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Delhi High Court: Courts are required to undertake a preliminary enquiry on the arbitrability of the “excepted matters” while considering an application for reference to arbitration

The Delhi High Court (“**Delhi HC**”) in the case of *Sorin Group Italia S.R.L. v. Neeraj Garg*¹ held that courts are required to hold a preliminary enquiry on whether the subject matter is arbitrable or if it falls within the scope of the “excepted matters” of the arbitration clause while considering applications for reference of dispute to arbitration under Section 45² of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”).

Brief Facts

The Sorin Group Italia S.R.L (“**Sorin**”/ “**Plaintiff**”) and Neeraj Garg (“**Defendant**”) entered into a sole distribution agreement (“**Agreement**”). Under the Agreement, the Defendant issued purchase orders on the Plaintiff to supply certain goods. The Plaintiff supplied the goods and raised invoices. However, the Defendant failed to make the payments towards the invoices. Aggrieved, the Plaintiff filed a summary suit under Order XXXVII of the Code of Civil Procedure, 1908 (“**CPC**”). In the suit, the Defendant filed an application under Section 45 of the Arbitration Act seeking reference of the dispute to arbitration in view of the arbitration clause in the Agreement (“**Application**”).

Clause on dispute resolution and choice of law | Article 15 (Enforcement of Agreement)

Article 15.2(a) stipulates that “*if a dispute arises between the Parties relating to the termination or the grounds for the termination (including expiration) including potential claims for indemnification or compensation thereof*” then such a dispute would be referred to arbitration (as per the modalities of the clause).

Whereas Article 15.2(b) stipulates that “*as for all other disputes between the parties resulting from the Agreement, the courts located within Milan, Italy shall have exclusive jurisdiction to adjudicate any disputes arising out of or in connection with this Agreement*”. The proviso to Clause 15.2(b) further clarifies that “*Sorin at its sole discretion, shall always have the right to invoke the jurisdiction of any court with competent jurisdiction and to commence proceedings, including but not limited to injunctive relief measures, to prevent violations of Articles 6, 7, and 8 hereof or to recover any monies owed by Distributor to Sarin hereunder.*”

¹ CS (Comm) 92/2020; 2022/DHC/004476.

² Section 45 - Power of judicial authority to refer parties to arbitration (Part II of the Arbitration Act).

Issue

The issue which arose for consideration was whether the courts are required to conduct a preliminary enquiry on the arbitrability of “excepted matters” before referring the dispute to arbitration (in a Section 45 Application).

Findings and Rationale

The Delhi HC dismissed the Defendant’s Application based on the following findings:

1. Court to hold a preliminary enquiry before referring disputes to arbitration.

- (a) The decision of *Vidya Drolia and Ors. v. Durga Trading Corporation*³ was referred to the extent that it recognises that civil courts can undertake a limited review to check and protect parties from being forced to arbitrate matters which are demonstrably non-arbitrable. The decision in *Indian Oil Corporation Limited v. NCC Limited*⁴ was referred to the extent that the Supreme Court recognises arbitration clauses for ‘excepted matters’, where parties can specify matters to be excluded from the purview of the arbitration clause. These decisions were followed by the Supreme Court in the case of *Emaar India Ltd. v. Tarun Aggarwal Projects LLP*⁵.
- (b) In view of the above, it was held that the courts are required to hold a preliminary enquiry to determine whether the dispute is arbitrable or not and come to a *prima facie* view so as to prevent parties from being forced to arbitrate when the subject is demonstrably non-arbitrable.
- (c) A dispute falling within the ‘*excepted matters*’ cannot be referred to arbitration since the choice of the parties to keep certain disputes out of arbitration has to be given supremacy. Since recovery of money is not related to the termination of the agreement, it is outside the purview of the arbitration clause and cannot be referred to arbitration.

2. The party autonomy in Article 15.2(a) and (b) must be upheld.

- (a) The word ‘including’ in Article 15.2(a) indicates that “*potential claims for indemnification or compensation thereof*” is used in relation to termination or expiration of the agreement and not in relation to any other dispute. All other disputes will be “*excepted matters*” and will not be covered under the arbitration clause.
- (b) With Article 15.2(b), the parties intended that for all other disputes {other than those under Article 15.2(a)}, the exclusive jurisdiction would vest in the courts located in the Milan, Italy. Under Article 15.2(b), Sorin was also given an option to invoke jurisdiction of *any other court having competent jurisdiction* to file proceedings relating to a (i) suit for injunctive relief or (ii) for recovery of monies owed by the Defendant to Sorin.

3. Party autonomy must be given supremacy even if the parties have consciously chosen two separate remedies in respect of different disputes under the same contract

Even though the parties have consciously chosen that the arbitration for disputes arising out of termination or expiration of the contract, and civil remedy for all other disputes - the choice of the parties in this regard may be given supremacy. Both parties are corporate entities and ought to have known the consequences arising out of having 2 (two) separate dispute resolution forums in the Agreement.

JSA Comment

This decision reflects the true spirit of the arbitration regime in India – a regime which holds supreme party autonomy and interprets the parties’ intentions from the strict reading of the contractual clauses. The Court has upheld that notwithstanding the legal position on the arbitrability of certain disputes, if parties resolve to keep certain matters out

³ (2021) 2 SCC 1.

⁴(2022) SCC OnLine SC 896.

⁵2022 SCC OnLine SC 1328.

of the scope of their arbitration clause, these matters are automatically rendered non-arbitrable between these parties. Likewise, notwithstanding the possible anomaly that may arise out of having different forums for different disputes under the same contract, if the dispute resolution clause explicitly contemplates such a multi-forum mechanism, the parties' intentions must be upheld.

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