Dispute Resolution Hotline

October 09, 2023

INDIAN COURTS AND THE ANUPAM MITTAL CASE: NAVIGATING THE MAZE OF ARBITRABILITY

- In January 2023, the Singapore Court of Appeal upheld an anti-suit injunction restraining Anupam Mittal from continuing the oppression and mismanagement proceedings before the NCLT in light of the arbitration clause in the shareholder's agreement ("**SHA**") between the parties ("**Anti-Suit Injunction**"). Applying a composite test to determining arbitrability, the SGCA found that oppression and mismanagement disputes may be arbitrated in the present case since such disputes are arbitrable under Singapore law (which is the law of the seat and the law governing the arbitration agreement).
- The Bombay High Court passed an anti-enforcement injunction restraining the defendants from enforcing this Anti-Suit Injunction ("**Anti-Enforcement Injunction**"). The court found the Anti-Suit Injunction would render Anupam Mittal remediless since NCLT has the exclusive jurisdiction to decide oppression and mismanagement disputes under Indian law. Since such disputes are non-arbitrable under Indian law, any award rendered in an arbitration, to the extent that it decides on such disputes between the parties, would not be enforceable in India on grounds of public policy.
- Shortly after, the NCLT also passed an anti-arbitration injunction restraining the parties from continuing the on-going Singapore-seated ICC arbitration proceedings. The NCLT held that it has power to pass such anti-arbitration injunctions. It also held that the grounds for granting such injunction were met in the present case since Anupam Mittal would be rendered remediless if the arbitral tribunal decides on such non-arbitrable disputes.

Recently, in ***Anupam Mittal v People Interactive (India) Pvt. Ltd. & Ors.***,[1] the Bombay High Court issued an anti-enforcement injunction restraining the defendants from enforcing an anti-suit permanent injunction passed by the Singapore High Court (which was confirmed by the Singapore Court of Appeal ("**SGCA**") in January 2023) ("**Anti-Suit Injunction**"). The Anti-Suit Injunction restrained Anupam Mittal from continuing proceedings regarding oppression and mismanagement against Westbridge II Investment Holdings ("**Westbridge**") before the National Company Law Tribunal, Mumbai ("**NCLT**") in light of the arbitration agreement between the parties. The rationale and findings of the SGCA judgment has been discussed here.

Shortly after the Bombay High Court judgment, the NCLT issued an anti-arbitration Injunction to stay the on-going Singapore seated ICC arbitration proceedings between the parties ("**Anti-Arbitration Injunction**").[2] Unlike the Singapore courts, the decisions of the Bombay High Court and the NCLT prioritise the potential non-enforceability of any award rendered in such arbitration proceedings considering that oppression and mismanagement disputes are non-arbitrable in India.

BRIEF FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A brief factual background of the dispute has been covered in our previous hotline. In summary, Anupam Mittal and Westbridge had entered into a Shareholders' Agreement ("**SHA**") along with Anand Mittal, Navin Mittal and People Interactive (India) Ltd. ("**Company**"). Certain disputes arose between the parties which, according to Anupam Mittal, pertained to oppression and mismanagement. On the other hand, the defendants interpreted the disputes as arising from the SHA itself, making them contractual disputes amenable to arbitration.

Procedural History

S. No.	Date	Event
1	2017-2019	Disputes arose between Anupam Mittal and Westbridge as Westbridge sought to exit its investment in the Company.
2	24 January 2021	The Company makes a requisition to convene an Extra-Ordinary General Meeting ("**EOGM**") for – ▪ Appointing nominee of Westbridge on the board; ▪ Appointing one or more non-executive directors on the board; ▪ Appointing Anand Mittal, instead of Anupam Mittal, as the managing director of the Company; and ▪ Appointing Navin Mittal as the founder director of the Company.

Research Papers

FAQs on Setting Up of Offices in India
December 13, 2024

FAQs on Downstream Investment
December 13, 2024

Gaming Law 2024
December 12, 2024

Research Articles

The Revolution Realized: Bitcoin's Triumph
December 05, 2024

The Bitcoin Effect
November 14, 2024

Acquirers Beware: Indian Merger Control Regime Revamped!
September 15, 2024

Audio

Securities Market Regulator's Continued Quest Against "Unfiltered" Financial Advice
December 18, 2024

Digital Lending - Part 1 - What's New with NBFC P2Ps
November 19, 2024

Renewable Roadmap: Budget 2024 and Beyond - Part I
August 26, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

"Investment return is not enough" Nishith Desai with Nikunj Dalmia (ET Now) at FII8 event in Riyadh
October 31, 2024

Analysing SEBI's Consultation Paper on Simplification of registration for FPIs

3	3 March 2021	Anupam Mittal files a petition before the NCLT alleging oppression and mismanagement by Westbridge, Anand Mittal and Navin Mittal.
4	15 March 2021	Singapore High Court passes an ex-parte anti-suit injunction restraining Anupam Mittal from continuing the proceedings before the NCLT.
5	18 March 2021	Anupam Mittal files a suit before the Bombay High Court requesting a permanent injunction against the Anti-Suit Injunction ("**Anti-Enforcement Injunction**").
6	31 March 2021	Anupam Mittal files an application before the Singapore High Court to vacate the ex-parte injunction granted on 15 March 2021.
7	8 October 2021	Westbridge issues a notice to exercise its drag along rights under the SHA. This notice lapsed on 23 October 2021.
8	26 October 2021	Singapore High Court confirms the Anti-Suit Injunction passed earlier on 15 March 2021.
9	15 November 2021	Anupam Mittal files an appeal against Singapore High Court orders in relation to the Anti-Suit Injunction.
10	22 November 2021	Bombay High Court passes an ad-interim order directing Westbridge to adjourn the EOGM until the application relating to the Anti-Enforcement Injunction is decided. This order was later upheld by the Division Bench of the Bombay High Court on 17 April 2023.
11	December / January 2021	Anupam Mittal applies to amend his pleadings before the NCLT.
12	28 February 2022	Westbridge approaches the Singapore High Court alleging that Anupam Mittal acted in contempt of the Anti-Suit Injunction by amending his plaint and pleadings before the Bombay High Court, and failing to withdraw his petition before the NCLT. Singapore High Court subsequently passed an order directing Anupam Mittal to withdraw the proceedings before the Bombay High Court and the NCLT.
13	17 May 2022	Arbitration proceedings commence in Singapore.
14	6 January 2023	Singapore Court of Appeal upholds the Anti-Suit Injunction.
15	4 April 2023	The arbitral tribunal issued a partial award upholding its jurisdiction to hear and decide the disputes.

ARGUMENTS BY ANUPAM MITTAL BEFORE THE BOMBAY HIGH COURT

First, the principles for granting an Anti-Enforcement Injunction are the same as those which govern the grant of temporary or permanent injunctions i.e. (1) a *prima facie* case in favour of Anupam Mittal; (2) irreparable harm that Anupam Mittal would suffer if the injunction is not granted; and (3) balance of convenience in favour of Anupam Mittal.

Second, as regard the existence of a *prima facie* case, the Anti-Suit Injunction would render Anupam Mittal remediless since this injunction would prevent him from litigating oppression and mismanagement disputes before the NCLT (i.e. the forum with exclusive jurisdiction to decide these disputes), which are otherwise non-arbitrable under Indian law.

Third, the arbitration clause in the SHA itself stated that the enforcement of any award shall be subject to the provisions of the Indian Arbitration & Conciliation Act, 1996 ("**Arbitration Act**"). Even if an award was passed in the on-going arbitration proceedings, it would be unenforceable in India for being in violation of Indian public policy which holds that disputes relating to oppression and mismanagement are non-arbitrable.

Fourth, prohibiting Anupam Mittal from pursuing his remedy before the NCLT is violative of his fundamental right of access to justice under Article 21 read with Article 14 of the Constitution of India.

Fifth, questions of whether the oppression and mismanagement disputes raised by Anupam Mittal before the NCLT are "dressed up" may be determined solely by the NCLT. The Bombay High Court cannot go into detail to examine whether the disputes raised before the NCLT actually pertain to oppression and mismanagement.

Sixth, the defendants can approach the NCLT under Section 45 of the Arbitration Act to refer the disputes before the NCLT to arbitration.[3]

ARGUMENTS BY WESTBRIDGE BEFORE THE BOMBAY HIGH COURT

First, the disputes in question were contractual disputes arising out of the SHA and had nothing to do with oppression and mismanagement. The petition before the NCLT was "*dressed up*" as relating to oppression and

September 26, 2024

Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996

September 22, 2024

mismanagement as an excuse to avoid arbitration. The reliefs sought before the NCLT were mere reproduction of Sections 241 and 242 of the Indian Companies Act, 2013. The Bombay High Court has the power to determine whether the disputes before the NCLT genuinely pertain to oppression and mismanagement.

Second, the judgment of the Singapore High Court issuing the Anti-Suit Injunction should not be taken lightly due to the principle of comity of courts. Only the seat of the arbitration would be vested with the exclusive jurisdiction for regulating the arbitration proceedings. In this light, the Anti-Suit Injunction was correctly granted, and a *prima facie* case was not made out by Anupam Mittal to resist enforcement.

JUDGMENT OF THE BOMBAY HIGH COURT

At the outset, the Bombay High Court found that the 3-pronged test for grant of temporary injunction will also apply while deciding whether an anti-enforcement injunction should be granted. This is because an anti-enforcement injunction is an equitable relief, and a species of injunction. The court also referred to the decision of ***Interdigital Technology Corporation v Xiaomi Corporation and ors.***[4] while outlining the principles that should be kept in mind while granting an anti-enforcement injunction. These principles include possibility of palpable and gross injustice, interference with the right of pursue one's legal remedies before competent forums, breach of natural justice principles and fraud in obtaining the judgment sought to be enforced.

The Bombay High Court held that under Indian law, oppression and mismanagement disputes are non-arbitrable, and that the NCLT has exclusive jurisdiction to decide them. Since such disputes are non-arbitrable in India, a foreign award deciding on such disputes will not be enforceable in India for being in violation of Indian public policy. The court held that even though the seat of arbitration is Singapore, the arbitration clause of the SHA specifically stipulates that any award should be enforceable under the provisions of the Arbitration Act. Therefore, it cannot be argued that Anupam Mittal should not be allowed to raise disputes before the NCLT merely because he agreed to a Singapore seat of arbitration (which permits arbitration of oppression and mismanagement disputes).

Further, the Bombay High Court also held that the principle of comity of courts cannot override the right of a litigant to access justice. This is especially so when the Anti-Suit Injunction prevents Anupam Mittal from pursuing the only remedy he has under Indian law to decide his grievances.

The Bombay High Court also looked at the extent to which it can go to determine whether the disputes referred to the NCLT involve genuine oppression and mismanagement disputes or whether they are simply "dressed up" as such. The court held that for this purpose, it cannot undertake a detailed enquiry into the nature of the disputes before the NCLT which has exclusive jurisdiction to decide these disputes. It further held that in this case, by undertaking a cursory review of these claims, it cannot be concluded that the oppression and mismanagement claims before the NCLT are dressed up. The Bombay High Court held that in any case, the defendants may make an application under Section 45 of the Arbitration Act before the NCLT arguing that the oppression and mismanagement claims are merely "*dressed up*" and should be referred to arbitration instead.

In conclusion, the Bombay High Court granted the Anti-Enforcement Injunction by stating that: (i) there is a strong *prima facie* case in favour of Anupam Mittal who would otherwise not be able to seek redress for his oppression and mismanagement claims; (ii) Anupam Mittal will suffer grave and irreparable loss if the Anti-Enforcement Injunction is not granted as he will not be able to pursue the only remedy he has; (iii) the balance of convenience lies in favour of granting the Anti-Enforcement Injunction since it will enable Anupam Mittal to pursue the only remedy he has; and (iv) the defendants can always approach the NCLT under Section 45 of the Arbitration Act to refer the parties to arbitration.

THE NCLT DECISION

Shortly after the Bombay High Court granted the Anti-Enforcement Injunction, Anupam Mittal approached the NCLT seeking an anti-arbitration injunction against the on-going ICC arbitration proceedings. He argued that the continuation of the arbitration proceedings would be oppressive to his rights since only NCLT has the jurisdiction to decide on oppression and mismanagement disputes. On the other hand, Westbridge argued that it had every right to commence the arbitration proceedings in Singapore in light of its contractual rights under the SHA.

The NCLT granted the Anti-Arbitration Injunction by making two findings in this case:

(i) NCLT has the power to issue an Anti-Arbitration Injunction in light of Section 430 of the Companies Act, 2013 and Rule 11 of the NCLT Rules, 2016. It is not bound by the findings of the NCLAT in *Macquarie SBI Infrastructure Investments Pvt. Ltd. and Another Vs. K Sadananda Shetty and others*,[5] which held that NCLT does not have power to grant anti-arbitration injunctions, since the facts of *Macquarie* were different.

(ii) In this case, the Anti-Arbitration Injunction was warranted since Anupam Mittal had established that grounds of *prima facie* case, irreparable harm and balance of convenience were in his favour. While deciding that these grounds were satisfied, the NCLT reiterated the observations that the Bombay High Court made while granting the Anti-Enforcement Injunction.

NDA ANALYSIS

The Bombay High Court and the NCLT decisions reflect the strong stance taken by Indian courts against the findings of the Singapore courts. While the Singapore courts emphasized the arbitrability of disputes in the law of the seat and arbitration agreement, the Indian courts prioritize the implications of non-arbitrability of such disputes in India (i.e. the forum where any such award may be finally enforced). These decisions challenge accepted principles of arbitration law: should tribunals consider the enforceability of their award in a non-seat country when such country is the only jurisdiction where such award may effectively be enforced?

This also leads to a question of whether the SGCA was right to find that the disputes in the present case should be arbitrated since oppression and mismanagement disputes are arbitrable under Singapore law. The SGCA relied upon the decision of *Tomulgen Holdings Ltd v. Silica Investors Ltd to* find thatoppression and mismanagement disputes are arbitrable under Singapore law.[6] However, the findings in *Tomulgen* were made in the context of the Singapore Companies Act, 1967. It is worthy discussion whether such findings should be similarly applied to

companies which are not governed by the Singapore Companies Act.

Further, the SGCA's approach while determining the law of the arbitration agreement can be questioned. The SGCA had found that if there is no express choice for law governing the arbitration agreement, there is a presumption that the law governing the contract will also govern the arbitration agreement. However, it found that in the present case, this presumption was displaced because Indian law (i.e. law of the contract) would render the present dispute non-arbitrable. It can be argued that the presumption should not have been displaced since, unlike the other cases cited by the SGCA, applying Indian law as the law governing the arbitration agreement would not have negated the entire arbitration agreement and would have merely rendered some disputes as non-arbitrable. The fact that the parties agreed to arbitrate oppression and mismanagement disputes in the arbitration clause could have been balanced with the fact that they also expressly mentioned that any award should be enforceable under Indian law in this clause.

At the same time, it also begs question whether foreign awards, which decide on subject-matter which is otherwise non-arbitrable in a country, should necessarily be unenforceable on grounds of public policy in such country. This brings focus to the US Supreme judgment of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*[7] which found that antitrust disputes, which were otherwise considered non-arbitrable in the US, could be arbitrated in that case owing to the international character of the undertaking in question. While *Mitsubishi* dealt with referral to arbitration, rather than enforcement of award, it importantly recognizes that different considerations may apply when deciding arbitrability of disputes in international – as compared to purely domestic – arbitrations.

Further, the NCLT decision, in particular, requires discussion of whether a statutory tribunal in India can - and should - injunct an arbitral tribunal (especially a foreign tribunal) from continuing with its proceedings. It is difficult to understand how the NCLT reached the conclusion that it had the power to grant an anti-arbitration injunction against the on-going Singapore-seated arbitration proceedings. This is especially considering the *Macquarie* judgment which specifically held that an arbitral tribunal has jurisdiction to decide its own competence and may only be bound by orders of courts which have supervisory authority over it. The NCLT decision did not explain why these legal findings made by the NCLAT in *Macquarie* are inapplicable in the present case.

The NCLT's reasoning for why it should grant such an injunction is also unclear. The parties do not dispute that they had a valid arbitration clause under the SHA, and that contractual disputes under the SHA may be referred to arbitration. The NCLT does not conclude, or even undertaken an enquiry of, whether the claims referred to arbitration were contractual disputes arising from the SHA. The NCLT's basis for then granting such an anti-arbitration injunction seems tenuous. Further, NCLT's reasoning that not granting such an anti-arbitration injunction would cause irreparable harm to Anupam Mittal appears contradictory to its finding that any award rendered in these arbitration proceedings would be unenforceable in India anyway. The NCLT seems to have not appreciated that different considerations would apply when deciding to grant an anti-enforcement injunction such that the NCLT proceedings are not disturbed, and granting an anti-arbitration injunction which would prohibit on-going arbitration proceedings.

Lastly, India forms part of a minority of countries which find that oppression and mismanagement are non-arbitrable. One of the main arguments for why oppression and mismanagement disputes are considered arbitrable in a majority of countries is because these disputes mostly affect commercial interests of private parties. It may be time for India to reconsider its position on arbitrability of oppression and mismanagement disputes. However, until any such change, the difference in standards of arbitrability between Indian and Singapore law may continue to create greater unpredictability for commercial parties. Parties may attempt to reduce such unpredictability by specifically identifying the law of the arbitration agreements in their arbitration clauses.

– Ansh Desai, Ritika Bansal & Ashish Kabra

You can direct your queries or comments to the authors.

[1]Anupam Mittal v. People Interactive (India) Pvt. Ltd. & Ors , IA No. 1010/2021 in Suit No. 95/2021 (Bombay High Court) (Judgment dated 11 September 2023).

[2]Anupam Mittal v. People Interactive (India) Pvt. Ltd. & Ors., CA/392/2023 in CP/92(MB)2021 (NCLT) (Judgment dated 15 September 2023).

[3]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 prima facie finds that the said agreement is null and void, inoperative or incapable of being performed.

[4]*Interdigital Technology Corporation v Xiaomi Corporation and ors.* judgement and order dated 03 May 2021, IA No. 8772/2020 in CS (Comm) 295/2020.

[5]*Macquarie SBI Infrastructure Investments Pvt. Ltd. and Another Vs. K Sadananda Shetty (Applicant No. 1 in IA 445 of 2020) and others,* Company Appeal (AT) (CH) No. 01 of 2021.

[6]*Tomulgen Holdings Ltd & Anr. v. Silica Investors Ltd & Ors.*, [2015] SGCA 57.

[7]*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).