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Indian Courts And Anti-Arbitration Injunctions

KC Khaitan & Co LLP

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India Litigation, Mediation & Arbitration

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Indian Courts are increasingly recognising and implementing the 'minimum interference' doctrine in context of international arbitrations. In the recent Judgment of *McDonald's India Private Limited* v *Vikram Bakshi & Ors* [FAO (OS) 9/2015, judgment dated 21 August 2016], the Delhi High Court (Delhi HC) has, *inter alia*, refused to grant an anti-arbitration injunction in the context of an international commercial arbitration.

FACTS IN BRIEF

Terms of the JVA

The case relates to a dispute between McDonald's India Private Limited (MIPL) and Mr Vikram Bakshi (VB) in connection with their joint venture. The parties had entered into a joint venture agreement (JVA) for the purposes of setting up and operating *McDonald's* restaurants in India. Pursuant to the JVA, the parties incorporated Connaught Plaza Restaurants Private Limited, which was the joint venture company (JVC). By way of a supplemental agreement to the JVA, Bakshi Holdings Private Limited (BHPL) also acceded to the JVA as an original party. The JVA was governed by Indian law and subject to the jurisdiction of the courts of New Delhi. It also contained an arbitration clause allowing for the settlement of disputes arising in

connection with specific rights under the JVA by arbitration to be administered by the London Court of International Arbitration (LCIA) with proceedings to be held in London.

Clause 32 of the JVA set out the grounds on which MIPL could exercise a call option to purchase all shares held by the other parties to the JVA (JV Counterparties) and Clause 35 of the JVA allowed for termination by a non-defaulting party on the occurrence of an event of default. One such event of default was failure by a party to vote for a managing director (MD) in the manner prescribed under the JVA. The JVA required that VB be appointed as the sole MD of the JVC.

In the year 2013, disputes arose between the parties to the JVA and after the initial term of appointment of VB as the MD expired, he was not re-appointed as the MD of the JVC. This resulted in a default under Clause 35 of the JVA entitling MIPL to exercise its right to terminate the JVA and to exercise its call option to purchase the shareholding of the JV Counterparties in the JVC.

Consequently, MIPL terminated the JVA and exercised the call option requiring the JV Counterparties to sell their shares in the JVC to MIPL.

Proceedings in India

VB challenged the termination of the JVA before the Company Law Board (CLB) alleging oppression and mismanagement by MIPL and sought his reinstatement as the MD of the JVC. The CLB, by way of an interim order, directed the parties to maintain *status quo* with respect to their shareholding in the JVC. Since the JVA contained an arbitration clause, MIPL filed an application under Section 45 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) before the CLB, seeking reference of the disputes between the parties to arbitration.

MIPL thereafter invoked arbitration before LCIA and both VB and BHPL participated in the arbitration proceedings without prejudice to their objection regarding the arbitrability of the disputes in question. MIPL also made an application under Section 9 of the Arbitration Act before the Delhi HC, seeking reliefs in aid of the arbitration proceedings. The said application was disposed of by the Delhi HC by a consent order dated 2 December 2013, wherein VB and BHPL agreed to maintain *status quo* with respect to their shareholding in JVC. However, even before the Delhi HC, VB and BHPL explicitly reserved their rights to raise objections regarding arbitrability of the disputes before the arbitral tribunal.

The application made under Section 45 of the Arbitration Act before the CLB by MIPL was subsequently withdrawn since the JVA was terminated and a separate arbitral reference had commenced. VB approached the CLB seeking stay of the arbitral proceedings, which was declined.

Suit before the Delhi HC

Four months after participating in the LCIA proceedings and nominating its arbitrator, VB filed a civil suit before the Delhi HC (Civil Suit), *inter alia*, seeking an injunction to stay the LCIA arbitration proceedings. The learned single Judge of the Delhi High Court granted the anti-arbitration injunction restraining MIPL from pursuing arbitration until the Civil Suit is disposed of or the *status quo* order of the CLB is vacated.

MIPL appealed against the said order of the learned single Judge before a Division Bench of the Delhi HC.

POSITION OF LAW

The Division Bench while deciding whether to grant such an anti-arbitration injunction held as follows:

1. The doctrine of *forum non-conveniens* can only be invoked where the court deciding not to exercise jurisdiction had such jurisdiction in the first place. This is essentially a principle of common law which the Delhi HC found had no application in the instant case. The conflict herein was not between two courts but between a court and an arbitral tribunal. Secondly, the subject matter of the proceedings before the CLB wasin connection with oppression and mismanagement, whereas the proceedings before the arbitral tribunal related to the rights of the parties under the JVA. Further, the Delhi HC also held that an alternative forum chosen by the parties cannot be considered to be inconvenient.
2. The underlying rationale and principles governing the grant of an injunction against arbitral proceedings set out under the erstwhile Arbitration Act, 1940 cannot be applied to cases under the present Arbitration Act. The Delhi HC noted that under the present Arbitration Act, there has been a shift towards directing the parties to arbitration rather than having the courts decide the same subject matter by way of a civil suit.
3. Principles governing anti-suit injunctions cannot be applied while deciding whether to grant anti-arbitration injunctions due to the applicability of principles of party autonomy and *kompetenz-kompetenz* to arbitral proceedings. Therefore, the Delhi HC, in essence, held that a higher threshold would be applicable for the grant of anti-arbitration injunctions. The Delhi HC cited with approval the reasoning in *Excalibur Venture LLC* v *Texas Keystone Inc. & Others* [2011 EWHC 1624 (Comm)] holding that in the case of foreign-seated arbitrations, it is only in exceptional cases such as where the continuation of such proceedings may be oppressive or unconscionable that a court may grant an anti-arbitration injunction. Such a scenario would arise where the main issue is whether or not the parties consented to a foreign arbitration or where there is an allegation that the arbitration agreement is forged. The Delhi HC observed that none of these issues arose in the present case.
4. The courts are duty bound to refer the disputes to arbitration in cases of international arbitration covered by the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) unless the parties can satisfy the court that the arbitration agreement is null and void, inoperative or incapable of being performed. This rule will equally apply to requests for grant of anti-arbitration injunctions in respect of such arbitrations. In fact, the Delhi HC went so far as to agree with the English courts' approach in this respect and hold that despite the principle of *kompetenz-kompetenz*, courts in India would retain the jurisdiction to determine whether an arbitration agreement was null and void, inoperative or incapable of being performed.
5. The expression 'null and void' would mean where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence.

6. The term 'inoperative' covers those cases where the arbitration agreement has ceased to have effect, such as a case of revocation by the parties. Another instance of the agreement having become inoperative is where it ceases to have effect because an arbitral award has already been made or there is a court decision which effectively operates as *res judicata*.
7. In cases of international commercial arbitrations to which the New York Convention applies, the mere fact that allegations of fraud or misrepresentation need to be adjudicated by the arbitral tribunal will not make the arbitration agreement null and void, inoperative or incapable of being performed.
8. The Delhi HC observed that the mere existence of the multiple proceedings, i.e. proceedings before the CLB and those before the arbitral tribunal, in the instant case, is not sufficient to render the arbitration agreement inoperative or incapable of being performed.
9. The Delhi HC in the instant case did not rule on the applicability of Part I of the Arbitration Act to the instant arbitration agreement. However, it observed that even if Part I of the Arbitration Act were to apply, the court is bound to refer the parties, or anyone claiming through or under the party to arbitration unless it finds that *prima facie*, no valid arbitration agreement exists.

CONCLUSION

Although the Delhi HC clarified that the approach of courts should be to minimise interference with arbitration since it is the forum of choice of parties, it did not enter into a detailed analysis of the degree of scrutiny which may be undertaken by courts in India to determine whether or not an arbitration agreement is null and void, inoperative or incapable of being performed.

However, the Supreme Court of India in *Chloro Controls India (P) Ltd.* v *Severn Trent Water Purification Inc.*, [(2013) 1 SCC 641] had clearly held that the court adjudicating an application under Section 45 of the Arbitration Act has to conclusively rule on the exceptions carved out under the said provision and that such a finding attains finality *inter se* parties and cannot be re-opened, even before the arbitral tribunal itself.

The Division Bench of the Delhi HC, in the instant case, has rightly tested the arbitration agreement against the three exceptions under Section 45 of the Arbitration Act viz. whether the agreement is null and void, inoperative or incapable of being performed, and concluded that none of the aforementioned exceptions is met to merit granting an anti-arbitration injunction.

It is interesting to note that given the present proceedings were commenced under Order 39, Rules 1 and 2 of the Code of Civil Procedure Code, 1908 (CPC), the appellant could have argued that the Delhi HC ought to have decided the challenge to the impugned order of the learned single Judge on the tests prescribed under Order 39, Rules 1 and 2 of CPC itself and not as an application under Section 45 of the Arbitration Act. Therefore, the Delhi HC should have formed a view only on the *prima facie* study of facts and circumstances of the present case and should have left it to the arbitral tribunal to rule on its own jurisdiction.

By way of this decision, the Delhi HC has clearly laid down the criteria to objectively determine if the challenge to an international arbitration proceeding to which the New

York Convention applies, is covered by any of the three exceptions listed in Section 45 of the Arbitration Act.

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Authors

Anchit Oswal

Sneha Janakiraman