Formal requirements of an arbitration agreement are satisfied even if it is not signed, but communications establish that the parties are ad idem on the arbitration clause (Delhi High Court)

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Chaitanya Construction Company v. Delhi Jal Board

Court: Delhi High Court | **Case Number**: OMP (T) (Comm) 35 /2020 | **Citation**: Not available currently | **Bench**: Rekha Palli J | **Date**: 01 September 2020

A. The written form requirements of an arbitration agreement

"Like all other types of contracts … arbitration agreements are subject to form requirements", and unless in a particular form, they are not valid. "The most significant and universally-accepted of these is the "writing" or written form" requirement, together with related requirements for a "signature" and/or am "exchange" of written communications."[1]

In the ACA, Section 7 deals with the formal validity of an arbitration agreement.[2] Sub-section 3 prescribes that the arbitration agreement "shall be in writing". Sub-section 4 explains when is an arbitration agreement in writing and recognises that it can be in:

(a) A document signed by the parties;

(b) An exchange of letters or communication which provides a record of the agreement :

(c) An exchange of the statement of claim and defence in which the existence of the agreement is alleged and not denied by the other.

B. The Chaitanya case: one party had signed the agreement, the other kept the signed copy on its record and acted in pursuance of that agreement

An application was filed in Chaitanya for the appointment of an arbitrator. The question was: was the written form requirement satisfied?

The court had the following facts before her:

(a) Delhi Jal Board ("**DJB**") issued notices inviting tenders for the supply of various materials. Chaitanya's bid was accepted.

(b) DJB sent to Chaitanya copies of the contracts, which contained the terms and conditions based on which the specific work orders were to be issued. This agreement had an arbitration clause.

(c) Chaitanya executed the contract on a stamp paper, signed it and sent it back to DJB. DJB kept it on its record but did not sign it.

[1]Gary B Born, *International Commercial Arbitration*, 2nd edition, 2014, pg. 657, Wolters Kluwer.

[2]As opposed to the substantive validity of the arbitration agreement. For instance, the arbitration agreement may be "null and void", "inoperative", or "incapable of being performed".

(d) DJB issued work orders. It was a standard practice of DJB, not denied in court, that work orders were issued only when the bidders agreed to the terms and conditions. This was in line with the practice directions given in public interest litigation in *KG Bhandari Delhi Jal Board*, (2013) 102 DLT 938.

Rekha Palli J allowed the application and appointed an arbitrator. Her reasoning is as follows:-

(a) There was no doubt that the work order could not have been issued without the parties being ad idem about the terms of the contract, which had the arbitration clause.

(b) Under Section 7(4) ACA, the agreement could be "evidenced from correspondences exchanged between the parties [citing *Govind Rubber Ltd*. v. *Louids Dreyfus Commodities Asia (P) Ltd.*, (2015) 13 SCC 477].[3]

(c) DJB's only objection that it did not sign the agreement "has to be rejected". A "conjoint reading of the documents exchanged between the parties and turn of events reveals that they intended to revolve all disputes … through arbitration." Merely because the work order did not have a specific arbitration clause will not be enough to hold that there was no arbitration clause. DJB cannot gain an undue advantage of its deliberate omission to sign the contract.

(d) The argument that specific claims did not arise is factually incorrect.

(e) The reliance on *Uttarakhand Purv Sainik Kalyan Nigam Limited Northern Coal Field Limited*, 2019 SCC OnLine SC 1518 | (2020) 2 SCC 455 is incorrect. That was not a case where a draft agreement had been signed by one of the parties, and based on that, a work order issued. Instead, that case related to a situation where parties were trying to enter into an agreement but did not follow through.[4]

[3]A 2-judge bench of M Yusuf Eqbal and R Banumathi JJ had decided that: (i) To constitute an arbitration agreement, it must be in writing. An agreement signed by the parties is one method to form an agreement in writing. But, there can be an agreement even if it is not signed. Under Section 7(4)(b) an arbitration agreement can be culled out from an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement (paras 15, 16); (ii) Parties should be prima facie ad idem, the identity of the parties should be established, there should be a record of the agreement. A few examples could be cases of internet purchases, tele purchases, ticket booking on internet and in standard forms of contract (see para 16) (iii) a commercial document having an arbitration clause has to be interpreted in such a manner as to give effect to the agreement rather than invalidate it … (citing to Scrutton on Charter Parties) in order to effectuate the immediate intention of the parties (see para 17).

[4]This is an incorrect reference of *Uttarakhand Purv Sainik*. The dispute had arisen in 2013, but the arbitration was invoked in 2016. The High Court had rejected the application for appointment of arbitrator saying that the application was limitation-barred. The Supreme Court proceeded on the premise, however, that the issue was whether the potential claim to be raised in the arbitration proceedings was itself limitation barred. Therefore, the court went on to consider whether the Section -11 court or the arbitral tribunal would decide the issue of limitation. During its discussion, the court noted at paragraph 7.10 and 7.11 that under the extant law it was only required to see if an agreement exists and all other matters were for the arbitrator to decide. Some exceptions were noted like a case where "the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step before executing the final contract". The court said that the "draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement". The DJB's counsel in *Chaitanya* had cited this general discussion.