

NY Court Rules Parent Corporations and Their Officers May Be Bound by Their Subsidiaries' Arbitration Agreements

March 8, 2011

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In *Hird v. iMergent, Inc.*, 2001 U.S. Dist. LEXIS 1193 (S.D.N.Y. Jan. 6, 2011), plaintiff Josiane Hird contracted with StoresOnline Inc., a subsidiary of iMergent Inc., to purchase six "web-stores" after attending a number of seminars in 2005 at which StoresOnline touted the profitability of its product. The contract between Hird and StoresOnline contained a binding arbitration clause that stated in pertinent part that "any and all disputes that arise between [Hird and StoresOnline] concerning this Agreement or any of the terms of this Agreement, or that concern any aspect of the relationship between [Hird and StoresOnline], shall be decided exclusively in binding arbitration.

When Hird was unable to operate the web-stores and StoresOnline refused to refund her money, Hird brought breach of contract and fraud claims against StoresOnline, iMergent, two executive officers of StoresOnline and iMergent, and seven current or former directors of iMergent. Hird subsequently agreed to dismiss the lawsuit against StoresOnline in favor of an arbitration proceeding commenced pursuant to the contract. However, Hird maintained her court action against iMergent and the individual defendants.

iMergent and the individual defendants moved to dismiss the action or, in the alternative, to compel arbitration pursuant to the agreement between Hird and StoresOnline. Hird opposed the motion stating, *inter alia*, that she only consented to arbitrate her claims against StoresOnline and not against iMergent and its officers/directors. The Southern District held that Hird was estopped from refusing to honor her obligation to arbitrate because "the subject matter of the dispute is intertwined with the contract providing for arbitration and there is a relationship between the defendants and the counter-party to the arbitration agreement [StoresOnline] such that a court could conclude that

the plaintiff had consented to extend its agreement to arbitrate to the non-party defendants” (internal quotation marks omitted). Among other things, the court found it reasonable to compel arbitration because all of Hird’s claims arose out of her relationship with StoresOnline and relied upon an “alter-ego” theory. The court also gave weight to the fact that “iMergent is the sole owner of StoresOnline and the various individual defendants [had] served as executives and former directors for both StoresOnline and iMergent.

Hird relies heavily on the U.S. Court of Appeals for the Second Circuit’s decision in *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354 (2d Cir. 2008), which held that a non-signatory to an arbitration agreement can invoke an arbitration agreement where there is such a close relationship between the signatory and non-signatory that a court can reasonably conclude that the plaintiff should have anticipated that it would be required to arbitrate its claims against the non-signatory. In short, a court will grant a non-signatory’s motion to compel arbitration where it would be “inequitable for [the plaintiff] to refuse to arbitrate on the ground that it had made no agreement with [the non-signatory].” According to *Sokol*, this is not contrary to the well-settled rule that a party may only be compelled to arbitrate its claims if it has consented to submit those claims to arbitration. Rather, *Sokol* recognized that “consent need not always be expressed in a formal contract made with the party demanding arbitration.

The decision in *Hird* is the latest development in the evolving law on whether and under what circumstances non-signatories may be bound by arbitration agreements. The bottom line is that no company (nor even its officers and directors) can safely assume that it is immune from an arbitration agreement entered into by one of its subsidiaries or affiliates.

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McDermott Will & Emery’s International Arbitration Group is continuing to monitor this matter, and will report on new developments as they arise. For more information, please contact your regular McDermott lawyer or:

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