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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Date of decision: 16<sup>th</sup> March, 2018*

+ ARB. P. 460/2017

BERNARD INGENIEURE ZT - GMBH ..... Petitioner  
Through: Mr.Sindhu Sinha, Adv.

versus

IRCON INTERNATIONAL LTD. .... Respondent  
Through: Mr.Dinesh Agnani, Sr. Adv. with  
Ms.Leena Tuteja, Mr.Ishan Chawla, Advs.

**CORAM:**  
**HON'BLE MR. JUSTICE NAVIN CHAWLA**

**NAVIN CHAWLA, J. (Oral)**

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed by the petitioner seeking appointment of an Arbitral Tribunal for adjudicating the disputes that have arisen between the parties in relation to the award of work for detailed design consultancy of structures, supervision of construction and commissioning of Railway Tunnels and bridges between 110 km and 125 km in connection with construction of Dharma-Qazigund Section of Udhampur-Srinagar-Baramulla, new BG Railway Line Project.

2. The agreement between the parties contains an Arbitration Agreement in form of clause 6.39.3 in the General Conditions of

Contract (GCC), which is reproduced herein below:

*“6.39.3 Conciliation/Arbitration*

*i) It is a term of this contract that Conciliation/Arbitration of disputes shall not be commenced unless an attempt has first been made by the parties to settle such disputes through mutual settlement.*

*ii) If the Contractor is not satisfied with the settlement by the Employer on any matter in question, disputes or differences, the Contractor may refer to the Managing Director of the Employer in writing to settle such disputes or differences through Conciliation or Arbitration provided that the demand for Conciliation or Arbitration shall specify the matters, which are in question or subject of the disputes or differences as also the amount of claim, item wise. Only such dispute(s) or difference(s) in respect of which the demand has been made, together with counter claims of the Employer shall be referred to Conciliator or Arbitrator as the case may be and other matters shall not be included in the reference.*

*iii) Managing Director of the Employer may appoint Conciliator/s or Arbitrator/s as the case may be. For this purpose a panel of names will be sent to the Contractor. Such persons may be working/retired employees of the Employer or working/retired employees of Railway, who had not been connected with the work.*

- This is an agreed term of this contract that the Conciliator/s and Arbitrator/s shall be appointed from the list of working/retired employees of IRCON or working/retired employees of Railway as per the approval of Northern Railway.*

***Two stages***

*Disputes shall be settled through two stages:*

- Conciliation procedures as established by the “The Arbitration and Conciliation Act-1996” (as*

*amended from time to time) and in accordance with this Clause. In the event this procedure fail to resolve the dispute*

- *Arbitration procedure undertaken as provided by the “The Arbitration and Conciliation Act-1996” (as amended from time to time) and in accordance with this Clause.*

**a) Conciliation**

*1) Within 60 days of receipt of Notice of Dispute, either party shall refer the matter in dispute to conciliation.*

*2) Conciliation proceedings shall be initiated within 30 days of one party inviting the other in writing to Conciliation. Conciliation shall commence when the other party accepts in writing this invitation. If the invitation is not accepted then Conciliation shall not take place. If the party initiating conciliation does not receive a reply within 30 days from the date on which he sends the invitation he may elect to treat this as a rejection of the invitation to conciliate and inform the other party accordingly.*

*3) The Conciliation shall be undertaken by one Conciliator selected from a panel of Conciliators maintained by the Employer. The Conciliator shall assist the parties to reach an amicable settlement in an independent and impartial manner.*

*4) As far as possible, the conciliation proceedings should be completed within 60 days of the receipt of notice by the Conciliator.*

*5) In case, the efforts to resolve all or any of the disputes through Conciliation fails, the Contractor may refer to the Managing Director of the Employer for settlement of such disputes or differences through Arbitration. No disputes or differences shall be referred to Arbitration after expiry of 60 days from the date of notification of failure of Conciliation.*

**b) Arbitration**

1) *In case where the total value of all the claims in question is less than 1000000/- (Rupees Ten lakhs only) the arbitral tribunal will consist of a sole arbitrator.*

2) *In case where the total value of all the claims in question is more than 1000000/- (Rupees Ten lakhs only) the arbitral tribunal will consist of panel of three serving/retired officers.*

3) *MD/IRCON shall appoint arbitrators from the panel approved by Northern Railway.*

4) *All other condition for arbitration in general shall be as per Northern Railway GCC 1999.*

iv) *The Conciliation and/or Arbitration proceedings shall be governed by the provisions of the Indian Arbitration and Conciliation Act 1996 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the conciliation and arbitration proceedings under this clause.*

v) *The language of proceedings, documents or communications shall be in English and the award shall be made in English in writing.*

vi) *The Conciliation and Arbitration hearings shall be held in Delhi only. The Arbitrators shall always give item-wise and reasoned awards in all cases where the total claim exceeds Rs.Ten lakh*

vii) *The fees and other charges of the Conciliator/Arbitrator shall be as per the scales fixed by the Employer and shall be shared equally between the Employer and the Contractor.”*

3. The above clause states that all other condition for arbitration in general shall be as per Northern Railway GCC, 1999.

Clause 64 of the GCC of the Northern Railway, 1999 is reproduced herein below:-

**“64(1)(i) Demand for Arbitration – In the event of any**

*dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the 'excepted matters' referred to in clause-63 of these conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.*

*64(1)(ii) – The demand for arbitration shall specify the matters which are in question or subject of the dispute or difference as also the amount of claim itemwise. Only such dispute(s) or difference(s) in respect of which the demand has been made, together with counter claims or set off shall be referred to arbitration and other matters shall not be included in the reference.*

*64(1)(ii)(a) – The Arbitration proceeding shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.*

*(b) The claimant shall submit his claim stating the facts supporting the claim along with all relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.*

*(c) The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claim from Tribunal thereafter unless otherwise extension has been granted by Tribunal.*

*64(1)(iii) – No new claim shall be added during proceedings by either party. However, a party may amend or supplement*

*the original, claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.*

*64(1) (iv) – If the contractor(s) does/do not prefer his/their specific and final claim in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.*

*64(2) – **Obligation during pendency of arbitration** – Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceeding, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.*

*64(3)(a)(i) – In cases where the total value of all claims in question added together does not exceed Rs. 10,00,000/- (Rupees ten lakhs only), the Arbitral Tribunal consist of a sole arbitrator who shall be either the General Manager or a gazetted officer of Railway not below the grade of JA grade nominated by the General Manager in that behalf. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by Railway.*

*64(3)(a)(ii) – In cases not covered by clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Rly. officers not below JA grade, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Rly. Officers of one or more departments, of the Rly. to the contractor who will be asked to suggest to General Manager upto 2 names out of panel for*

*appointment as contractor's nominee. The General Manager shall appoint atleast one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator from amongst the 3 arbitrators so appointed. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts department shall be considered of equal status to the officers in SA grade of other departments of the Railways for the purpose of appointment of arbitrators.*

*64(3)(a)(iii) – If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s).*

*64(3)(a)(iv) – The arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay.*

*64(3)(a)(v) – While appointing arbitrator(s) under sub clause (i), (ii) and (iii) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servants(s)*

*expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.*

*64(3)(b)(i) – The arbitral award shall state itemwise, the sum and reasons upon which it is based.*

*64(3)(b)(ii) – A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award and interpretation of a specific point of award to Tribunal within 30 days of receipt of the award.*

*64(3)(b)(iii) – A party may apply to tribunal within 30 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.*

*64.4 In case of the Tribunal, comprising of three members, any ruling or award shall be made by a majority of Members of Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.*

*64.5 Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.*

*64.6 The cost of arbitration shall be borne by the respective parties. The cost shall interlia include fee of the arbitrator(s) as per the rates fixed by the Rly. Administration from time to time.*

*64.7 Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules thereunder and any statutory modification thereof shall apply to the arbitration proceedings under this clause.”*

4. The disputes having arisen between the parties, the petitioner invoked the arbitration agreement vide its notice dated 12<sup>th</sup> April, 2017 and called upon the respondent to appoint independent arbitrators in terms of clause 6.39 of the agreement and in consonance with the Act, as amended by Arbitration and Conciliation (Amendment) Act, 2015.

5. In response to the above notice, the respondent vide its reply dated 3<sup>rd</sup> May, 2017 forwarded the names of 4 retired officials from the Railways, calling upon the petitioner to choose one as his nominee arbitrator. Further correspondence was exchanged between the parties in relation to the qualification of the persons proposed by the respondent, finally culminating into the notice dated 20<sup>th</sup> July, 2017 by which the petitioner refused the four names.

6. The petitioner thereafter, filed the present petition *inter alia* praying for the appointment of a panel of arbitrators for adjudicating the disputes that have arisen between the parties.

7. This Court on 5<sup>th</sup> December, 2017 passed the following order:-

*“Without prejudice to the submissions of either party, the learned senior counsel for the respondent would hand over a list of empanelled arbitrators to the petitioner and in case the petitioner is satisfied with the nomination of any of them, it shall communicate the same to the Court on the next date of hearing.”*

8. In compliance with the above order, the learned Senior Counsel for the respondent handed over a panel of Arbitrators empanelled by the respondent, which run into 20 in number. A bare perusal of this list would, however, show that the panel includes mainly retired employees from the Railways, though there are some additional names of retired employees from CPWD, NHPC, HUDCO, etc. Learned Senior Counsel for the respondent submits that all 20 of them are having knowledge in Engineering and, therefore, they have been nominated in the panel.

9. In ***Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited*** AIR 2017 SC 939, the Supreme Court was considering a similar Arbitration Agreement as in the present case. After considering the effect of Section 12(5) being introduced into the Act, the Supreme Court passed the following directions:-

*“27. As already noted above, DMRC has now forwarded the list of all 31 persons on its panel thereby giving a very wide choice to the petitioner to nominate its arbitrator. They are not the employees or ex-employees or in any way related to DMRC. In any case, the persons who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of Section 12 of the Act. We, therefore, do not find it to be a fit case for exercising our jurisdiction to appoint and constitute the Arbitral Tribunal.*

*28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not*

*only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel.*

*29. Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which DMRC prepares the panel of “serving or retired engineers of government departments or public sector undertakings”. It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broadbased. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this field as well.”*

10. The above judgment was passed by the Supreme Court as far back, as 10<sup>th</sup> February, 2017. More than a year has passed, however, even now the so-called broadbased panel of the respondent still does not contain names of Engineers of prominence and high repute from private sector, persons with legal background like Judges and lawyers of repute, people having knowledge and expertise in accountancy etc. The panel of Arbitrators now framed by the respondent is, therefore, in my opinion, still not in conformity with the judgment of the Supreme Court in **Voestalpine Schienen GMBH** (supra) and, therefore, in my opinion, the respondent has failed to act in accordance with the procedure prescribed under the arbitration agreement between the parties. It is again emphasised that even the Supreme Court in the above judgment had suggested, if not directed, that a clause in the arbitration agreement restricting the right of the contracting party to appoint/nominate his own Arbitrator should be deleted.

11. Learned Senior Counsel for the respondent submits that the respondent has already nominated **Mr.Sushil Kumar Malik**, Ex.- Addl. Member Civil, Railway Board as its nominee arbitrator. As suggested by the counsel for the petitioner, I appoint **Mr.Anand Kumar**, Retired Chief Engineer, Haryana Water Resources and Irrigation Department as nominee arbitrator for the petitioner. The two Arbitrators now appointed shall appoint the Presiding Arbitrator.

12. Before proceeding with the reference, the Arbitral Tribunal shall give the disclosure in terms of Section 12 of the Act.

13. The Arbitral Tribunal is entitled to charge fee as per the Fourth Schedule of the Act.

14. The petition is disposed of with the above directions, with no order as to costs.

Dasti.

**NAVIN CHAWLA, J**

**MARCH 16, 2018**  
**RN**