



ERGO

Analysing developments impacting business

SC FORTIFIES PRINCIPLES OF INCORPORATING ARBITRATION CLAUSE BY REFERENCE

11 March 2019

INTRODUCTION

Recently, in the case of *Giriraj Garg v Coal India Limited and Others* (Civil Appeal No. 1695 of 2019 decided on 15 February 2019), the Supreme Court has fortified the principle of incorporation of an arbitration clause by reference, where the arbitration clause was contained in the standard terms and conditions referred to, in the main contract between the parties.

FACTS

Coal India Limited, issued a scheme 2007 (Scheme) whereby coal distribution would be conducted through e-auction so as to provide access to coal buyers who were unable to source it through the institutional mechanism. The Scheme provided for disputes to be adjudicated through arbitration. The arbitrator was to be appointed by the Chairman and Managing Director of Coal India Limited upon written request in this behalf.

The Appellant participated in the e-auction process and being a successful bidder, also deposited earnest money towards the purchase of coal. Several sale orders (Sale Orders) were issued to the Appellant in this regard. However, for certain reasons, the Appellant was unable to lift the coal, due to which the earnest money deposit remitted by the Appellant was forfeited. This gave rise to disputes between the parties and the Appellant invoked arbitration in accordance with the Scheme. The Respondent failed to appoint an arbitrator which led to the Appellant filing an application under Section 11 of the Arbitration and Conciliation Act 1996 (Act) before the Jharkhand High Court. The Jharkhand High Court rejected the said application on the basis that the Sale Orders did not contain an arbitration clause. It was held that though the Scheme contains an arbitration clause, none of the individual Sale Orders make a reference to applicability of the terms and conditions of the Scheme and therefore the arbitration clause contained in the Scheme was not applicable to the parties.

The Sale Orders contained standard terms and conditions which provided that the Sale Orders would be governed by the guidelines, circulars, office orders, notices and instructions issued by Coal India Limited, Bharat Coking Coal Limited, State Governments, Central Government and other statutory bodies. The question considered by the Supreme Court was whether the arbitration clause contained in the Scheme would be applicable to the Sale Orders.

JUDGMENT

The Supreme Court stated that the principle of incorporation by reference was well established principle in arbitration jurisprudence. The arbitration agreement need not necessarily be in the form of a clause in the substantive contract. It could be incorporated by reference either from a parent agreement or by reference to a standard form contract. The Supreme Court relied on principles of incorporation by reference promulgated in the landmark case of *M R Engineers and Contractors Private Limited v Som Datt Builders Limited*, (2009) 7 SCC 696.

The Supreme Court further expounded on the theory of incorporation by reference in a 'single contract case' and 'two contract case' as laid down in the English case of *Habas Sanai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal Sal*, (2010) EWHC 29 (Comm). Explaining the concepts of 'single contract case' and 'two contract case', the Supreme Court stated that a 'single contract case' is one where the arbitration clause is contained in a standard form contract to which there is a general reference in the contract between the parties. However, where the arbitration clause is contained in some other contract, and a reference is made thereto to incorporate it in the contract between the parties, it is a 'two-contract case'. Further, the incorporation by general reference in a single contract is valid, but in a 'two-contract case', the reference to the arbitration clause of the referenced contract must be specific. Reference was also made to the earlier Supreme Court decision in the case of *Inox Wind Limited v Thermocables Limited*, (2018) 2 SCC 519.

The Supreme Court concluded that the Jharkhand High Court had erred in holding that the arbitration clause as contained in the Scheme won't stand incorporated in the Sale Orders. As per the Supreme Court, the Sale Orders specifically stated that they would be governed by the guidelines, circulars, office orders, notices, instructions etc issued by Coal India Limited or Bharat Coking Coal Limited etc and therefore the Scheme stood incorporated by reference.

COMMENTS

This judgment has further fortified the pro arbitration view that the Indian courts have been regularly endorsing in recent times.

It's important to bear in the mind that though the terms of the Sale Orders in the instant case did not refer to the Scheme, but to guidelines, circulars, notices, instructions etc issued by the Coal India Limited, Bharat Coking Coal Limited, even then, the Supreme Court decided in favour of parties being referred to arbitration.

Further, it is also interesting to note the famous English Author, Russel in his celebrated treatise, 'Russel on Arbitration' (24th Edition, 2015, Sweet and Maxwell), has further expanded the theory of 'single contract cases' to a situation where the contract referred to i.e. the contract containing the arbitration clause, is between one of the parties to the original contract and a third party, where the contract as a whole is a 'single commercial relationship'. In domestic arbitrations under Part I of the Act, though express provisions for referring third parties to arbitration, i.e., consolidation of claims, have not been made, some support for this proposition has been set out by the Supreme Court in the case of *Ameet Lalchand Shah v Rishabh Enterprises*, (2018) 15 SCC 678, where the Supreme Court held in favour of arbitration in a case where the contract which did not contain the arbitration clause was interlinked and integrally connected to the commercial understanding in the other agreements which contained the arbitration clause. Even in the institutional arbitration context, provisions for consolidation of arbitration claims have been provided under ICC Rules of Arbitration 2017 (Rules 7 and 10); LCIA Arbitration Rules 2014 (Rule 22) and SIAC Arbitration Rules 2016 (Rules 7 and 8). Hopefully, it will only be a matter of time before the Act is amended so as to bring it at par with international standards and have the legislature's express stamp of approval on consolidation of claims in the domestic context. Decisions

such as the present one, are Supreme Court's imprimatur to hold in favour of arbitration, leading to more stability to the burgeoning arbitration landscape in India.

- Raj R. Panchmatia (Partner) & Jaideep Singh Khattar (Senior Associate)

For any queries please contact: editors@khaitanco.com

We have updated our [Privacy Policy](#), which provides details of how we process your personal data and apply security measures. We will continue to communicate with you based on the information available with us. You may choose to unsubscribe from our communications at any time by clicking [here](#).

For private circulation only

The contents of this email are for informational purposes only and for the reader's personal non-commercial use. The views expressed are not the professional views of Khaitan & Co and do not constitute legal advice. The contents are intended, but not guaranteed, to be correct, complete, or up to date. Khaitan & Co disclaims all liability to any person for any loss or damage caused by errors or omissions, whether arising from negligence, accident or any other cause.

© 2019 Khaitan & Co. All rights reserved.

Mumbai

One Indiabulls Centre, 13th Floor
Tower 1 841, Senapati Bapat Marg
Mumbai 400 013, India

T: +91 22 6636 5000
E: mumbai@khaitanco.com

New Delhi

Ashoka Estate, 12th Floor
24 Barakhamba Road
New Delhi 110 001, India

T: +91 11 4151 5454
E: delhi@khaitanco.com

Bengaluru

Simal, 2nd Floor
7/1, Ulsoor Road
Bengaluru 560 042, India

T: +91 80 4339 7000
E: bengaluru@khaitanco.com

Kolkata

Emerald House
1 B Old Post Office Street
Kolkata 700 001, India

T: +91 33 2248 7000
E: kolkata@khaitanco.com