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PRECISION IN CONTRACTUAL PENUMBRA: INCORPORATION BY REFERENCE

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Introduction

The recent ruling in *NBCC (India) Limited v Zillion Infraprojects Pvt. Ltd.*[1] ["**NBCC**"] by the Apex Court of India on March 19, 2024, marks a crucial shift in the interpretation of incorporation of arbitration clauses by reference establishing a new standard for interpreting Sec.7(5) of the Arbitration and Conciliation Act, 1996[2] ["**Arbitration Act**"]. Therefore, this research paper attempts to decode the Court's reasoning, investigate its multi-faceted effects, and critically analyse its impact on the evolving landscape of alternative dispute resolution, nationally and internationally.

The apple of the discord emanates from a construction contract between NBCC (India) Limited, a government undertaking engaged in infrastructure projects, and Zillion Infraprojects Pvt. Ltd., a private construction company. NBCC had issued a tender (NIT No. 01-WEIR/06) for the construction of a dam with allied structures across the Damodar River at DVC, CTPS, Chandrapura, Bokaro, Jharkhand and following Zillion's successful bid, NBCC issued a Letter of Intent ["**LOI**"] on December 4, 2006, awarding a contract of Rs.19,08,46,612/-. Crucially, the LOI referred to terms and conditions from an earlier tender issued by the Damodar Valley Corporation ["**DVC**"] to NBCC.

As the project progressed, disagreements emerged, and on March 6, 2020, Zillion invoked the arbitration clause contained in Cl. 3.34 of Sec. III Vol. III of the Tender Documents (General

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[1] *NBCC (India) Ltd v Zillion Infraprojects Pvt. Ltd.* AIR OnLine [2024] SC 172.
[2] Arbitration and Conciliation Act 1996, s 7(5).

Conditions of Contract) ["**GCC**"] issued by DVC to NBCC. Subsequently, Zillion sought NBCC's consent for the former High Court judge's appointment as the sole arbitrator, but NBCC remained silent, prompting Zillion to apply under Sec.11(6) of the Arbitration Act[3] before the Delhi High Court. The Court, through an interim order dated March 12, 2021, and a final judgment dated April 9, 2021, allowed Zillion's application. Aggrieved, NBCC appealed to the Supreme Court and on March 19, 2024, the Division Bench of Justice B.R. Gavai and Justice Sandeep Mehta allowed the appeal, finding the Delhi High Court's decision to be erroneous.

Mapping the court's analytical contours

Primarily, the contended question was whether a general reference to terms and conditions from another contract is sufficient to incorporate an arbitration clause, necessitating the Court to interpret Sec. 7(5) of the Arbitration Act, which governs the incorporation of arbitration agreements by reference and reads, "*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.*"[4]

In their analysis, the Apex Court relied on its earlier decision in *M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited*[5] ["**M.R. Engineers**"] and reaffirmed the following principles:

- *Specificity and Intention Requirement*: The Court upheld that for incorporation of an arbitration clause from a separate document requires a specific reference to the arbitration clause itself and that such reference should clearly indicate an intention to incorporate the arbitration clause
- *Execution v. Dispute Resolution*: When a contract refers to another document for execution or performance terms, the arbitration clause from that document is not automatically incorporated without a particular reference, which is crucial for separating operational aspects of a contract from its dispute resolution mechanism.
- *Standard Forms and Trade Practices*: The Court acknowledged that where a contract provides for the application of standard form terms and conditions of an independent trade or professional institution, such standard forms, including their arbitration provisions, may be deemed incorporated by reference.

[3] Arbitration and Conciliation Act 1996, s 11(6).
[4] Arbitration and Conciliation Act 1996, s 7(5).
[5] *M.R. Engineers and Contractors Private Limited v Som Datt Builders Ltd.* [2009] 7 SCC 696.

- *Familiarity and Understanding*: Lastly, The Court noted that explicit statements in the contract indicating that parties are familiar with or understand the referenced terms could strengthen the case for incorporation of an arbitration clause. Further, where a contract stipulates that one party's contract conditions, like general conditions, shall form part of their contract, the arbitration clause within such general conditions will apply to the contract between parties.

By meticulously examining the language of the LOI, the Court focused on several key clauses:

- Cl. 1.0, which listed the documents that would form part of the agreement, including the Notice Inviting Tender, General Conditions of Contract, Special Conditions of Contract, and Bill of Quantity.
- Cl. 2.0, which stated that the DVC-NBCC tender terms would apply "mutatis mutandis except where these have been expressly modified by NBCC."
- Cl. 7.0, which specified that disputes "shall only be through civil courts having jurisdiction of Delhi alone."
- Cl. 10.0, which affirmed that the LOI itself would form part of the agreement.

The Court interpreted these clauses, particularly Cl. 7.0, as demonstrating a clear intention to modify the dispute resolution mechanism, effectively overriding any arbitration clause that might have been contained in the referenced DVC-NBCC tender documents. Notably, the Court distinguished its ruling in *Inox Wind Limited v Thermocables Limited* ["**Inox Wind**"],[6] remarking that the present case involved a two-contract scenario, which involves at least one different party across the two contracts or two other parties, unlike the single-contract, which involves the same parties across both contracts. The court in Inox Wind also held that a standard form of contract shall be sufficient to incorporate the arbitration clause in a single-contract case but not for the two contract cases where a specific reference to the primary contract's arbitral clause is needed. This was referenced from *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* ["**Habas**"], [7] which distinguished between two-contract cases and single-contract cases, in which a strict test of incorporation of referencing arbitration clause was applied in the former, and general words of incorporation were considered sufficient in the latter. This distinction is key to understanding the Court's approach to incorporation by reference in different commercial contracts.

This judgment was further followed by the Delhi High Court Judgment of *Deepa Chawla v. Raheja Developers Ltd*, dealing with whether an initial agreement's arbitration clause could be applied to a

[6] *Inox Wind Ltd. v Thermocables Ltd.* [2018] 2 SCC 519.
[7] *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm).

later agreement between the same parties, where the latter explicitly excluded arbitration for disputes. It was held that the second agreement would have an overriding effect due to the specific exclusion of the arbitration clause and stated that arbitration clauses of the prior contract have to be specifically referenced to be enforceable in subsequent agreements.

Critically analysing the court's approach

The Hon'ble Apex Court's approach emphasizes on parties' express intentions and explicit incorporation of arbitration clauses, ensuring certainty; however, it also raises critical considerations:

- *Party Autonomy vs. Formalism*: The Court's interpretation upholds the principle of party autonomy as a fundamental tenet of arbitration law by ensuring that parties are fully aware of and consent to arbitration as their chosen dispute resolution methods by mandating specific reference to arbitration clause thus preventing being bound by unintended or not agreed arbitration claims. However, it also introduces a level of formalism that may not always align with commercial realities or the parties' true intentions. For example, two companies, A and B, add an addendum to amend the arbitration clause in their contract to solely rely on litigation but do not explicitly state the arbitration clause to be null and void, the formalist approach, involving strict interpretation may still enforce arbitration due to lack of explicit rescission and reference to original clause despite the intention to exclude arbitration. Therefore, Formalism introduces a strict adherence to the word's literal meaning in a contract, which ensures certainty and predictability but may lead to non-alignment with the parties' true intention. In the present case, the parties modified the dispute resolution clause to exclude arbitration by the inclusion of the word 'only,' which, according to formalism, will follow a strict interpretation of strictly excluding arbitration, contrary to the respondent's intention to resolve the dispute through arbitration as evidenced by its invocation. This also conflicts with commercial realities, which prioritize efficient, faster dispute resolution and focus on the broader spirit of agreements over meticulous drafting, with intentions inferred from context and terms.
- *Practical Challenges in Complex Transactions*: Strict requirements for specific incorporation can create practical difficulties in complex commercial transactions with multiple documents/contracts, which may lead parties to unintentionally fail to incorporate arbitration clauses despite genuine intent to incorporate, undermining arbitration's efficiency and leading to drawn-out jurisdictional disputes.

- *Incorporation vs. Reference Dichotomy*: The Court emphasized a distinction between "incorporation" and "reference," holding the case to be that of the latter, which though provides some clarity but also introduces complexity in certain scenarios mainly where the distinction between the two is less clear-cut. Back-to-back contracts allow the main contract's terms to be passed down to subcontractors or other parties or replicated between different parties. Herein, the parties clearly intended to include Cl.7.0 of L.O.I. in the agreement as per Cl.10.0. The Court held that referencing the first contract's terms in the second contract, does not ipso facto apply the arbitration clause to subsequent contract, without specific reference, making it a case of reference, not incorporation. Incorporation by reference applies when arbitration clause is contained in a separate document, not being part of original signed contract like GCC. Here, the contract clauses, vide the LOI., referenced Tender Documents, including GCC, as applicable and binding, implying a back-to-back contract as the subsequent contract is largely based on the DVC tender whose terms were to apply mutatis-mutandis. However, the incorporation by reference requires an express reference, which was not followed, and LOI modified the arbitration clause to further exclude it, making the case a back-to-back contract that did not fulfil incorporation by reference criteria.

The *Habas* case, which was held to be a single-contract case involving multiple previous contracts between parties, therefore, requiring only general reference, provided 4 broad categories/situations of incorporating arbitration, where A and B make contracts-

- In which standard terms are incorporated, including standard terms of one party, organizations', or a particular industry's terms, or contained in another document.
- Incorporating terms previously agreed between them in another contract.
- Incorporating terms agreed between A (or B) and C, like the bill of lading, reinsurance contracts/excess insurance, and building/engineering sub-contracts/sub-sub contracts incorporating main contract/subcontract terms, respectively.
- Incorporating terms agreed between C and D

This Court held that a more restrictive approach exists in the last two categories, which are two-contract cases, than the former two, which are single-contract cases, as even with multiple contracts in consideration, the distinction exists in the incorporation of terms made between a) the same and b) different parties. Thus, single-contract and two-contract agreements consist of multiple, closely related agreements, but the latter involves different parties. This is because references from different contracts involving different parties do not inherently extend the

intention to incorporate an arbitration clause alongside substantive provisions. This distinguishes back-to-back contracts, where, without specific reference, an arbitration clause is not incorporated by reference in separate albeit related contracts involving reference/replication of terms.

International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd. ["**International Research Corp**"],[8] involved a Cooperation Agreement ["**CA**"] between Lufthansa and Datamat Public Company and two Supplemental Agreements ["**SA**"] between Datamat and the appellant. This Court held that the strict reference rule in two-contract cases has been stretched beyond its original application as under bills of lading and should not be taken as a general application rule. Instead, it emphasized focusing on the parties' intent to incorporate it within the context and objective circumstances. The court ruled that the parties did not intend for the arbitration clause in CA to be incorporated into SA.

In *Barrier Ltd. v Redhall Marine Ltd* ["**Barrier Ltd**"],[9] similar to the back-to-back cases, which involved a sub-contract assigning part of the main contract's functions to Barrier Ltd. without replicating it entirely and incorporating standard terms. The full incorporation of the arbitration clause in the main contract was rejected due to the general reference lacking sufficient clarity and specificity, though the standard terms were incorporated. The judgment raised important questions about interpreting "mutatis mutandis" clauses, emphasizing the phrase "except where these have been expressly modified by NBCC" in Cl. 2.0 of the LOI. This interpretation suggests that courts may view such clauses as potential carve-outs that can override general incorporations by reference. The Court's approach offers certainty in determining an arbitration agreement's existence but may lack flexibility in some commercial contexts. Its rigid requirement for specific incorporation might not align with the informal or expedited nature of certain business transactions, potentially leading to unintended consequences.

The global position: A comparative analysis

The Indian approach to incorporation by reference, as reinforced by this judgment, appears to be more stringent than that of some other jurisdictions. For instance, in *International Research Corp*[10] the Singapore Court of Appeal held that general words of incorporation could be sufficient to incorporate an arbitration clause, subject to the parties' intention and the circumstances of the case.

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[8] *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd.* [2014] 1 SLR 130.
[9] *Barrier Ltd v Redhall Marine Ltd.* [2016] EWHC 381 (QB).
[10] *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd.* [2014] 1 SLR 130.

English courts often adopt a liberal approach, permitting arbitration clauses to be incorporated through general references so long the wording is sufficiently comprehensive and there is no indication that the parties intended otherwise.[11] Though there has not been a clear stance on the matter but *Barrier Ltd.*[12] depicts a diversion in the lenient approach by the English Courts to hold that the arbitration clause in the sub-contract, involving a general reference, was not considered clear or explicit enough to bind parties to the arbitration or incorporate the main contract's clause.

Meanwhile, Hong Kong law takes a middle-ground approach, like in *G & C Construction Ltd. v. Hsin Chong Construction (Asia) Ltd.*,[13] the Court held that while specific words of incorporation are not always necessary, the incorporating words must be construed to determine whether they are wide enough to include the arbitration clause.

The United States of America ["**USA**"] also prefers to take a less stringent approach, with more emphasis on contractual clarity, intent, and enforcement, as showcased in *Standard Bent Glass Corp. v Glassrobots Oy.*[14] The case emphasized arbitration clauses to demonstrate an express, unequivocal agreement, with clear reference in the main contract, the identity of the referenced document being ascertainable, and the incorporation does not result in surprise/hardship. Here, though the arbitration clause was unsigned, it was contained in an exchange of letters that satisfied the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ["**New York Convention**"], Art.2 requirements for constituting the term 'agreement in writing'[15] and the Glassrobots standard sales agreement made explicit references to another document containing an arbitration clause un objected by Standard Bent Glass, as substantiated by the ongoing contract performance.

Art.2 of the New York Convention stipulates that states must recognize agreements to arbitrate disputes; they should be in writing, including clauses in contracts, signed agreements, or exchanged in letters or telegrams, and that the court must refer parties to arbitration unless an agreement is invalid or inoperative or void.[16] The arbitration by reference is not directly referenced under Art.2 but leaves the matter to different national jurisdictions.[17] This was also cited by *Jiangxi Provincial Metal & Minerals Import and Export Corporation v Sulanser Corporation*,[18] which held that the definition

[11] *Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd* [2006] EWHC 2530 (Comm).
[12] *Barrier Ltd v Redhall Marine Ltd.* [2016] EWHC 381 (QB).
[13] *G & C Construction Ltd. v Hsin Chong Construction (Asia) Ltd* [2018] HKCFI 1595.
[14] *Standard Bent Glass Corp v Glassrobots Oy* 333 F.3d 440 (3d Cir. 2003).
[15] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art 2.
[16] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art 2.
[17] Bhavna Mishra 'Arbitration and Standard Form of Contracts' in Sairam Bhat (ed), Contracts, Agreements and Public Policy (NLSIU, 2015).
[18] *Jiangxi Provincial Metal & Minerals Import and Export Corporation v Sulanser Corporation* [1995] 2 HKC 373.

under Art.2 was not exhaustive, allowing for both express and general or insufficient references in the main contract, as the Article's wording omits the term 'only.' In this case, despite the contract being unsigned, the court found that the written contract and the defendant's acknowledgment in correspondence, fulfilled Art.7(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 ["**UNCITRAL Model Law**"],[19] with the defendant's subsequent participation in arbitration reinforcing this conclusion.

Similarly, In Italy, while *Drefus Commodities Italia v Cereal Mangimi*[20] stipulated an express reference, but the recent *Del Medico v Iberprotein*[21]case held, an arbitration clause in general terms and conditions of an international sale agreement, as binding, as it did not conflict with the New York Convention permitting for incorporation by general reference, especially as the defendant, as commercial operator was familiar with main contract's standard terms.

Furthermore, the UNCITRAL Model Law, as amended in 2006, provides in Art. 7(6) that "*The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.*"[22] Thus, though the Indian approach prioritizes certainty and express consent, but may be more restrictive than those of other major arbitration jurisdictions.

From a practitioner's perspective: Understanding NBCC's practical impact

The decision has key implications for arbitration practice in India, particularly in drafting, contract review, jurisdiction, and commercial negotiations. Legal practitioners and drafters must be cautious when incorporating arbitration clauses by reference, ensuring explicit and unambiguous language that refers directly to the arbitration clause, not just general terms, which may require revising standard contract templates.

Furthermore, a thorough review of all contractual documents is essential, especially in multi-contract scenarios or where standard terms are referenced, to ensure proper incorporation of arbitration clauses as intended. This decision may also increase jurisdictional challenges in arbitration, particularly with general references for incorporation.

Additionally, Parties should ensure that dispute resolution clauses clearly express their intentions regarding arbitration in the primary contract itself. The judgment's suggestion to narrowly interpret mutatis mutandis clauses, especially when terms are expressly modified, requires parties to be

[19] UNCITRAL Model Law on International Commercial Arbitration, art 7(2).
[20] *Dreyfus Commodities Italia v Cereal Mangimi,* [2009] Court of Cassation, Italy 2009, 649.
[21] *Del Medico v Iberprotein SL* (2011, No 13231).
[22] UNCITRAL Model Law on International Commercial Arbitration, art 7(6).

cautious about relying on such clauses for incorporation and may prompt a review of existing contracts using such language.

Lastly, Legal professionals, including in-house counsel, may require additional training to understand the decision's impact. There may also be discussions on potential amendments to the Arbitration and Conciliation Act to offer more flexibility in arbitration clauses due to the Court's stringent stance.

Conclusion

The judgment reaffirms and refines India's approach to incorporating arbitration clauses by reference by building on M.R. Engineers principles. It emphasizes clarity, explicit consent, and party autonomy in arbitration agreements, promoting certainty and setting a high standard for including dispute resolution clauses in commercial agreements. The case underscores the need for meticulous drafting and comprehensive contract review.

As India positions itself as an arbitration-friendly jurisdiction, the judgment raises questions about balancing strict standards with pro-arbitration policies. It suggests a more flexible approach to incorporation by reference to align with the evolving arbitration framework and better balance commercial parties' needs while maintaining arbitration process' integrity maybe considered.