MULTIPLE ARBITRATIONS ARISING FROM A SINGLE AGREEMENT: PERHAPS UNDESIRABLE, BUT CERTAINLY LAWFUL? – CRITIQUING THE GAMMON RULING

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This is a case comment on a judgment passed by the Delhi High Court on 23.06.2020 in Gammon India Ltd. v National Highways Authority of India. Vide this judgment, the High Court, inter alia, had held that parties should not be given the freedom to raise multiple claims out of the same contract at their convenience and that if certain claims are not raised at the time of first reference to arbitration, then, such claims shall be deemed to be forfeited. The High Court further held that it would be opposed to public policy to permit parties to raise claims as per their convenience. This judgment is bound to create issues with respect to the concept of party autonomy in arbitration agreements as well as creating further uncertainty in relation to the enforcement regime in India. The possible ramifications of this judgment have been discussed in this case comment.

Keywords: *Gammon India, Dolphin Drilling, Party Autonomy, Enforcement of awards.*

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I. INTRODUCTION

Arbitration clauses are usually drafted in a manner that enables parties to raise claims at their convenience based on commercial imperatives. This *inter alia* allows the parties the liberty to, cherry-pick the 'stronger' claims and submit them first for arbitration, before making a second reference for arbitration before another tribunal in respect of the remaining 'weaker' claims. Such a strategy may also be adopted by the parties if a specialised tribunal (consisting of subject matter experts) is deemed necessary for adjudication of certain claims. In such scenarios, the parties could end up constituting multiple arbitral tribunals to arbitrate disputes arising out of a single contract / the same set of contracts.

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Multiple arbitral proceedings arising from the same contract are often considered to be undesirable due to reasons such as increase in administrative and legal / arbitral costs, added complexities to the dispute resolution process (such as if different tribunals give contradictory findings), and being the cause of undue delays.[1] While such multiple proceedings have traditionally been considered lawful in India, recently a judgment passed by the Delhi High Court[2] has examined the legality and desirability of such multiple arbitrations, which may have wider ramifications on the Indian arbitration framework. The present comment shall offer a critique of this judgment.

II. THE GAMMON CASE

In the *Dolphin Drilling v. ONGC* case (2010) ("Dolphin Case"),[3] the Indian Supreme Court, while allowing a second reference to arbitration on the ground that the contract permitted it, took notice of the financial burden resulting from multiple arbitrations arising out of a single contract. Here, the Court observed that parties may choose to draft future agreements in a manner indicating that the recourse to arbitration can be taken only once.[4]

However, in the *Gammon India v. NHAI* ruling (2020), the Delhi High Court,[5]relying on the above observations of the Supreme Court, held that it was against public policy to allow parties to raise multiple arbitral claims as per their convenience ("Gammon Case").[6] The High Court, drawing parallels from the provisions of the Code of Civil Procedure, 1908, ("CPC"), also held that claims not raised during the first arbitral reference should be regarded as waived by the parties, and therefore barred.[7] It was however clarified that if the parties could establish the existence of "*legally sustainable grounds*" to raise claims subsequently, then such claims could be allowed.[8] There was also no bar placed on the parties' ability to raise claims which arise after the first arbitration reference.[9] This ruling will be binding on arbitrations seated in New Delhi, while courts and tribunals across the country may rely on it for persuasive value.

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[1]The author writes from his professional experiences. Please also see observations at para 27 of *Gammon India Ltd. v National Highways Authority of India* (OMP 680/2011 (New No. O.M.P. (COMM)392/2020) & I.A. 11671/2018), decided on 23.06.2020 by the High Court of Delhi ("Gammon Case").

[2]Gammon Case.

[3]*Dolphin Drilling Ltd. v Oil& Natural Gas Corporation Ltd.* AIR 2010 SC 1296 ("Dolphin Case").

[4]ibid.

[5]Gammon Case. The High Court was dealing with a peculiar situation where there were three arbitral awards rendered by three separate tribunals constituted by the parties to arbitrate claims arising out of a single contract.While the first and third award had attained finality after a series of litigations, the High Court was now seized of the challenge to the second award. The issue before the Court was whether it was permissible for the contractor to rely on the findings in the third award to argue that the second award ought to be set aside. On this point, the Court held that each award would have to be tested on its own merits, and not on the basis of subsequent findings which may have been rendered by a later arbitral tribunal.

[6]Gammon Case, Paras 32-34.

[7]Ibid.

[8]Ibid. It is not clear as to what constitutes 'legally sustainable grounds'. The author deals with this point in the subsequent sections of the present comment.

[9]Ibid.

III. PROBLEMS ARISING FROM THE GAMMON CASE

A. CONCERNS REGARDING INFRINGEMENT OF PARTY AUTONOMY

A direct consequence of the *Gammon* case is likely to be that, irrespective of business considerations, parties opting for Indian substantive law, may now be reluctant to execute arbitration agreements with the option to raise claims as per their convenience, lest such agreements be deemed to be void as being opposed to public policy, in terms of Section 23 of the Indian Contract Act, 1872.It also raises questions over whether under existing agreements, parties would be mandatorily required to refer all their claims at one go for arbitration, even if the contract does not compel them to do so.

Thus, the ruling in *Gammon* effectively seeks to put fetters on party autonomy, which has been widely accepted to be the cornerstone of the arbitration process.[10] In fact, the provisions of the Indian Arbitration Act and Conciliation Act, 1996 ("Arbitration Act")[11] specifically recognise this principle and provide the parties to a contract the liberty to refer claims for arbitration as per their convenience. The High Court, too, in the *Gammon* case, has acknowledged that there is no legal impediment in this regard,[12]which makes the final decision even more absurd.

B. CREATING UNCERTAINTY WITH RESPECT TO ENFORCEMENT REGIME

The *Gammon* ruling also raises concerns relating to the enforcement landscape in India. By deeming the right of parties to raise multiple claims as per their convenience, as being contrary to 'public policy', it is now unclear as to whether the High Court implied that the awards, which are passed by arbitral tribunals on such 'subsequent claims', are now entitled to be set aside on the ground of being opposed to public policy, in terms of the Arbitration Act. Sections 34 and 48 of the Arbitration Act allow courts to set aside domestic and foreign arbitral awards respectively, on the ground that the award was against public policy of India. There is still no concrete definition of what constitutes public policy under the Arbitration Act. Through several judgments, the concept of public policy has evolved over time.[13] The

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[10]*Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.* (2017) 2 SCC 228, paras 28-29, 38, 42; *State Trading Corporation of India v Jindal Steel and Power Limited and Ors* (Civil Appeal No 2747 of 2020), para 8.

[11]Arbitration Act and Conciliation Act 1996 (India), ss 7-8.

[12] The High Court observed as under:

> *"24. A perusal of the provisions of the Arbitration and Conciliation Act, 1996 shows that the statute envisages that disputes can be raised at different stages and there can be multiple arbitrations in respect of a single contract.*
>
> *...*
>
> *Under Sec. 7 the agreement to arbitrate could be for `all or certain disputes which have arisen or which may arise'. Under Sec.8 if a particular proceeding is pending in court and there is a lis as whether a particular dispute is arbitrable, for other disputes, arbitration can be commenced or continued and even the award can be made. This means that, if the court, thereafter comes to the conclusion that the dispute is arbitrable, after the first reference is either pending or concluded, a second reference can be made. The commencement of proceedings under Section 21 is to be construed in respect of a particular dispute. Thus, if there are multiple disputes which have been raised at different times, the commencement of proceedings would be different qua each of the disputes. All these provisions show that there can be multiple claims and multiple references at multiple stages."*

[13]Vyapak Desai et al., *Public Policy and Arbitrability Challenges to the Enforcement of Foreign Awards in India, in Enforcing Arbitral Awards in India* (Nakul Dewan ed., 2017) 201; *Renusagar Power Co Ltd v General Electric Co* AIR 1994 SC 860; *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49, *Shri Lal Mahal Ltd. v Progetto Grano Spa* (2014) 2 SCC 433, *Oil & Natural Gas Corporation Ltd. v Western Geco*

Gammon ruling has gone beyond the contours of existing understanding of 'public policy', making the grounds for enforcement of both foreign and domestic awards even more uncertain. Moreover, this may impact the arbitration-friendly perception of India if, based on this ruling, courts start entertaining challenges to arbitral awards simply because the claims were not raised at the time of the first arbitration reference.

C. INCORRECT INTERPRETATION OF THE DOLPHIN CASE

Further, the High Court's reliance on the *Dolphin* case is misplaced primarily due to three reasons. *First,* the Dolphin Case did not have any precedential value. It was a single-judge decision issued on an application to appoint an arbitrator under Section 11 of the Arbitration Act. Prior to 2015, Section 11 of the Arbitration Act vested the power to appoint an arbitrator with the 'Chief Justice or his delegate' and not with the 'court'.[14]In this regard, in2014, a three-judge bench of the Supreme Court[15] held as under:

> "*It is obvious that Section 11 applications are not to be moved before the "court" as defined but before the Chief Justice either of the High Court or of the Supreme Court, as the case may be, or their delegates. This is despite the fact that the Chief Justice or his delegate have now to decide judicially and not administratively.*
>
> …
>
> *The decision of the Chief Justice or his designate, not being the decision of the Supreme Court or the High Court, as the case may be, has no precedential value being a decision of a judicial authority which is not a Court of Record*."

The above judgment makes it clear that the decisions rendered under Section 11 of the Arbitration Act, prior to 2015, would not have any precedential value. Given that the *Dolphin* ruling was rendered in 2010 on an application under Section 11 of the Arbitration Act, it would not have any binding value. Thus, contrary to the Delhi High Court's suggestion, the decision in the Dolphin Case was not binding on any other court.

Second, the Supreme Court in the Dolphin Case observed that "*in future agreements, the arbitration clause <u>can</u> be recast, making it clear that recourse to arbitration can be taken only once*", when the contract concludes or terminates, subject to the law of limitation.[16]The use of the word 'can' (instead of 'must' or 'shall') order implies that the Court's observations ought to be read as a mere suggestion for drafting clauses to safeguard against the inefficiencies of multiple arbitrations from a single contract, rather than as a blanket ban on permitting parties to raise claims as per their convenience. Further, it should be stressed that nowhere in the Order did the Supreme Court impose any such prohibition on the parties. In fact, it permitted the second reference to arbitration, on the ground that the contract allowed it.

In view of the above, it appears that the High Court incorrectly ruled that the ratio of the *Dolphin* Case is that parties are now barred from raising claims as per their convenience.

International Ltd. (2014) 9 SCC 263, *Vijay Karia. v Prysmian Cavi E Sistemi SRL* (2020) SCCOnline SC 177, *NAFED v Alimenta SA*, (2020) SCC OnLine SC 381.

[14]Subsequently, in 2015, the Arbitration Act was amended to indicate that an application under Section 11 of the Act would be filed before the 'court', as defined under the Arbitration Act.

[15]*State of WB v Associated Contractors*, (2015) 1 SCC 32.

[16]Dolphin Case, para 7.

D. THE ARBITRAL TRIBUNALS ARE NOT BOUND BY THE CPC

Additionally, the High Court extensively referred to the provisions of the CPC (particularly Order II Rule 2), which provide that the parties should raise all claims before a civil court at one go, and if some claims are not raised, those shall be considered to have been relinquished. It is astonishing that while the High Court noted that the CPC provisions "do not strictly apply to arbitral proceedings"[17], it eventually held that the Supreme Court's observations in the *Dolphin* Case clearly show that similar principles also apply to arbitrations.[18] This evidently makes the ruling very unclear and bereft of adequate reasoning.

At the outset, it would be appropriate to clarify that the Supreme Court does not even refer to the CPC, so it is very presumptive to suggest that the observations in the *Dolphin* Case imply that such principles ought to apply to arbitral proceedings. Further, the Arbitration Act explicitly provides that the rules of the CPC are not binding on an arbitral tribunal, subject to consent of the parties.[19]Moreover, it is well-settled that a general law cannot prevail over a special law.[20]Thus, the CPC, being a general procedural law applicable for all court proceedings[21], cannot supersede the provisions of the Arbitration Act, which is a special law governing alternate dispute resolution forums.[22] Given that the Arbitration Act specifically

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[17]Gammon Case, Para 33.

[18] The High Court in the Gammon Case observed as under:

"In Dolphin Drilling Ltd. v ONGC, the Supreme Court, while considering the question as to whether a second reference for arbitration ought to be made, observed as under:

> *"5.The plea raised by the respondent voices a real problem. It is unfortunate that arbitration in this country has proved to be a highly expensive and time consuming means for resolution of disputes. But on that basis it is difficult to read the arbitration clause in the agreement as suggested by the respondent. ...*
> *6. The plea of the respondent is based on the words "all disputes" occurring in paragraph 28.3 of the agreement. Mr. Agrawal submitted that those two words must be understood to mean "all disputes under the agreement" that might arise between the parties throughout the period of its subsistence. However, he had no answer as to what would happen to such disputes that might arise in the earlier period of the contract and get barred by limitation till the time comes to refer "all disputes" at the conclusion of the contract. The words "all disputes" in Clause 28.3 of the agreement can only mean "all disputes" that might be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. In its present form Clause 28 of the agreement cannot be said to be a one-time measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future."*

...

The underlying ratio of Dolphin (supra), on a careful reading, is that all disputes that are in existence when the arbitration clause is invoked, ought to be raised and referred at one go. Though there is no doubt that multiple arbitrations are permissible, it would be completely contrary to public policy to permit parties to raise claims as per their own convenience. While provisions of the CPC do not strictly apply to arbitral proceedings, the observations of the Supreme Court in Dolphin (supra) show that when an arbitration clause is invoked, all disputes which exist at the time of invocation ought to be referred and adjudicated together.

...

34. The observations of the Supreme Court in Dolphin (supra) also clearly show that principles akin to Order II Rule 2 CPC also apply to arbitral proceedings."

[19]Arbitration Act 1996 (India), s 19.

[20]*Sarwan Singh &Anr. v Kasturi Lal* (1977) 1 SCC 750, paras 20-21; *Solidaire India Ltd. v Fairgrowth Financial Services Ltd &Ors* (2001) 3 SCC 71, paras 7-11; *Allahabad Bank v Canara Bank* AIR 2000 SC 1535 paras 38-40; and *Maharasthra Tubes v State Industrial and Investment Corporation of Maharasthra Ltd.* (1993) 2 SCC 144, paras 7 & 9.

[21]*UP RashtriyaChini Mill Adhikari Parishad v State of UP,* (1995) 4 SCC 738, para 10; *Jagdish Kumar v State of HP* (2005) 13 SCC 606, para 10; *PS Sathappan v Andhra Bank Ltd*, (2004) 11 SCC 672, para 32.

[22]*Union of India v Popular Construction Co*, (2001) 8 SCC 470, para 7; *Consolidated Engg Enterprises v Irrigation Deptt*, (2008) 7 SCC 169, paras 20, 42.

permits the parties to raise claims at their convenience and exempts the applicability of the CPC to arbitral proceedings, the import of contrary principles of the CPC to the arbitration process does not seem to have any legal justification. The High Court's ruling, however, completely fails to appreciate the above points.

IV. MITIGATING STEPS

While it is difficult to foresee how courts will interpret the *Gammon* Case in the future, it is important to highlight that the High Court did allow the 'subsequent claims' to be allowed, if there were "legally sustainable grounds", although, what constitutes such grounds is not entirely clear. The position in the Arbitration Act is clear – parties have been given the freedom to raise multiple claims from a single contract, as per their convenience. In fact, as indicated above, even the *Gammon* Case has recognized this position under the Arbitration Act, despite eventually holding that such multiple references are impermissible for being contrary to public policy of India. Thus, in my view, a harmonious reading of the *Gammon* Case and the Arbitration Act should imply that if the contract permitted the parties to raise claims as per their convenience (subject to law of limitation), then, that itself should amount as a 'legally sustainable ground' to raise the 'subsequent claims' for arbitration. Based on this interpretation, if a party wishes to refer certain claims for arbitration, it may not be necessary for them to rush to arbitrate all their claims at one go, if they do not wish to, subject to contractual conditions.

V. CONCLUSION

Despite the issues pointed out in this comment, the *Gammon* ruling may be construed to be a genuine attempt at alleviating the problems associated with constitution of multiple arbitral tribunals from a single contract. In fact, several international arbitral rules also acknowledge that it may be useful to fold all such pending arbitrations in one consolidated proceeding, subject to consent of parties.[23]

As there are undeniable benefits of streamlining such parallel arbitrations, in consonance with both the *Gammon* and *Dolphin* cases, lawyers may suggest drafts of arbitration clauses which would steer their clients clear of the pitfalls of multiple arbitration proceedings in the future. However, it must be recognised that parties may have various commercial reasons for seeking to have the option and flexibility to institute multiple arbitral tribunals from a single contract. It is well established that the law should respect party autonomy in an arbitration process and thus, if the parties wish to have the option to raise claims as per their convenience, despite being cognizant of the resulting inefficiencies and costs, then, they should have the contractual liberty to do so.

[23]Rules of International Chambers of Commerce (art 10, ICC Rules 2017); Singapore International Arbitration Chambers (r 8, SIAC rules 2016); Hong Kong International Arbitration Chamber (art 28, HKIAC Rules, 2013) and Mumbai Centre International Arbitration (r 5, MCIA, 2017).