

arbitrator

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CONFERENCE HIGHLIGHTS

11th IBA Arbitration Day 1 February 2008, New York

International Arbitration Day 2008 will celebrate 50 years of the New York Convention. Presented in cooperation with the United Nations, its Secretary-General Mr Ban Ki-moon has been invited to deliver the Opening Address. A post-conference session in the United Nations Trusteeship Council Chamber and an evening reception in the Delegates Dining Room at the United Nations Headquarters will follow the conference which takes place at the Waldorf-Astoria Hotel.

For more information, contact the IBA Secretariat at confs@int-bar.org.

KLRCA 30th Anniversary Conference 2008 7 – 8 April 2008, Kuala Lumpur

The Kuala Lumpur Regional Centre for Arbitration will celebrate its 30th Anniversary with a conference discussing special challenges and opportunities in international arbitration in developing and newly developing countries.

For more information, contact the Conference Secretariat at events@rcakl.org.my or at (603) 2142 0103.

UNCITRAL-SIAC-CIAC Conference 18 – 19 October 2008, New Delhi

SIAC together with its joint venture centre in India, the Construction Industry Arbitration Council, are pleased to announce that they will be hosting an UNCITRAL Conference to be held in India for the first time. The conference will discuss 50 years of the New York Convention, the proposed amendments to the UNCITRAL Arbitration Rules and the Vienna Sales Convention.

For more information, contact Ajay Thomas at ajaythomas@siac.org.sg or at (65) 6334 1277.

PCA ESTABLISHES PRESENCE IN SINGAPORE



In a ceremony held on 10 September 2007, the Permanent Court of Arbitration ("PCA") signed an agreement with the Singapore Government to set up its first Asian Facility in Singapore. The agreement was signed by Secretary General of PCA Mr Tjaco Van den Hout and Deputy Prime Minister and Minister for Law Prof S Jayakumar.

Speaking after the ceremony, Mr Van den Hout said that the choice of Singapore for a regional centre was "a natural one because it is arbitration friendly and has a flourishing arbitration industry." The PCA Facility will provide arbitration, mediation, conciliation and fact-finding services in resolving international disputes for which at least one party is a State, State entity or inter-governmental organisation.

SINGAPORE ADOPTS 'OPEN-DOOR' POLICY FOR ARBITRATION PLAYERS

In an address to the members of the ICC Arbitration Commission held in Singapore on 14 October 2007, Deputy Prime Minister and Minister for Law Prof S Jayakumar reaffirmed Singapore's commitment to create an environment for international arbitration that will thrive here.

Pointing to the various tax incentives for lawyers and arbitrators both local and foreign to conduct arbitrations in Singapore, the liberalisation of legal practice for foreign lawyers and the setting up of a dedicated facility for arbitration and alternative dispute resolution activities (to

be ready in 2009), Prof Jayakumar also made clear that international arbitral institutions are welcomed to set up presence here.

SIAC Deputy Chairman Prof Lawrence Boo sees this as a positive move for arbitration in Asia. He said: "The action is now and the action is here in Asia. SIAC sees this competition as normal and healthy. The presence of leading arbitral institutions such as the AAA, PCA and ICC here in Singapore testifies to the seriousness that they each view Asia."

CONSTRUCTION ARBITRATION MOOT LAUNCHED IN INDIA

In a first of its kind, a specialised construction law arbitration moot competition named the International Infrastructure and Construction Law Arbitration Moot ("IICLAM") was held in New Delhi on 27 – 28 October 2007. IICLAM is a joint initiative of SIAC, the National University of Singapore and Käden Boriss. Sixteen teams from India and overseas participated.



The finals saw the two best teams argue before a three member Tribunal presided by Mr AM Ahmadi, a former Chief Justice of India. The Gujarat National Law University emerged victorious. Mr Tishampati Sen of the National Law University Jodhpur was declared the "Best Speaker" and the Faculty of Law, University of Malaya was awarded the "Best Memorial" trophy.

IICLAM is envisioned as an annual feature. More details are available at www.iiclam.org.

THE JUDICIAL DILEMMA IN INDIA: SUPERVISION OR INTERVENTION?

A COMMENT ON *McDERMOTT INTERNATIONAL INC v BURN STANDARD CO LTD*



BY AJAY THOMAS, ASSISTANT COUNSEL
SINGAPORE INTERNATIONAL ARBITRATION CENTRE

The Facts

The discovery of oil off the coast of Mumbai (Bombay) in the mid 1960's led to the government of India embarking upon an extensive programme to develop its offshore oil and gas resources through the Oil and Natural Gas Commission ("ONGC"). This programme envisaged the construction of offshore platforms and associated pipelines in an area situated in the Arabian Sea called the "Bombay High". Located 160 km west of the Mumbai coast, the Bombay High basin is the largest offshore oil field in India and accounts for nearly 40% of India's domestic oil production.

This interesting case stems from a series of contracts awarded by ONGC in favour of Burn Standard Company Limited ("BSCL") for the fabrication, transportation and installation of platforms to be installed in ONGC's Bombay High oil field. BSCL in turn entered into a sub-contract agreement with McDermott International Inc ("MII") for the fabrication and installation of offshore platforms and associated pipelines.

During the course of the execution of the sub-contract, disputes and differences arose between BSCL and MII, resulting in MII's invoking arbitration under the Arbitration Act 1940. In India, there is a perception that arbitration often is the beginning of litigation. Unfortunately, the reality is not too far away from the perception. Quite expectedly, MII's invocation of the arbitration clause led to several proceedings

being initiated in the Calcutta High Court including challenges by BSCL to the arbitrability of the disputes. The High Court upheld the jurisdiction of the arbitrators, but subsequently BSCL sought the removal of both arbitrators and recommencement of the proceedings *de novo* before an umpire. The High Court granted BSCL's application, which decision MII challenged by way of a special leave petition before the Supreme Court of India. With the consent of the parties, the Supreme Court appointed a sole arbitrator and assumed jurisdiction over all further judicial proceedings. The parties thereafter agreed to conduct the arbitration in accordance with the Arbitration and Conciliation Act 1996 ("Act").

The arbitration proceedings ended in favour of MII. Aggrieved by the award of the Tribunal, BSCL challenged the award under section 34 of the Act on grounds *inter alia* that the claims made by MII were contrary to the substantive law of India and therefore were opposed to public policy. The matter came to be referred to a two judge bench of the Supreme Court comprising Justices BP Singh and SB Sinha. A few of the more interesting aspects of the decision of the Supreme Court are discussed below.

The Decision

A. *Supervisory role of the court – It cannot correct errors of the arbitrators*

The courts in India, in their efforts to maintain a balance between a fair trial and arbitral autonomy have generally tended

“ The Indian judiciary, perhaps mindful of the criticism of court interference in arbitration, seems to be shedding its hitherto rather interventionist stand and seems to be more at peace with its prescribed role under the Act, as that of a facilitator and supporter of arbitration. ”

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Contribute to the Asian International Arbitration Journal

The Asian International Arbitration Journal is published bi-annually by Kluwer Law International. It carries independent editorial content, which is determined by the General Editors – Professor Michael Pryles and Dr Philip Chan.

If you wish to contribute an article to the journal, please contact us at publications@siac.org.sg for more details.

to lean more towards the former than the latter. In its decision, the Supreme Court while recognising the fact that parties by incorporating an arbitration clause had made a conscious decision to exclude the court's jurisdiction, clarified the supervisory role of the courts under the scheme envisaged under the Act. It held that the Act envisaged review of the award by the courts only in the few circumstances listed in section 34 such as fraud, bias by the arbitrators and violation of natural justice. The Supreme Court held that in reviewing an award, it cannot correct errors of the arbitrators, but could only quash the award leaving the parties free to begin the arbitration again if they desired.

The Supreme Court in deciding so, relied upon its earlier decision in *State of UP v Allied Constructions* (2003) 7 SCC 396, where it was held that, "an error apparent on the face of the records would not imply closer scrutiny of the merits of the documents and material on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from intervening."

The Supreme Court went on to hold that the interpretation of the contract is for the arbitrator to determine, even if it gives rise to a determination of a question of law. Once it is held that the arbitrator had jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.

B. Arbitration & public policy

Section 34 of the Act lists out the circumstances under which an award may be set aside. One of the grounds on which an award may be set aside is if it is contrary to the public policy of India. Public policy was construed by the Supreme Court in *Renusagar Power Co Ltd v General Electric Co* 1994 Supp (1) SCC 664 to include awards contrary to i) fundamental public policy of India; or ii) the interests of India; or iii) justice or morality. However, the Supreme Court in *ONGC Ltd v Saw Pipes Ltd*

2003 (5) SCC 705 ("*Saw Pipes*") expanded the meaning of the phrase "public policy of India" by adding the ground of patent illegality. This judgment of the Supreme Court came in for widespread criticism on account of the fact that it opened the door to challenge of the award on the merits. The two judge bench in the present case, while acknowledging the widespread criticism of its earlier decision in *Saw Pipes* expressed its inability to comment on the correctness of the decision in *Saw Pipes* as the issue was not in question before it. The Court held that the correctness or otherwise of the *Saw Pipes* decision was to be considered by a larger bench of the Supreme Court. The Court went on to hold that, in the circumstances, the *Saw Pipes* decision was binding on it and it proceeded on the basis that that decision laid down the correct principle of law. However, in doing so, it sounded a note of caution and stated that for an award to be set aside on the ground of patent illegality, such patent illegality must go to the root of the matter and it must be so unfair and unreasonable so as to "shock the conscience of the court."

C. Interim award and partial award: Is there a difference?

Another interesting issue which arose in the case was whether the arbitrator had the jurisdiction to make a "partial award". The counsel appearing for the respondents submitted that the partial award was in effect a piecemeal award which was impermissible under the provisions of the Act. The claimants argued that a partial award was in effect and substance an interim award within the meaning of sections 2(c) and 31(6) of the Act and consequently the validity of the partial award could not be challenged. In deciding the issue, the Supreme Court was of the view that what was important was that "the partial award answers the definition of the award, as envisaged under Section 2(c) of the 1996 Act, for all intent and purport." It held that the difference between a partial award and an interim award was only one of nomenclature and merely because some arbitrators preferred the use

of the term partial award in preference to interim award, the nature and character of the award was not changed.

D. Mandatoriness of the reasons in support of the award

The Court while referring to its earlier judgment in *Konkan Railway Corporation Limited v Mehul Construction Co* (2000) 7 SCC 201 reiterated that it was mandatory for an award to give reasons in support, unless the agreement provided otherwise. It further stated that a mere statement of reasons would not satisfy the requirement for a reasoned award laid down in section 31(3) of the Act, and that reasons would necessarily have to be "based upon materials submitted before the Tribunal."

E. A claim need not always be followed by a denial

The Supreme Court also clarified that it was not necessary in every case that a claim must be followed by a denial. It held that if the matter is referred to an arbitrator within a reasonable time, the party invoking the arbitration clause may proceed on the basis that the other party to the contract has denied or disputed his claim or is not otherwise interested in referring the dispute to the arbitrator.

Conclusion

Parties choose the medium of arbitration for resolving their disputes as they prefer the expediency and finality it offers. The Act makes a provision for the supervisory role of the courts for the review of the award only to ensure procedural fairness. The *Saw Pipes* decision to a great extent enlarged the scope for court intervention in the arbitral process. Although this decision fails to undo the damage done by *Saw Pipes*, it is indicative of a change in the mind set of the Indian judiciary vis-à-vis arbitration. The judiciary, perhaps mindful of the criticism of court interference in arbitration, seems to be shedding its hitherto rather interventionist stand and seems to be more at peace with its prescribed role under the Act, as that of a facilitator and supporter of arbitration.

CASE BRIEF

NON-SIGNATORY TO AGREEMENT – COURT ORDERS STAY OF ACTION

Mitsui OSK Lines Ltd v Samudera Shipping Line Ltd

[2007] SGHC 41; HIGH COURT; JUDGMENT DELIVERED BY CHOO J; DECISION DATE: 30 MARCH 2007

Facts – The plaintiff and Mitsui OSK Lines (SEA) Pte Ltd (“Mitsui SEA”) had commenced arbitration proceedings against the defendant for damages for breach of contract and for negligence. In the contract of carriage, Mitsui SEA purported to have executed the agreement on behalf of the plaintiff. The defendant denied this and disclaimed liability to the plaintiff on the ground that there was no contractual relationship between them. To preserve their right to claim in tort, the plaintiff then commenced a tort action in court against the defendant and proceeded to file their statement of claim. The defendant applied to strike out the plaintiff’s action in court and for an injunction against the plaintiff from prosecuting the arbitration as there would be duplicity of proceedings concerning the same dispute. The defendant contended that Section 6 of the Arbitration Act (Cap 10, 2002 Rev Ed) (“AA”) (which applied here) permitted the plaintiff, after filing the protective writ, to stay the court action pending arbitration. Having filed its

case statement, the plaintiff had elected to litigate and thus could not simultaneously pursue its claim in arbitration.

Held – Defendant’s application dismissed, stay of court action granted. [1] Section 6 of the AA permits a party to the arbitration agreement to apply for a stay of the court action. As the defendant had objected to the plaintiff’s participation in the arbitration on the basis that the plaintiff was not a party to the arbitration agreement, the defendant could not rely on that provision to seek a stay. [2] The question of whether Mitsui SEA had executed the agreement on behalf of the plaintiff would be a matter of fact to be determined by the Tribunal. [3] It would be more equitable to stay the court action pursuant to Clause 9 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, R5, 2006 Rev Ed) than to stay the arbitration as the latter would affect Mitsui SEA which was not a party to the court action.

ARBITRATOR UNLIKELY TO ORDER SPECIFIC PERFORMANCE – INTERLOCUTORY MANDATORY INJUNCTION REFUSED

NCC International AB v Alliance Concrete Singapore Pte Ltd

[2007] SGHC 64; HIGH COURT; JUDGMENT DELIVERED BY KAN J; DECISION DATE: 11 MAY 2007

Facts – The plaintiff and the defendant entered into a contract for the supply of concrete on 26 July 2006. The contract provided for a tiered dispute resolution process requiring a reference to the supervising engineer, then mediation before commencement of arbitration at the SIAC. Indonesia, Singapore’s main source of sand supply announced a ban on the export of concreting sand to Singapore from 6 February 2007. Certain measures were taken by the relevant authorities to ameliorate the problems created by the ban. However disputes arose between the plaintiff and defendant over the collection and payment for the sand from the suppliers to enable the defendant to prepare the ready mix concrete. The plaintiff commenced action and applied for an interlocutory mandatory

injunction for the defendant to deliver concrete to it under the terms of the contract pending commencement of arbitration proceedings. The plaintiff did not follow the tiered dispute resolution process set out in the agreement.

Held – Application for injunction dismissed. [1] The plaintiff’s failure to refer the matter to abide by the agreed dispute resolution process weakened its case that it needed or was deserving of court assistance. [2] In granting a mandatory injunction, the court should take whichever course appears to carry a lower risk of injustice if it should turn out to have been wrong at trial. [3] The court considered that the arbitrator would unlikely make such an order, and accordingly the injunction must be refused.

INTERNATIONAL ARBITRATION

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The Tribunal shall consist of _____* arbitrator(s) to be appointed by the Chairman of the SIAC.

The language of the arbitration shall be _____.

*State an odd number. Either state one, or state three.

Parties should also include an applicable law clause. The following is recommended:

This contract is governed by the laws of _____*.

*State the country or jurisdiction.

SECRETARIAT

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