

# The Delhi High Court Grant Anti-Arbitration Injunction

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The Delhi High Court has sent an extremely negative message to the international community with its judgement in the case of **Vikram Bakshi & Anr vs McDonalds India Pvt Ltd & Ors**, wherein the Court granted an anti-arbitration injunction. To begin with, an injunction is an order addressed to the parties, compelling and/or preventing them from doing certain specific acts. Thus, an anti-arbitration injunction is an order compelling the parties not to arbitrate their disputes. An order such as this, is as unpopular as it is uncommon since its enforceability is dependent on foreign courts and arbitral institution recognizing such order and enforcing it.

Notwithstanding the complications involved, the Delhi High Court went ahead and passed an order refraining the Defendants from pursuing arbitral proceedings under the LCIA, in London.

### **Facts of The Case:**

McDonalds India Pvt. Ltd. (MCD) and Mr. Vikram Bakshi entered into a Joint Venture Agreement dated 31.03.1995 through which they established a Joint-venture company, Connaught Plaza Restaurants Pvt Ltd (CPRL). Subsequently, CPRL also became a party to the JVA along with a company incorporated by Mr. Bakshi, Bakshi Holdings Pvt Ltd (BHPL). The JVA was governed by an arbitration clause which read, “...*this Agreement shall be submitted for arbitration to be administered by the London Court of International Arbitration (The "LCIA"). Such arbitration proceedings shall be conducted in London, England and shall be conducted before a panel of three (3) arbitrators and shall be conducted in accordance with the then current commercial arbitration rules of the LCIA for international arbitrations.*”

Disputes arose between the parties in the present case when MCD removed Mr. Bakshi as Managing Director of CRPL and sought to change the share-holding pattern of CRPL by exercising its right of call option and acquiring the shares held by Mr. Bakshi and

BHPL. In response, BHPL and Mr. Bakshi commenced proceeding with the Company Law Board (CLB) alleging mismanagement of the JV Company as well as oppression of management. The CLB ordered all parties to maintain status quo. Subsequently, MCD filed a Section 45 application with the CLB asking them to refer the dispute to arbitration. However, they withdrew this application before the CLB could decide on this matter. MCD, then, terminated the JVA and commenced proceeding with LCIA, in response to which Mr. Bakshi and BHPL applied to the Delhi High Court for an anti-arbitration injunction under Order 39 Rule 1 & 2 CPC.

### **Jurisdiction of The Court To Entertain And Anti-Arbitration Injunction:**

To begin with, the defendants challenged the jurisdiction of the Court to entertain this petition as the same was barred in view of **Section 5<sup>[1]</sup>** of the Arbitration Act which restricts judicial intervention and prohibits any challenge to the validity of the arbitration agreement except in accordance with law. Furthermore, it was contended that the validity of the arbitration agreement could only be ascertained in two cases by the Court – **(1)** where an application under **Section 45<sup>[2]</sup>** was preferred by one of the Parties to the arbitration agreement requesting a reference to arbitration, or **(2)** under Section 48 of the Act when the enforcement of an award is sought. Reliance was also placed on the doctrine of negative competence-competence, which prevents courts from adjudicating upon the validity of the arbitration agreement in the first instance. Thus, in this case any interference by the Court would lead to an abuse of the process of law since the Plaintiffs themselves had accepted the validity of the arbitration

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<sup>1</sup> Section 5 - Extent of judicial intervention: Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

<sup>2</sup> Section 45 - Power of judicial authority to refer parties to arbitration: Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

agreement by filing a petition under Section 9 of the arbitration Act. The only remedy available to the Plaintiffs was to argue lack of jurisdiction before the arbitral tribunal. The Court rejected these arguments and ruled that it had the jurisdiction to entertain this application based on the judgement of the Supreme Court in **World Sport Group (Mauritius) Ltd. V. MSM Satellite (Singapore) Pte. Ltd.** To re-affirm this position the Court relied on **Rakesh Malhotra vs. Rajinder Kumar Malhotra** to state that disputes under Section 397 to 402 which pertain to oppression and mismanagement, are not referable to arbitration and therefore, the jurisdiction of the Court cannot be ousted. This reasoning is severely flawed because the decision in Rakesh Malhotra vs. Rajinder Kumar Malhotra was subject to a caveat. Furthermore, in this case the arbitration pertained to the termination of the joint venture, not oppression and mismanagement.

Since the JVA had been terminated, there was no merit in the company law petition and the petition was merely a tool to prevent arbitration.

### **Forum Non Convenience:**

It was argued by the Petitioners that the forum of LCIA is a forum non convenience. It is on account of the fact that the plaintiff No.1 is an Indian and plaintiff No.2 is a company incorporated in India. Similarly, the defendant Nos.1 & 2 are incorporated in India.

This argument was accepted by the Court. While it was and can still be argued that the agreement was signed by the Petitioners with their eyes open, Indian law is not clear on the right of Indian nationals to choose a foreign seat of arbitration. The reasoning of the Court is reflective of this confusion.

**Waiver of Arbitration Agreement:**

Withdrawal of the application under Section 45 of the **Arbitration and Conciliation Act, 1996**, was interpreted by the Court as waiver by the Respondents of the arbitration clause. Furthermore, the fact that the Respondent did not press the Section 9 application filed by them was also interpreted as tacit acquiescence to the jurisdiction of the Company Law Board.

In the opinion of the author, the withdrawal of the application under Section 45 was a calculated gamble to avoid a discussion on the arbitrability of the dispute and the gamble did not pay off.

**Requirements of Ad Interim Injunction:**

The Court granted the injunction for the above mentioned reasons and concluded that the Petitioners had satisfied the three requirements for grant of ad interim injunction namely:

- The petitioner had a prima facie good case
- The Balance of Convenience Is In Favour of The Petitioners
- The petitioner will suffer irreparable loss in case ad interim injunction against the respondents from continuing with the arbitration proceedings is not granted.
- The arbitration agreement is prima facie inoperative or incapable of performance because the petitioner has already filed a suit for oppression and mismanagement in Company Law Board and that petition will have overlapping disputes with the disputes sought to be raised in arbitration.

**Analysis:**

The judgement is a rather unfortunate development in India though it does highlight the confusion that prevails with respect to the right of Indian nationals to choose a foreign seat.

It is humbly argued that this reasoning of the Court is dubious at best, since the Court in World Sport Group did not consider the impact of Section 5. Furthermore, the message of World Sport Group was centred on minimal interference by the Court, which the High Court in this case failed to appreciate.

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