

INCORPORATION OF ARBITRATION CLAUSE IN 'SINGLE-CONTRACT CASES' AND 'TWO- CONTRACT CASES'

ORTIS Law Offices

By Aditya Nayyar, Partner and Aastha Bansal, Associate

Engineering, Procurement, and Construction Contracts (“EPC Contracts”) usually involve and include execution of multiple contracts and subcontracts between parties. It is often seen that in such cases to facilitate faster and more efficient contract implementation, and to maintain consistency in standard clauses in such projects, parties usually incorporate by reference standard terms from other agreements, instead of reproducing all such terms in every contract. The primary issue which arises in such cases is identifying the circumstances under which an arbitration clause in one contract is considered incorporated into a subsequent contract.

Section 7(5) of the Arbitration and Conciliation Act, 1996 (“the Act”) states that “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.” However, the section does not specify the conditions in which a mere reference can be considered to be enough for said incorporation of an arbitration clause in a subsequent contract.

DIFFERENCE BETWEEN 'SINGLE-CONTRACT CASES' AND 'TWO-CONTRACT CASES'

In the case of *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL*,¹ the Queen’s Bench Division (Commercial Court) dealt with the question of whether general words of incorporation of an arbitration clause for one contract into another would be sufficient and hence would be enforceable while deciding the issue. The Hon’ble Court identified four separate categories of contracts in which incorporation of terms usually happens, namely:

1.[2010] EWHC 29 (Comm)

“(1) A and B make a contract in which they incorporate standard terms; (2) A and B make a contract incorporating terms previously agreed between A and B in another contract or contracts to which they were both parties; (3) A and B make a contract incorporating terms agreed between A (or B) and C; and (4) A and B make a contract incorporating terms agreed between C and D”

Category 1 and 2 above were recognized by the Court as a ‘single contract case’, wherein terms from one or more previous contracts between the same parties are incorporated into the present contract. Category 3 and 4 above were recognized by the Court as a ‘two-contract case’, wherein the terms are incorporated from a contract between one of the parties to the present contract and a third party, or from a contract where neither party to the current contract is involved.

TWO-CONTRACT CASES

In the above context, recently the Hon’ble Supreme Court in the case of *NBCC (India) Ltd. v. Zillion Infra Projects Pvt. Ltd.*², analysed the scope and intent of the Section 7(5) of the Act. This was a ‘two-contract case’ wherein NBCC issued an invitation of tender. Subsequently, the contract was awarded to one Zillion Infra Projects Pvt. Ltd. Thereafter, a Letter of Intent (“LOI”) was issued by NBCC to Zillion Infra Projects Pvt. Ltd., which contained a clause stating that all terms and conditions as contained in the tender (which had an arbitration clause) issued earlier by the Damodar Valley Corporation to the NBCC, shall apply *mutatis mutandis* except where these have been expressly modified by the NBCC.

The Supreme Court inter alia held that, as such, a general reference would not have the effect of incorporating the arbitration clause in the LOI. In any case, Clause 7.0 of the L.O.I., which is also a part of the agreement, makes it amply clear that the redressal of the dispute between the NBCC and the respondent has to be only through civil courts having jurisdiction of Delhi alone.

Relying upon this judgment, the Hon’ble Delhi High Court in the case *Deepa Chawla v. Raheja Developers Limited*,³ reiterated that a general reference of one contract in a subsequent contract would not automatically incorporate the arbitration clause in the subsequent contract and that the reference has to be very specific.

2. 2024 SCC OnLine SC 323

3. CS(OS) 416/2023

In *Deepa Chawla* (supra), the plaintiff had entered into two agreements. First, was a Flat Buyers' Agreement for purchasing the flat from the defendants for consideration, and the second was an agreement wherein the defendant had confirmed the receipt of the complete consideration amount and assured that the flat in question would be refabricated, furnished, and handed over to the plaintiff. The second agreement in Clause 9 stated that “...*the second agreement would have an overall overriding effect over the Flat Buyer's Agreement, including the settlement of any dispute.*” Further, while the Flat Buyer agreement (i.e. the first agreement) contained an Arbitration clause, the second agreement did not contain a similar clause.

The defendant argued that both agreements are interlinked and dependent on each other and hence, both should be read together, and the parties should be referred to arbitration. In making this claim, the defendant relied on a previous judgment of *Amit Guglani & Anr. V. L&T Housing Finance Ltd. & Anr.*⁴ wherein it was held as under-

“30... *where there are two agreements that are connected and interlinked and both contain Arbitration Clauses, which are not similar to one another, in order to determine the nature of the arbitral proceedings, the two documents have to be read in harmony or reconciled and parties should get the disputes resolved under the main or umbrella agreement.*”

Ultimately, the Hon'ble Delhi High Court rejected this contention and placed reliance upon the NBCC case⁵ and *M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited*⁶ case to hold that the second agreement does not contain a specific reference to the arbitration clause in the Flat Buyer Agreement and rather has an overriding clause which can be interpreted to mean that the arbitration clause is specifically excluded. In the latter case, the Supreme Court listed three conditions for an arbitration clause in one document to be considered incorporated into a subsequent contract by reference in a two-contract case:

1.The contract must contain a clear reference to the document/contract that contains the arbitration clause;

4. 2023 SCC OnLine 5206

5. Supra note 2

6. (2009) 7 SCC 696

- 2.The reference must explicitly indicate the intention of the parties to incorporate the arbitration clause; and
- 3.The arbitration clause should be such that it is applicable in respect of the disputes under the contract and is not in contradiction to any of the terms of the contract.

SINGLE CONTRACT CASES

In the case of *Inox Wind vs. Thermocables Ltd.*⁷, a dispute arose out of a contract pertaining to two purchase orders that mentioned the supply was to be made according to, (a) terms and conditions mentioned in the order, and (b) Standard Terms & Conditions, which contained the arbitration clause. The Hon'ble High Court of Allahabad held that there was no specific reference to the arbitration clause while dealing with an application under Section 11(6) of the Act.

This rather was then taken up to the Supreme Court, where, while noting the clear distinction created by the English Courts between 'single-contract cases' and 'two-contract cases', held that in single-contract cases, a general reference from a standard contract into a subsequent contract is enough for incorporation of an arbitration clause.

CONCLUSION

- 1.Therefore, it is clear that in single-contract cases, terms from one or more previous contracts between the same parties are incorporated into a contract, and a general reference is sufficient to bind the parties.
- 2.In two-contract cases, where terms are incorporated from a contract involving a third party or a contract to which neither party to the current contract is a party, a general reference falls short of incorporating an arbitration clause. The law demands a specific and unequivocal reference to the arbitration clause.