

## Virtual Studio Pvt. Ltd. Vs TMT Investment Pte. Ltd.

**Court:** Delhi High Court

**Date of Decision:** Dec. 3, 2014

**Acts Referred:** Arbitration and Conciliation Act, 1996 – Section 45, 7

**Hon'ble Judges:** S.P. Garg, J

**Bench:** Single Bench

**Advocate:** Atul Bhuchhar and Manoj Nagar, Advocate for the Appellant; Vivek Malik, Advocate for the Respondent

### Judgement

S.P. Garg, J.

I.A. No.2351/2013 (u/S 45 of Arbitration & Conciliation Act, 1996)

1. The plaintiff company incorporated and established under Companies Act, 1956 was engaged in the business of Web Casting, Live Streaming,

Web Design and Interactive Solutions, Films and Presentations. On the recommendation by Microsoft, the defendant No. 1 awarded the project

of web cast of IPL Season 2, 2009 to the plaintiff vide its PO No.Tmt/08- 09/09-001, which was signed by defendant No. 3 on 10.04.2009 on

behalf of the defendant No. 1 at the office of the plaintiff at New Delhi at a mutually agreed price of USD \$ 69,607.84/-. It is submitted that the

defendant No. 1 routed the aforesaid project through its subsidiary defendant No. 2. All the discussions and correspondence with regard to the

project had taken place between the plaintiff and the defendant No. 2. Defendant No. 2 being the subsidiary of the defendant No. 1, through its

sister concern Netlink Information Systems Ltd. paid an amount of Rs. 8,70,000/- vide cheque bearing No. 43760. It was signed by defendant

No. 3 as the security deposit towards the aforesaid web-casting contract. After signing the PO, the plaintiff company started to work at the

project.

2. Case of the plaintiff is that the defendant did not pay the outstanding dues despite various demands. As per accounts maintained by the plaintiff

company, USD \$98,025.71/- equivalent to Rs. 45,74,370/- and interest on delayed payment @ 24% were outstanding and due against the

defendants.

3. The defendants after receipt of summons filed the instant application under Section 45 of the Arbitration and Conciliation Act. It was contended

that the dispute is required to be referred to Arbitration in view of the existence of a commercial agreement containing International Commercial

Agreement between the plaintiff and the defendant No. 1, which clearly covers the subject matter of the disputes between the parties.

4. The application is contested by the plaintiff. It is urged that there was no agreement in writing to refer the dispute to Arbitration. The parties had

never agreed to refer the dispute to Arbitration. Terms and conditions mentioned in the Purchase Order were never supplied by the defendants to

the plaintiff.

5. It is not in dispute that the parties are governed by Purchase Order dated 10.04.2009. It contains terms of payments i.e. 25% current date,

25% May 15, 2009, 50% Post completion of all work mentioned. All payments to be considered paid on date of remittance. It further contains

terms and conditions as under : a) All services are governed by our terms and conditions as supplied to you at your office during the above sale

with the information pack / contract; b) Terms and conditions of sale can be obtained on written request or through our website; c) Terms of

payments : Payment against invoice to be remitted within 7 working days (equivalent to Rs. 35,50,000/-); and, d) Order is subject to SLA,

Agreement terms and conditions and receipt of decoders and setup in time for the encoding and transcending to take place.

6. Needless to say that there is no specific mention about the existence of the arbitration agreement in the Purchase Order. However, there is

specific mention that all services are to be governed by the terms and conditions as supplied during the above sale with the information pack /

contract and the order was subject to SLA, Agreement terms and conditions. The Purchase Order dated 10.04.2009 was duly acted upon by the

parties and at no stage, the plaintiff objected to the terms and conditions which were to govern the contract between the parties. The defendants

have filed certified copies of the terms and conditions along with the application. The relevant paragraph of the terms and conditions is as under :

#### Governing Law and Dispute Settlement

The agreement / purchase order / contract / work order shall be governed by an construed in accordance with the laws of Singapore and the

courts of Singapore shall have the jurisdiction. Any dispute, claim, or controversy shall be finally settled by arbitration in Singapore by sole

arbitrator in the English language in accordance with the rules of arbitration of the International Chamber of Commerce in accordance with

Singapore law.

7. The arguments that there must be an arbitration agreement in writing signed by the parties is devoid of any merit.  
Section 7 of the Arbitration and

Conciliation Act does not say that to constitute an arbitration agreement, it should bear signatures of the parties.  
Requirement of law is only that it

should be in writing.

8. In State Trading Corporation of India Vs. Stora Kvanransveden AB and Others, , it held :

(9) In this case, the petitioner accepts the contract in all material particulars including the clause of force majeure, disputes, the arbitration clause

therein. The ambiguity raised by defendant is with regard to the shipment and that was the reason assigned for not signing the contract by

defendant. The contract has been implemented and executed in accordance to the offer by defendant and acceptance of the same by the petitioner.

It seems the parties went ahead with the arrangement arrived and the formal contract was reduced in writing later on but it was agreed that the

contract shall be according to the standard contract of Stc for the supply of newsprint and that condition seems to have been carried out.

(10) Under the circumstances, on prima-facie consideration of the material on record, I am of the view that there exists a contract between the

petitioner and defendant containing arbitration clause for reference of the disputes arising between the parties out of the contract for adjudication to

the arbitration as pointed out in clause 17 reproduced above, and I do not find any prima-facie substance in the contention of the petitioner raised

in this regard and the is being devoid of merits, is liable to be dismissed.

9. In Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others, , it held :

71. The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the

parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of

non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or

mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or interdependent that it is

their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient

indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of "composite performance" would

have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the

parties and the attendant circumstances on the other.

72. As already noticed, an arbitration agreement, under Section 45 of the 1996 Act, should be evidenced in writing and in terms of Article II of

Schedule 1, an agreement in writing shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an

exchange of letters or telegrams. Thus, the requirement that an arbitration agreement be in writing is an expression incapable of strict construction

and requires to be construed liberally, as the words of this Article provide. Even in a given circumstance, it may be possible and permissible to

construe the arbitration agreement with the aid and principle of "incorporation by reference". Though the New York Convention is silent on this

matter, in common practice, the main contractual document may refer to standard terms and conditions or other standard forms and documents

which may contain an arbitration clause and, therefore, these terms would become part of the contract between the parties by reference. The

solution to such issue should be case specific. The relevant considerations to determine incorporation would be the status of parties, usages within

the specific industry, etc. Cases where the main documents explicitly refer to arbitration clause included in standard terms and conditions would be

more easily found in compliance with the formal requirements set out in the Article II of the New York Convention than those cases in which the

main contract simply refers to the application of standard forms without any express reference to the arbitration clause. For instance, under the

American Law, where standard terms and conditions referred to in a purchase order provided that the standard terms would have been attached

to or form part of the purchase order, this was considered to be an incorporation of the arbitration agreement by reference. Even in other

countries, the recommended criterion for incorporation is whether the parties were or should have been aware of the arbitration agreement. If the

Bill of Lading, for example, specifically mentions the arbitration clause in the Charter Party Agreement, it is generally considered sufficient for

incorporation. Two different approaches in its interpretation have been adopted, namely, (a) interpretation of documents approach; and (b) conflict

of laws approach. Under the latter, the Court could apply either its own national law or the law governing the arbitration.

73. In India, the law has been construed more liberally, towards accepting incorporation by reference. In the case of *The Owners and Parties*

*Interested in the Vessel M.V. Baltic Confidence and Another Vs. State of Trading Corporation of India Ltd. and Another*, , the Court was

considering the question as to whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the Bill of Lading and

what the intention of the parties to the Bill of Lading was. The primary document was the Bill of Lading, which, if read in the manner provided in

the incorporation clause thereof, would include the arbitration clause of the Charter Party Agreement. The Court observed that while ascertaining

the intention of the parties, attempt should be made to give meaning and effect to the incorporation clause and not to invalidate or frustrate it by

giving it a literal, pedantic and technical reading.

10. In the instant case, Purchase Order dated 10.04.2009 was subject to the standard terms and conditions which specifically mention regarding

arbitration clause and exhibit intention of the parties to resolve all their disputes through arbitration. Acceptance of the Purchase Order without any

objection makes it clear that the intention of the parties was that the terms and conditions as referred to in the Purchase Order would serve as

binding agreement, without which the Purchase Order would not have been in force.

11. It is also not in dispute that the said terms and conditions were accepted by the plaintiff and the plaintiff acted on the same. In fact, claims of the

plaintiff is based upon the Purchase Order containing the terms and conditions. The plaintiff thus had knowledge of the ""arbitration agreement"" and

is deemed to have given his consent to arbitration agreement. The intention of the parties to refer the dispute to arbitration is thus clearly spelt out.

There is no mandatory requirement that such agreement should bear signatures of both the parties.

12. The plaintiff in his e-mail dated 11.04.2009 specifically requested to send a copy of the SLA and Agreement. E-mail dated 14.04.2009

reveals that Sabnam Khan requested Siddharth Arora to send the terms and conditions of the sale as mentioned to go through and to finalize the

agreement. It cannot be said that the plaintiff was not aware about the terms and conditions on which the Purchase Order was issued.

13. There is specific mention that the terms and conditions were also available on the website of the defendant No. 1. Learned counsel for the

plaintiff urged that there was no such website and terms and conditions were not available. This plea has no merit as no such grievance, at any

stage, was raised to the defendants.

14. Since there is arbitration clause in the terms and conditions incorporated in the Purchase Order, the matter is required to be referred to

arbitration.

15. In the light of above discussion, the application is allowed and the parties are directed to refer the dispute to arbitration in accordance with the

laws of Singapore as stated in the Standard terms and conditions of the contract.

16. The IA stands disposed of accordingly.

CS(OS) 1700/2010

In view of the orders passed in IA No. 2351/2013, the suit stands disposed of.