
(2010) 10 BOM CK 0182

In the Bombay High Court

Case No : Arbitration Application No. 50 of 2007

United Shippers Limited

APPELLANT

Vs

Tata Power Company Limited

RESPONDENT

Date of Decision : 15-10-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 7(5)

Citation : (2010) 10 BOM CK 0182

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : Prashant Pratap and Manoj Khatri, for the Appellant; Janak Dwarkadas, S.V. Doijode, Parag Kabadi, Taruna Nagpal, instructed by and Doijode and Associates, for the Respondent

Judgement

S.J. Vazifdar, J.—This is an application u/s 11 of the Arbitration and Conciliation Act, 1996.

2. The parties had entered into an agreement dated 25th March, 2003, for transporting coal. The Applicant had agreed to perform and provide services necessary for the successful transport of coal from the mother vessel to the railway siding and loading the same onto rakes for delivery to the Respondent's Trombay Terminal Power Station. The agreement was valid for the period 16th February, 2003 to 31st March, 2004. Clause 29 thereof contained an arbitration agreement which reads as under:

29. Any dispute or difference between the parties including that of compensation on termination of the contract, which are not settled amicably will be referred to a sole arbitration by a retired Chief Justice of High Court or retired Judge of the Supreme Court. The Arbitration shall be as per the provisions of the Indian Arbitration and Conciliation Act 1996 (or any statutory modifications or reenactment thereof for the time being -in force.

The arbitration proceedings shall be held in Mumbai and shall be conducted in

English language. The parties agree that the Hon'ble High Court of Mumbai shall have jurisdiction in all matters relating to the arbitration proceedings.

The essence of this contract is timely payment by TPC to USL and the satisfactory performance of USL as per the terms and conditions of this agreement.

3. The parties thereafter entered into another agreement dated 27th February, 2004, for the period 1st January, 2004 to 31st March, 2005, on similar terms and conditions. The arbitration clause in this agreement was identical to the one in the agreement dated 25th March, 2003.

4. Mr. Dwarkadas, the learned senior counsel appearing on behalf of the Respondent submitted that the first agreement dated 25th March, 2003, is closed and that there are no disputes subsisting thereunder. In support of this submission, he relied upon a credit note dated 31st March, 2005 issued by the Applicant. He also relied upon the averments in paragraph 35 of the affidavit-in-reply to the same effect.

5. The submission is not well founded. The credit note itself states that it is "for shortage". The Applicant's letter invoking the arbitration agreement raises claims other than for shortage under the first contract. For instance, the Applicant has contended therein that the Respondent wrongly levied penalties in the sum of Rs. 1,42,50,777/- and Rs. 6,49,85,683/- respectively under the first two contracts viz. the contracts dated 25th March, 2003 and 27th February, 2004. There is thus a claim in the sum of Rs. 1,42,50,777/- in respect of the first contract dated 25th March, 2003. The Applicant further alleged that the Respondent had wrongly deducted the said amounts from the remuneration payable to the Applicant and was liable to pay the same. It was also contended that under the first and the second contracts the Respondent, while calculating the amount of despatch payable to the Applicant, had wrongly deducted diverse sums as demurrage. Under the first contract itself, the amount due to the Applicant is stated to be Rs. 46,10,362/-.

6. Thus, even assuming that the credit note dated 31st March, 2005, concludes the Applicant's claim regarding shortage, it cannot be stated that there are no disputes between the parties in respect of the first contract.

7. The submission, therefore, that there are no disputes under the first contract is rejected.

8. Thus, as far as the above agreements are concerned, there is no dispute that the same contained arbitration agreements and that the disputes and differences thereunder must be referred to arbitration.

9. The parties thereafter admittedly entered into a Memorandum of Understanding (MOU) dated 6th April, 2005, for a period of fifteen months from 1st April, 2005 to 13th June, 2006. This MOU was for similar work for a guaranteed quantity of two million metric tons plus five per cent at the

Respondent's option. The MOU states that it was prepared further to the meeting held between the representatives of the parties wherein the following had been agreed "by all present":

1. That the price for the above referred contract will be Rs. 581 PMT (including service tax of Rs. 9.25 PMT maximum)

This will be payable by TPC to USL as follows:

Rs 100 PMT basis B/L quantity prior to discharge commencement.

Rs. 439 PMT within 5 working days of unloading of each rake at TTPS

Rs. 42 PMT within 5 working days of presentation of bill which takes into account the quality and quantity parameter of coal delivered to TPC, Trombay.

2. That for NOR acceptance at discharge port, a minimum of 6 days gap is required between each vessel of TPC arriving for discharge at Dharamtar. If this gap is less than 5 days, then demurrage if any will be to TPC account.

USL has asked for the following changes in the contract, which remain unsettled and have to be mutually agreed between USL and TPC on the return of Mr. S. Ramakrishnan from vacation on or around 21st April, 2005.

Averaging of GCVs to be granted to USL, for vessels whose cargoes has been mixed due to excess inventory and shortage space at Dharamtar/close arrival of TPC's vessels at Dharamtar.

Exemption of penalty for increase in ash, over in similar coal (as received at TPC) in case of coal stock in excess of 150,000 mts. being stored at Dharamtar, as per TPC's instructions.

These issues will be taken up for fair settlement between 21st April, 2005 and 27th April, 2005 and accordingly, introduced in the contract.

The base contract to be used will remain the same as the contract for the period January 2004-2005 with modifications as necessitated from the above and any other modification/corrections as mutually agreed.

10. The first contention is that there was no concluded contract as the Applicant had, as recorded in the MOU, asked for changes in the contract which remained unsettled and had to be mutually agreed upon between the parties on the return of the Respondent's Director.

11. Shipments were, in fact, made pursuant to and on the terms and conditions contained in the MOU. The parties, therefore, elected to go ahead on the basis of the MOU. In other words, the Applicant did not insist upon the changes that it had referred to in the MOU, and was content to implement the MOU without insisting on the changes. The Respondent also proceeded on that basis. Payments were made in accordance with the MOU read with the earlier contracts for certain shipments made pursuant to the MOU. The Applicant's claim now is

for demurrage, despatch and payment for the tenth and eleventh shipments. In the said letter dated 24th January, 2006, invoking arbitration, the Applicant stated that the total remuneration due and outstanding for the last two shipments under the MOU is Rs. 2,11,40,700/- and a sum of Rs. 29,58,808/-. It further stated that there were outstanding diesel bills and bills for monsoon charges as well as despatch.

It is interesting to note the Respondent's reply dated 24th February, 2006. In paragraph 3, the Respondent stated:

After the expiry of the said Agreement dated 27th February, 2004 the shipment consignments were handled on the basis and the terms and conditions for each shipment were the same as mentioned in the said agreement dated 27th February, 2004, with the only modification being, payment to be made at the rate of Rs. 581/- per MT. These terms did not include the arbitration clause. Thus, although the disputes and claims between our respective clients arising out of and under the said two Agreements dated 25th March, 2003 and 27th February, 2004, respectively can be referred to arbitration, the claims and disputes arising between the parties in respect of the shipments handled after the expiry of the Agreement dated 27th February, 2004 cannot be referred to arbitration, in the absence of an arbitration agreement. However, in order to have a consolidated resolution of all the disputes, our clients have no objection to refer even the disputes in respect of shipments post expiry of the Agreement dated 27th February, 2004 to arbitration. Your clients are requested to confirm the same. In such event, our clients suggest appointment of Mr. Justice S.N. Variava (Retd.) to be the Sole Arbitrator to arbitrate upon all the disputes between our respective clients.

12. Thus, the Respondent admitted that upon expiry of the second agreement dated 27th February, 2004, the shipment consignments were handled on the basis and the terms and conditions of the second contract dated 27th February, 2004, the only modification being regarding the rate of payment. I will come to the further statement that the terms of the MOU did not include the arbitration clause shortly. Suffice it to note at this stage that the Respondent itself admitted that the shipments under the MOU were also handled on the basis of the terms and conditions of the agreement dated 27th February, 2004.

13. Faced with this, it was contended that the Respondent's case is that after the expiry of the second contract dated 27th February, 2004, the shipments were handled pursuant to an oral agreement as pleaded in paragraphs 13, 14 and 15 of the affidavit-in-reply. In these paragraphs, it is averred that the Executive Directors of the Respondent, who had executed the MOU, had no authority to agree to anything and that, therefore, they endorsed at the foot thereof that the MOU was subject to approval by the Managing Director. It is also averred that certain areas of disagreement remained to be resolved and that the parties had agreed to resolve the same between 21st April, 2005 and 27th April, 2005. It is further averred that on the date of the signing of the MOU, it was agreed that all

consignments that arrived post 1st April, 2005, would be handled by the Applicant on an ad-hoc and consignment to consignment basis, but on the same terms and conditions as those of the second contract, save and except that payment was to be at the rate of Rs. 581/ - per metric ton. This arrangement, it was alleged, would continue until a fresh contract was agreed to and executed between the parties.

14. These averments are a clear after-thought. There was no such contention in the Respondent's letter dated 24th February, 2006 in reply to the Applicant's letter invoking the arbitration. It is important to note another crucial fact. Paragraphs 13, 14 and 15 must be read with paragraph 12. So read, it is clear why the endorsement in the MOU to the effect that the same was subject to the approval of the Respondent's Managing Director was made. After all, the MOU was executed, not by just any officer, but by the Respondent's Executive Director (Finance) and Executive Director (Operations). The Executive Director (Operations) was also the Vice-President. The only reservation of the Respondent's Managing Director that was pleaded was as regards the rate. In paragraph 12, it is expressly stated that the representatives had no authority to agree to any rate on behalf of the Respondent. However, at the meetings before the execution of the MOU, a rate of Rs. 611/ - was negotiated and recommended by the signatories on behalf of the Respondent to the Managing Director, but that the Managing Director was not satisfied with the rate and insisted on the same being renegotiated. As a consignment was due to arrive in the first week of April, 2005, the parties had agreed to the shipment being handled at the rate of Rs. 611/ -, the other terms and conditions being the same as the second contract. Thereafter, the rate of Rs. 581/ - per metric ton as mentioned in the MOU was negotiated. Here again, it is important to note that the affidavit-in-reply read as a whole clearly indicates that the only reservation was as regards the rate. There were no other reservations on the part of the Respondent or its Managing Director. The reservations were only on behalf of the Applicant which, as I noted earlier, the Applicant did not insist upon.

15. The only possible dispute between the parties as regards the MOU is whether the rate was finalised or not. If it is a valid arbitration clause, a question I will deal with next, there is nothing that prevents the arbitral tribunal from considering this dispute.

16. In the circumstances, the MOU was a valid, concluded and binding agreement between the parties. The doubt, if any, is set at rest by the fact that the parties acted on the basis thereof. The contentions now raised are a clear after-thought.

17. This brings me to the question whether the arbitration clause in the second agreement dated 27th February, 2004, was incorporated in the MOU. I have come to the conclusion that it was. The MOU stated:

The base contract to be used will remain the same as the contract for the period

January 2004-2005 with modifications as necessitated from the above and any other modification/corrections as mutually agreed.

The latter words viz. "as necessitated from the above and any other modification/corrections as mutually agreed" are of no consequence. As I have noted earlier, there were no modifications or corrections that were insisted upon by either party. The MOU was implemented as such.

18. Section 7(5) of the Act reads as under:

7. Arbitration agreement.--(1) In this Part, "arbitration agreement" means 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.

* * *

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

19. The question is whether the reference in the MOU is such as to make the arbitration clause in the second contract a part of the MOU. In my view, the words: "The base contract to be used will remain the same as the contract for the period January 2004-2005" are of wide import. They incorporate all the terms and conditions of the contract dated 24th February, 2004, except as otherwise provided in the MOU. The provision in the MOU did not restrict the incorporation of only a part of the second contract. It incorporated the whole. This is clear from the expression "base contract". It is important to note that the three contracts were entered into between the same parties and were for identical work for different periods. In these circumstances, I see no reason to presume that the parties intended excluding the arbitration clause in the MOU although it was admittedly there in the first two contracts. There are no circumstances whatsoever which indicate that the parties had agreed to abide by and to implement all the terms of the second contract but the arbitration clause.

20. Mr. Dwarkadas's reliance on the judgment of the Supreme Court in M.R. Engineers and Contractors Pvt. Ltd. Vs. Som Datt Builders Ltd., is of no assistance to the Respondent. It is clearly distinguishable from the facts of the present case. The observations in the judgment, in fact, support the Petitioner's case that the arbitration clause in the second contract was incorporated in the MOU.

Mr. Dwarkadas relied upon paragraphs 21 to 24 of the judgment. It is necessary, however, to note the facts and read the judgment as a whole.

(A) In M.R. Engineers, the PWD, Government of Kerala and the Respondent had entered into a construction contract which contained the following arbitration clause:

Arbitration Clause 67.3

Any dispute in respect of which:

(a) the decision, if any, of the Engineer has not become final and binding pursuant to Clause 67.1, and

(b) amicable settlement has not been reached within the period stated in Clause 67.2, shall be referred to the adjudication of a committee of three arbitrators. The committee shall be composed of one arbitrator to be nominated by the employer, one to be nominated by the contractor and the third who will act as the Chairman of the committee, but not as umpire, to be nominated by the Director General (Road Development), Ministry of Surface Transport (Roads Wing), Government of India. If either of the parties abstain or fail to appoint his arbitrator within sixty days after receipt of notice for the appointment of such arbitrator, then the Director General (Road Development), Ministry of Surface Transport, Government of India, himself shall appoint such arbitrator(s). A certified copy of the appointment made by the Director General (Road Development), Ministry of Surface Transport, Government of India, shall be furnished to both parties.

The Appellant was awarded a sub-contract for a part of the work by the Respondent. The sub-contract stated: "This subcontract shall be carried out on the terms and conditions as applicable to main contract unless otherwise mentioned in this order letter.

The Supreme Court held that these words did not incorporate in the sub-contract the arbitration clause in the main contract. As noted by the Supreme Court in paragraphs 37 and 38, the wording of the arbitration clause in the main contract could never apply to the sub-contract. The procedure stipulated in the arbitration clause in the main contract would not even be capable of operating qua the sub-contract. For instance, it was pointed out by the Supreme Court that neither Clause 67.1 nor 67.2 would apply to the sub-contract as the question of the Engineer issuing any decision in a dispute between the Appellant and the Respondent or negotiations being held with the Engineer in regard to the disputes between the Appellant and the Respondent does not arise. Further, the arbitration clause provides for a committee of three arbitrators, the third to be nominated by the Director General, Road Development, Ministry of Surface Transport, Roads Wing, Government of India and there was no question of such nomination in the case of a dispute between the Appellant and the Respondent. The Supreme Court, therefore, observed that the entire arbitration agreement contained in the main contract was tailor-made to meet the requirements of the main contract and was wholly in-ept and not applicable in the context of a dispute between the Appellant and the Respondent.

(B). In paragraph 50, the Supreme Court observed that the Act does not contain any indication or guidelines as to the conditions to be fulfilled for the incorporation of an arbitration clause contained in one document in another. It

was held: "In the absence of such statutory guidelines the normal rules of construction of contracts will have to be followed."

(C). It is in this background that paragraphs 21 to 24, relied upon by Mr. Dwarkadas ought to be read. Paragraphs 21 to 24 read as under:

21. After referring to the view of Sir John Megaw in *Aughton Ltd. v. M.F. Kent Services Ltd.*¹ that specific words were necessary to incorporate an arbitration clause and that the reference in a sub-contract to another contract's terms and conditions would not suffice to incorporate the arbitration clause into the sub-contract, followed in *Barrett and Son (Brickwork) Ltd. v. Henry Boot Management Ltd.*², *Trygg Hansa Insurance Co. Ltd. v. Equitas Ltd.*³ and *AIG Europe (UK) Ltd. v. Ethniki*⁴ and *Sea Trade Maritime Corp'n. v. Hellenic Mutual War Risks Assn. (Bermuda) Ltd.* No. 25, Russell concludes:

The current position therefore seems to be that if the arbitration agreement is incorporated from a standard form a general reference to those terms is sufficient, but at least in the case of reference to a non-standard form contract in the context of construction and reinsurance contracts and bills of lading a specific reference to the arbitration agreement is necessary.

22. A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. The exception to the requirement of special reference is where the referred document is not another contract, but a standard form of terms and conditions of trade associations or regulatory institutions which publish or circulate such standard terms and conditions for the benefit of the members or others who want to adopt the same.

23. The standard forms of terms and conditions of trade associations and regulatory institutions are crafted and chiseled by experience gained from trade practices and conventions, frequent areas of conflicts and differences, and dispute resolutions in the particular trade. They are also well known in trade circles and parties using such formats are usually well versed with the contents thereof including the arbitration clause therein. Therefore, even a general reference to such standard terms, without special reference to the arbitration clause therein, is sufficient to incorporate the arbitration clause into the contract.

24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:

(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,

(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.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.

(D). Paragraph 21 also refers to cases of sub-contracts. I do not read the observations of the Supreme Court as excluding the possibility of an arbitration clause in one contract between the same parties being incorporated into another similar contract between the same parties.

(E). In paragraph 32, the Supreme Court furnished yet another reason why in that case the arbitration clause in the main contract was not incorporated in the sub-contract. The sub-contract stated that the same "shall be carried out on the terms and conditions as applicable to the main contract." In addition to what is observed in paragraphs 37 and 38, the Supreme Court observed that only the terms and conditions in the main contract relating to the execution of the work

were adopted in the sub-contract. In the case before me, there is no such limitation.

21. It is also significant that the Supreme Court in paragraph 34 referred to an earlier judgment of the Supreme Court in *Alimenta S.A. Vs. National Agricultural Co-operative Marketing Federation of India Ltd. and Another*, . The Supreme Court held that the words in the second contract were not sufficient to incorporate the arbitration clause for the incorporation was limited to the conditions for supply contained in the previous contract signed between the parties. The Supreme Court held that an arbitration clause is not incidental to the supply of goods and, therefore, could not be held to have been incorporated in the second contract. It is, however, important to note paragraph 12 of the judgment where the Supreme Court dealing with the first contract held as under:

12. Relying upon the decision in *Annefield*, it is submitted on behalf of the appellant that the arbitration clause in FOSFA-20 contract is not germane to the subject-matter of the first contract and, accordingly, it was not incorporated into the first contract. We are unable to accept the contention. It has already been noticed earlier that there has been a long continued practice in England that the arbitration clause is not incorporated into the bill of lading by general words, unless it is explicitly done in clear words either in the bill of lading or in the charter party. In the instant case, we are not, however, concerned with a charter party and a bill of lading contract. Even assuming that the subject-matters of FOSFA-20 contract and the FOB contract are different, we do not think that any question as to the germaneness of the arbitration clause to the subject-matter would be relevant. It has been found by the learned Judge of the High Court that the Manager of NAFED, who had signed the first contract, was aware of the terms of the FOSFA-20 contract including the arbitration clause contained therein. It is, therefore, manifestly clear that by the incorporation of Clause 11 in the first contract, the appellant intended to incorporate into it the arbitration clause of FOSFA-20 contract. Thus where, as in the instant case, the parties are aware of the arbitration clause of an earlier contract, the subject-matter of which is different from the contract which is being entered into by them, but incorporate the terms of the earlier contract by reference by using general words, we do not think there would be any bar to such incorporation merely because the subject-matters of the two contracts are different. unless, however, the incorporation of the arbitration clause will be insensible or unintelligible, as was in *Hamilton and Co. v. Mackie and Sons*. In the instant case, the arbitration clause in FOSFA-20 contract will fit in the first contract. In other words, it will not be either insensible or unintelligible. In our opinion, therefore, the High Court was right in holding that the arbitration clause in FOSFA-20 contract was incorporated into the first contract.

22. These observations apply with greater force in the present case as here the contracts are identical in nature, though not in particulars, and are between the same parties. The arbitration clause in the second contract is certainly not

insensible or unintelligible to the MOU or not germane to the MOU. In the present case, the Respondent was admittedly aware of the existence of the arbitration clauses in the first two contracts. The contracts in this case are similar and between the same parties. The cases dealing with the question of incorporation of a clause in a charter party containing an arbitration agreement in a bill of lading are not relevant to such cases. Authorities which consider whether an arbitration agreement contained in a clause between two parties is incorporated in an agreement where one or all the parties are different also stand on a different basis. Even in such case the arbitration clause in the contract between two parties can be incorporated in a contract between one such party and another or even between two different parties if the terms of the latter contract incorporate the former and the arbitration clause is germane to and consistent with the same. (Gangaram Ratanlal Vs. Simplex Mills Co. Ltd., and the judgments referred to therein). The question of incorporation of clauses in different agreements between the same parties especially when they are similar in nature are relatively simple.

23. Mr. Pratap, the learned Counsel appearing on behalf of the Applicant invited my attention to an instructive judgment of the Queen's Bench Division (Commercial Court) in *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL* (2010) 1 LLR 661. The learned Judge has dealt with the doctrine of incorporation in different types of contracts. There is a large body of case law which deals with the question of incorporation in various circumstances. I do not intend discussing the doctrine of incorporation generally as applicable to different cases. I will confine myself only to contracts of the nature of those in the present matter. I have no intention of complicating this otherwise simple matter by referring to the judgments on the doctrine of incorporation in different types of contracts and situations which have been discussed in *Habas v. Sometal*. The case before me is a simple one. For the purpose of the case before me, it is sufficient to refer only to paragraphs 48, 49 and 51 in *Habas v. Sometal* which read as under:

48. I accept that, if the terms of an earlier contract or contracts between the parties are said to have been incorporated, it is necessary for it to be clear which terms those were. But, like Langley J., I do not regard this to be the position only if the terms said to be incorporated include an arbitration or jurisdiction clause. Whenever some terms other than those set out in the incorporating document are said to be incorporated it is necessary to be clear what those terms are. Since arbitration clauses are not terms which regulate the parties' substantive rights and obligations under the contract but are terms dealing with the resolution of disputes relating to those rights and obligations it is also necessary to be clear that the parties did intend to incorporate such a clause. But, if a contract between A and B incorporates all the terms of a previous contract between them other than the terms newly agreed in the later contract, there should be no lack of clarity in respect of what is to be incorporated.

49. There is a particular need to be clear that the parties intended to incorporate the arbitration clause when the incorporation relied on is the incorporation of the terms of a contract made between different parties, even if one of them is a party to the contract in suit. In such a case it may not be evident that the parties intended not only to incorporate the substantive provisions of the other contract but also provisions as to the resolution of disputes between different parties, particularly if a degree of verbal manipulation is needed for the incorporated arbitration clause to work. These considerations do not, however, apply to a single contract case.

51. Like Langley J., however, I do not accept that, in a single-contract case, the independent nature of the arbitration clause should determine whether it is to be incorporated. A commercial lawyer would probably understand that an arbitration clause is a separate contract collateral to another substantive contract and that the expression "arbitration clause" is, on that account, something of a misnomer for "the arbitration contract which is ancillary to the primary contract". But a businessman would have no difficulty in regarding the arbitration Clause (as he would call it) as part of a contract and as capable of incorporation, by appropriate wording, as any other term of such a contract; and it is, as it seems to me to a businessman's understanding that the court should be disposed to give effect. A businessman who had agreed with his counterparty a contract with 10 specific terms under various headings and then agreed with the same counterparty terms 1 to 5 under the same headings as before and, as to the rest, that all the terms of the previous contract should apply, would, I think, be surprised to find that "all" should be interpreted so as to mean "all but the arbitration clause".

24. The ratio of the judgment in *Habas v. Sometal* is, in fact, similar to the ratio of the judgment of the Supreme Court in *Alimenta SA*. In the circumstances, it must be held that the arbitration clause contained in the second contract stood incorporated in the MOU.

25. Technically, there are three contracts between the parties viz. the contracts dated 25th March, 2003, 27th February, 2004 and the MOU dated 6th April, 2005. The agreements, however, are between the same parties, are identical in nature and the arbitration clause in the second agreement was incorporated in the MOU. In these circumstances, it would be far too technical to dismiss the application on the ground that three applications ought to have been filed. No prejudice whatsoever has been caused to the Respondent as a result of a composite petition. More important is the fact that the Applicant justifiably presumed that the Respondent was willing to have the disputes and differences under the three agreements referred to the same sole arbitrator and that the only point of disagreement was as to the name of the arbitrator. This is evident from the letter dated 24th February, 2006, the relevant portion whereof I have extracted earlier.

26. In the circumstances, the petition is disposed of by appointing Mr. Justice

C.K. Thakkar, former Judge of the Supreme Court as the sole arbitrator in respect of each of the contracts dated 25th March, 2003, 27th February, 2004 and the MOU dated 6th April, 2005. The learned arbitrator shall hear the references separately and make separate awards, unless otherwise agreed to by the parties in writing. There shall be no order as to costs.

27. This order is stayed upto and including 15th December, 2010, to enable the Respondent to challenge the same.