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Contents

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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on Court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/REV.1). CLOUT documents are available on the UNCITRAL website: (www.uncitral.org/clout/showSearchDocument.do).

Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the Court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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Cases relating to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards – The "New York" Convention

Case 1171: New York Convention IV(1)(a)(b)
Austria: Supreme Court, 3 Ob 35/08f
3 September 2008
Original in German
Published in German in ÖJZ 2009, 138
Abstract prepared by Christian Rauscher

Upon request of some of the plaintiffs an Austrian Court declared two arbitral awards of the London Court of International Arbitration (LCIA) enforceable in Austria and granted enforcement into assets of the defendant in the country.

The defendant and two garnishees objected to this decision on the ground that the authentication of the arbitral award and of the arbitral agreement presented by the plaintiffs did not meet the requirements of article IV § 1 (a) and (b) respectively of the New York Convention. Authentication only by the registrar of the LCIA, as had taken place in the given case, was not sufficient. The Court of second instance, however, dismissed these appeals.

The Austrian Supreme Court was requested to decide whether or not the plaintiff had presented the arbitral agreement and the arbitral award in duly authenticated form to the Court.

The Court invoked Article IV § 1 of the Convention which requires that the request for recognition and enforcement of an award must be accompanied by the duly authenticated original or a duly certified copy and by the original arbitral agreement or a duly certified copy thereof. The Court referred to its constant ruling according to which authentication of an award by a secretary of an arbitral institution was deemed sufficient if this way of authentication was laid down in the arbitral rules of the institution. As such rule was not contained in the LCIA rules, the Court held that the authentications of the registrar did *not* meet the strict requirements of the Convention.

The correct authentication of the *agreement*, however, was not deemed relevant. According to Article 614 § 2 of the Austrian Civil Procedure Code the submission of the original or a certified copy of the agreement (Article IV § 1 (b) of the Convention) was only necessary on request of the Court. Such a request must be based on reasonable doubts as to the existence of an agreement. As such doubts did not exist in the given case, the Court ruled that there was no need at all for the plaintiff to submit the agreement so that the question of authentication or certification of the agreement could not even arise.

Case 1172: New York Convention V(1)(b); V(1)(d); V(2)(b)
Israel: Central District Court No. 12254-11-08
Vuance Ltd. (formerly SuperCom Ltd.) v. The Department for Resources Supply of the Interior Ministry of Ukraine, and
The Department for Resources Supply of the Interior Ministry of Ukraine v. Vuance Ltd. (formerly SuperCom Ltd.)
15 April 2012
Original in Hebrew
Available in Hebrew: www.nevo.co.il//psika_word/mechozi/ME-08-11-12254-246.doc (un-official source)
Abstract prepared by Arie Reich, National Correspondent

The plaintiff, an Israeli company, sought to avoid the recognition and enforcement of the second of two arbitral awards of a Ukrainian arbitration tribunal (the "Tribunal") requiring the plaintiff to refund monies it had received from the respondent (a Ukrainian government department) in the framework of a work contract between the two parties. This request was filed in response to an application filed by the respondent to enforce the second award. The plaintiff alleged that the first arbitral proceedings were faulty, biased and riddled with lack of good faith and therefore it did not take part in the second arbitral proceedings.

The plaintiff based its petition to refuse recognition and enforcement of the award on Article V(1)(b) and (d) as well as Article V(2)(b) NYC, arguing that: the composition of the arbitral panel was not in accordance with the agreement of the parties (i.e., the rules of the Tribunal), the plaintiff was not granted the proper opportunity to present its case; and that in view of the actions of the Tribunal and the arbitrators, the enforcement of the award would be contrary to Israel's public policy.

After hearing the testimony of one of the arbitrators about how the proceedings in the Tribunal were conducted, the Court upheld the plaintiff's request not to recognize and enforce the second arbitral award and rejected the respondent's request to enforce it. The Court found that the way in which the chairman of the panel had been appointed was inconsistent with the Tribunal's procedure, since the two arbitrators appointed by each of the parties were not given the opportunity to agree on the appointment of a chairman. Instead the chairman, a Ukrainian citizen, was appointed unilaterally by the Ukrainian President of the Chamber of Commerce. Thus, two of the arbitrators were of the same nationality as one of the parties to the dispute and the chairman's independence was also under question, given the fact that he was an employee of a public body that was financially dependent on the Ukrainian Government — the respondent.

The Court also noted that as the result of the bias of the two Ukrainian arbitrators, the plaintiff was denied access to essential documentation it had requested in order to argue its case. The Court further concluded that the only non-Ukrainian on the panel was rushed and forced to agree to the panel's decision after receiving threats on his life and attempts of blackmail (by the publication of embarrassing pictures) from the head of the Tribunal himself. Also, the Secretary of the Tribunal repeatedly interfered in the arbitral proceedings and gave instructions to the arbitrators on how they should rule in the dispute.

The Court ruled that these actions constituted a clear violation of basic norms of procedural justice and of prevailing arbitration rules, and therefore could justify a refusal to enforce the first arbitral award, based on the NYC public policy exception, in addition to two other grounds. With regard to the plaintiff's argument based on Article V(1)(b) NYC, the Court saw some basis in the evidence that this ground may also exist, but it did not want to make a definite finding on this point, since it was not necessary. As the two arbitral awards were ruled to be inherently connected (the second one was based on the first), recognition and enforcement of the second award was refused as well. Thus, the Court accepted the petition to refuse recognition and enforcement of this award, rejected the respondent's petition to enforce it, and awarded costs against the respondent in the amount of NIS 100,000.

Case 1173: New York Convention IV(1)(b)
Slovenia: Vrhovno sodišče Republike Slovenije (Supreme Court of Republic of Slovenia): Sklep Cpg 6/2010
11 October 2011
Original in Slovenian
Published in Slovenian: www.sodisce.si/vsrs/odlocitve/2010040815259863/

After having obtained a foreign arbitral award, the claimant requested its recognition and enforcement. The respondent argued that the conditions for recognition were not fulfilled because the claimant had not supplied the original arbitration agreement but merely its photocopy. The Court of first instance summoned the claimant to supply the original agreement[1] or its certified copy, which it failed to do.

Therefore, the Court denied recognition of the award on the grounds that one of the cumulative conditions for recognition of a foreign arbitral award had not been fulfilled. The claimant filed an appeal to the Supreme Court, claiming that the Court of first instance had misapplied substantial law and stating that there was no obligation to supply the original arbitration agreement because, according to Article 461(5) of the Civil Procedure Act, an arbitration agreement had been concluded when the claimant had referred to it in the statement of claim and the respondent had not contradicted it.

The Supreme Court noted that under Article IV(1)(b) NYC, as well as Article 105(2) of the Civil Procedure Act, the party applying for recognition and enforcement shall, at the time of the application, supply the original arbitration agreement or a duly certified copy thereof.

The Court agreed with the claimant that the reference to the arbitration agreement in the statement of claim and the absence of the respondent's counterargument can indeed be considered an arbitration agreement. However, the Court noted that this does not relieve the claimant from its obligation to supply the original arbitration agreement or its duly certified copy under the New York Convention. Rather this

[1] Because the arbitration agreement under consideration was concluded before the Act on Arbitration (Model Law enactment) came into force, the validity of the arbitration agreement was determined under the provisions governing arbitration until 9 August 2008, the provisions on arbitration of the Civil Procedure Act.

enables the claimant to present the statement of claim and the respondent's reply to it in their originals or duly certified copies, which would be treated as an arbitration agreement by the Court.

In its appeal, the claimant tried to justify its claim that it has no obligation to present the original arbitration agreement by stating that the facts it had referred to were evident from the arbitral award. Nevertheless, the Court disagreed, noting that the arbitral award cannot replace a written arbitration agreement as required by Article 461 of the Civil Procedure Act.

For the above reasons, the Supreme Court denied the appeal and confirmed the decision of the Court of first instance.

Case 1174: New York Convention II; IV(1)(b); V(1)(a); VII
Slovenia: Vrhovno sodišče Republike Slovenije (Supreme Court of Republic of Slovenia): Sklep Cpg 2/2009
16 December 2009
Original in Slovenian
Published in Slovenian:
www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/65649/

The original dispute arose from a refurbishment contract concluded by the claimant (contractor) and its client, which included an arbitration clause. Later on, an Annex to the contract was made and it was signed by the respondent in the current dispute as a guarantor for the payment of the price. The Annex contained a provision that all of the other provisions of the contract remain unchanged. However, the respondent never signed the original refurbishment contract that included the arbitration agreement.

The claimant claimed the outstanding amount before a Croatian Court, asserting that no arbitration agreement had been concluded. The Court disagreed and denied jurisdiction arguing that the contract indeed included an arbitration agreement.

Thereupon arbitral proceedings were instituted in Croatia. The respondent argued that the arbitration agreement had not been validly concluded. The arbitration tribunal disagreed and declared itself competent to rule over the dispute. It based its decision on the fact that the respondent had agreed to the arbitration clause contained in the original refurbishment contract by signing the Annex, which stipulated that all of the other provisions of the contract remain unchanged.

After the arbitration award had been issued, the claimant requested recognition of the award in Slovenia, which was denied by the Court of first instance. The Court found that no valid arbitration agreement had been concluded. The claimant filed an appeal to the Supreme Court on the grounds of misapplication of the New York Convention and substantial law.

The Supreme Court noted that, under Article V of the European Convention on International Commercial Arbitration of 1961, which is to be used in conjunction with Article VII NYC, an objection to jurisdiction that has not been raised within the proper time limit may not be entered during subsequent court proceedings to enforce the award. However, the Court recognized the right of the respondent to object to jurisdiction since it had already done so during the arbitral proceedings.

The Court indicated that the existence of an arbitration agreement may constitute one of the conditions for recognition of the arbitral award. Despite the fact that this is not specifically required in Article V(1) NYC, it can be deduced from the provisions of Article II, Article IV(1)(b) and Article V(1)(a) NYC. The obligation to submit the arbitration agreement in writing, therefore, requires that the arbitration agreement actually exists.

The Contracting States of the New York Convention are bound by Article II to recognize a written arbitration agreement. This provision is directly referred to also in Article V(1)(a) NYC. Therefore, the existence of an arbitration agreement has to be determined under the law of the country where the award was made as well as under the law of the country where enforcement is sought (Article II NYC). The Supreme Court thus did not agree with the claimant that the existence of the arbitral agreement was to be determined solely under Croatian law, but it was to be determined under both Croatian and Slovenian law.

According to undisputed findings of the Court of first instance, the claimant had explicitly denied the existence of an arbitration agreement in the court proceedings in Croatia. This was taken into account by the Court which found that there was no intention between the parties of the proceedings that the respondent be bound by the arbitration clause. The Supreme Court pointed out that, in order to ascertain the common intention of the parties, it is not relevant what the judicial court in Croatia had decided but rather how the parties have acted. In this instance, the fact that the claimant denied the existence of an arbitration agreement before the Court in Croatia was used to determine that there was no agreement to be bound by the arbitration clause.

General terms and conditions are defined in Slovenian law as conditions set by one of the parties to the contract either by inclusion to a contract or by reference to them in the contract. The Court pointed out that, under Slovenian law, an arbitration agreement is valid also if it is incorporated in the general terms and conditions of the contract. Nevertheless, the Court found that the refit contract could not be compared to general terms and conditions. The Annex that the respondent had signed contained two separate agreements: the first one amended the original refit contract between the claimant and the contractor and the second one contained the respondent's obligation for the guarantee. By signing the Annex as a guarantor, the respondent did not become a party to the original refit contract but rather concluded a new contract of guarantee. The refit contract could thus not be considered similar to general terms and conditions under Slovenian law, as the respondent did not become a party to it by signing the Annex. The mere fact that the respondent was made aware of the stipulations of the refit contract can thus not be considered as a written arbitration agreement.

The Supreme Court therefore dismissed the appeal of the claimant and confirmed the decision of the court of first instance.

Cases relating to the UNCITRAL Model Law on International Commercial Arbitration (MAL)

Case 1175: MAL 5; 11(3); 11(4); 16(1); 16(3)

Australia: Supreme Court of New South Wales
teleMates (previously Better Telecom) Pty Ltd. v. Standard SoftTel Solutions Pvt Ltd. [2011] NSWSC 1365
11 November 2011
Original in English
Published in www.austlii.edu.au/au/cases/nsw/NSWSC/2011/1365.html
Abstract prepared by Diana Hu and Luke Nottage

The applicant (an Australian company) and the respondent (an Indian company) entered into a written agreement. This included a clause that all disputes be referred to arbitration, where the proceedings "shall be in accordance with the provisions of 'The Institute of Arbitrators & Mediators Australia' ('IAMA') … [and the] venue of arbitrators shall be mutually decided within New South Wales Australia".[2]

A dispute arose and the respondent subsequently requested IAMA to nominate an arbitrator. The arbitrator's appointment was disputed on the basis that the applicant had not consented to the referral or appointment. The appointed arbitrator published an "interim award" finding on this question of jurisdiction. The interim award found against the applicant and held that, as a preliminary question, the arbitrator had jurisdiction to hear the dispute.

The applicant submitted to the Court that the arbitrator should not have been appointed as arbitrator, as the parties failed to agree on a procedure for appointing an arbitrator under the MAL Art 11(3). The applicant alternatively argued that the respondent failed to comply with the procedure for appointing an arbitrator under MAL Art 11(4), on the basis that no reasonable steps were taken to seek the plaintiff's agreement over who would be appointed as arbitrator. The applicant requested the Court that an arbitrator should be nominated by the Australian Centre for International Commercial Arbitration. An interim order was also sought for the respondent to provide security for costs of the arbitration. In addition, two final orders were sought: for the arbitration to be stayed, until the respondent complied with the interim order and provided security for the arbitration costs; and an order for costs. An interim order was also sought by the plaintiff to restrain the respondent from proceeding with the arbitration.

Both the applicant's primary and alternative submissions were held to be on the issue of jurisdiction. The Judge rejected each of these arguments because: (a) MAL Art 16(1) stated that an arbitral tribunal may rule on its own jurisdiction, and (b) the applicant failed to apply for a court determination within 30 days of receiving notice of the tribunal's interim "award" maintaining the arbitrator had jurisdiction, as required under MAL Art 16(3). The Court held that it may not intervene on the question of a tribunal's jurisdiction after expiry of this 30-day period. The Court emphasised MAL Arts 5 and 16, understood as reflecting underlying principles of a

[2] IAMA is a non-profit company that provides arbitration and mediation services in Australia, including administering domestic and international arbitrations where parties adopt the IAMA Arbitration Rules published in 2007.

speedy resolution of disputes and minimal court intervention. For these reasons, the Court did not issue the orders requested.

The Court commented that it was "undoubtedly arguable" that the IAMA Rules would apply where the parties fail to reach agreement on appointment of the arbitrator. This could have disposed of the case straightforwardly. However it expressly did not consider this point, as the Court held the applicant could not overcome the initial issue of judicial intervention on the tribunal's jurisdiction.

Case 1176: MAL 34(2)(b)(ii)
Australia: Supreme Court of New South Wales
Cargill International SA v. Peabody Australia Mining Ltd. [2010] NSWSC 887
11 August 2010
Original in English
Published in www.austlii.edu.au/au/cases/nsw/NSWSC/2010/887.html
Abstract prepared by Albert Monichino and Luke Nottage

An international contract for the delivery of coal contained an arbitration clause referring future disputes to arbitration, with the seat in Sydney and subject to International Chamber of Commerce (ICC) Rules. A dispute arose and the arbitrator rendered a partial award in favour of the claimant. It was conceded that the arbitration was an international commercial arbitration for the purposes of the *International Arbitration Act 1974* ("*IAA*"). The respondent challenged the award on two alternative bases. First, it sought to set aside the award for serious error of law under s 38(4)(b) of the *Commercial Arbitration Act 1984* (NSW) ("*CAA*"). Secondly, it argued that the award should be set aside on the ground that it violated public policy under Art 34(2)(b)(ii) MAL, which is given the force of law in Australia by s 16 of the IAA, because the arbitrator failed to consider one of its arguments. The respondent contended that this amounted to a denial of natural justice and, in turn, a violation of public policy for the purposes of Article 34 MAL.

These arguments raised the important question of whether the MAL was the applicable arbitral law or whether the parties had opted out of it by adopting the ICC Rules. This required consideration of the so-called "*Eisenwerk* principle". In *Australian Granites Ltd. v. Eisenwerk Hensel Bayreuth Dipl-Ing GmbH* (2001) 1 QdR 461, the Queensland Court of Appeal had interpreted s 21 of the *IAA*, allowing parties to opt-out of the MAL (before amendment of s 21 in 2010), as applying where parties choose (putatively) inconsistent arbitration rules, such as (in that case) the ICC Rules.

In the case at hand, the Court held that the adoption of arbitral procedural rules did not in itself constitute an implied exclusion of the MAL under s 21 of the *IAA* (as it stood prior to its amendment in 2010). After referring to leading texts on international arbitration and the numerous policy criticisms made of *Eisenwerk*, the Court held that *Eisenwerk* was wrong in principle. The Court also rejected the respondent's argument that because the parties should have been aware of the existence of *Eisenwerk*, their choice to adopt procedural rules reflected, as a matter of contractual interpretation, an objective intention to opt-out of the MAL. The Court thus rejected the respondent's application to set aside the award under legislation other than the MAL and the *IAA*. In other words, the Court held that the

CAA — which was intended to principally govern domestic arbitration — had no application.

The Court then considered the respondent's natural justice argument, based on the public policy ground under the *IAA*. In particular, s 19(b) of the IAA relevantly provides that an award is in conflict with, or is contrary to, the public policy of Australia for the purposes of Art 34(2) (b) (ii) MAL if "a breach of the rules of natural justice occurred in connection with the making of the … award". The Court did not accept that the argument which the respondent contended the arbitrator ignored was ever clearly articulated to the arbitrator. Thus, the Court held that the arbitrator's failure to consider it was not a denial of natural justice.

Case 1177: MAL 9; 17
Australia: Victorian Court of Appeal
AED Oil Ltd. v. Puffin FPSO Ltd. (No 5) [2010] VSCA 37
11 March 2010
Original in English
Published in www.austlii.edu.au/au/cases/vic/VSCA/2010/37.html
Abstract prepared by Diana Hu and Luke Nottage

A contract existed between the Singaporean company and the defendant, a company incorporated in Malta. The applicant was the Australian company of which the Singaporean company was a fully owned subsidiary. The Australian company guaranteed the Singaporean company's performance under the contract. This guarantee was secured by a charge over the Singaporean company's assets. The contract included a clause submitting all disputes to arbitration. An exception was provided in the arbitration clause, which allowed either party to apply for "urgent interlocutory or declaratory relief". This exception was only available if, in the reasonable opinion of the party seeking relief, the proceedings were necessary to protect its rights.

A dispute arose between the applicant and the defendant, over this latter's tax liabilities. Under the contract, the applicant agreed to bear and indemnify the defendant's tax obligations. The defendant had demanded payment from the Singaporean company (its direct contracting party), to meet its own obligations for GST and income tax. This was being contested by the applicant on the basis that the defendant had no income tax liability, and because the defendant had breached its obligations under the contract. A proceeding was commenced in the Supreme Court of Victoria by the applicant seeking a declaration over whether the defendant's demand for payment was effective. The applicant also sought an injunction restraining the defendant from enforcing the charge against the applicant's assets.

The trial judge granted an interlocutory injunction against the defendant, restraining it from making a demand against the Singaporean company to meet the defendant's tax obligations. The defendant then cross-claimed against both the applicant and the subsidiary, and sought a declaration over what obligations this latter owed regarding the defendant's tax liabilities under the contract. The applicant, relying on the arbitration clause, sought for a stay of the cross-claim under s 7 of the *International Arbitration Act 1974* (Cth) ("*IAA*"), which governs enforcement of international arbitration agreements in Australia. Both at first instance and upon appeal, the Court found that the applicant had standing to apply for a stay of proceedings under s 7(4)

of the *IAA*, as it was a party "claiming through or under a party" (namely the Singaporean company). This requirement was satisfied because the applicant guaranteed the obligations of the subsidiary.

The defendant argued that the cross-claim should be allowed to proceed before the court as it fell within the exception provided in the arbitration clause, which allowed either party to apply for "urgent interlocutory or declaratory relief". The defendant alternatively submitted that even if an arbitral award was handed down on the question of subsidiary's obligations over the defendant's tax liabilities under the contract, it was uncertain whether the award would be enforced by the courts. The defendant further argued that it was "doubtful whether the courts will recognise and enforce a declaration contained in an arbitral award" and relied on the English Court of Appeal case *Margulies Brothers Ltd. v. Dafnis Thomaides and Co (UK) Ltd.* [1958] 1 Ll Rep 205 as authority that a "purely declaratory" arbitration award cannot be enforced. Finally, the defendant argued this uncertainty over enforcement meant it should be free to continue with the court proceedings, even if the arbitration clause applied.

At first instance it was held that *IAA* s 7 was engaged. However, as a question of fact the defendant's claim fell within the exception in the arbitration clause as its cross-claim was "urgent". Therefore, it could proceed with its cross-claim. The Court of Appeal reversed this finding and ordered a stay of the cross-claim by the defendant, so the dispute could be referred to arbitration.

The key factual issue before the Court of Appeal was the proper construction of the word 'urgent' within the arbitration clause. In this regard, the Court emphasized the parties' preference that disputes arising under the contract were to be decided by arbitration and, exceptionally, only urgent claims were to be determined by the court, as evident from the contract provisions. The Court also noted that the contract applied the arbitration rules recently published by the Institute of Arbitrators and Mediators Australia which incorporated the MAL. Articles 9 and 17 MAL contemplate application to a court for an interim measure of protection and provide for the arbitral tribunal granting interim relief. On the question whether the relief sought in the cross claim was urgent, the Court found that the cross-claim raised a non-urgent issue over whether the applicant was "required to consent to [the defendant] filing an income tax return". The Court also rejected the defendant's argument that the applicant's financial position was deteriorating, and overall found the evidence did not support a finding that the cross-claim was urgent.

On the defendant's alternative submission on the issue of enforceability, the Court of Appeal rejected the argument that an arbitrator's declaration would not be enforceable.

Case 1178: [MAL 12]
Denmark: Danish High Court, 21st Chamber Eastern Division, no. B-1752-08
27 November 2008
Original in Danish

This High Court decision concerns an appeal on the ruling of a lower court which found on behalf of the respondent.

The appellant requested that the respondent, an arbitration institution, be ordered to acknowledge that one of the arbitrators appointed by the institution to a given case did not possess the required qualifications and should vacate his seat. The appellant claimed that the respondent's impartiality and independence was not granted if an arbitrator had previously made statements in a newspaper/magazine article on legal issues that later on would arise in a dispute before the arbitral tribunal where the said arbitrator would be appointed.

The High Court stated that judges — including arbitrators — cannot be disqualified because of their writings or statements on legal issues that have occurred at a time that precedes the case. Similar circumstances do not create any doubt about the impartiality or independence of the arbitrator who was being challenged in the arbitration case in question. Therefore, the High Court upheld the ruling of the lower court and ordered the appellant to pay for the respondent's legal costs.