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Indian Arbitration Cart: Moving Forward or Backward?

Mohit Mahla · Saturday, June 6th, 2015

Prior to 2012, India faced widespread criticism from the international arbitral community over a series of judgments concerning arbitration. Much has changed since 2012 – in the post-*Bharat Aluminium* ("**BALCO**") era. A pro-arbitration approach by the judiciary was reflected in a series of judgments that came after the BALCO judgment, such as *Reliance Industries* (Reliance Industries Ltd. v. Union of India, Civ. App No. 5675 of 2014, Supreme Court of India) and *World Sports Group* (World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd. (Civ. App. No. 895 of 2014, Supreme Court of India). That said, a recent Delhi High Court ("**High Court**") decision has again stirred the water and it may be a step backward in establishing India as a pro-arbitration jurisdiction.

In *Vikram Bakshi v. McDonald's* (Vikram Bakshi and Anr. v. McDonald's India Pvt. Ltd., Interim Application Nos. 6207/2014 in Civil Suit. (Original Side) No. 962/2014) the High Court has granted an interim anti-arbitration injunction against the arbitration proceedings initiated by McDonald's India Pvt. Ltd. ("**McDonald's India**") in London. The reasoning and outcome of this High Court decision runs against the recent pro-arbitration trend apparent in other Indian cases.

Facts

A dispute arose from a Joint Venture Agreement ("**JVA**") relating to McDonald's restaurants in North and East India, entered between Vikram Bakshi and McDonald's India in 1995. The JVA created a joint venture company – Connaught Plaza Restaurants Pvt. Ltd. ("**JV Company**"). Mr. Bakshi was made the managing director of the JV Company which he held until 2013. The JVA was governed by Indian law and was subject to jurisdiction of the courts in New Delhi. However, it also provided that any unresolved dispute which may arise in connection with termination of the JVA would be submitted to LCIA arbitration in London.

In 2013, McDonald's India offered to buy out all the shares owned by Mr. Bakshi in the JV Company. In response Mr. Bakshi filed a petition before the Indian Company Law Board ("**CLB**") challenging the actions of McDonald's India and seeking his reinstatement as managing director of the JV Company. The CLB issued an order directing McDonald's India to maintain status quo over the shareholding of the JV Company, during the pendency of the petition. Meanwhile, McDonald's India applied under Section 45 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") praying for the proceedings to be stopped and the parties be referred to have their dispute adjudicated through arbitration, as per the terms of JVA. However, this application was later withdrawn.

McDonald's India while terminating the JVA started arbitration under LCIA, London. It applied to the High Court under Section 9 of the Arbitration Act, for interim relief in support of the arbitration, but even that application was later withdrawn. Later, Mr. Bakshi filed an application in the High Court, requesting an anti-arbitration injunction to restrain the arbitral proceedings in London.

A. Decision of the High Court and its Analysis

The High Court granted the anti-arbitration injunction and ordered a stay of arbitration proceedings in London. The High Court's grounds for granting this order are particularly problematic for establishing India as a pro-arbitration jurisdiction. A few of the grounds are worth highlighting:

First, the High Court found that as all the parties to the dispute were Indian except one, the area of operation of business was in India, meaning thereby, the cause of action had arisen in India and governing law of the agreement was Indian law, so London, as the arbitral seat, was a *forum non-conveniens.* This ground given by the High Court is troublesome in the sense that it undermines the principle of party autonomy, which is a cornerstone of international arbitration and gives the parties the freedom to refer their disputes to arbitration at their desired seat, even when that seat is not connected with the parties or their business. The High Court's reasoning is problematic, and might open up a door for new jurisdictional challenges that parties might raise under the armour of *forum non-conveniens,* even when they have agreed upon a forum under their arbitration agreement.

Second, the High Court found that the arbitration agreement prima facie was incapable of performance or inoperative at least until the time the question of oppression and mismanagement is decided by the CLB. This ground given by the High Court is arguably contrary to the recent Supreme Court of India ruling in the *World Sport Group*. There, the Supreme Court of India held that the mere fact that a related petition is subject to pending court proceedings is not a sufficient basis to refuse to refer a dispute to arbitration.

Third, the High Court found that there was a waiver of the arbitration agreement by McDonald's India by filing and subsequently withdrawing the applications under Section 9 and 45 of the Arbitration Act. This ground given by the High Court could be regarded as highly problematic. While there is no unified doctrine amongst different common law jurisdictions, courts in the UK, Australia and the US generally require clear evidence of a deliberate, intentional and unequivocal election, or release or abandonment of the right to arbitrate ("*A waiver or abandonment is constituted by the deliberate, intentional and unequivocal release or abandonment of the right that is later sought to be enforced*" (Zhang v. Shanghai Wool and Jute Textile Co. Ltd., VSCA 133 (2006)). Ultimately, the test is whether one party has acted in a manner that could be interpreted, in the totality of circumstances, as being inconsistent with a right to arbitrate.For instance, courts in the US have established a two-part test to determine the waiver of right to arbitrate. First, the court will decide if, "*under the totality of the circumstances*", the party "*has acted inconsistently with the arbitration rights*", and second, the court will look to see whether, by doing so, that party "*has in some way prejudiced the other party*" (Ivan Corp. v. Braun of America Inc., 286 F. 3d 1309 (11th Cir. 2002)).

B. Comments

It is surprising, and indeed extraordinary, that the mere withdrawal of a party's applications to the

court for ancillary relief in support of the arbitration can be construed as a deliberate and unequivocal release of the right to arbitrate. Parties in arbitration have the option of seeking interim relief from the tribunal or from national courts and it is their choice to select whichever option suits them the most. The withdrawal or abandonment of ancillary proceedings at the national court level does not necessarily imply that parties have waived their right to arbitrate – to the contrary, it may simply mean that parties have made a strategic calculation to obtain relief from the arbitral tribunal instead.

It is not clear if this judgment will be or has been appealed, but it is important that the problematic grounds for the High Court's decision be corrected on appeal or in future cases. In a period when India is witnessing a "*Modi-fication*" of its image on the world platform, and is trying to boost investor confidence, it is critical that the High Court's decision in *Vikram Bakshi* does not undo the strides forward in the *Reliance Industries* and *World Sports Group*.

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