



## ***Inox Wind Ltd. v. Thermocables Ltd. (Order dated 5 January 2018, Civil Appeal No. 19/2018, Supreme Court)***

### **BACKGROUND FACTS**

The Appellant manufactures wind turbine generators (**WTGs**). The Respondent is a manufacturer of wind power cables and other types of cables. The Appellant issued two purchase orders (**PO**) to the Respondent for cables to be used for the WTGs.

As per the PO, the supply was required to be carried out in compliance with the terms mentioned in the order and the attached Standard Terms and Conditions (**STCs**). The STCs contained an arbitration clause, providing for disputes to be resolved through a sole arbitrator in accordance with the Arbitration and Conciliation Act, 1996 (**Act**). Evidently, the Respondent had accepted all terms and conditions mentioned in the PO, with the exception of the delivery date.

### **DISPUTE**

Disputes arose between the parties when the supplied cables were purportedly found to be defective. The Appellant as such invoked arbitration as per the relevant clause in the STCs and proposed the name of a sole arbitrator. As the Respondent failed to respond, the Appellant filed an application under Section 11(6) of the Act, for appointment of a sole arbitrator, before the Allahabad High Court (**HC**). The HC dismissed the application on the basis that the existence of an arbitration agreement was not proven. Relying upon the Supreme Court's (**SC**) decision in *M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited*<sup>1</sup>, the SC held that as there was no special reference to the arbitration clause in the STCs, the arbitration clause could not be seen as having been incorporated into the PO.

Thus, the Appellant filed an appeal before the SC, against the judgment of the HC.

### **JUDICIAL PRECEDENTS**

The SC extensively analysed its earlier decision in *M.R. Engineers*, wherein the SC had considered an application under Section 11(6) of the Act, read with Section 7(5)<sup>2</sup>. The SC had held that a conscious acceptance of an arbitration clause located in another referenced document was necessary for it to be incorporated into the contract. The SC had then distinguished 'reference' to another document from 'incorporation', and had relied on *Russell on Arbitration*, 23<sup>rd</sup> Edition (2007) for interpretation of Section 7(5). However, while holding that general reference to an earlier contract does not result in incorporation of the arbitration clause therein, the SC did recognise an exception to this principle, stating that a general reference to a standard form of contract by a trade association or professional institution would suffice for incorporation of an arbitration clause.

### **DRAWING INFERENCES FROM ENGLISH JURISPRUDENCE**

In the present case, the SC first observed that Section 6(2) of the [English] Arbitration Act, 1996 is in *pari materia* with Section 7(5) of the Act.

Following this, the SC discussed the ruling of the English courts in *Sea Trade Maritime Corporation v. Hellenic Mutual War Risks Association (Bermuda) Limited, The Athena*<sup>3</sup> and *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL*<sup>4</sup>.

In *Habas Sinai*, which was the later of the two English judgments, the court therein had recognised four broad categories of parties seeking to incorporate arbitration clauses:

*"(1) A and B make a contract in which they incorporate standard terms. These may be the standard terms of one*

<sup>1</sup> (2009) 7 SCC 696. [*"M.R. Engineers"*]

<sup>2</sup> Section 7, sub-section (5): *"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."*

<sup>3</sup> [2006] EWHC 2530 (Comm). [*"The Athena"*]

<sup>4</sup> [2010] EWHC 29 (Comm). [*"Habas Sinai"*]

party set out on the back of an offer letter or an order, or contained in another document to which reference is made; or terms embodied in the rules of an organisation of which A or B or both are members; or they may be terms standard in a particular trade or industry.

(2) A and B make a contract incorporating terms previously agreed between A and B in another contract or contracts to which they were both parties

(3) A and B make a contract incorporating terms agreed between A (or B) and C. Common examples are a bill of lading incorporating the terms of a charter to which A is a party; reinsurance contracts incorporating the terms of an underlying insurance; excess insurance contracts incorporating the terms of the primary layer of insurance; and building or engineering sub contracts incorporating the terms of a main contract or sub-sub contracts incorporating the terms of a sub contract.

(4) A and B make a contract incorporating terms agreed between C and D. Bills of lading, reinsurance and insurance contracts and building contracts may fall into this category.”

The court in *Habas Sinai* then followed the ratio of *The Athena*, and held that in ‘single contract cases’ (categories 1 and 2), a general reference to a standard form of contract would suffice for incorporation. However, in ‘two contract case’ (categories 3 and 4), a stricter rule was to be adopted, and so a specific reference to the arbitration clause would be required.

## THE JUDGMENT

Having taken note of the relevant English case law on the subject, the SC also observed that that the corresponding passage which *M.R. Engineers* cited from *Russell on Arbitration* had itself undergone changes in the latest edition (24<sup>th</sup> Edition, 2015) to recognise incorporation of arbitration clause through a general reference to standard terms found in another document.

Simultaneously, on a factual basis, the SC found that there was no indication that the STCs had not been accepted by the Respondent.

In light of its above observations, the SC, although in agreement with the principle in *M.R. Engineers*, laid down a slight modification of the same, holding that “a general reference to standard form of contract of one party, along with those of trade associations and professional bodies, will be sufficient to incorporate the arbitration clause”, and allowed the appeal while appointing a sole arbitrator.

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**ECONOMIC  
LAWS  
PRACTICE**  
ADVOCATES & SOLICITORS

**MUMBAI**  
[mumbai@elp-in.com](mailto:mumbai@elp-in.com)

**AHMEDABAD**  
[ahmedabad@elp-in.com](mailto:ahmedabad@elp-in.com)

**NEW DELHI**  
[delhi@elp-in.com](mailto:delhi@elp-in.com)

**PUNE**  
[pune@elp-in.com](mailto:pune@elp-in.com)

**BENGALURU**  
[bengaluru@elp-in.com](mailto:bengaluru@elp-in.com)

**CHENNAI**  
[chennai@elp-in.com](mailto:chennai@elp-in.com)

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