

Specific and Express Reference Needed to Incorporate Arbitration Clause from Prior Contract: Supreme Court of India

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Introduction

In **NBCC (India) Limited v. Zillion Infraprojects Pvt. Ltd.**¹, the Supreme Court of India ruled that simply mentioning another contract in an agreement would not automatically lead to incorporation of the arbitration clause in the subsequent agreement. To ensure that an arbitration clause from another agreement is applied, parties must explicitly state in the subsequent contract that the arbitration clause from the prior contract stands incorporated. In this article, we navigate through the facts of the matter and examine the decision rendered by the Supreme Court.

Brief Background

NBCC (India) Limited ("**NBCC**") and Zillion Infraprojects Pvt. Ltd. ("**Zillion**") entered into an agreement ("**NBCC Contract**") for the certain construction works around the Damodar river. The NBCC Contract included a provision stating that all terms and conditions from the tender issued by Damodar Valley Corporation ("**DVC**") to NBCC ("**DVC Contract**") would also apply to the NBCC Contract, unless NBCC explicitly modified the contractual provisions. Additionally, one of the clauses of the NBCC Contract specified that any disputes between NBCC and Zillion would be resolved exclusively by civil courts in Delhi.

The DVC Contract contained an arbitration clause. When disputes arose under the NBCC Contract, Zillion attempted to invoke the arbitration clause from the DVC Contract and filed a petition under Section 11 of the Arbitration & Conciliation Act, 1996 ("**Arbitration Act**"), seeking the appointment of an arbitrator. NBCC opposed this move, arguing that the NBCC Contract did not include an arbitration clause. However, the Delhi High Court ruled in favour of Zillion, determining that the arbitration clause from the DVC Contract was applicable and appointed an arbitrator. NBCC then appealed against this decision before the Supreme Court.

The moot point before the Supreme Court was whether the mention of the DVC Contract in the NBCC Contract would result in the incorporation of the arbitration clause from the DVC Contract into the NBCC Contract.

Decision of the Supreme Court

The Supreme Court reaffirmed the legal principles regarding the incorporation of an arbitration clause by reference.

Firstly, according to Section 7(5) of the Arbitration Act, an arbitration clause from another document can only become part of a contract if both parties explicitly and consciously agree to its inclusion. The reference must clearly indicate the intention to incorporate the arbitration clause from the other document into the contract.

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Secondly, when parties to a contract generally refer to another contract for matters such as execution or performance, this does not automatically include the arbitration clause from that other contract. For an arbitration clause from another agreement to be included, there must be a specific reference to that particular clause.

Thirdly, if a contract specifies that the standard terms and conditions of (i) an independent trade or professional body or (ii) one of the contracting parties will apply, then any arbitration clause within those standard terms and conditions is considered incorporated by reference. The Supreme Court emphasized that such instances, where standard terms are incorporated, are considered "*single-contract*" situations, unlike the "*two-contract*" scenario in the present case.

In view of the above, the Supreme Court overturned the High Court's decision, ruling that there was no arbitration clause between NBCC and Zillion. To support its findings, the Supreme Court observed that one of the clauses of NBCC Contract explicitly stated that disputes would "only" be resolved through civil courts with jurisdiction in Delhi, indicating that the parties intended to restrict dispute resolution exclusively to the courts in Delhi, excluding arbitration.

Accordingly, Zillion's contention that the aforesaid clause merely changed the jurisdiction of courts from Calcutta to Delhi, without affecting the arbitration agreement in the DVC Contract, was dismissed by the Supreme Court.

Comment

The Supreme Court's decision in ***NBCC (India) Limited v. Zillion Infraprojects Pvt. Ltd.*** highlights the importance of explicit language when incorporating an arbitration clause from one contract into another. The ruling clarifies that a general reference to another contract is insufficient to import its arbitration clause unless there is a clear and deliberate intention expressed by the parties. This judgment also reinforces the need for precision in drafting contracts, particularly regarding dispute resolution mechanisms, to avoid unintended interpretations.

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