Arbitration Case *Insights*

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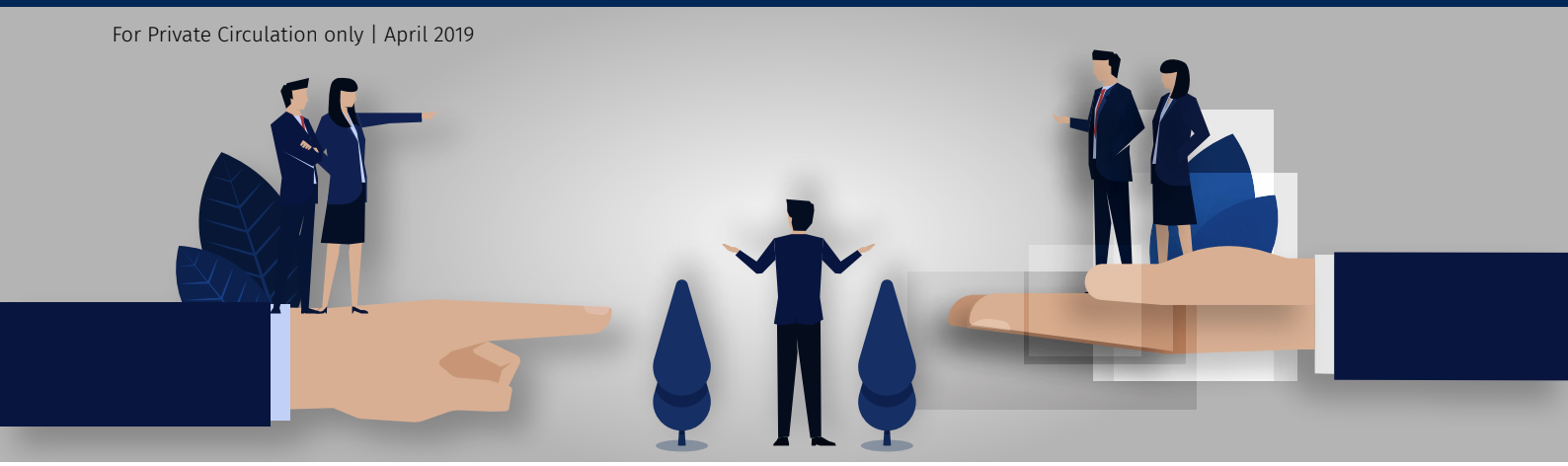

Delhi High Court refuses to grant an anti-arbitration injunction in case of constructive *res judicata*[1]

In this Issue

Brief Facts

The disputes between HSPCL & TAQA ("**Plaintiffs**") and NCCL ("**Defendant**") arose on account of the alleged breach of certain material conditions of a Securities Purchase Agreement dated 19 September 2012 ("**SPA**") and consequently, the purported violation of rights and obligations under the SPA. The SPA was for a power project on the Sorang tributary of the Sutlej river ("**Project**"). Since the Project could not be made operational by 31 March 2013, as required by the SPA, the Plaintiffs commenced SIAC arbitration proceedings under the SPA ("**First Arbitration**"). The Plaintiffs and Defendant participated in the First Arbitration, in which the Defendant filed two amended versions of its Statement of Counterclaim.

The arbitral tribunal rendered its award in favour of the Plaintiffs on 24 January 2018 ("**Award**"), following which the Plaintiffs filed their petition seeking enforcement of the Award in the Delhi High Court on 9 March 2018. Subsequently, on 1 October 2018, the Defendant made a claim against the Plaintiffs for incentive payments under the SPA, which was already made in the First Arbitration. The Plaintiffs denied this claim, following which the Defendant invoked another SIAC arbitration proceeding on 31 December 2018 ("**Second Arbitration**"). In response, the Plaintiffs filed an-anti arbitration suit in the Delhi High Court for declaratory and permanent injunctive reliefs to restrain the Defendant from proceeding with the Second Arbitration.

Issue

Whether an anti-arbitration injunction can be sought against a subsequent/second arbitration for being barred by *res judicata*?

Judgment

The High Court held that the concept of *res judicata* would not apply to the facts of the present case and, at best, constructive *res judicata* could apply, which is a derivative of *res judicata*. The Court observed that the determination of whether or not constructive *res judicata* applies with respect to the issue of incentive payments was undoubtedly a mixed question of fact and law. Therefore, this would require, if not a full-blown trial, at least appreciation of evidence. Since the Plaintiffs in effect aim to have a mini-trial in the garb of an anti-arbitration injunction suit, the relief so sought cannot be granted by the Court as it did not have jurisdiction to do so. The Court found support for its position in Rules 28.2 and 29.1 of the SIAC Rules, which permit the arbitral tribunal to rule on its own jurisdiction as well as the existence, validity or scope of the arbitration agreement.

The Court encapsulated the following parameters for the grant of anti-arbitration injunctions: (i) principles governing anti-suit injunctions are not identical to those governing anti-arbitration injunctions; (ii) courts are slow in granting anti-arbitration injunctions unless they come to the conclusion that the proceeding initiated is vexatious and/or oppressive; (iii) the court

which has supervisory or even personal jurisdiction over the parties has the power to disallow commencement of fresh proceedings on the ground of *res judicata* or constructive *res judicata*; (iv) the fact that in the court's assessment a trial would be required, would weigh against the grant of an anti-arbitration injunction; (v) the aggrieved party should be encouraged to approach either the arbitral tribunal or the court which has supervisory jurisdiction; and (vi) the arbitral tribunal could adopt a procedure to deal with a "re-arbitration complaint" (depending on the rules or procedure governing the proceeding) as a preliminary issue.

Analysis

As rightly noted by the High Court, courts have ordinarily been cautious in granting anti-arbitration injunctions. This is because weightage is given to party autonomy as by entering into an arbitration agreement, parties voluntarily and mutually consent to arbitration as the dispute resolution mechanism. Consequently, an anti-arbitration injunction restraining the arbitration would take away the power of the arbitral tribunal to decide its own jurisdiction.

While formulating the parameters for the grant of anti-arbitration injunctions, the Court referred to already settled principles governing the grant of anti-arbitration injunctions laid down by the Supreme Court of India in the case of *World Sports Group v. MSM Satellite (Singapore) Pte. Ltd.*[2] and the Delhi High Court in *Mcdonald's India Private Limited v. Vikram Bakshi & Ors.*[3] The Court also reiterated the law enshrined in Section 45 of the Arbitration and Conciliation Act, 1996, according to which any party seeking an-anti arbitration injunction has to satisfy the court that the arbitration agreement is null and void, inoperative and incapable of being performed.

This decision and in particular, the parameters governing the grant of anti-arbitration injunctions, clarify the consideration while granting anti-arbitration injunctions in India. The decision demonstrates the growing judicial inclination to adopt a pro-arbitration stance when addressing questions on anti-arbitration injunctions, both in the fields of international commercial arbitration and Bilateral Investment Treaty arbitration.

In this Issue

1 Authored by Tejas Karia, Partner & Head-Arbitration, and Amee Rana and Juhi Gupta, Associates; Himachal Sorang Power Private Limited & Anr. v. NCC Infrastructure Holdings Limited, CS (COMM) No. 12 of 2019 & I.A. No. 291 of 2019, Delhi High Court, 2019 SCC OnLine Del 7575, judgment dated 13 March 2019.
Quorum: Rajiv Shakdher, J.

2 (2014) 11 SCC 639.

3 (2016) 232 DLT 394.

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