New York Convention
ROADSHOW
New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
ICCA

Rapporteur's Report

JUDICIAL DIALOGUE ON THE NEW YORK CONVENTION

New Delhi

Saturday 23 November 2013

THE CASUARINA HALL at THE INDIA HABITAT CENTRE

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Introduction

This report summarises the proceedings and key conclusions of the ‘Judicial Dialogue on the New York Convention’ that took place in New Delhi on Saturday, 23rd November 2013. The seminar was organised by International Council for Commercial Arbitration (ICCA) with assistance of LCIA-India.

The report has been categorised in the following four sections:

- Speakers
- Executive Summary
- Opening Session
- Panel Discussions

I. Speakers:

(In order of appearance in the conference)

Mr. Fali S. Nariman

Professor Jan Paulsson

Hon'ble Mr. Justice P Sathasivam

Hon'ble Mr. Justice SS Nijjar

Mr. Dushyant Dave

Ms. Zia Mody

Hon'ble Mr. Justice TS Thakur

Professor Marike Paulsson

Hon'ble Mr. Judge Dominique Hascher

Hon'ble Mr. Justice Ranjan Gogoi

II. Executive Summary

The series of colloquia for judges on the New York Convention (NYC) known as the "New York Convention Roadshow" reached India with great vigour and was welcomed with equal delight. The one-day international seminar for judicial officers on the effective application of the NYC witnessed an extensive dialogue with national court judges**.**

The event was by invitation only. Over 60 participants took part in this seminar, including sitting and retired judges of the Supreme Court and various High Courts. Senior Lawyers, Academicians, Representatives of the law firms and trainee judicial officers from the Delhi Judicial Academy were also part of the event.

In their welcome addresses Mr. Fali Nariman (Honorary President, ICCA) and Professor Jan Paulsson **(**President, ICCA) underlined the importance of the judicial dialogue in the framework of ICCA activities and highlighted its specific objectives. The Honourable Mr Justice P Sathasivam, Chief Justice of India, gave the inaugural address emphasizing the efforts that have to be taken to make India an arbitration-friendly jurisdiction.

The seminar itself included four panel discussions by Indian and overseas experts on relevant topics relating to the application of NYC. Two open forums served as a platform for panellists and participants to share their own experiences and were devoted to answering questions from the participants.

The first session after the opening ceremony focused on the interface between arbitration and the judicial process with an emphasis on the role of courts in appointing arbitrators, considerations in ordering interim measures of protection, challenges to arbitral awards, and international trends and emerging principles on arbitrability.

The second session focused on the arbitration agreement/clause. This session addressed *inter alia* the issue of pathological arbitration clauses and how party autonomy finds its limits in public policy. The panellists discussed landmark cases pertaining to the recognition of the arbitration agreement and referral to arbitration.

After lunch, the third session was devoted to providing an overview of the NYC, mainly focusing on the essential features of NYC such as party autonomy and role of courts in enforcement of foreign awards; its object and purpose, and its relevance for judicial application of the NYC. The session discussed a few landmark cases pertaining to NYC.

The fourth and final session contemplated the best practices in the international arena discussing important cases from different jurisdictions and formulated some recommendations to be circulated among the national court judges in India.

On behalf of ICCA, Professor Jan Paulsson gave the concluding remarks.

II. Opening Session

At the beginning of the seminar, after lighting the ceremonial lamp, the Chief Justice of India informed the audience of the coincidence of the event with the National *Lok Adalat* (a system of alternative dispute resolution developed in India which verbatim translates into "People's court) Day in the country.

In his welcome address, Mr. Fali Nariman informed the audience of the historical importance of the NYC. He remembered the late Professor Pieter Sanders – known as the father of the NYC – and his remarkable contributions to the international business community through this highly successful international instrument. During his speech, Mr. Nariman stressed the role of judges in maintaining the success rate of the NYC.

Professor Jan Paulsson started his welcome remarks by mentioning the relationship between national courts and arbitration process. He referred to the historical speech made by the then Secretary General of the United Nations Organisation during the adoption of NYC. During the latter part of his address he spoke about ICCA and clarified how it is different from any arbitral institution.

The Honourable Mr Justice P Sathasivam, Chief Justice of Supreme Court of India, stated during his inaugural address that the success of the NYC depended on the approach of the State courts to interpret the NYC. He mentioned the constitutional mandate given under Article 51 of the Constitution of India, relating to the settlement of disputes through peaceful means including Arbitration. He noted further that the NYC and UNCITRAL Model Law are the two pillars of international arbitration, observing that modern instruments such as the NYC also required certain amendments. At this juncture he posited that the Arbitration and Conciliation Act, 1996 of India (AC Act) needed to sync in with the transnational economic order, concluding by acknowledging the contribution of ICCA to the world of modern arbitration.

III. Panel Discussions

A. Introduction to International Arbitration Law and Practice

Mr. Justice S S Nijjar, Judge Supreme Court of India, made the opening remarks of this session. The other panellists included Prof. Jan Paulsson, Mr. Dushyant Dave, and Ms. Zia Mody.

Mr.Justice Nijjar in his initial comments stressed the interface between national courts and arbitral process. He mentioned the issues relating to pathological arbitration clauses, anti-suit injunctions and interim measures, and raised the question of validity of arbitration agreement on the basis of affidavits not requiring oral evidence.

Prof. Paulsson focused his comments on the problem of allocating tasks between an arbitrator and a judge so as to ensure that they remain within their jurisdiction as mandated by NYC.

Mr. Dave talked about the role of the court and pointed out two decisions from the Indian Supreme Court in this regard, *Shin etsu*[1] and *Chloro Control*[2].

Mr. Justice A. P Shah, Chairman of the Law Commission, in his intervention referred to the infamous decision of the Supreme Court in *SBP v Patel engineering*[3] emphasising on the reluctance of the courts in referring the matter to arbitration. He emphasised the need for arbitrators to be empowered to decide on fraud. Mr. Justice Ravindra Bhat agreed with Mr. Justice Shah and indicated the need to overruling *SBP*[4] decision.

Prof. Paulsson intervened that fraud is a problematic term. According to him, unless an arbitration agreement is directly affected, it should be validated by the court. He remarked that it is an absolute routine to find fraud matters decided by the tribunal. He opined that any crafty lawyer would find a fraud issue in any matter if raising of such an issue could lead to injunction of arbitration.

Ms. Zia Mody in her discussion pointed that the fraud-related problems are the result of the decision of the Supreme Court. She also expressed the hope that if judges persuade the parties to go to institutional arbitrations then the risk of running into pathological defects will gradually go away. She made it clear that there was a need somewhere to "fashion and tweak

[1] AIR 2005 SC3 766
[2] (2013)1 SCC 641
[3] AIR 2006 SC 450
[4] Ibid

the safety net". She expressed her concern over the application of *BALCO*[5] only to agreements entered into after the date of the judgment, saying that it can be dangerous. She also encouraged early amendment of the law so as to make S.9 available.

In his intervention, Mr.Judge Dominique Hascher indicated the need for having separate acts for domestic and international arbitration. He elaborated on the difference between domestic and international public policy.

Mr. S. K Dholakia commented on the nebulous concept of public policy and pointed that the concept is not similar in international and domestic context. He also suggested the overruling of *SBP*[6] decision and also discussed the welcome change brought in by *Lal Mahal*[7] case but also said that it did not go far enough.

Mr. Dave pointed out that Section 11 of the AC Act provides for the scope for the appointment of arbitrators by arbitral institutions. He stressed the need for appointing subject experts as arbitrators.

Mr. Darius Khambata discussed the efficacy of institutional arbitration. He remarked that institutional arbitration casts a positive shadow on the tribunal which makes it work swiftly. On the issue of public policy, his opinion was that although the public policy exception under S. 34 and S. 48 uses identical language, its interpretation should be different. His suggestion was to amend S.34 so as to expressly state what constitutes public policy of India.

Mr.Justice Nijjar directed the discussion to applicability of the principle of competence-competence under Section16 on the AC Act.

Prof. Paulsson ended the session by pointing to the problem of conflict of interests for the arbitrators and the importance of transparency. In this context he made reference to the IBA Guidelines on Conflicts of Interest in International Arbitration.

B. The Recognition and Enforcement of the Arbitration Agreement

[5] (2012) 9 SCC 552
[6] Supra 3
[7] 2013 (8) SCALE 489

Mr. Justice T S Thakur, Judge Supreme Court of India, made the opening remarks of this session. The other panellists included Prof. Marike Paulsson, Mr. Dushyant Dave, and Ms. Zia Mody.

Mr.Justice Thakur opined that that the job of NYC is to create an atmosphere where stakeholders of arbitration are required to have a pro arbitration approach. He agreed that the AC Act is in a state of flux.

Prof. Marike Paulsson in her initial remarks gave cogent reasons as to why the event was titled as a roadshow, noting that the event was a *dialogue*. She emphasised the enforcement of arbitration agreement and elaborated on the formal and material validity requirements of an arbitration agreement. She clarified the apparently vague wording of Art. II of the NYC, while describing it as the core of the NYC, pointing out that Art II (3) empowers the courts to send the parties to arbitration and specifies the circumstances when it can refuse to do so. She called it a basic right for a party to go to the court if he does not get what he bargained for in the arbitration agreement, then discussing Section 44 of the AC, which requires the arbitration agreement to be in writing, whereas very often parties have not signed the contract. She noted that Section 44 of the AC Act has to be taken seriously.

Mr. Justice AP Shah raised a question relating to the mandatory writing requirement under US and European jurisdictions. He was of the opinion that US Courts were biased towards enforcement of agreements.

Prof. Marike Paulsson cautioned that arbitration may become dangerous. While discussing the US Courts, she clarified that they adopt a pragmatic approach and attach a lot of value to party autonomy. She explained why and how enforcement bias was not always effective. There was also discussion as to what extent it is fine to rely on the case laws. Admiralty cases furnish examples of culling out arbitration agreement from exchange of documents.

Mr. Dushyant Dave stated that the interpretation of Art II by the courts in India has been very liberal and good.

Mr. Nariman mooted the point of reconciliation between Section 7 and Section 44 of the AC Act. He also mentioned the requirement of an agreement to be in writing and gave an example about the Telegraph Act.

Mr. Justice Thakur expressed his concern as to whether the AC Act should be interpreted independently or cues be taken from the NYC.

Mr. Darius Khambata answered that S.7 cannot be imported into S.44.

Prof. Marike Paulsson pointed to the latest amendments in the UNCITRAL Model Law regarding the writing requirements.

Ms. Zia Mody discussed the land mark judgement of the Supreme Court of India in *Chloro Controls*[8] case.

There was also discussion on the various essentials of writing requirements under Section 7 including the role of statement of claim and non-denial of an assertion of reference to arbitration agreement made into it. The panel also discussed the principle of Competence-competence at the end.

Open Forum

A pre-lunch forum was organised to further discuss certain important points that had come up in the preceding two panels.

At the beginning Mr. Fali Nariman introduced Mr. Judge Dominique Hascher from the Supreme Judicial Court of France. In his opening remarks, Mr. Nariman stated that the general perception was to consider the process of arbitration as an exception; but in the context of international trade law a court of law becomes an exception. He opined that the parties who are not willing to arbitrate must state so at the very outset.

Mr. Judge Hascher elaborated on the topic of public policy. He gave an example of a US Court decision stating that foreign policy is not public policy. He stressed that international public policy is a narrow concept, which incorporates the fundamental values of human society. He then differentiated between procedural and substantive public policy, where procedural public policy means violation of due process, whereas issues of corruption and fraud come under the category of substantive public policy.

[8] Supra 2

On the point of corruption, Nariman questioned the power of courts in reversing the decision made by an arbitrator.

Mt. Judge Hascher mentioned the *res judicata* effect of an arbitral award.

Mr. Nariman was curious to know about how a civil law judge interprets public policy at the enforcement stage.

Mr. Judge Hascher stated that a civil law judge would not review an award on its merits.

C. Introduction to the New York Convention

Mr. Justice Ranjan Gogoi**,** Judge Supreme Court of India, made the opening remarks of this session. The other panellists included Prof. Marike Paulsson, Mr. Fali Nariman, and Mr. Judge Dominique Hascher.

In his opening remarks, Mr. Justice Gogoi mentioned that there have been positive developments to bring India closer to the NYC. He discussed the positive indications of *Shri Lal Mahal*[9] case decided by the Supreme Court in July 2013. His discussion also included the comparison between Section 34 and Section 48 of the Indian Arbitration and Conciliation Act.

Prof. Marike Paulsson gave an overview of the NYC, explaining that the onus is on the contracting state to decide what rules apply to the enforcement of an award and explaining the scope of the NYC and territoriality. She also indicated the differences between non-domestic award and foreign award in the context of Art. I of the NYC. After providing a summary of the procedure required for enforcing an award under NYC, Prof. Marike Paulsson, compared various provisions of Chapter II of Part II of the AC Act.

Mr. Fali Nariman elaborated on the concept of sovereignty and NYC. He explained the principle of reciprocity under Art. I(3) of the Convention and its application under Indian Law. He mentioned the historical aspects relating to the Treaty of Westphalia and the problems of international law in general. According to Mr. Fariman, one of the main reasons for the success of the Convention is that it is left to the state courts to interpret, which is not the case in general international law.

[9] Supra 7

Mr. Judge Hascher pointed out the presumption of validity underlying in Article III of the convention. Article IV and V are based on this presumption. He discussed the grounds for resisting the enforcement of an award in detail including the problem of arbitrability and the public policy exception, mentioning that national interests cannot be treated as the international public policy.

Making a quick intervention, Mr. Justice Mohit Shah raised a question on the cultural differences that exist in east and west, particularly the customs and traditions in India. He was of the opinion that the national interests must be taken into account by the arbitrators.

D. Judicial Harmonization of the New York Convention- Discussion of Best Practices

Mr. Justice Dipak Mishra, Judge Supreme Court of India, made the opening remarks of this session. The other panellists included Mr. Judge Dominique Hascher, Mr. Dushyant Dave and Prof. Marike Paulsson.

Mr. Justice Mishra in his presentation referred to a few landmark cases from Indian courts that are treated as pro-arbitration judgments. He had suggested the need for making India an arbitration friendly destination.

Prof. Marike Paulsson stated that the judges must look locally, though the NYC is a global instrument. It is for the states to decide whether to treat the convention as a global or local. Thus, describing NYC as a “glocal” convention.

At the end of her discussion, she gave ten recommendations that can be considered as the best practices for the application of NYC. Mr. Fali Nariman acclaimed these recommendations and suggested that copies be distributed among the various high courts and district courts in India.

Mr. Dushyant Dave was of the view that there is no need for making any legislative amendments. He said that the judges have enough opportunity to make India arbitration-friendly and suggested that parochial considerations should be put aside while applying the NYC. He stressed that foreign investment is necessary to take the country forward, and that development would not be possible if India remain in isolation.

Mr. Judge Hascher proposed the need to enhance confidence in international arbitration and mentioned the tremendous work done by ICCA in this regard. He opined that national court judges to be internationally minded.

Concluding Remarks

President of ICCA Professor Jan Paulsson delivered the concluding remarks to the day's sessions and proposed the vote of thanks. In his concluding address, Prof. Paulsson said that the world of international arbitration is complex and that one should not blindly believe in anything they hear. Everything needs to be verified.