

Dispute Resolution Hotline

October 23, 2012

FOREIGN AWARD SET-ASIDE FOR CONFLICT OF INTEREST OF ARBITRATOR

The Delhi High Court ("**Court**") in a judgment dated August 21, 2012 in the matter of *Shakti Bhog Foods Limited ("Petitioner") vs. Kola Shipping Limited ("Respondent No. 1") and Anr¹* set aside the arbitral award on the ground that the arbitrator had failed to disclose the fact concerning his participation in an arbitration of a "related issue" involving the Respondent No. 1 giving rise to "justifiable doubts as to his independence and impartiality".

FACTS OF THE CASE

The Petitioner is a company dealing in the business of manufacturing and exporting food products and cereals/grains etc. The Petitioner was to export sorghum (hereinafter referred to as the "**Goods**") to the State of Niger, subject to the Government of Niger approving the export order. During that process, the Petitioner addressed an e-mail to the Respondent No. 1 disclosing its intent to load the Goods at Kakinada Port for transportation to Cotonou, Niger. Since the export order was not approved by the Government of Niger, the Petitioner offered to load consignment of maize for Colombo.

The Respondent No. 1 contended that there existed a charter party agreement ("**Agreement**") between the Petitioner and the Respondent No.1 which was disputed by the Petitioner. As per the terms of the Agreement, the Petitioner had to load maize to Colombo from Kakinada Port, in case he failed to get the export order from Niger. The Petitioner loaded only a part of the total cargo in the vessel and kept delaying in loading the balance cargo. Thereafter, the Petitioner informed the Respondent No. 1 that it was not in a position to load any further goods and offered lumpsum compensation to the Respondent No. 1 which was not acceptable to the Respondent No.1.

Finally, after series litigations before the District Court of Kakinada and the Andhra Pradesh High Court on the existence of the Agreement, the Supreme Court upon a Special Leave Petition ("**SLP**") being filed by the Petitioner confirmed the existence of the Agreement and referred the parties to arbitration as per the terms of the Agreement. The Supreme Court further granted the Petitioner a right to raise the issue about the non-existence of the Agreement before the arbitral tribunal at London.

IMPORTANT DATES AND EVENTS

Sr. No	Date	Event
1.	October 14, 2005	Petitioner filed a suit in the Court of III Additional District and Sessions Judge (' ADJ '), Kakinada against Respondent No.1 for damages.
2.	October 17, 2005	Respondent No. 1 issued a notice appointing Mr. Alan Oakley (Respondent No. 2 in the matter) as their arbitrator.
3.	October 25, 2005	The Petitioner wrote to the Respondent No. 1 denying that the Agreement had been entered into and declined to appoint an arbitrator..
4.	November, 2005	Respondent No.1 filed an application before ADJ Kakinada under Section 45 of the Act, seeking reference of the disputes between the parties to arbitration in London under the provisions of the English Arbitration Act, 1996.
5.	February 21, 2006	The Respondent No. 1 requested the Petitioner to appoint an arbitrator and further stated that if the Petitioner failed to appoint their arbitrator within 14 days, Mr. Alan Oakley would be the sole arbitrator.
6.	March 9, 2006	As per the Agreement, the time period 14 days were extended by the Respondent.
7.	November 30, 2006	TheB ADJ Kakinada allowed the application filed by Respondent No.1 and referred the parties to arbitration in London
8.	December, 2006	Petitioner filed a Civil Revision Petition in the High Court of Andhra Pradesh against the order of the ADJ Kakinada
9.	June 15, 2007	High Court of Andhra Pradesh dismissed the said Civil Revision Petition
10.	June 25, 2007	Further extension was given to the Petitioner as the final opportunity.
11.	August 22, 2007	A letter was sent by the Respondent No. 1 to Mr. Alan Oakley requesting him to act as sole arbitrator as the Petitioner was not willing to appoint its arbitrator.
12.	September 17, 2007	Against the aforementioned judgment of the Andhra Pradesh High Court, the Petitioner filed Special Leave Petition (' SLP ') before the Supreme Court. Notice was issued to Respondent No.1 in the SLP
13.	October 3, 2007	Respondent No.1 filed its statement of claim before Mr. Alan Oakley
14.	October 9, 2007	Mr. Alan Oakley, wrote to the Petitioner asking it to submit its defence submissions
15.	October 30, 2007	Advocate for the Petitioner, wrote a letter to Mr. Alan Oakley acknowledging receipt of the letter dated 22nd August 2007 from Respondent No.1 and requesting for extension up to six weeks for the Petitioner to file its defence submissions.
16.	November 1, 2007	The Petitioner wrote to the Respondent No. 1 that since the SLP was pending before the Hon'ble Supreme Court, the arbitration proceedings should not be continued pending SLP, which the Respondent No. 1 as well as Mr. Alan Oakley agreed to.
17.	September 23, 2008	The Supreme Court dismissed the SLP filed by the Petitioner and directed the parties to go for arbitration in London.
18.	September 25, 2008	The Petitioner nominated Mr. Ramaswami as the arbitrator.
19.	October 18, 2008	The Respondent No. 1 disputed the validity of the Petitioner nominating Mr. Ramaswami as the arbitrator and reiterated the Mr. Alan Oakley's appointment as sole arbitrator and said that it was not open to the Petitioner "to purport to appoint an arbitrator at this stage". The Petitioner contended that the Respondent No. 1

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straightaway nominated its arbitrator and called upon the Petitioner to nominate its Arbitrator within 14 days. The failure by the Petitioner to do so would require Respondent No. 1 to apply to the court under Section 18 of the English Arbitration Act, 1996 for appointment of a sole arbitrator. The declaration of Mr. Alan Oakley that he had become the sole arbitrator after nomination of Mr. Ramaswami as Petitioner's arbitrator, is therefore invalid

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| 20. | October 20, 2008 | Respondent No.1 wrote to Mr. Alan Oakley asking him to reconfirm his appointment as sole Arbitrator |
| 21. | October 21, 2008 | Mr. Alan Oakley sent a letter to the Petitioner with a copy to counsel for Respondent No.1 confirming that he had accepted his appointment as a sole Arbitrator. He ordered the Petitioner to submit its defence submissions on or before November 17, 2008, failing which a final and voluntary order would result which would carry severe sanctions. |
| 22. | November 4, 2008 | Petitioner wrote a detailed letter to the counsel for Respondent No.1 disputing the validity of the appointment of Mr. Alan Oakley as sole Arbitrator. A copy the same was marked to the Mr. Alan Oakley. A separate letter was also written to the arbitrator. |
| 23. | November 5, 2008 | Mr. Alan Oakley in a reply to the Petitioner, refused to recognize the Petitioner's appointment and stated that his appointment as a sole arbitrator was in accordance with law and Agreement |
| 24. | November 17, 2008 | A detailed Application made by the Petitioner challenging the constitution of the Arbitral Tribunal. |
| 25. | November 17, 2008 | Petitioner filed an application before the Court under Section 14 r/w Section 17 (3) and 24 of the Act requesting for terminating of the mandate of Mr. Alan Oakley |
| 26. | November 18, 2008 | Respondent No. 1 objected to the Application on the ground inter alia that as the Petitioner had sought time to file statement of defense on October 30, 2007 it had submitted to the jurisdiction of the Arbitrator. |
| 27. | November 18, 2008 | Mr. Alan Oakley rejected the Application made by the Petitioner and stated that is the Respondent No.1 would make an application he would proceed to the final arbitral award. |
| 28. | November 27, 2008 | Respondent No.1 requested Mr. Alan Oakley to pass a peremptory order directing the Petitioners to serve their defense and counter-claim whereas Petitioner requested Mr. Alan Oakley to await the decision of the Court in the Application made on November 17, 2008. Same day Mr. Alan Oakley passed a final and peremptory order as requested by Respondent. |
| 29. | January 28, 2009 | Hearing fixed by Mr. Alan Oakley in London. Petitioner did not participate. Respondent No.1 written submissions. Same not provided to the Petitioner. |

ARBITRAL AWARD

While the aforesaid proceedings continued, since the Petitioner did not make any written submissions for defending the claim of the Respondent, Mr. Alan Oakley, based on the written submissions and evidence provided by the Respondent No. 1 and oral hearing fixed by Mr. Alan Oakley, went ahead and passed an award on February 11, 2009.

APPEAL BEFORE THE COURT

The Petitioner filed the present petition before the Court challenging the award passed by Mr. Alan Oakley wherein all the contentions of the Parties were once again dealt with.

At this juncture, the Petitioner, inter alia, raised the question of impartiality of Mr. Alan Oakley to act as an arbitrator and failure by Mr. Oakley to disclose his interests. The Petitioner pointed out that Mr. Alan Oakley failed to disclose that he had acted as co-arbitrator of the Respondent No. 1 in a related dispute between the Respondent No. 1 and the head owner of the said vessel.

The stand taken by Respondent No. 1 is that the arbitral proceeding between the Respondent No. 1 and the head owners was not relevant for adjudication of the disputes between the Petitioner and the Respondent No.1. Mr. Alan Oakley was not required to disclose to the Petitioner that he had acted as an arbitrator in the proceeding between the Respondent No. 1 and the head owners. The Petitioner has not suffered any prejudice by reason of non-disclosure by the Mr. Alan Oakley. There was no conflict of interest in Mr. Alan Oakley accepting appointment as sole arbitrator in the arbitration between Respondent No. 1 and the Head Owner and the arbitration between Respondent No. 1 and the Petitioner.

The Respondent No. 1 relied on International Bar Association Guidelines on Conflicts of Interest in International Arbitration. It was stated that Mr. Alan Oakley is a professional arbitrator and a full Member of the London Maritime Arbitrators Association. He accepts approximately 300 arbitration appointments annually. He has till date passed over 1,000 arbitral awards over the past 15 years. He has over 42 years of experience as a practicing shipbroker. He was a Director of The Baltic Exchange between 1993 and 2005. He has also been a Magistrate in England and Wales since 2006. All this clearly demonstrated that Mr. Alan Oakley has an impeccable record and that it would be inconceivable that Mr. Alan Oakley would act in connivance and/or tacit understanding with the Respondent No. 1 and pass a favourable award to Respondent. It is submitted that Mr. Oakley did not have any financial interest or personal interest in the outcome of the arbitration and had no personal relationship with Respondent No. 1 or their legal representatives.

DECISION OF THE COURT

The Court concluded as follows:

- The contention of the Petitioner that in terms of Section 34(2)(a)(ii) of the Act, there was no valid Agreement, and therefore no valid arbitration agreement, between the parties was rejected.
- The constitution of the arbitral Tribunal with Mr. Alan Oakley as sole Arbitrator was held to be invalid. The award rendered by such Tribunal is liable to be set aside under Section 34(2)(a)(v) of the Act.
- The failure by Mr. Alan Oakley to disclose the material fact concerning his having been an arbitrator on behalf of Respondent No. 1 in the arbitration on a related issue involving it and the head owners gives rise to justifiable doubts as to his independence on a collective reading of Section 12(3), 13(5) and 34(2)(b)(ii) of the Act and is required to be set aside on this ground.
- The court further observed that the facts of the case collectively give rise to serious doubts as to the legality of the Award. The court based on the correspondences between the parties concluded that they suggested Mr. Alan Oakley did not independently apply his mind and was easily persuaded to accept what the Respondent No. 1 suggested.

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

RELEVANT LAWS FOR CONFLICTS OF INTEREST

Position under the Act

Section 12(1) of the Act states that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

Further, Section 12(2) of the Act states that there is a mandatory obligation on the arbitrator from the time of his appointment and throughout the arbitral proceedings to disclose to the parties "without delay" "any circumstances" that are likely to give rise to justifiable doubts as to his independence or impartiality.

The Arbitrator can be challenged on the above ground under Section 13(3) of the Act, if a party has participated in the arbitration, he may challenge the Arbitrator "only for reasons of which he becomes aware after the appointment has been made." Under Section 13(2) of the Act, a party can within fifteen days after becoming aware of the above ground challenge the arbitrator. The party failing in the challenge can under Section 13(5) of the Act, make an application for setting aside such arbitral award in accordance with Section 34.

Position under the International Bar Association Guidelines

As per the General Standard 2 of the International Bar Association Guidelines Conflicts of interest is described as:

- An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent.
- The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard.
- Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.
- Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative.

General standard 3, deals with "Disclosure by the Arbitrator". Clause (a) states: " If facts or circumstances exist that may, in the eyes of the parties give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstance to the parties...prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them."

This brooks no exception and is applicable in the present case where Mr. Alan Oakley acted as a nominated Arbitrator in a "related issue" concerning the head owners of the vessel and the Respondent.

ANALYSIS

Every arbitrator, whether nominated by a party or appointed independently, must carry out his/her duty on behalf of both parties and this should. An arbitrator is unlikely to be disqualified on the basis that he/she has acted in a prior arbitration involving one of the parties which arose from entirely different circumstances. However, in a situation where there is a similar circumstance and which had included one party as a party to an earlier arbitration, the likelihood of disqualification in the absence of any disclosure becomes vital. Therefore, disclosure and transparency is of vital importance in assessing the question of an arbitrator's independence, particularly in multinational arbitrations where it is likely that the parties will know very little about the arbitrators nominated by their counterparts. All major arbitration centers would contain requirements for an arbitrator to disclose any relationships which could have an impact upon his/her independence. The intention is to even out any potential problems with an arbitrator at the outset of proceedings and it is often the case that if a disclosure is made, the parties may take the view that it is not fatal to the arbitrator's independence or impartiality and decide not to challenge his/her appointment.

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¹ O.M.P. 194 of 2009

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