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Consolidation Of Arbitrations – Where Is India Headed?

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Multi-party arbitrations arising out of multiple agreements between multiple parties containing different arbitration clauses give rise to complex issues to be answered by arbitral tribunals and Courts. While negotiating an agreement, parties rarely take into consideration the impact on the dispute resolution mechanism because of subsequent agreements with new parties. In a multi-party multi-agreement scenario, parties often seek a composite reference of all the disputes arguably arising out of a single transaction. Request for joinder of parties is also often made to avoid multiplicity of proceedings and to keep costs of arbitration under control. In the absence of an express agreement allowing consolidation, the tribunals and courts are called upon to decipher the intention of the parties and the permissibility of such consolidation under the applicable law before ruling on the possibility of consolidation.

This post endeavours to analyse the Indian position on consolidation of arbitrations.

Typically, three scenarios may be envisaged:

1. Multi-contract, multi-party international arbitration;
2. Multi-contract, multi-party domestic arbitration; and
3. Multi-contract, multi-party having some contracts between a foreign party and a domestic party and others between two domestic parties bringing it under the domain of both – international arbitration as well as domestic arbitration.

The above three scenarios could further fall into three sub-categories:

1. Agreements with same/ similar arbitration clauses;
2. Agreements with substantially different arbitration clauses; and
3. Agreements with arbitration clauses in only some of the agreements.

Indian Supreme Court has answered issues around joinder/consolidation of arbitrations in a few cases. The question of consolidation of disputes and a common reference to arbitration in the context of multiple domestic parties arose before the SC in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya; (2003) 5 SCC 531* (Sukanya Holdings). In Sukanya Holdings, the SC held that when the subject matter of dispute may be covered under arbitration as well as a suit and if there are non-signatory parties involved in the list, the Court cannot bifurcate the cause of action and therefore cannot make a partial reference to arbitration. Before the 2015 amendments to the 1996 Act, the SC has held that a civil court exercising such power cannot refer a suit to arbitration, unless all the parties to the suit agree for such reference (See *Afcons Infrastructure Ltd. v. Cherian Varkey*

Construction Co. (P) Ltd, (2010) 8 SCC 24).

In *P.R Shah, Shares and Stock Brokers Private Limited* v. *B.H.H Securities Private Limited and Others;* (2012) 1 SCC 594 *(*PR Shah), the question arose whether a single arbitration is permissible in respect of member and non-member under the bye-laws and regulations of the Bombay Stock Exchange. SC, interestingly, held that if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B and C. The SC further observed that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration.

In the case of *Chloro Controls India (P) Ltd*. v. *Severn Trent Water Purification Inc.;* (2013) 1 SCC 641 (Chloro Controls), the Indian counterpart filed a suit and sought an injunction against two non-signatories. The Indian counterpart *inter alia* relied on Sukanya Holdings to contest that parties ought not to be referred to arbitration since there are non-signatory parties involved in the dispute.

The SC held that shareholders' agreement is the mother agreement and all other agreements were to facilitate implementation of the mother agreement and that multiple agreements are part of one composite transaction. Further, the SC observed that signatories to these multiple agreements are all related companies and the interests of these companies are not averse to the interest of the joint venture company. The Court held that even a non-signatory party can be referred to arbitration subject to proving that it is claiming through or under the party signatory to the arbitration.

Recently in *M/s Duro Felguera S.A.* v. *M/s Gangavaram Port Limited* (GPL) (2017 SCC OnLine SC 1233) (Duro), the SC was called upon to rule in cases of multi-contract, multi-party having some contracts between a foreign party and a domestic party and some contract between two domestic parties bringing the disputes under the domain of international arbitration as well as domestic arbitration. Duro, argued that each agreement is a sperate agreement containing a standalone arbitration clause and the parties had no intention to consolidate arbitrations. It resisted consolidation by arguing that if a holistic reference is made it would amount to clubbing of international and domestic arbitration and in such a case, FGI, the Indian subsidiary of Duro may lose the opportunity of challenging the award under Section 34(2A) of the 1996 Act, arguably a wider provision, available only in a domestic arbitration.

The SC distinguished Chloro Controls judgment on facts holding that in the said judgment the words "under and in connection with" appearing in the arbitration clause in the principal agreement was broad to cover the third parties under the arbitration agreement contained in the mother agreement. SC did not refer to PR Shah in the Duro case.

The SC held that since there a mix of domestic as well as international arbitrations, a 'composite reference' of disputes will not be proper. The SC constituted six separate arbitral tribunals with common arbitrators. Out of the six, two tribunals to arbitrate disputes under as international arbitral tribunals and other four as domestic arbitral tribunals.

The judicial block created by Sukanya Judgement in referring non-signatories to arbitration has been done away with by the 2015 Amendments to 1996 Act. Post-2015 Amendments, in a domestic arbitration, even a non-signatory party, who is claiming through or under the signatory party can seek reference of disputes to arbitration. However, what remains to be tested is the

scenario wherein a non-signatory moves the court/arbitral tribunal to be impleaded as a party on the strength of 2015 Amendments. Such a non-signatory may argue that if a non-party can seek reference of disputes to arbitration, it can also be a part of the arbitration as a necessary party, subject to satisfying the "through and under" test. The reverse proposition, i.e., compelling a non-signatory in a domestic arbitration, to take part in arbitration and its impact on enforcement of the resultant award, post the 2015 amendments remains to be tested. Further, the issue of allowing/ refusing a non-signatory party to an arbitration if decided by a Court may operate as res judicata and may therefore not impact enforcement of the resultant award. However, if such a determination is done by an arbitral award, it is likely that the Court deciding the enforcement/ objection to the resultant award may take a contrary view to that taken by the arbitral tribunal. The issue of whether two Indian parties can opt for a foreign-seated arbitration may arise and will be required to be answered by the SC in view of the conflicting judgments of High Courts on the issue.

The adjudicating authority dealing with the request to consolidate arbitrations may be called to answer multiple side issues before ruling on the such a request. Questions that may arise are:

1. Whether there is an express clause permitting consolidation?
2. Whether there is an implied consent of parties for consolidation?
3. The permissibility of request to consolidate would be decided as per which law?
4. Whether all the disputes are covered under the arbitration agreement?
5. Who would be a 'party' to arbitration?
6. Whether all the parties are signatories to the arbitration agreement?
7. Whether the arbitration clause is incorporated by reference into another agreement?
8. Whether non-signatories can be compelled to arbitrate?
9. Is there a novation of the original agreement due to subsequent agreements?
10. Whether the disputes are categorised as a domestic arbitration or an international arbitration or both?
11. Whether the interests of all the parties, including the right to confidentially, cost sharing, etc., would be protected if consolidation is ordered?
12. Whether consolidation would be against the public policy of India?

Further, consolidation of arbitrations may not bode with other concepts like confidentiality, party autonomy, and consensuality. Therefore, the forum adjudicating the request to consolidate arbitrations may have to answer some of the above questions before allowing a party to be joined in an arbitration or refusing to consolidate arbitral proceedings. The best shot for a party seeking consolidation will be by establishing express or implied agreement for the same. Alternatively, if the party can satisfy the court with respect to the test laid down in PR Shah, consolidation may be possible. Insofar as cases where there is a mix of domestic and international arbitration, consolidation may be difficult as has been held in the Duro case. However, where there are multiple agreements, all in the domain of international arbitration, essentially flowing from a main/ mother agreement, parties can seek consolidation on the strength of Chloro Controls judgment.

The views expressed are those of the author only.

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This entry was posted on Friday, December 1st, 2017 at 11:20 am and is filed under Arbitration, Consolidation, India
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