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NPAC's Arbitration Review: A convenient argument of forum non conveniens rejected by Delhi HC, Parties referred to arbitration instead!

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Continuing the trend of arbitration-friendly rulings, the Delhi High Court, recently in *Jes & Ben Groupo Pvt Ltd & Ors v. Hell Energy Magyarorzag Kft (Hell Energy Hungary Ltd) & Anr* referred the parties to arbitration before the Hungarian Chamber of Commerce, Budapest and dismissed the civil suit filed to wriggle out of the arbitration.

Factual Background:

The Plaintiff No 1 and Defendant No 1 entered into an Exclusive Distribution Agreement (**Distribution Agreement**), granting exclusive distribution rights to Plaintiff No 1 in respect of the product Hell Energy (an Energy Drink). Due to failure to fulfill 75% of the annual order volume, Defendant No 1 terminated the Distribution Agreement. Aggrieved by the termination, the Plaintiffs filed a civil suit for injunction, cancellation, declaration, reconciliation/ rendition of accounts and damages. Relying on the arbitration clause in the Distribution Agreement, the Defendants filed an application under Section 45 of the Arbitration and Conciliation Act, 1996 (**Act**) objecting to the maintainability of the suit and sought a referral to arbitration. Section 45 of the Act confers powers on a judicial authority to refer parties to arbitration unless the agreement is found to be null and void, inoperative, or incapable of being performed.

Decision of the Delhi High Court:

The Delhi High Court ruled that: (a) the scope of power under Section 45 of the Act requires the Court to take a prima facie view of the matter on the basis of material and evidence produced by the parties on record. (b) forum non conveniens cannot make a subject matter non-arbitrable or incapable of being performed; (c) when both parties have the expertise and the contract is a commercial transaction, the plea of unequal bargaining power cannot be raised to avoid arbitration; (d) the parties cannot be allowed to wriggle out of an arbitration by cleverly drafting the plaint and impleading non-signatories to the arbitration agreement in the civil suit; (e) the allegations on malpractices and predatory practices are questions of disputed facts and within the scope of adjudication by the Arbitral Tribunal, and do not prima facie render the arbitration agreement null and void; (f) although allegations of fraud and malpractice was contended to confer jurisdiction on the civil court, and wriggle out of arbitration, but a review of the plaint does not disclose any allegations of fraud, much less serious fraud; (g) where the parties have expressly entered into an agreement referring any dispute to arbitration, the same cannot be held to be contrary to public policy.

Analysis:

This appears to be a well-reasoned ruling by the Delhi High Court. Some of the important aspects of the ruling have been discussed below:

Scope of enquiry under Section 45 of the Act:

The Delhi High Court relied on the decision of the Supreme Court in *Shin-Etsu Chemical Co. Ltd v. Aksh Optifibre Ltd and Anr* (2005) 7 SCC 234, where it was held that at the pre-reference stage, the court should draw a prima facie finding as to the validity of the arbitration agreement and refer the parties to arbitration. The Delhi High Court also referred to the ruling of the Supreme Court in *Sasan Power Ltd v. North American Coal Corpn (India) (P) Ltd.* (2016) 10 SCC 813, where it was observed that the scope of enquiry under Section 45 is only confined to whether the arbitration agreement is void, inoperative or incapable of being performed, but not the legality and validity of the substantive contract. Relying on the above decisions, the Delhi High Court upheld the arbitration clause in the Distribution Agreement and directed the parties to arbitration.

Forum Non Conveniens cannot bar arbitration:

The Delhi High Court relied on the decision of the Supreme Court in *Harmony Innovations Shipping Ltd v. Gupta Coal Indian Ltd and Ors*, AIR 2015 SC 1504 and negated the objection of the Plaintiff. Indeed, forum non conveniens such as financial prejudice or geographical location cannot be contended to come out of a contractually agreed mechanism of dispute resolution. In fact, the Supreme Court in *Modi Entertainment Network & Anr vs W.S.G. Cricket Pte. Ltd*, while ruling on the jurisdiction of the court, had opined that a party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the

jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.

Impleading Non-Signatories to the arbitration:

Although the Delhi High Court held that the non-signatories impleaded in the civil suit are not necessary parties, as the dispute related to the termination of the Distribution Agreement, the law on impleadment of non-signatories to the arbitration is well settled. It is not enough for a party to implead non-signatories and wriggle out of an arbitration. The Supreme Court in *Chloro Control* has held that the legal bases to bind *alter ego* to an arbitration agreement are implied consent, third party beneficiary, guarantors, assignment or another transfer mechanism of control rights, apparent authority, piercing of the corporate veil, agent principle relationship etc. Subsequently, in *Cherian Properties Limited v. Kasturi and Sons Limited and Ors*, the Supreme Court has held that the effort should be to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone which is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory. Similar findings have been arrived at by the Supreme Court in *Purple Medical Solutions Private Limited v. MIV Therapeutics Inc and Anr* and Delhi High Court in *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors* as well.

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