Dispute Resolution Hotline

September 09, 2008

TECHNICALITIES NOT TO COME IN THE WAY OF ARBITRATION- SUPREME COURT

The Hon'ble Supreme Court of India (**"Court"**) has, by its order dated August 25, 2008 in the matter of Great Offshore Limited (**"Great Offshore"**) versus Iranian Offshore Engineering & Construction Company (**"Iranian Offshore"**) in Arbitration Petition No. 10 of 2006, once again expounded upon the legislative intent surrounding the Arbitration and Conciliation Act, 1996 (**"the Act"**). The Hon'ble Court has discussed the various technicalities prevalent in contracts today such as stamps, seals and even signatures and described the same as "*red tape that have to be removed before the parties can get what they really want – an efficient and potentially cheap resolution of their dispute*". In doing so, the Court has once again upheld one of the main objectives of the Act, being to minimize the supervisory role of the courts in the arbitral process.

BACKGROUND & SUBMISSIONS:

Great Offshore filed a petition in the Court for appointment of a sole arbitrator under the provisions of Section 11(5), (6), (9) and (12)[1] of the Act as, according to Great Offshore, the charter party agreement (**"Agreement"**) entered into by the parties contained an arbitration clause. Iranian Offshore contended that the parties had not progressed beyond the stage of negotiation and that there was no concluded contract between them and therefore, there was no question of referring the dispute to arbitration.

Great Offshore, admittedly, did not have the original executed Agreement. It however, claimed to have a faxed copy of the same, which it contended was handed over by an officer of Iranian Offshore. Great Offshore said that the said fax was sent from the head office of Iranian Offshore to its local office from where it was handed over to Great Offshore. The said fax accordingly bore the usual fax header consisting of the date and time, 'from' party's name and 'to' party's name. The said fax was signed by Great Offshore and Iranian Offshore and also bore the seal of Great Offshore. In addition thereto, there was correspondence received from Iranian Offshore to show that the Agreement was signed.

During the course of hearing the matter, the Court stated that it needed to decide whether the parties had entered into a valid contract containing an arbitration clause and for this, it was necessary to review the relevant correspondence exchanged between them. Once this was done, the Court would be able to decide whether there was indeed a concluded contract between the parties or whether the parties had never progressed beyond the stage of negotiation.

Great Offshore *inter alia* contended that the faxed Agreement was signed by both the parties and their statement to this effect was not denied by Iranian Offshore in the pleadings. It further contended that Iranian Offshore had admitted the execution in correspondence and finally, where the assertion (of such execution) was made by Great Offshore, such assertion was not denied by Iranian Offshore in their pleadings.

Iranian Offshore *inter alia* contended that as the original signed copy was not given to Great offshore, the parties continued to remain in negotiations. Insofar as the faxed Agreement was concerned, it contended that each page was not signed and also that the signature was forged.

JUDGMENT:

The Court carefully examined each of the contentions and submissions put forth before it by the parties and stated that the burden to prove that a valid contract containing an arbitration clause existed, was on Great Offshore and the faxed Agreement, prima facie, appeared legitimate and not the products of forgery. The burden of proof thus shifted on to Iranian Offshore to show that the signature was forged. The Court, however, wished to satisfy itself on the small issue of whether the faxed Agreement was valid under the relevant law (being the Act).

On a bare reading of Section 7 of the Act, the Court held that there was no requirement that the arbitration agreement be an original. Additionally, Section 7 of the Act did not require the parties to stamp the arbitral agreement nor sign every page. The Court further proceeded to elucidate upon its requirement to translate the legislative intent when viewed in light of one of the main objectives of the Act which is to minimize the supervisory role of the courts in the arbitral process.

The Court stated that if courts were to add a number of extra requirements such as stamps, seals and originals, the courts would then be enhancing their role and not minimizing it, as was envisaged under the Act. Such measures would increase the cost of doing business as also the time to implement such formalities and the parties' intention to arbitrate would be foiled by such formality.

The Court further stated that adding technicalities disturbs the parties' wishes or '*autonomie de la volonti*' and that technicalities like stamps seals and even signatures are red tape that have to be removed before the parties get what they really want – an efficient, effective and potentially cheap resolution of their dispute. The Court stated that it would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation and

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they courts must achieve legislative intention.

ANALYSIS AND IMPLICATIONS:

Thus the judgment clearly lays down more emphasis on the intention of the parties to arbitrate. The courts, while deciding on an application for appointment of an arbitrator, should not go into technicalities of the agreement in question. Thus technical issues such as stamping, seals, signatures or production of original agreement are to be considered as mere indicators of intent and should not be insisted upon if parties are able to show intent (to arbitrate) in other ways.

Arbitration has always been the better option over litigation to resolve disputes. It is considered to be a less complicated and more efficient alternative to litigation, which is marred by complex, technical and time consuming procedures which pose a bigger challenge in the court than the actual dispute. While procedural and technical issues are the primary reasons for causing delay in the administration of justice, this judgment brings the much required relief to parties who have approached the court for enforcement of the arbitration agreement.

- Sahil Kanuga & **Shafaq Uraizee Sapre**

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1 11 (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

11(6) Where, under an appointment procedure agreed upon by the parties,—

1. a party fails to act as required under that procedure; or
2. the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
3. a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

11 (9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

11(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as a reference to the “Chief Justice of India”.
(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of Section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court..

Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996

September 22, 2024