Dispute Resolution & ADR

Monthly Newsletter
November 2024

www.foxandmandal.co.in
KOLKATA | MUMBAI | NEW DELHI

FOX & MANDAL
SOLICITORS & ADVOCATES
Estd. 1896

TABLE OF CONTENTS

Consent of a non-signatory not required for appointment of arbitral tribunal

Yves Saint Laurent v. Brompton Lifestyle Brands Pvt Ltd & Anr

Delhi High Court | September 18, 2024
OMP (T) (Comm) No. 29 of 2023

The Delhi High Court recently held that a non-signatory's consent is not required for the appointment of an arbitral tribunal. In coming to this conclusion, the Court's reasoning – that a 'party' under Section 2(1)(h) of the Arbitration and Conciliation Act, 1996 (**Act**) does not include a non-signatory – seems to be inconsistent with the Supreme Court's decision in **Cox and Kings Ltd v. SAP India Pvt Ltd**[1] where it was held that 'parties' includes both signatories and non-signatories, while leaving it to the arbitral tribunal to decide on the impleadment of the non-signatory as a veritable party to the arbitration. In light of this, a claimant initiating arbitration cannot assume that such a non-signatory would indeed be made party to the arbitration and therefore, is not mandated under law to seek its participation in the appointment procedure prior to such determination by arbitral tribunal. However, in our view, it is in the interest of natural justice that a non-signatory that is made a 'party' is not bound by orders passed by an arbitral tribunal, the appointment of which it did not consent to (this issue was not addressed by the Supreme Court in Cox & Kings).

SUMMARY OF FACTS

Yves Saint Laurent (YSL), a leading fashion design house, entered into a Franchise Agreement (FA) with Beverly Luxury Brands Ltd (Beverly) in 2019. Subsequently, Beverly entered into a Sub-Franchise Agreement (SFA) with Brompton Lifestyle Brands Pvt Ltd (Brompton), without the consent or knowledge of YSL. While the FA did not contain any arbitration clause, the SFA provided for arbitration by a sole arbitrator.

YSL terminated the FA in 2021, and subsequently Beverly terminated the SFA. Brompton sent a notice to Beverly and YSL invoking arbitration under the SFA, and by mutual consent of Beverly and Brompton (without knowledge of YSL), an arbitrator was appointed.

YSL challenged the jurisdiction of the arbitrator under Section 16 of the Act (that empowers the arbitrator to adjudicate challenges to its jurisdiction), contending that the arbitrator was *coram non judice* vis-à-vis YSL since YSL, being a non-signatory, had neither consented to arbitration nor to the appointment of the arbitrator. The arbitrator dismissed YSL's Section 16 challenge.

Thereafter, YSL sought termination of the mandate of the arbitrator under Section 14 of the Act before the Delhi High Court, but without any alternate prayer for deletion of its name or substitution of the arbitrator (Section 14 Petition).

DECISION OF THE COURT

The key issues before the Court were whether the Section 14 Petition filed by YSL was maintainable and if so, whether the unilateral appointment of the arbitrator rendered him *de jure* incapable of performing his functions.

On the issue of maintainability, the Court observed that the right to seek termination of the arbitrator's mandate under Section 14 remains absolute, independent and unaffected by the outcome of a separate jurisdictional challenge under any other provision of the Act. Thus, the Section 14 Petition was maintainable despite dismissal of the Section 16 challenge by the arbitrator.

In respect of the arbitrator's appointment, the Court observed that the requirement for consensus in appointing an arbitrator envisaged under Section 21 of the Act, applies only to the 'parties' to the arbitration agreement as defined in Section 2(1)(h), and not to 'non-signatories'. The Court relied on an excerpt from the decision in *Chloro Controls India Pvt Ltd v. Severn Trent Water Purification Inc*[2] wherein the Supreme Court stated that '*a non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases*' As such, the Court held the arbitrator's appointment does not become unilateral simply because the consent of YSL, a non-signatory to the SFA, was not obtained.

The Court also observed that if YSL was improperly made a party to the arbitration, the appropriate remedy of its deletion from proceedings was never prayed for.

[1] 2024 4 SCC 1
[2] (2013) 1 SCC 641

Buyback claim of shares constitutes 'financial debt' under the IBC framework

Spectrum Trimpex Pvt Ltd v. VPhrase Analytics Solutions Pvt Ltd

National Company Law Tribunal (**NCLT**), Mumbai Bench | October 4, 2024
Company Petition (Insolvency) No. 249 of 2024 (Mumbai)

The NCLT recently held that claims arising out of buyback clauses under Share Purchase Agreements constitute 'financial debt' under the insolvency framework if they imply an obligation that mirrors the commercial effect of borrowing. The judgment helps clarify the scope of 'financial debt' under the Insolvency and Bankruptcy Code, 2016 (**IBC**) and underlines the importance of compliance with mutually agreed terms, particularly in valuation, to fulfil the IBC's financial thresholds. Even though NCLT has limited scope of adjudication before admitting a corporate debtor into insolvency, diligent scrutiny of shareholder claims will help prevent misuse of IBC provisions.

SUMMARY OF FACTS

Spectrum Trimpex Pvt Ltd (Spectrum) invested in VPhrase Analytics Solutions Pvt Ltd (VPhrase) under a Share Subscription and Shareholders Agreement (SSA). The SSA involved the allotment of 378 equity shares to Spectrum, with a clause for mandatory buyback to provide an exit at fair market value after 5 years. Spectrum invoked this buyback clause in January, 2023 calling upon VPhrase to pay INR 93,79,692 at the rate of INR 24,814 per equity share based on its audited financial statements. However, VPhrase did not respond.

A valuation report was then obtained unilaterally by Spectrum, setting a share price of INR 34,600 per equity share, resulting in a claim amount of more than INR 1 crore (unpaid buyback amount).

Consequently, Spectrum filed a petition under Section 7 of the IBC before the NCLT, Mumbai seeking initiation of Corporate Insolvency Resolution Process against VPhrase, claiming that the unpaid buyback amount constituted a 'financial debt' due to non-compliance by VPhrase.

DECISION OF THE TRIBUNAL

While deciding on whether the buyback claim of shares by Spectrum constituted 'financial debt', the NCLT referred to the decision in *Kotak Mahindra Bank Ltd v. A Balakrishnan & Anr*[3] wherein the Supreme Court held that raising of an amount by a company through a Shareholders Agreement had the commercial effect of borrowing since the said transaction has direct effect with the business and the Company and the promoters were obliged to purchase all the shares held by non-defaulting shareholders at a price that provides an internal rate of return of 15% p.a. compounded annually or at the fair market value, whichever is higher.

Additionally, the NCLT also referred to the judgment in *Sanjay D Kakade v. HDFC Ventures Trustee Co Ltd*[4] wherein the National Company Law Appellate Tribunal (NCLAT) held that investments made in the corporate debtor by means of Share Subscription and Shareholders Agreements involving a pre-emption right in favour of the financial creditor and/or a put option in the Shareholders Agreement obligating the promoters to buy-back shares at a fair market value, such a transaction would be treated as a 'financial debt' as the transaction has the commercial effect of borrowing.

The NCLT, thus, held that the unpaid buyback amount had the commercial effect of borrowing and constituted financial debt; however, Spectrum's unilateral appointment of a valuer contrary to the SSA's requirement and the consequent unilateral valuation will not bind VPhrase.

Noting that the amount claimed initially was INR 93,79,692 which fell below the IBC's threshold of INR 1 crore, the NCLT rejected Spectrum's attempt to inflate the valuation as non-compliant with the SSA, thereby dismissing the petition.

[3] 2022 (9) SCC 186
[4] Company Appeal (AT) (Ins) No. 481 of 2023

Mandate of pre-institution mediation under Section 12A of the Commercial Courts Act, 2015 applies to counterclaims

Aditya Birla Fashion & Retail Ltd v. Saroj Tandon

Delhi High Court | September 2, 2024
2024 SCC OnLine Del 6099

The Delhi High Court held that pre-institution mediation is mandatory for the filing of a counterclaim involving a commercial dispute not contemplating any urgent relief. While the judgment aligns with the strict interpretation of the statutory provisions of the Commercial Courts Act, 2015 (**Act**) and Code of Civil Procedure, 1908 (**CPC**) mandating pre-institution mediation as a means to reduce the workload of the Courts, it must be analysed whether the mandate indeed yields any objective results. While the judgement rightly upholds the ethos of a legal mandate that cannot be given a go bye, however, if a party is clearly disinclined to settle, the chances of any positive outcome of such a mandate are very low, particularly considering that parties generally attempt to settle their disputes prior to approaching the Court in the first place. Therefore, it remains to be seen whether such a mandatory provision actually serves its purpose of efficiently resolving disputes and reducing burden on Courts or whether it merely postpones the litigation.

SUMMARY OF FACTS

Saroj Tandon (Saroj) had leased a shop to Aditya Birla Fashion & Retail Ltd (ABFRL). During Covid-19, ABFRL ceased its business operations and sought termination of the lease and refund of security deposit. However, Saroj failed to return the security deposit constraining ABFRL to file a commercial suit seeking recovery of money along with an application under Section 12A of the Act for mandatory pre-institution mediation.

As Saroj failed to appear for mediation, it was declared as non-starter and the commercial suit was filed and registered. Along with her written statement to the suit, Saroj filed a counterclaim seeking rentals without any urgent relief. The counterclaim involved a commercial dispute and was, therefore, also registered as a commercial suit.

ABFRL filed an application under Order VII Rule 11 of the CPC seeking rejection of the counterclaim on the ground that Saroj had failed to invoke mandatory pre-institution mediation. The said application was dismissed by the Commercial Court.

Against such dismissal, ABFRL filed the present petition under Article 227 of the Constitution of India.

DECISION OF THE COURT

In order to determine whether invoking pre-institution mediation under Section 12A of the Act is mandatory for filing a counterclaim in commercial disputes when no urgent relief is sought, the Delhi High Court analysed Order VIII Rule 6A and Order IV Rules 1 & 2 of CPC and held that a counterclaim is of the nature of a distinct suit and must be treated procedurally as such. Counterclaims in commercial disputes are subject to the same legal obligations as commercial suits.

Having regard to Rule 3 of the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 (2018 Rules) which requires initiation of mandatory mediation process against the 'opposite party' as well as Rule 2(g) of the 2018 Rules which defines 'opposite party' as '*a party against whom relief is sought in a commercial dispute*', the Court clarified that the Legislature never intended to exempt any party from the mandate of pre-institution mediation, upholding the indefeasible right of such 'opposite party' to participate in mediation.

The Court also referred to the Supreme Court's decision in *Patil Automation Pvt Ltd v. Rakheja Engineers Pvt Ltd*[5] holding that non-compliance of pre-institution mediation would entail rejection of the plaint.

While rejecting Saroj's argument that an unsuccessful mediation prior to the filing of the original suit, in all probability, renders a pre-counterclaim mediation to be a futile exercise, the Court noted that the subject matter and nature of relief in a counterclaim may be dissimilar, and the approach of the original plaintiff cannot be anticipated in a mechanical manner. It was held that a mandatory pre-requisite cannot be given a go-bye on whims and fancies even if the conduct of the counterclaimant is reflective of disinclination towards any settlement.

[5] 2022 SCC OnLine SC 1028

Equal treatment of government enterprises and private parties for grant of stay on the execution of an arbitral award

International Seaport Dredging Pvt Ltd v. Kamarajar Port Ltd

Supreme Court of India | October 24, 2024
2024 SCC OnLine SC 3112

The Supreme Court clarified that while determining the conditions for grant of stay of an arbitral award, no special treatment can be accorded to government enterprises and statutory undertakings over private respondents. Thus, factors such as nature (government or private), size, success and public image of the undertaking cannot be applied while deciding the conditions for grant of interim stay of an award. The decision reinforces the principle of equality and fairness in arbitration and will help ensure that government enterprises are held to the same standards of accountability and financial responsibility, thus promoting a more equitable environment for all parties in commercial disputes.

SUMMARY OF FACTS

Kamarajar Port Ltd (KPL) entered into a contract with International Seaport Dredging Pvt Ltd (ISDPL) for capital dredging. Disputes arose between the parties constraining ISDPL to invoke arbitration on several claims.

The arbitral tribunal passed an award (Award) directing KPL to pay INR 21.07 crore (Principal Sum) along with interest and INR 3.2 crore as costs (Cost). KPL challenged the Award under Section 34 of the Arbitration and Conciliation Act, 1996 (Act) before the Madras High Court and sought interim stay on execution of the Award under Section 36 of the Act.

The conditions for grant of interim stay of an arbitral award directing payment of money are guided by the principles of the Code of Civil Procedure, 1908 (CPC). While Order XLI Rule 5 of CPC empowers an Appellate Court to direct a party to deposit or furnish security of the decretal amount, Order XXVII Rule 8A of CPC provides that no security shall be required from the Government as the judgment-debtor.

The High Court granted an interim stay on the award subject to KPL furnishing a bank guarantee for merely the Principal Sum within a period of 8 weeks (Stay Order). The Court refused to issue orders qua the Cost component observing that KPL is not a fly-by-night operator and is a statutory undertaking.

ISDPL challenged the Stay Order before the Supreme Court of India.

DECISION OF THE COURT

The key issue for consideration was whether the High Court was correct in determining conditions for grant of stay of the Award – such as furnishing a bank guarantee instead of depositing the security amount and not including the Cost component – because KPL is a statutory undertaking.

Relying on its decision in *Pam Developments Pvt Ltd v. State of West Bengal*,[6] the Supreme Court observed that since Section 36(3) of the Act postulates that a Court must merely 'have due regard' to the principles of CPC while granting interim stay of an arbitral award for payment of money, the law qua arbitration proceedings does not differentiate between statutory undertakings and private entities.

In support of its observation, the Court took note of Section 18 of the Act which mandates that parties shall be treated with equality. In this regard, the High Court erred in relying on the status of KPL as a statutory enterprise to frame the stay conditions.

Based on the principles for grant of interim stay under CPC, the Court modified the Stay Order and subjected the stay of the Award to KPL depositing 75% of the entire awarded sum including the Cost component.

[6] (2019) 8 SCC 112

Transfer of property to minor is not invalid

Neelam Gupta & Ors v. Rajendra Kumar Gupta & Anr

Supreme Court of India | October 14, 2024
2024 SCC OnLine SC 2824

The Supreme Court recently held that a sale is not a contract and that a minor can be a valid transferee of an immoveable property. In light of prevailing family disputes in India entailing adversarial property claims and harassment, this decision is significant in protecting the rights of minors from unscrupulous family litigation ensuring that the property is in the custody of the intended beneficiary. In property disputes, where the issue of adverse possession is often raised, this decision provides an important clarification that the limitation period of 12 years for claiming title under adverse possession under Section 27 (read with Article 65 of the Schedule) of the Limitation Act, 1963 commences when the defendant's possession become adverse and not when the right of ownership arises to the plaintiff.

SUMMARY OF FACTS

Rajendra Kumar Gupta (RKG) filed a suit in 1986 (Suit) seeking recovery of possession of land from Ashok Kumar Gupta and Rakesh Kumar Gupta (Defendants) contending to be the sole purchaser of the land from Sitaram Gupta, their common cousin, *vide* a registered sale deed in 1968, and claiming to have been dispossessed of the land in 1983 by the Defendants.

On the other hand, the Defendants contended that the land was jointly purchased by their father and the father of the RKG, in the name of Sitaram Gupta in 1963. They asserted that Sitaram Gupta had no right to sell the land to RKG since the same was purchased jointly. They also contended that the suit was barred by limitation, on principle of adverse possession i.e. the Defendants had perfected their title over the land by having possession over the same adverse to the title of RKG for a period of 12 years or more.

The Trial Court upheld the Defendants' contentions. The First Appellate Court set aside the finding of the Trial Court that the land was a joint family property but upheld the dismissal of the suit on the ground of limitation. The Chhattisgarh High Court reversed the concurrent findings and concluded that the Defendants had failed to prove their possession as being adverse to the title of RKG for a continuous period of 12 years or more.

Against this judgment, the legal representatives of the Defendants approached the Supreme Court.

DECISION OF THE COURT

While deciding on the twin issues of whether sale of the land by Sitaram Gupta to RKG was valid and whether the Defendants had perfected their title by way of adverse possession (i.e. by being in continuous and uninterrupted possession of the land for more than 12 years), the Court noted that the Defendants had not disputed the First Appellate Court's finding on the land not being a joint family property before the High Court, and proceeded on the basis that the land was not a joint family property.

Rejecting the Defendants' contention that the sale between RKG and Sitaram was void since Sitaram was a minor in 1963 and RKG was a minor in 1968, the Court held that the sale of land cannot be said to be a contract. Taking note of Section 54 of the Transfer of Property Act, 1882 (TOPA), it was held that 'sale' was a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. On a conjoint reading of the provisions of TOPA and the Indian Contract Act, 1872, it was held that the transfer of an immovable property in favour of a minor was permissible. Thus, a minor can be a transferee though not a transferor of immovable property.

On adverse possession, the Court stated that if possession of the land was permissive in nature, the Defendants could not claim title by way of adverse position. The Court further held that as per Article 65 of the Limitation Act, 1963, the starting point of limitation to claim title by way of adverse possession commences only from the date when the Defendant's ownership becomes adverse to the title of the Plaintiff.

Third party has no right to challenge an arbitral award

Mukesh Udeshi v. Jindal Steel Power Ltd & Anr

Delhi High Court | July 2, 2024
2024 SCC OnLine Del 4564

The Delhi High Court dealt with an interesting issue regarding the locus of a person to challenge an arbitral award under Section 34 of the Arbitration & Conciliation Act, 1996 (Act), reinforcing the legal position that only a 'party' to the arbitration proceeding can challenge an arbitral award and a non-party, despite claiming to be a beneficial owner of the subject matter of the dispute, has no locus to challenge the award. The judgment protects the efficiency of the arbitration process by respecting privity of contract and preventing unscrupulous litigants from interfering in the process of obtaining a speedy resolution. This judgment provides a significant clarification at a time when the law permits non-signatories to be included in arbitration proceedings.

SUMMARY OF FACTS

A dispute between Jindal Steel & Power Ltd (Jindal) and Nspire Solutions Pvt Ltd (Nspire) over Nspire's registration of the domain name 'jsplsteel.in' was referred to arbitration under the .IN Domain Name Dispute Resolution Policy (INDRP).

Nspire sought to justify its registration basis the third-party rights accruing to its client Jamnadas Steel Pvt Ltd for whom the domain name was registered.

The arbitral award directed Nspire to transfer the domain name to Jindal since Nspire's domain name was confusingly similar to that of Jindal's.

The award was challenged by Mukesh Udeshi claiming to be a beneficial owner of the domain name under Section 34 of the Act (Section 34 Petition).

DECISION OF THE COURT

While deciding on the maintainability of a challenge to an arbitral award by a third party claiming to have a beneficial interest in the subject matter of the dispute, the Delhi High Court reaffirmed the position that only parties to the arbitration agreement as defined under Section 2(1)(h) of the Act have the right to challenge an arbitral award.

The Court dismissed the Section 34 Petition holding that Mukesh Udeshi was not a formal party to the arbitration proceedings and therefore had no locus to challenge the arbitral award.

The Court observed that the INDRP rules bind only the registrant (Nspire), the complainant (Jindal), and the domain name registrar, and do not bind any third party claiming a beneficial interest.

The Court also negated the contention of breach of principles of natural justice since Mukesh Udeshi was not listed as the registrant in the WHOIS database and, therefore, was not entitled to be made a party to the arbitration proceedings in any circumstance.

Employment offer to selected candidates cannot be revoked due to previous employer's lapse in processing resignation

Matthew Johnson Dara v. Hindustan Urvarak and Rasayan Ltd

Delhi High Court | October 16, 2024
Writ Petition (Civil) No. 11818 of 2024

The Delhi High Court recently directed the re-appointment of a selected candidate whose employment had been cancelled due to lapse by the previous employer in processing his resignation and issuing a relieving letter. The case of Matthew Johnson Dara highlights the challenges employees face with bureaucratic procedures in public sector resignations and transitions. While the Court's employee-friendly approach ensured Matthew could pursue better career opportunities without being penalised for delays by its previous employer, the case sets an important precedent reinforcing the need for a balanced approach that protects employees' rights while promoting streamlined, employee-centric practices in public sector transitions.

SUMMARY OF FACTS

Matthew Johnson Dara (Matthew) joined Brahmaputra Valley Fertilizer Corporation Ltd (BVFCL) in 2023. While he was still on probation at BVFCL, Matthew applied against the advertisement issued by Hindustan Urvarak and Rasayan Ltd (HURL) for the position Vice President (Finance) in 2024.

On June 7, 2024, he was offered the post and directed to report for joining by July 5, 2024. He tendered his resignation at BVFCL on the same day requesting to be relieved within 15 days since he was not required to serve the notice period during probation.

Subsequently, instead of accepting his resignation, BVFCL confirmed his service retrospectively from April 28, 2024. Matthew sent a letter agreeing either to serve a 1-month notice period effective from June 7, 2024 or to adjust his balance leaves against the remaining notice period.

As no response was forthcoming from BVFCL, Matthew joined HURL from July 8, 2024 undertaking to furnish the relieving letter from BVFCL within 30 days. Consequently, BVFCL served a show-cause notice upon him, seeking to initiate disciplinary action, which was challenged before the Gauhati High Court. Matthew obtained an interim order staying any disciplinary proceeding and directing finalisation of his resignation.

In the meantime, however, without affording Matthew a hearing, HURL unilaterally revoked his joining *vide* order dated August 19, 2024 and issued a fresh advertisement for the vacancy. This order was challenged before the Delhi High Court.

DECISION OF THE COURT

The Delhi Court heard the matter and passed an interim order dated August 28, 2024 directing HURL not to initiate fresh hiring. On October 3, 2023, BVFCL accepted Matthew's resignation.

During the final hearing the Court observed that there was no dispute as to Matthew's qualifications and successful clearance for the post at HURL. Noting that the issue of relievement from BVFCL, which formed the basis for HURL's impugned order dated August 19, 2024, no longer survived, there was no impediment in Matthew joining HURL since the position was lying vacant due to the Court's interim order dated August 28, 2024.

CONTRIBUTORS

Kunal Vajani | Jt. Managing Partner
Kunal.Vajani@foxandmandal.co.in

Kunal Mimani | Partner
Kunal.Mimani@foxandmandal.co.in

Prashant Alai | Senior Associate
Abhinav Jain | Associate
Akshay Luthra | Associate
Tanish Arora | Associate

Ashutosh Gupta | Partner
Ashutosh.Gupta@foxandmandal.co.in

Kartikey Bhatt | Partner
Kartikey.Bhatt@foxandmandal.co.in

Shubhang Tandon | Senior Associate
Abhinav Rana | Associate
Shraddha Chirania | Associate
Tanika Rampal | Assistant Manager

OUR OFFICES

KOLKATA
12, Old Post Office Street
Kolkata 700 001
Email: calcutta@foxandmandal.co.in
Phone: +91 (33) 2248 4843

MUMBAI
105, Arcadia Building, 195 NCPA Marg
Nariman Point, Mumbai 400 021
Email: mumbai@foxandmandal.co.in
Phone: +91 (0) 91672 30014

KOLKATA
7th Floor, 206 AJC Bose Road
Kolkata 700 017
Email: calcutta@foxandmandal.co.in
Phone: + 91 (33) 4603 6631

NEW DELHI
Fox & Mandal House
D – 394, Defence Colony, New Delhi 110 024
Email: newdelhi@foxandmandal.co.in
Phone: +91 (11) 6932 4000