

# Dispute Resolution Hotline

October 21, 2008

## SUBSTANCE OVER TECHNICALITIES: AFFIRMS SUPREME COURT IN A RECENT ARBITRATION CASE

The Hon'ble Supreme Court of India ("Court") in a recent decision in the matter of M/s Unissi (India) Pvt. Ltd. ("Unissi") v Post Graduate Institute of Medical Education & Research ("PGI") in Civil Appeal No. 6093 of 2008 decided on October 1, 2008, examined the existence, validity and enforceability of arbitration agreements in the backdrop of section 7 of the Arbitration and Conciliation Act 1996 ("Act"). The Hon'ble Supreme Court held that in the absence of a formal agreement executed between the parties, the tender documents indicating certain conditions of a contract evidenced the existence of an arbitration clause. Accordingly, the Hon'ble Supreme Court set aside the order of the Additional District Judge, Chandigarh, ("Trial Court") which was the subject matter of the said appeal. In this important judgment the Hon'ble Court has once again emphasized that the efficacy of the arbitration process ought not to be thwarted by insistence on technicalities such as absence of signature in the Agreement, as in the said case.

### BACKGROUND & SUBMISSIONS:

PGI floated a tender for the purchase of Pulse Oxymeters, the format of which contained an arbitration clause. Pursuant to the tender, Unissi gave an offer, which was accepted by PGI. Accordingly, certain equipments were delivered to PGI, the delivery of which was accepted by them and machineries were installed. PGI demanded the execution of an agreement ("Agreement") containing an arbitration clause on a non judicial stamp paper, duly signed. The said Agreement was signed by Unissi, but PGI's signature was not procured. Disputes arose between the parties, whereby Unissi invoked the arbitration clause and filed an application for the appointment of arbitrator before the Trial Court.

PGI mainly alleged that in the absence of a signed Agreement, it is implausible to presume the existence of a valid arbitration clause and therefore the, question of appointing an Arbitrator in the present case did not arise. The Trial Court concurred with PGI and held that in the absence of PGI's signature the Agreement remained only an offer, thereby, conferring no right on Unissi to ask for appointment of arbitrator under section 11 (4) of the Act<sup>1</sup>.

### JUDGMENT:

The Hon'ble Supreme Court carefully examined the provisions of Section 7<sup>2</sup> of the Act read with Article II Para 2 of the New York Convention which deal with the existence and validity of arbitration agreements. The vital fact in the said case, was the correspondences exchanged between the parties and conduct and actions taken in reference to the Agreement, which particularly contained the arbitration clause under which the materials were supplied to PGI by Unissi. This document being accepted by PGI, inferred the existence of an arbitration agreement between the parties. Accordingly the, order of the Trial Court was set aside and Unissi's appeal was allowed against which Unissi preferred appeal to Supreme Court by way of Special Leave Petition (SLP) under article 136 of the Indian Constitution wherein it was held that *"although no formal agreement was executed, the tender documents indicating certain conditions of contract contained an arbitration clause. It is also an admitted position that the appellant gave his tender offer which was accepted and parties acted upon it"*.

### ANALYSIS AND IMPLICATIONS:

The said decision echoes the principles laid down by the [Supreme Court in the matter of Great Offshore Limited versus Iranian Offshore Engineering & Construction Company case](#). In the said case, the Supreme Court held that mere procedural requirements such as stamping, seals, signatures or production of original agreement may not be considered as the conclusive indicators of intent, if the parties are able to demonstrate intent to arbitrate in other justiciable ways.

We believe that the said judgment further strengthens the validity and enforceability of arbitration agreements. The rationale being that parties, having accepted the terms and conditions of an agreement containing an arbitration clause, which in the present case was evidenced by a tender accepted by PGI, and having acted upon it, they ought to act in conformity with the agreement. Further, in our view, while procedural and technical issues often tend to delay if not deny justice, the present case re enforces the need to ensure due enforceability of arbitration agreements, as envisaged under the Act.

Source: Supreme Court Order in Civil Appeal No. 6039 of 2008, decided on October 1, 2008 [Arising out of SLP(C) No. 9204 of 2006]

- Alap Yadav, Advait Sethna & Vyapak Desai

1 Section 11: Appointment of arbitrators.

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- (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
- (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
- (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators, shall appoint the third arbitrator who shall act as the presiding arbitrator.
- (4) If the appointment procedure in sub-section (3) applies and –
- (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
- (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made upon request of a party, by the chief justice or any person or institution designated by him.
- (5) \*\*\*\*\*
- (12) \*\*\*\*\*

## 2 7. Arbitration agreement.

- (1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
- (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (3) An arbitration agreement shall be in writing.
- (4) An arbitration agreement is in writing if it is contained in –
- (a) a document signed by the parties;
- (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
- (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
- (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

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