Dispute Resolution Hotline

July 26, 2016

DELHI HIGH COURT SETS ASIDE ANTI-ARBITRATION INJUNCTION ISSUED AGAINST MCDONALDS

DELHI HIGH COURT:

- Upholds the sanctity of the arbitration agreement
- The forum of arbitration and the place of such proceedings, when agreed upon by the parties to an agreement, cannot be held to be 'inconvenient'
- Holds that the mere existence of multiple proceedings is not sufficient to render an arbitration agreement inoperative.

INTRODUCTION

A Division Bench of the Delhi High Court ("**Court**") in the case of ***McDonalds India Private Limited* ("MIPL") *vs. Vikram Bakshi and Ors.***[1] **("Respondents")** has set aside an order of the learned Single Judge of the Delhi High Court, thus vacating an order of injunction restraining the Appellant from pursuing institutional arbitral proceedings in London.

Acknowledging that the focus under the Arbitration and Conciliation Act, 1996 ("**Act**") has shifted towards directing parties towards arbitration, the Court in its judgment has, *inter alia,* stated that the principle of *forum non conveniens* would only be applicable where the court deciding not to exercise jurisdiction, has jurisdiction to decide the case and when there are competing courts with concurrent jurisdiction to deal with the same subject matter of a dispute. The Court also stated that a civil court has no jurisdiction to entertain a dispute the subject matter of which is covered under an arbitration agreement and must refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

FACTS

The facts of the case have been dealt with in detail in our earlier hotline on the Delhi High Court's Order (see here), which order has been challenged by way of an appeal before a Division Bench of the Delhi High Court.

ISSUES

- Whether civil courts had jurisdiction to entertain a dispute arising from an agreement wherein parties had agreed to resolve their disputes through arbitration.
- Under which circumstances can an anti-arbitration injunction be granted by a civil court under the doctrine of *forum non conveniens.*

JUDGMENT AND CONTENTIONS

1. *Forum non-conveniens*

   The Respondents did not press their arguments in this respect. Nonetheless, the Court noted that the view of the learned Single Judge in the order under appeal was incorrect and proceeded to provide clarity on the applicability of the doctrine of *forum non conveniens.* The Court referred to the Black's Law Dictionary and to a number of Indian and Common Law precedents[2] to hold that the doctrine of *forum non conveniens* could only be invoked where the court deciding not to exercise jurisdiction, infact had jurisdiction to decide the case, but came to the conclusion that some other court, which also had jurisdiction, would be the more convenient forum.

   The Court applied the principle of *forum non conveniens* to the facts of the case and held that:

   1. There was no competing court; there was a court and an arbitral tribunal, an altogether different situation;
   2. The subject matter of dispute before the Court was different from that before the arbitral tribunal. The subject matter before the Court was the plea of an anti-arbitration injunction while the subject matter before the arbitral tribunal was the substantive dispute under the Joint Venture Agreement;
   3. The forum and place of arbitration was consciously chosen by the parties as an alternative forum of dispute resolution, alternative to the forum of a court. Therefore the same could not be regarded as an '*inconvenient forum'* or '*inconvenient place*'.

2. Anti-Arbitration Injunctions

   The Respondents had relied upon the judgments of *Modi Entertainment Network and Another v.W.S.G Cricket*

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Pte Limited [3] and *Essel Sports Pvt. Ltd. v. Board of Control for Cricket in India & Others* [4] which were essentially decisions pertaining to anti-suit injunctions and not anti-arbitration injunctions. The Court stated that the principles governing an anti-suit injunction would not be applicable to arbitrations because of the principles of autonomy of arbitration and the competence-competence (Kompetenz-kompetenz) principle.

Thereafter, the Court referred to the cases of *Albon (T/A NA Carriage Co.) v. Naza Motor Training SDN BHD* [5] and *Excalibur Venture LLC v. Texas Keystone Inc & Others* [6] wherein it was held that a court had the power to grant an injunction restraining arbitrations in exceptional cases and with caution. Such situations could be where both the parties had not consented to the arbitration or where the arbitration agreement was forged. However, since no such circumstance had been made out by the Respondents, the Court did not find a reason compelling enough to uphold the anti-arbitration injunction.

3. Jurisdiction of the Civil Court

   The Court citing the decision of the Supreme Court in *World Sport Group (Mauritius) Limited v. MSM Satellite (Singapore) Pte. Ltd* [7] noted that once a judicial authority, was asked by the parties to refer the disputes to arbitration, it would have to oblige, unless it found the agreement to be null and void, inoperative or incapable of being performed. Further, the Court noted that the expression '*null and void*' would mean a situation where the arbitration agreement was affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence. Insofar as the word '*inoperative*' was concerned, it covered those cases where the arbitration agreement had ceased to have effect, such as the case of revocation by the parties. This was clearly not the case in the facts of the present proceedings.

   Finally the Court observed that the mere existence of multiple proceedings (proceedings before the Company Law Board ("**CLB**") and those before the arbitral tribunal) was not sufficient to render the arbitration agreement inoperative or incapable of being performed. Moreover, the subject matter of the proceedings before the CLB fell within the ambit of the alleged oppression and mismanagement whereas the subject matter of the dispute before the arbitral tribunal was related to the termination of the Joint Venture Agreement and the rights flowing therefrom.

4. Waiver of the arbitration clause

   The Court held that the mere withdrawal of an application under Section 45 of the Act which had been previously presented before the CLB, in light of the fact that the Joint Venture Agreement had been terminated after the institution of the application, and arbitration proceedings had been commenced in pursuance of the termination would not constitute abandonment of the arbitration clause.

ANALYSIS

Although India Courts have adopted a pro arbitration approach in the past couple of years, they have often sent mixed signals to the international community through precedents that run contrary to the UNICITRAL model, often infringing upon the jurisdiction of arbitral tribunals and the finality of their awards. However, in the present case the Court has sent a strong message by setting aside the anti-arbitration injunction and by curbing judicial interventionism to further the ends of justice.

The courts have to be careful and involve a degree of circumspection when dealing with arbitral proceedings and the same has been reiterated by the Court in the present case. Civil Courts have the power to issue anti-arbitration injunctions but such power should be used in exceptional circumstances and not as a general rule. The Court has also set aside the contention of *forum non conveniens* on the ground that a consensual agreement to use arbitration as a mode for dispute resolution with a particular seat cannot be subsequently rescinded on the basis of the principle in question. The court's decision of vacating the injunction and setting aside the order is a welcome move which hopefully will generate more confidence amongst the business community in India and abroad.

– Arjun Gupta, Sahil Kanuga & Vyapak Desai
You can direct your queries or comments to the authors

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[1] FAO(OS) 9/2015

[2] *Sim v. Robinow: (1892) 19 K.665; Mayar (H.K.) Ltd v. Owners & Parties, Vessel M.V. Fortune Express: (2006) 3 SCC 100; Spiliada Maritime Corpn. v. Cansulex Ltd: (1986) All ER 843; Tehrani v. Secy of State for the Home Department: [2006] UKHL 47; Gulf Oil Corp. v. Gilbert: 330 U.S. 501.*

[3] 2003 (1) Arb. LR 533 (SC)

[4] ILR (2011) V Delhi 585

[5] 2008 (1) Lloyds Law Reports 1

[6] 2011 EWHC 1624 (Comm)

[7] 2014 (11) SCC 639

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