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UPDATE

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Enforcement of foreign arbitral awards on non-signatories in light of the Gemini Bay case: The counter and counterpoise

A. The locus

No one sums it up better than Prof. William W. Park in his well-known treatise, Non-Signatories and International Contracts: An Arbitrator's Dilemma[1] , "*the term 'non-signatory' remains useful for what might be called 'less-than-obvious' parties to an arbitration clause: individuals and entities that never put pen to paper, but still should be part of the arbitration under the circumstances of the relevant business relationship…the expression remains potentially misleading, suggesting that a lack of signature in itself reduces the validity of an arbitration agreement. Most significantly, the fact that a 'non-signatory' might be bound to arbitrate does not dispense with the need for an arbitration agreement. Rather, it means only that the agreement takes its binding force through some circumstance other than the formality of signature*".

Yet consent, even implied from circumstances, remains the cornerstone of arbitration, at least by arbitrators who value intellectual rigor and analytic integrity. Similarly, 'joining non-signatories' may mislead by implying that signatures are needed to create commitments to arbitrate, when many developed legal systems recognize unsigned commitments to arbitrate.

Traditionally, joinder of an additional party into arbitral proceedings justifies itself on grounds such as apparent agency, veil-piercing, alter ego, and estoppel and can be sought by either signatories or non-signatories. For arbitrators, motions to join non-signatories create a tension between two principles, first, maintaining arbitration's consensual nature and second, maximizing an award's practical effectiveness by binding related persons. Resolving the tension usually implicates the two doctrines discussed below, namely, implied consent and disregard of corporate personality.

It was held in the International Chamber of Commerce ("**ICC**") arbitral award of Dow Chemical case[2], that, a third party non-signatory to the contract containing the arbitration clause can be obliged to submit to arbitration proceedings if the common intentions of the signing parties demand for such interpretation. This may be the case, in particular, if the non-signatory company has effectively and individually: participated in the conclusion, performance, and termination of the respective contract; appeared as the actual party both to the contract and to the arbitration clause; and has taken or will probably take advantage of such appearance, the so called 'group of companies doctrine'.

[1] Non- Signatories and International Contracts: An Arbitrator's Dilemma, Multiple Parties in International Arbitration, Oxford University Press 2009, pp. 2-7.

[2] ICC Case No. 4131, Y.C.A. Vol. IX (1984), 131 | http://arbitrationblog.kluwerarbitration.com/2014/07/30/when-does-an-arbitration-agreement-have-a-binding-effect-on-non-signatories-the-group-of-companies-doctrine-vs-conflict-of-laws-rules-and-public-policy/.

B. *The exposition: Implied consent and disregard of corporate personality as per Delaware laws in the Gemini Bay case*[3]

In the instant case, DMC Management Consultants ("**DMC**") terminated the contracts with two substantial customers brought to them by Integrated Sales Service Ltd. ("**ISS**"), namely MedQuist Transcriptions Ltd., New Jersey and AssistMed Inc., California (collectively referred to as **"Customers**") and new contracts were subsequently caused to be executed between the said Customers and Gemini Bay Consultants. Contemporaneously, Gemini Bay Transcriptions was established to carry on the operations for the said Customers. Gemini Bay Consultants and Gemini Bay Transcriptions are hereinafter collectively referred to as the "**Gemini Bay entities**".

The fact that the '*very existence of Gemini Bay germinated within the confines of DMC*' and that both companies shared the same employees, address, telephone numbers, e-mail addresses, customers and almost identical contracts with the same customers demonstrates that the transfer of medical business from DMC to the Gemini Bay entities was not a coincidental occurrence. This further illustrates that the use of the corporate forms of DMC and the Gemini Bay entities was a '*facade used to shield or cover-up the unjust result of eliminating ISS*' and orchestrated to deviously evade an otherwise enforceable and valid contract. The Chairman of DMC was found guilty of manipulating and dominating the activities of DMC to contravene the companies' obligations to ISS under the Representation Agreement (the "**Agreement**") by '*using the companies as alter egos of himself* ' and '*ignoring the corporate forms of both DMC Management Consultants…*". The alter ego doctrine was hence, fittingly employed, to pierce the corporate veil, in the instant case, under the Delaware laws, the seat of the arbitration.

The corporate forms of the Gemini Bay entities were disregarded and used as '*continuation corporations*' of DMC to divert funds away from ISS and to elude their contractual obligations. It is also observed that the employees of DMC constituted that of the Gemini Bay entities and worked '*in the same facilities, using the same equipment and managed by the same management team*'. The Chairman of DMC through deliberate machinations '*orchestrated chain of events*' and '*timely actions*' and consequently the Gemini Bay entities effectively '*inherited*' the Customers' business from DMC, to the detriment of ISS. Since this resulted in a deceitful avoidance of payment of commissions, it was but just that the Gemini Bay entities be '*subrogated to DMC*' and '*inherit*' the terms and conditions of the Agreement.

The Gemini Bay entities' '*inheriting*' of the medical transcription business and DMC's purported ramping down of the Customer contracts after their termination, which in fact never took place, and rather continued by the Gemini Bay entities on the same terms and conditions with the Customers, among other things, as discussed above, indicates the subrogation of the Gemini Bay entities to DMC which essentially has the effect of constructively entering into the said Agreement as a party, though not being an actual signatory by putting pen to paper, but through the implied consent and wilful conduct. Hence, the Gemini Bay entities were rightfully indicted as parties to the arbitration proceedings and DMC's breach being imputed to them as per the substantive laws of Delaware, USA.

C. *The Indian arbitration landscape: The Arbitration and Conciliation Act, 1996 ("The 1996 Act")*

A close reading of S 44 of the 1996 Act would show that there are 6 (six) ingredients to an award being a foreign award under the said section, namely: (i) it must be an arbitral award on differences between persons arising out of legal relationships; (ii) these differences may be in contract or outside of contract, for example, in tort; (iii) the legal relationship so spoken of ought to be considered 'commercial' under the law in India; (iv) the award must be made on or after the 11th day of October, 1960; (v) the award must be a New York Convention award i.e., it must be in pursuance of an agreement in writing to which the New York Convention applies and be in one of such territories; and, (vi) it must be made in one of such territories which the Central Government by notification declares to be territories to which the New York Convention applies.

[3] Gemini Bay Transcription Pvt. Ltd. v Integrated Sales Service Ltd. & Ors., AIR 2021 SC 3836.

Also, S 46 of the 1996 Act states, a foreign award is treated as *"binding for all purposes on the persons as between whom it was made…",* whereas the corresponding section for domestic awards under S 35 of the 1996 Act states *"arbitral award shall be final and binding on the parties and persons claiming under them respectively."*

A comparison between S 35 and S 46 of the 1996 Act would show that first and foremost, S 46 does not speak of 'parties' at all, but of 'persons' who may, therefore, be non-signatories to the arbitration agreement. Also, S 35 of the 1996 Act speaks of 'persons' in the context of an arbitral award being final and binding on the 'parties' and 'persons claiming under them', respectively. S 35 would, therefore, refer to only persons claiming under parties and is, therefore, more restrictive in its application than S 46 that speaks of 'persons' without any restriction.

Finally, S 48 of the 1996 Act lays down the provisions for enforcement of the foreign awards and also the discretion of the Indian courts to refuse execution, among other things, through clause (a) of sub-section (1), if the contesting party, i.e., the party against whom the execution is invoked, furnishes to the court proof that, the parties to the agreement were under some incapacity or that the agreement was invalid under the law to which the parties have subjected it.

If read literally, S 48(1)(a) of the 1996 Act speaks only of '*parties to the agreement*' being under some incapacity, or the agreement being invalid under the law to which the parties have subjected it to. There can be no doubt that a non-signatory to the agreement, not being a 'party' alleging that it cannot be bound by an award made under such agreement, is outside the literal construction of S 48(1)(a) of the 1996 Act.

Further, whereas S 44 speaks of an arbitral award on differences between 'persons', S 48(1)(a) of the 1996 Act refers only to the 'parties' to the agreement referred to in S 44(a) of the 1996 Act. Thus, to include non-signatories to the agreement by introducing the word 'person' would run contrary to the express language of S 48(1)(a) of the 1996 Act, when read with S 44 of the 1996 Act.

At the same time, keeping in mind the implied consent and the alter ego contentions, as discussed above, it must not be forgotten that, the grounds under S 48 (1) cannot be expansively interpreted as has been held above. The conditions for refusal to enforce a foreign award set forward in S 48 of the 1996 Act are exhaustive. The scope of refusal to enforce a foreign award by the enforcement court is limited to the grounds alone and does not enable a party to impeach the award on merits in such proceedings, none of which were made out by the Gemini Bay entities. Hence, the appeal for refusing enforcement of the award was dismissed.

D. The counter and counterpoise

Having said so, it is pertinent to note that one of the requirements of a valid foreign award under S 44 of the 1996 Act is that the award should have been made on a written agreement for arbitration in consonance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 ("**NY Convention**"). Article II (2) of the NY Convention states that the phrase '*agreement in writing*' shall include an arbitral clause in a contract, or an arbitration agreement signed by the parties, or contained in the exchange of letters or telegrams. The rationale behind the requirement of a written agreement is found in Article II (2) of the NY Convention to ensure that the parties are aware of the terms of the agreement. The signature is an assurance that both the parties are *ad idem* on the terms of the agreement. To fulfil the pre-requisites of Article II (2) of the NY Convention, the exchange of documents, arbitration agreement or arbitration clause in the contract have to be examined. Previous trading relationships, customs in trade are also relevant criteria for deciding whether the parties are aware of the agreement to arbitrate.[4]

S 48(1)(a) further provides that the court may refuse enforcement of a foreign award if the arbitration agreement referred to in S 44 is invalid under the law governing the arbitration agreement or the law of the seat of the arbitration. If there is no valid arbitration agreement, the resultant award would be invalid. An award made on the basis of an invalid agreement would be a nullity. Lack of jurisdiction goes to the root of the matter and the substantive validity of an agreement must be determined according to the law chosen by the parties, i.e., the arbitration agreement refers to the express choice of law as made by the parties. It is a settled

[4] Di Petro D & Platte M. Enforcement of International Arbitration Awards: The New York Convention of 1958, p. 70.

principle that the parties are at liberty to choose the substantive law governing the arbitration as well as procedural law for governing the conduct of the proceedings. Therefore, the existence of a valid arbitration agreement or arbitration clause, in writing, appears to be most essential in invoking a foreign award against a person or party, as the case may be.

However, one may enquire in the instant case on, whether the words '*in pursuance of*' in the phrase '*in pursuance of an agreement in writing*' under S 44 of the 1996 Act, contemplates that the subject matter of the disagreement that is arbitrated must be 'in consequence of', 'in connection with', 'in relation to', 'in respect of' or 'have regard to' a separate arbitration agreement between the non-signatory, i.e., the Gemini Bay entities and ISS, or the said Agreement between the original parties would suffice given the 'group of companies' doctrine. Simply put, 'in pursuance of' ordinarily is understood as a guide and not a fetter. They only oblige the authority to consider as relevant data material to which it must have regard to. When some statutory requirements are to be met 'in pursuance to' certain specified provisions it only means that those matters must be taken into consideration, constructively or otherwise.

Furthermore, a question is also posed whether it is deemed that an extant agreement was already in place owing to an implied consent and conduct of the Gemini Bay entities and the subsequent application of alter ego doctrine to pierce the corporate veil, given that, the Gemini Bay entities were essentially an 'alter ego' of DMC, the actual signatory to the said Agreement, where the former's corporate personality was consequentially disregarded. Hence, the Gemini Bay entities and the signatory, i.e., DMC were one and the same, thus '*the agreement takes its binding force through some circumstance other than the formality of signature'*.

It is pertinent to note here that, the application of alter ego doctrine to pierce the corporate veil was as per the substantive laws of Delaware, hence, the question arises as to whether, the Indian court enforcing such award, without re-appreciating the facts, would require to look into the basic notions necessary for the application of the 'alter ego' and 'group of companies' doctrine, as per the fundamental policy of Indian laws, before enforcing the award on a non-signatory.

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