Anti-arbitration Injunctions: Delhi High Court Says Nay

Kluwer Arbitration Blog
May 17, 2020

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Please refer to this post as: Anjali Anchayil, Tamoghna Goswami, 'Anti-arbitration Injunctions: Delhi High Court Says Nay', Kluwer Arbitration Blog, May 17 2020, http://arbitrationblog.kluwerarbitration.com/2020/05/17/anti-arbitration-injunctions-delhi-high-court-says-nay/

In a recent decision, *Bina Modi and Ors. v. Lalit Modi and Ors.,* CS(OS) 84 and 85/2020, a single judge of the Delhi High Court has cast doubt on the jurisdiction of Indian courts to grant injunctions restraining arbitral proceedings (popularly called anti-arbitration injunctions). While the grant of anti-arbitration injunctions by Indian courts has been discussed previously on this blog (here and here), the Delhi High Court's decision merits discussion as it poses a more fundamental question regarding the existence of a court's jurisdiction to grant anti-arbitration injunctions.

Delhi High Court's Decision in *Bina Modi*

In *Bina Modi,* one of the trustees of a family trust had initiated arbitral proceedings against the other trustees for resolution of disputes arising under the trust deed. The other trustees filed two civil suits before the Delhi High Court, seeking *inter alia* an anti-arbitration injunction against such arbitral proceedings and a declaration that the arbitration agreement in the trust deed was null, void, inoperative and unenforceable. The Delhi High Court, while dealing with the suits, limited its adjudication to whether it has the power to injunct the arbitral proceedings "*notwithstanding the* [purported] *bar*" set out in a 2001 decision of a three-judge bench of the Supreme Court of India ("Supreme Court") in *Kvaerner Cementation India Limited v. Bajranglal Agarwal and Anr.*, (2012) 5 SCC 214.

The Delhi High Court ultimately relied on *Kvaerner Cementation* and concluded that a civil court did not have jurisdiction to entertain suits to declare invalidity of an arbitration agreement or injunct arbitral proceedings. In doing so, the Delhi High Court noted that *Kvaerner Cementation* had recently been approved by the Supreme Court in *A. Ayyasamy v. A. Paramasivam and Ors.,* (2016) 10 SCC 386 and *National Aluminium Company Limited v. Subhash Infra Engineers Private Limited and Anr.*, 2019 SCC OnLine SC 1091.

Presently, an appeal against the decision in *Bina Modi* is pending before a division bench of the Delhi High Court. The division bench has in the interim restrained the respondents from pursuing proceedings before the emergency arbitrator till the disposal of the appeal.

However, in light of *Bina Modi*'s reliance on *Kvaerner Cementation*, there is now some doubt as to whether suits seeking anti-arbitration injunctions are maintainable, notwithstanding case law, both of the Supreme Court and other Indian High Courts, affirming civil courts' jurisdiction to grant such injunctions.

Kvaerner Cementation **and Subsequent Developments**

Kvaerner Cementation was an early decision of the Supreme Court (given in 2001, but reported in 2012) on the Arbitration and Conciliation Act, 1996 ("Act") which did not consider the interplay between the various provisions of the Act, or the scope of judicial intervention in relation to arbitration. It is a short order which did not consider or cite any precedent, nor did it elaborate on the facts of the dispute.

In *Kvaerner Cementation*, Kvaerner had sought the grant of an anti-arbitration injunction on the ground that there was no arbitration agreement between the parties, and as such the arbitration already initiated was without jurisdiction. The Supreme Court, on a bare reading of Section 16 of the Act (which enshrines the principle of kompetenz-kompetenz) and the object of the Act, held that a civil court did not have jurisdiction to determine any objection with respect to the existence or validity of the arbitration agreement.

Kvaerner Cementation appears to have read in a negative formulation of kompetenz -kompetenz, denuding civil courts of jurisdiction to rule on, *inter alia*, the existence and validity of an arbitration agreement. However, the argument

that an arbitral tribunal has competence, to the complete exclusion of civil courts, to determine its jurisdiction was soundly rejected by a seven-judge bench of the Supreme Court in *SBP & Co. v. Patel Engineering Limited,* (2005) 8 SCC 618 and subsequent decisions. Under Indian law, the competence of the arbitral tribunal to rule on its own jurisdiction only means that when issues of jurisdiction are raised before the arbitral tribunal, it can decide them. Accordingly, in light of *SBP & Co.*, it may be argued that *Kvaerner Cementation* has been implicitly overruled.

Kvaerner Cementation also did not consider earlier decisions of the Supreme Court where it had acknowledged civil courts' jurisdiction to grant injunctions in restraint of foreign arbitrations and foreign court proceedings where such proceedings were vexatious or oppressive.

A number of judgments of the Supreme Court subsequent to *Kvaerner Cementation* have also affirmed the jurisdiction of civil courts to grant anti-arbitration injunctions. In *Chatterjee Petrochem Company and Anr. v. Haldia Petrochemicals Limited and Ors.*, (2014) 14 SCC 574, the Supreme Court affirmed civil courts' jurisdiction to entertain suits seeking grant of anti-arbitration injunctions. While ultimately the Supreme Court declined the grant of an injunction restraining arbitral proceedings, such decision was based on the Supreme Court's finding that there was a valid arbitration agreement. Similarly, in *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*, (2014) 11 SCC 639 the Supreme Court unequivocally held that a civil court in India had inherent jurisdiction under Section 9 of the Code of Civil Procedure, 1908 to grant injunctions in restraint of arbitration. While these judgments did not consider *Kvaerner Cementation*, they incontrovertibly acknowledge the inherent jurisdiction of civil courts to grant anti-arbitration injunctions. From these judgments, it is also clear that the issue before courts is now limited to specifying the circumstances in which such injunctions can be granted.

While *Kvaerner Cementation* has subsequently been cited in two Supreme Court decisions, *Ayyaswamy* and *National Aluminium*, the following may be borne in mind.

The Supreme Court in *Ayyasamy* makes a distinction between cases where the arbitral tribunal is constituted at one party's instance and the other party files a civil suit stating that the proceedings are not valid, and cases where a suit is filed by one party and the other party files an application under the Act seeking

reference of the matter to arbitration. It observes that in the former case, *Kvaerner Cementation* applies to exclude the jurisdiction of civil courts whereas in the latter, courts have jurisdiction to examine questions of existence and validity of the arbitration agreement and arbitrability of the dispute. However, *Ayyasamy* did not appreciate that *Kvaerner Cementation* had been implicitly overruled by *SBP & Co.* and subsequent decisions which rejected the idea that an arbitral tribunal has the sole competence to decide such questions. Moreover, the distinction made in *Ayyasamy* appears to be without any real difference as the question of civil courts' jurisdiction to examine the existence and validity of the arbitration agreement and arbitrability is equally at issue in both cases.

Similarly, in *National Aluminium*, the Supreme Court relied on *Kvaerner Cementation* and held that any objection with regard to the existence or validity of an arbitration agreement may be raised before the arbitrator. A civil suit cannot be maintained for determination of such objection. The Supreme Court simply applied *Kvaerner Cementation* without analysing that *Kvaerner Cementation* could no longer be considered good law in light of *SBP & Co.* Interestingly, the Supreme Court also appointed a new arbitrator, without examining the existence of a valid arbitration agreement. This goes against its previous decisions, including in *Duro Felguera S.A v. Gangavaram Port Limited,* (2017) 9 SCC 729, where the Supreme Court explicitly held that while considering the appointment of an arbitrator, it is well within the power of the Court to look into the existence of a valid arbitration agreement.

Additionally, both *Ayyasamy* and *National Aluminium* did not consider the decisions in *Chatterjee Petrochem* and *World Sport Group* wherein the Supreme Court had affirmed the jurisdiction of civil courts to grant anti-arbitration injunctions. Therefore, the value of these decisions as binding precedent to negate civil courts' jurisdiction to grant such injunctions is doubtful at best.

Delhi High Court's Prior Decision in *Mcdonald's*

A division bench of the Delhi High Court had previously in *Mcdonald's India Private Limited v. Vikram Bakshi and Ors. 2016 (4) ARBLR 250 (Delhi)* dealt with the issue of civil courts' jurisdiction to grant anti-arbitration injunctions in arbitrations governed by the Act.

The division bench in *Mcdonald's* held that civil courts had jurisdiction to grant anti-arbitration injunctions where it was proved that the arbitration agreement was null, void, inoperative or incapable of being performed. However, on facts, the court held that an anti-arbitration injunction could not be granted.

The Delhi High Court in *Bina Modi* considered *Mcdonald's* but held that it was *per incuriam* as it did not consider *Kvaerner Cementation*, which was decided by a larger bench of the Supreme Court. However, while *Mcdonald's* did not discuss *Kvaerner Cementation*, the reasoning therein is based on subsequent precedents of the Supreme Court including *World Sport Group*. It may also be argued that *Mcdonald's* did not have to consider *Kvaerner Cementation* as the hardline interpretation of *Kvaerner Cementation* i.e. a complete bar on civil court's jurisdiction is not applicable anymore owing to the decision in *SBP & Co.* The law laid down in *Mcdonald's* holds ground as a challenge to the decision in *Mcdonald's* before the Supreme Court was dismissed.

Does Section 41(h) of the SRA Bar the Grant of Anti-arbitration Injunctions?

A novel issue considered by the Delhi High Court in *Bina Modi* was the applicability of Section 41(h) of the Specific Relief Act, 1963 ("SRA") which bars the grant of injunctions when "*equally efficacious relief can certainly be obtained by any other usual mode of proceeding*". The Delhi High Court in *Bina Modi* decided that the Act provided an equally efficacious relief under Section 16, and therefore, injunctive relief could not be granted by a civil court. While this argument may seem attractive, it must also be taken into account that a procedurally inefficient remedy cannot be equally efficacious. If the issues go to the root of the arbitral proceedings, such as arbitrability and jurisdiction, such issues are bound to come back to the court in some manner or the other, which makes the whole process of referring the matter to an arbitral tribunal an exercise in superfluousness.

It remains to be seen whether the division bench hearing the appeal from *Bina Modi* would follow the single judge's approach and deny jurisdiction to grant anti-arbitration injunctions or instead follow the position in *Chatterjee Petrochem* and *World Sports Group.*

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