IN THE HIGH COURT OF DELHI

Suit No. Suit No. 2958 of 1989
and
I.A. 8199 of 1989

Appeal No / Revision Application No. of from Original / Appellate Decree / Order

Date of Decision May 23, 1990.

The National Thermal Power .....through Dr.L.M.Singhvi, Sr.Advocate with Mr.J.C.Seth, Dr. M.Singhvi, Mr.N.Waziri and Mr.S.Rizvi, Advocate
Corporation Ltd.

Versus

The Singer Company & Others.....through Mr.D.C.Singhania, Senior Advocate with Mr.O.P.Popli, Ms.Archna Vasan, Ms.Vijyalaxmi Vishwanathan, Advocates.

Coram:—

The Hon'ble Mr. Justice D.P.Wadhwa.

The Hon'ble Mr. Justice

1. Whether Reporters of local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not? Yes
3. Whether their Lordships wish to see the fair copy of the Judgment?

This is a petition filed under Sections 14,30 and 33 of the Indian Arbitration Act, 1940 (for short the Arbitration Act) for setting aside the interim award made at London on 9.8.1989 by the Arbitral Tribunal constituted in effect under the ICC Court of Arbitration of the International Chamber of Commerce, Paris, and under the ICC Rules of Concilliation and Arbitration. There are two respondents, the first respondent being the contesting respondent. The three members of the Arbitral Tribunal have also been added as party-

petitioner also filed an application seeking interim relief restraining the respondents from proceeding with the arbitration during the pendency of these proceedings.

On notice being issued the first respondent, The Singer Company, filed replies in opposition and raised a preliminary objection that the petition was not maintainable as the interim award of the Arbitral Tribunal was a foreign award within the meaning of the Foreign Awards (Recognition & Enforcement) Act, 1961 (for short the Foreign Awards Act) and as such outside the purview of the Arbitration Act. On 22.2.90 I recorded as under:-

> "At the outset an objection has been raised by Mr.Singhania that the present proceedings are not maintainable. Presently, I am hearing arguments on the application (I.A.8199/89) Since, while considering the application one of the things which the petitioner will have to show is if it has a prima facie case. With this the question of maintainability of the proceedings is linked. Both the counsel agree that the issue regarding maintainability of the present petition may also be decided along with the application for grant of interim relief. They further state that no evidence is required and that the question of maintainability can be argued on the basis of record already before me. I order accordingly."

By the interim award the Arbitral Tribunal, respondent No.2, decided certain preliminary issues. It recorded that Terms of Reference identified eleven issues to be decided in the arbitration and certain issues were to be decided as preliminary issues. Some of these were as to (1) whether the laws of India governed procedural matters in the Arbitration and if not, what was the applicable procedural law; (2) whether the reference to Arbitration was bad by reason of not being made within the time allegedly prescribed by the contract; (3) whether the whole, or part, of the claimant's claims were barred by time limitation pursuant to

Limitation Act, 1908; and (4) whether the counter claims of the petitioner were barred by time limitation. After discussing the preliminary issues the interim award was made, inter alia, among other things holding that (1) the laws of England governed procedural matters in the arbitration; (2) the reference to Arbitration was not bad by reason of not being made within the time allegedly prescribed by the Contract; (3) neither the whole nor any part, of the claimant's claims were barred by time limitation under the laws of India; and (4) none of the counter claims of the petitioner was barred by time limitation.

It was not disputed before me that the arbitration proceeded in accordance with the ICC Rules of Arbitration and that in terms of Article 12 of the aforesaid Rules, the ICC Court of Arbitration fixed London as the venue of arbitration. This was, as a matter of fact, concurred by the arbitrators constituting the Arbitral Tribunal and this was in fact included in the terms of reference.

The Arbitral Tribunal held that the substantive law of the contract in question was Indian law. It further decided that the law relating to the conduct of the arbitration proceedings, including the issue of an award in the arbitration, was the law of London. The Tribunal examined in details the applicability of the Indian Limitation Act, 1963 to the claims raised by the first respondent and to the counter claims of the petitioner and came to the conclusion that these were not barred by the law of limitation. I may note that under the ICC Rules of Arbitration the date when request for arbitration is

The arguments by the petitioner before me proceeded on somewhat same line as these were before the Arbitral Tribunal that it was the Arbitration Act and substantive law of this country that governed the subject disputes between the parties.

Dr.Singhvi, learned counsel for the petitioner, said that interim award in the present case was the domestic award and could be subject matter of challenge under the Arbitration Act and this court was competent to decide this question. Mr.Singhania for the first respondent, however, contended to the contrary and said that interim award in question was in fact a foreign award and would be governed by the Foreign Awards Act and as such the present proceedings were not maintainable.

In support of his submissions Dr.Singhvi referred to various clauses in the contract and in particular to clauses 7.2, 32.3, 27.5, 27.6.1, 27.6.2, 27.7 and 27.8. Since considerable arguments were made on the effect of these clauses, I may well reproduce the same. (The words 'contractor' and 'owner' respectively signify the 1st respondent and the petitioner):

"7.2 The laws applicable to this Contract shall be the laws in force in India. The Courts of Delhi shall have exclusive jurisdiction in all matters arising under this Contract.

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27.5 All disputes or differences in respect of which the decision, if any, of the Engineer has not become final or binding as aforesaid, shall be settled by arbitration in the manner hereinafter provided.

27.6.1. In the event of the Contractor being an Indian party, that is to say a citizen and/or a permanent resident of India, a firm or a company duly registered or incorporated in India, the arbitration shall be conducted by three arbitrators, one each to be nominated by the Contractor and the Owner and the third to be named by the President of the Institution of Engineers, India. If either of the parties fails to appoint its arbitrator within sixty (60) days after receipt of a notice from the other party invoking the Arbitration clause, the President of the Institution of Engineers India, shall have the power at the request of

27.6.2 The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The venue of arbitration shall be New Delhi, India.

27.7 In the event of foreign Contractor, the arbitration shall be conducted by three arbitrators, one each to be nominated by the Owner and the Contractor and the third to be named by the President of the International Chamber of Commerce, Paris save as above all Rules of Concilliation and Arbitration of the International Chamber of Commerce shall apply to such arbitrations. The arbitration shall be conducted at such place as the arbitrators may determine.

27.8. The decision of the majority of the arbitrators shall be final and binding upon the parties. The expense of the arbitration shall be paid as may be determined by the arbitrators. The arbitrators may, from time to time, with the consent of all the parties enlarge the time for making the award. In the event of any of the aforesaid arbitrators dying, neglecting, resigning or being unable to act for any reason, it will be lawful for the party concerned to nominate another arbitrator in place of the outgoing arbitrator.

32.3. The contract shall in all respects be construed and governed according to Indian laws."

At the same time reference be made to the agreement dated 17.8.1982 between the parties and in particular to Article 4.1 relating to settlement of disputes. This clause is as under:-

"Article 4.1 Settlement of disputes

It is specifically agreed by and between the parties that all the differences or disputes arising out of the contract or touching the subject matter of the Contract, shall be decided by process of settlement and Arbitration as specified in Clause 26.0 and 27.0, excluding 27.6.1, and 27.6.2, of the General Conditions of the Contract."

Dr.Singhvi then referred to provisions of the Foreign Awards Act and said that the present case fell under clause (b) of Section 9 of the Act. This Section provides that nothing in the Foreign Awards Act shall "apply to any award made on an arbitration agreement governed by the law of India." A contention was also raised that since there was no notification issued by the Central Government under clause (b) of Section 2 of the Foreign Awards Act stating that reciprocal provisions had been made by the United Kingdom, the provisions of that Act will not apply in the present case.

This argument was, however, not pressed since a notification dated 25.10.76 was produced (No.12(10)/75-E.POL) issued by the Central Government in exercise of powers conferred by clause (b) of Section 2 of the aforesaid Act of its satisfaction that reciprocal provisions had been made and thus declaring that United Kingdom to be territories to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, set forth in the Schedule to the said Act, applied. Then Dr.Singhvi referred to certain provisions of the Arbitration Act and in particular to Section 37 (1), 46 and 47 of the Act. These Sections are as under:-

> "37.(1) All the provisions of the Indian Limitation Act, 1908 shall apply to arbitration as they apply to proceedings in Court.
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> - - - - - -
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> 46. The provisions of this Act, except sub-section (1) of Section 6 and sections 7,12 (36) and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder.
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> 47. Subject to the provisions of section 46 and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:
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> Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending".

Dr.Singhvi then submitted that conditions of the contract between the parties did not rule out the applicability of the Arbitration Act and that interim award in question had to be treated as the domestic award

Limitation Act applied only to the proceedings in a court of law and Limitation Act was applicable to arbitrations only by virtue of Sub section (1) of Section 37 of the Act. He said that once the Arbitral Tribunal held that the Indian Limitation Act was applicable it would necessarily follow that arbitration proceedings were governed by the Arbitration Act. To such a case, he said, that clause (b) of Section 9 would apply. Dr.Singhvi said that Arbitration Act is a law of India. According to him Clause 27.7 of the contract between the parties only specified the points of departure from the Arbitration Act and if there was any inconsistency between the Arbitration Act and ICC Rules of Arbitration, the ICC Rules of Arbitration would apply. He said that if the contract had not specified about the applicability of the Indian laws the award in question could well have been a foreign award. He said that under this Clause venue was to be decided by the arbitrators and not by ICC Court of Arbitration and the arbitrators could well have decided the venue to be Delhi and then the impugned award could not have been termed a foreign award in any case. The choice of London as the venue of arbitration in the present case was of no significance to decide the controversy in the present case, so Dr.Singhvi argued. His submission was that courts of Delhi were to have exclusive jurisdiction for all matters arising under the contract which was governed by the law in force in India and only the administrative mechanics or modalities or conduct of arbitration was to be as per ICC Rules of Arbitration and no more. In fact Dr.Singhvi said that when choice of law had been made, fixing of venue was of no significance or of

present case. Dr.Singhvi also referred to Article 55 of the Limitation Act, 1963 to contend that the claims raised by 1st respondent were clearly barred by limitation with reference to the cause of action as alleged by the 1st respondent.. Reference was made to a few decisions as to when cause of action would arise in such a case. Lastly Dr.Singhvi said that interim award itself was made beyond the period fixed even under the ICC Rules of Arbitration and that there was no provision under those Rules for extension of time for making the award after the award had been made.

In support of his various submissions Dr.Singhvi referred to certain reported decisions but I think I need to refer only two of them. One is a decision rendered by the Supreme Court in Oil and Natural Gas Commission v. Western Company of North America, AIR 1987 SC 674 and the other is of Delhi High Court in C.O.S.I.D. Inc. and another v. Steel Authority of India, AIR 1986 Delhi 8, a judgment rendered by me. I think, however, it is unnecessary to refer to the case of Oil and Natural Gas Commission inasmuch as there the award which was subject matter of controversy was admittedly a domestic award for the purposes of Indian courts being governed by the provisior of Arbitration Act.. The agreement between the parties in that case clearly provided that arbitration proceedings shall be held in accordance with the provisions of the Arbitration Act and the rules made thereunder as amended from time to time. The question as to how the arbitrators' award which was not a domestic award in India could be enforced in a court in India in the context of the Indian legislation enacted in that behalf, namely the Foreign Awards Act, was not before the Supreme

Court. The Supreme Court was of the view, however, that the provisions of the Foreign Awards Act would be attracted only if a foreign award was sought to be enforced in an Indian court. Dr.Singhvi tried to distinguish the decision in C.O.S.I.D.'s case on the ground that there the venue was agreed to be at London whereas in the present case the choice was left with the arbitrators and further the clauses in the present case were not comparable to those in C.O.S.I.D.'s case.

Mr.Singhania, learned counsel for the respondent, countering the arguments of the petitioner submitted that the interim award in the present case was a foreign award an outside the purview of the Arbitration Act. He relied upon the decision in C.O.S.I.D.'s case. He said that Dr.Singhvi, in fact, argued that though requirements of Section 2 of the Foreign Awards Act were fulfilled to make the interim award in question as foreign award yet clause (b) of Section 9 of that Act was attracted to save the award to be governed by Arbitration Act. This could not be so, he said. He said various clauses of the agreement between the parties andespecially Article 4.1 of the agreement dated 17.9.1988, clearly showed that the arbitration agreement in the present case was governed not by the laws of India, i.e. Arbitration Act. He said the provisions of the Arbitration Act and the ICC Rules of Arbitration could not stand together. Clause 27.7 of the agreement clearly stipulated that ICC Rules of Arbitration would apply with the modification only relating to the appointment of the arbitrators which in effect India also in terms of Article 2 of the aforesaid Rules. Article 12 of these Rules provides that the place of arbitration shall

fixed by the ICC Court of Arbitration it was consented to by the arbitrators, and this would again be in effect in terms of Article 12.

In C.O.S.I.D.'s case one of the questions was if the award there was a foreign award within the meaning of Section 2 of the Foreign Awards Act. It was held that that Act was a complete Code in itself in respect of a foreign award. The argument of the respondent in that case that the arbitrator had held that the contract was governed by the laws of India, and so the arbitration agreement which was incorporated in the contract would also be so governed, was repelled. It was held that inspite of the fact that the contract between the parties would be governed by the laws of India, the parties could nevertheless agree that the arbitration agreement would be governed otherwise. Thus though a contract may be governed by the laws of India the arbitration clause contained in it need not be so governed by the Indian law.

I think the principal question that needs consideration in the present controversy between the parties is if the award in the present case is a foreign award or not. Two questions were thrown up for consideration that if the interim award in the present case is a foreign award, could not a final award be yet a domestic award and secondly fixing of a venue may be a sound guide to find out if the award is a foreign award but could that always be decisive and if once the venue is fixed could not it be changed and if so to what effect. However, these questions do not arise for consideration in the present case and I need not discuss them.

Under Section 2 of the Foreign Awards Act, foreign award means an award when made (i) in pursuance to an

agreement in writing for arbitration to which the Convention set out in the Schedule to the Act applies and (ii) is made in territories having reciprocal provisions. In the present case there is no doubt now regarding the second condition. The Convention set out in the Schedule so far it is relevent may be referred to. Under Article I, the Convention applies to the Recognition and enforcement of Foreign Arbitral Awards made (i) in a foreign country and (ii) by arbitrators appointed by the parties or made by permanent arbitral bodies to which the parties have submitted. Under Article II "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement signed by the parties. "Agreement in writing" can be indicative if the award made pursuance thereto would be a foreign award. Section 3 of the Foreign Awards Act, which in terms is equivalent to clause 3 of Article II of the Convention, is also indicative if the parties intended the award made in pursuance to the arbitration agreement would be a foreign award. This Section applies notwithstanding the Arbitration Act or the Code of Civil Procedure and if any party to agreement to which Article II of the Convention applies, commences any legal proceedings in any court against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after putting appearance and before filing written statement or taking any other step in the proceedings, apply to the court to stay the proceedings and the court shall make an order staying the proceedings unless it is satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute

Now as I read the relevent clauses of the agreement between the parties which have been set out above, it is clear to me that the parties agreed that all the differences or disputes between them under the contract shall be decided by the process of settlement of arbitration as specified in clauses 26.0 and 27.0 excluding clauses 27.6.1 and 27.6.2 Clause 26.0 is not relevent as there has not been any settlement. Clauses 27.6.1 and 27.6.2 are relatable when the contractor is an Indian party and then the provisions of the Arbitration Act are applicable and the venue for arbitration is to be at New Delhi, India. These two clauses have been specifically excluded in the present case. The contractor, i.e. respondent No.1, before me is a foreign party. The arbitration is not to be conducted in accordance with the provisions of the Arbitration Act. It is to be conducted as per Rules of Concilliation and Arbitration of the ICC. The venue is to be selected by the arbitrators. Only to this extent the ICC Rules may not apply, but that does not make any material difference. The venue for arbitration has been agreed to by the arbitrators to be London. Not much argument is, therefore, needed to show that the award in the present case is a foreign award and would be governed by the Foreign Awards Act. Reference to any of the provisions of the Arbitration Act is not, therefore relevent.

Agreement in writing for referring the disputes to arbitration should be such as one can infer easily that the award made thereunder will be in the territory of a State other than the State where the recognition and enforcement of such an award is sought. It is loosely termed as International Arbitration. As to the place where the agreement was executed may give indication if the award would be a foreign award. Unless it can be shown from the arbitration

Award Act could be made applicable. Another indication could be if one of the parties is a foreign party and where the parties agreed to international arbitration, for example under the ICC Rules of Arbitration. Yet another instance could be of the procedure the parties agreed would apply for the conduct of arbitration proceedings and also what would be the law applicable to the contract in question. If it is not so specifically provided one could ask what system of law has the contract the closest and most real connection. If the arbitration is to be held in a foreign land it could be yet another indication that the award would be a foreign award. There is, however, no authority for the proposition that when arbitration takes place in one country the law to be applied must be the law of that country but the authorities do show that there is a strong inference that this would be so. Reference in this connection may be made to a decision of the House of Lords in James Miller & Brothers vs. Whitworth Street Estates (1970 A.C. 583)

The parties in the present case expressly agreed that their right under the contract would be determined under the Indian laws. This, however, did not imply that they also agreed that the law governing the arbitration procedure would also be Indian law, i.e. Arbitration Act as well. Applicability of the Arbitration Act was specifically excluded. The parties could certainly agree that their rights under the contract are to be governed by one system of law and the procedure for resolving their disputes by arbitration by some other system of law (see in this connection the decision of this court in C.O.S.I.D.'s case). However, one can safely hold that in absence of any

contractual provisions to the contrary the procedural law governing the arbitration will be the place for conducting arbitration proceedings, for example the English law in the present case and that is what the Arbitral Tribunal has held.

Again in the present case there are all the characteristics of a foreign arbitration and the award in question being the foriegn award, for example ICC Rules of Arbitration are to apply; Arbitration Act is specifically excluded; arbitration proceedings are being held in foreign land; one of the parties is a foreign party; ICC Court has appointed a third arbitrator who acts as a Chairman of the Arbitral Tribunal and he is also a foreigner; the English law is to govern the arbitration proceedings as has been rightly held by the arbitrators.

Dr.Singhvi referred to the following passage in the Dicey and Morris book on the Conflict of Laws;(Eleventh Edition):

> "If there is an express choice of the proper law of the contract as a whole, the arbitration agreement will usually be governed by that law. If there is no express choice of the law to govern the contract as a whole, or the arbitration agreement ~~xk~~ in particular, there is a strong presumption that the proper law of the contract (including the arbitration clause) is the law of the country in which the arbitration is to be held. But this presumption, though strong, can be rebutte for the House of Lords has emphasised that an arbitration clause is only one of sever circumstances to be considered in determin ing the proper law of a contract. The presumption cannot operate if no place of arbitration is agreed in the original contract, or if the place of arbitration i left to be chosen by the arbitrators or by an outside body. In such cases the proper law of the contract (including the arbitra tion clause) will be determined in accorda nce with the normal principles."

applicability of the Arbitration Act and instead chose ICC Rules of Arbitration and law governing the arbitration proceedings would be that of England where the arbitration proceedings are being held.

Reference was also made to the following passage in the book Law and Practice of International Commercial Arbitration by Alam Redfern and Martin Hunter, 1986 Edition:

> "The distinction between the law governing the arbitration and the law applicable to the matters in issue before the arbitral tribunal is of general application; and as a matter of principle, it is right that this should be so. In many cases the parties do not choose for themselves the place of arbitration. Frequently, they leave the decision to the arbitral tribunal itself. Even more frequently, they leave the choice to a third party responsible both for the appointment of a sole arbitrator (or presiding arbitrator) and for the selection of the place of arbitration. The selection of the place of arbitration is then likely to depend on considerations which have no connection with the dispute between the parties, the dominant consideration usually being that the arbitration should take place in a country which is neutral in the sense that it is not the home of either of the parties to the arbitration.
>
> For instance, when the ICC appoints a sole arbitrator, or a presiding arbitrator, it almost invariably appoints a person who is of a different nationality from that of the parties; and when the ICC selects the place of arbitration, it usually chooses the country of the sole arbitrator or of the presiding arbitrator. In such cases, which are common, it is evident that the chosen place of arbitration has nothing to do with the parties or with the agreement under which the dispute arises. It is, so to speak an accidental choice. In these circumstances it would be capricious to hold that the law of the place of arbitration was also, and necessarily, the law applicable to the issues in dispute."

On this basis it was stressed by [illegible] that choice of place being London in the present case, was

award in question a foreign award. I am afraid I cannot agree to this contention as the place of holding arbitration proceedings is not the only circumstance which could be taken to decide if the award is a foreign award, though this would certainly raise a strong presumption for the award being a foreign award.

Then Dr.Singhvi attacked the award on the ground that the arbitrators could not hold the claims of the 1st respondent to be within limitation under the Limitation Act, 1963 as applicable and as noted above one of his arguments was that the law of limitation could apply only if the arbitrators held the proceedings under the Arbitration Act as outside this Act there is no other provision for the applicability of Limitation Act to arbitral tribunal except the courts. I do not think Dr.Singhvi is correct in his submissions. The parties can always agree that they will have no claim against each other if raised after a particular period and they could thus resort to the Limitation Act to agree that if a claim or counter claim is barred under that Act that claim or counter claim will be extinguished and the arbitrators will not award any such claim or counter claim. Moreoever if ultimately the foreign award is sought to be enforced in this country the court can always go into the question if the claim under the foreign award was barred by limitation under the law as applicable in India and if so may refuse the enforcement of such an award on the ground of public policy. Under the Convention set out in the Schedule to the Foreign Awards Act recognition and enforcement of a foreign award could be refused if the recognition and enforcement of an award would be contrary to the public policy of that country. Afterall statutes of limitation and prescription are statutes of peace and repose. I would, therefore, reject the submissions of

Dr.Singhvi on this account as well.

The result is that the petition is not maintainable under the Indian Arbitration Act, 1940 and is dismissed with costs. I.A.9199/89 is also dismissed.

May 23, 1990,
GKS

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the recognition and execution of foreign arbitral awards. Foreign arbitral awards are defined as awards made by an arbitrator or tribunal outside of the legal territory of the Republic of Indonesia or awards so designated according to the judicial stipulations of the Republic.

The regulations provide for several preconditions to recognition for the purposes of execution. First, they codify the reciprocity reservation with which Indonesia ratified the New York Convention. Second, awards will be recognized only if they are *within the scope of the Indonesian Commercial Code*, and will not be enforced if they are contrary to public order. Finally, an award may not be executed in Indonesia until an exequatur has been obtained from the Indonesian Supreme Court.

The regulations then provide for the process by which exequatur may be obtained from the Indonesian Supreme Court. The detailed application procedure requires, among other things, that the file be accompanied by (1) an original or copy of the award authenticated pursuant to Indonesian law and by a translation in conformity with the requirements of Indonesian law; (2) the arbitration agreement which formed the basis for the award, also duly authenticated and translated pursuant to Indonesian law; and (3) a statement from the Indonesian diplomatic envoy to the relevant State, stating that the latter either has a bilateral agreement with Indonesia or has entered into an international convention on the recognition and execution of foreign arbitral awards. The fee for the issuance of an exequatur is

While the Indonesian Supreme Court's promulgation of regulations should aid in enforceability of foreign awards in Indonesia, the complex procedure involved may still lead those with a choice to avoid attempting to enforce an award in Indonesia.

3. Delhi High Court Upholds ICC Interim Award.

The High Court of Delhi has concluded that an International Chamber of Commerce interim award was a foreign award governed by India's Foreign Awards (Recognition and Enforcement) Act of 1961. *National Thermal Power Corp., Ltd. and the Singer Co. and others*, suit No. 2958 of 1989 and I.A. 8199 of 1989.

The contract between Singer and National contained separate arbitration provisions for domestic and foreign contractors. The contract stated that arbitration with domestic contractors "shall be conducted in accordance with the provisions of the Indian Arbitration Act 1940" with venue in New Delhi. By contrast, that Act provides that arbitration with foreign contractors be under ICC Rules, and a separate agreement between the parties specifically excluded application of the domestic arbitration provisions to arbitration with foreign contractors. Indian law governed the contract.

After a dispute arose, the arbitrators chose London as the venue for the hearings. On August 8, 1989, they handed down an interim award deciding certain preliminary issues regarding the applicable law on procedural matters, the timeliness of the commencement of arbitration according to contract provisions, and the timeliness of claims as determined by Indian law. The tribunal concluded that the substantive law of the contract was Indian, but that ICC rules and English law governed disputes relating to the procedural aspects of the arbitration.

National attempted to challenge the award in the High Court of Delhi and to have it set aside under the Indian Arbitration Act 1940 (sections 14.30 and 33), which, as noted above, applies only to domestic awards. Singer replied that the suit was not maintainable before the court, since the award was foreign, and that the Arbitration Act 1940 did not apply. The primary issue then became whether the award was domestic or foreign.

National argued that the award, even though issued in London, should be considered domestic because the contract pursuant to which it had been issued was governed by Indian law. National emphasized that clause "b" of the Indian Foreign Awards Act of 1961 states that the Act "will not apply to any award made on an arbitration agreement governed by the law of India."

Mr. Justice Wadhwa rejected National's argument, holding that the ICC interim award was foreign and non-challengeable under the Arbitration Act 1940. Justice Wadhwa noted that the contract had specifically provided for foreign arbitral awards, that the parties had specifically excluded application of the Arbitration Act 1940 in a separate agreement, and that choice of Indian substantive law did not preclude choice of a different procedural law for the arbitration nor require that an arbitral award be con-

sidered domestic merely because Indian substantive law governed.

B. United States

1. U.S. Supreme Court Denies Certiorari To First Circuit Decision Holding That Federal Arbitration Act Precludes Regulation Of Securities Pre-Dispute Arbitration Agreements.

The U.S. Supreme Court declined to review a First Circuit Court decision holding that the Federal Arbitration Act (FAA) preempts a Massachusetts law which barred brokers from demanding mandatory arbitration. *Connolly, Michael, et al. v. Securities Industry Ass'n*, 883 F.2d 1114 (1989); *cert. denied*, ____U.S.___, 110 S.Ct. 2559, 109 L.Ed. 2d 748 (1990). The First Circuit's decision was reported at pp. 4-5 of our November 1989 Newsletter.

The Massachusetts statute prohibited broker-dealers from requiring customers to sign mandatory pre-dispute arbitration agreements as a non-negotiable requirement to establishing a brokerage account.

The Supreme Court invited the federal Solicitor General, Kenneth W. Starr, to comment on the case. In his *amicus curiae* brief, Starr focused on section 2 of the FAA, explaining that the Supreme Court had:

> "consistently drawn the distinction between impermissible state arbitration regulations that single out and subject arbitration provisions to a different enforcement regime under state law, and permissible state regulations of general application that necessarily encompass arbitration in contracts. The Federal Arbitration Act bars the former regulatory efforts precisely because such state action violates the anti-discrimination principle

Starr explained that the Massachusetts law violates federal law and treats arbitration agreements differently than other contracts. Citing *Southland Corp. v. Keating*, he concluded that the FAA reflects a national policy favoring arbitration and precludes the state from requiring parties to a contract to resolve their differences in a court of law where they have agreed in that contract to arbitrate their disputes. He added that the First Circuit's decision will not harm state or federal efforts to police securities arbitration provisions, in that the Commodities Futures Trading Commission and the Securities and Exchange Commission are working on regulations to encourage the "efficient and fair" use of arbitration provisions.

Starr explained that Massachusetts still has the power to supervise securities arbitration agreements:

> "Absent controlling federal law, the state legislature presumably could accomplish the goal of the securities arbitration regulations by enacting a state law providing, for example, that forum selection clauses in all consumer contacts must be the subject of negotiation and full disclosure. In other words, application of the anti-discrimination principle of Section 2 of the Federal Arbitration Act is by no means tantamount to outlawing state regulation of arbitration provisions. Federal law simply guarantees that arbitration agreements not be singled out for special treatment . . . ."

2. Second Circuit Finds Limitations On The "Amex Window" In The Amex Constitution.

The use of the American Arbitration Association as a forum to settle disputes between investors and their brokers has been limited by two decisions issued by the U.S. Second Circuit Court of Appeals.

In the first case, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Argyris G. Georgiadis and the American Arbitration Association*, 903 F.2d 109 (2d Cir. 1990) ("*Georgiadis*"), the Court affirmed a lower court ruling that the arbitration clause of the American Stock Exchange ("Amex") Constitution can be "superseded" by a more detailed customer agreement, and that Merrill Lynch and Mr. Georgiadis had closed the so-called "Amex window" by that agreement.

The Amex window, contained in Section 2, Article VIII of the Amex constitution, allows a customer to refer a claim to the AAA unless the customer has agreed "in writing, to submit only to the arbitration procedure of the Exchange."

The arbitral provision in the customer agreement in *Georgiadis* stated that any dispute was to be settled by arbitration before the National Association of Securities Dealers (NASD), the New York Stock Exchange (NYSE), or any other exchange located in the United States. Citing ordinary contract principles, Circuit Judge William H. Timbers held Georgiadis was bound by the arbitration clause of his agreement with Merrill Lynch, since the parties agreed explicitly to settle their disputes only before particular arbitration fora.

Georgiadis argued that under *Merrill Lynch v. Hart*, Merrill Lynch was estopped from denying him the right to take his case to the AAA. In *Hart*, Merrill Lynch did not assert its contractual rights under a customer agreement and accepted AAA jurisdiction. Judge Timbers pointed out that to invoke equitable estoppel, Georgiadis "must have been an adverse party in the