

NEWSLETTER 6

Deciphering the Assignment of Arbitration Agreements in the Indian Judicial Landscape

The vicissitudes concerning the transfer of arbitration agreements upon the assignment of a principal contract reveal a complicated legal position of the matter. The Indian Contract Act, of 1872 lays down that arbitration agreements are distinct from the principal contract and their transfer to third parties can be enabled vide the mechanism established in Section 37 of the Indian Contract Act, 1872. This process of transferring a contract to a third party is popularly known as “assignment”. However, the problem lies in determining whether such an assignment mandates fresh consent from the parties involved. In the case of *Khardah Company Ltd. Vs. Raymon & Co. (India) Pvt. Ltd.*, the Apex court clarified the position of assignment of rights and liabilities and underscored that novation is said to occur when both rights and liabilities are transferred to a third party. This precedent gave rise to a seminal inquiry on whether upon the novation of a primary contract, the arbitration agreement also undergoes novation and necessitates the fresh consent of the parties involved consequent to the assignment of the contract.

The matter was further complicated by the differing views taken by various jurisdictions. Prominent jurisdictions such as Singapore and Switzerland adopted the Automatic Transfer Approach. The arbitration agreement automatically transfers to the third party once an assignment is made of the principal contract, according to this approach. Explicit consent is not mandatory in such cases. Contrarily, jurisdictions, like Sweden necessitate explicit consent or even specific notice before conceding to the transfer of arbitration agreements. The Indian legal landscape conforms to the said practice. Certain judicial pronouncements, such as the *Delhi Iron and Steel Co. Ltd. Vs. U.P. Electricity Board* uphold the need for specific consent for the assignment of arbitration agreements, other precedents, however, exemplified by the decision in *DLF Power Ltd. Vs. Mangalore Refinery & Petrochemicals Ltd.*, assert that arbitration agreements naturally escort the principal agreement upon assignment, without the need for specific consent.

In the matter of *Rajesh Gupta Vs. Mohit Lata Sunda*, the consensual theory of arbitration was underlined. The consensual theory of arbitration propounds that the conduct of parties post-assignment can be used as an indicator to determine whether the parties have provided implied consent to the assignment of an arbitration agreement. In light of the abovementioned diverse

perspectives, the recent watershed judgement in the case of Cox and Kings Ltd. Vs. SAP India Pvt. Ltd. and Anr. by the Apex court provides some much-needed clarity. The decision has not explicitly addressed the necessity for specific consent, however, the extension of the arbitration agreement to the parties that are not signatories to the agreement, implies a transition towards accepting the assignment of arbitration agreements without explicit consent.

On a concluding note, while the deliberation over the importance of specific consent for the assignment of arbitration agreements remains contested. A practical approach that stresses the overall purpose of arbitral agreements; to resolve disputes arising from the main agreement, seems to accelerate. A solid and comprehensive understanding of the complexities and nuances of the concepts of arbitration is of utmost importance to develop a stronger jurisprudence in the said arena.

Best,

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