THE LAW ON INCORPORATION OF ARBITRATION AGREEMENTS BY REFERENCE REPEATEDLY CLARIFIED!

Readers may recall that in one of our previous updates, we had covered the case of *Inox Wind Ltd. v. Thermocables Ltd.* (order dated January 5, 2018, Civil Appeal No. 19/2018, Supreme Court). In that judgment, the Supreme Court ('**SC**') had laid down that a general reference in a contract to a standard form of contract of one party would be sufficient for incorporation of arbitration clause contained in such standard form of contract.

In a subsequent decision in the case of *M/s Elite Engineering and Construction (Hyd.) Pvt. Ltd.* v. *M/s Techtrans Construction India Pvt. Ltd.* (order dated February 23, 2018, Civil Appeal No. 2439/2018, Supreme Court), the SC has taken a conservative and modified stance on what at first appears to be a very similar situation to *Inox Wind*, but, in fact, is not. In this update we discuss the *Elite Engineering* decision and the contrast it with the *Inox Wind* decision.

BRIEF BACKGROUND

The Respondent had been awarded a works contract by a third party ('**the EPC Concessionaire**'). The Respondent had then floated a tender for sub-contracting part of said works, in which the Appellant emerged as the winning bidder. The parties signed an agreement dated July 29, 2009 ('**the Agreement**'). Annexure-I to the Agreement specified the terms and conditions, wherein Clause 9.10 stated that *"For items which are not mentioned in this Agreement Clauses, terms and conditions of Agreement between Contractor* (Respondent) *and EPC Concessionaire will be applicable."* The agreement between the Respondent and the EPC Concessionaire ('**the Referred Agreement**') *inter alia* contained an arbitration clause.

When disputes arose between the Appellant and Respondent under the Agreement, the Appellant attempted to invoke arbitration on the grounds that the arbitration clause of the Referred Agreement had been incorporated into the Agreement by virtue of Clause 9.10 of the Agreement. The Appellant had filed petition under Sections 11 of the Arbitration and Conciliation Act, 1996 ('**the Act**') on the same basis i.e. arbitration clause of the Referred Agreement was incorporated into the Agreement by virtue of Clause 9.10 of the Agreement. The Respondent denied the existence of an arbitration clause in the Agreement.

The petition filed under Section 11 was dismissed by the High Court ('**HC**'), upholding the Respondent's contention that no arbitration agreement existed between parties. Thus, the Appellant came to file the present appeal before the SC.

FINDINGS

The SC was called upon to examine whether, in the given fact situation, there existed a valid arbitration agreement between parties by operation of Section 7(5) of the Act.

The SC upheld the decision of the HC, which had relied on the SC's judgment in *M.R. Engineers and Contractors Private Limited* v. *Som Datt Builders Ltd.*[1] wherein it was laid down that for incorporating in an agreement an arbitration clause from another document *"the reference to the other document should clearly indicate an intention to incorporate the*

[1] (2009) 7 SCC 696.

arbitration clause into the contract".

In the instant case, after reading Clause 2[2] of the Agreement in which a reference was to "works and quality" and Clause 9.10 of the Agreement in which reference was to "items" which are not mentioned in the contract, the SC confirmed that the foregoing clauses incorporate in the Agreement only those terms of the Referred Agreement which relate to the terms of work; the foregoing clauses do not reflect an intention of parties to incorporate the arbitration agreement from the Referred Agreement.

CONCLUSION

It is interesting to compare the conclusions of the judgments in *Inox Wind* and *Elite Engineering*. After extensive discussions the SC's earlier judgment *M.R. Engineers*, while SC in *Inox Wind* chose to recognise the developing nature of commercial law and expand the scope of incorporation to allow incorporation from standard form of contract of one party, the SC in *Elite Engineering* opted to be entirely faithful to the black letter of *M.R. Engineers* in adopting a restrictive approach to the scope of incorporation of arbitration agreements. Even so, the decisions of the SC in *Inox Wind* and *Elite Engineering* clarify and reiterate that before reading an arbitration clause in another document as a part of a contract between parties, it is a must that there exists in the contract between the parties a conscious acceptance of the arbitration clause in such other document.

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[2] *"2.Subcontractor hereby agrees, undertakes to execute the said value of work, and is responsible for the efficient and successful execution of the work and is to be completed as per the contract period specified in the contract document.*
a.....
b.....
All the conditions and special conditions of contract, specifications (general and additional clauses relating to the works and quality specified in the relevant agreement between the Construction Contractor and the Employer are binding on the Subcontractor."