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Supreme Court: For the parties to be referred to arbitration, there must be a specific and conscious incorporation of an arbitration clause from another contract

In *NBCC (India) Limited vs. Zillion Infraprojects Pvt.Ltd.*¹, the Supreme Court has held that a general reference in a contract (“**Contract 1**”) to a separate contract (“**Contract 2**”) would not incorporate the arbitration clause contained in Contract 2 for resolution of disputes that arise under Contract 1. In view of this judgment, if the parties want to incorporate an arbitration clause from another contract, they should ensure that there is a specific reference in Contract 1 to the arbitration clause contained in Contract 2.

Brief Facts

1. NBCC (India) Limited (“**NBCC**”) and Zillion Infraprojects Pvt. Ltd. (“**Zillion**”) entered into a contract (“**NBCC Contract**”) for construction of Weir with Allied Structures across river Damodar.
2. The NBCC Contract provided that:
 - a) All terms and conditions as contained in the tender (“**DVC Contract**”) issued by Damodar Valley Corporation (“**DVC**”) to NBCC would apply mutatis mutandis except where these were expressly modified by NBCC (clause 2).
 - b) The redressal of disputes between the NBCC and Zillion would only be through civil courts at Delhi (clause 7).
3. The DVC Contract contained an arbitration clause.
4. When disputes arose between Zillion and NBCC under the NBCC Contract, Zillion referred the dispute to arbitration in terms of the arbitration clause contained in the DVC Contract. Zillion filed a petition under Section 11 of the Arbitration & Conciliation Act, 1996 (“**Arbitration Act**”) praying for appointment of an arbitrator.
5. Though NBCC objected to the appointment of an arbitrator on the ground that no arbitration clause existed under the NBCC Contract, the Delhi High Court held that an arbitration clause existed between the parties (as per the DVC Contract) and appointed an arbitrator.
6. NBCC challenged the judgment passed by the High Court before the Supreme Court.

¹ 2024 INSC 218

Issue

The issue before the Supreme Court was whether by referring to the DVC Contract, the parties had also incorporated the arbitration agreement contained in the DVC Contract to the NBCC Contract.

Findings and Analysis

1. The Supreme Court reiterated the following law relating to incorporation of an arbitration clause by reference:
 - a) Section 7(5) of the Arbitration Act provides for a conscious acceptance of the arbitration clause from another document by the parties, before such arbitration clause could be read as a part of the contract between the parties. Reference in terms of Section 7 (5) of the Arbitration Act should be such that shows the intention to incorporate the arbitration clause contained in the document into the contract.
 - b) When parties enter into a contract, making a general reference to another contract (for execution, performance etc.) would not have the effect of *ipso facto* incorporating the arbitration clause from that contract. Arbitration clause from another contract can be incorporated only by a specific reference to such arbitration clause.
 - c) Where the contract provides that the standard form of terms and conditions of (i) an independent trade or professional institution; or of (ii) one of the parties to the contract will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, will be deemed to be incorporated by reference. The court held that such cases (where standard terms and conditions are incorporated) are 'single-contract' cases and not 'two-contract' cases (as in the present case).
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2. On facts, the Supreme Court set aside the High Court's judgment and held that no arbitration clause existed between NBCC and Zillion because:
 - a) Clause 7 in the present case used the word "only" before the words "be through civil courts having jurisdiction of Delhi alone" and therefore, the intention of the parties was to give jurisdiction to only courts at Delhi (and not to submit to arbitration).
 - b) Zillion's argument that clause 7 only modified the jurisdiction of court from Calcutta (as in the DVC Contract) to Delhi but did not have the effect of modifying the arbitration agreement contained in the DVC Contract was rejected.

Conclusion

The parties would have to be careful in drafting their contracts and if the intention is to be bound by an arbitration clause contained in another contract, the parties should ensure that a 'specific' reference is made to incorporate the arbitration clause of the other contract. As stated in the judgment, this principle should not apply in cases where standard terms and conditions are incorporated (in which case, the arbitration clause is deemed to be specifically incorporated).

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