

LEX OMNIA MOOT COURT COMPETITION 2023

MOOT PROPOSITION

BEFORE THE SIAC ARBITRAL TRIBUNAL

MADE IN HEAVEN v. SPEED INC. & ORS

A. PARTIES

1. The Claimant, Made in Heaven (“**Claimant**”), is a company incorporated under the Companies Act 2013, having its registered office at 232 Malvia Enclave, Tower 54, A-2, New Delhi 110099. The Claimant is in the business of online matchmaking and is an internationally renowned online service provider to individuals looking for a partner to get married. The website and mobile applications of the Claimant have an active user base of over 12 million. The start-up has grown substantially over the years and successfully established itself not only in India but also in other jurisdictions such as Europe and the USA. With strong leadership in matchmaking, the Claimant has expanded into the \$35 billion marriage services industry.
2. Respondent No.1, Speed Inc. (“**Respondent No. 1**”) is an American multinational technological conglomerate holding company incorporated under the laws of California, headquartered at Hill Top, California, CA 95693, United States. Respondent No. 1 is one of the largest technology companies globally by revenue and one of the world’s most valuable companies.
3. Respondent No. 2, Bard LLC (“**Respondent No. 2/ Bard**”), is a limited liability company incorporated under the laws of the State of Washington, which is the principal and primary entity owning and running operations of various products being offered by Respondent No. 1 and its subsidiaries. Respondent No. 2 has been often referred to as the most valuable company in the world due to its market dominance in mobile software, artificial intelligence, online advertising, search engine technology, cloud computing, software, quantum computing, e-commerce, and consumer electronics.

4. Respondent No. 3, Bard India Private Limited (“**Respondent No. 3**”) is a company incorporated under the Companies Act, 2013, having its registered office at MRF Centre, 393 Modi Place, Mumbai 400111. Respondent No. 3 supports the operations of Respondent No. 2 in India, including but not limited to entering into agreements with other Indian entities, and facilitating payment transactions from merchants as well as e-commerce websites.

B. BACKGROUND

5. At present, there are two major mobile operating systems in the global market, namely, (a) Pixel OS, which is owned and operated by Bard, and (b) Orange OS, which is owned and operated by Orange, which is the world’s biggest company by market capitalization and the largest technology company in the globe.
6. All mobile manufacturers require an operating system for their mobile phones to function. Orange OS is used exclusively to operate mobile phones manufactured by Orange, i.e., the 'Ophone', and has not been made available to other mobile manufacturers. As a result, most mobile manufacturers use the Pixel OS in their mobile phones. In India, almost 86% of mobile phones operate on the Pixel OS, while the rest 14% of mobile phones are Ophones.
7. All phones that operate on Pixel OS have a mobile app store named Bard App Store preinstalled. Bard App Store is a platform for distributing applications (“**apps**”) on smartphones as well as other devices. The Bard App Store is one of the many app stores available that may be used by app developers to distribute their apps to users. There are also other distribution channels available to app developers, such as downloads through the websites of app developers (i.e., known as sideloading), app stores other than the Bard App Store, such as Jeevan, Sonix, Ubun (through such app stores have limited user outreach), and preinstallation in mobile devices through agreements with mobile manufacturers. Most app developers also distribute their apps on Ophones through Orange’s App Store.
8. The Bard App Store presently hosts over 20 million apps in over 137 countries. When an app developer desires to publish their app on the Bard App Store, they must enter

into the Bard Developer Agreement (“**BDA**”) with Bard. This allows them to register on the Bard App Store. At the time of registration, the app developers must pay a nominal fee of INR 500/-, upon which they can publish as many apps as they want on the Bard App Store.

9. The BDA governs the contractual relationship between Bard and the app developer. The BDA is a standard form contract and is devised to ensure the safety and security of the users as well as regulation of the apps. Upon entering into the BDA, the app developer also gains access to various tools offered by the Bard App Store, such as technical and regulatory support as well as analytics and testing tools.
10. The app developer has the complete control in deciding whether their apps on Bard App Store will be free for users to download, or paid i.e., a user pays to download the app. In addition to payment for downloading the app, the app developers may also have in-app purchases for users, such as subscriptions or premium content. Bard App Store has no control over the amount an app developer chooses to charge for using the apps.
11. A key component of the BDA is Bard App Store’s payments policy. Clause 14 of the BDA provides that the payments policy of the Bard App Store, which is available on the website of Bard App Store and may be updated from time to time by Bard, are incorporated and form part of the contract between the parties and shall be binding on the app developers. Clause 14.8 of the BDA is reproduced below:

“The app developer is bound by the Bard App Store’s payments policy. The payments policy is subject to modifications by Bard, and such modifications form part of the BDA and bind the Parties.”

12. According to the website of the BDA App Store, the BDA *“allows inviting app developers across the globe to accept legitimate and standard terms and conditions in order to use and benefit from a service. This is an entirely conventional and efficient commercial practice, followed by businesses around the world. Such terms are ubiquitous among online businesses that cannot practically negotiate bespoke contracts with millions of their customers. This reduces the potential for discrimination and uncertainty amongst users and businesses.”*

13. Clause 19.8 of the BDA further provides as follows:

“In the event, the app developer does not agree with the modifications to the Agreement, the app developer may terminate its use of the Bard App Store, which shall be the sole and exclusive remedy. In the event, the app developers continue to use the Bard App Store, the same would amount to its agreement and consent to the modifications made to the Agreement.”

14. Certain other provisions of the BDA are reproduced below:

Clause 8: Free consent

“The parties acknowledge that they have wilfully agreed to all the terms of this Agreement and there is no form of coercion or undue influence on either party.”

Clause 27: Severability

“Each provision of the contract is severable and distinct from the others. If a provision is or becomes illegal, invalid or unenforceable to any extent, it must be severed from the remainder of the contract. This does not affect the legality, validity or enforceability of any other provisions of the contract, which continue in full force and effect.”

Clause 28: Entire Agreement

“This Agreement constitutes the entire agreement of the Parties relating to the subject matter hereof and supersedes all prior communications, representations, or agreements, oral or written, by the Parties relating thereto.”

15. In October 2022, Bard updated its payments policy, which introduced two changes globally:

(a) An app developer providing paid apps on the Bard App Store must necessarily use the Bard Billing System for such transactions. The Bard Billing System provides a safe, secure, and seamless platform to facilitate payments made to app developers for the use of their paid applications. It is a payment processor and provides various

options, such as card payments, UPI, mobile wallets, etc. to the users to make their payments.

(b) For each transaction for a paid app, facilitated through the Bard Billing System, the app developers would be required to pay 10-15% service fee to Bard, depending on the annual turnover of the app developer in the previous year. App developers earning less than INR 1 Crore per annum are required to pay 10% service fee whereas those earning more than INR 1 Crore per annum are required to pay 15% service fee to Bard. According to Bard, the service fee charged by them “*is not a simple fee for payment processing done by the Bard Billing System but also accounts for the various services provided by the Bard App Store such as providing a safe and efficient distribution channel and other services to app developers as well as users. The service fee collected by Bard will be utilised for investments across Pixel OS and the Bard App Store and reflects the value provided by Bard and the Bard App Store. There is no service fee charged for free apps available on the Bard App Store. In other words, Bard only charges the app developers when they charge the users, and not otherwise*”.

(c) When any paid app is downloaded through any other distribution mechanisms such as through sideloading or any app store other than the Bard App Store, the app developers are not required to use the Bard Billing System or pay service fee to Bard.

16. Relying on Clause 14 of the BDA, on 1 November 2022, Bard issued a notification to all app developers hosting apps on the Bard App Store globally, wherein it *inter-alia* stated as follows:

“.....*The updated payments policy will take effect from 1 February 2023. All app developers all required to comply with the payments policy and refusal to integrate the Bard Billing System and pay the required service fee would lead to removal/delisting of the apps from the Bard App Store. Starting 1 November 2023, any app that is still not complaint with the updated payments policy shall be removed from the Bard App Store.*”

C. DISPUTE

17. The Claimant established Made in Heaven i.e., its business of online matchmaking in 2014. At first, the Claimant's apps were made available for download to mobile users directly from the website of the Claimant. It also published its apps on other app stores such as Jeevan, Sonix, Ubu.
18. Given the presence of the Bard App Store in all mobile phones operating on the Pixel OS (which is more 83% of all mobile phones in India, the Claimant believed that Bard App Store is the best and most suited platform to distribute its app to consumers. Accordingly, in 2015, the Claimant entered into the BDA with Respondent No. 3 and registered with the Bard App Store. Upon registration, the Claimant published 24 apps i.e., online matchmaking apps available in 24 different Indian languages on the Bard App Store.
19. For the first couple of years, the Claimant allowed users to download its apps free of cost from the Bard App Store. Thereafter, in 2017, in view of the success of its apps, the Claimant transformed its apps to paid apps, and also provided in-app purchases such as premium services.
20. By the end of 2019, the Claimant began to witness significant financial success. Since a vast majority of the Claimant's customers were heavily reliant on the Bard App Store, approximately 90 % of the Claimant's profits were generated from subscribers who downloaded and opted for in-app purchases from the Bard App Store.
21. In 2022, the Claimant was aggrieved when Bard updated the payments policy of the Bard App Store to make the use of Bard Billing System mandatory and introduce service fee on the app developers for each payment made through the Bard Billing System. As the annual turnover of the Claimant was more than INR 1 Crore, it was subject to a 15% service fee for each transaction made on the Bard Billing System. According to the Claimant, the Respondents were abusing its dominant position in the market to gain an unfair advantage by imposing non-negotiable and discriminatory payments policy on app developers.

22. In response to the notification dated 1 November 2022, the Claimant issued a letter dated 14 November 2022 to the Respondents, stating as follows:

“Pixel OS mobile phones constitute most of the total devices used not only in India but across the globe. Bard App Store is therefore an unavoidable and indispensable trading partner for app developers, particularly in India. Recent changes to the payments policy are unjust and arbitrary as an app developer, who wishes to be enlisted in the Bard App Store, is required to accept all non-negotiable terms and conditions set out by Bard. The terms of the BDA, particularly its payments policy, is one-sided and unconscionable. The reason being that in the event an app developer refused to use the Bard Billing System for its payments and pay the prescribed service fee to Bard, the app of such app developer would not be enlisted in the Bard App Store.

We request Bard to reconsider its updated payments policy as the requirement to exclusively use the Bard Billing System is not only unconscionable on account of the unfair bargaining power under the Indian Contract Act, 1872 but also amounts to abuse to dominant position under the Competition Act, 2002 as it (a) imposes an unfair and discriminatory condition in purchase or sale of goods or service; (b) limits market access to other payment processors such as razor pay, paypal, phone pe, and paytm as well as technical or scientific development in the payment processor market; and (c) makes a conclusion of the BDA subject to acceptance by other parties of supplementary obligations which are unrelated to the subject of such contracts.

App stores such as Jeevan, Sonix, Ubun allow app developers to use various payment processors such as razor pay, paypal, phone pe, and paytm. These payment processors in India charge a fee within a range of 0 - 3% only, whereas Bard charges excessive service fee of 15% to the app developers for same kind of services as provided by these payment processors. Bard does not even negotiate the service fee with the app developers, thus, making it 'take it or leave it' situation for the app developers.”

23. While there was no specific response to the letter issued by the Claimant, on 1 December 2022, Respondent No. 3 issued a notification to all app developers in India, which stated as follows:

“The mandatory requirement to use the Bard Billing System is a contractual obligation which arises from Clause 14 of the BDA and the accompanying payments policy. This obligation is for those app developers that wish to charge for the apps that they distribute on the Bard App Store, or for paid content within those apps. Such an obligation is a business-to-business obligation, which is completely fair, reasonable and legal. Further, there is no legal impediment in parties entering into standard form contracts.

There are several benefits of using the Bard Billing System as it provides the app developers with a global billing system, which enables them to sell their paid apps while also allowing the Bard App Store to remit the appropriate taxes on behalf of developers where required as per the applicable law. The Bard Billing System provides a consistent, trustworthy, supportive, simple, fair, highly efficient, secure, convenient method to purchase apps and in-app content on the Bard App Store. The requirement to use the Bard Billing System therefore benefits app developers, both directly and indirectly by benefiting the users.

The Bard Billing System automatically collects customer payments and deducts the applicable service fee and any applicable taxes before sending the remaining amount to the app developers. The Bard Billing System, being safe, secure, reliable, and consistent, is therefore not an unfair imposition of a condition. In fact, the requirement to use the Bard Billing System is no different than a multi-brand super-market providing a single check-out option for their users.

The Bard Billing System is an efficient way to collect the service fee from app developers, without incurring additional costs to monitor and enforce recovery of service fees or impose an additional administrative burden on app developers. Allowing alternative billing systems to be used within Bard App Store would reduce efficiency as a result. Further, there is also no market access denial to other payment processors such as razor pay, paypal, phone pe, and paytm. The reason being that payment processing on Bard App Store is a miniscule portion of digital payments in India and payment processors have grown exponentially.

With respect to the charging of service fee, it is a common market practice and can be found in almost all app stores. Only 5% app developers who provide paid apps are required to pay service fee and the remaining 95% access Bard App Store without paying a service fee. This aligns Bard's success with the app developers' success, in that Bard only receives a service fee when app developers generate revenue.

The service fee being charged by Bard is not excessive. To put it in context, Orange's App Store charges app developers a service fee of upto 30% of revenues earned. The service fee is essentially the distribution fee for the services provided by Bard App Store to the apps for their in-app purchases, and not merely a transaction/bill processing fee. Service fee is the compensation for the services such as hosting, discovery, development tools, technical infrastructure, support and compliance that is offered to users and developers. The service fee therefore cannot be compared to a payment processing fee. While payment processors facilitate financial transactions between users and businesses through a variety of forms of payment, Bard App Store offers payment processing as one among hundreds of services that help developers create, distribute, and monetize their apps. Payment processing costs account for only a small proportion of Bard App Store's service fee. Bard App Store is able to provide developers and users with its feature-rich distribution platform precisely because the service fee covers much more than mere payment processing. It is therefore incorrect to compare the processing fee charged by the other payment gateways/ payment processing to assess the reasonability of the service fee charged by Bard.

D. INITIATION OF ARBITRATION

24. Clause 25 of the BDA is the dispute resolution clause, which provides as follows:

“25. GOVERNING LAW AND DISPUTE RESOLUTION.

25.1. Governing Law.

This Agreement shall be governed by and construed in accordance with the Laws of India. Subject to the provisions of Section 25.2 (Dispute Resolution), the courts at New Delhi, India shall have exclusive jurisdiction over any matters or Dispute (hereinafter defined) relating or arising out of this Agreement.

25.2. *Dispute Resolution.*

25.2.1. *Arbitration.*

Any dispute, controversy, claim or disagreement of any kind whatsoever between or among the Parties in connection with or arising out of this Agreement or the breach, termination or invalidity thereof failing amicable resolution through negotiations, shall be referred to and finally resolved by arbitration. The Parties agree that they shall attempt to resolve through good faith consultation, any such Dispute between any of the Parties and such consultation shall begin promptly after a Party has delivered to another Party a written request for such consultation. In the event the Dispute is not resolved by means of negotiation within a period of 30 (thirty) days or such different period mutually agreed between the Parties, such Dispute shall be referred to and finally resolved by arbitration in accordance with the arbitration rules of the Singapore International Arbitration Centre and such rules as may be modified by the provisions of this Section 25 (Governing Law and Dispute Resolution). This Agreement and the rights and obligations of the Parties shall remain in full force and effect pending the award in such arbitration proceeding, which award, if appropriate, shall determine whether and when any termination shall become effective.

25.2.2. *Seat and Venue of Arbitration.*

The seat of the arbitration shall be at New Delhi unless otherwise agreed between the Parties to the Dispute and the venue of the arbitration shall be Goa. The arbitration shall be conducted under and in accordance with this Section 25 (Governing Law and Dispute Resolution). This choice of jurisdiction and venue shall not prevent either Party from seeking injunctive reliefs in any appropriate jurisdiction.

25.2.3. *Number of Arbitrator and Language.*

Each party shall be entitled to appoint 1 (one) arbitrator, with the two Party-appointed arbitrators appointing the third arbitrator to act as chairman of the arbitral tribunal. The language of the arbitration shall be English.

25.2.4. *Award*

The award rendered shall be in writing and shall set out the reasons for the arbitral tribunal's decision. The decision and award of the arbitral tribunal will be final and binding and shall be enforceable in any court of competent jurisdiction.”

25. On 1 April 2023, as the deadline to comply with the updated payments policy was approaching, the Claimant invoked arbitration in terms of Clause 25 of the BDA, and issued a notice of arbitration to the Respondents under Section 21 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) read with Rule 3 of the SIAC Rules, 2016.
26. In the arbitration, the Claimant seeks a declaration that the updated payments policy of the Respondents along with the related provisions of the BDA, relating to any service charges levied by the Respondents is illegal, void and unenforceable vis-a-vis the apps owned and operated by the Claimant in Bard App Store. The Claimant also seeks a declaration that the mandatory use of the Bard Billing System is illegal, void, and unenforceable. The Claimant has sought for a permanent injunction restraining the Respondents from removing or delisting the apps owned and operated by the Claimant on Bard App Store for its refusal or failure to accept or subscribe to updated payments policy of Bard.
27. Notwithstanding that Respondent Nos. 1 and 2 were not parties to the BDA, the Claimant made them parties to the arbitration on the ground that they were integral to the agreement, and Respondent No. 3 was only acting as their agent for the services provided in India.
28. On 20 May 2023, a three-member arbitral tribunal was constituted. The Claimant filed its statement of claim on 20 June 2023.
29. Thereafter, on 1 July 2023, Respondent No. 3 filed an application under Section 16 of the Arbitration Act read with Rule 28 of the SIAC Rules 2016 challenging the jurisdiction of the arbitral tribunal on the ground that the dispute raised by the Claimant concerns competition law allegations against Respondent No. 3 and was therefore not arbitrable under Indian law. Respondent No. 3 asserted that the Claimant had disguised its abuse of dominance claim as a contractual claim to initiate the arbitration

proceedings since competition law concerns rights *in rem* and are therefore cannot be arbitrated upon. Respondent No. 3 also asserted that the arbitral tribunal lacked jurisdiction on the ground that the Claimant had failed to exhaust the mandatory requirement of good faith and amicable negotiations prior to initiating arbitration in terms of Clause 25 of the BDA.

30. On the same day, Respondent Nos. 1 and 2 also filed a separate application under Section 16 of the Arbitration Act read with Rule 28 of the SIAC Rules 2016 challenging the jurisdiction of the arbitral tribunal *qua* them in view of the lack of privity between the Claimant and Respondent Nos. 1 and 2. They asserted that they are not signatories to the BDA and therefore have been erroneously arrayed as parties to the arbitration by the Claimant as the circumstances to implead non-signatory parties do not exist in the present case.
31. On 1 August 2023, the Claimant filed a combined response to the applications filed by the Respondents, wherein it asserted the following:
- (a) There is no precedent under Indian law which holds competition law disputes, which are *inter-se* between the parties and concerns adjudication of subordinate rights *in personam* arising out of rights *in rem* to be non-arbitrable. Further, it asserted that the present arbitration was an international commercial arbitration, and it is widely accepted across jurisdictions that competition law claims in transnational disputes are arbitrable in nature. Lastly, it submitted that, in any event, the present case arises out of the BDA and is therefore a contractual dispute, and the Claimant has sought a declaration that contractual terms between the parties are unconscionable under contract law.
 - (b) All the Respondents form part of the same group of companies and therefore Respondent Nos. 1 and 2 are non-signatory parties to the present arbitration as Respondent No. 3 is merely operating the operations of Respondent Nos. 1 and 2 in India.
 - (c) The obligation to indulge in good faith negotiations was not a mandatory obligation and in any event, any such attempt was futile as there was no possibility of any resolution.

32. Thereafter, on 1 September 2023, the Claimant filed an application under Section 17(1) of the Arbitration Act read with Rule 30 of the SIAC Rules seeking an interim injunction to restrain the Respondents from delisting or removing the Claimant’s apps from the Bard App Store for non-compliance of the updated payments policy of Bard till 1 November 2023. On 1 October 2023, Respondent No. 3 filed a response to the Claimant’s application submitting that the conditions for grant of such interim relief do not arise in the present case and therefore the application should be dismissed.
33. On 12 October 2023, without prejudice to its jurisdictional objections, Respondent No. 3 filed its statement of defence denying the averments made by the Claimant in the statement of claim. Respondent Nos. 1 and 2, without prejudice to its jurisdictional objections, adopted the statement of defence of Respondent No. 3.
34. On 20 October 2023, the arbitral tribunal passed its procedural order 1 (“**PO 1**”), wherein the arbitral tribunal stated as follows:
- (a) The arbitral tribunal would hear the jurisdictional objections of the Respondents, the interim relief application filed by the Claimant, and the merits of the case together on 27-29 October 2023. The hearing would be held at BITS Goa Campus.
 - (b) After hearing the parties, the arbitral tribunal will first decide the jurisdictional objections, followed by the interim relief application and thereafter issue an award on the merits of the case, if required.
 - (c) The arbitral tribunal has framed the following issues for the hearing scheduled 27-29 October 2023:
 - (i) Whether the dispute raised by the Claimant in the present arbitration is arbitrable in nature?
 - (ii) Whether Respondent Nos. 1 and 2 are proper and necessary parties to the present arbitration?
 - (iii) Whether the Claimant was obligated to attempt to resolve the dispute through good faith consultation/negotiation? If yes, whether the Claimant

has failed to fulfil such obligation? If yes, what are the implications of such failure?

- (iv) Whether the Claimant is entitled to interim relief against delisting/removal from the Bard App Store under Section 17 of the Arbitration Act read with Rule 30 of the SIAC Rules, 2016 till the conclusion of the arbitration?
- (v) Whether the mandatory condition to use Bard Billing System for paid apps in the Bard App Store is legal, valid, and enforceable in law?
- (vi) Whether the imposition of 15% service fee is legal, valid, and enforceable in law?

(d) During the hearing, parties are required to address the issues concerning the merits of the dispute notwithstanding the jurisdictional objections. The parties may submit their respective memorials to the arbitral tribunal in advance of the hearing on 27-29 October 2023.

35. In line with PO 1, the Claimant and the Respondents will make submissions before the arbitral tribunal on 27-29 October 2023. All the Respondents are being represented by the same team of counsel.

DISCLAIMER

The facts stated in the present moot problem are fictitious and have been drafted solely for the purposes of the competition. The Facts, names, locations and dates bear no resemblance to any person, event or happening whether dead or alive. Any resemblance, if any found is purely coincidental.

The Moot Proposition has been drafted by Mr. Abhisar Vidyarthi, former Associate at AZB & Partners and upcoming BCL Candidate at Oxford University.