

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

% **Date of order : 23rd March, 2023**

+ **ARB.P. 1410/2022**

INTECH BRINECHEM LIMITED Petitioner

Through: **Mr. Vikas Tomar, Advocate**

versus

DE DIETRICH PROCESS SYSTEMS INDIA PVT. LTD.

..... Respondent

Through: **Mr. Neil Hildreth and Mr. Rahul Jain,**
Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter "Arbitration Act") has been filed on behalf of the petitioner seeking the following reliefs:-

"a) Pass appropriate orders to appoint an Arbitrator to adjudicate the disputes between the petitioner and the Respondent.

b) pass any such order or orders as this Hon'ble Court may deem fit proper in the interest of justice, equity and fair play."

2. The petitioner, i.e., M/s Intech Brinechem Limited is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Plot No.27, Sector-34, Gurugram-122004 and the respondent, i.e., M/s DE Dietrich Process Systems India Pvt. Ltd. is a

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company duly incorporated under the provisions of the Companies Act, 1956 having its registered office at AWFIS, Inspire BKC, Unit No.4, 3rd Floor, Main Road, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051. The respondent is engaged in the business of detailed engineering, manufacturing and supply of plants related equipment and the petitioner company is in the process of setting up a green field plant of Bromine Extraction at Kutch, Gujarat.

3. The parties came together when the respondent approached the petitioner for providing services of detailed engineering, along with the plant and machinery as required by the petitioner company and thus, the parties entered into an Agreement on 3rd May 2022 (hereinafter “the Agreement”).

4. The petitioner, accordingly, paid a sum of Rs. 5,30,00,000/- as advance to the respondent in three parts i.e. Rs. 1,00,00,000/- paid on 26th February, 2022, Rs. 2,00,00,000/- paid on 22th June, 2022 and Rs.2,30,00,000/- paid on 16th August, 2022 through Bank transfer against which the respondent, through its parent company and from M/s Societe Generale, provided a Bank Guarantee from Paris, France.

5. The learned counsel appearing on behalf of the petitioner submitted that after the receipt of the advance amount, the respondent absolutely failed to fulfil its obligations from the very beginning and to carry out the work as per the Agreement. It is further submitted that the officers of the petitioner made several communications to the respondent requesting it to fulfil its obligations as per the Agreement and carry out the work, however, no action was taken by the respondent.

6. It is submitted on behalf of the petitioner that due to the delay attributable to the respondent, in carrying out and completing the work, the petitioner suffered huge losses. The petitioner, therefore, served an undated Notice under Section 21 of the Arbitration Act upon the respondent invoking Clause 13 of the Agreement to settle the disputes arisen between the parties by the appointment of an Arbitrator, which was duly replied to by the respondent company vide letter dated 14th November, 2022 denying the entire dispute and contending that there were no disputes between the parties for the purpose of invoking Clause 13 of the Agreement. It was further requested by the respondent company vide the said letter that if there was any dispute between the parties, the same shall be settled amicably.

7. The learned counsel for the petitioner, therefore, prays that in accordance with Clause 13 of the Agreement dated 3rd May 2022, an arbitrator may be appointed in order to adjudicate the disputes between the parties.

8. The learned counsel appearing on behalf of the respondent submitted that he has filed the reply to the instant petition *vide* Diary No. 327863/2023, however, the same is lying under objections. During the arguments, learned counsel for the respondent handed over a copy of the reply to this Court, which is taken on record.

9. The learned counsel for the respondent raised objections to the contents of the petition on merits and also submitted that the petitioner has failed to invoke Clause 13 of the Agreement in accordance with the terms laid therein. It is submitted that the petitioner has not invoked Arbitration in terms of Clause 13 of the Agreement, i.e., by issuing a notice or by

appointing an arbitrator in accordance with the Rules of Arbitration and Conciliation of the Indian Council of Arbitration (hereinafter “ICA Rules”).

10. The learned counsel for the respondent submitted that the petitioner failed to place the Letter dated 8th December 2022 before this Court, whereby the respondent reserved the right to challenge the formation of the Arbitral Tribunal in case the requirements of Clause 13 of the Agreement were not met. Hence, the deviation from the prescribed procedure provided in Clause 13 of the Agreement by the petitioner is not acceptable to the respondent. Therefore, the arbitration agreement provided under Clause 13 of the Agreement continues to apply.

11. The learned counsel for the respondent, therefore, submitted that the prescribed recourse has not been taken by the petitioner, however, he conceded to the fact that the disputes that have arisen between the parties are arbitral in nature and may be resolved by way of arbitration proceedings.

12. In rejoinder, the learned counsel for the petitioner relied upon the judgment of *C.M.C. Ltd. vs. Unit Trust of India & Ors.*, (2007) 10 SCC 751 and submitted that ICA Rules may only be applicable in the cases where both the parties are in consensus that the disputes may be adjudicated in accordance with and the observation of the ICA Rules and the same are not mandatory in nature. However, in the instant case, there is no consent on the part of the petitioner to initiate arbitration proceedings in accordance with ICA Rules and hence, they are not mandatory to be followed while referring the disputes between the parties to arbitration.

13. Heard the learned counsel for the parties and perused the record.

14. The petitioner has approached this Court for appointment of an

arbitrator to adjudicate the disputes between the parties. The respondent has objected to the contents of the petition on merits as well as the course taken by the petitioner while invoking arbitration proceedings between the parties, however, the respondent has not objected to the averment that the disputes between the parties are arising out of the Agreement and are arbitrable in nature.

15. The preliminary objection taken on behalf of the respondent is that the petitioner has not followed the due course of procedure while invoking the arbitration clause. The petitioner objects to invocation of the arbitration clause and proceedings thereto in accordance with the ICA Rules.

16. The relevant clause as stipulated under the Agreement providing for arbitration or dispute resolution is reproduced hereunder for perusal:-

“13 Place of Jurisdiction / Applicable Law

This Contract shall be governed by and construed in accordance with the SUBSTANTIVE LAW OF INDIA.

Arbitration:

All disputes in connection with the execution of this Contract shall be settled through friendly consultations between both parties. In case no agreement can be reached through consultation, all disputes shall be submitted to Arbitration for settlement and the same shall be settled by arbitration in accordance with Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof. Place of Arbitration shall be at New Delhi.

The arbitrators (each Party will nominate one arbitrator and Presiding Arbitrator shall be appointed as per the said Rules) are to be appointed by the Parties in accordance with the said Rules. Arbitrators to be appointed shall have an excellent knowledge and practice of the English language.

The Arbitration award shall not be final and binding on both parties. The aggrieved party can take legal recourse as per the Indian Arbitration and Conciliation Act, 1996, as amended. The place of legal jurisdiction will be Mumbai.

The Arbitration fee shall be borne by the losing party unless otherwise awarded by Arbitration committee.

In the course of Arbitration both parties shall continue to execute the present Contract except the part which is under Arbitration.

The language of the process shall be English.”

17. A perusal of the Clause reveals that the parties agreed to invoke arbitration in case of any dispute in accordance with the ICA Rules. On the other hand, reference to Rule 4(c) of the ICA Rules makes it abundantly clear that the ICA is not bound to process a case unless both the parties agree to follow the entire procedure under the ICA Rules. The same is also reproduced hereunder:-

“Rule 4

(c) In case the parties have provided different procedure for appointment of arbitrator or schedule of cost including the arbitrator’s fee, the Council shall not be bound to process the case unless both the parties agree to follow the entire procedure of arbitration under Rules of Arbitration of the Council.”

18. At this juncture, it is deemed fit to refer to the case of **C.M.C. Ltd. vs. Unit Trust of India (Supra)**, the relevant part of which is reproduced hereunder:-

“7. It is settled that getting resolution of a dispute by arbitration is a matter of contract between the parties. So long as the contract does not militate against the provisions of the Arbitration Act, nothing in law prevents the arbitration agreement between the parties being given effect to in full. What is contended by learned counsel for the appellant is that

the arbitration agreement clearly specifies that “the arbitration proceedings shall be conducted in accordance with the rules prescribed by the Indian Council of Arbitration” and this would mean that the procedure for appointment of an arbitrator and making a claim for arbitration must all be in terms of the rules of the Indian Council of Arbitration. Learned counsel points out that under Rule 15 any party wishing to commence arbitration proceedings under the rules of the Council had to give a notice of the request for arbitration to the Registrar of the Indian Council of Arbitration and to the opposite party and had to follow the procedure laid down in those rules. Learned counsel submits that the rules of the Indian Council of Arbitration had been incorporated in the arbitration agreement by the parties and any mode of exercise of right for invoking an arbitration clause other than the one prescribed by the rules of the Council would be futile. Therefore, the notice issued on behalf of Respondent 1 intimating the appellant of the appointment of an arbitrator and calling upon the appellant to appoint an arbitrator, would not amount to a proper invocation of the arbitration agreement and there is no failure on the part of the appellant to follow the procedure agreed to between the parties for appointment of an arbitrator resulting in conferment of jurisdiction on the Chief Justice to appoint an arbitrator in terms of Section 11(6) of the Act. In this context, we may specifically record that the learned counsel for the appellant agreed that the arbitration was governed by the Arbitration and Conciliation Act, 1996. Respondent 1 had, of course, invoked that very Act.

8. *Even going by the rules of arbitration of the Indian Council of Arbitration, it is seen that the parties are not precluded from having a different procedure for appointment of an arbitrator. The rules, even at the inception, suggest the incorporation by the parties of an arbitration clause in writing in their contracts in the following terms:*

“Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by

arbitration in accordance with the rules of arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.”

Rule 4(c) which is relevant reads:

“In case the parties have provided a different procedure for appointment of arbitrator or schedule of cost including the arbitrator's fee, the Council shall not be bound to process the case unless both the parties agree to follow entire procedure or arbitration under rules of arbitration of the Council.”

9. It is clear from the comparison of the arbitration agreement suggested by the Council and the arbitration agreement between the parties, that the arbitration agreement between the parties substantially differs from the one suggested by the Indian Council of Arbitration. Secondly, Rule 4(c) is specific that in case the parties had provided a different procedure for appointment of an arbitrator, the Council was not bound to process the case unless both the parties agreed to follow the entire procedure or arbitration rules of the Council. Obviously, a different procedure for appointment of an arbitrator or arbitrators had been agreed to by the parties and Respondent 1 had obviously not agreed to follow the entire procedure or have an arbitration under the rules of the Council. Therefore, even if one were to apply the rules, it is difficult to accept the argument that Respondent 1 was bound to invoke the rules of the Council to put in motion an effective machinery for arbitration.

12. As we have noticed, resolution of disputes by way of arbitration is a matter of agreement between the parties. If while contemplating such a resolution of disputes they also retain in themselves the power to constitute an Arbitral Tribunal, it cannot be said that there is anything wrong in such a provision or that the same cannot be given effect to. Therefore, the power retained by the parties to name an arbitrator each, does not militate either against the provisions of the Act or against the rules of the Indian Council of Arbitration. That Arbitral Tribunal once constituted in terms of the Act, may have to follow the rules of the Indian Council of

Arbitration in that behalf. But as rightly pointed out by the learned Additional Solicitor General who appeared on behalf of Respondent 1, when an Arbitral Tribunal of persons well versed in law is constituted, surely, a proper procedure will be followed by them and there is no reason to insist on a particular procedure to be followed. But obviously, it is not a matter on which we need to pronounce now. Suffice it to say, that we find no infirmity in the interpretation of the arbitration agreement by the designated Judge and in the constitution of the Arbitral Tribunal as presently constituted... ”

19. Upon referring to the observations of the Hon’ble Supreme Court as well as Rule 4(c) of the ICA Rules, it is apparent that resolution of a dispute by arbitration is a matter of agreement between the parties which shall not be barred or otherwise discouraged for the reason of following a strict protocol or procedure. The purpose of alternate mechanisms of dispute resolution shall not be defeated for want of fulfillment formal and procedural technicalities. Moreover, Rule 4(c) of the ICA Rules unequivocally stipulates that reference to ICA is not bound to process a case, which shall mean that observance of the Rules is not mandatory or obligatory unless both the parties are in consensus.

20. The Arbitration Act and the provisions therein encourage that the parties to a dispute may be referred to arbitration where there exists an arbitration clause/agreement, the parties are in consensus for invocation of such clause/agreement, the disputes between the parties are arbitral in nature and a prior notice is served upon the other party to the dispute.

21. In the instant petition as well, there is an arbitration clause in existence, that is, Clause 13 of the Agreement, there is consensus on the fact that disputes have arisen between the parties which are arbitrable in nature

and the petitioner has also served a Notice under Section 21 of the Arbitration Act. The only objection taken on behalf of the respondent is regarding the procedure followed for invocation of the arbitration proceedings. However, considering the spirit of the Arbitration Act, this Court is inclined to refer the parties to arbitration for resolution of their disputes.

22. Accordingly, keeping in view the above facts, circumstances, Rule 4(c) of the ICA Rules, the observations of the Hon'ble Supreme Court, the mandate of the Arbitration Act as well as the inclination of the parties to be referred to arbitration for adjudication for the disputes arisen between them, this Court finds it appropriate to refer the disputes between the parties to a sole arbitrator. Hence the following order:

ORDER

- (i) Dr. Justice B.S. Chauhan, Former Judge, Supreme Court of India, is appointed as a sole arbitrator to adjudicate the disputes between the parties which have arisen under the Agreement dated 3rd May 2022;
- (ii) The learned sole arbitrator, before entering the arbitration reference, shall ensure the compliance of Section 12(1) of the Arbitration and Conciliation Act, 1996;
- (iii) The learned sole arbitrator shall be paid fees as prescribed under The Delhi International Arbitration Centre (DIAC) (Administrative Cost and Arbitrators Fees) Rules, 2018 as amended vide notification dated 15th November, 2022;

- (iv) At the first instance, the parties shall appear before the learned sole arbitrator within 10 days from today on a date which may be mutually fixed by the learned sole arbitrator;
- (v) All contentions of the parties are expressly kept open.

23. A copy of the order be forwarded to the learned sole arbitrator on the following address:

Dr. Justice B.S. Chauhan,
Former Judge Supreme Court of India
Address- 474, Sector 15A, NOIDA- 201 301
Contact No.- +91 9717393516

24. Accordingly, the instant petition is disposed of alongwith pending applications, if any.

25. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

MARCH 23, 2023
gs/ms

Click here to check corrigendum, if any