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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 08.01.2019

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O.M.P. (COMM) 314/2017

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through Ms. Padma Priya and Mr. Mukesh
Kumar, Advs.

versus

PATI -BEL (JV)

..... Respondent

Through Mr. Vivek Chib, Mr. Asif Ahmed,
Ms. Ruchika Goel, Ms. P. Kar, Mr.
Vikramditya and Ms. Kaushal
Sharma, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1 This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short '1996 Act') to assail the Award dated 13.04.2017.

2 The record shows that a three member Arbitral Tribunal was constituted. The petitioner i.e. National Highways Authority of India (hereafter referred to as 'NHAI'), referred three claims to the Arbitral Tribunal.

2.1 The three claims referred were (i) recovery of Rs.3,54,29,325/- crores from the respondent i.e. M/s PATI-BEL (JV) (hereafter referred to as 'contractor') on account of balance amount of Worker's Welfare Cess; (ii) recovery of excess payment made on account of price adjustment; and (iii) recovery on account of deduction against the royalty paid.

2.2 These three claims were captured by NHAI in its notice invoking arbitration. The notice issued in this behalf is dated 13.03.2015.

3. The Arbitral Tribunal, however, has declined to deal with the merits of the matter, primarily, on the ground that NHAI had failed to approach the Dispute Review Board (in short 'DRB') as required under Clause 67.1 of the Conditions of Particular Application (in short 'COPA').

3.1 Furthermore, the Arbitral Tribunal has also held that what was referred to it was only claim No.1 and, therefore, it could not rule on Claim No.2 and 3.

4. To my mind, if the Arbitral Tribunal was inclined to hold that it would not decide upon the merits of the case as NHAI had not

approached the DRB, it ought not to have made any observation as to whether or not Claim No. 2 and 3 were referred to it. In other words, that the reference made to it was confined only to Claim No.1. It may, however, be relevant to note that NHAI before this Court has confined its challenge to the Award in respect of the observations made *vis-a-vis* Claim No.1 and 2 only.

5. Therefore, in sum, what I am required to examine is: as to whether the Arbitral Tribunal was right in coming to a conclusion that the provision made in Clause 67 of COPA was mandatory, inasmuch as before NHAI could trigger the arbitration agreement, it ought to necessarily have taken recourse to the DRB mechanism.

5.1 For this purpose, it may be relevant to extract Clauses 67.1, 67.3 & 67.4 of COPA:

<i>Sub Clause 67.1</i> <i>Disputes Review Board</i>	<i>67.1 If any disputes arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after the repudiation or other termination of Contract, including any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred to the Disputes Review Board. The Board shall be established when each of the three Board Member has signed a Board Members Declaration of Acceptance as required by the DRB's rules and procedures (which, along with the declaration of acceptance form, are attached as Annex "A" to these Conditions of Particular</i>
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	<i>Applications” - Para 12.)</i> <i>The Board shall comprise three Members experienced with the type of construction involved in the Works and with the interpretation of contractual documents. One Member shall be selected by each of the Employer and the Contractor and approved by the other. If either of these Members is not so selected and approved within 28days of the date of the Letter of Acceptance, then upon the request of either or both parties such members shall be selected as soon as practicable by the Appointing Authority i.e. Chairman of the Executive Committee, Indian Road’s Congress. The third Member shall be selected by the other two and approved by the parties. If the two Members selected by or on behalf of the parties fail to select the third Member within 14 days after the later of their selections or if within 14 days after the selection of the third member, the parties fail to approve that Member shall be selected promptly by the same Appointing Authority specified in the Appendix to Bid who shall seek the approval of the proposed third Member by the parties before selection but, failing such approval, nevertheless shall select the third Member. The third Member shall serve as Chairman of the Board.</i> <i>In the event of death, disability, or resignation of any member, such Member shall be replaced in the same manner as the Member being replaced was selected. If for whatever other reason a member shall fail or be unable to serve, the Chairman (or failing the action of the Chairman then either of the other Members) shall inform the parties and such non-serving Member shall be replaced in the same manner as the member being replaced was selected. Any replacement made by the parties shall be completed within 28 days after the event giving rise to the vacancy on the Board, failing which the replacement shall be made by the Appointing Authority in the same manner as described above. Replacement shall be considered completed when the new Member signs the Board Member’s Declaration of Acceptance. Throughout any replacement process the Members not being replace shall continue to serve and the board shall continue to function and its activities shall have the same force and effect as if the vacancy had not occurred, provided, however that the Board shall not conduct a hearing nor issue a Recommendation until the replacement is completed.</i> <i>Either the Employer or the Contractor may refer a dispute to the Board in accordance with the provisions of Annex A to these Conditions of Particular Application.</i>
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	<i>The recommendation of the Board shall be binding on both parties who shall promptly give effect to it unless and until the same shall be revised as herein after provided, in an arbitral award. Unless the Contract has already been repudiated or terminated, the Contractor shall in every case, continue to proceed with the Works in accordance with the contract.</i> <i>If, either the Employer or the Contractor is dissatisfied with the Recommendation of the Board, or if the Board fails to issue as Recommendation within 56 days after receipt by the Chairman of the Board of the written Request for Recommendation, then either the Employer or the Contractor may, within 14 days after the expiry of the said 56 days period, as the case may be give notice to the other party, with a copy for information to the Engineer of his intention to commence arbitration herein provided, as to the matter in dispute. Such notice shall established the entitlement of the party giving the same to commence arbitration as hereinafter provided, as to such dispute and, subject to Sub-Clause 6 7 .4 arbitration in respect thereof may be commenced unless such notice is given.</i> <i>If the Board has issued a Recommendation to the Employer and the Contractor within the said 56 days and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor within 14 days after the parties received such Recommendation from the Board, the Recommendation shall become final and binding the Employer and the Contractor.</i> <i>Whether or not it has become final and binding upon the Employer and the Contractor, a Recommendation shall be admissible as evidence in and subsequent dispute resolution procedure, including any arbitration and litigation having any relation to the dispute to which the Recommendation relates. All Recommendations which have become final and binding shall implemented by the parties forthwith, such implementation to include relevant action of the Engineer.</i> <i>If during the contract period, the Employer and the Contractor the opinion that the Dispute Review Board is not performing its functions properly, the Employer and the Contractor may disband the Disputes Review Board and reconstitute it. A new board shall then be selected in accordance with the provisions applying to the selection of the original Board as specified above, except that words “within 28 days after the letter of Acceptance” shall be replaced by the words “within 28 days after the date on</i>
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	which notice disbanding the original Board became effective.” The Employer and the Contractor shall jointly sign a notice specifying that the Board shall stand disbanded with effect from the date specified in the notice. The notice shall be posted by a registered letter with AD or delivered personally to each Member of the Board. A Member shall be deemed to have received the delivery of the letter even if he refuses to do so.
Sub Clause 67.3 Arbitration	Sub-Clause 67.3 is modified to read as follows: “Any dispute in respect of which the Recommendation(s). if any, of the Board has not become final and binding pursuant to Sub- Clause 67.1 shall be finally settled by arbitration as set forth below. The arbitral tribunal shall have full power to open-up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any Recommendation(s) of the Board related to the dispute. 67. A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act. 1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the Chairman of the Executive Committee of the Indian Roads Congress. For the purposes of this Sub-Clause, the term “Indian Contractor” means a contractor who is registered in India and is a juridical person created under Indian law as well as a joint venture between such a contractor and a Foreign Contractor. (ii) In the case of a dispute with a Foreign Contractor, the dispute shall be finally settled in accordance with the provisions of UNCITRAL Arbitration Rules. The arbitral tribunal shall consist of three Arbitrators one each to be, appointed by the Employer and the Contractor. The third

	Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties, and shall act as presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Chairman of the Executive Committee of the Indian Roads Congress. For the purposes of this Clause 67, the term “Foreign Contractor” means a contractor who is not registered in India and is not a juridic person created under Indian Law. (iii) Neither party shall be limited in the proceedings before such evidence or arguments before the Board for the purpose of obtaining its Recommendations(s) pursuant to Sub-Clause 67.1. No Recommendation shall disqualify and Board Member from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute. (iv) Arbitration may be commenced prior to or after completion of the works provided that the obligations of the Employer, the Engineer, Contractor and the Board shall not be altered by reason of the arbitration being conducted during the progress of the Works. (v) If one of the parties fail to appoint its arbitrator in pursuance (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the President of the Institution of Engineers (India) both in cases of foreign country as well as Indian Contractors, shall appoint the arbitrator. A certified copy of the order of the President of the Institution of Engineers (India) making such an appointment shall be furnished to each of the parties. (vi) Arbitration proceedings shall be held at Delhi India, and language of the arbitration proceedings and that of all documents and communication between the parties shall be English. (vii) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation etc. of its proceedings as also the fees and expenses paid to the arbitrator by such party or on its behalf shall be borne by each party itself.
Sub-Clause 67.4	67.4 Where neither the Employer nor the Contractor has

<i>Failure to Comply with Recommendation</i>	<i>given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related Recommendation has become final and binding, either party may, if the other right it may have party fails to comply with such Recommendation and without prejudice to any other right it may have, refer the failure to arbitration in accordance with Sub-Clause 67.3. The provisions of Sub-Clause 67.1 shall not apply to any such reference.</i>
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(emphasis is mine)

5.2 A perusal of Clause 67.1 would show that while it is prolix, it has the following salient features:

(i) First, where any dispute arises between the employer (in this case NHAI) and the contractor, in connection with the contract or execution of any works, it is, in the first instance, referred to the DRB.

(ii) Second, the DRB, as per the clause, comprises three members. One member is selected by the employer/NHAI and the other is by the contractor. The two members are vested with power to agree on the appointment of a third member. In case of failure to arrive at an agreement, the third member is to be appointed by the authority, specified in the appendix to the bid, which is the Chairman of the Executive Committee of Indian Roads Congress.

(iii) Third, under the clause, either party, that is, the

employer/NHAI or the contractor, can refer the dispute to the DRB.

(iv) Fourth, as per the clause the recommendations made by the DRB would be binding on both parties, who, in turn, are required to promptly give effect to the same unless they are revised by an arbitral award.

(v) Fifth, there are timelines set as to the period within which the DRB is to give its recommendation. The clause provides that the DRB is required to give its recommendation, within a period of 56 days, after receipt by the Chairman of the DRB, a written request in that behalf.

(v)(a) In case, a recommendation is made, the aggrieved party has the power to trigger the arbitration agreement, *albeit*, within a period of 14 days after the expiry of 56 days period by serving a notice of its intention to commence arbitration on the other party with a copy for information to the Engineer appointed under the contract. A similar procedure can be followed by the aggrieved party where no recommendation is made, *albeit*, within the defined timeline.

(v)(b) What is important is that the clause provides that whether or not the recommendation of the DRB has become final or binding

either on the employer or the contractor, the said recommendation is admissible as evidence in any subsequent dispute resolution procedure, which includes any arbitration or litigation having any relation to the dispute to which the recommendation relates.

(v)(c) Furthermore, the clause also provides that all recommendations which have become final and binding shall be implemented by parties forthwith. Such implementation would include any relevant action which the Engineer may be required to take.

(v)(d) Provision is also made in the clause for reconstitution of the DRB where the DRB is not performing its functions properly. The employer and the contractor have been given the right to seek disbandment of the DRB and have the same reconstituted. How the reconstituted DRB or the new DRB, is required to be selected, is provided in the clause itself.

(v)(e) Insofar as the disbandment of the DRB is concerned, the employer and the contractor are required to submit a joint notice in that behalf. The DRB shall stand disbanded thereafter from the date specified in such notice. The notice is required to be posted via a

registered letter with acknowledgement due or delivered personally to each member of the DRB. A member is deemed to have received such notice even if he refuses to do so.

5.3 Insofar as Clause 67.3 is concerned, it, broadly, provides for triggering of the arbitration mechanism in respect of any dispute where recommendations, if any, of the DRB have not become final and binding. The Arbitral Tribunal, has been given powers under the said clause to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any recommendation of the DRB.

5.4 Clause 67.4 provides for an eventuality (after referring the matter to arbitration in accordance with clause 67.3) where neither the employer/NHAI nor the contractor has given notice of intention to commence arbitration of a dispute within the period stated in clause 67.1 and on account of this situation obtaining, related recommendation has become final and binding. In such an eventuality, either party is provided with a right to refer such failure to arbitration in accordance with the aforesaid clause i.e. Clause 67.3 where the other party fails to comply with the recommendation.

5.5 If one were to juxtapose clause 67.1 with Clauses 67.3 and 67.4, it would emerge that reference to DRB is a condition precedent in order to trigger the arbitration mechanism.

5.6 The reason, I say so, is that the recommendations made by the DRB are, as per Clause 67.1, admissible as evidence not only before the Arbitrator but also before any other forum or in any other litigation that the parties may embark upon. The parties appear to have given the views of the DRB a certain kind of pre-eminence and weight which it may not have but for such a provision in Clause 67.1.

6. I must indicate, at this juncture, that it has been argued on behalf of NHA that reference to the DRB is not mandatory and that even if reference is not made to DRB, once an Arbitral Tribunal has been constituted, it can decide the matter on merits. In this behalf, learned counsel for the petitioner has drawn my attention to that part of Clause 67.3, which empowers the Arbitral Tribunal to review and revise the recommendations given by the DRB.

6.1 Mr. Vivek Chib, who, appears on behalf of the contractor, on the other hand, contends that the clause is mandatory and the arbitration mechanism cannot get triggered without parties taking

recourse to DRB. In a sense, learned counsel for the contractor supports the view, which I have expressed hereinabove.

7. In my opinion, the submission of the learned counsel for the petitioner cannot be accepted in view of the manner in which clause 67.1 has been framed. The frame of the said clause, as delineated, persuades me to hold that the parties have in fact agreed that reference to DRB would be a crucial first step, prior to the dispute being referred to an Arbitral Tribunal. The reason why parties have chosen to do so has already been articulated hereinabove by me.

8. I must also indicate herein that the learned counsel for the parties have placed before me three judgments, in which, broadly, the view taken is that the prior proceedings in the nature of conciliation, as envisaged in the contracts under examination, before kick starting the arbitration mechanism, are not mandatory in nature.

8.1 The three judgments, which were referred to, are the judgments of the Single Judges of this Court; these being: (i) ***Ravindra Kumar Verma Vs. BPTP Ltd & Anr., 2015 (147) DRJ 175***; (ii) ***Saraswati Construction Company Vs. East Delhi Co-operative Group Housing Society Ltd., (1995) 57 DLT 343***; and (iii) ***M/s Halidram***

Manufacturing Company Pvt. Ltd. Vs. M/s DLF Commercial Complexes Limited, 193 (2012) DLT 410.

8.2 A perusal of the judgment ***Ravindra Kumar Verma*** would show that there is a reference to the other judgment referred to above which is ***Saraswati Construction Company***.

8.3 Furthermore, a perusal of ***Saraswati Construction Company*** would show that in coming to the conclusion as whether reference to an expert (i.e. an Architect in that case) prior to the arbitration agreement being triggered would be necessary, it was held that the provision in issue was directory in nature. Importantly, the conclusion reached in this case was based on the view taken in ***Sikand Construction Co. Vs. State Bank of India, ILR (1979) Delhi 364.***

8.4 Pertinently, both ***Saraswati Construction Company*** and ***Sikand Construction Co.*** were matters which were decided under the Arbitration Act, 1940 (in short '1940 Act').

8.5 The Court in ***Saraswati Construction Company*** was called upon to render its decision with respect to a petition filed under Section 20 of the 1940 Act. In the context of Section 20 of the 1940

Act, the Court ruled that all that it was required to examine was whether the parties had entered into an arbitration agreement and if so, whether there was any sufficient ground or not for referring the matter to arbitration.

8.6 A close perusal of the arbitration clause, which came up for consideration before the Court would show that in crucial parts its framework was quite different from clause 67.1.

8.7 For the sake of convenience, the said clause is extracted hereafter:-

*"All disputes and differences of any kind whatever arising out of or in connection with the **contract** of the carrying out of the works (whether during the progress of the works or after their completion, and whether before or after the determination, abandonment or breach of the contract) shall be referred to and settled by the architects who shall state their decision in writing. Such decision may be in the form of a final certificate or otherwise. The decision of the Architects with respect to any of the excepted matters shall be final and without Appeal as stated in Clause No. 35. But if either the Employer or the Contractor be dissatisfied with the decision of the Architects or any matter, question of the dispute of any kind (except any of the excepted matters) or as to the withholding by the Architect of any certificate to which the contractor may claim to be entitled, then and in any such case either party (the Employer or the Contractor) may within twenty eight (28) days after receiving notice of such decision give a written notice to the other party through the Architects requiring that such matters in*

dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the arbitration and final decision of a single arbitrator being a Fellow of the Indian Institute of Architects to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a single arbitration of two Arbitrators being both Fellows of the Indian Institute of Architects one to be appointed by each party, which Arbitrators shall before taking upon themselves the burden of reference appoint an Umpire."

8.8 A perusal of the aforementioned clause would show that before the dispute could be referred to arbitration, a determination would be made by an Architect, there was no provision of the like as obtaining in Clause 67.1 which is that the decision rendered could be used as evidence in the arbitration proceedings. To my mind, this singular aspect, which obtains in clause 67.1, apart from anything else would distinguish clause 67.1 from the clause which was under consideration in ***Saraswati Construction Company***.

8.9 Insofar as the ***Ravindra Kumar Verma*** case is concerned, the Court, in that matter, was dealing with a petition under Article 227 of the Constitution. The plaintiff had approached the Court for setting aside an order passed by the trial Court while dealing with the defendant's application under Section 8 of the 1996 Act. The Court

made certain observations with regard to the arbitration clause obtaining in that matter. The said clause is set out in paragraph 4 of the judgment. For the sake of convenience, the same is extracted hereafter:

“All and any disputes arising out of or touching upon or in relation to the terms of this application and/or Standard Floor Buyer’s Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration & Conciliation Act, 1996, or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a sole arbitrator appointed by the Company. The applicant(s) hereby confirms that he/she shall have or raise no objection to this appointment. The Courts at New Delhi alone shall have the jurisdiction in all matter arising out of/touching and/or concerning this application and/or Floor Buyers agreement regardless of the place of execution of this application which is deemed to be at New Delhi.”

9. Once again, to my mind, the clause, which obtained in **Ravindra Kumar Verma** is quite different from the one, which obtains in the instant matter. Therefore, in my view, the said judgment is distinguishable and not applicable to the facts of the instant case.

9.1 Insofar as the judgment rendered in **Halidram Manufacturing**

Company Pvt. Ltd.'s case is concerned, this judgment, as a matter of fact, contains observation in paragraph 13, which, in a sense, support the conclusion reached by me hereinabove. In this case, the arbitration clause required the parties to attempt a settlement in the matter by amicable discussion. The Court observed that this was mandatory. The relevant observations made in paragraph 13 of the judgment are extracted hereafter:

“The controversy in hand does not come to an end here as the arbitration clause under consideration has another dimension. It would be manifest on perusal of the above arbitration clause that the disputes arising between the parties at the first instance were to be mandatorily settled amicably by mutual discussion as the word used is shall in the clause and it is only on the failure of any settlement arrived at between the parties after the mutual discussion, the other alternative was the settlement of the disputes through arbitration. Hence, clearly the first step stipulated in the said clause is the settlement of disputes through mutual discussion and second step is the settlement through arbitration. The Forum of Arbitration was, therefore, made dependent on the outcome of the first step that is of mutual settlement.”

(emphasis is mine)

10. Having referred to the judgments cited on behalf of NHAI, I must also advert to a judgment referred to by learned counsel for the contractor in the matter of: **Channel Tunnel Group Ltd. and Another Vs. Balfour Beatty Construction Ltd. and Others, (1993) 2 W.L.R.**

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10.1 This was a contract where the plaintiff had employed the defendants, a consortium of English and French companies, to build a tunnel under the English Channel between England and France. Variation was brought in the contract which required construction of a cooling system. In that contract, there was a provision, which required initial reference of disputes and differences including the disputes as to the valuation of variations to a panel of experts and, thereafter, for final settlement via arbitration in Brussels. Incidentally, the clause obtaining in this matter was also numbered as Clause 67. The observations made by the House of Lords in that case as to why the parties should not be allowed to depart from their agreement being apposite are extracted hereafter:

“My Lords, I also have no doubt that this power should be exercised here. This is not the case of a jurisdiction clause, purporting to exclude an ordinary citizen from his access to a court and featuring inconspicuously in a standard printed form of contract. The parties here were large commercial enterprises, negotiating at arms length in the light of a long experience of construction contracts, of the types of disputes which typically arise under them, and of the various means which can be adopted to resolve such disputes. It is plain that clause 67 was carefully drafted, and equally plain that all concerned must have recognised the potential

weaknesses of the two-stage procedure and concluded that despite them there was a balance of practical advantage over the alternative of proceedings before the national courts of England and France. Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point..”

(emphasis is mine)

11. To my mind, the observations are relevant to the present case as well. The parties should be able to show good reason, as to why they should not be held to, what they have agreed between themselves. The parties, in this case, had agreed that before they trigger the arbitration agreement, they would agitate their grievance before the DRB. The DRB is constituted in a manner whereby each party is entitled to select a nominee and the two nominees can decide upon the Chairperson of the DRB. It is only when there is no agreement as to the Chairperson of the DRB that another Authority has been given the right to select the Chairperson. Furthermore, the decision of the DRB has been given pre-eminence and, as noted hereinabove, is factored in

the final adjudication, in case of one of the parties refuses to accept the decision of the DRB.

12. Therefore, in my view, the language of Clause 67.1 gives an enforceable right to the parties to insist that the opposite party should, in the first instance, take their grievance to the DRB before it embarks upon the arbitration route. The clause, apart from anything else, provides for a defined structure and the timeline within which the DRB is to process the matter, once it is placed before it.

12.1 As noticed above, the outcomes reached by the DRB are given due weight in the final adjudication proceedings. Therefore, the overall sense, which, one gets upon reading Clause 67.1, is that it is mandatory in nature and that the parties cannot opt out from this preliminary step and not have their grievance examined by the DRB in the first instance.

13. Clause 67.1 is a typical multi-tier clause, which is found in many domestic and international arbitration agreements. The language of the multi-tier clause determines as to whether or not the preliminary step(s) indicated therein would form a condition

precedent before the aggrieved party is able to escalate the matter to the next stage, that is, have its disputes adjudicated upon by an Arbitral Tribunal. Therefore, where the clause is so structured that it does give rise to a binding obligation, it may not be possible to contend that the preliminary step provided in the concerned clause is not a condition precedent.

14. A case in point is the judgment of the Queens Bench Division (Commercial Court) in the matter of *Cable & Wireless PLC and IBM United Kingdom Ltd.*, (2002) EWHC 2059 (Comm.). This was a case where a clause¹ in the contract obtaining between the parties required them, before they proceeded to arbitration, to resolve their disputes through negotiations entered into between their respective senior executives who had the necessary authority to settle the matter and if for any reason, the dispute was not resolved through negotiations, the parties were required to attempt, in good faith, resolution of the disputes via Alternative Dispute Resolution ('ADR') mechanism as

¹ The parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement or any Local Services Agreement promptly through negotiations between the respective senior executives of the Parties who have authority to settle the same pursuant to Clause 40.

If the matter is not resolved through negotiations, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any party or Local Party from issuing proceedings."

recommended to the parties by a body known as Centre for Dispute Resolution.

14.1 The Court, *inter alia*, observed² that it was the mutual intention

² The dispute resolution structure to be found in clauses 40 and 41 of the GFA leaves no doubt that when the parties negotiated that agreement it was the mutual intention that litigation was to be resorted to as a last resort in the event that negotiation by means of the escalation process so specifically set out in clause 40 or, failing that, ADR under clause 41 were unproductive. The reference in the last sentence of clause 41.2 does not qualify this conclusion. It is to be compared with the last sentence of clause 40.1 which excludes the commencement of proceedings until the escalation process “has been completed” which, in the context must mean that the parties have not resolved their dispute by negotiation. That provision contemplates that a party may initiate proceedings before the escalation process is complete if that party has reasonable cause to do so in order to avoid damage to its business or to protect or preserve any right of action. Although not expressly referred to, this provision appears to be designed to provide for such eventualities as the need to apply for injunctive or other preservative or interim relief in cases so urgent that they cannot await the outcome of the various stages of negotiation. Upon the failure of the escalation process to achieve a settlement of the dispute, clause 41.2 is triggered and the parties engage to refer the issue to ADR. However, the last sentence of clause 41.2 introduces a similar but now unqualified opportunity to commence litigation. That does not detract from the weight which the parties attached to the agreement to refer their dispute to ADR. That method of dispute resolution is usually speedier than litigation except where there is resort to the courts for pre-trial relief. The mere issue of proceedings is thus not inconsistent with the simultaneous conduct of an ADR procedure, such as mediation, or with a mutual intention to have the issue finally decided by the courts only if the ADR procedure fails. Accordingly, there is, in my judgment, no basis for the submission that the last sentence of clause 41.2 suggests that the parties did not mutually intend that clause 41.2 should be a binding agreement to refer disputes to ADR. There is, however, another basis for the submission that the reference to ADR is of no binding effect. Essentially the question that arises is whether that reference is in substance nothing more than an agreement to negotiate and, as such, an agreement incapable of enforcement in English Law as decided by the Court of Appeal in Courtney & Fairbairn Ltd v. Tolaini Brothers, *supra*. The starting point is the wording of the reference to ADR in clause 41.2. It is to be observed that the parties have not simply agreed to attempt in good faith to negotiate a settlement. In this case they have gone further than that by identifying a particular procedure, namely an ADR procedure as recommended to the parties by the Centre for Dispute Resolution to which I refer as “CEDR”. That is one of the best known and most experienced dispute resolution service providers in this country. It has over the last 12 years made a major contribution to the development of mediation services including mediation methodology and consultative services available to parties to disputes who need advice on both a choice of mediator and on appropriate procedures for mediation.

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However, the clause went on to prescribe the means by which such attempt should be made, namely “through an (ADR) procedure as recommended to the parties by (CEDR)”. The engagement can therefore be analysed as requiring not merely an attempt in good faith to achieve resolution of a dispute but also the participation of the parties in a procedure to be recommended by CEDR. Resort to CEDR and participation in its recommended procedure are, in my judgment, engagements of sufficient certainty for a court readily to ascertain whether they have been complied with. Thus, if one party simply fails to co-operate in the appointment of a mediator in accordance with CEDR’s model procedure or to send documents to such mediator as is appointed or to attend upon the mediator when he has called for a first meeting, there will clearly be an ascertainable breach of the agreement in clause 41.2.

of the parties that litigation was to be resorted to as a last recourse and that if negotiations failed, they would resort to an ADR mechanism. In sum, the Court held the preliminary first step (before parties could proceed to arbitration) was a binding obligation.

15. Thus, for the reasons stated above in the instant case, I am clearly of the view that placing the matter before DRB was a condition precedent, a condition which NHAI, failed to fulfil.

16. Therefore, for the foregoing reasons, in my view, the Arbitral Tribunal was right in concluding that they could not enter upon the merits of the matter since NHAI had not approached the DRB.

17. As noted above, the Arbitral Tribunal having reached this conclusion, in my opinion, ought not to have made any further observations as to whether or not claims No. 2 & 3 were within their remit.

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Before leaving this point of construction I would wish to add that contractual references to ADR which did not include provision for an identifiable procedure would not necessarily fail to be enforceable by reason of uncertainty. An important consideration would be whether the obligation to mediate was expressed in unqualified and mandatory terms or whether, as is the case with the standard form of ADR orders in this court, the duty to mediate was expressed in qualified terms – “shall take such serious steps as they may be advised”. The wording of each reference will have to be examined with these considerations in mind. In principle, however, where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find.

18. Therefore, given the aforesaid discussion, the petition is partially allowed and thus, disposed of with the following directions in place:

- (i) NHAI would be free to approach the DRB in terms of clause 67.1 of COPA
- (ii) NHAI will also be free to refer claims No. 1 & 2 to the DRB. As noted above, claim No. 3 is not the subject matter of the instant petition.
- (iii) The DRB will decide the matter in accordance with the provisions of Clause 67.1 of the COPA.

19. Parties shall, however, bear their own costs.

RAJIV SHAKDHER, J

JANUARY 08, 2019

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