‘TO IMPLEAD OR NOT-TO-IMPLEAD’ – NON-SIGNATORIES TO AN ARBITRATION AGREEMENT

- ***Shashank Garg & Kanika Singh*** [*]

ABSTRACT

Arbitration is premised on the fundamental principle of party autonomy and consent. This principle implies that only the parties to the arbitration agreement can be made a party in an arbitration proceeding. Consent of the parties is of paramount value in arbitration and is one of the foremost reasons for its popularity across the globe. However complications arise where the effective and proper adjudication of dispute cannot be undertaken by the Arbitral Tribunal or the Court without impleading necessary third-party to the case. This logic of adjudication locks horns with the principle of consensual nature of arbitration. Can a third party, which has not consented to the arbitration, be made a party to such arbitration by the Tribunal or Courts? Or in simpler words, can a non-signatory to the arbitration agreement be impleaded as a party to the arbitration in the absence of express consent? The article seeks to contemplate the position of Indian Arbitration Law on the said issue by analysing several doctrines adopted by the Courts such as ‘implied consent theory’, ‘alter-ego doctrine’ and ‘group of companies doctrine’ in various case laws. Furthermore, the article also reflects on the global trend around issue by understanding the positions of UK, Singapore and Germany Laws. While uncertainties still looms over the impleadment of non-signatories to the arbitration, the article attempts to provide much needed clarity on the subject-matter.

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"Like consummated romance, arbitration rests on consent"[1]

Party autonomy and minimal intervention by the supervisory court are the fundamental factors for arbitration being a favoured mechanism of alternate dispute resolution for parties. This autonomy is derived from the consent of the parties which is paramount in any arbitration agreement. The consent expressed in an arbitration agreement binds the parties to the contract.

This principle of consent finds prominence as a *sine qua non* in virtually all conventions, model laws, and enactments on arbitration, be it Article II of the New York Convention, Section 7 of the UNCITRAL Model Law or closer to home, in India, Section 7 of the Arbitration & Conciliation Act, 1996 **['The Act'].**

Section 7 of the Act recognises the many forms which written consent can take – a clause in an agreement, a separate agreement, an exchange of letters or correspondence, an exchange of pleadings, even incorporation by reference to an arbitration clause contained in another contract.[2] With all these different expressions of consent, what remains essential is the element of conscious choice which ultimately binds a party to the arbitration agreement.

Given much fanfare around the concept of consent in arbitration, a lot of jurists, scholars and practitioners of arbitration law have elucidated the juxtaposition between the emphasis on consent and the more practical concerns of reconciling the concept of consent in complex disputes involving non-signatories to the arbitration agreement, where proper logical adjudication of disputes would require the impleading of non-signatories to an arbitration agreement.

From an arbitrator's perspective, motions to join non-signatories create a tension between two principles: (i) maintaining consensual nature of the process, and (ii) maximizing an award's practical effectiveness by binding the necessary parties. Pushed to the limit of their logic, each goal points in the opposite direction.[3]

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[1] William W. Park, *Non-signatories and International Contracts: An Arbitrator's Dilemma*, in Multiple Party Actions In International Arbitration 1 (2009).

[2] *See* Justice Indu Malhotra, Commentary on the Law of Arbitration, 2020 (Wolters Kluwer).

[3] *Id.*

To resolve this tension, courts have enumerated several theories to allow impleading non-signatories to an arbitration agreement when necessary. However, these theories often overlap. Elements from more than one theory may be pressed into service by a Court while referring non-parties to arbitration. Some of these theories dealing with non-signatories to an arbitration agreement have been discussed below:

(i) Implied Consent Theory

The first theory is that of implied consent and it generally covers third party beneficiaries, guarantors, assignees and other transfer mechanisms of contractual rights where implied consent of the party being bound can be inferred. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle and has been held to apply to both private as well as public legal entities[4] and as the name suggests, is a consensual theory.

The theory of implied consent by its very nature is fact-specific and has a history of hits and misses when pressed into service by enterprising counsels before the Courts in India. In *S.N. Prasad v. Monnet Finance*[5], the Indian Supreme Court held that a co-guarantor who was not a party to the arbitration agreement could not be made a party to the arbitration merely because it had been impleaded as a party in the Section 11 petition. However, more recently in the judgment of *MTNL v. Canara Bank*[6], the Indian Supreme Court accepted the implied consent theory to implead a non-signatory to the arbitration as it participated in various proceedings as a party leading up to reference of disputes to arbitration.

(ii) Alter-ego Doctrine

This doctrine has its underpinnings on principal-agent relations, apparent authority, piercing of veil (also called the "alter-ego"), joint venture relations, succession, and estoppel. The doctrine does not rely on the parties' intention but rather on the force of the applicable law and/or principles of equity and for this reason, has been described as a "non-consensual" doctrine.[7]

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[4] Paragraph 100 in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification In [*(2013) 1 SCC 641]

[5] (2011) 1 SCC 320

[6] (2019) 10 SCC 32

[7] *Supra* note 5

The essence of the alter-ego doctrine is that "one party so strongly dominates the affairs of another party, and has sufficiently misused such control, that it is appropriate to disregard the two companies' separate legal forms, and to treat them as a single entity".[8]

However, Courts and Tribunals have adopted a restrictive approach when it comes to applying this doctrine. Reasons for this, particularly in the context of arbitration agreements, are threefold:

i. *First*, as a general rule, only signatories are bound to arbitration agreements[9];

ii. *Second*, consent to arbitrate is not presumed[10]; and,

iii. *Third* and most importantly, because limited liability must retain the norm.[11]

An example of the restrictive approach is the judgment of the Indian Supreme Court in *Indowind Energy Limited v. Wescare (India) Limited*,**[12]** where the Court ruled that merely because two separate companies had common shareholders or a common Board of Directors would not make them a single entity and refused to refer a non-signatory to arbitration.

More recently, the Delhi High Court in *Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd. & Anr.,*[13] was faced with the issue of compelling a non-signatory subsidiary to arbitration. While detailing the three doctrines used to compel a non-signatory to arbitrate, the Court relied upon the alter-ego doctrine since the subsidiary in question (Respondent No. 2) was found to be a wholly-owned subsidiary of Respondent No. 1 and was therefore deemed to be the latter's alter-ego. The Court thereafter confirmed that Respondent No. 2, despite being a non-signatory to the arbitration agreement, would be compelled to arbitrate.

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[8] Gary B. Born, International Commercial Arbitration at 1432 (2014).

[9] Paras 15 and 16, *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Ors*., (2003) 5 SCC 351

[10] Bernard Hanotiau, *Consent ot Arbitration: Do we Share a Common Vision?*, ARBITRATION INTERNATIONAL, Vol. 27(4), December 2011 at 539.

[11] Juan Marcos Otazu, *The Law Applicable to Veil Piercing in International Arbitration*, 5(2) Mcgill Journal Of Dispute Resolution 33, 37 (2018).

[12] (2010) 5 SCC 306

[13] Arb. P. 716/2019 delivered on April 07, 2021.

(iii) Group of Companies Doctrine

This doctrine has found gradual acceptance across both common law and civil law[14] jurisdictions and was first enunciated and recognized in the interim award in *Dow Chemical v. Isover Saint Gobain*[15]. This doctrine provides that an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. It was first recognised by the Indian Supreme Court in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*[16] wherein the Court clarified certain pre-conditions which were required to attract the said doctrine:

i. Direct relation to the party signatory to the arbitration agreement.

ii. The direct commonality of the subject matter.

iii. The transaction must be composite.

Most recent applications of this doctrine can be witnessed through the Indian Supreme Court judgements in *Ameet Lalchand Shah v. Rishabh Enterprises*[17] and *MTNL v. Canara Bank.*

The Delhi High Court in *Magic Eye Developers Pvt. Ltd. v. Green Edge Infra Pvt. Ltd. and Ors.*[18], invoked the group of companies doctrine to decide that 2 respondents which belonged to the same family as respondent no. 1 could be compelled to arbitrate despite not being signatories to the arbitration agreement.

With zeal to pinpoint the sanctity of this doctrine, the Courts have ruled in favour of extending references to all the non-signatories of an arbitration agreement contingent upon the '*Dow Chemical*' thresholds being fulfilled. Moreover, extending the scope of principles laid down in *Chloro Controls* (supra) from international arbitrations to domestic arbitrations, the Courts have

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[14] *See* Kirstin Schwedt, *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*, Kluwer Arbitration Blog, July 30, 2014.

[15] ICC Award No. 4131, YCA 1984, at 131 et seq.

[16] (2013) 1 SCC 641

[17] (2018) 15 SCC 678

[18] C.S. (Comm) 1290/2018 judgment delivered on May 21, 2020.

broadened their approach. Facts must be assessed on a case-to-case basis and thereafter the doctrine must be applied (not applied) since a contrary approach might bind non-signatories whom the concerned parties never intended to be bound by the agreement.

RESTRICTIVE APPROACH OF U.K. & SINGAPORE

(i) Position in the U.K.

The United Kingdom has always had a very strict and limited approach concerning implied consent warranting impleadment of non-signatories into arbitration. Initially, in *Arsanovia Ltd. & Ors v. Cruz City 1 Mauritius Holding*[19], the Court held that *"English law requires that an intention to enter into an arbitration clause must be clearly shown and is not readily inferred."* This position was cemented in the U.K. Supreme Court's decision in *Dallah Real Estate and Tourism Holding Co. v. Pakistan*[20] where the Court elevated the threshold required for impleadment to the 'test of common intention'[21] taking a cue from a 1990 decision of a French Court[22].

Any attempt to implead using the '*group of companies'* doctrines would fail since English Courts have rejected the group of companies doctrine by clearly stating that it does not form part of English Law. This position developed over time, beginning with the High Court of England & Wales' decision in the enforcement proceedings in *Peterson Farms Inc. v. C&M Farming Ltd.*[23].

Much recently, the Court of Appeal for England & Wales in *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)*[24] delivered its judgment on 'no-oral modification' (NOM) clauses[25] and their impact on non-signatories to an arbitration agreement. The Court while restating the English position on non-enforceability of NOM clauses[26], reiterated that the non-signatories may

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[19] [2012] EWHC 3702 (Comm)

[20] [2010] UKSC 46 [10] (Eng.)

[21] *See Municipalité de Khoms El Mergeb v. Dalico* [1994] 1 Rev Arb 116

[22] [1992] JurFr 95

[23] [2004] 1 Lloyd's Rep 603

[24] [2020] EWCA Civ 6

[25] NOM Clauses are clauses in a contract which do not allow for the modification of that contract unless that modification is made in writing.

[26] *Rock Advertising v MWB Business Exchange*, [2018] UKSC 24

be bound to a contract with NOM clauses only if they were estopped. This is a further reflection on England's narrow approach to impleadment of non-signatories.

(ii) Position in Singapore

The position in Singapore has been very similar to the English position, except it has preferred to leave the question of impleadment of non-signatories open to arbitral tribunals to decide in the facts of the case. Concerning the application of the 'alter-ego' doctrine, the Singapore High Court in *Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd and another*[27] left it to the arbitral tribunal to decide whether a 'person is an alter ego of a company' deeming that 'such an issue can in an appropriate case be decided by arbitration.' This demonstrates Singapore's arbitration-friendly approach.

This decision was followed by the High Court's decision in *The Titan Unity (No. 2)*[28] where the Court confirmed that a non-signatory could be joined to arbitration only with the consent of all concerned parties and that the arbitral tribunal must decide.

When it comes to the position of law in Singapore concerning using the 'group of companies' doctrine to implead non-signatories to an arbitration agreement in an arbitration, the Singapore High Court laid down the law in *Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pvt. Ltd.*[29] relying on *Peterson Farms* (supra), holding that the 'group of companies' doctrine (similar to the 'single economic entity' doctrine[30]), had no place in common law jurisdictions of England and Singapore and hence, could not bind a non-party who did not consent to arbitration.

(iii) Position in Germany

The German Federal Supreme Court also dealt with the proposition of joining a non-signatory to arbitration in 2014.[31] The case involved a Danish Claimant and an Indian Respondent. The Claimant had invoked proceedings against the Respondent in the German lower court to which,

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[27] [2006] 3 SLR(R) 174

[28] [2014] SGHCR 4

[29] [2014] SGHC 181

[30] Competition law doctrine which states that "irrespective of the legal status of two or more enterprises can be said to form a single entity for the purposes of competition law".

[31] Case Reference No. III ZR 371/12

the Respondent had objected stating that the matter before the court was subject of an arbitration agreement contained in a license contract between a Mauritius based company and the Respondent's legal predecessor. The Mauritius based company and the Danish Claimant company had the same Managing Director/sole shareholder. Hence, it was the case of the Respondent that even the Danish Claimant Company would be bound by that same arbitration agreement and the proceedings before the Court were not maintainable (Respondent asserted that the license contract empowered the Respondent's legal predecessor to use designs subject to the Managing Director's patent).

The German regional court however, dismissed the Respondent's objection. The Respondent thereafter approached the Higher Regional Court of Braunschweig, however, the appeal too was dismissed as the Claimant was deemed not to be bound by the arbitration agreement. The Court further held that the 'group of companies doctrine' violated the public policy of Germany and was not recognized as per the law of Denmark.

Respondent further appealed to the German Federal Supreme Court which took a different view. It remitted the case back to the lower court for a proper adjudication since in the view of the Federal Supreme Court, the lower court had not determined all facts necessary to render a final judgment. It directed the court to also determine the law applicable to the question whether a third party is bound by an arbitration agreement and whether such an interpretation would be against the German public policy?[32]

The Court did not follow principles of international law in answering the question but instead, resorted to determining the national law applicable and thereafter the conflict of laws rule. In determining the law applicable to the arbitration agreement, it held that the law of the seat would be applicable (where there was nothing on the contrary) and hence, the Indian law would be the law governing the arbitration agreement. Hence, the question would be determined by the Indian law.

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[32] Kirstin Schwedt, *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*, Kluwer Arbitration Blog, July 30, 2014. Accessible at: 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/

Thereafter, the Supreme Court indulged in the second part of the enquiry, i.e., whether invoking the 'group of companies' doctrine in the present case would be against the German public policy? On this, the Supreme Court held that the Higher Regional Court's ruling on this point did not take into account the special circumstances of the case, i.e., that the Managing Director was not only the assignor of the claim but was also involved in the conclusion of the arbitration agreement. The Supreme Court further clarified that although the German Civil Code (Article 6) provides that foreign laws are not applicable whose application leads to a result which is against the German public policy, the correct approach in such cases would be to first identify the applicable national law (foreign law) and apply it to the facts of the case and only if upon an application of the law to the facts the result is in violation of the public policy, should the foreign law be refused to be applied.[33]

CONCLUSION

Indian Courts have taken a capacious method of referring non-signatories to arbitration, unlike UK and Singapore. However, the German approach is practical and takes a true pro-arbitration approach as it treats such cases granularly, without larger restraints.

Despite India's expansive approach to this issue, a major issue remains unaddressed - Can arbitrators refer non-signatories to arbitration? Arguably, only courts may press these doctrines into service, as the Delhi High Court held in the Delhi High Court in *Sudhir Gopi v. IGNOU*[34]. It remains to be seen whether the Supreme Court extends this power to the arbitral tribunals or keeps it confined to the supervisory courts.

Thus, in the view of the author, while it is significant that Courts in India have impleaded non-signatories to arbitration intending to ensure effective adjudication of the dispute at hand by placing reliance on several doctrines, what is of critical importance is that the approach of the court to let a non-signatory be added to an Arbitration must be kept limited to very special circumstances and more so in the case where such non-signatory does not consent/refuses to consent for arbitration, post the disputes have arisen.

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[33] *See generally* supra note 24

[34] (2017) 2 KLJ (NOC 8) 11