

Indian court appoints arbitrator as a commissioner to record witness evidence abroad (Stemcor (S.E.A.) v Mideast Integrated Steels)

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Arbitration analysis: The Bombay High Court has addressed a critical issue on the examination of witnesses where they are not physically present at the seat of arbitration. In this case, one of the petitioners' key witnesses refused to visit India ostensibly due to certain regulatory enquiries pending against him as he feared prosecution. The Bombay High Court, under Section 27 of the Arbitration and Conciliation Act, 1996 (the A&C Act), appointed the arbitrator as the court commissioner and instructed the team of lawyers along with the commissioner, to travel to Singapore to record the witness's evidence. A Letter of Request was also issued to the High Court of Singapore for the issuance of directions on cross examination and transmitting witness testimony back to the Bombay High Court.

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Stemcor (S.E.A.) Pte Limited and Anr v Mideast Integrated Steels Limited, Arbitration Petition No 332 of 2018 (not reported by LexisNexis[®] UK)

What are the practical implications?

The Bombay High Court adopted a pro-arbitration approach by facilitating the recording of witness evidence in Singapore and overcoming procedural hurdles.

Indian law allows an arbitrator to grant the parties permission to seek the assistance of the court in relation to the production of witnesses and documents. The Bombay High Court in its earlier ruling in *Montana Developers Pvt Ltd vs Aditya Developers* Arbitration Petition (Lodging) No 680 v 2016 (not reported by LexisNexis[®] UK), clarified that the courts are not empowered to adjudicate upon the validity of an order passed by an arbitral tribunal under A&C Act, s 27. The court cannot go into the merits of such an application and/or the order itself. The nature of power under the A&C Act, s 27 is limited to executing the request of the tribunal and the court cannot second guess the admissibility, relevance, materiality, and weight of any evidence. This also ensures that parties do not have a 'second bite at the apple' (before the court) and the orders of the tribunal are adhered to.

The Bombay High Court placed reliance on the recording of evidence by commission rather than video-conferencing, despite the advantages associated. Video-conferencing may be cost effective, but may possibly prevent capturing the demeanour and body language of parties during cross-examination. While deciding whether video conferencing should be permitted or a commission to be appointed, courts are likely to weigh the unavailability of the witness, the prejudice to the cross-examining party, and the importance of the testimony. It should be kept in mind that various courts across India have issued guidelines for the adoption of technology and factors to be considered when permitting video-conferencing.

However, since a one size fits all approach cannot be the norm, it remains to be seen how courts in the future will exercise such powers in different factual scenarios, especially in situations where parties may have financial constraints.

What is the background of this decision?

Disputes arose between the parties, Stemcor (SEA) Pte Limited and Moorgate Industries Pvt Ltd (the petitioners) and Mideast Integrated Steels Limited and others (the respondents) in 2004. The parties filed consent terms on 14 June 2016 (the Consent Order). The Consent Order held:

‘The said Agreements are/shall be governed by the laws of India. The seat and venue of arbitration shall be Mumbai. The courts at Mumbai shall have exclusive jurisdiction in relation to the arbitration.’

During the arbitral proceedings, the respondents examined four witnesses, including Mr Mathew Scott. The petitioner proposed to examine two witnesses, including Mr Gerard Craggs a resident of Singapore, the Managing Director of the first Petitioner. However, the petitioners could not carry out the cross-examination of Mr Craggs as he refused to travel to Mumbai.

The petitioners filed an application under A&C Act, s 19 to direct the recording of Mr Craggs’ evidence through video conferencing. The respondents opposed the application. The arbitrator allowed the application and held that the cross examination would be conducted in Singapore at the petitioners’ cost. However, the arbitrator subsequently recalled this order and directed Mr Craggs’ to be present in Mumbai on 29 and 30 January 2018 for his cross examination.

The petitioners filed an application before the arbitrator to recall its previous order and allow the recording of evidence from Mr Craggs through video conferencing. In the alternative, the petitioners prayed that they be granted leave to apply to the court to appoint a commissioner to record the evidence of Mr Craggs under A&C Act, s 27. The arbitrator granted leave to the petitioners, leading to the present petition.

Separately, during the pendency of the arbitration proceedings, the respondents had requested the arbitrator for leave to approach the court for the appointment of a commissioner to examine their witness, Mr Mathew Stock, a resident of another country, as he was not able to visit India. The arbitrator had at that time allowed the application for issuance of a commission on the condition that the respondents would bear all the related expenses. However, eventually, Mr Mathew Stock visited India and had his witness statement recorded

What did the Bombay High Court decide?

The issues that came up in this case are, whether:

- ordering of a commission to Singapore for recording evidence of Mr Craggs would effectively change the venue of arbitration and thus, against the terms of the Consent Order
- the respondents had waived their right to object to an application filed under A&C Act, s 27, considering they had raised a similar application before the arbitrator in the past
- an order of an arbitrator allowing an application to the court under A&C Act, s 27 can be challenged before the court

After hearing the parties, the Bombay High Court proceeded to appoint the arbitrator as a commissioner (subject to his approval) and also issued a Letter of Request to the High Court in Singapore. A brief analysis on the various points raised during the arguments were:

Waiver by the respondents

The arbitrator granted liberty to the respondents to file an application before the court under A&C Act, s 27 seeking permission for recording evidence of Mr Stock, if they were unable to procure his affidavit. The respondents made an application for the appointment of a commissioner and the issuance of a Letter of Request. Though that was granted, Mr Stock eventually appeared before the arbitrator in India. Further, in the case of Mr Stock, the respondents had not denied that:

- an application for issuance of witness summons or for issuance of a commission or a letter of request was without jurisdiction
- the arbitrator’s order granting liberty to obtain assistance from the court was without jurisdiction

. Therefore, the respondents having sought and been granted such an order in the past, had effectively waived their rights to object to the appointment of a commissioner to record evidence on the same grounds amounting to a change in venue.

Taking evidence in Singapore does not amount to a change in venue

The Bombay High Court considered whether taking evidence in Singapore would amount to a change in venue under A&C Act, s 20 as the Consent Order recorded that the seat and venue of arbitration shall be Mumbai.

Relying on the case of *Vithaldas Damodar v Lakhmidas Harjiwan*(1942) 44 BOM LR 609 (not reported by LexisNexis® UK), and *International Planned Parenthood Federation v Madhu Bala Nath* FAO (OS) No 416 of 2015 (not reported by LexisNexis® UK) the Bombay High Court held that the provisions of Order XXVI Rules 7 and 8 are relevant in this context clarifying that evidence recorded on commission has to be read as evidence before the court before whom it is considered as evidence.

Therefore, when the evidence recorded by the commission is read before the arbitrator in Mumbai, the evidence would be considered to have been tendered in Mumbai. Thus, there is no change in venue if the evidence is recorded on commission in Singapore.

Validity of the arbitrator's order

The respondents questioned the validity of the arbitrator's order to allow petitioners to approach the court under A&C Act, s 27. The Bombay High Court held that the purpose of an application under A&C Act, s 27 is to facilitate and expedite the arbitral proceedings by obtaining assistance from the court in the production of documents and witnesses, which is necessary for effective adjudication of a dispute.

Under A&C Act, s 5, there is a clear bar on courts intervening in arbitral proceedings unless expressly specified. Since A&C Act does not specify an intervention, the Bombay High Court held that at the stage of hearing an application under s 27, it cannot adjudicate on the accuracy and validity of the arbitrator's order. In the event, the respondents are not satisfied by an award made, they can challenge the arbitrator's order granting permission to seek the assistance of the court under A&C Act, s 27, along with the award, under s 34.

Reasons for ordering commissions

The Bombay High Court held that A&C Act, s 27(6) clarifies that commissions and summons can be issued for the examination of witnesses and production of documents. The court has the power to order a commission for examination of witnesses. Further, the arbitrator having held that if Mr Craggs was unable to visit Mumbai due to his perception of the likelihood of detention or impounding of his passport, the petitioners would be denied the benefit of his evidence. Considering Mr Craggs was the Officer/Managing Director of the Petitioner, his evidence was relevant and material to the proceedings and could not be ignored.

The Bombay High Court held that it was beyond reasonable doubt that the evidence of Mr Craggs was material and relevant to the arbitral proceedings. Relying on a Supreme Court ruling (*State of Maharashtra v Praful Desai*, AIR 2003 (4) SCC 601 (not reported by LexisNexis® UK), the Bombay High Court held that recording of evidence by a commission is more authentic than evidence recorded through video conferencing. The commission would be the agent of the court for the purposes of recording evidence and therefore ordered a commission to Singapore to obtain the evidence of Mr Craggs.

Procedure for ordering commissions

The Bombay High Court provided directions under A&C Act, s 27 and for the purpose of issuing a Letter of Request to the High Court in Singapore:

- the arbitrator (subject to his confirmation) must be the court commissioner in charge of recording the examination of Mr Craggs in Singapore
- the Prothonotary and Senior Master of the Bombay High Court must issue a Letter of Request to the High Court of Singapore to issue directions for the examination of Mr Craggs pursuant to the Supreme Court of Judicature Act. The Singapore High Court was requested to submit Mr Craggs's testimony along with a report, if any, to the Bombay High Court
- if the arbitrator declines to act as the commissioner, the Letter of Request will include a plea to the Singapore High Court to appoint a fit and proper person as commissioner
- all the costs incurred due to recording Mr Craggs's evidence will be carried by the plaintiffs

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