ARBITRATION FOUNDED ON AN INCONSPICUOUS CLAUSE: BUILDING TALL WALLS ON WEAK FOUNDATIONS

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"If there be no "meeting of minds" no contract may result[2]*."*

The foundation of any contract lies, *inter alia*, in the meeting of the minds or *consensus ad idem* of the contracting parties. It is trite law[3] that common consent/ *consensus* is necessary for the genesis and sustenance of a binding contract and that such consent must be on each aspect, thereof. A manifestation of this principle may be observed under Section 13 of the Indian Contract Act, 1872 ("**Contract Act**"), which defines consent as, *"[t]wo or more persons are said to consent when they agree upon the same thing in the same sense."* Further, Section 10 of the Contract Act stipulates 'free consent[4]' as one of essential ingredients of a valid contract. At the same time, Section 20 of the Contract Act provides, *"[w]here both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void."* Therefore, it is quite understandable that where the binding obligations result on an execution of a contract, such terms must be acquiesced by contracting parties only after being completely aware of the same and, *inter alia*, with free will. However, there may be instances where due to reasons of haste, fraud/ misconduct, nature of contract[5], etc., all the terms of an agreement may not be reasonably brought to the notice of one or more of the signatories to a contract at the time of its execution. Under such circumstances, a contracting party may not only be wrongly encumbered with unwarranted contractual obligations, rather, may have also unwittingly agreed upon a dispute resolution mechanism through arbitration. Unfortunately, in a majority of these cases, a party may become aware of its obligations only after a considerable delay, which may lead to feeling of treachery, frustration and loss.

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[2] ***Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas & Co., AIR 1966 SC 543***
[3] ***Rolta India Ltd v. Maharashtra Industrial Development Corporation, 2014 SCC OnLine Bom 1138***
[4] Refer to Section 14 of the Indian Contract Act, 1872
[5] Eg. Standard Form Contract containing general terms and conditions

Section 7(1) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") defines an arbitration agreement as *"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."* Significantly, though, Section 7(3) of the Arbitration Act stipulates that an arbitration agreement must be in writing[6], however, no particular form of such an agreement is prescribed under law. In fact, as per Section 7(2) of the Arbitration Act, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. In this regard, the Hon'ble Supreme Court in ***Rukmanibai Gupta v. Collector***[7] has observed, *"Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement."* Further, the Hon'ble Apex Court in ***Giriraj Garg v. Coal India Ltd.***[8] has clarified that an arbitration agreement, *"need not necessarily be in the form of a clause in the substantive contract itself. It could be an independent agreement; or it could be incorporated by reference either from a parent agreement, or by reference to a standard form contract"*. Accordingly, it is settled law[9] that for an agreement/ dispute resolution clause to be termed as an arbitration agreement/ arbitration clause, *"(a) The agreement should be in writing; (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal; (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it; and (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them."*

Clearly, in order to establish the existence of an arbitral clause under an agreement the intention of the parties to settle their disputes through arbitration is of paramount consideration. In fact, the significance of parties' intention to refer their contractual disputes to arbitration is such that it has

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[6] Section 7(4) of the Arbitration and Conciliation Act, 1996 *"An arbitration agreement is in writing if it is contained in-(a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means] which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other."*

[7] ***(1980) 4 SCC 556***

[8] ***(2019) 5 SCC 192***

[9] ***Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719***

been considered as a determining factor regarding the existence of an arbitral clause/ agreement, in cases of ambiguity under a contract. Therefore, it is quite understandable that in a case where dispute handling clause under an agreement offers an option to the parties to refer their disputes to an arbitration body for arbitration or the Court, the Hon'ble Apex Court[10], upheld the validity of such a clause as an arbitral agreement, considering the intention of the contracting parties. In fact, the Hon'ble Apex Court, while relying upon one of its previous judgments[11], held, *"there is an option and the petitioner has invoked the arbitration clause and, therefore, we have no hesitation, in the obtaining factual matrix of the case, for appointment of an arbitrator…."* Pertinently[12], such intention of the parties may be inferred from the terms of the contract, conduct of the parties and correspondence exchanged, to ascertain the existence of a valid and binding arbitral agreement. Consequently, where it can be demonstrated, basis the documents placed on record that the parties were *ad idem* and had actually reached an agreement for arbitration, then it would be construed to be a binding contract/ obligation.

Understandably, for a consensus to reach and a for parties to form an intention to arbitrate, the factum of existence of such clause under an agreement/ proposal must be within the knowledge of the contracting parties at the time of execution of an agreement. As a corollary, where the existence of an arbitral clause is neither within the knowledge of one of the parties to a contract at the time of its execution nor is there any manifestation of any intention on the part of such parties to take recourse to arbitration at any point in time on or after such execution, no binding arbitration agreement may be perceived under such a case. Therefore, in the cases where a 'so called' arbitral clause is reproduced inconspicuously in a document, which, though may be signed by the receiving party/ other party, however, being not aware of the existence of such a clause or expressing an intention to concede to such a term at any point in time, no arbitral agreement may deem to exist under such a case. Quite recently, the Hon'ble High Court of Delhi[13] was posed with a similar question wherein arbitration was invoked based on the 'so called' arbitral clause existing under the invoice(s). In the instant case, besides the fact that two distinct 'so called' arbitral clauses existed under the invoices, the said clauses were reproduced in small font at the bottom of the said

[10] ***Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. v. Jade Elevator Components, (2018) 9 SCC 774***
[11] ***Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd., (2008) 10 SCC 308***
[12] ***Mahanagar Telephone Nigam Ltd. v. Canara Bank & Ors., 2019 SCC OnLine SC 995***
[13] ***Parmeet Singh Chatwal and Ors. v. Ashwani Sahani, MANU/DE/0442/2020***

invoice(s). Further, the intention of the parties to mutually agree to such a term was not manifest from the conduct thereof. Accordingly, under such circumstances the Hon'ble Court held, *"[t]he so called Arbitration Clause is reproduced in a small font at the bottom of the invoice. It is doubtful if the petitioner even noticed that he was signing a document which has an Arbitration Clause. It is not possible to conclude that the parties were ad idem."*

Previously, in another instance[14], where the 'so called' arbitral clause was reproduced on the reverse side of an invoice/ document, with no indication of its existence on the front/ face of the document or any evidence to demonstrate the factum of parties mutually agreeing to the said clause, arbitral agreement was held not to exist under such a case. In fact, as per the Hon'ble High Court, *"[t]he mere printing of condition No. 4 on the reverse of the invoice was, at the highest, an offer made by the respondent to the petitioner. Unless the said offer was accepted by the petitioner, it could not result in a binding and enforceable contract. The inclusion of terms and conditions at the back of the invoice, unilaterally issued by the respondent while affecting delivery of the goods in terms of the petitioner's purchase order, would not bind the petitioner."* The Hon'ble Court further clarified that an "arbitration agreement" is a species of the genus, that is, "Agreement" and reiterated that for the existence of an agreement there has to be "*consensus ad idem*" between the parties, i.e., they should agree to the same thing in the same sense. However, it is trite law[15] that there is no strait-jacket formula to say whether a invoices/ terms of invoices can or cannot amount to binding arbitration clauses. In fact, in order to determine the existence of a valid arbitral agreement/ clause it is necessary to consider the conduct and intention of the parties to arbitrate, as evident from the record.

Consequently, where the terms of the contract are brought to the notice of the parties to an agreement at the time of entering into a contract, including an arbitral clause existing on the reverse side of said agreement. Further, where the parties act in terms of such an agreement, as manifest from their conduct, it would be inconsequential for determining the existence of an arbitral clause/ agreement, whether or not such an agreement is signed. Recently, the Hon'ble Supreme Court in ***Caravel Shipping Services (P) Ltd. v. Premier Sea Foods Exim (P) Ltd.***[16] was posed with a

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[14] ***Taipack Limited v. Ram Kishore Nagar Mal, 2007 SCC OnLine Del 804 : (2007) 143 DLT 123***
[15] Refer to ***Scholar Publishing House Pvt. Ltd. v. Khanna Traders, 2013 SCC OnLine Del 2708***
[16] ***(2019) 11 SCC 461***

question; whether the arbitral clause existing on the reverse of an unsigned bill of lading would constitute a binding/ valid arbitral agreement/ clause? In this case, at the outset, it was noted by the Hon'ble Apex Court that the very opening clause of the said bill of lading[17] made it clear that it was expressly agreed between parties to the instant case to be bound by all the terms, conditions, clauses and exceptions on both sides of the bill of lading whether typed, printed or otherwise. Accordingly, the Hon'ble Court held, *"the respondent has expressly agreed to be bound by the arbitration clause despite the fact that it is a printed condition annexed to the bill of lading.…respondent, therefore, cannot blow hot and cold and argue that for the purpose of its suit, it will rely upon the bill of lading (though unsigned) but for the purpose of arbitration, the requirement of the Arbitration Act is that the arbitration clause should be signed."* Pertinently, the Hon'ble Supreme Court, besides considering the fact that the terms of such unsigned bill of lading were relied upon by the objecting/ contesting party, while referring to one of its previous judgments[18], held, *"Section 7(4) only further adds that an arbitration agreement would be found in the circumstances mentioned in the three sub-clauses that make up Section 7(4). This does not mean that in all cases an arbitration agreement needs to be signed. The only pre-requisite is that it be in writing, as has been pointed out in Section 7(3)."*

Significantly, where arbitration is sought to invoked on the basis of reference, it is settled law[19] that a conscious acceptance of such arbitration clause found in another/ previous document is necessary for the purpose of incorporating it into the (latter) contract. Accordingly, mere a general reference to such an arbitral clause in previous contract would not suffice for incorporation by reference. In fact, an arbitration clause in another document, would get incorporated into a contract by reference, only where, "*(1) the contract should contain a clear reference to the documents containing arbitration clause, (2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract, and (3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract."* Pertinently, an exception[20] to the said rule

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[17] *"In accepting this bill of lading the merchant expressly agrees to be bound by all the terms, conditions, clauses and exceptions on both sides of the bill of lading whether typed, printed or otherwise."* (Refer to Para 1 of ***Shipping Services (P) Ltd. v. Premier Sea Foods Exim (P) Ltd., (2019) 11 SCC 461***)

[18] ***Jugal Kishore Rameshwardas v. Goolbai Hormusji, AIR 1955 SC 812***

[19] ***M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696***

[20] Refer to ***Inox Wind Ltd. v. Thermocables Ltd., (2018) 2 SCC 519***

is, *"a reference to a standard form of contract by a trade association or a professional institution in which case a general reference would be sufficient for incorporation of an arbitration clause."* However, in case of standard form contracts, experiences have shown that such agreements are entered without any negotiations and hardly leaving an option to one of the contracting parties to do anything except to accede to the terms mentioned therein. Therefore, under such circumstances, it not difficult to comprehend that a party may be forced upon with an arbitral clause/ agreement through such standard from contracts, which may not in all circumstances be feasible or would have been accepted by the party in unequal bargaining position, except for a such lack of option.

Quite recently, the Supreme Court of Canada[21] has struck down a mandatory clause existing in standard form contract between driver and multinational corporation, requiring that disputes be submitted to arbitration in the Netherlands and imposing substantial up-front costs for arbitration proceedings, as unconscionable. While rendering the decision, though, it was acknowledged by the Hon'ble Court, *"We do not mean to suggest that a standard form contract, by itself, establishes an inequality of bargaining power… Standard form contracts are in many instances both necessary and useful"*, however, in the facts of the instant case it was observed that not only was such an agreement/ clause in form of a standard form, rather, the respondent (Mr. Heller) was powerless to negotiate any of its terms. It was further noted by the Hon'ble Court that there was a significant gulf in sophistication between the Respondent and the Appellant (Uber) and that the arbitration agreement contained no information about the costs of mediation and arbitration in the instance case. Lastly, the Hon'ble Court noted that a person in Respondent's/ Mr. Heller's position *"could not be expected to appreciate the financial and legal implications of agreeing to arbitrate under ICC Rules or under Dutch law."* Significantly, while further acknowledging the severability of an arbitral clause from the main agreement and its importance as a cost-effective and efficient method of resolving disputes, it was observed by the Hon'ble Court, *"[w]hen arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all."* Therefore, clearly, where the arbitral clause/ agreement itself imposes unrealistic and unconscionable terms, forced upon a party though standard from contract, the same requires to be struck down and

[21] ***Uber Technologies Inc. v. Heller, 2020 SCC 16***- dated 26.06.2020- Supreme Court of Canada (https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do)

negated. Indian Courts[22] as well, though in a different context, have consistently struck down unfair and unreasonable contracts, or unfair and unreasonable clauses in a contract(s), entered into between parties who are not equal in bargaining power. Undoubtedly, where the circumstances demonstrate, on the face of it, injustice and improvidence in the standard form contracts, equity and justice demand their negation, notwithstanding the other advantages which arbitration which offer. As the Hon'ble Supreme Court of Canada in the aforesaid case noted, *"Parties cannot expect courts to enforce improvident bargains formed in situations of inequality of bargaining power; a weaker party, after all, is as disadvantaged by inadvertent exploitation as by deliberate exploitation."*

Conclusively, though there are several advantages to arbitration in comparison to Court proceedings, however, the foundation of such proceedings cannot be permitted to be laid on fraud, deception, inequality, injustice, etc. In fact, all the cases where such unjust modes are sought to be devised to invoke arbitral machinery, Courts have been vigilant to nip such injustice in the bud. As a saying goes, *"[t]hings built on a weak foundation will eventually crumble*[23]*."* Undoubtedly, same holds good for an arbitration sought to be invoked on inconspicuous and unjust 'so called' arbitral clauses. These proceeding, too, fall and crumble like a house of cards, come one blow.

[22] ***Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Anr., (1986) 3 SCC 156***
[23] Vincentian Proverb