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Update

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An anti-arbitration injunction on the ground that the arbitrator does not have jurisdiction is not maintainable (Delhi High Court) [UPDATE: set aside by appellate bench in decision reported at 2020 SCC OnLine Del 1678]

by Editor , Editor

Dr Bina Modi v. Lalit Modi and others

Court: Delhi High Court | **Case Number**: CS(OS) 84 of 2020 | **Citation**: 2020 SCC Online 109 | **Bench**: Rajiv Sahai Endlaw J | **Date**: 03 March 2020

A. Preface: seeking anti-arbitration injunction on the ground that dispute is not arbitrable– relying on *Vimal Kishor Shah* and *Vidya Drolia* case

The question before the High Court in two civil suits was whether it should declare the arbitration agreement “null and void, inoperative, unenforceable …” and injunct the arbitration. The plaintiffs, among a host of other grounds, mainly said that the subject matter was not arbitrable; “what is the fun of going ahead with arbitration” then?

The plaintiffs asserted, relying on the Supreme Court's decision in *Vimal Kishor Shah* v*. Jayesh Dinesh Shah,* (2016) 8 SCC 788, that the subject matter is not arbitrable because disputes inter se trustees or between trustees, on one hand, and beneficiaries on the other or between the beneficiaries are subject to the exclusive jurisdiction of the courts under the Indian Trusts Act, 1882. In *Vimal Kishor,*[1]
[1] Decision of a 2-judge bench comprising of Jasti Chelamsewar & Abhay Manohar Sapre JJ, decided on 17 August 2016. Show More the court first concluded that the clause in the trust deed which provided for settlement of disputes between the beneficiaries did not constitute an arbitration agreement within the meaning of Section 7 ACA. Therefore, it was said "it may not be necessary" to consider the issue of arbitrability but "being a pure legal question" it was nonetheless "decided in this appeal." The court concluded that the Trusts Act, 1882 is a complete code and provides a comprehensive mechanism to deal with all issues relating to trust, the trustees and the beneficiaries including providing an adequate forum (civil court). The court held that "disputes relating to trust, trustees and beneficiaries arising out of the trust deed and the Trusts Act,1882 are not capable of being decided by the arbitrator despite existence ofarbitration agreement to that effect between the parties."

The plaintiffs also relied on *Vidya Drolia and others* v*. Durga Trading Corporation,* 2019 SCC OnLine SC 358, another 2-judge bench decision. The *Drolia* court referred to *Vimal Kishor* with approval and added that the Indian Trusts Act, 1882, provides an excellent instance of how necessary implication excludes arbitration.[2]
[2] RF Nariman & Vineet Saran JJ. The court had before it a tenancy dispute under the Transfer of Property Act, 1882 ("TPA"). A prior 2-judge bench in *Himangni Enterprises* v*. Kamaljeet Singh Ahluwalia,* (2017) 10 SCC 706 had held that such a matter was not arbitrable. The *Drolia* court differed with that view and referred the matter to a 3-judge bench. It examined the provisions of TPA and gave several reasons as to why that enactment did not bar arbitration of a dispute between a tenant and a landlord. In that context, it cited *Vimal Kishor* to refer to an illustration where the statute implied barred arbitration. Show More

To these arguments advanced in *Bina*, Rajiv Sahai Endlaw J had a simple doctrinal response. He concluded that a three-judge bench of the Supreme Court in *Kvaerner Cementation India Limited* v*. Bajranglal Agarwal*, (2012) 5 SCC 215, a decision of 2001, has enunciated a bar that an arbitrator must decide all questions of jurisdiction[3] [3] Most authorities consider the question of arbitrability a problem of jurisdiction. However, many consider it an item different from the issue of the validity of the arbitration agreement. There are a few exceptions. Also, there is another view that arbitrability is a "primordial" question, one that precedes the question of jurisdiction. See more in the Comments section at the end of the Update. Show More and not a civil court. It, therefore, follows that the courts do not have the power to grant an anti-arbitration injunction.

Let us first look at the Supreme Court's order in *Kvaerner Cementation*.

B. The *Kvaerner Cementation* decision[4]

[4] This order was published in a few law reports but apparently not those which have wide circulation. The Supreme Court Cases published it in 2012. Show More

This is a concise order of one page which was made on 21 March 2001 against a decision of the Bombay High Court. The order describes the facts very briefly. It appears that a suit was filed in the civil court for a declaration that the arbitration clause did not exist and for an injunction in continuing the arbitration proceedings. The civil court first granted the injunction but vacated it later. The matter went in appeal to the High Court of Bombay. Chandrachud J dismissed the appeal and held that given Sections 4 and 16 ACA it was the arbitral tribunal and not the court that

had the power to make an injunction.

The matter was heard in the Supreme Court by a 3-judge bench comprising of GB Pattnaik, SN Phukan and BN Agrawal JJ. They ruled as follows:

a. There cannot be any dispute that in the absence of an arbitration clause in the agreement, a dispute could not be referred to arbitration.
b. But, bearing in mind the object as well Section 16 ACA (conferring the power on the arbitral tribunal to rule on its own jurisdiction) "we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question."
c. The decision made by the arbitral tribunal could be challenged in the set-aside proceedings.

C. Bina et al. versus Lalit Kumar Modi before the single-judge

C1. A trust deed involving Indian parties and its dispute resolution clause

Lalit Modi, Charu Modi and Samir Modi are the children of KK Modi and Bina Modi. After KK Modi passed away, disputes arose concerning the family-controlled businesses. The family trust deed had the following dispute resolution clause: –

a. Disputes "shall be settled under the Rules of Arbitration of the International Chamber of Commerce, Singapore."
b. Arbitration to be "governed in accordance with the laws of India."
c. Substantive law: Indian.
d. Arbitration under ICC Rules in Singapore and suit for anti-arbitration injunction in Delhi

Lalit invoked arbitration under the rules of the International Chamber of Commerce ("ICC") and applied for emergency measures. ICC appointed an emergency arbitrator.

Then Bina brought a suit in the Delhi High Court for a declaration that the arbitration agreement contained in the trust deed is "null and void, inoperative, unenforceable and contrary to public policy of India." She also sought a permanent injunction to restrain Lalit from continuing or commencing any arbitration. Lalit's siblings, Charu and Samir, together filed another suit for identical reliefs.

C2. The arguments made for resisting the injunction in *Bina*

Many arguments were advanced to resist the grant of an injunction, some of which were as follows:

a. *Existence and nullity*: the clause in the trust deed was not an arbitration agreement. It was vague and therefore, null and void.
b. *Seat*: If it were true that the arbitral seat was London, it was void because private parties could not choose a foreign seat.
c. *Nonarbitrability:* Under Indian law, as declared by the Supreme Court in *Vimal Kishor Shah* and *Vidya Drolia*, disputes between trustees and beneficiaries are not arbitrable. The matter goes to the root of enforceability. It should not be left for the tribunal to decide it.

d. *Forum non-conveniens*: All parties were Indian residents. The defendant Lalit too had a permanent residence in India. London was not a convenient venue to arbitrate, and Singapore (the seat of arbitration, according to Lalit), was not a convenient forum to litigate.
e. *Principles of Section 8 ACA*: The arbitration was a domestic arbitration and principles of Section 8 will apply under which a judicial authority must refer a dispute to arbitration unless it prima facie finds that a valid arbitration agreement does not exist. Here, there is no valid arbitration agreement because the dispute is not arbitrable. The ACA does not affect any other law under which certain disputes may not be referred to arbitration [per Section 2 (3)].
f. *Kvaerner not a precedent*: *Kvaerner* is not a precedent because it has no discussion or reasoning.
g. *Other precedent recognizing anti-arbitration injunction:* There are other precedents where the concept of anti-arbitration injunction has been recognized.

D. Endlaw J rejected all the arguments

Endlaw J was of the view that the court "does not have jurisdiction to adjudicate a plea which can be adjudicated by the Arbitral Tribunal relating it its own jurisdiction." He accordingly left it open to the parties to raise the matter before the arbitral tribunal. These were his reasons:

a. Contrary view than earlier taken not possible: Endlaw J had followed *Kvaerner* in many cases before *Bina*—
    i. *Roshan Lal Gupta* v. *Parasram Holdings Pvt. Ltd.*, (2009) 157 DLT 712
    ii. *Spentex Industries Ltd.* v. *Dunavant SA*, 2009 SCC OnLine Del 1666
    iii. *Shree Krishna Vanaspati Industries (P) Ltd.* v. *Virgoz Oils & Fats Pte Ltd.*, 2009 SCC OnLine Del 1665
    iv. *Sons Enterprises Pvt. Ltd.* v. *Suresh Jagasia*, 2011 SCC OnLine Del 82
    v. *Ashok Kalra* v. *Akash Paper Board Pvt. Ltd.*,2013 SCC OnLine Del 3299
b. He held in all of these cases that "a suit for declaration of invalidity of Arbitration Agreement or of arbitration commenced, and for permanent injunction to restrain arbitration [is] not maintainable."
c. *Kvaerner Cementation is a binding precedent:* The contention that *Kvaerner*, a dictum of the three-judge bench of the Supreme Court, is not a binding precedent cannot be sustained "at least before this Bench." A pronouncement of the Supreme Court, even if cannot be strictly called the r*atio decidendi* is binding on the High Court [citing to *Peerless General Finance and Investment Company Ltd.* v. *Commission of Income Tax* ,(2019) SCC OnLine SC 851]. Even the *obiter dicta* of the Supreme Court binds a High Court [citing to *Oriental Insurance Co. Ltd.* v. *Meena Variyal* ,(2007) 5 SCC 428 and *Sanjay Dutt* v. *State*, (1994) 5 SCC 402]. *Kvaerner* has held "the fray for the last twenty years."
d. *Kvaerner Cementation cited and followed by the Supreme Court:* It is not as if *Kavaerner* has remained hidden. It has been cited with approval in *Ayyasamy* v. *A. Paramasivam*, (2016) 10 SCC 386[5] [5] Endlaw J noted at paragraph 15 that *Ayyasamy* was not directly concerned with the issue but had cited *Kvaerner* with approval (*Ayyasamy* observed that after arbitration proceedings have begun, Section 5 ACA bars any judicial intervention scuttling the arbitration proceedings. Then, all issues as to existence or validity is for the tribunal to decide. The *Ayyasamy* court then said that this scheme of the ACA "is succinctly brought out in … *Kvaerner Cementation*"). In *National Aluminum*, the preceding court granted an anti-arbitration injunction. A 2-judge bench of Abhay Manohar Sapre & R Subhash Reddy JJ set aside that order applying *Kvaerner*. Show More

and followed in *National Aluminum Company Limited* v*. Subhash Infra Engineers Pvt. Ltd.*, (2019) SCC OnLine SC 1091.

e. *Other precedents recognizing anti-arbitration injunction do not consider Kvaerner; are per incuriam*: Cases cited by Bina et al., that is, *Mcdonald's India Pvt.* v*. Vikram Bakshi,* (2016) 232 DLT 394[6] [6] A division bench of the Delhi High Court, Badar Durrez Ahmad & Sanjeev Sachdeva JJ, decided on 21 July 2016 overturning the anti-arbitration injunction granted by the preceding Single Judge but recognizing the power of the court to make such an injunction ("while courts in India may have the power to injunct arbitration proceedings, they must exercise that power rarely and only on principles analogous to those found in Sections 8 and 45, as the case may be, of the 1996 Act"). Show More and *Union of India* v*. Vodafone Group PLC United Kingdom ,*2018 SCC OnLine Del 8842 do not consider Kavaerner and hence do not apply. *McDonald* being a dictum of a 2-judge bench of the Delhi High Court would have been binding, but it is per incuriam [citing to *Pal Singh* v*. NTPC*, 2002 SCC Online Del 178 on precedential value].

f. In *Mcdonald*, though the principle of competence-competence was noted as a factor to distinguish the nature of anti-suit injunctions with anti-arbitration injunctions, it was not argued as a ground against granting an anti-arbitration injunction ("perhaps had the same been argued, a Google search would have taken also to *Kvaerner*").

g. *Principle of granting an injunction in a suit; arbitration is an efficacious remedy:* Grant of reliefs of declaration and injunction is governed by the Specific Relief Act, 1963. Declaration "shall not be granted if there is an alternative efficacious remedy." It is not anyone's case that the tribunal "is not empowered to decide any of the objections which have been taken by them for injuncting arbitration." The ACA is a complete code. The courts cannot interfere in matters for which efficacious remedy can certainly be obtained from the tribunal.

h. *Not vexatious, not oppressive, not 'forum non-conveniens,' procedure not contrary to ACA*: – The trust deed was executed in London, which consciously provided for arbitration of ICC, Singapore. The ACA allows freedom of the parties to agree on the procedure.

i. *It cannot be now contended that the arbitration at Singapore is oppressive or vexatious:* A meeting of the board of trustees of their own volition was held at Dubai*.* A party having agreed expressly with a particular state of affairs cannot raise the argument of forum non-conveniens, which is available only in a case of concurrent jurisdiction [citing to *McDonald's*[7]]. [7] *McDonald's*, cited *supra* , commented on forum non-conveniens. The preceding court had granted an anti-arbitration injunction, and one of the grounds was the ground of forum non-conveniens. The argument was given up in the appellate proceedings after the court pointed out that the decision on the point was "contrary to law". ("To clarify the position with regard to forum non-conveniens, a slight digression would be in order …It is clear that the doctrine of forum non conveniens is only available when a Court has the jurisdiction but the respondent is able to establish the existence of another competent court. Clearly, the principle applies when there are competing courts, each of which has jurisdiction to deal with the subject matter of the dispute. This principle would have no application to the case at hand. First of all, there is no competing court. Here we have a court and an arbitral tribunal (which is certainly not a court). Secondly, the subject matter of dispute before this court is different from that before the arbitral tribunal. The subject matter before this court is the plea of an anti-arbitration injunction and the subject matter before the arbitral tribunal is the substantive dispute under the JVA. Thirdly, the forum of arbitration consciously chosen by the parties as an alternative forum of dispute resolution, alternative to the forum of a court, cannot be regarded as an inconvenient forum. Fourthly, the place of arbitration chosen by the parties cannot be regarded as an inconvenient place"). Show More

j. *Merits of the arbitrability argument:* Once it is held that the court does not have jurisdiction, the court cannot foray into the merits. "All that needs to be observed is that … an arguable case qua the non-applicability of *Vimal Kishor Shah* and *Vidya Drolia*" has been made out.

E. To the division bench, then the Supreme Court, and back to the division bench

Bina and others appeared before a division bench of two judges of the Delhi High Court with lightning speed.[8] [8] RFA (OS) 21 of 2020 and RFA (OS) 22 of 2020 filed on 04 March 2020. Show More Hima Kohli and Asha Menon JJ heard the matter briefly on 05 March 2020 but the matter was ultimately adjourned to 27 March 2020. In the meanwhile, Lalit was restrained from pressing the emergency application before the emergency arbitrator till further hearing in the appeals.

Now it was Lalit's turn. A special leave petition was filed on 06 March 2020[9] [9] SLP(C) No. 006284 – 006285 / 2020 with an application for permission to file special leave petitions without certified copy and with a noted copy of the impugned order. Show More and was listed before the vacation bench on 09 March 2020. Ashok Bhushan and Surya Kant JJ who heard and disposed of the matter after holding that "High Court having already fixed the matter on 27.03.2020, it is open for the petitioner to make a request to the High Court for preponement of the date… It is, however, for the High Court to take appropriate decision in the above regard."[10] [10] It appears from a case-status search on the Delhi High Court's website that the matter was listed on 13 March 2020. It was scheduled to be listed again on 27 March 2020, but this has been deferred in the wake of the Covid-19 lockdown. Show More

F. Editorial comments

F1. Endlaw J appears to be plainly right in his decision.

a. First, he was bound to follow *Kvaerner*. Seen from whatever standpoint, the case is a binding precedent because *Kvaerner's* sphere of application directly covered the issue before Endlaw J. The relevant facts between the two cases were similar.
b. As we noted, a suit was filed in *Kvaerner* for a declaration that the arbitration clause did not exist and, quite apparently, an anti-arbitration injunction. The Supreme Court referred to Section 16 ACA and ruled "[S]ection 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question." Therefore, *Kvaerner* has a visible line of reasoning, and it gives a clear rule which Endlaw J rightly applied.
c. Second, *Ayyasamy*[11] [11] n *Ayyasamy*, the opinion of Dr A K Sikri J (to which the other judge Dr D Y Chandrachud supplemented) also discusses the effect of Section 5 and Section 16 ACA. He said that once arbitration has begun, Section 5 ACA "provides a clear message that there should not be any judicial intervention at that stage scuttling the arbitration proceedings." He added that "even if the other party has objection to initiation of such arbitration proceedings on the ground that there is no arbitration agreement or validity of the arbitration clause or the competence of the Arbitral Tribunal is challenged, Section 16, in clear terms, stipulates that such objections are to be raised before the Arbitral Tribunal itself which is to decide, in the first instance, whether there is any substance in questioning the validity of the arbitration proceedings on any of the aforesaid grounds." Therefore, Ayyasamy recognized that any matter relating to the competence of the arbitral tribunal, once arbitration has begun, must go to the arbitrator. This "scheme" of the ACA, Dr Sikri J noted, was "succinctly brought out" in *Kvaerner* . However, Dr Sikri J made a distinction between a situation where the tribunal has yet to be constituted. "What would be the position", he asked, "in case a suit is filed by the plaintiff and in the said suit the defendant files an application under Section 8 of the Act questioning the maintainability of the suit on the ground that the parties had agreed to settle the disputes through the means of arbitration having regard to the existence of an arbitration agreement between them?" He said, "obviously, in such a case, the court is to pronounce upon arbitrability or non-arbitrability of the disputes." Show More [12] A 2-judge bench of Abhay Manohar Sapre & R Subhash Reddy J denied an anti-arbitration injunction following the *Kvaerner* rule. Show More

and National Aluminum Company Limited[12] have reiterated the *Kvaerner*.

d. Third, the other decisions where the court accepted the jurisdiction to injunct an arbitration (concerning matters which go to the question of arbitrator's jurisdiction) did not consider the rule laid down in *Kvaerner*.
e. Fourth, the *Kvaerner* rule does not make a distinction between a clear-cut case where it is understandable that the arbitral tribunal does not have jurisdiction and a case where there are arguable points on both sides. If it matters, Endlaw J found that the "senior counsels of Lalit have made out an arguable case qua non-applicability of *Vimal Kishor Shah* and *Vidya Drolia*."

While many legal systems recognize the competence of an arbitral tribunal to rule on its jurisdiction (the competence-competence doctrine or the "who decides" question), their application varies with each jurisdiction. For example, does the arbitral tribunal have chronological priority to rule on its jurisdiction before the courts? Is such a priority absolute?

India has adopted the Model Law and Section 16 (1) ACA is modelled on Article 16 (1) of the Model Law. Both are almost identically worded and provide that the arbitral tribunal may rule on its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement.

Many Indian cases have recognized the court's power to grant an anti-arbitration injunction in the context where the arbitrator's lack of jurisdiction was alleged, but the *Kvaerner* rule, right or wrong, gives the tribunal an exclusive power to determine its jurisdiction (which then, in Indian seated arbitrations, is subject to review by the court only at the set-aside stage). An assessment of the *Kvaerner* rule is outside the scope of this Update but will be an exciting topic to explore.

It remains to be seen what escape route from *Kvaerner* will be argued before the appellate court.[13] [13] Bina's argument before Endlaw J was that the arbitral seat was India and the law applicable to the arbitration was Indian law. In this view, it was perhaps not possible to argue that *Kvaerner* is a ruling on Section 16 ACA and did not apply. The argument would require an admission that the arbitral seat was outside India (Singapore) as Lalit contended. Also, even under the laws of Singapore the arbitrator has the competence to rule on its own jurisdiction. Show More Was it possible, for instance, to suggest that the issue of non-arbitrability is a not a matter of jurisdiction? Possibly not.

An author Karim Youssef in an article *The Death of Inarbitrability* (L Mistelis and S Brekoulakis (eds), Arbitrability: International & Comparative Perspectives, 2009, Kluwer Law International) has argued that "arbitrability is also the primordial question, which precedes all other matters in the regulation of arbitration." Also, "…arbitrability thus precedes jurisdiction, conceptually and usually also in time."

However, many cases have presumed arbitrability as a question of the arbitrator's jurisdiction. *Booz Allen and Hamilton Inc.* v*. SBI Home Finance Limited and others,* (2011) 5 SCC 532, a 2-judge bench decision of the Supreme Court used the expression arbitrability to signify more than disputes which are only for the courts to decide. *Booz* considered the following two also as part of arbitrability: whether the arbitration agreement covers the disputes, and whether the parties have referred the dispute to arbitration? The court then also considered these "three facets of arbitrability" as questions of jurisdiction of the arbitral tribunal ("The term"arbitrability" has different meanings in different contexts. The three facets ofarbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under …").

Section 16(3) ACA itself recognises that the tribunal will consider arbitrability by indicating a timeframe to raise a "plea that the arbitral tribunal is exceeding the scope of its authority."

The drafting history of the Model Law suggests that the issue of non-arbitrability was always considered to be within the domain of the arbitrator's competence.

Also, while many make a distinction between arbitrability and validity, there is also a view in which arbitrability relates to the validity of the arbitration agreement. For example, in a frequently quoted paper '*The law applicable to arbitrability*', Bernard Hanotiau notes "[A]rbitrability is indeed a condition of validity of the arbitration agreement and, consequently, of the arbitrators' jurisdiction."

In applying *Kvaerner*, Endlaw J presumed and proceeded on the footing that Section 16 ACA applied. Therefore, there are several choices of law matters which tribunal may have to decide. These include primarily the choice of law governing the issue of non-arbitrability. This may require, apart from the construction of the arbitration clause of the trust deed, a determination as to the seat of arbitration.

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