Justice Beyond Signatures: Arbitration Agreement Features

Wednesday Wisdom
03-01-2024

As we get used to getting things done more instantly and quickly in today's world, it is but natural that one would expect that relief in case of a contractual dispute should also be quick and fast as well, especially if parties have opted for arbitration. While it is known that final resolution of disputes take a very long time, parties generally sue for interim or ad-interim reliefs like injunctions or stay orders to protect their interests in the subject matter[1].

Arbitration is increasingly becoming a popular mechanism for dispute resolution and **aspects related to arbitration agreement** and **appointment of arbitrator** are covered **here**.

Section 9 of the Arbitration and Conciliation Act, 1996 ("Act") deals with interim measures that can be granted by the Courts before or during arbitral process or any time after the arbitral award is passed but before its enforcement. Section 17 of the Act deals with interim measures that can be granted by the arbitral tribunal during the arbitration proceedings.

Let us understand this better with an illustration.
A and B have entered into a transaction wherein A is required to construct certain equipment and machinery for B for an end client within 180 days. Any non-performance is secured through a bank guarantee. Parties have agreed for arbitration as a dispute resolution mechanism.

B delivers the machine. However, A alleges that the machine is defective and threatens to encash the bank guarantee. B claims that the fault is attributable to the designs provided by A, and wants to obtain a stay against A from encashing the bank guarantee. This is an immediate relief and thus B will be required to either approach the courts under section 9 or the arbitral tribunal under section 17. Sometimes, parties seek an order against a party that may not be a party to the arbitration proceedings. This poses an interesting question as to whether an arbitral tribunal is empowered to grant reliefs against a third party in an arbitration proceeding. This may arise in situations when two large groups enter into agreements and sometimes, the agreement is signed with another entity for certain purposes.

[1] The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

Illustration:
A entered into a Services Agreement with B, wherein B was supposed to provide certain services related to administrative services through its employees to be deputed at the office site of A. B and BB are affiliates and operate on the same premises and many employees though being on pay roll of BB also work for B.

During the course of deputation, A notices that its confidential information is getting leaked and that leakage is attributable to deployed personnel and wishes to sue them to obtain an urgent injunction against such leakage. However, the employees are not employees of B but BB.

The agreement between A and B provides for arbitration as dispute resolution and any injunction would be fruitful only against the relevant party. BB refuses to be a party to the arbitration proceedings as no agreement is executed between A and BB.

Can the arbitral tribunal or the court grant an injunction of this nature against BB and its employees?

One guiding light, with respect to inclusion of non-signatories in an arbitration, is the **group doctrine** principle that was promulgated by the Supreme Court in the judgement of Chloro Control India (P) Ltd. v. Severn Trent Water Purification Inc. **(Chloro controls)[2]**. In this case, the Supreme Court acknowledged that cases of composite transactions involving multi-party agreement give rise to peculiar challenges where non-signatories may be implicated in the dispute because of their legal relationship and involvement in the performance of contractual obligations. To remedy such situations, it was held that the group of companies' doctrine could be applied to systematically evaluate the facts and circumstances to determine **"a clear intention of the parties to bind both, the signatory as well as the non-signatory parties"** to the arbitration agreement.

This judgement dealt with a situation where the success of the joint venture agreement was dependent upon the fulfilment of all the ancillary agreements. In this context, this Court observed that all the ancillary agreements were relatable to the parent agreement and the ancillary agreements were intrinsically linked with each other, to the extent that they could not be severed. This in the view of the court indicated the intention of the parties to refer all disputes arising out of the parent agreement and ancillary agreements to the arbitral tribunal.

[2] Chloro Control India (P) Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641

Recently, Chloro Controls was referred to the constitution bench of the Supreme Court questioning the group doctrine, in Cox and Kings Ltd. Vs. SAP India Pvt. Ltd. and Ors. [3]

'**Group of Companies'** doctrine in the jurisprudence of Indian arbitration provides that an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of the parties to bind both signatories and non-signatories. This doctrine is called into question purportedly on the ground that it interferes with the established legal principles such as party autonomy, privity of contract, and separate legal personality.

The Supreme Court again discussed this doctrine in terms of the reference questions and particularly on the definition of the term "Parties". It was held that the definition of "parties" includes both the signatory as well as non-signatory parties. Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement.

Brief facts of the C&K and SAP Dispute:

14TH December 2010: Cox and Kings Ltd ("C&K") entered into SAP Software End User License Agreement and Software Agreement under which the C&K were made licensee of ERP software which was developed and owned by SAP India Private Limited i.e. SAP INDIA. SAP GMBH was the holding company and was also in regular correspondence with C&K.

2015: While C&K was developing its own e-commerce platform, SAP recommended a Hybris Solution to C&K as it would be 90% compatible with the C&K's own software. Respondents also claimed that this would be to C&K's benefit as it would take only take 10 months to complete the remaining 10% customization. To execute the Hybris Solution, the aforesaid agreed arrangement was divided into 3 transactions i.e. Software License Agreement, Services General Terms and Conditions Agreement which had an Arbitration Clause as well and another agreement for customization of the software was entered into for the customization of the software.

2016: Due to several issues in the implementation of the Hybris Solution, the contractual framework in this regard was rescinded by C&K. Following which, all the necessary resources were withdrawn by SAP.

Aggrieved by this withdrawal, C&K demanded a refund of Rs. 45 crores.

[3] Supreme Court of India in Arbitration Petition (Civil) No. 38 of 2020, SLP (C) Nos. 8607 of 2022 and 5833 of 2022

29th October 2017: As the disputes could not get resolved even after several meetings, SAP INDIA invoked Arbitration Clause and demanded payment of Rs.17 crores on the ground of wrongful termination of the contract by the C&K. Arbitral Tribunal was constituted, and it is important to note that the SAP GMBH was not made a party of these arbitration proceedings. Alongside, C&K filed an Application under Section 16 of the Act contenting that all the four agreements were a composite transaction.

Thereafter, National Company Law Tribunal appointed an Interim Resolution Professional to an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 made against C&K. NCLT directed the parties to adjourn the Arbitration Proceedings as Corporate Insolvency Resolution Process was initiated.

7th November 2019: Thereafter, a second notice to invoking Arbitration was sent by the C&K arraying SAP GMBH this time, but no response was received from the Respondents' side.

Aggrieved, C&K filed an application before the Hon'ble Supreme Court of India under Section 11(6) of the Act praying constitution of an Arbitral Tribunal.

This case referred the matter to the larger bench and ultimately, last month in 2023, the Supreme Court held that the requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties. Under the Act, the concept of a "party" is distinct and different from the concept of "persons claiming through or under" a party to the arbitration agreement.

The Court also held that ***"The group of companies' doctrine should be retained in the Indian arbitration jurisprudence considering its utility in determining the intention of the parties in the context of complex transactions involving multiple parties and multiple agreements. At the referral stage, the referral court should leave it for the arbitral tribunal to decide whether the non-signatory is bound by the arbitration agreement".***

CONCLUSION

As a precautionary measure, the parties have to be very careful before signing any Agreement. The entire transaction ought to be structured carefully with proper and consistent agreements amongst the relevant parties. If any of the party that has a key role, remains on the sidelines and does not actually sign the arbitration agreement or signs an agreement that does not contain the arbitration clause or an arbitration clause that is inconsistent with the provisions of other agreements, it could be a catch-22 situation for the party seeking relief through arbitration.

The question as to whether a party can be embroiled in the arbitration or not is a delicate and will have to be answered in each case specifically. It has been clarified that to apply the group of company's doctrine, the courts or tribunals, as the case may be, have to consider all the cumulative factors laid down in Discovery Enterprises[4] i.e.:

1. The mutual intent of the parties;
2. The relationship of a non-signatory to a party which is a signatory to the agreement;
3. The commonality of the subject-matter;
4. The composite nature of the transactions; and
5. The performance of the contract

Answering and dealing with these questions, when a party is actually seeking relief, may take considerable time and impose such party to commercial risks. Thus, the parties must insist on entering into agreements with all relevant parties with consistent dispute resolution clauses.

[4] (2022) 8 SCC 42

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