General Conditions, including the arbitration clause therein, 'constitutes' the entire agreement between the parties.

13. What distinguishes the present case from the one in ***M.R. Engineers and Contractors Pvt. Ltd.*** (supra) is evident from the relevant clause of the contract in that case which is set out in para 5 of the decision:

“This sub-contract shall be carried out on the terms and conditions as applicable to main contract unless otherwise mentioned in this order letter.”

14. The Supreme Court in ***M.R. Engineers*** drew a distinction between the contracts which merely made a reference to another contract and those cases where the clause in a contract containing an arbitration clause was expressly incorporated into the main contract. This is further clear from the following passages in ***M.R. Engineers and Contractors Pvt. Ltd.***:

“17. We will give a few instances of incorporation and mere reference to explain the position (illustrative and not exhaustive). If a contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract.

When there is such incorporation of the terms and conditions of a document, every term of such document (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract. If the document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause also will apply to the contract.

18. On the other hand, where there is only a reference to a document in a contract in a particular context, the document will not get incorporated in entirety into the contract. For example, if a contract provides that the specifications of the supplies will be as provided in an earlier contract or another purchase order, then it will be necessary to look to that document only for the limited purpose of ascertainment of specifications of the goods to be supplied. The referred document cannot be looked into for any other purpose, say price or payment of price. Similarly, if a contract between X and Y provides that the terms of payment to Y will be as in the contract between X and Z, then only the terms of payment from the contract between X and Z will be read as part of the contract between X and Y. The other terms, say relating to quantity or delivery cannot be looked into.”

15. In light of the legal position explained by the Supreme Court there can be no manner of doubt that in the present case the Agreement makes not only a reference to the General Conditions but specifically states that the Agreement and General Conditions “constitute the entire agreement between the parties concerning its subject matter”. In the present case, it is not plausible to exclude any portion of the General Conditions as not having been incorporated in the main Agreement. All clauses of the General Conditions, including the arbitration clause, concern the subject matter of supply of gas by the Seller to the Buyer. In fact, a dispute resolution clause cannot but be considered as concerning the subject matter of any contract.

16. The decision in *Owners and Parties Interested in the Vessel M.V. "Baltic Confidence"* (supra) is also not helpful to the Respondent. The relevant clause there incorporated another contract "including the law and arbitration clause". In the present case there is nothing to indicate that the parties intended to leave out the arbitration clause, forming part of the General Conditions while incorporating it into the main Agreement between the parties. Additionally, the opening paragraphs of the General Conditions make it abundantly clear "these general conditions shall form integral part of the supply agreement executed between the parties....".

17. In that view of the matter, this Court is unable to accept the submissions made on behalf of the Respondent that there is no arbitration agreement between the parties.

18. Accordingly, the Court appoints Justice S.K. Mahajan, a former Judge of this Court, residing at C-271, Defence Colony, New Delhi-110024 as Sole Arbitrator to adjudicate the disputes between the parties including their claims and counter-claims. The arbitration shall take place under the aegis of the Delhi International Arbitration Centre ('DAC'). The fees of the learned Arbitrator will be in terms of the Delhi International Arbitration Centre Arbitration Proceedings (Arbitrators' Fees) Rules.

19. The petition is disposed of. A copy of this order be communicated

to the learned Arbitrator as well as Additional Coordinator, DAC
forthwith.

S. MURALIDHAR, J.

JANUARY 21, 2015

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