Kluwer Arbitration Blog

India's Treatment of Interconnected Agreements to Arbitrate

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A plethora of business transactions today have evolved into complex structures of multi-faceted sub-transactions. Multiple parties enter into several distinct, yet interconnected and interdependent agreements towards achieving a common commercial goal.

Every so often, however, one or more of these interconnected agreements will lack an arbitration agreement; whereas the others will contain similar/related arbitration clauses. Disputing parties may then initiate parallel litigation and arbitration proceedings against each other.

One disputing faction would most likely request the relevant State Court to refer all the parties to one tribunal. Conversely, the other faction would resist any request for arbitral reference on grounds that it is a non-party to the arbitration agreement; and/or oppose a composite reference on grounds that the parties have clearly entered into several separate agreements.

I argue here that in such disputes, the Indian Supreme Court (**SC**) has realigned its focus on determining the commonality and end goal of composite transactions, instead of merely dissecting them into separate agreements based on a strict interpretation.

One Agreement, One Tribunal

India's treatment of these issues has been previously analysed here on this blog. The most recent judgment discussed in the aforesaid post is the SC's decision in *Duro Felguera v. Gangavaram Port* (2017 SCC OnLine SC 1233) [***Duro****]*.

In *Duro,* the SC was faced with a request for a composite arbitral reference in relation to disputes arising out of six agreements. An original tri-partite agreement between all parties was subsequently restructured into five new agreements. The sixth agreement was a related bank guarantee. All six agreements were entered into in respect of one main project and had identical arbitration clauses.

In *Chloro Controls v. Severn Trent (2013) 1 SCC 641 (Chloro Controls),* the SC had referred even non-signatories to a single international arbitration since the 'mother agreement' among the agreements in question, contained an arbitration clause. However, the SC distinguished *Chloro Controls* because the arbitration clauses in *Duro* lacked the wide terms: [disputes arising] *'under and in connection with'* [this agreement].

Even though it was observed in *Duro* that there had been "*no novation by substitution of all five*

agreements", the SC declined a composite reference mainly on grounds that Section 11(6A) of the Arbitration Act, 1996 (**the Act**) restricts the scope of judicial inquiry merely to determining the existence of an arbitration agreement. Having found six separate arbitration agreements, the parties were referred to four domestic and two international arbitrations, albeit presided over by the same set of arbitrators.

Paradigm Shift?

In this backdrop, the SC was yet again required to adjudicate a similar dispute in *Ameet Lalchand Shah & Ors. v. Rishabh Enterprises and Another (Ameet Shah) [Civil Appeal No. 4690 of 2018]*.

Briefly put, four parties executed a total of four contemporaneous agreements for the purpose of commissioning a photovoltaic solar plant in Uttar Pradesh, India (**the Solar Plant**). Three of these four interconnected agreements contained an arbitration clause. When disputes arose, one of the parties issued a notice of arbitration, whereas the opposing party filed a suit before a Single Judge of the Delhi High Court (**HC**). In the suit, the plaintiff levelled serious allegations of misrepresentation and fraud in respect of the subject matter covering all four agreements. In *Ameet Shah*, the SC has also discussed a few contours of arbitrability of fraud. However, I have not delved into this aspect of the judgment in this post.

The defendant in the suit then filed an application under Section 8 of the Act and sought the dispute to be referred to arbitration. This request was rejected by the Single Judge, as also by the Division Bench (**DB**) on appeal.

While deciding the request for a single reference, the SC first revisited its ratio in *Chloro Controls.* Here, it will be recalled, the SC had given a purposive construction not only to the arbitration clause in the mother agreement, but also to the transaction as a whole. Importing its formative analysis from *Chloro Controls*, the SC in *Ameet Shah* observed that all parties could be covered by the arbitration clause in the main agreement as all four agreements were clearly interconnected and meant for achieving the single commercial goal of setting up the Solar Plant at Uttar Pradesh, India. Unlike in *Duro*, the Apex Court did not mandate the presence of a particular widely worded arbitration clause, as the one in *Chloro Controls*, to enable a single arbitral reference.

Further, the SC in *Ameet Shah* steered clear of its earlier decision in *Sukanya Holdings v. Jayesh H. Pandya* (2003) 5 SCC 531 (*Sukanya).* In *Sukanya*, it was held that a matter cannot be referred to arbitration if all parties to a civil suit are not privy to the arbitration agreement; as there is no provision in the Act for a partial reference to arbitration. The SC in *Ameet Shah* rightly adverted to the 2015 Amendments to the Act, and noted that the amended in the amended Section 8(1) clearly entitles even persons claiming through or under a party to the arbitration agreement to seek an arbitral reference, notwithstanding any judicial precedent. The SC then went on to refer all disputing parties to arbitration. Notably, while the SC has not returned a concrete finding to this effect, *Sukanya* should effectively stand overruled in light of the amended Section 8 and the SC's decision in *Ameet Shah.*

Missed Chances

Interestingly though, *Duro* does not feature at all in the *Ameet Shah* analysis; and as such it has not been expressly overruled. Parties in future disputes may still seek to rely upon *Duro* to resist a composite reference if governed by both domestic as well as international agreements.

The SC has rightly applied *Chloro Controls* in *Ameet Shah*. However, it has done so only after having identified a principal/mother agreement among the four agreements. Therefore, *Ameet Shah* may impede the application of *Chloro Controls* in a similar multi-contract dispute which lacks the centrifugal force of a mother agreement. Hopefully, Indian Courts will nevertheless discard a Shylockian interpretation of contract and apply the *Chloro Controls* ratio in all multi-contract disputes where the *overall transaction* is common and comprises inextricably linked components.

Concluding Remarks

As Lord Hoffman has remarked in *Fiona Trusts v. Primalov* [2007] UKHL 40, the construction of an arbitration clause should start with the assumption that parties, as rational businessmen, are likely to have intended that any dispute arising out of their commercial relationship should be decided by the same tribunal. Perhaps India had a good opportunity to have formally adopted this presumption in *Ameet Shah*. Nonetheless, the SC's purposive approach towards commercial transactions is a refreshing development in India's arbitration landscape.

That said, would a party be permitted to reintroduce its grievance to consolidation as a ground for challenging the arbitral award? Most leading arbitral institutions now provide for consolidation (Article 28 of the 2013 HKIAC Rules, Article 8 of the 2016 SIAC Rules, Article 10 of the 2017 ICC Rules, Article 15 of the 2017 SCC Rules, and Article 22(ix) and (x) of the 2014 LCIA Rules). It has been previously argued on this blog that an institution's decision on consolidation is administrative in nature and cannot by itself be challenged. However, the tribunal of the consolidated proceedings can determine the validity of the consolidation order since it retains *kompetenz-kompetenz* to decide its own jurisdiction, including a challenge based on the institution's decision to consolidate.

Insofar as a tribunal's decision on consolidation is jurisdictional, parties in an Indian arbitration may raise it as a ground for setting aside an award before the relevant Court (*Sections 16(6) and 34(2)(a)(v) of the Act*). In *PR Shah v. BHH Securities (Civil Appeal No. 9238/2003)*, an award was challenged because the tribunal had permitted a common arbitration when a party raised related claims against two parties under separate arbitration agreements. The SC dismissed the objections against consolidation and observed that denying the benefit of a single arbitration against the two parties would lead to multiplicity of proceedings, conflicting decisions and cause injustice.

Where the decision of consolidation is made by a court of the arbitral seat in accordance with its laws, as argued in the above post, it would be difficult to sustain a challenge to the award on the ground that the arbitral procedure and/or constitution of the tribunal was not in accordance the parties' agreement(s) or with the law of the seat of arbitration.

Of course, this is not to suggest that every dispute with multiple contracts must automatically be referred to a single arbitral tribunal. Even in multi-party transactions involving several related contracts, parties may consciously structure the agreements to create distinct obligations on each set of contracting parties.

In *Trust Risk Group v. AmTrust Europe* [2015] EWCA Civ 437, the parties' contractual arrangements comprised (i) a standard London-form agreement with dispute resolution under English law and jurisdiction and (ii) a subsequent framework agreement structured closer to the Italian market, which provided for arbitration in Milan under Italian law. It was observed that both agreements dealt with different parts of the parties' commercial relationship, and the parties'

decision to have different dispute resolution was founded on a rational basis. The Court dismissed the argument that all disputes between the parties must be referred to arbitration under the latter agreement. Accordingly, such disputes could indeed be referred to separate tribunals even though they arise out of related transactions.

Views expressed in the post are the personal opinion of the author and do not necessarily reflect those of his law firm.

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