

# Dispute Resolution Hotline

January 02, 2015

## ANTI-ARBITRATION INJUNCTION ISSUED AGAINST MCDONALDS

- Delhi High Court holds that even in a situation where the parties have contractually opted for international arbitration, the jurisdiction of the civil court is necessarily not completely ousted;
- Delhi High Court lays down the threshold for grant of anti-arbitration injunction;
- Delhi High Court reaffirms that in a dispute of oppression and mismanagement, the dispute ought not to be referred to arbitration;
- Delhi High Court looked at the hardship of the Plaintiff and based on relevant factors decided that arbitration in London becomes *forum non-conveniens* to the Plaintiff.

Recently, the High Court of Delhi ("**Delhi High Court**") in Vikram Bakshi & Anr. v. Mc Donalds India Pvt. Ltd. & Ors. granted an anti-arbitration injunction, wherein the Defendants were restrained from pursuing arbitral proceedings under the London Court of International Arbitration Rules ("**LCIA**"). Vikram Bakshi and a company incorporated by Vikram Bakshi are the Plaintiff No. 1 and 2 respectively (collectively referred to as "**Plaintiff**"). Mc Donalds India Pvt. Ltd. & Connaught Plaza Restaurants Ltd. is being referred to as Defendant and 2<sup>nd</sup> Defendant respectively.

### FACTS

The Plaintiff and the Defendant entered into a Joint Venture Agreement ("**JVA**") in 1995 and incorporated 2<sup>nd</sup> Defendant. The Defendant had issued a "Call Option" notice offering to buy out the stake of the Plaintiff in 2<sup>nd</sup> Defendant. The Plaintiff filed a company petition before the Company Law Board ("**CLB**") claiming oppression and mismanagement and prayed for his re-election as the Managing Director of the 2<sup>nd</sup> Defendant, pursuant to Clause 7(e) of the JVA. The CLB in its ad interim order directed parties to maintain status quo with respect to their shareholding.

Thereafter, the Defendant filed an application under Section 45 of the Arbitration and Conciliation Act, 1996 ("**Act**") before the CLB, praying that the parties be referred to arbitration, in light of the provisions of the JVA. The CLB refused to stay the arbitration proceedings and subsequently, aggrieved by the CLB Order, the Plaintiff filed an appeal; however, as the said application under Section 45 of the Act was eventually withdrawn, the appeal became infructuous.

Subsequently, the Defendant terminated the JVA and invoked the arbitration clause, and consequently the dispute was referred to arbitration under the LCIA Rules in London. Additionally, the Defendant also filed a petition under Section 9 of the Act; however, this petition was also dismissed as withdrawn. In the meantime, the Plaintiff preferred an application under Order 39 Rule 1 and 2 of Code of Civil Procedure ("**CPC**"), praying for an ad interim injunction against the arbitration proceedings initiated under the LCIA Rules.

### ISSUES

The crucial question before the Delhi High Court was to ascertain whether the civil courts had jurisdiction even when the parties had agreed to resolve their dispute by arbitration. The Delhi High Court also had to decide whether LCIA arbitration in London would be *forum non conveniens* and that if this is a fit case where anti-arbitration injunction should be granted.

### CONTENTIONS:

#### Plaintiff:

Briefly, it was submitted that:

- as the status quo Order has been passed in the CLB petition, initiation of arbitration in London is not only vexatious but also oppressive.
- as the application under Section 45 of the Act was withdrawn, it amounted to tacit acquiescence on the part of Defendants to concede to the jurisdiction of the CLB.
- the arbitral proceedings in London would be *forum non convenience* qua the Plaintiff because the parties except for the holding company of the Defendant were situated in India and carried out business in India. Moreover, the governing law, cause of action and the CLB petition between the parties all were in India and that the concept of comity of courts would not be applicable because arbitral proceedings are yet to be started.

#### Defendant:

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Briefly, it was submitted that:

- based on decided cases<sup>1</sup>, the present suit is not maintainable as the suit challenging validity of JVA has an arbitration clause embedded into it and the objective of the Act was to minimize the supervisory roles of Courts in the arbitral proceedings.
- the validity of an arbitration agreement to which Part II of the Act applies can be decided either by the arbitral tribunal or by the Court pursuant to Section 45 or 48 of the Act.
- reliance was placed on *National Insurance Co Ltd. v. Boghara Ployfabs Pvt. Ltd.*<sup>2</sup> and *Devinder Kumar Gupta (Dr) v. Realogy Corporation & Anr.*<sup>3</sup> and it was contended that the only remedy available to the Plaintiff is before arbitral tribunal and not before civil court to challenge the validity of the arbitration agreement. The doctrine of '*Kompetenz Kompetenz*' was elaborately discussed and *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors*<sup>4</sup> was relied to submit that it is the arbitral tribunal who would have to decide the validity of the arbitration agreement.
- a case of *forum non-conveniens* would not arise given that the parties had expressly agreed to arbitration in England. Any inconvenience caused due to the seat being in London, could not be classified as *forum non conveniens*.
- merely because the application under Section 45 of the Act was withdrawn, that does not tantamount to waiver or abandonment of Defendant's right to go for arbitration and that the termination of the JVA meant that the CLB petition had become infructuous.
- the subject matter of dispute in the CLB petition and the arbitration are operating in different fields and therefore neither the application under Section 45 nor the continuance of the arbitration proceedings can be said to be oppressive and vexatious.

## JUDGMENT

The Delhi High Court was of the opinion that the Plaintiff was able to show a *prima facie* case, the balance of convenience was in his favour and that the Plaintiff would suffer irreparable loss in case the injunction was not granted because a) *prima facie* it appeared that the arbitration agreement was inoperative or incapable of performance on account of the fact that the CLB petition is pending and a status quo order has been obtained with regard to the shareholding pattern; b) there will be certain overlapping disputes between the CLB petition and the arbitration proceedings sought to be conducted under LCIA Rules; c) the dispute sought to be raised before LCIA arbitration is suffering from *forum non-conveniens*.

The Delhi High Court reasoned its decision based on the following premises:

- considered the judgment of the Supreme Court of India ("**Supreme Court**") in *World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte. Ltd*<sup>5</sup>, wherein it has been held that reference of a dispute to an arbitrator is not an absolute proposition because Section 45 of the Act has three provisos, namely that the agreement should not be null and void, in operative or incapable of being enforced etc.
- highlighted the need to reconcile the ratio of *Chatterjee Petrochem case*<sup>6</sup>, which in essence excluded the jurisdiction of a civil court in case of an international arbitration and *World Sport Group* which ran contrary to the same in so far as it upheld the exceptions in Section 45 of the Act, as it would create an incongruous position of law in India.
- the interpretation in *World Sport Group* was embraced since the facts were *pari materia* with the facts of the present case. Moreover, *World Sport Group* being a later judgment would have more persuasive value over a previous judgment on the same point.
- the decision of the Supreme Court in *Shi –Etsu Chemicals v. Aksh Optifibre Ltd*<sup>7</sup> was also considered, wherein the majority held that in case of an international arbitration, the civil court would have to refer the parties to arbitration unless the agreement between the parties was null and void, incapable of being performed or inoperative, and this determination will have to be taken on *prima facie* basis.
- relied on the Bombay High Court decision in *Rakesh Malhotra v. Rajinder Kumar Malhotra*<sup>8</sup>, wherein it was held that disputes pertaining to oppression and mismanagement would not be referable to arbitration, and therefore the jurisdiction of the civil court ought not be ousted.
- observed that all parties except the holding company of the Defendant were Indian persons, that the cause of action had arisen in India, and that the governing law of the agreement between the parties was Indian law. It held that in light of these factors the venue of arbitration being London would constitute *forum non conveniens*.
- clarified that the requirement for the grant of anti-arbitration injunction would be the fulfilment of the conditions required for the grant of an ad-interim injunction i.e. *prima facie* case, balance of convenience and irreparable harm; and the satisfaction of any of the three contingencies envisaged in Section 45 of the Act.

## ANALYSIS

Although the India Courts have adopted a pro arbitration approach in the past couple of years, it might appear that the present ruling goes a step backward in so far as an anti-arbitration injunction was granted restraining the Defendant to pursue LCIA Arbitration. Notably, the Delhi High Court reconciled the conflicting decisions and concluded that the jurisdiction of civil court need not be necessarily ousted in a case where parties have contractually agreed to refer the dispute to international arbitration, and thereafter took a *prima facie* view that the agreement itself was inoperative, thus making the present case come under the proviso to Section 45 of the Act.

The Delhi High Court has further reaffirmed that in a dispute pertaining to allegations of oppression and mismanagement, the arbitral tribunal would not be the correct forum for adjudication of rights. However, the reasoning that LCIA would be a *forum non conveniens* appears to be contrary to the ruling of the Supreme Court in *Mddi Entertainment Network v W.S.G.Cricket Pte.*<sup>9</sup> wherein it was held that reasons such as hardship, subject matter being in India, or parties per se would not suffice to turn a *forum conveniens* into a *forum non conveniens*.

Although we have had landmark rulings on grant of anti-suit injunctions, generally anti-arbitration injunctions are rare in India and therefore the observation that in a case of an anti-arbitration injunction, in addition to a general threshold for grant of ad-interim injunction, the case should fall under one of the contingencies of Section 45 of the Act which would add necessary jurisprudence on the subject.

– **Alipak Banerjee & Vyapak Desai**

You can direct your queries or comments to the authors

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<sup>1</sup> Chatterjee Petrochem (Mauritius) Co. and Anr. v. Haldia Petrochemicals Ltd., 2013 (4) Arb. L.R. 456 (SC)

<sup>2</sup> 2009 (1) SCC 267

<sup>3</sup> 2011 (125) DRJ (DB)

<sup>4</sup> (2013) 1 SCC 641

<sup>5</sup> 2014 (1) Arb L. R. 197 (SC)

<sup>6</sup> Supra Note at 1

<sup>7</sup> (2005) 7 SCC 234

<sup>8</sup> Company Appeal (L) Nos. 10, 11, 12, 13, 16, 17, 18, and 19 of 2013 and Company Appeal No. 15, 16, 17, 18, 23, and 24 of 2013

<sup>9</sup> (2003) 4 SCC 341

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