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"Journal of Unique Laws and Students" (JULS) which shall provide law students, young lawyers and legal professionals to deliberate and express their critical thinking on impressionistic realms of Law. The JULS aims to provide cost free, open access academic deliberations among law students and young lawyers. The ISSUE II of Volume 1 focuses on three themes i.e. (i) Artificial Intelligence and Block chain in Law (ii) Intellectual Property Rights and Media, and (iii) Laws applicable to the intermediaries.

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EXPERTS CONTRIBUTIONS

Whether A Matter Can be Referred for Arbitration in the Absence of an Arbitration Clause or Agreement?

Authors – **Mr. Tariq Khan**[*]
Ms. Ruhi Thakkar

INTRODUCTION

Arbitration has a similar structure to that of litigation but the fundamental difference between arbitration and litigation lies in the fact that the former owes its existence to an arbitration clause or an arbitration agreement. *An arbitration agreement is the written agreement between the parties, to submit their existing, or future disputes or differences, to arbitration,* ***Mahanagar Telephone Nigam Ltd vs. Canara Bank***[1]

In certain situations, as a result of inartistic drafting, the process of alternative dispute mechanisms becomes time consuming which defeats it's very objection. The situation becomes worse when there is no arbitration clause or agreement in place as *a valid arbitration agreement is the foundation stone on which the entire edifice of the arbitral process is structured*[3]and the nature of dispute is such that it could be better resolved through arbitration.

Therefore, in the research paper, the authors examine the approach, wherein there is no written arbitration clause or agreement in place but there still exists a possibility to refer the matter for arbitration.

INTENTION OF THE PARTIES

In an English case, ***Sonact Group Limited v. Premula Spa***,[2] the Court held that an arbitral tribunal had jurisdiction in a dispute which arose from an informal settlement agreement even if that agreement did not contain an arbitration clause. The decision was based on the clear intentions of the parties to settle the dispute through arbitration.

Such a pragmatic and pro arbitration stance has been taken by the Supreme Court and High

[*] This *Case Commentary* is authored by Mr. Tariq Khan, Principal Associate at Advani & Co. and Ms. Ruhi Thakkar, final-year student at Adv. Balasaheb Apte College of Law, Mumbai.
[1] Civil Appeal Nos. 6202-6205 OF 2019 (Arising out of SLP (Civil) No. 13573-13576 of 2014)
[3] Supre note 1
[2] (2018) EWHC 3820 Comm

Courts of India as well. Indian arbitration law is governed by the Arbitration and Conciliation

Act, 1996 and Section 7 of the said act defines an arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes to arbitration which have arisen or which may arise between the parties. An arbitration agreement can be in the form of an arbitration clause in the contract or can be in the form of a separate agreement and it should be in writing. Clause 4 of the said section explains that an arbitration clause can be considered in writing if it is contained in a document signed by the parties, an exchange of letters or correspondence which provide a record of the agreement, an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. The 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.

Keeping Section 7(4) in mind, the courts have often reiterated that an arbitration agreement need not be in a particular form. It can be inferred from various documents signed and exchanged by the parties in the course of their contract, thereby making it possible to resort to arbitration even in the absence of an express agreement.

In Smt. Rukmanibai Gupta v. The Collector, Jabalpur &Ors,[3] the Apex Court explained that the arbitration clause is not required to be in any particular form. What is important is that the intention of the parties to refer the dispute to arbitration should be clearly ascertained from the terms of the agreement. It is therefore immaterial whether or not the expression arbitration or 'arbitrator' has been used in the agreement. Also, it is not important that agreement of arbitration has to appear in the document containing the other terms of agreement between the parties.

"Law is well settled that arbitration clause may be incorporated by reference to a specific document which is in existence and whose terms are easily ascertainable."

The same view has been taken by the court in ***Visa International Ltd vs. Continental Resources USA Ltd[4],***

"No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and material on record including surrounding circumstances."

In ***Mahanagar Telephone Nigam Ltd vs Canara Bank[5],*** the Apex Court opined that if it can be implied from the documents on record that the parties were ad idem and have reached an

[3] (1980) 4 SCC 556

[4] Arbitration Petition No. 16 Of 2007

agreement upon all material terms, such contract would then be considered as a binding contract. The meaning of a contract should therefore be interpreted by adopting a common sense and such understanding of the contract must not be hindered by a pedantic and leglistictic interpretation.

"A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An 'arbitration agreement' is a commercial document inter parties, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities."

In Khardah Company Ltd. v. Raymon and Co. (India) Pvt. Ltd[6]the court while ascertaining the terms of agreement, held:

"If on a reading of the document as a whole, it can fairly be deduced from the words actually used herein, that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be expressed or implied from what has been expressed. It is in the ultimate analysis, a question of construction of the contract."

Party Autonomy

"Party autonomy has been held to be the brooding and guiding spirit of arbitration."

"Party autonomy" is "the freedom of the parties to construct their contractual relationship in the way they see fit"[7]. It is one of the biggest advantages of Arbitration wherein, the parties can decide everything mutually, from the dates of hearing to the procedure to be followed. In the landmark judgement of ***Pasl Wind Solutions Private ... vs Ge Power Conversion India Private***[8]**,** the Supreme Court of India while relying on various judgements and international resources, elucidated the importance of party autonomy in Arbitration Mechanism.

Thus, in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc*[9], the Apex Court held:

"Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract — (1) proper law of

[5] Nos. 6202-6205 Of 2019
[6] 1962 AIR 1810, 1963 SCR (3) 183
[7] The Doctrine Of Party Autonomy In International Commercial Arbitration: Myth Or Reality? Sunday A. Fagbemi*
[8] Civil Appeal No. 1647 Of 2021
[9] No.7019 Of 2005

contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as "curial law."

The Apex Court in the judgment has also shed light on the findings of authors in Comparative International Commercial Arbitration [Chapter 17: Determination of Applicable Law in Julian D.M. Lew, Loukas A. Mistelis, et al.,Comparative International Commercial Arbitration (Kluwer Law International 2003) pp. 411-437 , Para 17-8]

"All modern arbitration laws recognise party autonomy, that is, parties are free to determine the substantive law or rules applicable to the merits of the dispute to be resolved by arbitration. Party autonomy provides contracting parties with a mechanism of avoiding the application of an unfavourable or inappropriate law to an international dispute. This choice is and should be binding on the Arbitration Tribunal. This is also confirmed in most arbitration rules."

Henceforth, in the course of deciding the existence, validity or understanding of the arbitration agreement or the presence of an arbitration clause in the agreement, the terms of the said contract will have to be understood in the way the parties want and intend them to be.

"In that context, particularly in agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement." [10]

Power of the Court to Refer the Matter for Arbitration

When two parties enter into a contract, and there is an absence of arbitration clause the parties will have only one resort i.e., the aggrieved party filing a civil suit in the court. In such cases, while hearing the matter there can be a realization by the court that the said matter being a Commercial dispute can be better resolved through alternative dispute mechanisms as litigation is comparatively a long drawn process.

When there is no pre-arbitration clause or an agreement in a matter, the Courts have the power to refer any matter to arbitration under Section 89 of Civil Procedural Code, according to which if it appears to the court that there exists an element of settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and after getting parties observations on

[10] Supra 9

the same, the matter may be referred for arbitration, conciliation, judicial settlement through Lok Adalat or mediation.

In the landmark judgement of ***Kerala State Electricity Board and Anr. Vs. Kurien E. Kathilal and Anr***[11], the Apex Court has elucidated the requisites for referring a matter for arbitration under Section 89 of CPC.

In this case, the contract did not contain an arbitration clause and therefore a civil suit was filed in the Kerala High Court. While hearing the matter the court opined that as the dispute was commercial in nature, it will take ages to resolve the same through a civil suit. The Court adjudged that it would be better to send the matter for arbitration. The court took the consent of the parties, the parties agreed and the judgment of the High Court referred the matter for arbitration.

The Kerala Electricity Board appealed to the Apex Court contending that there was no arbitration agreement or a clause in writing. The parties gave their oral consent in an open court and there was no agreement in writing clearly stating the intention and consent of the parties to refer the matter to arbitration which is a compulsion under section 7 of the AC Act.

Section 7 therefore makes it compulsory that courts have to take the consent of the parties in writing before referring a matter for arbitration even if they are taking the route of Section 89. Of CPC.

The Apex Court in the Kerala Electricity Board case explained this requisite as follows:

*"*35. *Insofar reference of the parties to arbitration, oral consent given by the counsel without a written memo of instructions does not fulfill the requirement under Section 89 CPC. Since referring the parties to arbitration has serious consequences of taking them away from the stream of civil courts and subject them to the rigor of arbitration proceedings, in the absence of arbitration agreement, the court can refer them to arbitration only with written consent of parties either by way of joint memo or joint application; more so, when government or statutory body like the appellant-Board is involved."*

Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court under section 89 of the Code. Such agreement can be by means of a joint memo or joint application or a joint affidavit before the court, or by record of the agreement by the court in the order sheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be

[11] Nos.3164-3165 Of 2017

referred to arbitration under section 89 of the Code; and on such reference, the provisions of Act will apply to the arbitration.[12]

Section 89 of CPC, gives vast powers to the courts to refer a matter for arbitration without an arbitration clause; however, such reference can only be made if all the parties to the contract mutually agree to resort to arbitration. As mentioned above, such consent should be in writing. The clear settled law thus is that the existence or validity of an arbitration agreement shall be decided by the Court alone.

In ***Sukanya Holdings Pvt. Ltd vs Jayesh H. Pandya & Anr***[13]court opined that "*section 89 of CPC would be applicable even in cases where there is no arbitration agreement for referring the dispute to arbitration."*

The position was reiterated by this Court in ***Jagdish Chander vs. Ramesh Chander***[14]***,*** **s**tating as follows:

Therefore, where there is no pre-existing arbitration agreement between the parties, the consent of all the parties to the suit will be necessary, for referring the subject matter of the suit to arbitration under section 89 of the Code.

It is pertinent to keep in mind that though there is a possibility of referring a matter for arbitration without a clause through the inference of the intention of the parties, the Apex court has also refused such reference in cases where the intention of the parties could not be inferred from the exchange of documents.

The Supreme Court in ***S.N.Prasad, M/S Hitek..vs. M/S Monnet Finance Ltd. & Ors***[17]***,*** refusing a reference to the existence of an arbitration agreement between the first respondent and the appellant, explained that to in order to constitute an arbitration agreement under section

[12] Nos.3164-3165 OF 2017
[13] Appeal (civil) 1174 of 2002
[14] Appeal (civil) 4467 of 2002

7(4)(c)of the Act, it is required that a statement of claim containing a specific allegation about the existence of an arbitration agreement by the applicant and 'non-denial' thereof by the party.

"An `allegation' is an assertion or declaration about a fact and also refers to the narration of a transaction. If there is no allegation as to the existence of any arbitration agreement between the parties, the question of 'non-denial' does not arise and the matter will not be referred for arbitration because no reference in any manner by the party is inferred."[15]

Novation

Novation is the act of replacing a legitimate existing contract with a new contract, where the transfer is mutually agreed by both parties concerned. [16]

In ***Spml Infra Ltd vs Ntpc Limited,*** the Apex Court opined that**,** t*here is no dispute that in theevent a contract is novated by the parties entering into another contract, the rights and obligations of the parties would be covered by the new contract and not the one that has been novated.*

Therefore, when initially in the main contract there is no arbitration agreement, but if it is added in the subsequent contract or probably an addendum there is a possibility that entering into an addendum on a later date an agreeing for arbitration will result in the arbitration clause to prevail and it will therefore be governing the previous contracts also.

"*Once it is established that the parties had entered into an arbitration agreement, the Courts must lean in favour of relegating the parties to that forum. Once it is established that the parties had entered into an Arbitration Agreement, the question whether the contract (including the arbitration clause) stood discharged by accord and satisfaction must be considered with the perspective whether the same is established without any detailed adjudicatory exercise."*[17]

Third Parties

An arbitration agreement exists between two or more parties to that agreement. But, there are certain situations as indicated from the evolving body of academic literature and adjudicatory

[15] CIVIL APPEAL No. 9224 OF 2010
[16] https://cleartax.in/g/terms/novation
[17] Civil Appeal No. 9224 Of 2010

trends which indicate that an arbitration agreement between two or more parties can function soas to bind other parties or non-signatories to the agreement as explained in ***Cheran Properties Limited vs Kasturi And Sons Limited.***[18]

While explaining the above mentioned interpretation, the court relied on the theories formulated by various international jurists;

"Arbitration is usually limited to parties who have consented to the process, either by agreeing in their contract to refer any disputes arising in the future between them to arbitration or by submitting to arbitration when a dispute arises. A party who has not so consented, often referred to as a third party or a non-signatory to the arbitration agreement, is usually excluded from the arbitration. There are however some occasions when such a third party may be bound by the agreement to arbitrate. For example, …, assignees and representatives may become a party to the arbitration agreement in place of the original signatory on the basis that they are successors to that party's interest and claim "through or under" the original party.

The third party can then be compelled to arbitrate any dispute that arises."

Modern business transactions often set off multiple layers and agreements which also involve transactions within a group of companies. The intention to bind both signatory and non-signatory entities to the agreement may be reflected from the circumstances in which the agreement was entered into.

"The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory. " [19]

In ***Chloro Controls India (P) Ltd. Vs. Severn Trent Water Purification Inc***[20]**,** the Apex court elucidated on arbitration between a signatory and a third party stating that Arbitration thus could be possible between a signatory and a third party, but the onus lies on that party to show that in fact and in law, it is claiming 'through' or 'under; the signatory party as our Section 45 of the 1996 Act.

The same view was reiterated by the Apex Court in ***Ameet Lalchand Shah vs. Rishabh***

[18] CIVILAPPEAL NOS 10025-10026 OF 2017
[19] CIVIL APPEAL NOS 10025-10026 OF 2017
[20] CIVIL APPEAL NO. 7134 OF 2012

Enterprises*[21]*, wherein the court opined that,

"If it can prima facie be shown that parties are ad idem, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement."

Conclusion

Recently, the trends have changed. India is moving towards arbitration and a pro arbitration stance is being adopted as is reflected from the recent judgments. From emphasizing the importance of party autonomy in arbitration as the *"the grund norm" in,* ***Pasl Wind SolutionsPrivate ... vs Ge Power Conversion India Private***[22]to giving utmost importance to ascertain the intention of the parties in ***Visa International Ltd vs. Continental ResourcesUSA Ltd***[23]***,*** and upholding the pertinence of mutual consent in ***Jagdish Chander v. Ramesh Chander***[24]***,*** the judiciary has time and again adopted a pragmatic approach towards arbitration in India.

The Legislature has also taken significant steps towards this direction by reducing the scope of interference in arbitration proceedings as is evident from what was opined in ***N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.***[25] as, *"The legislative policy of minimal interference is enshrined in Section 5, which by a non-obstante clause prohibits judicial intervention except as specified in Part I of the Arbitration Act."*

The legislature as well as judiciary are taking excellent steps but in these cases where there is no arbitration clause, parties have to be very careful and it is always a better resort to get a proper arbitration clause drafted if the intention of the parties to refer the matter to arbitration is clear. During the process of drafting and resorting to arbitration it is pertinent that the observations of the ***Kerala State Electricity Board and Anr. Vs. Kurien E. Kathilal and Anr***[26], about mutual consent of the parties to refer the matter to arbitration ought to be in

[21] CIVIL APPEAL NO. 4690 OF 2018
(Arising out of SLP(C) No.16789 of 2017)
[22] CIVIL APPEAL NO. 1647 OF 2021
[23] ARBITRATION PETITION NO. 16 OF 2007
[24] Appeal (civil) 4467 of 2002
[25] CIVIL APPEAL NOS. 3802 - 3803 / 2020
[26] Civil Appeal Nos.3164-3165 Of 2017

writing, to not be ignored. As held by the Apex Court in ***Mahanagar Telephone Nigam Ltd vs Canara Bank***[27], *A valid arbitration agreement constitutes the heart of an arbitration.*

[27] Civil Appeal Nos. 6202-6205 OF 2019 (Arising out of SLP (Civil) No. 13573-13576 of 2014)