**REPORTABLE**

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO.10 OF 2006

Great Offshore Ltd. ... Petitioner/Applicant

*Versus*

Iranian Offshore Engineering &
Construction Company ...Respondent

# J U D G M E N T

**Dalveer Bhandari, J.**

1. Great Offshore Limited has filed a petition under section 11(5)((6)(9) and (12) of the Arbitration and Conciliation Act, 1996 whereby the applicant seeks the appointment of a sole arbitrator. The applicant, Great Offshore Ltd., submits that it has entered into a charter party agreement with the respondent, Iranian Offshore Engineering & Construction Company. The charter party agreement ("CPA") contains an arbitration clause. Relying on this clause, the applicant has asked this Court to appoint an arbitrator to resolve the

dispute. The respondent, however, contends that the two parties had not progressed beyond the stage of negotiation and that there is no concluded contract between them. Therefore, it is argued that there is no question of referring the dispute to arbitration.

2. Brief facts which are relevant to dispose of this arbitration petition are recapitulated below.

3. The charter party agreement in dispute marks the second time the parties have done business with each other. The first time was in 2004. In March of that year, the respondent entered into a contract with the Oil and Natural Gas Corporation Limited ("ONGC") to carry out construction work on ONGC's installations at Bombay High. On 26th October, 2004, the applicant and the respondent entered into a charter party agreement. Under this prior agreement, the respondent hired a vessel combination from the applicant. The respondent required a specialized offshore construction barge known as a "Gal Constructor." It also required an anchor handling tug, named "AHT Malaviya Five." The AHT Malaviya

is used in combination with the Gal Constructor. I shall refer to the Gal Constructor and the AHT Malaviya as the "vessel combination."

4. The respondent needed this combination to execute offshore work for ONGC. This work was part of ONGC's RSPPM project, Phase I. The first phase was completed in November 2004.

5. In this case, the controversy is confined to the alleged agreement relating to the second phase of ONGC's project.

6. In this arbitration petition, I need to decide whether the parties have entered into a valid contract containing an arbitration clause. To this end, it has become imperative to review the relevant correspondence between them. Only then will I be able to arrive at a conclusion as to whether there was a concluded contract or whether the parties had never progressed beyond the stage of negotiation.

7. After the parties expressed mutual interest in resuming business for Phase II, the respondent faxed a letter to the

applicant. The letter is dated June 20th, 2005. In this letter, the respondent expressed its intention to use the applicant's vessel combination for 170 days pursuant to the same terms as the preceding agreement. A few amendments, however, were to be made to that agreement.

8. The applicant responded vide email the next day and stated that it would like to "come to an agreement." After meeting the respondent on 22nd June, the applicant faxed an offer to the respondent on June 23rd, 2005.

9. In turn, the respondent faxed a letter of intent on June 23rd, 2005. The letter stated that it was "...a firm and unconditional letter of intent (for short LIO) for award of contract for charter hire of your barge Gal Constructor and Malviya 5". Nevertheless, the very same letter contained a contingency clause:

> "This Agreement is subject to IOEC [respondent] providing a suitable barge and AHT acceptable to GE Shipping [applicant] for a period of 45-55 days on mutually agreed rates for commencement between 25th October and 10th November 05 for BHN MOL project works."

10. On July 1st, 2005, the respondent's minutes of meeting indicate that the barge (vessel) was to be available for visual examination "…until 25th of July after which the barge will leave AJMAN port in UAE for the project in PG".

11. On August 4th, 2005, the applicant explained that it no longer wanted the respondent to provide a barge for 45-55 days, as mentioned in the respondent's June 23rd letter of intent. Because the parties could not agree on the rate for this service, the applicant said that it would make alternate arrangements.

12. On August 11th, the respondent sent a letter in regard to modifying the Barge Gal Constructor so that it could function as a riser installation barge. Based on its engineering analysis, it sought to install "…5 davits in the port or STBD side at the barge" as well as a "… working platform as an extension to main deck in the aft quarter over one of the anchor rests".

13. In response to a meeting on August 8th and the above letters, the respondent faxed a letter to the respondent on

August 13th, 2005. The letter suggested that additional provisions be incorporated in a new draft of the contract. The respondent requested the right to modify the Gal Constructor, thereby enabling it to perform a riser installation. The respondent further asked the applicant to pay the outstanding amount (USD 188,500) from the preceding contract. In conclusion, the respondent stated that it would be willing to finalize the contract before the 30th of August.

14. On 16th August, the parties met to discuss the proposed changes. The applicant formally responded to the respondent's suggestions in a letter dated August 22nd, noting that the parties had come to the following agreement regarding a number of outstanding issues:

| S. No. | Clause | Agreement |
|---|---|---|
| 1 | Modifications for Riser Installation | Clause on the basis of Addendum 3 to Charter Party dated 26th Oct 04 to be incorporated |
| 2 | Early Termination Clause | It was mutually agreed not to include the clause suggested |
| 3 | Employment of vessel | Clause as per Charter Party dated 26th Oct 04 to be incorporated |
| 4 | Sublet Clause | Clause 17 of the charter party to be referred in additional clause pertaining to sublet |
| 5 | Credit note issue | Addressed hereunder |

> … we confirm our acceptance of the credit note amounting to US$186,618 … for subject vessel combination for charter party dated 26th Oct 2004. …"

15. Before proceeding with the correspondence, it is pertinent to note that the faxed charter party agreement ("faxed CPA") is dated August 22nd. After having settled a number of outstanding issues vide the above letter, the applicant allegedly sent the faxed CPA to the respondent on the same day.

16. The faxed CPA officially entitled the "Charter Party for Offshore Service Vessels Code Name 'Supplytime 89'" dated August 22nd, 2005 is reproduced, in relevant part. The "charterer" is the respondent, and the applicant is the "owner":

> 1. Place & Date. Mumbai, India. 22nd August 2005. …
>
> 9. Period of Hire. 204 days firm / minimum …
>
> 14. Early termination of charter (state amount of hire payable) (Cl. 26(a)) Not Applicable.
>
> 18. Employment of Vessel restricted to (state nature of service(s))
>
> (Cl 5a)) Hook up, commissioning, accommodation and offshore Installation work such as I-Tube installation and Riser Installation and all other activities of RSPPM Project, within Vessel's natural Capabilities and safe practices/

operations.

19. Charter Hire (state rate & currency) (Cl 10(a) & (d))

USD 31,000 … PDPR …

22. Payments …

Payments shall be made against acceptable, unconditional, revolving and irrevocable Letter of Credit issued at sight by the Charterer's bank for USD 6,500,000 …

These L/C(s) to be opened, latest by 15th September 2005. However draft of L/C(s) should be provided to the Owners by 1st September 2005.

33. Law and arbitration (state Cl 31(a) or 31(b) or 31(c), as agreed, If 31c agreed also state place of arbitration) (Cl.31)

Clause 31(c) – Indian Arbitration and Conciliation Act, 1996 at Mumbai

…. . "

17. I must provide some background before dealing with other documents, as the faxed CPA sits at the center of this dispute.

18. It appears that both parties signed the faxed CPA, and it bears the applicant's seal. However, it does not bear the respondent's seal. The applicant contends that it had sent the original to the respondent on August 22nd. The respondent did not return the original. Instead, on September 8th, the

respondent's head office faxed a copy of the CPA to its local office. [The top of the said fax shows the date and time as well as the place from and to which it was sent; it reads "08-SEP-2005 13:52 FROM IOEC HEAD OFFICE TO ALLAHVERDI"]. This faxed copy is signed by the respondent's Project Director, Mr. M. Sabbaghi.

19. The respondent's Mr. Ali Rahmati provided the applicant the faxed CPA on October 12th, according to the applicant's letter dated October 21st. In a letter dated October 26, the respondent originally asserted that it never signed the faxed CPA and that the document was forged.

20. Between the date on which the applicant sent the faxed CPA – 22nd August – and the date on which the respondent reportedly returned it to the applicant – 12th September, ONGC had advised the respondent to get the vessel combination certified before proceeding with a Riser installation. ONGC's letter dated 30th August stated that the vessel did not have any past track record with riser installations.

21. The applicant later expressed concern that the respondent's failure to return the original contract, i.e., charter party agreement, could result in undue delay. In an email sent at 9:03 a.m. on 14th September, the applicant stated, in relevant part, that:-

> "... You would appreciate that it is imperative for us to have the charter party with us in order to initiate actions from various departments such as operations, fleet personnel, accounts etc to prepare for the said contract and in absence of this document we are not in a position to push for same. This will result in last minute hassles and delays. ..."

22. The respondent's email rejoinder came at 4:31 p.m. on the same day. The relevant part reads as under:-

> "...
>
> The CPA of Gal Constructor and Malavya 5 <u>is ready in our office and will be hand over to you</u>.
>
> ..."

23. On September 15th, 2005, the applicant sent the following email to the respondent. It reads in relevant part as under:-

> "1. Understand that charter party is ready in your office. However, we are yet to receive the same and

> urgently require it to be circulated among the concerned departments so that they are prepared for the next contract. Will get in touch with your office again today for the same. …"

24. The respondent faxed a letter dated September 23rd, 2005 to the applicant. The letter asks the applicant to issue a cheque for the outstanding amount due from the parties' Phase I work. It further demands that the applicant grant the respondent the sole and absolute right to sublet the vessel to its subcontractor(s) at the agreed charter party rate. It concludes by saying that the respondent "… can not conclude the charter party agreement until the above issue are settled."

25. On September 24th, the respondent met with Likpin Engineers to discuss whether the applicant's vessel could be converted to perform a riser installation. Likpin surveyed the vessel on 23rd September 2005 and, in the following minutes, concluded that:-

> "Taking into account the number of problems associated with the vessel, it is the conclusion of Likpin and IOEC that the Gal Constructor is not suitable as a riser installation. … the vessel size combined with the limited crane reach cannot be corrected or overcome and hence the vessel should not be chartered for riser installation operations."

26. In a letter dated September 27th, 2005, the respondent again asked the applicant to issue a cheque or remit $186,618. It once again demanded that it be granted the right to sublet the vessel and that until those issues were settled, it could not conclude the CPA.

27. In a letter dated September 29th, 2005, the respondent reiterated its demands, namely, that the applicant remit $186,618 and that it provide the respondent with the sole and absolute right to sublet the vessel combination. It admitted that this payment had nothing to do with Phase II of the project and thus "... has no connection with the current negotiations and should be closed out immediately, so that Phase II can begin on a clean slate." It further stated that:

> "... the sole and absolute right to sublet the vessel to IOEC subcontractors ... is an essential element in IOEC work plan for Phase II. ... Lack of, or delay in, the ability to exercise the sublet option will impact on IOEC work plan and also affect the cost schedule of RSPPM project and is not acceptable to IOEC. Please note that time is running short and in absence of GESCO's immediate compliance with above two requirements IOEC may be compelled to take recourse to other options. ..."

28. The applicant responded to the above with the following letter dated 30th September 2005. The relevant part reads as under:-

> "... We are in the process of arranging funds to be remitted to you against the said amount and will confirm remittance as soon as possible. 2) Your request for sole and absolute right to sublet the vessel is not acceptable to us. The LOI for the contract has been issued by you on 23rd June 2005 after we mutually agreed on the terms and conditions of charter party. Thereafter, on your request, we have provided with you with signed originals of the charter party on 22nd August 2005 for your signatures. You have accepted the same and conformed to us vide your letter communique dated 14 September that he charter party has been signed and is ready in your office and will be handed over to us. Previous to that, you have also sent us letter saying that you confirm that the charter party will be finalized by 30 August 2005. While we have been provided a photocopy of the signed charter party by your office, it is now 30 September and rather than keeping your commitment and returning the original and issuing the L/C as promised, you are deliberately delaying the same.

29. The letter goes on to demand that the respondent immediately issue the signed, stamped original charter party agreement as well as the irrevocable line of credit. The applicant further demanded that both tasks be completed by 1st October at 1200 hours.

30. Vide letter dated 10th October, the applicant informed the respondent that the applicant's vessel combination arrived at P & V Channel, Mumbai on October 6th. Because it had yet to receive the line of credit, it informed the respondent that it could not proceed further with the mobilization of the vessel combination. The applicant provided the respondent with an invoice for mobilizing its vessel combination. It gave the respondent another chance to comply with the purported contract: "please note that contractual hire will begin as and from 0000 hours of the 11th October 2005. We on our party stand ready and willing to comply with all our obligations."

31. In its October 10th letter, the respondent reiterated that the terms of the agreement were still under negotiation and that no contracted had been concluded. It objected to the absence of a provision that provided the respondent with the absolute right to sublet the vessel.

32. It also argued that the applicant's vessel combination was not fit for the agreed purpose. This issue is beyond the scope of this decision, which limits itself to deciding whether

or not a contract containing an arbitration clause was formed. While I have made mention of some of the other issues, such as whether the vessel was fit for the agreed purpose, I need not rehash each and every one. All matters, save for whether the alleged contract/arbitration clause was formed, would be more appropriately addressed by an Arbitral Tribunal.

33. The letter goes on to state that it would still consider hiring the applicant's vessel combination if it received the right to sublet and also if the crane were made fit for the purpose for which the respondent intended. On 18th October, the respondent sent a letter in which it stated that it would have to look for a vessel from an alternative provider. The respondent said that it would treat the matter with the applicant as "closed." It concluded by asking the applicant to pay the amount due for Phase I. It sent a letter on 20th October reiterating the same.

34. On 21st October, the applicant sent a letter detailing the sequence of events that had occurred between the parties. Para 5 of the said letter is reproduced as under:-

> "The Charter Party Agreements, two originals duly signed and stamped by us, were submitted to your office on 22nd August 2005 requesting you to forward us one original after execution of the same from your side. You never returned one original for our records. However, your Mr. Ali Rahmati had handed over to us a fax copy of the formal Charter Party document signed by your Mr.M. Sabbaghi when we had a meeting with him on 12th September 2005. A copy of the same is enclosed herewith for your perusal."

35. In its 26th October 26th, the respondent once again claimed that the charter party remained unconcluded. It alleged that the faxed copy of the charter party agreement was "forged and the story of delivery false and concocted." Moreover, it stated that "since we have found the vessel completely unfit for riser installation as the said vessel with the present condition of the crane is not suitable at all, therefore we thought fit to withdraw from the negotiation…." It claimed that the applicant had misrepresented its vessel's ability to perform a riser installation. Thus, it thought this misrepresentation had vitiated the negotiations. At this point, it appeared that their relationship had officially soured.

36. In its letter dated 16th November, the respondent reiterated much of what is already provided above. Of interest,

it stated that:-

> "You are aware that initially, we intended to hire the vessel combination for only 170 days. However, since you agreed to take barge and AHT from us for 45-55 days, we agreed to extend the intended hire period from 170 days to 200 days and accordingly in this background the said LOI was issued. However, since thereafter you unilaterally declined to take our barge and AHT on the ground of difference in rate levels offered by us, we, in view of the said condition and in the light of your refusal to accept our barge and AHT, asked you for absolute subletting right of the said vessels to compensate us/minimize our expenses for risk of additional days than the originally intended 170 days. The correspondences which were exchanged between us make it aptly clear that negotiations and change in terms and conditions from your side continued even after issuance of LOI and therefore the question of concluding the CPA in respect of RSPPM project phase-II does not arise at all."

37. In its December 2nd, 2005 letter, the respondent called upon the applicant to arrange for a third party inspection of the applicant's vessel, in order to determine whether or not it was suitable for riser installation.

38. In response, on 23rd January 2006, the applicant served the respondent with a notice of arbitration. On 2nd February 2006, the respondent replied to the same.

39. With the relevant correspondence outlined above, I turn to the parties' main submissions. The applicant contends, inter alia, that the faxed copy of the charter party agreement ("faxed CPA") dated 22nd August is a binding, concluded contract. The applicant gives four reasons for this assertion.

40. First, the faxed CPA is signed by both parties. Second, the applicant's statement to this effect was not denied in the pleadings [See the last page of the respondent's supplementary written submission of May 13th, 2005: ("…it was not signed properly and *but for the last page*, the said fax communication, did not bear signature on other page.")

41. Third, the respondent admitted in its letter dated 14th September that the original CPA "… is ready in our office and will be hand to you." The applicant argues that because the applicant had already signed the original CPA, there was nothing left for the respondent to do but sign. Hence, by saying it was "ready", I may infer that it was signed.

42. Fourth, the respondent's letter of 10th October did not

deny the fact that the original CPA was signed by the respondent and was waiting in the respondent's office, even though the applicant had asserted as much in its letter dated 30th August. It was not until 26th October that the respondent deemed it necessary to deny this fact.

43. The respondent contends that because the original signed copy was never given to the applicant, the parties were in negotiations at all times. With respect to the faxed CPA, it points to the fact that the respondent did not sign every page. It gives further weight to the fact that the faxed copy was not sent vide fax from the respondent to the applicant; rather, it was first sent vide fax from the respondent's main office to its local branch.

44. Learned counsel for the respondent states in its written submission that "...the respondent failed to even sign the formal contract document that the applicant had sent to it for its signature." It argues that because the original CPA was not signed by the respondent, the Court will have to find a contract, if any, in the correspondence. According to Mulla:-

> "In construing whether or not a particular agreement does or does not amount to a contract, the court would look for the intention of the parties, the nature of the transaction, the language employed in the informal agreement and other relevant circumstances. None of these is conclusive in itself. ... The fact that the parties contemplate that the letters or an informal agreement would be superceded by a more formal one, does not prevent it from taking effect as a contract. If the letter of intent is acted upon, especially for a length of time, the court is likely to hold the parties bound by the contract." [See Mulla, *Indian Contract and Specific Relief Acts*, 13th Edition at pages 317-318].

45. In ***Dresser Rand S.A.*** *v.* ***M/s. Bindal Agro Chemical Ltd. & Another***, AIR 2006 SC 871 at page 884 at para 34, a two-Judge Bench of this Court emphasized that whether letters of intent rise to the level of being a contract hinges on the terms of the letter itself. It observed as under:-

> "It is no double true that a Letter of Intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that the detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a Letter of Intent, it may amount to acceptance of the offer resulting in a concluded contract ... . <u>But the question whether the letter of intent is merely an expression of intention to place an order in future or whether is a final acceptance of the offer thereby leading to a contract, is a matter</u>

> that has to be decided by reference to the terms of the letter."
>
> [Emphasis added].

46. The respondent's main submission is that it never actually concluded a contract and that, if anything, the applicant mistakenly thought that the respondent's LOI of 23rd June was an offer. Why else would the applicant have sent its acceptance on 4th? Its attack against the LOI as a contract is two-fold. First, it argues that the parties cannot leave a major piece of the contract open for future negotiation. Second, it contends that the parties were not eye-to-eye, or ad idem on the points.

47. According to the respondent, the applicant's assumption that the respondent's 23rd June LOI read with the applicant's 4th August letter is misplaced. The LOI of 23rd June read with the applicant's letter of 4th August does not form a contract because a contract cannot leave a major part of its terms open to future negotiation. The respondent relies on ***May & Butcher Limited*** *v.* ***The King*** *(*1934) 2 KB 17, for the proposition that an agreement in which some critical part of

the contract matter is left undetermined is no contract at all.

48. In its assertion that the applicant's LOI of 23rd June was conditional, it points to the following language from the same LOI: "this agreement is subject to IOEC providing a suitable barge and AHT acceptable to GE Shipping for a period of 45-55 days on mutually agreed rates for commencement between 25th October and 10th November 05 for BHN MOL project works." The respondent's supplying the barge to the applicant for 45-55 days went unmet when the applicant said it would not need this barge.

49. In addition, the respondent argues that this condition was material to the contract, as evidenced by the fact that the respondent only agreed to increase the duration of the work from 170 to 200 days *if* it got paid for supplying the barge. By doing so, the respondent was attempting to offset the costs it would incur by having the applicant's vessel combination for an extra 30 days.

50. Furthermore, the respondent claims that no contract could arise from its LOI of 23rd June because the parties were

not ad idem, i.e., in agreement on each point. Along these lines, *Chitty on Contracts* [29th Edn. Vol.1 at page 134] has observed:-

> "When parties carry on lengthy negotiations, it may be difficult to say when and whether a contract has been concluded. The court must then look at the whole correspondence and decide, whether on its true construction, the parties had agreed to the same terms."

51. In ***M/s. Rickmers Verwaltung Gimb H*** *v.* ***Indian Oil Corporation Ltd.***, AIR 1999 SC 504 at page 509 para 12, this Court reiterated this stand: "Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence." [See also: ***Dresser Rand S.A.*** *v.* ***M/s. Bindal Agro Chemical Ltd. & Another***, AIR 2006 SC 871 at page 879 para 21 (affirming the same)]

52. The respondent argues that they were still negotiating the terms and conditions. It cites to its letter of 13th August and the applicant's letter of 22nd August as evidence of continued negotiations. In the respondent's letter dated 13th

August, it suggests that a number of changes be made to the "new *draft* contract." [emphasis added]. "Draft" suggests that nothing had been finalized. Moreover, the letter lists a number of issues that were still open to negotiation. The applicant's letter of 22nd August, however, addressed the proposed changes.

53. The respondent concedes that while it said it would sign and finalize the contract by 30th August, it changed its mind on 27th August and conveyed the message that it would not enter the agreement until all outstanding issues were resolved.

54. Like the applicant's counsel, the respondent also makes use of the fact that the applicant did not object to the respondent's letter dated 13th August. The applicant should have said that there was no question of finalizing the contract when it had already been finalized. I note that this argument seems unfair because the applicant could not have gotten the faxed CPA from the respondent until 8th September at the earliest, as that is the date that appears on the fax. According

to the applicant, it received the faxed copy on 12th September.

55. Of course, all of the respondent's arguments become moot if the faxed CPA dated 22nd is valid. In the instant case, the burden to prove that a valid contract containing an arbitration clause existed first rested on the applicant, as it was the applicant that was moving this Court. However, upon producing the faxed CPA that, on its face, appears legitimate, the onus shifted to the respondent to prove that it was forged. It appears, prima facie, to be legitimate because it bears the heading "08-SEP-2005 13:52 FROM IOEC HEAD OFFICE TO ALLAHVERDI" (hereinafter the "fax header"). This is an important piece of evidence that makes its genuineness more probable than not. Hypothetically, the applicant could have fabricated the fax header. But that is highly unlikely and presumes much more than what is expected in normal human conduct especially when that conduct concerns the forgery of an executive officer's signature. It should not be forgotten that this case is between sophisticated companies, not warring family members that dispute the authenticity of a will.

56. The respondent could argue that it handed over an unsigned copy of the faxed CPA and that the applicant forged it after the fact. Such an assumption is equally dubious. Why would the respondent go through the trouble of returning the applicant's August 22nd CPA unsigned, when it had been routed vide fax through its Head Office?

57. There is no evidence to suggest that the faxed CPA was forged. To the contrary, the evidence we do have is the faxed CPA bearing the parties' signatures coupled with correspondence between the parties. The correspondence, as it is more than just a pleading, adds additional weight to the applicant's story. The applicant's letter of 21st October corroborates the allegation that Ali Rahmati delivered the faxed CPA to the applicant on 12th September. The date of delivery of 12th September fits the timeline provided on the fax header, as the respondent could only have delivered the faxed CPA after 8th September. Moreover, it appears that having received the faxed CPA on 12th September, the applicant was prompted to ask for the original vide email on 14th September. Once again, the dates match up.

58. The fax header, on its face, suggests that the document is genuine. This conclusion is bolstered by the above-mentioned correspondence. Thus, I find that the applicant had discharged its initial burden of sufficiently proving that the faxed CPA was not forged. The onus shifted to the respondent to prove that its signature was forged. With no evidence to support its assertion, the respondent cannot discharge its onus. Therefore, I find that the faxed CPA is legitimate and is not a product of forgery. As such, I need not look for the existence of a contract on the basis of the LOI of 23rd June.

59. The question then becomes whether the faxed CPA is valid under the relevant law. Here, the purported contract provides that the Arbitration and Conciliation Act, 1996 (26 of 1996) is to be used. [page 3 of faxed CPA dated 22 August 2005]. In the preceding contract the same Act was used. Therefore, it comes as no surprise that the parties have not objected to the same in the instant case.

60. Section 7 of the Arbitration and Conciliation Act, 1996

(26 of 1996) provides:

> (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 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.

61. Section 7 squarely deals with the present controversy. This Court has taken note of Section 7(3) & 7(A)(a)'s requirement that the arbitration agreement be in writing and

signed by the parties. According to the learned counsel for the applicant, affixing a seal under section 7 of the Act is not a requirement. [See: ***Bihar State Mineral Development Corporation & Another*** *v.* ***Encon Builders (1) (P) Ltd.*****,** (2003) 7 SCC 418 at page 423 para 13 (one of the essential elements of an arbitration agreement is that "the parties must agree in writing to be bound by the decision of such tribunal.") and ***K.K. Modi*** *v.* ***K.N. Modi & Others*****,** (1998) 3 SCC 573 at page 585 para 21 ("there are, of course, the statutory requirements of a written agreement …. Vide Section 2 Arbitration Act, 1940 and Section 7 Arbitration and Conciliation Act, 1996.")

62. The respondent makes much of the fact that the "faxed CPA" of August 22nd is (1) a copy, not the original; (2) is stamped by one, not by both parties; (3) one of the parties did not sign every page; and (4) it was first sent vide fax.

63. Section 7 defeats all four assertions. First, there is no requirement that the arbitration agreement be an original. Where the statute has gone to great lengths to define exactly what is meant by the term "in writing," we are precluded from

adding another term to definition. Indeed, "it is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so." [See: Justice G.P. Singh's *Principles of Statutory Interpretation*, 11th Edition, 2008, at page 62.63, citing to ***Renula Bose (Smt.)*** *v.* ***Rai Manmathnath Bose***, AIR 1945 PC 108, p. 110; ***Stock v. Frank Jones (Tiptan) Ltd.***, (1978) 1 All ER 948, p.951; ***Assessing Authority-Cum-Excise and Taxation Officer, Gurgaon & Another*** *v.* ***East India Cotton Mfg. Co. Ltd.***, ***Faridabad*** (1981) 3 SCC 531].

64. An exception to this rule can be made. But before adding words to a statute, "… the Court must be abundantly clear of three matters: (1) the intended purpose of the statute or provision in question, (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have used, had the error in the Bill been noticed." [See: Justice G.P. Singh's *Principles of Statutory Interpretation*, 11th Edition, 2008 at page 75 citing to

*Inco Europe Ltd. v. First Choice Distribution (a firm)* (2000) 2 All ER 109, at page 115 (HL)]. As I mention below, one of the main objectives of the Arbitration and Conciliation Act, 1996 is to minimise the role of the Court; adding additional requirements to the Act is antithetical to such a goal.

65. Second, the plain language of Section 7 once again governs my conclusion. Section 7 does not require that the parties stamp the agreement. It would be incorrect to disturb the Parliament's intention when it is so clearly stated and when it in no way conflicts with the Constitution.

66. Third, nothing in Section 7 suggests that the parties must sign every page. Once again, if I take the respondent's argument to its logical conclusion, I would have no choice but to read language into the Act that is *not* there. Even if the faxed CPA is construed as a "document," it need only be "signed by the parties" pursuant to Section 7(4)(a). Every page does not need to be signed. If it is considered a "document," then this requirement would be met. As established above, both parties signed the faxed CPA in the signature box at the

bottom of Part I. That said, the faxed CPA more closely fits within Section 7(4)(b)'s requirements.

67. Fourth, Section 7(4)(b) states that an agreement is in writing if it is contained in "an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement." This section covers agreements that are sent via facsimile ("fax") as they are "other means of telecommunication". "Fax" is defined as "a machine that scans documents electronically and transmits a photographic image of the contents to a receiving machine by telephone line" or "a document received by such a machine." [See: Chambers 21st Century Dictionary, Allied Publisher's Limited (1996)]. This definition clearly provides that a fax falls under "other means of telecommunication." Thus, faxed agreements are acceptable under Section 7 of the Act.

68. Section 7(4)(b) further requires us to ask whether a record of the agreement is found in the telecommunication, in this case a fax. What could be a better record of the agreement than the signatures of the parties themselves? As noted above, with no evidence to indicate that the respondent's signature

was forged, the faxed CPA stands on its own as the record of agreement. Likewise, Section 7(4)(b) stands satisfied.

69. The court has to translate the legislative intention especially when viewed in light of one of the Act's "main objectives": "to minimise the supervisory role of Courts in the arbitral process. [See: Statements of Objects and Reasons of Section 4(v] of the Act].

70. If this Court adds a number of extra requirements such as stamps, seals and originals, we would be enhancing our role, not minimising it. Moreover, the cost of doing business would increase. It takes time to implement such formalities. What is even more worrisome is that the parties' intention to arbitrate would be foiled by formality.

71. Such a stance would run counter to the very idea of arbitration, wherein tribunals all over the world generally bend over backwards to ensure that the parties' intention to arbitrate is upheld. Adding technicalities disturbs the parties' "autonomy of the will" (l' autonomie de la volonté), i.e., their wishes. [For a general discussion on this doctrine see Law and

Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter, Street & Maxwell, London, 1986 at pages 4 and 53].

72. Technicalities like stamps, seals and even signatures are red tape that have to be removed before the parties can get what they really want – an efficient, effective and potentially cheap resolution of their dispute. The *autonomie de la volonté* doctrine is enshrined in the policy objectives of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration, 1985, on which our Arbitration Act is based. [See Preamble to the Act]. The courts must implement legislative intention. It would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The courts directions should be to achieve the legislative intention. The courts must implement legislative intention. It would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The courts directions should be to achieve the legislative intention.

73. One of the objectives of the UNCITRAL Model Law reads as under:-

> "the liberalization of international commercial arbitration by limiting the role of national courts, and by giving effect to the doctrine "autonomy of will," allowing the parties the freedom to choose how their disputes should be determined." [See *Policy Objectives adopted by UNCITRAL in the preparation of the Model Law,* as cited in Law and Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter, Street & Maxwell, London (1986) at page 388 (citing UN doc.A/CN.9/07, paras 16-27].

74. It goes without saying, but in the interest of providing the parties a comprehensive review of their arguments, I note that once it is established that the faxed CPA is valid, it follows that a valid contract and a valid arbitration clause exist. This contract, the faxed CPA, does not suffer from a conditional clause, as did the Letter of Intent. Thus, the respondent's argument that the parties were not ad idem must fail.

75. I have heard the learned counsel appearing for the applicant and the respondent at length. I have carefully reviewed the entire correspondence between the parties. The charter party agreement that had been signed by the applicant

and the respondent clearly indicated that the parties have entered into a valid and concluded contract. The other correspondence between the parties also leads to a definite conclusion: the parties have entered into a valid contract containing an arbitration clause. Since a dispute has arisen between the applicant and the respondent, it needs to be referred to the arbitrator.

76. On consideration of the totality of the facts and circumstances, I am clearly of the opinion that the applicant is entitled in law to an order for appointment of a sole arbitrator. Consequently, I request Hon'ble Justice S.N. Variava, the retired Judge of the Supreme Court, to accept this arbitration. The learned arbitrator would be at liberty to fix his own fee. I direct the parties to appear before the learned arbitrator on 8th September, 2008 or any date convenient to the learned arbitrator.

77. Before parting with this arbitration petition, I would like to make it abundantly clear that the learned arbitrator shall not be bound by any observations which have been made in

this judgment. The observations have been made only to decide this arbitration petition.

78. The Registry is directed to communicate this order to the learned arbitrator to enable him to enter upon the reference and decide the matter as expeditiously as practicable.

79. Consequently, this arbitration petition is allowed and disposed of. In the peculiar facts and circumstances of this case, I direct the parties to bear their own costs.

**.....J.**
**(Dalveer Bhandari)**

New Delhi;
August 25, 2008.