ORANGE COUNTY BAR ASSOCIATION

INTERNATIONAL LAW SECTION WEBINAR

Doing Business with India & Mexico – Laws, Pitfalls and Best Practices

Monday, May 17, 2021

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DOING BUSINESS WITH INDIA & MEXICO: LAWS, PITFALLS AND BEST PRACTICES

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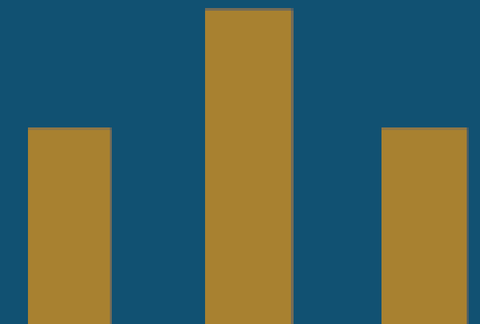

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- Dually licensed in California and India.
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AGENDA

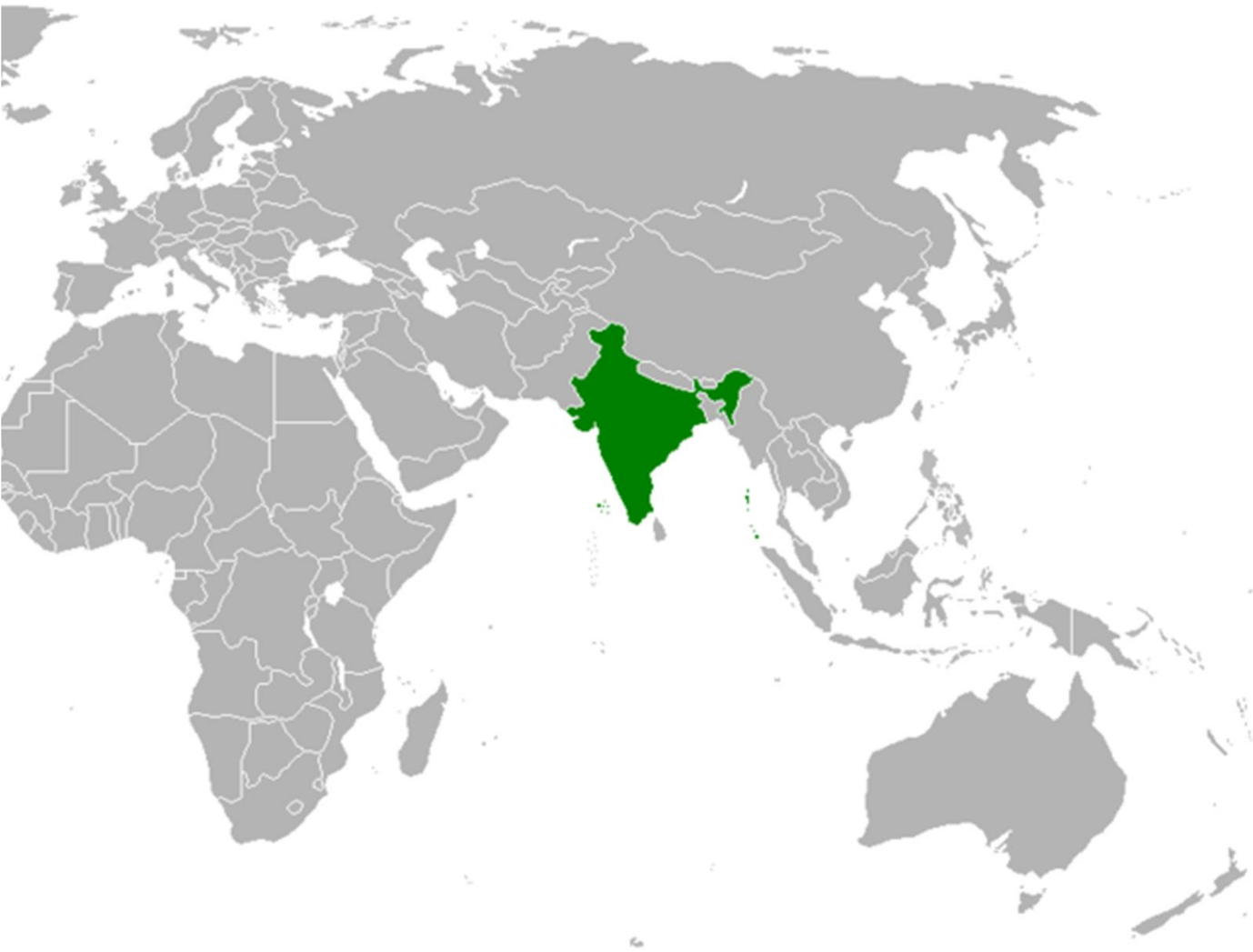
OVERVIEW & DEVELOPMENTS

LEGAL SYSTEMS & LAWS

PITFALLS & BEST PRACTICES

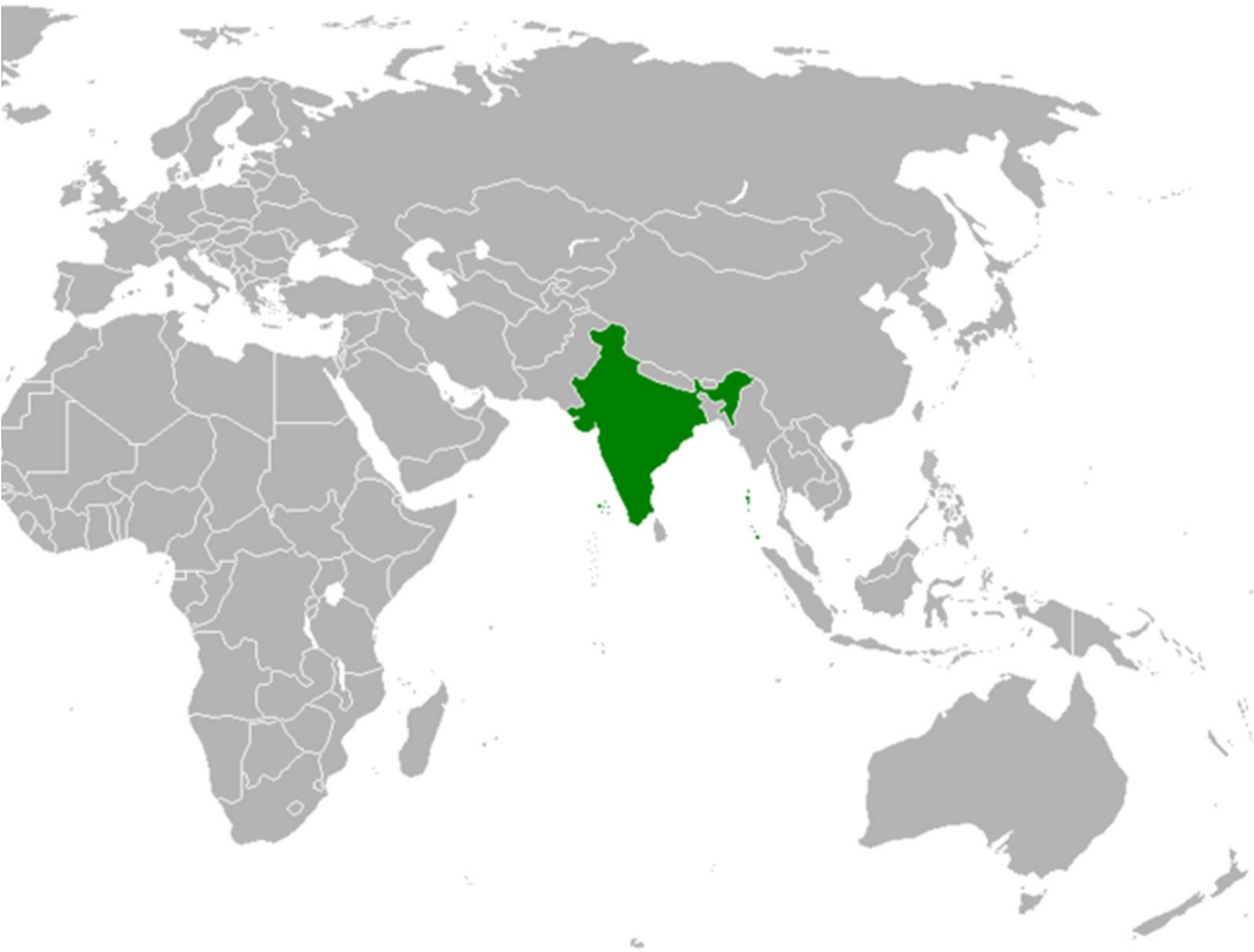
Q&A

INDIA



- Major Cities – New Delhi (capital); Mumbai, Kolkata, Bangalore, Chennai, Hyderabad, 28 States/8 union territories
- Population - 59% working age (15-54 years); 74% literate
- Economy – GDP – 4.8%; 35% Urban, 60% Rural; Savings Rate – 30%
- Employment – Agri -47%; Industry - 22%; Services – 31%;

INDIA



- Markets – US largest export partner - $146.1 billion(2019); Exports - 15.6%; Imports - 5.5%
- India FDI to US - $16.7 billion (2019) - professional, scientific & technology services, financial, manufacturing
- U.S. FDI - $46 billion. Energy, Healthcare, IT, Aerospace/Defense. Google, Facebook , Amazon. JV best option

DEVELOPMENTS: INDIA

PIVOT FROM CHINA

Diversify supply chains and manufacturing relieving trade wars and overreliance of China.

LOW LABOR COSTS

Large and skilled workforce with low labor costs.

INFRASTRUCTURE

A focus and investment in infrastructure needed - including to boost industrial sector.

LEGAL SYSTEM: INDIA

BRITISH COMMON LAW

- Barristers & Solicitors ; No Juries
- Three-tiered court system similar to U.S. court system. Supreme Court has final appellate power over all state and federal matters.
- No Foreign Lawyers, Temporary Rep ok

FEDERAL V. STATE

- Constitution – fundamental rights
- Most laws national, states have different licensing regulations
- Separate marriage/inheritance laws for Muslims, Christians, Hindus

INTERNATIONAL ORGANIZATIONS

- Accepts compulsory ICJ jurisdiction with reservations
- ICC

LAWS:
INDIA

- Foreign Exchange– FEMA, RBI Guidelines, limits on FDI in Indian companies
- Corporate Law – entities (LLC, corps.), liability of directors like US
- Intellectual Property – limited protection of IP, no trade secret law
- Tax - double taxation treaty with US; US tax on worldwide income
- Arbitration – Indian Arbitration & Conciliation Act, UNCITRAL, NY Convention Recognition & Enforcement Foreign Arbitral Awards

MEXICO

- Population
- Economy
- Market Share

DEVELOPMENTS: MEXICO

NEAR-SHORING SUPPLY CHAINS

Offers skilled work force, and quality low-cost manufacturing in North America

CAUTIOUS OPTIMISM ABOUT RECOVERY

Government has set goal to vaccinate all eligible citizens within 18 months. Expecting a slow path to recovery.

REFORMS

Expected reforms in tax arena, labor obligation, and imports/exports

LEGAL SYSTEM: MEXICO

CIVIL LAW

Five major codes: Civil, Civil Procedures, Commercial, Criminal, and Criminal Procedures.

NOTARIO PUBLICO

An attorney responsible for the legality of the content of transactional documents and their compliance with civil code.

COURTS

Three-tiered court system similar to U.S. court system. Supreme Court has final appellate power over all state and federal matters.

LAWS:
MEXICO

- Lending and Investments
- Corporate Law
- Intellectual Property
- Tax
- Foreign Arbitration

PITFALL: DELAYS

PITFALL: DELAYS

BEST PRACTICE

PITFALL: BUREAUCRACY

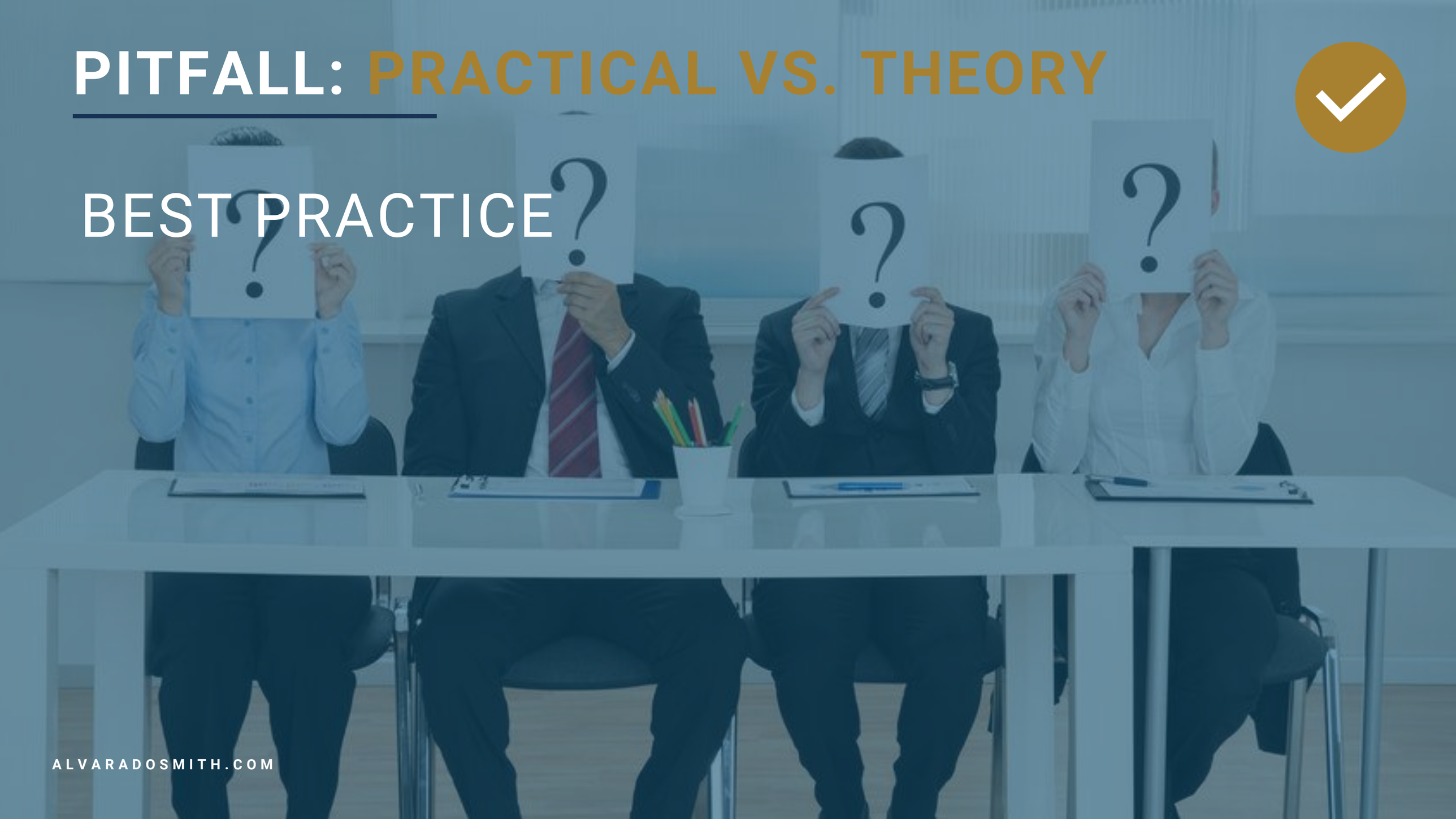
PITFALL: BUREAUCRACY

BEST PRACTICE

PITFALL: PRACTICAL VS. THEORY

PITFALL: PRACTICAL VS. THEORY

BEST PRACTICE



QUESTIONS?

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Supreme Court of India
Pasl Wind Solutions Private ... vs Ge Power Conversion India Private ... on 20 April, 2021
Author: Rohinton Fali Nariman
Bench: Rohinton Fali Nariman, B.R. Gavai, Hrishikesh Roy

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 1647 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.3936 OF 2021]

PASL WIND SOLUTIONS PRIVATE LIMITED ...APPELLANT
VERSUS
GE POWER CONVERSION INDIA
PRIVATE LIMITED ...RESPONDENT

JUDGMENT

R.F. Nariman, J.

1. Leave granted.

2. The present appeal raises an interesting question as to whether two companies incorporated in India can choose a forum for arbitration outside India and whether an award made at such forum outside India, to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [New York Convention] applies, can be said to be a foreign award under Part II of the Arbitration and Conciliation Act, 1996 [Arbitration Act] and be enforceable as such.

Factual Background 3.1. The appellant is a company incorporated under the Companies Act, Signature Not Verified Digitally signed by R Natarajan 1956 with its registered office at Ahmedabad, Gujarat. The respondent is a Date: 2021.04.20 16:06:51 IST Reason:

company incorporated under the Companies Act, 1956 with its registered office at Chennai, Tamil Nadu, and is a 99% subsidiary of General Electric Conversion International SAS, France, which in turn is a subsidiary of the General Electric Company, United States.

3.2. In 2010, the appellant issued three purchase orders to the respondent for supply of certain converters. Pursuant to these purchase orders, the respondent supplied six converters to the appellant. Disputes arose between the parties in relation to the expiry of the warranty of the said converters. In order to resolve these disputes, the parties entered into a settlement agreement dated 23.12.2014. Under clauses 5.1 and 5.2 of the settlement agreement, the respondent agreed to provide certain delta modules along with warranties on these modules for the working of the converter panel. Clause 6 of the settlement agreement contained the dispute resolution clause which reads as follows:

> 6. Governing Law and Settlement of Dispute 6.1 Any dispute or difference arising out of or relating to this agreement shall be resolved by the Parties in an amicable way. (A minimum of 60 days shall be used for resolving the dispute in amicable way before same can be referred to arbitration). 6.2 In case no settlement can be reached through negotiations, all disputes, controversies or differences shall be referred to and finally resolved by Arbitration in Zurich in the English language, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, which Rules are deemed to be incorporated by reference into this clause. The Arbitration Award shall be final and binding on both the parties.

6.3 The Agreement (together with any documents referred to herein) constitutes the whole agreement between the Parties and it is hereby expressly declared that no variation and / or amendments hereof be effective unless mutually agreed upon and made in writing. 3.3. Disputes arose between the parties pursuant to the settlement agreement whereby the appellant claimed that warranties that were supposed to be given for converters were not so given, whereas the respondent argued that the warranties covered only the delta modules and not the converters. Thus, on 03.07.2017, the appellant issued a request for arbitration to the International Chamber of Commerce [ICC]. On 18.08.2017, the parties agreed to resolution of disputes by the sole arbitrator appointed by the ICC. It was agreed between the parties, as was reflected in the request for arbitration and in the terms of reference to arbitration, that the substantive law applicable to the dispute would be Indian law.

3.4. The respondent filed a preliminary application challenging the jurisdiction of the arbitrator on the ground that two Indian parties could not have chosen a foreign seat of arbitration. Importantly, the appellant opposed the said application and asserted that there was no bar in law from this being done. By Procedural Order No.3 dated 20.02.2018, the learned sole arbitrator, Mr. Ian Leonard Meakin, dismissed the respondents preliminary application, holding as follows:

The Tribunal finds that two Indian parties can arbitrate outside India. The Tribunal is persuaded that the Supreme Court of Indias decision in Reliance Industries Ltd v. Union of India (2014) 7 SCC 603 (Exhibit CLM-3) is a leading authority. This has been confirmed by the Supreme Court of India in Sasan Power Limited v. North American Coal Corporation India Private Limited (2016) 10 SCC 813 (RL-6), which at an earlier instance before the High Court of Madhya Pradesh 2016 (2) ARBLR 179 (MP), rendered on 11.09.2015, held that two Indian companies can arbitrate outside of India.

Furthermore, the earlier case of Atlas Export Industries v. Kotak & Company (1999) 7 SCC 61, which was applied in Sasan, found that a contract which is unlawful under section 23 of the Indian Contract Act 1872, because it breaches Indian public policy, would be void but that merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement (p.65, para f of judgment). Such is the case here where the parties freely agreed on Zurich as the seat of the arbitration. This position has been followed in a recent decision of the Delhi High Court in GMR Energy Ltd. v. Doosan Power Systems India Pvt. Ltd. on 14 November 2017 CS (Comm) 447/2017 (RL-7) applying Atlas in allowing two Indian parties to arbitrate outside India. The Tribunal notes

the Respondents contention that this case is expected to be appealed (Respondents Preliminary Application dated 9 December 2017, para 23) but the Tribunal must deal with the law as it finds it at present and no doubt the Final Award in the present case will precede any exhaustive appeal in India in GMR.

Respondents pleadings in reliance, inter alia, on TDM Infrastructure Private Limited v. UE Development India Private Limited (2008) 14 SCC 271 are, in the Tribunals finding, misplaced because although it is accepted that two Indian nationals should, as a matter of Indian law, not be permitted to derogate from Indian substantive law, this being part of the public policy of the country, this fails to distinguish between the lex arbitri and the lex causae. In the present case, the parties have not chosen a foreign substantive law, only a foreign seat. The Respondent also relied on M/s Addhar Mercantile Private Limited v. Shree Jagadamba Agrico Exports Pvt. Ltd. (2015) SCC Online Bom 7752, which the Respondent submitted followed TDM (RL-4). However, although the Tribunal is aware that this decision has been criticised because although the court did not expressly find that two parties could not opt for arbitration outside India, the courts finding that Indian parties cannot derogate from Indian law because that would violate Indian public policy has led to the judgment being interpreted wrongly to imply that Indian parties cannot choose a foreign seat. That said, Addhar is in any event a first instance decision and the higher authorities of the Indian Supreme Court prevail. Finally, the cases of Enercon (India) Limited v. Enercon GMBH (2014) 5 SCC 1 and Bharat Aluminium Co. v. Kaiser Aluminium Inc. (2012) 9 SCC 552 relied on by the Respondent in relation to its submissions that the closest and most real connection test under Indian law do not assist the Respondent because that test is only relevant where the seat is unclear. Moreover, Bharat clearly held that the applicability of section 28 of the Indian Act is restricted to the substantive law of the contract and does not apply to the seat of the arbitration. Conclusion For the reasons set out above, the Tribunal therefore finds that the arbitration clause in the Settlement Agreement is valid and will proceed to apply the Swiss Act because the seat of the arbitration is Zurich, Switzerland. 3.5. This procedural order was not challenged by either of the parties.

Vide the said procedural order, the seat of the arbitration was stated to be Zurich, Switzerland. The respondent suggested Mumbai, India as a convenient venue in which to hold arbitration proceedings as costs would be reduced thereby. The appellant objected to this suggestion. At the Case Management Conference dated 28.06.2018, the learned arbitrator decided that though the seat is in Zurich, all hearings will be held in Mumbai, acceding to the application made by the respondent. Since the mountain did not come to Muhammad, Muhammad, in the form of the learned arbitrator, went to the mountain and held all sittings at the convenient venue in Mumbai.

3.6 A final award dated 18.04.2019 was passed by the learned arbitrator in which the appellants claim was rejected. The learned arbitrator held:

> Operative Part
>
> 227. Based on the foregoing, the Arbitral Tribunal hereby finds, holds and orders:

> Preliminary Issues A. The seat of the arbitration is Zurich, Switzerland. On the Merits B. The Claimants claims for breach of contract, damages and interest thereon are rejected.
>
> C. The Claimant shall pay to the Respondent INR 25,976,330.00 and US$40,000.00 in legal costs and expenses with accumulated interest, if any, in accordance with the Indian Interest Act, 1978.
>
> D. All other claims of either party, to the extent that they exist, are dismissed.

Made in Zurich, this 18th day of April 2019 3.7. After the passing of the final award, the respondent called upon the appellant to pay the amounts granted vide the said award. As the appellant failed to oblige, the respondent initiated enforcement proceedings under sections 47 and 49 of the Arbitration Act before the High Court of Gujarat, within whose jurisdiction the assets of the appellant were located. At this stage, the appellant did a complete volte-face and asserted that the seat of arbitration was really Mumbai, where all the hearings of the arbitral proceedings took place. So asserting, the appellant filed proceedings challenging the said final award under section 34 of the Arbitration Act, being CMA No.18 of 2019 before the Small Causes Court, Ahmedabad which was then transferred to the Commercial Court, Ahmedabad and renumbered as CMA No.76 of 2020. An application filed under Order 7 Rule 11 of the Code of Civil Procedure, 1908 [CPC] by the respondent was rejected by the Commercial Court, Ahmedabad. At present, the proceedings under section 34 of the Arbitration Act and the respondents application under Order 21 of the CPC for execution of the final award are at a standstill in view of the appeal before us.

The Appellants Case:

4.1. Mr. Tushar Himani, learned Senior Advocate appearing on behalf of the appellant, argued that two Indian parties cannot designate a seat of arbitration outside India as doing so would be contrary to section 23 of the Indian Contract Act, 1872 [Contract Act] read with section 28(1)(a) and section 34(2A) of the Arbitration Act. To buttress this submission, Mr. Himani pointed out the provisions of the Prohibition of Benami Property Transactions Act, 1988 [Benami Transactions Act] which cannot be bypassed if two Indians are to apply only the substantive law of India.

However, by designating a seat outside India, it is open to two Indian parties to opt out of the substantive law of India which itself would be contrary to the public policy of India.

4.2. He then argued that foreign awards contemplated under Part II of the Arbitration Act arise only from international commercial arbitrations.

International commercial arbitration, as has been defined in section 2(1)(f) of the Arbitration Act, would make it clear that there has to be a foreign element when parties arbitrate outside India, the foreign element being that at least one of the parties is, inter alia, a national of a country other than India, or habitually resident in a country other than India, or a body corporate incorporated outside India. For this reason, the award passed in the present case cannot be designated as a foreign award

under Part II of the Arbitration Act. To buttress this submission, he relied heavily upon the judgment of a learned Single Judge of this Court in TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd., (2008) 14 SCC 271 [TDM] and two judgments of the Bombay High Court.

4.3. He then sought to distinguish this Courts judgment in Atlas Export Industries v. Kotak & Co., (1999) 7 SCC 61 [Atlas Export], arguing that the specific argument made under section 23 of the Contract Act was not dealt with by the Court and that, in any case, ultimately, the Court did not allow the appellant in that case to take up this plea as it had not been taken up in the courts below.

4.4. Mr. Himani also argued that the judgment of the Madhya Pradesh High Court in Sasan Power Limited v. North American Coal Corporation (India) Pvt. Ltd., 2015 SCC OnLine MP 7417 [Sasan I], which decided that two Indian parties can choose a foreign seat outside India for the purpose of resolving their disputes, was based on an incorrect appreciation of facts, as observed in the appeal to the Supreme Court in Sasan Power Ltd. v. North American Coal Corporation (India) Pvt. Ltd., (2016) 10 SCC 813 [Sasan II].

4.5. Going to the language of section 44 of the Arbitration Act, Mr. Himani stressed upon the expression unless the context otherwise requires and cited several judgments to show that the context of section 44 is that of an international commercial arbitration and cannot, therefore, apply to a foreign award between two Indian parties without the involvement of a foreign element. He also relied heavily upon the 246 th Report of the Law Commission of India of August 2014 which recommended amendments to the Arbitration Act, and particularly, the substitution of section 2(1)(e) and the explanation to section 47. He stressed the fact that both these amendments were necessary to ensure that it is the High Court that exercises jurisdiction in all cases of international commercial arbitration.

For this purpose, he relied upon the domestic arbitration law of the United States [U.S.] to show that even under the said law, it is only when an agreement or award between two U.S. citizens involves some foreign element that such arbitration can take place abroad. He buttressed these submissions by referring to the proviso to section 2(2) of the Arbitration Act which, according to him, furnished a bridge that joined Part II to Part I, as a result of which it became clear that section 44 refers only to international commercial arbitrations, as is stated in the proviso to section 2(2).

4.6. He then went on to argue that the Arbitration Act is a self-contained code, as has been held by several judgments of this Court, and that when there is no foreign element involved in an award made in Zurich between two Indian companies, such award cannot be the subject matter of challenge or enforcement either under Part I or Part II of the Arbitration Act.

4.7. Mr. Himani then relied heavily upon section 10 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 [Commercial Courts Act] which also recognises only two categories of arbitrations international commercial arbitration and other than international commercial arbitration. He argued that there is a head-on conflict between section 10(3) of the Commercial Courts Act and section 47 of the Arbitration Act, as a result of which the former must prevail. For this purpose, he relied upon the non-obstante clause in section 21 of the

Commercial Courts Act. This being the case, in any case, the impugned judgment made by the Gujarat High Court has to be set aside as it was made without jurisdiction because even as per the impugned judgment, the present is not a case of an international commercial arbitration but instead falls under the second category of other than international commercial arbitration, as a result of which only the district court would have jurisdiction.

4.8. He finally argued that going by the closest connection test, the seat of arbitration can only be held to be Mumbai, and for this purpose, he relied upon Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 [Enercon]. According to him, since every factor connected the arbitration in the present case to India, with no foreign element involved, applying this test, the seat would necessarily be Mumbai. Consequently, he argued that Zurich, at best, could be stated to be a salutary seat. This being so, obviously Part II of the Arbitration Act would not apply and the judgment has to be set aside on this score also. Despite the fact that in the written submissions before us, Mr. Himani argued, without prejudice, that the award would not be enforceable under section 48 of the Arbitration Act, he very fairly did not press this issue.

The Respondents Case:

5.1. Mr. Nakul Dewan, learned Senior Advocate appearing on behalf of the respondent, first pointed out that the appellant argued the exact opposite of what it itself sought under Procedural Order No.3 dated 20.02.2018 before the arbitrator. Having argued that two Indian companies can agree to have a seat of arbitration outside India, and that in the present case, that seat was Zurich, and having opposed any hearings being held in Mumbai, it would now not be open to the appellant to argue the exact opposite before this Court only because the final award was made against it.

5.2. Mr. Dewan then argued that Part I and Part II of the Arbitration Act have been held to be mutually exclusive and pointed out the fundamental fallacy contained in the argument of Mr. Himani to try and import the definition of international commercial arbitration from Part I of the Arbitration Act into section 44 via the expression unless the context otherwise requires contained in section 44, and the so-called bridge between Parts I and II contained in the proviso to section 2(2). According to him, section 44 is modelled on the New York Convention which only requires persons, both of whom can be Indian, having disputes arising out of commercial legal relationships, which are to be decided in the territory of a State outside India, which State is a signatory to the New York Convention. He then argued that any attempt to breach the wall created between Part I and Part II, which have been held to be mutually exclusive in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 [BALCO], cannot be countenanced by this Court.

5.3. He further argued that unlike the definition of international commercial arbitration contained in section 2(1)(f) in Part I, nationality, domicile or residence of parties is irrelevant for the purpose of applicability of section 44 of the Arbitration Act. As a matter of fact, according to the learned Senior Advocate, this is no longer res integra as it has been expressly decided under the pari materia provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961 [Foreign Awards Act] in Atlas (supra) that two Indian parties can enter into an arbitration agreement with a seat outside India, which would result in an award that would then have to be enforced as a foreign award.

5.4. He also relied upon the judgment of the Madhya Pradesh High Court in Sasan I (supra) and argued that, in appeal, the Supreme Court did not dislodge any of the findings of the High Court but instead proceeded on the basis that the arbitration was not between only two Indian companies. He then argued, relying upon a commentary on International Commercial Arbitration, authored by Prof. Eric E. Bergsten and published by the United Nations Conference on Trade and Development in 2005 [UNCTAD Commentary on International Commercial Arbitration], that parties being from the same State can agree to have their disputes resolved in a State other than the State to which they belong, as a result of which the New York Convention will then apply to enforce the aforesaid foreign award.

5.5. He then went on to argue that neither section 23 nor section 28 of the Contract Act proscribe the choice of a foreign seat in arbitration. As a matter of fact, the exception to section 28 of the Contract Act expressly excepts arbitration from the clutches of section 28, which is an express approval to party autonomy which is the very basis of the Arbitration Act.

He also argued that section 23 of the Contract Act, when it speaks of public policy, must be confined to clear and incontestable cases of harm to the public and cited several cases to buttress this proposition.

5.6. In any case, he combated Mr. Himanis argument by referring to paragraph 118 of BALCO (supra) to argue that section 28(1) of the Arbitration Act would apply only when the arbitration takes place in India and not when the seat is outside India. Equally, grounds available for challenge, which would no longer be available as a result of two parties going abroad to resolve their differences, are waivable, and both parties have, in this case, substituted the challenge to be made to an award under section 34 of the Arbitration Act with two bites at the cherry first, by a challenge under Swiss law to the award in Zurich, and second, by resisting enforcement under the grounds contained in section 48 of the Arbitration Act.

5.7. He then refuted Mr. Himanis contention that the expression unless the context otherwise requires can be used to defeat the very basis of section 44, arguing that section 44 only requires that the seat of arbitration be in a territory which is outside India and cited case law for this proposition.

5.8. He also refuted Mr. Himanis argument that Mumbai should be the seat, as the closest connection test applies only absent the determination of seat. In the present case, the arbitration clause in the settlement agreement, together with the procedural orders passed by the arbitrator, designated Zurich as the seat and Mumbai only as a convenient venue, which has been accepted by both parties, and must govern the arbitral proceedings in this case.

5.9. He then proceeded to distinguish the three judgments relied upon by Mr. Himani to demonstrate that two Indian parties can choose a foreign seat. He then went on to argue that both in the proviso to section 2(2) and section 10 of the Commercial Courts Act, the phrase international commercial arbitration is not governed by the definition contained in section 2(1)(f) but would only refer to arbitrations in which the seat is outside India.

The Arbitration and Conciliation Act, 1996

6. Having heard learned counsel for both parties, it is first necessary to set out the relevant provisions of Part I and Part II of the Arbitration Act.

2. Definitions.(1) In this Part, unless the context otherwise requires, ***

(e) Court means

(i) in the case of an arbitration other than international commercial arbitration, the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal civil court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;

(f) international commercial arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country;

*** Scope (2) This Part shall apply where the place of arbitration is in India.

Provided that subject to an agreement to the contrary, the provisions of Sections 9, 27 and clause (b) of sub-section (1) and sub-section (3) of Section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.

*** Construction of references (6) Where this Part, except Section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.

(7) An arbitral award made under this Part shall be considered as a domestic award. A party may choose to waive its right to object under section 4 of the Arbitration Act, which reads as follows:

> 4. Waiver of right to object.A party who knows that
>
> (a) any provision of this Part from which the parties may derogate, or
>
> (b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-

limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object. The rules applicable to the substance of dispute are set out in section 28 as follows:

28. Rules applicable to substance of dispute.(1) Where the place of arbitration is situated in India,

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration,

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under sub-

> clause (ii) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction. Recourse to a court against an arbitral award may be made by an application for setting aside such award, inter alia, under section 34(2A) of the Arbitration Act, which is set out as follows:

> 34. Application for setting aside arbitral award. *** (2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. Part II of the Arbitration Act deals with enforcement of foreign awards in India, and contains two chapters, Chapter I of which deals with the enforcements of awards to which the New York Convention applies.

Sections 44, 46, 47, and 49, contained in Chapter I of Part II of the Arbitration Act, are extracted as follows:

> 44. Definition.In this Chapter, unless the context otherwise requires, foreign award means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11 th day of October, 1960
>
> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
>
> (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies. 46. When foreign award binding.Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award. 47. Evidence.(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the Court
>
> (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
>
> (b) the original agreement for arbitration or a duly certified copy thereof; and
>
> (c) such evidence as may be necessary to prove that the award is a foreign award.
>
> (2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation.In this section and in the sections following in this Chapter, Court means the High Court having original jurisdiction to decide the questions forming the subject matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court. 49. Enforcement of foreign awards.Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court. Seat of the arbitral proceedings in the present case

7. Clause 6 of the settlement agreement extracted above would show that arbitration is to be resolved in Zurich in accordance with the Rules of Conciliation and Arbitration of the ICC. In similar circumstances, in Mankastu Impex (P) Ltd. v. Airvisual Ltd., (2020) 5 SCC 399, where disputes were to be resolved by arbitration administered in Hong Kong, the Court concluded:

21. In the present case, the arbitration agreement entered into between the parties provides Hong Kong as the place of arbitration. The agreement between the parties choosing Hong Kong as the place of arbitration by itself will not lead to the conclusion that the parties have chosen Hong Kong as the seat of arbitration. The words, the place of arbitration shall be Hong Kong, have to be read along with Clause 17.2. Clause 17.2 provides that any dispute, controversy, difference arising out of or relating to MoU shall be referred to and finally resolved by arbitration administered in Hong Kong.. On a plain reading of the arbitration agreement, it is clear that the reference to Hong Kong as place of arbitration is not a simple reference as the venue for the arbitral proceedings; but a reference to Hong Kong is for final resolution by arbitration administered in Hong Kong. The agreement between the parties that the dispute shall be referred to and finally resolved by arbitration administered in Hong Kong clearly suggests that the parties have agreed that the arbitration be seated at Hong Kong and that laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award. (emphasis in original) As per this clause, Zurich was therefore determined to be the juridical seat of arbitration between the parties.

8. At the Case Management Conference held on 28.06.2018, the learned arbitrator specifically decided:

> 3. The venue of the hearing shall be Mumbai, India. The seat of the arbitration of course remains Zurich, Switzerland. I am grateful to the Respondent for offering to assist with the organisation of the hearing in India. The consequence of holding the hearing in Mumbai will of course be dealt with in the Award on costs, depending on the outcome. The Tribunal is of the view that it is cost efficient to hold the hearing in India where the parties are based, the Respondents five witnesses are based, where Respondents legal team are based and Claimants co-counsel is based. This means that the Claimants lead counsel, the Claimants sole witness and the sole arbitrator must travel to India. This arrangement has been accepted by both parties. Even in the final award dated 18.04.2019, the learned arbitrator held:

> 82. For the reasons set out above, the Tribunal therefore has held in Procedural Order No.3 and hereby finds that the arbitration clause in the Settlement Agreement is valid and proceeds to apply the Swiss Act because the seat of the Arbitration is Zurich, Switzerland.
>
> 9. The closest connection test strongly relied upon by Mr. Himani would only apply if it is unclear that a seat has been designated either by the parties or by the tribunal. In this case, the seat has clearly been designated both by the parties and by the tribunal, and has been accepted by both the parties. The judgment in Enercon (supra), relied upon by Mr. Himani, applied the aforesaid test only because the arbitration clause therein provided that London was the venue and not the seat. It was, therefore, pointed out by this Court that given the various factors connecting the dispute to India and the absence of any factors connecting it to England, on the facts of that case, there was no necessity to regard London as the seat when it was, in fact, only the venue (see paragraphs 98-103, 114-116, and
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> 128).

10. For this reason, it is not possible to accept Mr. Himanis contention that the seat of arbitration ought to be held to be Mumbai in the facts of the present case.

Part I and Part II of the Arbitration Act are mutually exclusive

11. The Arbitration Act is in four parts. Part I deals with arbitrations where the seat is in India and has no application to a foreign-seated arbitration. It is, therefore, a complete code in dealing with appointment of arbitrators, commencement of arbitration, making of an award and challenges to the aforesaid award as well as execution of such awards. On the other hand, Part II is not concerned with the arbitral proceedings at all. It is concerned only with the enforcement of a foreign award, as defined, in India. Section 45 alone deals with referring the parties to arbitration in the circumstances mentioned therein. Barring this exception, in any case, Part II does not apply to arbitral proceedings once commenced in a country outside India.

12. Even before the Arbitration Act of 1996, India, being one of the earliest signatories to the New York Convention, legislated in accordance therewith and enacted the Foreign Awards Act in 1961. Under this Act, section 2, which is pari materia to section 44 of the Arbitration Act, laid down:

> 2. Definition.In this Act, unless the context otherwise requires, foreign award means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960
>
> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies; and

(b) in one of such territories as the Central Government being satisfied that reciprocal provisions have been made, may, by notification in the official Gazette, declare to be territories to which the said Convention applies. Under section 6 of the Foreign Awards Act, where the court is satisfied that the foreign award is enforceable, the court shall order the award to be filed and shall proceed to pronounce judgment according to the award. This provision has since been done away with by the Arbitration Act, 1996 as section 49 of the Arbitration Act expressly provides that the award shall be deemed to be a decree of the court. Thereafter, section 7 of the Foreign Awards Act enumerates grounds on which such foreign award may be refused to be enforced. Obviously, under the earlier regime, there was no overlap between the Arbitration Act, 1940, which dealt only with domestic awards, and the Foreign Awards Act. This situation continues in the current Arbitration Act, Part I and Part II of which have been held to be mutually exclusive. Thus, in BALCO (supra), this Court held:

37. In 1953 the International Chamber of Commerce promoted a new treaty to govern international commercial arbitration. The proposals of ICC were taken up by the United Nations Economic and Social Council. This in turn led to the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards at New York in 1958 (popularly known as the New York Convention). The New York Convention is an improvement on the Geneva Convention of 1927. It provides for a much more simple and effective method of recognition and enforcement of foreign arbitral awards. It gives much wider effect to the validity of arbitration agreement. This Convention came into force on 7-6-1959. India became a State signatory to this Convention on 13-7-1960. The Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted to give effect to the New York Convention. *** 44. In the 1961 Act, there is no provision for challenging the foreign award on merits similar or identical to the provisions contained in Sections 16 and 30 of the 1940 Act, which gave power to remit the award to the arbitrators or umpire for reconsideration under Section 30 which provided the grounds for setting aside an award. In other words, the 1961 Act dealt only with the enforcement of foreign awards. The Indian Law has remained as such from 1961 onwards. There was no intermingling of matters covered under the 1940 Act, with the matters covered by the 1961 Act. *** 88. Section 2(7) of the Arbitration Act, 1996 reads thus:

2. (7) An arbitral award made under this Part shall be considered as a domestic award. In our opinion, the aforesaid provision does not, in any manner, relax the territorial principle adopted by the Arbitration Act, 1996. It certainly does not introduce the concept of a delocalised arbitration into the Arbitration Act, 1996. It must be remembered that Part I of the Arbitration Act, 1996 applies not only to purely domestic arbitrations i.e. where none of the parties are in any way foreign but also to international commercial arbitrations covered within Section 2(1)(f) held in India. The term domestic award can be used in two senses:

one to distinguish it from international award, and the other to distinguish it from a foreign award. It must also be remembered that foreign award may well be a domestic award in the country in which it is rendered. As the whole of the Arbitration Act, 1996 is designed to give different treatments to the awards made in India and those made outside India, the distinction is necessarily to be made between the terms domestic awards and foreign awards. The scheme of the Arbitration Act, 1996 provides that Part I shall apply to both international arbitrations which take place in India as well as domestic arbitrations which would normally take place in India.

This is clear from a number of provisions contained in the Arbitration Act, 1996 viz. the Preamble of the said Act, proviso and the explanation to Section 1(2), Sections 2(1)(f), 11(9), 11(12), 28(1)(a) and 28(1)(b). All the aforesaid provisions, which incorporate the term international, deal with pre-award situation. The term international award does not occur in Part I at all. Therefore, it would appear that the term domestic award means an award made in India whether in a purely domestic context i.e. domestically rendered award in a domestic arbitration or in the international context i.e. domestically rendered award in an international arbitration. Both the types of awards are liable to be challenged under Section 34 and are enforceable under Section 36 of the Arbitration Act, 1996. Therefore, it seems clear that the object of Section 2(7) is to distinguish the domestic award covered under Part I of the Arbitration Act, 1996 from the foreign award covered under Part II of the aforesaid Act; and not to distinguish the domestic award from an international award rendered in India. In other words, the provision highlights, if anything, a clear distinction between Part I and Part II as being applicable in completely different fields and with no overlapping provisions.

89. That Part I and Part II are exclusive of each other is evident also from the definitions section in Part I and Part II. The definitions contained in Sections 2(1)(a) to (h) are limited to Part I. The opening line which provides In this Part, unless the context otherwise requires., makes this perfectly clear. Similarly, Section 44 gives the definition of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter I (New York Convention Awards). Further, Section 53 gives the interpretation of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter II (Geneva Convention Awards). From the aforesaid, the intention of Parliament is clear that there shall be no overlapping between Part I and Part II of the Arbitration Act, 1996. The two parts are mutually exclusive of each other. To accept the submissions made by the learned counsel for the appellants would be to convert the foreign award which falls within Section 44, into a domestic award by virtue of the provisions contained under Section 2(7) even if the arbitration takes place outside India or is a foreign seated arbitration, if the law governing the arbitration agreement is by choice of the parties stated to be the Arbitration Act, 1996. This, in our opinion, was not the intention of Parliament. The territoriality principle of the Arbitration Act, 1996, precludes Part I from being applicable to a foreign seated arbitration, even if the agreement purports to provide that the arbitration proceedings will be governed by the Arbitration Act, 1996. *** 120. We are unable to agree with the submission of the learned Senior Counsel that there is any overlapping of the provisions in Part I and Part II; nor are the provisions in Part II supplementary to Part I. Rather there is complete segregation between the two parts.

121. Generally speaking, regulation of arbitration consists of four steps:

(a) the commencement of arbitration;

(b) the conduct of arbitration;

(c) the challenge to the award; and

(d) the recognition or enforcement of the award.

In our opinion, the aforesaid delineation is self-evident in Part I and Part II of the Arbitration Act, 1996. Part I of the Arbitration Act, 1996 regulates arbitrations at all the four stages. Part II, however, regulates arbitration only in respect of commencement and recognition or enforcement of the award. *** 124. Having accepted the principle of territoriality, it is evident that the intention of Parliament was to segregate Part I and Part II. Therefore, any of the provisions contained in Part I cannot be made applicable to foreign awards, as defined under Sections 44 and 53 i.e. the New York Convention and the Geneva awards. This would be a distortion of the scheme of the Act. It is, therefore, not possible to accept the submission of Mr Subramanium that provisions contained in Part II are supplementary to the provision contained in Part I. Parliament has clearly segregated the two parts.

13. This being the case, it is a little difficult to accede to any argument that would breach the wall between Parts I and II. Mr. Himanis argument that the proviso to section 2(2) of the Arbitration Act is a bridge which connects the two parts must, thus, be rejected. As a matter of fact, section 2(2) specifically states that Part I applies only where the place of arbitration is in India. It is settled law that a proviso cannot travel beyond the main enacting provision see Union of India v. Dileep Kumar Singh, (2015) 4 SCC 421 (at paragraph 20), DMRC v. Tarun Pal Singh, (2018) 14 SCC 161 (at paragraph 21), Kandla Export Corpn. v. OCI Corpn., (2018) 14 SCC 715 (at paragraph 13), and Mavilayi Service Co-operative Bank Ltd. v. Commissioner of Income Tax, Calicut, 2021 SCC OnLine SC 16 (at paragraph 41).

14. As a matter of fact, the reason for the insertion of the proviso to section 2(2) by the Arbitration and Conciliation (Amendment) Act, 2015 was because the judgment in Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105 [Bhatia] had muddied the waters by holding that section 9 would apply to arbitrations which take place outside India without any express provision to that effect. The judgment in Bhatia (supra) has been expressly overruled a five-Judge Bench in BALCO (supra). Pursuant thereto, a proviso has now been inserted to section 2(2) which only makes it clear that where, in an arbitration which takes place outside India, assets of one of the parties are situated in India and interim orders are required qua such assets, including preservation thereof, the courts in India may pass such orders. It is important to note that the expression international commercial arbitration is specifically spoken of in the context of a place of arbitration being outside India, the consequence of which is an arbitral award to be made in such place, but which is enforced and recognised under the provisions of Part II of the Arbitration Act. The context of this expression is, therefore, different from the context of the definition of international commercial arbitration contained in Section 2(1)(f), which is in the context of such arbitration taking place in India, which only applies unless the context otherwise requires. The four sub-clauses contained in section 2(1)(f)

would make it clear that the definition of the expression international commercial arbitration contained therein is party-centric in the sense that at least one of the parties to the arbitration agreement should, inter alia, be a person who is a national of or habitually resident in any country other than India. On the other hand, when international commercial arbitration is spoken of in the context of taking place outside India, it is place-centric as is provided by section 44 of the Arbitration Act.

This expression, therefore, only means that it is an arbitration which takes place between two parties in a territory outside India, the New York Convention applying to such territory, thus making it an international commercial arbitration.

Ingredients of a Foreign Award sought to be enforced under Part II

15. Section 44 of the Arbitration Act is modelled on Articles I and II of the New York Convention. The relevant provisions of the New York Convention read as under:

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. *** Article II

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

2. The term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

16. By way of contrast, section 53 of the Arbitration Act, which deals with awards under the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 [Geneva Convention], states:

> 53. Interpretation.In this Chapter foreign award means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924,
>
> (a) in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and
>
> (b) between persons of whom one is subject to the jurisdiction of some one of such powers as the Central Government, being satisfied that reciprocal provisions have

> been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the powers aforesaid, and
>
> (c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made. It will be seen that the requirement of section 53(b) is conspicuous by its absence in section 44 when it comes to an award to which the New York Convention applies.

17. As a matter of fact, before the New York Convention was made final, several countries wanted to insert the provisions of section 53(b), which reflected Article I of the Geneva Convention, in the New York Convention as well. Thus, China objected to the phrasing of Article I of the New York Convention, stating:

> China The first part of article I, paragraph 2, provides: Any Contracting State may, upon signing, ratifying or acceding to this Convention, declare that it will apply the Convention only to the recognition and enforcement of arbitral awards made in the territory of another Contracting State. It follows from this provision that any person receiving an arbitral award in a Contracting State may request recognition and enforcement, and this right is not limited to the nationals of a Contracting State. The Chinese Government considers this provision as too liberal, and is of the opinion that, on the basis of the principle of international reciprocity, such a right should be restricted in accordance with the spirit of article I of the 1927 Convention on the Execution of Foreign Arbitral Awards, which provides: An arbitral award shall be recognised as binding and shall be enforced provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies, and between persons who are subject to the jurisdiction of one of the High Contracting Parties. Likewise, Mexico also objected, stating:
>
> The Mexican Government further considers that it would be advisable to include in the draft Convention the stipulation contained in the Geneva Convention that the arbitral award must have been made in a dispute between persons who are subject to the jurisdiction of one of the Contracting States. The Mexican Government takes this view because Mexican law regards arbitral awards as acts which in themselves are private, since they are made pursuant to compromise concluded between private persons, and which become enforceable only when the logic of the award is, in addition supported by the authority of a judicial decision. Hungary followed suit, also stating:
>
> For this reason, and contrary to the statement contained in point 23 of the Committees report, the point should be reconsidered whether, in compliance with the

provisions of the Geneva Convention of 1927, the validity of the Convention should be restricted to arbitral awards on differences between persons coming under the jurisdiction of one or the other of the Contracting States, or whether at least the Contracting States should be accorded the right under the Convention to apply the provisions of the same only to arbitral awards of such a nature.

If the present meaning of the word jurisdiction as stated in the Committees report - is rather vague and ambiguous, there is no reason why it should not be defined more precisely. As did Norway:

As far as the definition of the scope of the convention is concerned, the Norwegian Government agrees with the Special Committee (see paragraph 23 of the Report) that the requirement of the Geneva Convention of 1927 (article I, first paragraph), to the effect that the arbitral award must have been made between persons who are subject to the jurisdiction of one of the High Contracting Parties, is too vague and ambiguous. The scope of the present draft seems on the other hand to be unreasonably comprehensive. As now formulated, the convention would apply even if both the parties to the arbitral award are nationals of the State where enforcement is sought as well as in cases where none of them is a national of a Contracting State.

18. Professor Pieter Sanders, in an article New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Netherlands International Law Review, Volume 6, Issue 1, March 1959), outlined what he referred to as the strides made by the New York Convention when compared with the Geneva Convention, thus:

The international business world, for whom these conventions are made, strongly hopes that Government will soon ratify the New York Convention or accede to it, as in their opinion the Convention constitutes an important step forward compared with the Geneva Convention. Before briefly commenting upon the separate articles of the Convention, I may try to give a broad outline of the most important differences between the Geneva Convention 1927 and the New York Convention 1958. *** 4. Article 1 has been the result of lengthy discussions in a special working group as well as in the plenary sessions of the New York arbitration conference. The first paragraph is the result of a compromise reached within the working group. The first sentence of this paragraph is based upon a territorial criterion:

The Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.

The second sentence introduces the national principle: It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement is sought.

> Let me illustrate this by an example. Germany regards an arbitral award rendered in France under German procedural law as a German arbitral award and an arbitral award rendered in Germany under French procedural law as a non-domestic, French award. Germany applies the criterion of the applicable procedural law and therefore will also apply the Convention when enforcement is sought in Germany of an award rendered in Germany under French procedural law.
>
> The scope of the new Convention is wider than that of the Geneva Convention which applies to awards that have been made in a territory of one of the High Contracting Parties to which the Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties. Here we only find the territorial principle and in addition to this the restriction that the award must be made between persons, subject to the jurisdiction of the High Contracting Parties.

19. Likewise, Gary B. Born, in his book International Commercial Arbitration (Wolters Kluwer, 3rd Edn., 2021), has this to say:

> The Geneva Protocol was expressly limited to agreements to arbitrate between parties that were nationals of different Contracting States. This was the sole criterion for internationality: other agreements to arbitrate, even if they involved classic cross-border international trade or investment, were not subject to the Protocol.
>
> In contrast, as noted above, the text of Article II of the New York Convention does not expressly address the categories of arbitration agreements which are subject to the Convention. Instead, the Conventions text only addresses what arbitral awards are entitled to the treatys protections. As a consequence, the definition of those arbitration agreements that are within the scope of the New York Convention must be ascertained by implication, either by reference to the Conventions treatment of awards or otherwise. In these circumstances, there are unfortunately several possible interpretations that may be adopted. The analysis of these permutations can be frustratingly complex, but, properly understood, ultimately produces a simple, sensible result.

20. Finally, the New York Convention, in Article I(3), referred to only two conditions that can be made by a State when it signs, ratifies, or accedes to the New York Convention, as follows:

> 3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration. It is in pursuance of Article I of the New York Convention that section 44 of the Arbitration Act has been enacted.

21. Under section 44 of the Arbitration Act, a foreign award is defined as meaning an arbitral award on differences between persons arising out of legal relationships considered as commercial under the law in force in India, in pursuance of an agreement in writing for arbitration to which the New York Convention applies, and in one of such territories as the Central Government, by notification, declares to be territories to which the said Convention applies. Thus, what is necessary for an award to be designated as a foreign award under section 44 are four ingredients:

(i) the dispute must be considered to be a commercial dispute under the law in force in India,

(ii) it must be made in pursuance of an agreement in writing for arbitration,

(iii) it must be disputes that arise between persons (without regard to their nationality, residence, or domicile), and

(iv) the arbitration must be conducted in a country which is a signatory to the New York Convention.

Ingredient (i) is undoubtedly satisfied on the facts of this case. Ingredient

(ii) is satisfied given clause 6 of the settlement agreement. Ingredients (iii) and (iv) are also satisfied on the facts of this case as the disputes are between two persons, i.e. two Indian companies, and the arbitration is conducted at the seat designated by the parties, i.e. Zurich, being in Switzerland, a signatory to the New York Convention.

22. At this juncture, it is important to cite the UNCTAD Commentary on International Commercial Arbitration, which states:

> 1.4.1 Foreign arbitration and international arbitration are not the same An arbitration that takes place in State A is a foreign arbitration in State B. It does not matter whether the arbitration is commercial or non-commercial or whether the parties are from the same country, from different countries or that one or all are from State A. Since even a domestic arbitration in State A is a foreign arbitration in State B, the courts of State B would be called upon to apply the New York Convention to enforcement of a clause calling for arbitration in State A and to the enforcement of any award that would result.

Aiding foreign arbitration In some legal systems the courts will not come to the aid of a foreign arbitration by way of aiding in the procurement of evidence, granting interim orders of protection or the like. However, many modern arbitration laws provide that the courts will aid arbitrations taking place in a foreign State.

1.4.3 Definition of an international arbitration *** Model Law In the Model Law an arbitration is international if any one of four different situations is present:

***

2) The place of arbitration, if determined in or pursuant to, the arbitration agreement, is situated outside the State in which the parties have their places of business.

23. The ICCAs Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, compiled by the International Council for Commercial Arbitration with the assistance of the Permanent Court of Arbitration, in its comment on Article I(1) of the New York Convention, and particularly, the expression awards made in the territory of a State other than the State where the recognition and enforcement are sought, states as follows:

> III.1.1. Any award made in a State other than the State of the recognition or enforcement court falls within the scope of the Convention, i.e., is a foreign award. Hence, the nationality, domicile or residence of the parties is without relevance to determine whether an award is foreign. Where is an award made? The Convention does not answer this question. The vast majority of Contracting States considers that an award is made at the seat of the arbitration. The seat of the arbitration is chosen by the parties or alternatively, by the arbitral institution or the arbitral tribunal. It is a legal, not a physical, geographical concept. Hearings, deliberations and signature of the award and other parts of the arbitral process may take place elsewhere.

24. However, Mr. Himani strongly relied upon the following judgments to buttress his submission that the expression unless the context otherwise requires used in section 44 would necessarily import the definition of international commercial arbitration contained in Part I when the context requires this to be done, namely, when two Indian parties are resolving their disputes against each other in a territory outside India:

(i) Vanguard Fire and General Insurance Co. Ltd. v. Fraser and Ross, (1960) 3 SCR 857 The main basis of this contention is the definition of the word insurer in Section 2(9) of the Act. It is pointed out that that definition begins with the words insurer means and is therefore exhaustive. It may be accepted that generally the word insurer has been defined for the purposes of the Act to mean a person or body corporate etc. which is actually carrying on the business of insurance i.e. the business of effecting contracts of insurance of whatever kind they might be. But Section 2 begins with the words in this Act, unless there is anything repugnant in the subject or context and then come the various definition clauses of which (9) is one. It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statutes generally begin with the qualifying words similar to the words used in the present case, namely, unless there is anything repugnant in the subject or context.

Therefore in finding out the meaning of the word insurer in various sections of the Act, the meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word has been used and that will be giving effect to the opening

sentence in the definition section, namely, unless there is anything repugnant in the subject or context. In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. Therefore, though ordinarily the word insurer as used in the Act would mean a person or body corporate actually carrying on the business of insurance it may be that in certain sections the word may have a somewhat different meaning. (at pages 863-864)

(ii) Bennett Coleman & Co. (P) Ltd. v. Punya Priya Das Gupta, (1969) 2 SCC 1 6. But assuming that there is such a conflict as contended, we do not have to resolve that conflict for the purposes of the problem before us. The definition of Section 2 of the present Act commences with the words In this Act unless the context otherwise requires and provides that the definitions of the various expressions will be those that are given there. Similar qualifying expressions are also to be found in the Industrial Disputes Act, 1947, the Minimum Wages Act, 1948, the C.P. and Berar Industrial Disputes Settlement Act, 1947 and certain other statutes dealing with industrial questions. It is, therefore, clear that the definitions of a newspaper employee and a working journalist have to be construed in the light of and subject to the context requiring otherwise. Section 5 of the Act, which confers the right to gratuity itself contemplates in clause

(d) of sub-section (1) a case of payment of gratuity to the nominee or the family of a working journalist who dies while he is in the service of a newspaper establishment. Section 17(1) provides that where any amount is due under the Act to a newspaper employee from an employer, such an employee himself or a person authorised by him or, in case of his death, any member of his family can apply to the State Government or other specified authority for the recovery thereof. Similar provisions are also to be found in Section 33-C(1) of the Industrial Disputes Act. Claims under that section include those for compensation in cases of retrenchment, transfer of an undertaking and closure under Chapter V-A of that Act, all of which would necessarily be claims arising after termination of service and the claimant would obviously be one in all those cases who would not be presently employed in the establishment of the employer against whom such claims are made. Likewise, the claim for gratuity under Section 17, read with Section 5 of the Act, would itself be one which accrues after the termination of employment. These provisions, therefore, clearly indicate that it is not only a newspaper employee presently employed in a particular newspaper establishment who can maintain an application for gratuity. The scheme of all these acts dealing with industrial questions is to permit an ex-employee to avail of the benefits of their provisions, the only requirement being that the claim in dispute must be one which has arisen or accrued whilst the claimant was in the employment of the person against whom it is made. There can, therefore, be no doubt that the definitions of a newspaper employee and working journalist being subject to a context to the contrary, the benefit of Sections 5 and 17 is available to an ex-employee though he has ceased to be in the employment of that particular newspaper establishment at the time of his application for gratuity. The contention that the respondent was not entitled to maintain his application as he was not in the service of the appellant company on the date of his claim before the Labour Court cannot be sustained.

(iii) Allied Motors (P) Ltd. v. CIT, (1997) 3 SCC 472 12. In the case of Goodyear India Ltd. v. State of Haryana [(1990) 2 SCC 71 : 1990 SCC (Tax) 223 : (1991) 188 ITR 402] this Court said that the rule of reasonable construction must be applied while construing a statute. Literal construction should be avoided if it defeats the manifest object and purpose of the Act.

13. Therefore, in the well-known words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of R.B. Jodha Mal Kuthiala v. CIT [(1971) 3 SCC 369 : (1971) 82 ITR 570] , this Court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole.

25. We have already seen that the context of section 44 is party-neutral, having reference to the place at which the award is made. For this reason, it is not possible to accede to the argument that the very basis of section 44 should be altered when two Indian nationals have their disputes resolved in a country outside India. On the other hand, the judgment in S.K. Gupta v.

K.P. Jain, (1979) 3 SCC 54 is apposite, and states as follows:

> 24. The noticeable feature of this definition is that it is an inclusive definition and, where in a definition clause, the word include is used, it is so done in order to enlarge the meaning of the words or phrases occurring in the body of the statute and when it is so used, these words or phrases must be construed as comprehending not only such things which they signify according to their natural import, but also those things which the interpretation clause declares that they shall include (see Dilworth v. Commissioner of Stamps [(1899) AC 99, 105 : 79 LT 473]). Where in a definition section of a statute a word is defined to mean a certain thing, wherever that word is used in that statute, it shall mean what is stated in the definitions unless the context otherwise requires. But where the definition is an inclusive definition, the word not only bears its ordinary, popular and natural sense whenever that would be applicable but it also bears its extended statutory meaning. At any rate, such expansive definition should be so construed as not cutting down the enacting provisions of an Act unless the phrase is absolutely clear in having opposite effect (see Jobbins v. Middlesex County Council [(1949) 1 KB 142 : (1948) 2 All ER 610]). Where the definition of an expression in a definition clause is preceded by the words unless the context otherwise requires, normally the definition given in the section should be applied and given effect to but this normal rule may, however, be departed from if there be something in the context to show that the definition should not be applied (see Khanna, J., in Indira Nehru Gandhi v. Raj Narain [(1975) Supp SCC 1, 97]). It would thus appear that ordinarily one has to adhere to the definition and if it is an expansive definition the same should be adhered to. The frame of any definition more

> often than not is capable of being made flexible but the precision and certainty in law requires that it should not be made loose and kept tight as far as possible (see Kalya Singh v. Genda Lal [(1976) 1 SCC 304, 309 : (1975) 3 SCR 783]).

26. For this reason, it is not possible to accede to the argument that the expression unless the context otherwise requires can be held to undo the very basis of section 44 by converting it from a seat-oriented provision in countries that are signatories to the New York Convention to a person-

oriented provision in which one of the parties to the arbitration agreement has to be a foreign national or habitually resident outside India. In any case, the context of section 44 is very far removed from the context of an international commercial arbitration in Part I which is defined for the purposes of section 11, section 28, section 29A(1), section 34(2A), and section 43I, all of which occur in Part I and deal with arbitrations which take place in India. Also, the argument of Mr. Himani would involve bodily importing the expression international commercial arbitration into section 44, which cannot be done because of the opening words of section 44, In this Chapter which is Chapter I of Part II, and then applying the definition contained in section 2(1)(f) of the Arbitration Act which, being restricted to Part I, must now be applied to Part II. No canon of interpretation would permit acceptance of such an argument.

27. At this point, it is important to refer to the judgment of this Court in Atlas (supra). In this case, even though the appellant, an Indian company, had entered into a contract dated 03.06.1980 with a company incorporated in Hong Kong, the goods were to be supplied through an Indian company, namely, Kotak & Co., in Mumbai. Disputes arose between the two Indian companies Atlas Exports Pvt. Ltd. and Kotak & Co. The contract dated 03.06.1980 incorporated an arbitration clause as follows:

> 2. The contract dated 3-6-1980 incorporated an arbitration clause which is extracted and reproduced hereunder:
>
> This contract is made under the terms and conditions effective at date of Grain and Food Trade Association Ltd., London, Contract 15 which is hereby made a part of this contract both buyers and sellers hereby acknowledge familiarity with the text of the GAFTA contract and agree to be bound by its terms and conditions.
>
> 3. GAFTA stands for Grain and Food Trade Association Ltd., London. Clause 27 of Standard Contract 15 of GAFTA provides as under:
>
> 27. Arbitration.(a) Any dispute arising out of or under this contract shall be settled by arbitration in London in accordance with the arbitration rules of Grain and Food Trade Association Limited, No. 125 such rules forming part of this contract and of which both parties hereto shall be deemed to be cognisant.
>
> (b) Neither party hereto, nor any persons claiming under either of them, shall bring any such dispute until such dispute shall first have been heard and determined by the

arbitrators, umpire or Board of Appeal, as the case may be, in accordance with the arbitration rules and it is expressly agreed and declared that the obtaining of the award from the arbitration, umpire or Board of Appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute. A foreign award was delivered on 22.06.1987 as per the Rules of GAFTA, London. Kotak & Co. moved an application under sections 5 and 6 of the Foreign Awards Act before the High Court, seeking enforcement of the award by filing the same and praying for pronouncement of judgment according to the award. The award was made a rule of the court, followed by a decree, by a learned Single Judge of the Bombay High Court. A Letters Patent Appeal preferred by Atlas Exports Pvt. Ltd. was dismissed. A specific contention was raised that since both Atlas Exports Pvt. Ltd. and Kotak & Co. were Indian parties, the award could not be enforced, being contrary to sections 23 and 28 of the Contract Act. This was repelled by this Court as follows:

10. It was however contended by the learned counsel for the appellant that the award should have been held to be unenforceable inasmuch as the very contract between the parties relating to arbitration was opposed to public policy under Section 23 read with Section 28 of the Contract Act. It was submitted that Atlas and Kotak, the parties between whom the dispute arose, are both Indian parties and the contract which had the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India should be held to be opposed to public policy. Under Section 23 of the Indian Contract Act the consideration or object of an agreement is unlawful if it is opposed to public policy. Section 28 and Exception 1 to it, (which only is relevant for the purpose of this case) are extracted and reproduced hereunder:

28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1.This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

11. The case at hand is clearly covered by Exception 1 to Section 28. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute/s adjudicated by having the same referred to arbitration. Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement. Moreover, in the case at hand the

> parties have willingly initiated the arbitration proceedings on the disputes having arisen between them. They have appointed arbitrators, participated in arbitration proceedings and suffered an award. The plea raised before us was not raised either before or during the arbitration proceedings, nor before the learned Single Judge of the High Court in the objections filed before him, nor in the letters patent appeal filed before the Division Bench. Such a plea is not available to be raised by the appellant Atlas before this Court for the first time.

28. It is clear that this Court categorically held that a foreign award cannot be refused to be enforced merely because it was made between two Indian parties, under pari materia provisions of the Foreign Awards Act.

The Court also held that since this plea had never been taken in any of the courts below, it was not available to the appellant to raise the said plea before this Court for the first time.

29. It is clear that there can be more than one ratio decidendi to a judgment. Thus, In Jacobs v. London County Council, (1950) 1 All ER 737, the House of Lords, after referring to some earlier decisions, held, as follows:

> However, this may be, there is, in my opinion, no justification for regarding as obiter dictum a reason given by a Judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing. A good illustration will be found in London Jewellers Ltd. v. Attenborough, (1934) 2 KB 206 (CA). In that case the determination of one of the issues depended on how far the Court of Appeal was bound by its previous decision in Folkes v. R., (1923) 1 KB 282 (CA), [in which] the court had given two grounds for its decision, the second of which [as stated by Greer, L.J., in Attenborough case, (1934) 2 KB 206] was that: (KB p. 222):
>
> where a man obtains possession with authority to sell, or to become the owner himself, and then sells, he cannot be treated as having obtained the goods by larceny by a trick. In Attenborough case, (1934) 2 KB 206 it was contended that, since there was another reason given for the decision in Folkes case, (1923) 1 KB 282, the second reason was obiter, but Greer, L.J., said in reference to the argument of counsel:
>
> (Attenborough case, KB p. 222) I cannot help feeling that if we were unhampered by authority there is much to be said for this proposition which commended itself to Swift, J., and which commended itself to me in Folkes v. R., (1923) 1 KB 282, but that view is not open to us in view of the decision of the Court of Appeal in Folkes v. R., (1923) 1 KB 282. In that case two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the ratio decidendi and neglect the second, or to pick out the second reason as the ratio decidendi and neglect the first;

we must take both as forming the ground of the judgment. So, also, in Cheater v. Cater, (1918) 1 KB 247 (CA) Pickford, L.J., after citing a passage from the judgment of Mellish, L.J., in Erskine v. Adeane, (1873) LR 8 Ch App 756, said: (Cheater case, KB p. 252) That is a distinct statement of the law and not a dictum. It is the second ground given by the Lord Justice for his judgment. If a Judge states two grounds for his judgment and bases his decision upon both, neither of those grounds is a dictum. (at page 741) The said judgment has been followed in State of Gujarat v.

Manoharsinhji Pradyumansinhji Jadeja, (2013) 2 SCC 300 (at paragraphs 78 and 79) and in Shayara Bano v. Union of India, (2017) 9 SCC 1 (at footnote 65).

30. Obviously, there were two reasons for discarding the appellants argument in Atlas (supra) the first reason was clearly on merits. The second reason undoubtedly refused to entertain this plea as it had not been raised earlier. However, this was coupled with the fact that the parties participated in the arbitral proceedings and suffered an award, after which such plea was then taken. We are, therefore, unable to accede to the contention of Mr. Himani that this case cannot be regarded as an authority for the proposition that sections 23 and 28 of the Contract Act are out of harms way when it comes to enforcing a foreign award under the Foreign Awards Act, 1961, where both parties are Indian companies.

31. It is interesting to note that under U.S. law, an arbitration agreement or award made between two U.S. citizens shall not fall under the New York Convention unless such relationship involves properties located abroad, envisages performance of a contract, entered in the U.S., to take place abroad, or has some reasonable connection with one or more foreign states. Thus, section 202 of the Federal Arbitration Act [Title 9, U.S. Code] states as follows:

> Section 202. Agreement or award falling under the ConventionAn arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

32. It is important to note that no such caveat is entered when India acceded to the New York Convention and enacted the Foreign Awards Act and the Arbitration Act, 1996. On the contrary, we have seen as to how persons mentioned in section 44 has no reference to nationality, residence or domicile. This is another important pointer to the fact that, unlike the U.S. Code, section 44 of the Arbitration Act does not enter any such caveat.

33. In Sasan I (supra), the dispute resolution clause contained in the contract between two Indian companies was set out in paragraph 33 of the judgment as follows:

> 33. However, Article 12 deals with the governing law and a dispute resolution mechanism. Section 12.1 and 12.2(a), which are relevant, read as under:
>
> Section 12.1-Governing Law This Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the United Kingdom without regard to its conflicts of law principles.
>
> Section 12.2-Dispute Resolution Arbitration
>
> (a) Any and all claims, disputes, questions or controversies involving Reliance on the one hand and NAC on the other hand arising out of or in connection with this Agreement (collectively, Disputes) which cannot be finally resolved by such parties within 60(sixty) days of arising by amicable negotiation shall be resolved by final and binding arbitration to be administered by the International Chamber of Commerce (the ICC) in accordance with its commercial arbitration rules then in effect (the Rules). The place of arbitration shall be London, England.

Each party shall appoint one (1) arbitrator and the two (2) arbitrators so appointed shall together select and appoint a third arbitrator. If either Reliance, on the one hand, or NAC, on the other hand, fail to appoint their respective arbitrator within 30(thirty) days after receipt by respondent(s) of the demand for arbitration or if the two (2) party-appointed arbitrators are unable to appoint the chairperson of the arbitral tribunal within thirty (30) days of the appointment of the second arbitrator, then the ICC shall appoint such arbitrator or the chairperson, as the case may be, in accordance with the listing, ranking and striking provisions of the Rules. Save and except the provision under Section 9, the provisions of the Part 1 of (Indian) Arbitration and Conciliation Act, 1996, as amended (the Arbitration Act) shall not apply to the arbitration. The arbitrators shall not award punitive, exemplary, multiple or consequential damages. In connection with the arbitration proceedings, the parties hereby agree to cooperate in good faith with each other and the arbitral tribunal and to use their respective best efforts to respond promptly to any reasonable discovery demand made by such party and the arbitral tribunal. Sub-clause (d) of this Article deals with payments to be made by the parties for the purpose of Arbitration.

(d) Each party shall bear its own arbitration expenses, and Reliance on the one hand, and NAC, on the other hand, shall pay one-half of the ICC's and the chairperson's fees and expenses, unless the arbitrators determine that it would be equitable if all or a portion of the prevailing party's expenses should be borne by the other party. Unless the Award provides for non-monetary remedies, any such Award shall be made and shall be promptly payable in (i) US Dollars if payable to NAC or (ii) Rupees if paid to Reliance net of any tax or other deduction. The Award shall include interest from the date of any breach or other violation of this Agreement and the rate of interest shall be specified by the arbitral tribunal and shall be calculated from the date of any such breach or other violation to the date when the Award is paid in full. The Court then referred to BALCO (supra) and held:

> 46. Finally, in paragraph 118 [Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552], the crucial part heavily relied upon by Shri. V.K.

Tankha, learned Senior Advocate, reference is made to section 28, and it is held as under:

118. It was submitted by the learned counsel for the appellants that Section 28 is another indication of the intention of Parliament that Part I of the Arbitration Act, 1996 was not confined to arbitrations which take place in India. We are unable to accept the submissions made by the learned counsel for the parties. As the heading of Section 28 indicates, its only purpose is to identify the rules that would be applicable to substance of dispute. In other words, it deals with the applicable conflict of law rules. This section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide the dispute by applying the Indian substantive law applicable to the contract. This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations. The provision would have an overriding effect over any other contrary provision in such contract. On the other hand, where an arbitration under Part I is an international commercial arbitration within Section 2(1)

(f), the parties would be free to agree to any other substantive law and if not so agreed, the substantive law applicable would be as determined by the Tribunal. The section merely shows that the legislature has segregated the domestic and international arbitration. Therefore, to suit India, conflict of law rules have been suitably modified, where the arbitration is in India. This will not apply where the seat is outside India. In that event, the conflict of law rules of the country in which the arbitration takes place would have to be applied. Therefore, in our opinion, the emphasis placed on the express where the place of arbitration is situated in India, by the learned Senior Counsel for the appellants, is not indicative of the fact that the intention of Parliament was to give an extra-territorial operation to Part I of the Arbitration Act, 1996. (emphasis in original)

47. Honble Supreme Court holds that section 28 makes a clear distinction between purely domestic arbitration and international arbitration with a seat in India, and it is indicated that section 28(1)(a) makes it clear that in an arbitration under Part I to which section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide the dispute by applying the Indian substantive law applicable to the Contract. It is this part of the judgment which was heavily relied upon by Shri. V.K. Tankha, learned Senior Advocate further refers to the next sentence which says that two or more Indian parties cannot circumvent the substantive Indian Law by resorting to arbitration. By placing much emphasis on this part, learned Senior Advocate tried to indicate that the order of the learned District Judge is unsustainable.

48. However, if we further read the findings recorded by the Supreme Court in the same paragraph 118, as reproduced hereinabove, it is held by the Supreme Court that when the seat is outside India,

the conflict of law rule of the country in which the arbitration takes place would have to be applied, and thereafter it is held that the expression whether the place of arbitration is situated in India does not indicate the intention of the Parliament to give extra territorial operation to Part I, of the Arbitration Act of 1996. In paragraph 123 also, the matter has been considered in the backdrop of the provisions contemplated under section 28, this also makes us to come to the inevitable conclusion that the provisions of Part I will not apply where the seat of arbitration is outside India.

49. On consideration of the law laid down in the case of TDM Infrastructure (supra), we find, that the proceeding before the Hon'ble Supreme Court was with regard to appointing an arbitrator under section 11(6) and after taking note of the definition of International Commercial Arbitration as provided in section 2(1)(f), the procedure for appointment of arbitrator and the provision of section 28, it was held that Part I of the Act of 1996 deals with domestic arbitration and Part II deals with foreign award, and by specifically taking note of the provisions of section 28, has held that companies incorporated in India and when both the parties have Indian nationality, then such arbitration cannot be said to be an international commercial arbitration. However, after having said so, in paragraph 23 reference is made to section 28, the intention of the legislature, to hold that two Indian nationals should not be permitted to derogate Indian Law.

50. Finally, in para 23 the following observations are made by the Supreme Court in the aforesaid case:

> 23. Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excluded the same from those provisions which parties derogate from (if so provided by the Act). The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian Law. This is part of the public policy of the country.
>
> 36. It is, however, made clear that any findings/observations made hereinbefore were only for the purpose of determining the jurisdiction of this Court as envisaged under Section 11 of the 1996 Act and not for any other purpose. (emphasis in original)

51. If we analyse this judgment, we find, that apart from being one rendered in a proceeding held under section 11(6), is based on the consideration made with reference to section 28(1), as is evident from paragraph 23 relied upon by Shri. V.K. Tankha and thereafter in paragraph 36, a caution is indicated with regard to applicability of this judgment. Whereas in the case of Atlas Exports (supra), we find that in Atlas Exports, in paragraphs 10 and 11, the following principles have been laid down:-

> 10. It was however contended by the learned counsel for the appellant that the award should have been held to be unenforceable in as much as the very contract between the parties relating to arbitration was opposed to public policy under Section 23 read with Section 28 of the Contract Act. It was submitted that Atlas and Kotak, the parties between whom the dispute arose, are both Indian parties and the contract which had the effect of compelling them to resort to arbitration by foreign arbitrators

and thereby impliedly excluding the remedy available to them under the ordinary law of India should be held to be opposed to public policy. Under section 23 of the Indian Contract Act the consideration or object or an agreement is unlawful if it is opposed to public policy. Section 28 and Exception 1 to it, (which only is relevant for the purpose of this case) are extracted and reproduced hereunder:

28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1 - This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

11. The case at hand is clearly covered by Exception 1 to Section 28. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute/s adjudicated by having the same referred to arbitration. Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement. Moreover, in the case at hand the parties have willing initiated the arbitration proceedings on the disputes having arisen between them. They have appointed arbitrators, participated in arbitration proceedings and suffered an award. The plea raised before us was not raised either before or during the arbitration proceedings, nor before the learned Single Judge of the High Court in the objections filed before him, nor in the letters patent appeal filed before the Division Bench. Such a plea is not available to be raised by the appellant Atlas before this Court for the first time. (emphasis in original)

52. In this case i.e. Atlas Exports (supra), Sections 23 and 28 of the Contract Act are considered and it is held that when a dispute arises where both the parties are Indian, and if the contract has the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India, the same is not opposed to public policy. Section 28 exception (1) of the Contract Act is taken note of and it is held that merely because the arbitrators are situated in a foreign country that by itself cannot be enough to nullify the arbitration agreement, when the parties have with their eyes open, willingly entered into an agreement. If this observation made by the Supreme Court is taken note of, we find that merely because two Indian companies have entered into an arbitration agreement to be held in a foreign country by agreed arbitrators, that by itself is not enough to nullify the arbitration agreement.

53. Shri. V.K. Tankha, learned Senior Advocate, tried to indicate that Atlas Exports (supra) case was rendered in a proceeding held under the Arbitration Act, 1940 which is entirely different from the Act of 1996 and, therefore, the said judgment will not apply in the present case. Instead, the judgment in the case of TDM Infrastructure (supra) would be applicable.

54. We cannot accept the aforesaid proposition. Shri Anirudh Krishnan, learned counsel, had taken us through the provisions of both the Act of 1940 and the Act of 1996, and thereafter he had referred to the judgment of the Supreme Court in the case of Fuerst Day Lawson Limited (supra), where after a detailed comparison of various sections of both the Acts, from paragraphs 65 onwards, Hon'ble Supreme Court discussed the provisions of both Acts, and finally has observed that there is not much of a difference between them. If the aforesaid judgment in the case of Fuerst Day Lawson Limited (supra) is considered, the same holds that both, the Act of 1980 [sic 1940] and 1996 are identical and the Hon'ble Court has also indicated the similarity in both the Acts. That being so, we see no reason as to why the principle laid down of Atlas Exports (supra), which is by a Larger Bench i.e.. Division Bench, should not be applied particularly in the light of the law of precedent as laid down in the case of A.R. Antulay (supra). The contention of Shri. V.K.

Tankha, learned Senior Advocate, that the learned District Judge relied upon the judgment in the case of Atlas Exports (supra) and refused to rely upon the case of TDM Infrastructure (supra) only because it is by a Single Bench is not convincing or acceptable, as the Division Bench Judgment in the case of Atlas Exports (supra) is a binding precedent and once it is held in the aforesaid case that two Indian companies can agree to arbitrate in a foreign country and the same is not hit by public policy, we see no error in the order passed by the learned District Judge.

55. That apart, we also find that in the case of TDM Infrastructure (supra), a note of caution is indicated in paragraph 36, which was added by a corrigendum subsequent to pronouncement of judgment, this clearly indicates the principle laid down by the Supreme Court was only for determining the jurisdiction under section 11 and nothing more. We need not go into the questions any further now, as we find that the judgment in the case of Atlas Exports (supra) is a binding precedent.

56. Various other contentions were also advanced by Shri. Anirudh Krishnan, learned counsel, to say that the judgment in the case of TDM Infrastructure (supra) is not by a Court and, therefore, the provision of Article 141 of the Constitution will not apply. Once we have held that the principle of law laid down by the Supreme Court in the case of Atlas Exports (supra) is binding on us and is applicable to the present dispute, we need not go into all these questions.

57. On going through the scheme of the Arbitration and Conciliation Act, 1996, we find that based on the seat of arbitration so also the nationality of parties, an arbitration is classified to be an International Arbitration, and the governing law is also determined on the basis of the seat of arbitration. Therefore, it is clear that based on the seat of arbitration, the question of permitting two Indian companies/parties to arbitrate out of India is permissible. In the case of Atlas Exports (supra) itself, the principle has been settled that two Indians can agree to have a seat of arbitration outside India. Now, if two Indian Companies agree to have their seat of arbitration in a foreign country, the question would be as to whether the provisions of Part I or Part II would apply. Section 44, of the Act of 1996, contemplates a foreign award to be one pertaining to difference between persons arising out of legal relationship, whether contractual or not, which is in pursuance to an agreement in writing for arbitration, to which the convention set forth in the first schedule applies.

58. In the First Schedule to the Act of 1996, convention on the recognition and enforcement of foreign award popularly known as New York Convention has been laid down and admittedly in this case the parties have agreed to have an arbitration with its seat outside India i.e.. London. If that be the position then the provisions of section 45 would be attracted until and unless it is established that the agreement is null and void, inoperative or incapable of being performed. If we analyse the scheme of the Arbitration and Conciliation Act, 1996, we find that there is a distinction between International Commercial Arbitration and a Foreign Award. It is the case of the appellant that in a dispute between two Indian Parties, which is a domestic arbitration, Part II and Section 45 of the Act of 1996 will not apply. However, when we consider the distinction between International Commercial Arbitration and Foreign Award, we find that there is a difference between an International Commercial Arbitration and an Arbitration which is not an International Commercial Arbitration. The same is based on the nationality of the parties and this distinction is only relevant for the purpose of following the appointment procedure as contemplated under section 11. As far as nationality of the parties are concerned, the same has no applicability for considering the applicability of Part II, of the Act of 1996. Applicability of Part II is determined solely based on what is the seat of arbitration, whether it is in a country which is signatory to the New York Convention. If this requirement is fulfilled, Part II will apply and in the present case as this requirement is fulfilled, we have no hesitation in holding that the dispute in question is covered by Part II of the Act of 1996. *** 72. Finally, we may observe that once it is found by us that parties by mutual agreement have decided to resolve their dispute by arbitration and when they, on their own, chose to have the seat of arbitration in a foreign country, then in view of the provisions of Section 2(2) of the Act of 1996, Part I of the Act, will not apply in a case where the place of arbitration is not India and if Part I does not apply and if the agreement in question fulfils the requirement of Section 44 then Part II will apply and when Part II applies and it is found that agreement is not null or void or inoperative, the bar created under Section 45 would come into play and if bar created under Section 45 comes into play then it is a case where the Court below had no option but to refer the parties for arbitration as the bar under Section 45 would also apply and the suit itself was not maintainable. This statement of the law has our approval. It may only be mentioned that the judgment in Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 SCC 333 [Fuerst Day Lawson], referred to the provisions of the Foreign Awards Act, 1961 and Part II of the Arbitration Act of 1996 and not the Arbitration Act, 1940, as has been incorrectly held in paragraphs 53 and 54 of the aforesaid judgment. In addition, it may only be mentioned that the judgment of this Court by a learned Single Judge, under section 11 of the Arbitration Act, in TDM (supra) cannot, in any case, be regarded as a binding precedent, having been delivered by a Single Judge appointing an arbitrator under section 11 see State of West Bengal v. Associated Contractors, (2015) 1 SCC 32 (at paragraph 17).

34. The Bombay High Court has referred to and relied upon TDM (supra) to arrive at the opposite conclusion of Sasan I (supra). Thus, in Seven Islands Shipping Ltd. v. Sah Petroleums Ltd., (2012) 5 Mah LJ 822, one of us (Gavai, J.) sitting as Single Judge of the Bombay High Court, after placing reliance on TDM (supra), held:

> 13. Mandate of section 45 to refer a dispute to the Arbitrator is also on a condition that the said agreement has to be a legal agreement. When the Apex Court, in unequivocal terms has held that when both the Companies are incorporated in India

> an agreement cannot be termed as an International Arbitration Agreement, I am of the view that since both the plaintiff and the defendants are companies incorporated in India even for the sake of argument, there is an arbitration agreement, it cannot be an International Arbitration Agreement and as such not valid in law. However, I may clarify that I have not gone through the question whether in fact there is an arbitration agreement between the parties or not.

35. Likewise, another learned Single Judge of the Bombay High Court, in M/s. Addhar Mercantile Pvt. Ltd. v. Shree Jagadamba Agrico Exports Pvt. Ltd., Arbitration Application No. 197 of 2014 (decided on 12.06.2015), after referring to TDM (supra), then held:

> 8. It is not in dispute that both parties are from India. A perusal of clause 23 clearly indicates that intention of both parties is clear that the arbitration shall be either in India or in Singapore. If the seat of the arbitration would have be at Singapore, certainly English law will have to be applied. Supreme Court in case of TDM Infrastructure Private Limited (supra) has held that the intention of the legislature would be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.
>
> 9. Insofar as submission of the learned counsel for the respondent that if such provision is interpreted in the manner in which it is canvassed by the learned counsel for the applicant, it would be in violation of section 28(1)(a) is concerned, since I am of the view that the arbitration has to be conducted in India, under section 28(1)(a), the arbitral tribunal will have to decide the disputes in accordance with the substantive law for the time being in force in India. In my view the said agreement which provides for arbitration in India thus does not violate section 28(1)(a) as canvassed by the learned counsel for the respondent.

36. Both these decisions rely on the judgment of this Court in TDM (supra) and have not appreciated the law in its correct perspective and, therefore, stand overruled. On the other hand, a learned Single Judge of the Delhi High Court in GMR Energy Limited v. Doosan Power Systems India, CS (COMM) 447/2017 (decided on 14.11.2017), considered the same question and followed the judgment of the Madhya Pradesh High Court in Sasan I (supra) see paragraphs 29, 30 and 31. It distinguished the judgment in TDM (supra) correctly, as follows:

> 33. However, in para-36 of TDM Infrastructure (supra) Supreme Court clarified that any findings/observations made hereinabove were only for the purpose of determining the jurisdiction of the Court as envisaged under Section 11 of the 1996 Act and not for any other purpose and is also evident from the conclusions noted in para 20 and 22 of the report. Thus GMR Energy cannot rely upon the decision in TDM Infrastructure (supra) to contend that in the present case Part-I of the Arbitration Act would apply and not Part-II. The learned Single Judge of the Delhi High Court then relied upon this Courts judgment in Atlas (supra) in paragraph 41. In paragraph 43, the learned Single Judge then referred to the table that is set out in

Fuerst Day Lawson (supra) as follows:

> 43. Contention of learned counsel for GMR Energy that the judgment in Atlas (supra) was given prior to Arbitration and Conciliation Act, 1996, and therefore not applicable to the present case, also deserves to be rejected in view of the decision of the Supreme Court reported as (2011) 8 SCC 333 Fuerst Day Lawson v. Jindal Exports Ltd. wherein comparing the pre amendment and post amendment Arbitration Act it was observed that the new Act is more favourable to international arbitration than its previous incarnation. The report comparing the provisions of the two Acts noted:
>
> 64. The provisions of Chapter I of Part II of the 1996 Act along with the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961, insofar as relevant for the present are placed below in a tabular form:

Foreign Awards (Recognition Arbitration and Conciliation Act, and Enforcement) Act, 1961 1996
Part II: Enforcement of Certain Foreign Awards Chapter I: New York Convention Awards

2. Definition.In this Act, (a) in pursuance of an unless the context otherwise agreement in writing for requires, foreign award arbitration to which the means an award on Convention set forth in the differences between persons Schedule applies, and arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960

44. Definition.In this (a) in pursuance of an Chapter, unless the context agreement in writing for otherwise requires, foreign arbitration to which the award means an arbitral Convention set forth in the First award on differences between Schedule applies, and persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960

(b) in one of such territories as (b) in one of such territories as the Central Government being the Central Government, being satisfied that reciprocal satisfied that reciprocal provisions have been made, provisions have been made may, by notification in the may, by notification in the Official Gazette, declare to be Official Gazette, declare to be territories to which the said territories to which the said Convention applies. Convention applies.

3. Stay of proceedings in 45. Power of judicial authority respect of matters to be to refer parties to arbitration. referred to arbitration. Notwithstanding anything Notwithstanding anything contained in Part I or in the contained in the Arbitration Code of Civil Procedure, 1908 Act, 1940 (10 of 1940), or in (5 of 1908), a judicial authority, the Code of Civil Procedure, when seized of an action in a 1908 (5 of 1908), if any party matter in respect of which the to an agreement to which parties have made an Article II of the Convention set agreement referred to in Section forth in the Schedule applies, 44, shall, at the request of one or any person claiming of the parties or any person through or under him claiming through or under him, commences any legal refer the parties to arbitration, proceedings in

any court unless it finds that the said against any other party to the agreement is null and void, agreement or any person inoperative or incapable of claiming through or under him being performed. in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the court to stay the proceedings and the court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

4. Effect of foreign awards. 46. When foreign award (1) A foreign award shall, binding.Any foreign award subject to the provisions of which would be enforceable this Act, be enforceable in under this Chapter shall be India as if it were an award treated as binding for all made on a matter referred to purposes on the persons as arbitration in India. between whom it was made, (2) Any foreign award which and may accordingly be relied would be enforceable under on by any of those persons by this Act shall be treated as way of defence, set-off or binding for all purposes on the otherwise in any legal persons as between whom it proceedings in India and any was made, and may references in this Chapter to accordingly be relied on by enforcing a foreign award shall any of those persons by way be construed as including of defence, set off or references to relying on an otherwise in any legal award.

proceedings in India and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.

5. Filing of foreign awards in court.(1) Any person interested in a foreign award may apply to any court having jurisdiction over the subject-matter of the award that the award be filed in court. (2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.	
(3) The court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified why the award should not be filed.	
6. Enforcement of foreign award. (1) Where the court is satisfied	49. Enforcement of foreign awards.Where the court is satisfied that the foreign award

that the foreign award is enforceable under this Act, the court shall order the award to be filed and shall proceed to pronounce judgment according to the award.
(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except insofar as the decree is in excess of or not in accordance with the award.

is enforceable under this Chapter, the award shall be deemed to be a decree of that court.
Appealable orders.(1) An appeal shall lie from the order refusing to refer the parties to arbitration under Section 45;
enforce a foreign award under Section 48,
to the court authorised by law to hear appeals from such order.
(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

7. Conditions for enforcement of foreign awards.(1) A foreign award may not be enforced under this Act
if the party against whom it is sought to enforce the award proves to the court dealing with the case that the parties to the agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made; or the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(iii) the award deals with questions not referred or contains decisions on matters beyond the scope of the agreement:
Provided that if the decisions

48. Conditions for enforcement of foreign awards.(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that the parties to the agreement referred to in Section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the

on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or	submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or	(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(v) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of	(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent
which, that award was made; or	authority of the country in which, or under the law of which, that

(b) if the court dealing with the award was made. case is satisfied that (2) Enforcement of an arbitral

(i) the subject-matter of the award may also be refused if difference is not capable of the court finds that settlement by arbitration under (a) the subject-matter of the the law of India; or difference is not capable of

(ii) the enforcement of the settlement by arbitration under award will be contrary to the law of India; or public policy. (b) the enforcement of the award would be contrary to the public policy of India.

(2) If the court before which a Explanation.Without prejudice foreign award is sought to be to the generality of clause (b) of relied upon is satisfied that an this section, it is hereby application for the setting declared, for the avoidance of aside or suspension of the any doubt, that an award is in award has been made to a conflict with the public policy of competent authority referred India if the making of the award to in sub-clause (v) of clause was induced or affected by

(a) of subsection (1), the court fraud or corruption. may, if it deems proper, (3) If an application for the adjourn the decision on the setting aside or suspension of enforcement of the award and the award has been made to a may also, on the application of competent authority referred to the party claiming in clause (e) of sub-section (1) enforcement of the award, the court may, if it considers it order the other party to furnish proper, adjourn the decision on suitable security. the enforcement of

the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

8. Evidence.(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce	47. Evidence.(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court
the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; the original agreement for arbitration or a duly certified copy thereof; and such evidence as may be necessary to prove that the award is a foreign award. (2) If the award or agreement requiring to be produced under subsection (1) is in a foreign language, the party seeking to enforce the award	the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; the original agreement for arbitration or a duly certified copy thereof; and such evidence as may be necessary to prove that the award is a foreign award. (2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a

shall produce a translation into translation into English certified English certified as correct by as correct by a diplomatic or a diplomatic or consular agent consular agent of the country to of the country to which that which that party belongs or party belongs or certified as certified as correct in such other correct in such other manner manner as may be sufficient as may be sufficient according according to the law in force in to the law in force in India. India.

Explanation.In this section and all the following sections of this Chapter, court means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-

matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes.

9. Saving.Nothing in this Act shall	51. Saving.Nothing in this Chapter shall prejudice any
prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Act had not been passed; or	rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not been enacted.

(b) apply to any award made on an arbitration agreement governed by the law of India.

10. Repeal.The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), shall cease to have effect in relation to foreign awards to which this Act applies.

11. Rule-making power of the High Court.The High Court may make rules consistent with this Act as to the filing of foreign awards and all proceedings consequent thereon or incidental thereto; the evidence which must be furnished by a party seeking to enforce a foreign award under this Act; and

(c) generally, all proceedings in court under this Act.

52. Chapter II not to apply. Chapter II of this Part shall not apply in relation to foreign awards to which this Chapter applies.

65. A comparison of the two sets of provisions would show that Section 44, the definition clause in the 1996 Act is a verbatim reproduction of Section 2 of the previous Act (but for the words chapter in place of Act, First Schedule in place of Schedule and the addition of the word arbitral before the word award in Section 44). Section 45 corresponds to Section 3 of the previous Act.

66. Section 46 is a verbatim reproduction of Section 4(2) except for the substitution of the word chapter for Act. Section 47 is almost a reproduction of Section 8 except for the addition of the words before the court in sub-section (1) and an Explanation as to what is meant by court in that section.

67. Section 48 corresponds to Section 7; Section 49 to Section 6(1) and Section 50 to Section 6(2).

68. Apart from the fact that the provisions are arranged in a far more orderly manner, it is to be noticed that the provisions of the 1996 Act are clearly aimed at facilitating and expediting the enforcement of the New York Convention Awards.

69. Section 3 of the 1961 Act dealing with a stay of proceedings in respect of matters to be referred to arbitration was confined in its application to legal proceedings in any court and the court had a wider discretion not to stay the proceedings before it. The corresponding provision in Section 45 of the present Act has a wider application and it covers an action before any judicial authority. Further, under Section 45 the judicial authority has a narrower discretion to refuse to refer the parties to arbitration. The learned Single Judge thereafter arrived at the conclusion, on the facts of that case, that the arbitral award delivered in Singapore between the two Indian parties would be enforceable under Part II, and not Part I, of the Arbitration Act.

37. Likewise, a learned Single Judge of the Delhi High Court, in Dholi Spintex v. Louis Dreyfus, CS (COMM) 286/2020 (decided on 24.11.2020), had occasion to consider the same point of law, and after referring to Sasan I (supra), correctly held:

> 43. Learned counsel for the plaintiff has heavily relied upon Section 23 of the Contract Act which provides for considerations and object which are lawful and which are not, thus emphasizing that two Indian parties contracting out of Indian law would defeat the provisions of the law and would be opposed to public policy. Learned counsel for the plaintiff seeks either declaration of Clause 6 of the agreement between the parties as null and void or by applying the Blue Pencil Test give meaningful interpretation to clause-6 whereby the parties can then subject themselves to the jurisdiction of Indian Cotton Association. Three Judge Bench of the Honble Supreme Court in (2017) 2 SCC 228 Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd. emphasized the principle of party autonomy in arbitration and held that the same is virtually the backbone which permit parties to adopt the foreign law as the proper law of arbitration. In (2005) 5 SCC 465 Technip SA v. SMS Holding Pvt. Limited, a three Judge Bench of the Hon'ble Supreme Court dealing with the conflicts of law held that disregard of applicability of foreign law must relate to basic principles of morality and justice and only when the foreign law amounts to a flagrant or gross breach of such principle that power should be exercised to hold inapplicability of foreign law that too, exceptionally and with great circumspection. It was held that in a sense all statutes enacted by Parliament or the States can be said to be part of Indian public policy, but to discard a foreign law only because it is contrary to an Indian statute would defeat the basis of private international law to which India undisputedly subscribes.

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47. Therefore, an arbitration agreement between the parties being an agreement independent of the substantive contract and the parties can choose a different governing law for the arbitration, two Indian parties can choose a foreign law as the law governing arbitration. Further there being clearly a foreign element to the agreement between the parties, the two Indian parties, that is the plaintiff and defendant could have agreed to an international commercial arbitration governed by the laws of England. Hence Clause 6 of the contract dated 30 th May, 2019 between the parties is not null or void. The argument of the appellant based on sections 23 and 28 of the Contract Act

38. Mr. Himani has argued that even if Atlas (supra) is to be taken to be a binding precedent, it contains no discussion on how section 23 of the Contract Act is not infracted and does not, in any case, deal with his argument based on section 28(1)(a) and section 34(2A) of the Arbitration Act. Sections 23 and 28 of the Contract Act read as follows:

> 23. What considerations and objects are lawful, and what not.The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or

> involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.
>
> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void. 28. Agreements in restraint of legal proceedings void. Every agreement,
>
> (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or
>
> (b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.
>
> Exception 1.Saving of contract to refer to arbitration dispute that may arise.This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. ***

39. The elusive expression public policy appearing in section 23 of the Contract Act is a relative concept capable of modification in tune with the strides made by mankind in science and law. An important early judgment of the Court of Appeal, namely, Maxim Nordenfelt Guns and Ammunition Company v. Nordenfelt, [1893] 1 Ch. 630 [Nordenfelt], puts it thus:

> Rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification. Circumstances may change and make a commercial practice expedient which formerly was mischievous to commerce. But it is one thing to say that an occasion has arisen upon which to adhere to the letter of the rule would be to neglect its spirit, and another to deny that the rule still exists. The dicta which Lord Justice Fry cites from Hitchcock v. Coker [142. 6 A. & E. 348], from Tallis v. Tallis [1 E. & B. 391], and from Mallan v. May [11 M. & W. 653], are all dicta in cases of partial restraint, where the reasonableness of the particular contract necessarily came under consideration. The necessary protection of the individual may in such cases be the proper measure of the reasonableness of the bargain. When Lord Justice Fry passes on [14 Ch. D. 366] to examine the question of the existence of the common law rule, he assumes, as it appears to me, without sufficient justification, that complete protection of the individual is the only reason which ought to lie at the root of the doctrine.

But the reasonableness of the legal principle which forbids general restraint altogether is not the same thing as the reasonableness (as between the parties) of the bargain in any particular case. With

regard to the argument that the rule, if it existed, would be an artificial one, and would therefore admit of no exceptions, the judgments of the Judges and of the House of Lords in the case of Egerton v. Earl Brownlow [4 H. L. C. 1], illustrate, I submit, the distinction between a fixed rule of customary law and a rule based on reason and policy. The latter may admit of exceptions, although the former may not. (at pages 661-662) *** The result seems to me to be as follows: General restraints, or, in other words, restraints wholly unlimited in area, are not, as a rule, permitted by the law, although the rule admits of exceptions. Partial restraints, or, in other words, restraints which involve only a limit of places at which, of persons with whom, or of modes in which, the trade is to be carried on, are valid when made for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenantee. A limit in time does not, by itself, convert a general restraint into a partial one. That which the law does not allow is not to be tolerated because it is to last for a short time only. In considering, however, the reasonableness of a partial restraint, the time for which it is to be imposed may be a material element to consider. (at pages 662-663)

40. The classic judgment of this Court in Gherulal Parakh v.

Mahadeodas Maiya, 1959 Supp (2) SCR 406 [Gherulal] states as follows:

> Cheshire and Fifoot in their book on Law of Contract 3rd Edn., observe at p. 280 thus:
>
> The public interests which it is designed to protect are so comprehensive and heterogeneous, and opinions as to what is injurious must of necessity vary so greatly with the social and moral convictions, and at times even with the political views, of different judges, that it forms a treacherous and unstable ground for legal decision. These questions have agitated the Courts in the past, but the present state of the law would appear to be reasonably clear. Two observations may be made with some degree of assurance.
>
> First, although the rules already established by precedent must be moulded to fit the new conditions of a changing world, it is no longer legitimate for the Courts to invent a new head of public policy. A judge is not free to speculate upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions. He must expound, not expand, this particular branch of the law.

Secondly, even though the contract is one which prima facie falls under one of the recognized heads of public policy, it will not be held illegal unless its harmful qualities are indisputable. The doctrine, as Lord ATKIN remarked in a leading case, should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds In popular language the contract should be given the benefit of the doubt. Anson in his Law of Contract states the same rule thus, at p. 216:

> Jessel, M.R., in 1875, stated a principle which is still valid for the Courts, when he said: You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract ; and it is in reconciling freedom of contract with other public interests which are regarded as of not less importance that the difficulty in these cases arises .

We may say, however, that the policy of the law has, on certain subjects, been worked into a set of tolerably definite rules. The application of these to particular instances necessarily varies with the conditions of the times and the progressive development of public opinion and morality, but, as Lord Wright has said, public policy, like any other branch of the Common Law, ought to be, and I think is, governed by the judicial use of precedents. If it is said that rules of public policy have to be moulded to suit new conditions of a changing world, that is true; but the same is true of the principles of the Common Law generally. In Halsburys Laws of England, 3rd Edn., Vol. 8, the doctrine is stated at p. 130 thus:

> Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy. It seems, however, that this branch of the law will not be extended. The determination of what is contrary to the so-called policy of the law necessarily varies from time to time. Many transactions are upheld now which in a former generation would have been avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion. (at pages 432-434) *** The doctrine of public policy may be summarized thus: Public policy or the policy of the law is an illusive (sic elusive) concept; it has been described as untrustworthy guide, variable quality, uncertain one, unruly horse, etc; the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days. (at pages 439-440)

41. This judgment has been referred to with approval in several subsequent decisions. Thus, in Murlidhar Aggarwal v. State of U.P., (1974) 2 SCC 472, this Court held:

> 30. Public Policy has been defined by Winfield as a principle of judicial legislation or interpretation founded on the current needs of the community [Percy H. Winfield, Public Policy in English Common Law, 42 Harvard Law Rev. 76]. Now, this would show that the interests of the whole public must be taken into account; but it leads in practice to the paradox that in many cases what seems to be in contemplation is the interest of one section only of the public, and a small section at that. The explanation of the paradox is that the courts must certainly weigh the interests of the whole community as well as the interests of a considerable section of it, such as tenants, for instance, as a class as in this case. If the decision is in their favour, it means no more than that there is nothing in their conduct which is prejudicial to the nation as a whole. Nor is the benefit of the whole community always a mere tacit consideration. The courts may have to strike a balance in express terms between community interests and sectional interests. So, here we are concerned with the general freedom of contract which everyone possesses as against the principle that this freedom shall not be used to subject a class, to the harassment of suits without valid or reasonable grounds. Though there is considerable support in judicial dicta for the view that courts cannot create no (sic) new heads of public policy [Gherulal Parekh v. Mahadeodas Maiya, 1959 Supp (2) SCR 406, 440] , there is also no lack of judicial authority for the view that the categories of heads of public policy are not closed and that there remains a broad field within which courts can apply a variable notion of policy as a principle of judicial legislation or interpretation founded on the current needs of the community [Dennis Lloyd, Public Policy (1953) pp. 112 & 113.].

42. In Union of India v. Gopal Chandra Misra, (1978) 2 SCC 301, this Court held:

> 38. It must be remembered that the doctrine of public policy is only a branch of the common law, and its principles have been crystallised and its scope well delineated by judicial precedents.

It is sometimes described as a very unruly horse. Public policy, as Burroughs, J. put it in Fauntleroy case [Amicable Society v. Boeland, (1830) 4 Bligh, (NS) 194 : 2 Dow & C11] , is a restive horse and when you get astride of it, there is no knowing where it will carry you. Public policy can, therefore, be a very unsafe, questionable and unreliable ground for judicial decision and courts cannot, but be very cautious to mount this treacherous horse even if they must. This doctrine, as pointed out by this Court in Gherulal Parakh case [AIR 1959 SC 781 :

> 1959 Supp 2 SCR 406] (ibid.), can be applied only in a case where clear and undeniable harm to the public is made out. To quote the words of Subba Rao, J. (as he then was):
>
> Though theoretically it may be permissible to evolve a new head (of public policy) under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days. There are no circumstances, whatever, which would show that the withdrawal of the

> resignation by the appellant would cause harm to the public or even to an individual. The contention, therefore, is repelled.
>
> 43. This Courts judgment in Central Inland Water Transport Corpn. v.

Brojo Nath Ganguly, (1986) 3 SCC 156, after referring to the case law on the subject, then held:

> 92. The Indian Contract Act does not define the expression public policy or opposed to public policy. From the very nature of things, the expressions public policy, opposed to public policy, or contrary to public policy are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought the narrow view school and the broad view school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of the narrow view school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in Janson v. Driefontein Consolidated Gold Mines Ltd. [(1902) AC 484, 500]: Public policy is always an unsafe and treacherous ground for legal decision. That was in the year 1902. Seventy-eight years earlier, Burrough, J., in Richardson v.

Mellish [(1824) 2 Bing 229, 252 : 130 ER 294, 303 and (1824-

34) All ER 258, 266] described public policy as a very unruly horse, and when once you get astride it you never know where it will carry you. The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in Enderby Town Football Club Ltd. v. Football Assn. Ltd. [(1971) Ch 591, 606]: With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. Had the timorous always held the field, not only the doctrine of public policy but even the common law or the principles of Equity would never have evolved. Sir William Holdsworth in his History of English Law Vol. III, p. 55, has said:

> In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to

> weaken or negative them. It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

44. Likewise, in Rattan Chand Hira Chand v. Askar Nawaz Jung, (1991) 3 SCC 67, this Court took the view that:

> 17. I am in respectful agreement with the conclusion arrived at by the High Court. It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury to public interests or welfare would depend upon the times and climes. The social milieu in which the contract is sought to be enforced would decide the factum, the nature and the degree of the injury. It is contrary to the concept of public policy to contend that it is immutable, since it must vary with the varying needs of the society. What those needs are would depend upon the consensus value judgments of the enlightened section of the society. These values may sometimes get incorporated in the legislation, but sometimes they may not. The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society. So long as the courts keep themselves tethered to the ethos of the society and do not travel off its course, so long as they attempt to furnish the felt necessities of the time and do not refurbish them, their role in this respect has to be welcomed.

45. In Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644, this Court held:

48. Since the doctrine of public policy is somewhat open-

textured and flexible, Judges in England have shown certain degree of reluctance to invoke it in domestic law. There are two conflicting positions which are referred as the narrow view and the broad view. According to the narrow view courts cannot create new heads of public policy whereas the broad view countenances judicial law making in this areas. (See : Chitty on Contracts, 26th Edn., Vol. I, para 1133, pp. 685-686). Similar is the trend of the decision in India. In Gherulal Parakh v.

Mahadeodas Maiya [1959 Supp 2 SCR 406 : AIR 1959 SC 781] this Court favoured the narrow view when it said:

> though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these days (p. 440)

49. In later decisions this Court has, however, leaned towards the broad view. [See : Murlidhar Agarwal v. State of U.P. [(1974) 2 SCC 472, 482 : (1975) 1 SCR 575, 584]; Central Inland Water Transport Corpn. v. Brojo Nath Ganguly [(1986) 3 SCC 156, 217]; Rattan Chand Hira Chand v. Askar Nawaz Jung [(1991) 3 SCC 67, 76-77].]

46. In Zoroastrian Coop. Housing Society Ltd. v. District Registrar, Coop. Societies (Urban), (2005) 5 SCC 632, this Court held:

> 38. It is true that our Constitution has set goals for ourselves and one such goal is the doing away with discrimination based on religion or sex. But that goal has to be achieved by legislative intervention and not by the court coining a theory that whatever is not consistent with the scheme or a provision of the Constitution, be it under Part III or Part IV thereof, could be declared to be opposed to public policy by the court. Normally, as stated by this Court in Gherulal Parakh v. Mahadeodas Maiya [1959 Supp (2) SCR 406 : AIR 1959 SC 781] the doctrine of public policy is governed by precedents, its principles have been crystallised under the different heads and though it was permissible to expound and apply them to different situations it could be applied only to clear and undeniable cases of harm to the public. Although, theoretically it was permissible to evolve a new head of public policy in exceptional circumstances, such a course would be inadvisable in the interest of stability of society.

47. In State of Rajasthan v. Basant Nahata, (2005) 12 SCC 77, this Court held:

> 39. The principles have been crystallised under different heads and though it may be possible for the courts to expound and apply them to different situations but it is trite that the said doctrine should not be taken recourse to in clear and incontestable cases of harm to the public though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world. (See Gherulal Parakh v. Mahadeodas Maiya [1959 Supp (2) SCR 406 : AIR 1959 SC 781].)

48. In Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613, this Court held:

> 263. This Court in Gherulal Parakh v. Mahadeodas Maiya [AIR 1959 SC 781 : 1959 Supp (2) SCR 406] held that freedom of contract can be restricted by law only in

> cases where it is for some good of the community. The Companies Act, 1956 or the FERA, 1973, RBI Regulation or the IT Act do not explicitly or impliedly forbid shareholders of a company to enter into agreements as to how they should exercise voting rights attached to their shares.

49. A reading of the aforesaid judgments leads to the conclusion that freedom of contract needs to be balanced with clear and undeniable harm to the public, even if the facts of a particular case do not fall within the crystallised principles enumerated in well-established heads of public policy. The question that then arises is whether there is anything in the public policy of India, as so understood, which interdicts the party autonomy of two Indian persons referring their disputes to arbitration at a neutral forum outside India.

50. It can be seen that exception 1 to section 28 of the Contract Act specifically saves the arbitration of disputes between two persons without reference to the nationality of persons who may resort to arbitration. It is for this reason that this Court in Atlas (supra) referred to the said exception to section 28 and found that there is nothing in either section 23 or section 28 which interdicts two Indian parties from getting their disputes arbitrated at a neutral forum outside India.

51. However, it was argued by Shri Himani, with specific reference to section 28(1)(a) and section 34(2A) of the Arbitration Act, that since two Indian parties cannot opt out of the substantive law of India and therefore, ought to be confined to arbitrations in India, Indian public policy, as reflected in these two sections, ought to prevail. We are unable to agree with this argument. It will be seen that section 28(1)(a) of the Arbitration Act, when read with section 2(2), section 2(6) and section 4, only makes it clear that where the place of arbitration is situated in India, in an arbitration other than an international commercial arbitration (i.e. an arbitration where none of the parties, inter alia, happens to be a national of a foreign country or habitually resident in a foreign country), the arbitral tribunal shall decide the dispute in accordance with the substantive law for the time being in force in India.

52. It can be seen that section 28(1)(a) of the Arbitration Act makes no reference to an arbitration being conducted between two Indian parties in a country other than India, and cannot be held, by some tortuous process of reasoning, to interdict two Indian parties from resolving their disputes at a neutral forum in a country other than India.

53. Take the case of an Indian national who is habitually resident in a country outside India. Any dispute between such Indian national and an Indian national who is habitually resident in India would attract the provisions of section 2(1)(f)(i) and, consequently, section 28(1)(b) of the Arbitration Act, in which case two Indian nationals would be entitled to have their dispute decided in India in accordance with the rules of law designated by the parties as applicable to the substance of the dispute, which need not be Indian law. This, by itself, is a strong indicator that section 28 of the Arbitration Act cannot be read in the manner suggested by Mr. Himani.

54. Even otherwise, BALCO (supra), which has been referred to by the Madhya Pradesh High Court in Sasan I (supra), in paragraph 118 thereof specifically indicated that section 28(1)(a) of the

Arbitration Act will not apply where the seat is outside India as, in that event, the conflict of law rules of the country in which the arbitration takes place would have to be applied.

55. Coming to the example given by Shri Himani, namely, that the application of the Benami Transactions Act cannot be sought to be circumvented by two Indian nationals by resorting to an arbitration in a seat outside India, it is more than likely that, as in the present case, two Indian nationals will apply the substantive law of India to disputes between them which arise from a breach of contract which takes place in India. Even in the absence of any designation of which rules will apply to the substance of the dispute, which dispute pertains to transactions concluded in India and breach thereof, the substantive law of India will be applied by the arbitrator in accordance with the conflict of law rules of the country in which the arbitration takes place. Dicey, Morris and Collins on the Conflict of Laws (Sweet & Maxwell, 15th Edn.) states as follows:

> Rule 224 (1)(a) Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not be prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement. *** The principle in Ralli Bros.: It has already been seen that at common law there was thought to be a principle that a contract (whether lawful by its governing law or not) was, in general, invlaid in so far as the performance of it was unlawful by the law of the country where the contract was to be performed (lex loci solutionis). This principle as formulated in the second edition of this work, was adopted by the Court of Appeal in the Ralli Bros case. There remains a question, however, whether it is a rule of the conflict of laws (as its formulation would suggest) or is, on the contrary, a principle of the domestic law of contract relating to supervening illegality. The answer affects the question whether the principle has any application since the incorporation of the Rome Convention and the enactment of the Rome I Regulation. It is clear that if an English contract was to be performed abroad, the English court would refuse to enforce it if its performance would directly or indirectly violate the law of the place of performance. Hence an agreement governed by English law for the payment in Spain of chartered freight beyond the maximum permitted by Spanish law did not support an action in England. Where such a contract was illegal ab initio according to the foreign law and was made by the parties with the object of defying the foreign law, its invalidity would often follow from a general principle of public policy stated below in connection with Rule 229. We are here mainly concerned with contracts which are not against the public policy of this country by reason of their interference with the friendly relations towards a foreign government, but which nevertheless involve the doing of something unlawful according to the law of the country in which the contractual obligation is to be performed, e.g. because performance was rendered illegal by the lex loci solutionis after the making of the contract. If English law is the governing law of the contract, the consequences of illegality, whether initial or supervening, according to the law of the place of performance will be identical with those which arise from the initial or supervening illegality according to English domestic law of a contract to be performed in England.

For the principle in Ralli Bros, as so understood, to be applicable it is necessary that performance includes the doing in a foreign country of something which the laws of that country make it illegal to do. What this means is not that performance is excused whenever it includes an act in a country whose law makes this act illegal. It is not enough that performance is excused, or that the act is unlawful by the law of the country in which it happens to be done, or that the contract is contrary to public policy according to the law of the place of performance. It must be unlawful by the law of the country in which the act has to be done, i.e. by the law of the country in which, according to its express or implied terms, the contract is to be performed. It would not matter whether the person liable to perform would, by doing so, infringe the laws of the foreign country in which he is resident or carries on business, or of which he is a national, if the law of that country is neither the governing law of the contract nor the lex loci solutionis. Up to this point the question of the consequences of illegality according to the lex loci solutionis is covered by authority. It was, however, doubtful and highly controversial whether, according to the English rules of the conflict of laws, illegality according to the lex loci solutionis as such had any effect on the validity or operation of a contract governed by foreign law and to be performed in a third country, i.e. in a foreign country other than that of the governing law. Would an English court enforce a French contract for the payment in Spain of chartered freight beyond the maximum permitted by Spanish law? Would it hold that the consequences of such illegality were governed by Spanish law, the lex loci solutionis, or would it leave it to French law, the governing law of the contract, to determine whether illegality according to the lex loci solutionis had any, and if so what, effect upon the validity and operation of the contract? The prevailing academic view was that supervening illegality according to the law of the place of performance did not as such prevent an English court from enforcing the contract, unless it were governed by English law. The principle in Ralli Bros, on this view, was not a principle of the conflict of laws at all, but merely an application of the English domestic rules with regard to the discharge or suspension of contractual obligations by supervening illegality, and the illegality of performance under the lex loci solutionis was no more than a fact to be taken into account by an English court in judging whether performance had become impossible. Whether an English court would enforce a French contract for the doing in Spain of something which Spanish law had forbidden after the making of the contract would depend on French law, and, in particular, on the French law of suspension or discharge of contracts. There was no direct authority on the point. In Kahler v. Midland Bank Ltd. Lord Reid said that the law of England will not require an act to be done in performance of an English contract if such act.would be unlawful by the law of the country in which the act has to be done. In Zivnostenska Banka v. Frankman, however, he regarded it as settled law that, whatever be the proper law of the contract, an English court will not require a party to do an act in performance of a contract which would be an offence under the law in force at the place where the act is to be done.

56. The case of Ralli Brothers was followed in Foster v. Driscoll 1929 1 Kings Bench 470. Both these judgments were then referred to in Regazzoni v. KC Sethia [1958] A.C. 301. In this case, the House of Lords decided a case in which the respondents agreed to sell and deliver to the appellant, jute bags. Both parties contemplated that they should be shipped from India to Genoa for resale in South Africa. The parties were also aware that the export of jute from India to South Africa was prohibited by Indian law. Despite the fact that English law was the proper law of the contract, the House of Lords held that the contract was unenforceable since an English court will not enforce a contract

which violates the law of a foreign and friendly state. Vicount Simonds put it thus:

> The question then arises and it is, as I say, the only question for your Lordships' consideration whether the respondents were justified in repudiating the contract. They claim to be justified on the ground that I have already stated.

Their broad proposition is that whether or not the proper law of the contract is English law, an English court will not enforce a contract, or award damages for its breach, if its performance will involve the doing of an act in a foreign and friendly State which violates the law of that State. For this they cite the authority of the well-known case of Foster v. Driscoll, [1929] 1 K.B. 470 and much of the debate in this House has been whether that case was rightly decided, and if so, whether it is distinguishable from the present case. The appellant contends that it was not rightly decided, and further invokes a familiar principle which he states in these wide but questionable terms, An English court will not have regard to a foreign law of a penal, revenue, or political character, and claims that the Indian law here in question is of such a character. (at pages 317-318) *** Here, my Lords, was a formidable line of authority when in 1920 Ralli Brothers v. Compañia Naviera Sota y Aznar, [1920] 2 K.B. 287 came before the Court of Appeal. In that case the contract in suit was governed by English law but it required the performance in Spain of an act illegal by Spanish law, and it was held that for that reason it could not be enforced. I will cite one passage only from the judgment of Scrutton L.J. Where, he said, [1920] 2 K.B. 287, 304: a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent States. In the Ralli Brothers case, [1920] 2 K.B. 287, the relevant law was not a revenue law, and I am content to assume that Scrutton L.J. might have qualified his statement if he had had such a law in mind. But I venture to return to what I said earlier in this opinion. It does not follow from the fact that today the court will not enforce a revenue law at the suit of a foreign State that today it will enforce a contract which requires the doing of an act in a foreign country which violates the revenue law of that country. The two things are not complementary or co-extensive. This may be seen if for revenue law penal law is substituted. For an English court will not enforce a penal law at the suit of a foreign State, yet it would be surprising if it would enforce a contract which required the commission of a crime in that State. It is sufficient, however, for the purposes of the present appeal to say that, whether or not an exception must still be made in regard to the breach of a revenue law in deference to old authority, there is no ground for making an exception in regard to any other law. I should myself have said and this is, I think, the only point upon which I do not agree with the Court of Appeal that the present case was precisely covered by the decision in Ralli Brothers, [1920] 2 K.B. 287. For when the fact is found that the very thing which the parties intended to do was to export the jute bags from India in order that they might go via Genoa to the Union of South Africa, it appears to me irrelevant that upon the face of the documents that wrongful intention was not disclosed. But, whether this is so or not, it is clearly covered by Foster v. Driscoll, [1929] 1 K.B. 470, a decision the correctness of which is not to be doubted. The distinctive feature of the case was that Scrutton L.J. thought that the contract there in question could be carried out legally, and for that reason, differing from Lawrence and Sankey L.JJ., held that it was not invalid. The principle of the decision in Ralli Brothers, [1920] 2 K.B. 287 was emphatically reasserted and the apparent

innocence of the documents was disregarded, the guilty intention being proved ab extra. So, here, it has been conclusively found that the common intention of the parties was to violate the law of India, and it is of no consequence that the documents did not disclose their intention. I ought not to part from the case without noting that Sankey L.J. observed that the cases relating to the breach of a revenue law were not germane to the issue. Nor are they germane to this appeal. Whether they are still to be regarded as a binding authority is a question that must await determination. (at pages 321-323) Lord Reid, concurring, held:

> The only recent authority which is directly in point is Foster v. Driscoll, [1929] 1 K.B. 470. There Scrutton L.J. dissented because he took a different view of the facts: if he had held that performance of the contract necessarily involved a breach of American law, I think that he would have agreed with the majority. He said, [1929] 1 K.B. 470, 496: I have no doubt that if seller and buyer agreed to ship the whisky into the United States contrary to the laws of that country the contract would not be enforced here: Ralli's case, [1920] 2 K.B. 287, not because it was illegal here but as a matter of public policy based on international comity. He then cited with approval, [1929] 1 K.B. 470, 497, Dicey's Conflict of Laws, 4th ed., p. 620: It must, however, be noted that if a contract is an English contract, it will only be held invalid on account of illegality if it actually necessitates the performance in a foreign and friendly country of some act which is illegal by the law of such country. And he also quoted with approval a passage from the judgment of Blackburn J. in Waugh v. Morris, (1873) L.R. 8 Q.B. 202, 208:

We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance. By a thing which cannot be performed without a violation of the law, I think that Blackburn J. meant a thing which the contract expressly or by clear implication requires to be done. This contract does not require the seller to obtain the goods from India: it is only after investigation of the facts that it appears that he could not have got them anywhere else. And this contract does not disclose the buyer's intention to send the goods to South Africa. On the face of it this contract could be performed without a breach of the laws of any country. I shall also quote from what Lawrence L.J. said in Foster's case, [1929] 1 K.B. 470, 510:On principle, however, I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed; and none the less so because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would instigate or aid and abet some other person to commit it. These passages cover the present case, and I agree with them.

Finally, it was argued that, even if there be a general rule that our courts will take notice of foreign laws so that agreements to break them are unenforceable, that rule must be subject to exceptions

and this Indian law is one of which we ought not to take notice. It may be that there are exceptions. I can imagine a foreign law involving persecution of such a character that we would regard an agreement to break it as meritorious. But this Indian law is very far removed from anything of that kind. It was argued that this prohibition of exports to South Africa was a hostile act against a Commonwealth country with which we have close relations, that such a prohibition is contrary to inter national usage, and that we cannot recognize it without taking sides in the dispute between India and South Africa.

My Lords, it is quite impossible for a court in this country to set itself up as a judge of the rights and wrongs of a controversy between two friendly countries, we cannot judge the motives or the justifications of governments of other countries in these matters and, if we tried to do so, the consequences might seriously prejudice international relations. By recognizing this Indian law so that an agreement which involves a breach of that law within Indian territory is unenforceable we express no opinion whatever, either favourable or adverse, as to the policy which caused its enactment. In my judgment this appeal should be dismissed. (at pages 324-326)

57. It will thus be seen that where the law of India prohibits a certain act, the conflict of law rules as set down in Diceys authoritative treatise will take care of this situation in most cases as the arbitrators would then apply these rules on the ground of international comity between nations in cases which arise between two Indian nationals in an award made outside India, which would fall within the definition of foreign award under Section 44 of the 1996 Act.

58. Even otherwise, a ground may be made out under section 48 against enforcement of a foreign award where enforcement of such award would be contrary to the public policy of India. If, on the facts of a given case, it is found that two Indian nationals have circumvented a law which pertains to the fundamental policy of India, such foreign award may then not be enforced under section 48(2)(b) of the Arbitration Act. On the assumption that Mr. Himanis example of the Benami Transactions Act pertains to the fundamental policy of Indian law, if the foreign award is contrary to such fundamental policy, such award will then not be enforced in India.

59. When it comes to the ground raised under section 34(2A) of the Arbitration Act, it is clear that in an international commercial arbitration, say, between an Indian national habitually resident outside India and an Indian national resident in India, even when the arbitration takes place in India resulting in an award being made in India, the ground available under section 34(2A) would not be available, as it would not apply to an international commercial arbitration held in India. In agreeing to a neutral forum outside India, parties agree that instead of one bite at the cherry under section 34 of the Arbitration Act, where an arbitration between two Indian nationals is conducted in India [with the grounds for setting aside the award being available under section 34(2A)], what is instead put in place by the parties is two bites at the cherry, namely, the recourse to a court or tribunal in a country outside India for setting aside the arbitral award passed in that country on grounds available in that country (which may be wider than the grounds available under section 34 of the Arbitration Act), and then resisting enforcement under the grounds mentioned in section 48 of the Arbitration Act. The balancing act between freedom of contract and clear and undeniable harm to the public must be resolved in favour of freedom of contract as there is no clear and undeniable

harm caused to the public in permitting two Indian nationals to avail of a challenge procedure of a foreign county when, after a foreign award passes muster under that procedure, its enforcement can be resisted in India on the grounds contained in section 48 of the Arbitration Act, which includes the foreign award being contrary to the public policy of India.

Party Autonomy

60. The decks have now been cleared to give effect to party autonomy in arbitration. Party autonomy has been held to be the brooding and guiding spirit of arbitration. Thus, in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126, this Court held:

> 5. Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as curial law. The interplay and application of these different laws to an arbitration has been succinctly explained by this Court in Sumitomo Heavy Industries Ltd. v.

ONGC Ltd. [Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (1998) 1 SCC 305], which is one of the earliest decisions in that direction and which has been consistently followed in all the subsequent decisions including the recent Reliance Industries Ltd. v. Union of India [Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737] . *** 10. In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement.

61. Likewise, in Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd., (2017) 2 SCC 228, this Court held that a two-tier arbitration, namely, an arbitration at an original forum followed by an appeal at an appellate forum, would not be interdicted by the Arbitration Act, given the free party autonomy for parties to enter into an agreement as to choice of fora and procedure at such fora.

Thereafter, this Court, under the head party autonomy, put it thus:

> Party autonomy
>
> 38. Party autonomy is virtually the backbone of arbitrations. This Court has expressed this view in quite a few decisions. In two significant passages in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. [Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126 :

(2016) 2 SCC (Civ) 580, Hon'ble Judges/Coram: Anil R. Dave, Kurian Joseph and Amitava Roy, JJ.] this Court dealt with party autonomy from the point of view of the contracting parties and its importance in commercial contracts. In para 5 of the Report, it was observed: (SCC p. 130) 5. Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as curial law. The interplay and application of these different laws to an arbitration has been succinctly explained by this Court in Sumitomo Heavy Industries Ltd. v. ONGC Ltd., [Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (1998) 1 SCC 305] which is one of the earliest decisions in that direction and which has been consistently followed in all the subsequent decisions including the recent Reliance Industries Ltd. v. Union of India [Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737] . (emphasis in original) Later in para 10 of the Report, it was held: (SCC pp. 131-32) 10. In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement. (emphasis in original)

39. In Union of India v. U.P. State Bridge Corpn. Ltd. [Union of India v. U.P. State Bridge Corpn. Ltd., (2015) 2 SCC 52 : (2015) 1 SCC (Civ) 732] this Court accepted the view [O.P. Malhotra on the Law and Practice of Arbitration and Conciliation (3rd Edn. revised by Ms Indu Malhotra, Senior Advocate)] that the A&C Act has four foundational pillars and then observed in para 16 of the Report

that: (SCC p. 64) 16. First and paramount principle of the first pillar is fair, speedy and inexpensive trial by an Arbitral Tribunal. Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to. (emphasis in original)

40. This is also the view taken in Law and Practice of International Commercial Arbitration [Chapter 6. Conduct of the Proceedings in Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration [Sixth Edn., © Kluwer Law International, Oxford University Press 2015] pp. 353-414, Para 6.07] wherein it is said:

> Party autonomy is the guiding principle in determining the procedure to be followed in an international arbitration. It is a principle that is endorsed not only in national laws, but also by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law.

41. However, the authors in Comparative International Commercial Arbitration [Chapter 17: Determination of Applicable Law in Julian D.M. Lew, Loukas A. Mistelis, et al., Comparative International Commercial Arbitration (Kluwer Law International 2003) pp. 411-437, Para 17-8] go a step further in that, apart from procedure, they say that party autonomy permits parties to have their choice of substantive law as well. It is said:

> All modern arbitration laws recognise party autonomy, that is, parties are free to determine the substantive law or rules applicable to the merits of the dispute to be resolved by arbitration. Party autonomy provides contracting parties with a mechanism of avoiding the application of an unfavourable or inappropriate law to an international dispute. This choice is and should be binding on the Arbitration Tribunal. This is also confirmed in most arbitration rules. (emphasis in original)

42. Be that as it may, the legal position as we understand it is that the parties to an arbitration agreement have the autonomy to decide not only on the procedural law to be followed but also the substantive law. The choice of jurisdiction is left to the contracting parties. In the present case, the parties have agreed on a two-tier arbitration system through Clause 14 of the agreement and Clause 16 of the agreement provides for the construction of the contract as a contract made in accordance with the laws of India. We see nothing wrong in either of the two clauses mutually agreed upon by the parties. In a very important passage, where it was sought to be argued that a two-

tier arbitration would be contrary to the public policy of India, this Court held:

> Public policy and two-tier arbitrations
>
> 43. The question that now arises is the interplay between public policy and party autonomy and therefore whether embracing the two-tier arbitration system is

contrary to public policy.

44. Years ago, it was said per Burroughs, J. in Amicable Society v. Bolland [Amicable Society v. Bolland, (1830) 4 Bligh (NS) 194 : 5 ER 70 : 2 Dow & Cl 1 : 6 ER 630. [Ed.: See also per Burroughs, J. in Richardson v. Mellish, 1824 Bing 229 at 252 : 130 ER 293 at 303, wherein also he observed: Public Policy it is a very unruly horse, and when once you get astride it you never know where it will carry you.]] (Fauntleroy case):

> Public policy is a restive horse and when you get astride of it, there is no knowing where it will carry you. Perhaps to assist in getting over this uncertainty, Mustill and Boyd [The Law and Practice of Commercial Arbitration in England, London, Butterworths 1982 pp. 245-246] identify four classes of provision regarded by the courts as contrary to public policy. They are: (i) Terms which affect the substantive content of the award; (ii) Terms which purport to exclude or restrict the supervisory jurisdiction of the Court; (iii) Terms which require the arbitrator to conduct the reference in an unacceptable manner; and (iv) Terms which purport to empower the arbitrator to carry put procedures or exercise powers which lie exclusively within the jurisdiction of the courts. Clause 14 of the agreement between the parties does not fall under any of these situations. *** 46. For the present we are concerned only with the fundamental or public policy of India. Even assuming the broad delineation of the fundamental policy of India as stated in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] we do not find anything fundamentally objectionable in the parties preferring and accepting the two-tier arbitration system. The parties to the contract have not by-passed any mandatory provision of the A&C Act and were aware, or at least ought to have been aware that they could have agreed upon the finality of an award given by the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. Yet they voluntarily and deliberately chose to agree upon a second or appellate arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. There is nothing in the A&C Act that prohibits the contracting parties from agreeing upon a second instance or appellate arbitration either explicitly or implicitly. No such prohibition or mandate can be read into the A&C Act except by an unreasonable and awkward misconstruction and by straining its language to a vanishing point. We are not concerned with the reason why the parties (including HCL) agreed to a second instance arbitration the fact is that they did and are bound by the agreement entered into by them. HCL cannot wriggle out of a solemn commitment made by it voluntarily, deliberately and with eyes wide open. Nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals, as has been held hereinabove.

Section 10 of the Commercial Courts Act.

62. Shri Himani relied upon section 10 read with section 21 of the Commercial Courts Act to argue that in all cases between Indian nationals which result in awards delivered in a country outside India, section 10(3) would apply, as a result of which the impugned judgment having been made by a High Court, is made without jurisdiction. In order to appreciate this submission, sections 10 and 21 of the Commercial Courts Act are set out hereinbelow:

> 10. Jurisdiction in respect of arbitration matters.Where the subject-matter of an arbitration is a commercial dispute of a specified value and (1) If such arbitration is an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.
>
> (2) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.
>
> (3) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted. 21. Act to have overriding effect.Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act.

63. It must be remembered that when a foreign award is sought to be enforced under Part II of the Arbitration Act, the explanation to section 47 makes it clear that it is the High Court alone which is the court on whose doors the applicant must knock. This is sought to be answered by Shri Himani by stating that since the explanation to section 47 is in direct collision with section 10(3) of the Commercial Courts Act, vide section 21 of the Commercial Courts Act, section 10(3) would prevail over the explanation to section 47.

64. Before entering into a discussion as to whether there is any direct collision between the aforesaid provisions, one is first to appreciate the purport of the expression international commercial arbitration contained in section 10(1) of the Commercial Courts Act. We have already seen how section 2(1)(f) of the Arbitration Act which defines the expression international commercial arbitration is only for a limited purpose, namely, for the purpose of Part I of the Arbitration Act. Under section 2(2) of the Commercial Courts Act, words and expressions used and not defined in

the Commercial Courts Act but defined in the CPC and the Indian Evidence Act, 1872 shall have the same meanings respectively assigned to them in that Code and the Act. Conspicuous by its absence are definitions contained in the Arbitration Act.

65. We have therefore to see what is the purport of the expression international commercial arbitration when used in section 10(1) of the Commercial Courts Act.

66. We have already seen how international commercial arbitration, when used in the proviso to section 2(2) of the Arbitration Act, does not refer to the definition contained in section 2(1)(f) but would have reference to arbitrations which take place outside India, awards made in such arbitrations being enforceable under Part II of the Arbitration Act. It will be noted that section 10(1) applies to international commercial arbitrations, and applications or appeals arising therefrom, under both Parts I and II of the Arbitration Act. When applications or appeals arise out of such arbitrations under Part I, where the place of arbitration is in India, undoubtedly, the definition of international commercial arbitration in section 2(1)(f) will govern. However, when applied to Part II, international commercial arbitration has reference to a place of arbitration which is international in the sense of the arbitration taking place outside India. Thus construed, there is no clash at all between section 10 of the Commercial Courts Act and the explanation to section 47 of the Arbitration Act, as an arbitration resulting in a foreign award, as defined under section 44 of the Arbitration Act, will be enforceable only in a High Court under section 10(1) of the Commercial Courts Act, and not in a district court under section 10(2) or section 10(3).

67. Even otherwise, this Court has made it clear in BGS SGS SOMA JV v. NHPC, (2020) 4 SCC 234 (at paragraphs 12 and 13) that the substantive law as to appeals and applications is laid down in the Arbitration Act whereas the procedure governing the same is laid down in the Commercial Courts Act. In this context, it has also been held that the Arbitration Act is a special Act vis-à-vis the Commercial Courts Act which is general, and which applies to the procedure governing appeals and applications in cases other than arbitrations as well. In Kandla Export Corpn. v. OCI Corpn., (2018) 14 SCC 715, this Court held:

> 20. Given the judgment of this Court in Fuerst Day Lawson [Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178] , which Parliament is presumed to know when it enacted the Arbitration Amendment Act, 2015, and given the fact that no change was made in Section 50 of the Arbitration Act when the Commercial Courts Act was brought into force, it is clear that Section 50 is a provision contained in a self-contained code on matters pertaining to arbitration, and which is exhaustive in nature. It carries the negative import mentioned in para 89 of Fuerst Day Lawson [Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178] that appeals which are not mentioned therein, are not permissible. This being the case, it is clear that Section 13(1) of the Commercial Courts Act, being a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration Act. *** 27. The matter can be looked at from a slightly different angle. Given the objects of both the statutes, it is clear that arbitration itself is meant

> to be a speedy resolution of disputes between parties. Equally, enforcement of foreign awards should take place as soon as possible if India is to remain as an equal partner, commercially speaking, in the international community.

In point of fact, the raison d'être for the enactment of the Commercial Courts Act is that commercial disputes involving high amounts of money should be speedily decided. Given the objects of both the enactments, if we were to provide an additional appeal, when Section 50 does away with an appeal so as to speedily enforce foreign awards, we would be turning the Arbitration Act and the Commercial Courts Act on their heads. Admittedly, if the amount contained in a foreign award to be enforced in India were less than Rs 1 crore, and a Single Judge of a High Court were to enforce such award, no appeal would lie, in keeping with the object of speedy enforcement of foreign awards. However, if, in the same fact circumstance, a foreign award were to be for Rs 1 crore or more, if the appellants are correct, enforcement of such award would be further delayed by providing an appeal under Section 13(1) of the Commercial Courts Act. Any such interpretation would lead to absurdity, and would be directly contrary to the object sought to be achieved by the Commercial Courts Act viz. speedy resolution of disputes of a commercial nature involving a sum of Rs 1 crore and over. For this reason also, we feel that Section 13(1) of the Commercial Courts Act must be construed in accordance with the object sought to be achieved by the Act. Any construction of Section 13 of the Commercial Courts Act, which would lead to further delay, instead of an expeditious enforcement of a foreign award must, therefore, be eschewed. Even on applying the doctrine of harmonious construction of both statutes, it is clear that they are best harmonised by giving effect to the special statute i.e. the Arbitration Act, vis-à-vis the more general statute, namely, the Commercial Courts Act, being left to operate in spheres other than arbitration.

68. It is interesting to note that the Arbitration and Conciliation (Amendment) Act, 2015 and the Commercial Courts Act, 2015, both came into effect from 23.10.2015. In R.S. Raghunath v. State of Karnataka, (1992) 1 SCC 335, this Court held that even a later general law which contains a non-obstante clause does not override a special law as both must be held to operate as follows:

> 13. As already noted, there should be a clear inconsistency between the two enactments before giving an overriding effect to the non-obstante clause but when the scope of the provisions of an earlier enactment is clear the same cannot be cut down by resort to non-obstante clause. In the instant case we have noticed that even the General Rules of which Rule 3(2) forms a part provide for promotion by selection. As a matter of fact Rules 1(3)(a) and 3(1) and 4 also provide for the enforceability of the Special Rules. The very Rule 3 of the General Rules which provides for recruitment also provides for promotion by selection and further lays down that the methods of recruitment shall be as specified in the Special Rules, if any.
>
> In this background if we examine the General Rules it becomes clear that the object of these Rules only is to provide broadly for recruitment to services of all the departments and they are framed generally to cover situations that are not covered by the Special Rules of any particular department. In such a situation both the Rules including Rules 1(3)(a), 3(1) and 4 of General Rules should be read together. If so

read it becomes plain that there is no inconsistency and that amendment by inserting Rule 3(2) is only an amendment to the General Rules and it cannot be interpreted as to supersede the Special Rules. The amendment also must be read as being subject to Rules 1(3)

(a), 3(1) and 4(2) of the General Rules themselves. The amendment cannot be read as abrogating all other Special Rules in respect of all departments. In a given case where there are no Special Rules then naturally the General Rules would be applicable. Just because there is a non-obstante clause, in Rule 3(2) it cannot be interpreted that the said amendment to the General Rules though later in point of time would abrogate the special rule the scope of which is very clear and which co- exists particularly when no patent conflict or inconsistency can be spelt out. As already noted Rules 1(3)(a), 3(1) and 4 of the General Rules themselves provide for promotion by selection and for enforceability of the Special Rules in that regard. Therefore there is no patent conflict or inconsistency at all between the General and the Special Rules.

69. Consequently, this argument of the appellant also fails.

Whether an application under section 9 of the Arbitration Act would lie

70. Mr. Dewan, by way of cross objection, has challenged the finding of the Gujarat High Court by the impugned judgment that the section 9 application that was made by the respondent was not maintainable by reason of the expression international commercial arbitration appearing in the proviso to section 2(2) having the meaning to be ascribed by section 2(1)(f) of the Arbitration Act. We have already held in paragraph 14 above that this view of the law is incorrect. Consequently, this part of the judgment is set aside, it being held that the application made by the respondent under section 9 would be maintainable.

71. In light of the findings arrived at by us, we uphold the impugned judgment of the Gujarat High Court, except for the finding on the section 9 application of the respondent being held to be non-maintainable. The appeal is disposed of accordingly.

.....J.

[ROHINTON FALI NARIMAN] .....J.

[B.R. GAVAI] .....J.

[HRISHIKESH ROY] New Delhi;

April 20, 2021.

Supreme Court of India
Renusagar Power Co. Ltd vs General Electric Co on 7 October, 1993
Equivalent citations: 1994 AIR 860, 1994 SCC Supl. (1) 644
Author: S Agrawal
Bench: Agrawal, S.C. (J)

PETITIONER:
RENUSAGAR POWER CO. LTD.

Vs.

RESPONDENT:
GENERAL ELECTRIC CO.

DATE OF JUDGMENT07/10/1993

BENCH:
AGRAWAL, S.C. (J)
BENCH:
AGRAWAL, S.C. (J)
VENKATACHALLIAH, M.N.(CJ)
ANAND, A.S. (J)

CITATION:
1994 AIR 860 1994 SCC Supl. (1) 644
JT 1993 Supl. 211 1993 SCALE (4)44

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by S.C. AGRAWAL, J.- The decision in these appeals would, we hope, mark the culmination of the protracted litigation arising out of a contract entered into by the parties on August 24, 1964 for the supply and erection of a thermal power plant at Renukoot in District Mirzapur, U.P.

2. Renusagar Power Co. Ltd. (for short 'Renusagar'), the appellant in C.A. Nos. 71 and 71-A of 1990 and the respondent in C.A. No. 370 of 1992, is a company incorporated under the Indian Companies Act, 1956 engaged in the production and sale of electric power. General Electric Company (for short 'General Electric'), respondent in C.A. Nos. 71 and 71-A and appellant in C.A. No. 370 of 1992, is a company incorporated under the laws of the State of New York in United States of America and is engaged in the business of manufacturing, selling and servicing electrical products and various ancillary activities. After negotiations, the parties arrived at an arrangement whereunder General

Electric was to supply to Renusagar the equipment and power services for setting up a thermal power plant to be known as 'Renusagar Power Station' at Renukoot and, on November 27, 1963, Renusagar moved the Government of India for its approval. By its letter dated January 2, 1964, the Government of India gave its approval to the proposals and thereafter a formal contract was executed by the parties on August 24, 1964. Under the said contract, General Electric undertook to supply equipment and services for a plant having a capacity of 135,800 K.W. The total price for the electrical and mechanical equipment, spare parts, freight forwarding services, plant design and consulting services was US $ 13,195,000. The contract price for all electrical and mechanical equipment and spare parts was FAS vessel, U.S.A. port so selected by seller (Article

11). All items of the equipment were to be delivered along with vessel at New York not later than 15 months from the contract effective date (which was December 31, 1964) and the erection of the plant was to be completed within 30 months from the contract effective date (Article IV-A 1). 10 per cent of the total contract basic price (US $ 1,319,500) was to be paid either in cash or by Letter of Credit. The balance 90 per cent of the price (US $ 11,875,500) plus interest at the rate of 6 1/2 per cent per annum from the 16th to the 30th month of the contract effective date (US $ 900,558.75) totalling US $ 12,776,058.75 was to be paid in 16 equal six monthly instalments commencing from the date of the expiry of 30 months from the contract effective date, and the last instalment was payable on the date of expiry of 120 months from the contract effective date (Article III). Since the contract effective date was December 31, 1964 the first instalment was payable on June 30, 1967 and the last, i.e., 16th instalment was payable on December 31, 1974. In the contract, it was also provided that Renusagar would execute unconditional negotiable promissory notes in four series (A-B-C-D) in respect of the 16 instalments [Article 111-A 3(a)] and that the notes shall be prepared substantially in the form shown in the attached Ext. 'B' entitled "Promissory Note" and shall bear interest, at the rate of 6 1/2 per cent per annum on the outstanding principal balance commencing from 30 months after contract effective date [Article III-A 3(c)]. A provision was also made that the payment of the full amount of each note shall be unconditionally guaranteed by the United Commercial Bank or other mutually acceptable bank. [Article III-A 3(e)]. The contract contained an arbitration clause which provides that any disagreement arising out of or related to the contract which the parties are unable to resolve by sincere negotiation shall be finally settled in accordance with the Arbitration Rules of the International Chamber of Commerce (for short 'ICC'). Each party would appoint one arbitrator and the Court of Arbitration of the ICC would appoint a third arbitrator (Article XVII). It was also agreed that the rights and obligations of the parties under the Contract shall be governed in all respects by the laws of the State of New York, USA (Article XIX-A).

3. It was, also, provided that if General Electric received an exemption from the Government of India from the payment of income tax levied by the Government of India on interest payments made by Renusagar then the interest rate on that series of promissory notes as exempted shall be reduced from 6 1/2 per cent to 6 per cent per annum commencing on the date such exemption is made effective and the notes so affected shall be replaced by new notes [Article III-A 3(b)]. In the contract it was stated that General Electric intended to apply to the Central Government of India for exemption from income tax on the interest (including capitalised interest and interest thereon) and Renusagar undertook to assist General Electric in expediting the application of General Electric for exemption. It was also agreed that should the application of General Electric be denied Renusagar

may withhold the Indian income tax applicable to any payments of interest, but Renusagar was to furnish General Electric with receipts on all withheld amounts paid to the Government of India. [Article XIV-B].

4. By its orders dated September 3, 1965 and June 7, 1967 the Government of India gave their approval under Section 10(15)(iv)(c) of the Income Tax Act, 1961 to the loan obtained by Renusagar from General Electric and thereby exempted the interest paid on the said loan from payment of income tax. The said exemption was, however, withdrawn by the order of the Government of India dated September 11, 1969 whereby the orders granting exemption were cancelled retrospectively and General Electric was held liable to pay Indian income tax on the interest payable @ 6.5 per cent per annum.

5. Renusagar filed a writ petition (C.W. No. 179 of 1970) before Delhi High Court on February 24, 1970 wherein it challenged the above order of the Government of India dated September 11, 1969 relating to cancellation or revocation of the tax exemption. In the said writ petition, the Delhi High Court on February 24, 1970 passed an ad interim order restraining the Government of India and its officers from enforcing or implementing the said order dated September 11, 1969. The said order was continued by order dated May 18, 1970 subject to Renusagar furnishing security for Rs 4 lakhs to the satisfaction of Commissioner of Income Tax, Lucknow. Renusagar furnished the necessary security and as a result, the operation of the order dated September 11, 1969 was suspended. Renusagar, however, did not remit the amount of interest calculated @ 6 per cent per annum payable to General Electric in terms of the contract. Renusagar only remitted 27 per cent of the amount of interest calculated @ 6 1/2 per cent per annum and it did not deposit the balance amount of 73 per cent by way of tax with the Government but retained the same with themselves. It, however, sent letters to General Electric to the effect that they had deducted the said amount towards tax and had retained the same with itself. Originally General Electric was not impleaded as a party in the writ petition before the Delhi High Court and it got itself impleaded as a respondent in the writ petition by moving an application dated October 28, 1977. The writ petition was decided by the Delhi High Court by its judgment dated November 17, 1980 whereby the writ petition was allowed and the order dated September 11, 1969 was set aside. As a result the exemption from the payment of income tax on the interest payable by Renusagar was restored and the liability of Renusagar for interest was reduced from 6 1/2 per cent to 6 per cent. On June 3, 1981, Renusagar moved the Reserve Bank of India for permission to remit the balance amount of regular interest calculated @ 6 per cent per annum to General Electric and on February 3, 1982, the Income Tax Officer, Bombay issued "No Objection Certificate" for repatriating the balance regular interest amount of US $ 2.130 million. The said amount was, however, not remitted by Renusagar to General Electric.

6. It appears that there was some delay on the part of the General Electric in adhering to the time schedule for the supply of equipment and keeping the same in view General Electric by their letter dated January 5, 1967 agreed to defer the payment of the first instalment payable on June 30, 1967 by six months and suggested that the promissory notes shall be recast into 15 notes instead of 16 which would commence on the 36th month from the contract effective date and capitalised interest shall be calculated for 20 months instead of 14 months and the said interest would then be reduced

by a sum of 132,500 US $. By another letter dated October 4, 1967, General Electric agreed to recast the note structure to provide for 14 notes with the first note becoming due on June 30, 1968 instead of December 31, 1967 and the capitalised interest was to be calculated for 20 months instead of 14 months and it would be reduced to 132,500 US $. It appears that during the course of supply of equipment and erection of the plant, some disputes arose between the parties and Renusagar made certain claims against General Electric some of which were accepted by General Electric and a settlement was arrived at on December 10, 1968 whereunder General Electric agreed that the payment of the instalments due on December 30, 1968 and June 30, 1969 with accrued interest would be deferred for payment with the result that there would be no payment on December 31, 1968 and June 30, 1969 both of interest and principal and that the interest accrued up to December 31, 1968 and to accrue up to June 30, 1969 on the outstanding balance due would be calculated at the rate provided for in the contract and capitalised and that the entire sum, namely, the principal and interest to be so capitalised would be recast in 13 notes, the first of which would be payable on December 31, 1969 and the last on December 31, 1975. As a result of these discussions and settlement, instalments Nos. 1, 2, 4 and 5 were not paid by Renusagar on the due dates. Renusagar moved the Government of India for approval of the revised schedules regarding the payments of the instalments to General Electric. The said request of Renusagar was, however, not accepted by the Government of India and by their letter dated August 1, 1969, the Government of India expressed their inability to agree to the revised proposals for repayment in view of the larger outgo of foreign exchange (by way of interest) which was not contemplated when the loan was approved originally. Renusagar were, therefore, asked to take necessary action to effect payments of the past instalments immediately. The request for review of the said decision was rejected by the Government of India by their letter dated August 4, 1969. The first instalment which was payable on June 30, 1967 under the original contract was paid by Renusagar in instalments by July 1970, the second instalment which was payable on December 31, 1967 was paid in instalments by December 1971, the fourth instalment which was payable on December 31, 1968 was paid in instalments by December 1973 and the fifth instalment which was payable on June 30, 1969 was paid in instalments by February 1976.

7. On March 1, 1982, General Electric served a notice on Renusagar indicating its intention to arbitrate pursuant to clause XVII of the Contract. On March 2, 1982, General Electric made a request to the Court of Arbitration of ICC for arbitration of the disputes between General Electric and Renusagar. ICC, after taking cognizance of the said request for arbitration made by General Electric, called upon Renusagar to nominate their arbitrator, file its reply and remit certain sums towards administrative expenses and arbitration fees. Renusagar raised an objection that the claims of General Electric did not fall within the purview of arbitration clause in the Contract and challenged the arbitrability of the claims. The Arbitration Court of ICC accepted that there was a prima facie dispute within the agreement and appointed Rt. Hon. Peter Thomes, Q.C. MP as Chairman of the Arbitral Tribunal and confirmed the appointment of Prof. Boris 1. Bittker as arbitrator nominated by General Electric and Dr R.K. Dixit as arbitrator nominated by Renusagar.

8. On June 11, 1982, Renusagar filed a suit (Suit No. 832 of 1982) in the Bombay High Court, on its original side, against General Electric and the ICC seeking a declaration that the claims referred to the arbitration of ICC by General Electric were beyond the purview and scope of Article XVII of the Contract dated August 24, 1964 and that General Electric was not entitled to refer the same to

arbitration with consequential prayers for injunctions restraining the ICC and General Electric to proceed further with the reference and restraining ICC from requiring Renusagar to make any deposit towards administrative expenses and arbitration fees. Renusagar obtained an ex parte ad interim relief in the said suit. General Electric filed Arbitration Petition No. 96 of 1982 under Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter referred to as 'the Foreign Awards Act') seeking stay of Suit No. 832 of 1982 and all proceedings therein with a prayer for vacating the ad interim ex parte reliefs obtained by Renusagar in the said suit. Both the matters, namely, stay petition of General Electric under Section 3 of the Foreign Awards Act and Renusagar's notice of motion for confirmation of ad interim relief were heard together and disposed of by a learned Single Judge of the Bombay High Court by a common judgment and order dated April 20, 1983 whereby the prayer for stay of the suit filed by General Electric under Section 3 of the Foreign Awards Act was allowed and all proceedings in the said suit were stayed and all the interim reliefs which were granted earlier by ad interim order were vacated. C.A. Nos. 404-405 of 1983 filed by Renusagar against the said judgment of the learned Single Judge were dismissed by a Division Bench of the High Court by judgment dated October 21, 1983. The appeals filed by Renusagar against the said decision of the High Court were dismissed by this Court on August 16, 1984. (See : Renusagar Power Co. Ltd. v. General Electric Co. 1 hereinafter referred to as 'Renusagar Case 1'.) In the said case, this Court (Tulzapurkar and Pathak, JJ.) has held that the three claims referred by General Electric to the ICC do 'arise out of' and are 'related to the contract' and squarely fall within the widely-worded arbitration clause contained in Article XVII of the Contract.

9. On August 19, 1982, General Electric filed a suit in the Calcutta High Court against United Commercial Bank to enforce the bank guarantee given by the said Bank at the instance of Renusagar. As a counter to the said suit, Renusagar, on November 25, 1982, filed a suit (No. 127 of 1982) in the Court of Civil Judge, Mirzapur, U.P. praying for a declaration that the guarantee given by United Commercial Bank for and on behalf of Renusagar stood discharged and had become ineffective and unenforceable and for a mandatory injunction directing and ordering General Electric to settle the claim of Renusagar regarding 75 MVA Transformers and to satisfy the settlement validly arrived at of the claim of Renusagar as mentioned in the plaint of the said suit. General Electric filed an application in the Mirzapur Court whereby it was prayed that the suit was liable to be stayed under Section 10 and/or Section 151 CPC in respect of the first relief and under Section 3 of the Foreign Awards Act in respect of the second relief claimed by Renusagar in the plaint. The said 1 (1 984) 4 SCC 679 : (1985) 1 SCR 432 application was rejected by Mirzapur Court and thereupon General Electric filed a petition under Article 227 of the Constitution before the Allahabad High Court for quashing the proceedings in the suit. The said petition was, however, dismissed by the High Court by order dated April 4, 1985. Thereupon General Electric filed Civil Appeal No. 2319 of 1986 in this Court which was allowed by this Court (Chinnappa Reddy and Jagannatha Shetty, JJ.) by judgment dated August 11, 1987 reported as General Electric Co. v. Renusagar Power Co.2 hereinafter referred to as 'Renusagar Case II'. As a result of the said judgment, the proceedings in Suit No. 127 of 1982 in the court of Civil Judge, Mirzapur were stayed under Section 3 of the Foreign Awards Act.

10. We may now revert to the arbitration proceedings. After the decision of the learned Single Judge of the Bombay High Court staying further proceedings in Suit No. 832 of 1992 and vacating the

interim order passed in the said suit, Renusagar entered into the arbitration proceedings on June 9, 1983 under protest and without prejudice to its claim on arbitrability and gave answer to the claims of General Electric and also made counter-claims. On February 7 and 8, 1984 both the parties met with the Arbitral Tribunal in Paris and agreed to sign the Terms of Reference, though Renusagar did so under protest and without prejudice. Certain amendments were subsequently made in the Terms of Reference. In the said Terms of Reference the issues to be determined were defined in clauses (a) to (cc) of para 22. Issues in clauses (a) to (f) of para 22 of the Terms of Reference were determined by an interim award on December 11, 1984 wherein the Arbitral Tribunal found that General Electric and Renusagar were parties to a valid agreement to arbitrate all disputes between them arising out of or related to the 1964 Contract and that the issues referred to the Arbitral Tribunal, apart from two minor exceptions which were reserved for determination, were such arbitral disputes and that the Arbitral Tribunal had jurisdiction to adjudicate on them. The Arbitral Tribunal also held that the applicable law was that of the State of New York, U.S.A.

11. After the decision of this Court in Renusagar Case II, both the parties appeared before the Arbitral Tribunal in Paris for a hearing which lasted for ten days between February 25 and March 8, 1985. Each party was represented by counsel and legal and other advisers and issues (g) to

(p) of para 22 of the Terms of Reference were argued and submitted for consideration by both the sides and the hearing was adjourned to a later date for more detailed consideration to be given to the remaining issues and for further written submissions to be made by both parties. The next hearing was fixed to be in London to begin on October 1, 1985 and both parties were summoned to appear before the Arbitral Tribunal. Khaitan & Partners, lawyers for Renusagar sent a letter dated July 24, 1985 to the Arbitral Tribunal, wherein they stated that an Indian Civil Court had seisin of the whole of the subject-matter of the reference in this arbitration and submitted that in consequence the Arbitral Tribunal and ICC had become functus officio and that no further proceedings in this arbitration should be taken by the Arbitral Tribunal. The said submission by Renusagar was disputed by General Electric and the Arbitral Tribunal informed the parties that the matter would be considered as a preliminary issue at the scheduled meeting in London on October 1, 1985. The scheduled meeting took 2 (1987)4SCC137:(1987)3SCR858 place in London on October 1, 1985. General Electric, represented by counsel and advisers, appeared before the Arbitral Tribunal but Renusagar failed to appear. The Arbitral Tribunal considered the written submissions of Renusagar on the issue of the jurisdiction of the Arbitral Tribunal and heard the arguments of General Electric and by majority (Dr Dixit dissenting), the Arbitral Tribunal ruled that their jurisdiction remained and that the arbitration should proceed in the absence of Renusagar. It appears that before the meeting on October 1, 1985, each Arbitrator had received from the parties during the course of the arbitration a total of 33 bound volumes of typed submissions, exhibits and legal authorities, (General Electric having presented 19 and Renusagar 14) and in addition each party had put before the Arbitral Tribunal a large number of papers. On October 2, 3 and 4, 1985 the Arbitral Tribunal considered the said documents as well as the written submissions of Renusagar on issues (q) to (bb) of the Terms of Reference and heard the arguments of counsel for General Electric in reply. The Arbitral Tribunal also considered the submissions of Renusagar on the validity of the claim of entitlement of General Electric to 'dollar for dollar' foreign tax credit at the relevant period in this action and also heard General Electric on the question of costs. Thereafter, the Arbitral

Tribunal by a majority (Dr Dixit dissenting) made the award on September 16, 1986.

12. The Arbitral Tribunal upheld the claim of GEC for US $ 2,130,785.52 towards regular interest which was withheld by Renusagar. It was not disputed by Renusagar that it had retained the said amount. The issue was whether by doing so Renusagar acted wrongfully. The Arbitral Tribunal has found that the said withholding or retention of the amount of interest by Renusagar was wrongful since the failure on the part of Renusagar to pay the taxes over to the Indian tax authorities rendered it impossible for General Electric to get the U.S. foreign tax credit to which it would otherwise have been entitled for the amount withheld. It was also held that nothing in the 1964 contract authorises nonpayment of either the interest or the withheld taxes for tactical reasons arising out of litigation brought by Renusagar. The Arbitral Tribunal rejected the contention of Renusagar that the claim in respect of regular interest was barred by limitation and held that the applications submitted by Renusagar to Reserve Bank of India on June 3, 1981 and August 29, 1981 for permission to remit the said amount to General Electric amount to acknowledgement. It was also held that the said sum had to be computed in U.S. dollars regardless of variation in dollar-rupee exchange rate prevailing from time to time. As regards claim for compensatory damages on the said amount of regular interest, which was withheld by Renusagar, the Arbitral Tribunal, after referring to the decisions of New York Courts, has held that an arbitrator's paramount responsibility is to reach an equitable result and that it is a basic principle of damages for breach of contract applicable throughout the U.S. (including New York) that a party to a contract who is injured by its breach is entitled to compensation for the injury sustained and is entitled to be placed insofar as this can be done by money in the same position he would have occupied if the contract had been performed. The Arbitral Tribunal found that General Electric would have benefited from 'dollar for dollar' from the foreign tax credits that it could have claimed had Renusagar paid the disputed amounts over to the Indian tax authorities and supplied General Electric with the appropriate tax certificate. The Arbitral Tribunal, therefore, awarded compensatory damages and computed the same by applying the average prime rate to the amounts withheld and observed that although General Electric was entitled to interest from the due dates of the various notes but the interest that had been claimed by General Electric in the Terms of Reference was computed from the later dates set out in a detailed computation supplied to the Arbitral Tribunal and since General Electric had accepted these later dates in its submission, the Arbitral Tribunal awarded compensatory damages computed by applying the average prime rate to the amounts withheld commencing with the dates listed in the statement and compounded annually commencing with the last day of the calendar year for each amount. The Arbitral Tribunal rejected the contention urged on behalf of Renusagar that award of interest on regular interest as compensatory damages would violate public policy of the State of New York against 'interest on interest'. Relying upon the decision of the New York Court of Claims in City of New York v. State of New York3 the Arbitral Tribunal held that interest on interest is not against public policy in the State of New York. The Arbitral Tribunal also rejected the contention of Renusagar that it would violate New York's public policy to award compound interest as compensatory damages and, after referring to the various decisions of the courts in the State of New York, the Arbitral Tribunal has held that compounding of interest is equally appropriate in actions of an equitable nature and in the circumstances of this case compounding of interest would not violate the public policy of the State of New York. In this context the Arbitral Tribunal has pointed out that they were not concerned with a contract to pay compound interest but with the propriety of

compounding interest in fashioning a remedy for a breach of contract in order to put the injured party in the same economic position it would have occupied if the contract had been duly performed. As regards the claim for delinquent interest on late payment of instalments by Renusagar, the Arbitral Tribunal held that Renusagar was liable to pay such delinquent interest. The Arbitral Tribunal found that under the 1964 Contract the notes evidencing the obligation of Renusagar to pay the purchase price 'shall bear interest, at the rate of 6.5 per cent per annum on the outstanding principal balance', subject to the agreed reduction to 6 per cent commencing with the date when tax exemption, if granted, is made effective and that the rescheduling negotiations on which Renusagar relied never resulted in an effective agreement and there was no evidence of a waiver by General Electric of its right to be paid on the original due dates when the rescheduling plan collapsed and further that Renusagar had acknowledged in telex dated March 25, 1976 that they were liable for interest on the delayed payment of the principal. The Arbitral Tribunal also rejected the contention that the claim of General Electric in this regard was barred by the statute of limitation. Taking into account the acknowledgement contained in the telex dated March 25, 1976, the Arbitral Tribunal deducted a sum of US $ 316,610 from the amount of US $ 783,686.20 computed as interest @ 6 per cent and held that General Electric was entitled to net amount of US $ 467,076.20 by way of delinquent interest. The Arbitral Tribunal rejected the contention urged on behalf of Renusagar that even if period of limitation is computed from telex of March 25, 1976 the claim was barred by limitation in view of the four-year limitation prescribed by Section 2- 275(1) of New York's version of the Uniform Commercial Code which came into force with effect from September 27, 1964. The Arbitral 3 408 NYS 2d 702, 707 (1978) Tribunal held that the said provision was not applicable to the present case and that it is governed by the 6-year period of limitation that was prescribed in the State of New York prior to the commencement of the said provision. The Arbitral Tribunal further held that General Electric was entitled to compensatory damages on the aforesaid amount of delinquent interest in the same manner as damages were to be computed on the unpaid amount of regular interest. The Arbitral Tribunal also upheld the claim of General Electric for US $ 119,053.31 towards purchase price of spare parts and further held that the said claim was not barred by limitation in view of the acknowledgement by Renusagar in the telex dated March 25, 1976. The Arbitral Tribunal also held that compensatory damages were payable on account of Renusagar's failure to pay for spare parts in the same manner as damages for failure of Renusagar to pay regular interest. With regard to the counter-claim made by Renusagar, the Arbitral Tribunal had earlier rejected the purported withdrawal of the said counter-claim in respect of items 2 to 8 by Renusagar and after considering the said counter-claim on merits, the Arbitral Tribunal rejected the same in respect of all the eight items. In view of the rejection of counter-claim of Renusagar, the Arbitral Tribunal rejected the claim made by General Electric by way of reply to the claim of Renusagar. In the matter of costs, the Arbitral Tribunal held that Renusagar must pay the costs of arbitration and apart from the amount which General Electric was required to pay towards administrative expenses and arbitration fees, the Arbitral Tribunal held that Renusagar must also pay the normal legal costs incurred by General Electric. The Arbitral Tribunal awarded the following amounts against various heads of claims:

1. Regular interest wrongfully withheld US $2,130,785.52

2. Compensatory damages up to March 31, US $6,347,748.50 1986 on the above regular interest continuing at the annual rate of 8 per cent on the said regular interest until payment.

3. Delinquent interest on late payments of US $467,076.20 principal

4.Compensatory damages up to March 31, 1986 US $1,324,357.75 on the above delinquent interest continuing at the annual rate of 8 per cent on the said delinquent interest until payment

5. Spare parts US $ 119,053.00

6. Compensatory damages up to March 31, 1986 US $276,702.17 on the above spare parts continuing at the annual rate of 8 per cent on the said sum for the spare parts until payment.

7. Towards costs of General Electric Us $1,549,899.00 Total US $12,215,622.14 The Arbitral Tribunal has awarded interest at the annual rate of 8 per cent on items 1, 3 and 5.

13. On October 15, 1986, General Electric instituted proceedings for enforcement of the award of the Arbitral Tribunal by filing Arbitration Petition 7 No. 159 of 1986 under Section 5 of the Foreign Awards Act in the Bombay High Conn. On October 17, 1986, Renusagar instituted a suit (Suit No. 265 of 1986) in the Court of Civil Judge, Mirzapur, seeking a declaration that the award made by the Arbitral Tribunal was a nullity and for restraining General Electric by a perpetual injunction from denying Renusagar's rights and taking any action affecting Renusagar's rights in any manner whatsoever on the basis of the said award. General Electric filed a Transfer Petition (No. 388 of 1986) in this Court seeking transfer of the suit filed by Renusagar in the Mirzapur Court to the original side of the Bombay High Court. By order dated September 10, 1987, this Court stayed further proceedings in the suit filed by Renusagar in the Mirzapur Court and the stay was to remain in operation during the pendency of the petition filed by General Electric for enforcement of the award. by General Electric in the Bombay High Court and submitted :

(i) the award could not be filed as it did not become binding on the parties in the country in which the award was made as prescribed under Section 7(1)(a)(v) of the Foreign Awards Act and Rule 801(c) of the Rules framed by the Bombay High Court under the Foreign Awards Act; (ii) the Bombay High Court did not have the territorial jurisdiction to entertain the petition of General Electric under Section 5 of the Act; (iii) General Electric had failed to comply with the mandatory requirement of Section 8(1)(a) of the Foreign Awards Act and Rule 801(a) of the Rules framed by the Bombay High Court under the Foreign Awards Act inasmuch as neither the original award nor a copy thereof duly authenticated as required by the law of the country had been produced along with the application; (iv) the award sought to be enforced was a nullity and should be ignored as the arbitrators had become functus officio in view of institution of Suit No. 127 of 1982 by Renusagar in the Court of Civil Judge, Mirzapur and refusal by the Mirzapur Court to stay the suit under Section 3 of the Foreign Awards Act; (v) the award could not be enforced in view of Section 7(1)(b)(ii) of the Foreign Awards Act because its enforcement was contrary to public policy; (vi) the claim for regular interest was barred by limitation; (vii) the claim for delinquent interest had been wrongly accepted by the arbitrators;

(viii) the award of interest on interest or compensatory damages in lieu of interest on regular interest and delinquent interest and the award of compound interest is contrary to public policy; (ix) the compensatory damages were excessive and unusual; (x) the Chairman of the Arbitral Tribunal was biased against Renusagar; and (xi) the costs of arbitration were unconscionable and excessive.

15. The learned Single Judge (Pendse, J.) has considered all the aforesaid objections raised on behalf of Renusagar in his very comprehensive judgment dated October 21, 1988 wherein after rejecting the said objections, he has held that the award is enforceable under the provisions of the Foreign Awards Act and on that basis a decree in terms of the award was drawn.

16. Renusagar filed an appeal (Appeal No. 680 of 1989) under clause 15 of the Letters Patent of the Bombay High Court against the said judgment of the learned Single Judge which was disposed of by a Division Bench of the said High Court (C. Mookerjee, C.J. and Mrs Sujata Manohar, J.) by judgment dated October 12, 1989. The learned Judges of the High Court held that the said appeal was not maintainable in view of Section 6(2) of the Foreign Awards Act. The learned Judges, however, examined the matter on merits and found that there was no substance in the appeal. In this context the learned Judges have dealt with the objection about the arbitrators having become functus officio on account of the pendency of the civil suit filed by Renusagar in the Mirzapur Court; the award being contrary to public policy; the award being not binding; the failure to file the authenticated copy of the award and the jurisdiction of the Bombay High Court to entertain the petition and they have rejected the contentions urged by Renusagar in respect of the said objections. Since the learned Single Judge had not specified the rate of exchange for conversion of the decretal amount expressed in U.S. dollars to Indian rupees, the learned Judges have dealt with the said question and taking into consideration the decision of this Court in Forasol v. ONGC4 they have directed that the date of conversion of decretal amount which is in U.S. dollars to Indian rupees shall be the date on which the learned Single Judge completed pronouncing of judgment, i.e., October 21, 1988 and that opening the rate of exchange shall be the selling rate of U.S. dollars as ascertained by the State Bank of India. The learned Judges have granted a certificate for appeal to this Court under Article 134-A read with Article 133 of the Constitution since they felt that the case involves substantial questions of law of general importance which need to be decided by this Court.

17. Civil Appeal No. 71 of 1990 has been filed by Renusagar on the basis of the said certificate against the judgment of the Division Bench of High Court dated October 12, 1989. Renusagar has also filed Civil Appeal No. 71-A of 1990 against the judgment of the learned Single Judge dated October 21, 1988 after obtaining the special leave to appeal from this Court. General Electric has filed Civil Appeal No. 379 of 1992 against the judgment of the Division Bench of High Court dated October 12, 1989 after obtaining special leave to appeal. The said appeal of General Electric has been filed by way of abundant caution and is confined to the directions given by the Division Bench of High Court in paras 117 to 119 of the judgment with regard to rate of exchange for conversion of the decretal amount from U.S. dollars to Indian rupees. According to General Electric the said rate of exchange should have been the rate prevailing on the date of payment.

18. During the pendency of these appeals this Court, by Order dated February 21, 1990 on I.A. No. 1 of 1990 in Civil Appeal No. 71 of 1990, stayed the operation of the judgment and decree under

appeal subject to Renusagar depositing in the original side of the Bombay High Court, the sums equivalent to one-half of the decretal amount calculated as on date and furnishing security to the satisfaction of the High Court in respect of the decretal amount. General Electric was permitted to withdraw the deposit upon furnishment of security by way of bank guarantee for the sum to be withdrawn in excess of Rupees four crores to the satisfaction of the High Court. In the said order it was also directed that interest @ 10 per cent per annum would be payable by Renusagar on the balance of the decretal amount in the event of its failing in the appeal and correspondingly General Electric would be liable to pay interest at the same rate on amount withdrawn by it in the event of the appeal succeeding. In pursuance of this order, Renusagar deposited, a sum of Rs 9,69,26,590.00 on March 20, 1990 which was withdrawn by GEC after furnishing necessary bank guarantee. By another order dated November 6, 1990 on I.A. No. 3 of 1990 in Civil Appeal No. 71 of 1990, this Court directed Renusagar to deposit a further sum of Rs 1 4 1984 Supp SCC 263 :(1984) 1 SCR 526 crore and to furnish a bank guarantee for Rs 1.92 crores. In pursuance of the said order, Renusagar deposited, on December 3, 1990, a sum of Rs 1 crore which amount has also been withdrawn by General Electric. Thus, a total sum of Rs 10,69,26,590.00 has been deposited by Renusagar and the same has been withdrawn by General Electric.

19. Shri K.K. Venugopal, learned Senior Counsel appearing for Renusagar, and Shri Shanti Bhushan, learned Senior Counsel appearing for General Electric, have made elaborate submissions before us. The oral submissions have been supplemented by written submissions.

20. During the course of his submissions, Shri Venugopal did not pursue some of the objections that were raised by Renusagar before the High Court. But at the same time he has raised certain objections which were not raised before the High Court. Shri Venugopal has not disputed the liability of Renusagar for US $ 2,130,785.52 awarded under item No. 1 towards regular interest withheld by Renusagar and US $ 119,053.00 awarded under item No. 5 towards price of spare parts. The submissions of Shri Venugopal are confined to the award of compensatory damages under item Nos. 2, 4 and 6, delinquent interest under item No. 3 and costs under item No. 7. The submissions of Shri Venugopal broadly fall under two heads : (i) enforceability of the award; and (ii) the rate of exchange for conversion of the decretal amount from U.S. dollars to Indian rupees.

21. Before we proceed to examine the submissions made by learned counsel, we consider it necessary to briefly refer to the background in which the Foreign Awards Act was enacted because it would have a bearing on the interpretation of the provisions of the said Act.

22. Arbitration is a well-recognised mode for resolving disputes arising out of commercial transactions. This is equally true for international commercial transactions. With the growth of international commerce there was an increase in disputes arising out of such transactions being adjudicated through arbitration. One of the problems faced in such arbitrations related to recognition and enforcement of an arbitral award made in one country by the courts of other countries. This difficulty has been sought to be removed through various international conventions. The first such international convention was the Geneva Protocol of 1923 which was drawn up on the initiative of ICC under the auspices of the League of Nations. The Geneva Protocol had two objectives, first, it sought to make arbitration agreements, and arbitration clauses in particular,

enforceable internationally; and secondly, it sought to ensure that awards made pursuant to such arbitration agreements would be enforced in the territory of the State in which they were made. The Geneva Protocol of 1923 was followed by the Geneva Convention of 1927 which was also drawn up under the auspices of the League of Nations. The purpose of this Convention was to widen the scope of the Geneva Protocol of 1923 by providing recognition and enforcement of protocol awards within the territory of contracting States, (not merely the State in which the award was made). (See : Alen Redfern and Martin Hunter: Law & Practice of International Commercial Arbitration, 2nd Edn. pp. 61-62). India was a signatory to the Protocol of 1923 and the Convention of 1927. With a view to implementing the obligations undertaken under the said Protocol and Convention, the Arbitration (Protocol & Convention) Act, 1937 was enacted. A number of problems were encountered in the operation of the aforesaid Geneva treaties inasmuch as there were limitations in relation to their field of application and under the Geneva Convention of 1927, a party seeking enforcement had to prove the conditions necessary for enforcement and in order to show that the awards had become final in its country of origin the successful party was often obliged to seek a declaration in the countries where the arbitration took place to the effect that the award was enforceable in that country before it could go ahead and enforce the award in the courts of the place of enforcement. ICC, in 1953, promoted a new treaty to govern international commercial arbitration. The proposals of ICC were taken up by the United Nations Economic and Social Council and it led to the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards at New York, 1958 (hereinafter referred to as 'the New York Convention'). The New York Convention is an improvement on the Geneva Convention of 1927 in the sense that it provides for a much more simple and effective method of obtaining recognition and enforcement of foreign arbitral awards and it replaces Geneva Convention of 1927 as between the States which are parties to both the Conventions. The New York Convention also gives much wider effect to the validity of arbitration agreements than does the Geneva Protocol of 1923. [See : Alan Redfern and Martin Hunter, Law & Practice of International Commercial Arbitration, (1 991) 2nd Edn. pp. 62-63.]

23. India was a party to the New York Convention. The Foreign Awards Act has been enacted to give effect to the New York Convention and for purposes connected therewith. In the Statement of Objects and Reasons, reference has been made to the defects in the Geneva Convention of 1927 which "hampered the speedy settlement of disputes through arbitration and hence no longer met the requirements of international trade" and which led to the adoption of the New York Convention. Section 2 of the Act defines the expression 'foreign award'. Section 3 makes provision for stay of proceedings in respect of matters to be referred to arbitration. Section 4 deals with effect of foreign awards. Sub-section (1) of Section 4 provides that a foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India. Sub-section (2) prescribes that any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made and may be relied on by any of those persons by way of defence, setoff or otherwise in any legal proceedings in India. Section 5 makes provision for filing of foreign awards in Court. In sub-section (1) it is laid down that any person interested in a foreign award may apply to any court having jurisdiction over the subject- matter of the award that the award be filed in Court. Sub- section (2) requires that such an application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. Sub-section (3) requires the court to give

notice to the parties to the arbitration other than the applicant requiring them to show cause within a time specified why the award should not be filed. Section 6 deals with enforcement of foreign awards. Sub-section (1) lays down that where the Court is satisfied that the foreign award is enforceable under the Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Sub-section (2) provides that upon the judgment so pronounced a decree shall follow, no appeal shall lie from such decree except insofar as the decree is in excess of or not in accordance with the award. Section 7 contains the conditions for enforcement of foreign awards and prescribes the circumstances under which foreign awards will not be enforced. Section 8 requires the production of the original award or a duly authenticated copy thereof as well as original agreement for arbitration or a duly certified copy thereof and the production of evidence to prove that the award is a foreign award. Section 9 is a saving clause which excludes the applicability of the Act to matters specified therein. Section 10 provides for repeal of the Arbitration (Protocol and Convention) Act, 1937, in relation to foreign awards to which the Act applies. Section 11 provides for rule-making power of the High Court. The New York Convention is appended as a schedule to the Foreign Awards Act.

24. In the present case, we are concerned with conditions of enforcement laid down in Section 7, which provides as follows:

> "7. Conditions for enforcement of foreign awards.- (1) A foreign award may not be enforced under this Act-
>
> (a) if the party against whom it is sought to enforce the award proves to the court dealing with the case that-

(i) the parties to the agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made; or

(ii) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(iii) the award deals with questions not referred or contains decisions on matters beyond the scope of the agreement: Provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted t o arbitration may be enforced; or

(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or

(b) if the Court dealing with the case is satisfied that-

(i) the subject-matter of the difference is not capable of settlement by arbitration under the law in India; or

(ii) the enforcement of the award will be contrary to public policy;

(2) If the Court before which a foreign award is sought to be relied upon is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority referred to in sub-clause

(v) of clause (a) of sub-section (1), the Court may, if it deems proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to furnish suitable security."

25. The objection of Renusagar against enforceability of the award is based on (i) Section 7(1)(a)(ii) of the Foreign Awards Act, on the ground that Renusagar was unable to present its case; and (ii) Section 7(1)(b)(ii) of the Foreign Awards Act, on the ground that the enforcement of the award would be against public policy.

26. In support of his submission that Renusagar was unable to present its case, Shri Venugopal has urged that after the Mirzapur Court had refused to stay the civil suit filed by Renusagar on the application submitted by General Electric under Section 3 of the Foreign Awards Act on July 9, 1985, Renusagar had raised a preliminary objection before the Arbitral Tribunal that it had become functus officio and on the said objection raised by Renusagar, the Arbitral Tribunal had issued a further notice on September 2, 1985 stating that the effect of the rejection of the application under Section 3 of the Foreign Awards Act would be considered as a preliminary issue at the scheduled meeting of the Arbitral Tribunal fixed for October 1, 1985. The submission of Shri Venugopal is that Renusagar was not informed by the Arbitral Tribunal that if the decision of the Arbitral Tribunal on the objection that the Arbitral Tribunal had become functus officio were to go against Renusagar, the Arbitral Tribunal would straight away proceed to hear the case on merits without informing Renusagar about its decision and that if Renusagar had been put on notice, it would have been able to decide whether to proceed with the merits or not and that the action of the Arbitral Tribunal in going into the merits of the dispute without notice to Renusagar was a gross, blatant and unpardonable violation of principles of natural justice and the elementary tenets of fair play inasmuch as on account of the said procedure adopted by the Arbitral Tribunal, Renusagar was deprived of an opportunity to meet and deal with the entirety of claims of General Electric.

27. As regards bar to the enforcement of the award under Section 7(1)(b)(ii) of the Foreign Awards Act, Shri Venugopal has argued that : (i) under Section 7(1)(b)(ii), enforcement of the award could be refused by the courts in India not only on the ground that the award is against the public policy of India but also that it is against the public policy of the State of New York; (ii) the expression "public policy" in Section 7(1)(b)(ii) of the Act has to be construed in a liberal sense and not narrowly and it would include within its ambit disregard of the provisions of the Foreign Exchange Regulation Act,

1973 (hereinafter referred as FERA) and would also cover unjust enrichment; (iii) it would be contrary to the public policy of India as well as of the State of New York to award interest on interest and compounding it further and to award damages on damages; (iv) under the contract, interest was payable only up to the date of maturity of each promissory note and no interest was payable for the period subsequent to the said date and the only remedy available to General Electric in the event of default in payment of an instalment on the due date was to enforce the bank guarantee or to recall all the promissory notes; (v) under the original approval dated January 2, 1964 given by the Government of India the total amount of loan was to be repaid in sixteen semi-annual instalments between 30 and 120 months from contract effective date and payment of interest was specifically restricted for the period from 16th to 30th month and thereafter upon capitalisation from the 30th month to the 120th month and no interest was payable without FERA sanction after due date of each instalment; (vi) no liability for interest for delayed payment of instalments would accrue in respect of the period from June 30, 1967 to August 1, 1969 while the application for approval under FERA was pending before the Government of India; (vii) after the refusal by the Government to give its approval to the rescheduling of the instalments the award of interest was in breach of the prohibition contained in FERA and was contrary to public policy of India; (viii) while awarding compensatory damages under item Nos. 2 and 4 the Arbitral Tribunal has failed to deduct 46 per cent U.S. tax payable by General Electric on the amount of regular interest and delinquent interest and compensatory damages could only be awarded on the amount receivable by General Electric after deducting the said tax and this has resulted in unjust enrichment which is contrary to public policy; (ix) compensatory damages have been awarded by way of interest on interest and that too by compounding the rate of interest which is contrary to public policy of India and New York;

(x) compensatory damages awarded on delinquent interest under item No. 4 constitutes award of damages upon damages which is contrary to public policy of India; (xi) award of compensatory damages on regular interest under item No. 2 in respect of the period from 1970 to 1980 when the interim order passed by the Delhi High Court in the writ petition was operative was impermissible and against public policy;

(xii) the amount awarded as costs is unconscionable and constitutes unjust enrichment inasmuch as it includes the amount which was admitted as part of the legal fees and expenses for proceedings in India and which was found to be inadmissible by the Arbitral Tribunal and the same amount was transposed into cost of the arbitration on the pretext that the material collected for litigation in India was also used in the arbitration proceedings; and (xiii) there has been violation of principles of natural justice inasmuch as the vouchers of costs regarding legal fees and expenses were never shown or given to Renusagar nor were its objections heard in this regard.

28. With regard to rate of exchange for conversion of the decretal amount in U.S. dollars to Indian rupees, the submission of Shri Venugopal is that the date with reference to which conversion of foreign currency is to be made is a matter of substance and is governed by lex contractus, i.e., the law of the contract, and not by lexfori, i.e., the law of the forum. It has been urged that the law of the State of New York is the law of the contract and that the said law provides the date of breach as the date of conversion and therefore, the amount awarded in U.S. dollars under the award of the Arbitral Tribunal must be converted into Indian currency on the basis of the rate prevalent on the

date of the breach. It has been submitted that the decision of this Court in Forasol v. O.N.G.C.4 on which reliance has been placed by the Division Bench of the High Court, has no application to the present case because in that case the Court was not dealing with a foreign award but was dealing with an award made under the Indian Arbitration Act, 1940.

29. Shri Shanti Bhushan, has, on the other hand, submitted that : (i) the scope of enquiry in proceedings under Section 5 of the Foreign Awards Act is confined to questions relating to the enforcement of the award and does not comprehend a challenge to the merits and even if a question of law decided by the Arbitrators is incorrect, it is not a ground of challenge under Section 7 of the Foreign Awards Act; (ii) Renusagar cannot have any grievance that they were unable to present its case because it had voluntarily refused to appear before the Arbitral Tribunal when it met on October 1, 1985 and further that in the sittings of the Arbitral Tribunal from February to March 1985 in which Renusagar had participated it had made oral submissions and had also produced documents before the Arbitral Tribunal, with regard to issues 22(g) to (p) and that in the sittings held from October 1, 1985 onwards, the Arbitral Tribunal had dealt with rest of the issues which related to the counter-claim of Renusagar as well as the claim made by General Electric against the counter-claim which claims have been rejected by the Arbitral Tribunal; (iii) public policy, comprehended in Section 7(1)(b)(ii) of the Foreign Awards Act is the public policy of India and does not cover the public policy of New York State; (iv) for the purpose of Section 7(1)(b)(ii) of the Foreign Awards Act the expression 'public policy' has a narrower connotation than in domestic law; (v) the regular interest was wrongfully withheld by Renusagar because as a result of the failure on the part of Renusagar to deposit the amount of tax with the Government of India. General Electric was not able to claim relief under the U.S. tax laws in respect of the amount payable as tax in India on the interest and that the interim order passed by the Delhi High Court in the writ petition filed by Renusagar did not preclude Renusagar from either depositing the tax amount with the Government or remitting the interest amount to General Electric at the rate of 6 per cent; (vi) for awarding compensatory damages for withholding of regular interest and on delinquent interest for delayed payment of instalments the tax payable in United States on the amount of regular interest and delinquent interest could not be deducted since tax would be payable in the United States by General Electric on the amount awarded as compensatory damages; (vii) the amount of compensatory damages awarded by the Arbitral Tribunal relates to the merits of the award and the same cannot be questioned in proceedings for enforcement of the award under Section 7 of the Foreign Awards Act;

(viii) the challenge to the award on the basis of unjust enrichment, award of compound interest, award of damages on damages does not fall within the ambit of permissible objections on the ground of violation of public policy in Section 7(1)(b)(ii) of the Foreign Awards Act; (ix) there is no violation of the provisions of FERA because in view of the approval that had already been granted by the Government of India to the original contract, there was no prohibition against remittance of regular interest on the instalments which had become due and payable and the refusal on the part of the Government to give approval to rescheduling of the payment of instalments did not in any way preclude the Government of India from granting necessary permission for remittance of the interest on the unpaid instalments under Section 9 of FERA; (x) in any event, the bar of Section 9 of FERA is not applicable to the proceedings for enforcement for the award in view of Section 47(3) of FERA

and the enforcement of the award does not involve contravention of the provisions of FERA; (xi) the costs that have been awarded are reasonable and that three copies of the supporting vouchers except for the vouchers relating to fees of M/s Amarchand Mangaldas, a Bombay/Delhi firm of Solicitors, were sent to all the three arbitrators and that one set of billings of M/s Amarchand Mangaldas was sent to the Chairman but copies of the letter addressed to Chairman were sent to the other Arbitrators and that the bills of M/s Amarchand Mangaldas were in respect of fees of Indian lawyers in Bombay High Court and Supreme Court which claim of costs has been disallowed by the Arbitral Tribunal;

(xii) the rate of exchange for conversion of foreign currency in proceedings for enforcement of a foreign award is governed by lexfori, i.e., law of the forum in which the proceedings have been instituted and not by the proper law of contract or law of place of performance; (xiii) the relevant date for conversion of U.S. dollars into Indian rupees in proceedings for enforcement of a foreign award is the date of actual payment and not the date of judgment as held by the Division Bench of the High Court; (xiv) the decision of this Court in Forasol v. O.N.G.C.4 on which the reliance has been placed by the Division Bench has no application and in any event the said decision does not lay down the correct law and needs reconsideration; (xv) although under the award interest has been awarded at 8 per cent in respect of items 1, 3 and 5 only but in view of the interim order passed by this Court on February 21, 1990 interest at the rate of 10 per cent is payable on the entire amount; (xvi) since the permission was not granted to General Electric by the Reserve Bank of India to transfer the sum of Rs 10.92 crores deposited by Renusagar in pursuance to the orders of this Court dated February 21, 1990 and November 6, 1990 the said amount should be adjusted against the decree that is ultimately passed after converting the decretal amount in U.S. dollars to Indian rupees on the basis of the rate of exchange prevailing on the date of the judgment of this Court.

30.Having regard to the foregoing submissions of the learned counsel the questions that arise for consideration in these appeals can be thus formulated:

(1) What is the scope of enquiry in proceedings for enforcement of a foreign award under Section 5 read with Section 7 of the Foreign Awards Act?

(II) Were Renusagar unable to present their case before the Arbitral Tribunal and consequently the award cannot be enforced in view of Section 7(1)(a)(ii) of the Foreign Awards Act?

(III) Does Section 7(1)(b)(ii) of the Foreign Awards Act preclude the enforcement of the award of the Arbitral Tribunal for the reason that the said award is contrary to the public policy of the State of New York?

(IV) What is meant by 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act?
(V) Is the award of the Arbitral Tribunal unenforceable as contrary to public policy of India on the ground that-

(a) it involves contravention of the provisions of FERA;

(b) it penalises Renusagar for acting in accordance with the interim order passed by the Delhi High Court in the writ petition filed by Renusagar challenging the withdrawal of exemption from income tax on the interest paid to General Electric;

(c) it results in charging of interest on interest which is compounded and also damages on damages;

(d) it would lead to unjust enrichment for General Electric.

(VI) Which law would govern the rate of exchange for conversion of foreign currency in proceedings for enforcement of a foreign arbitral award?

(VII) Does Forasol v. O.N.G.C4 need reconsideration?
(VIII) Is General Electric entitled to

interest pendente lite and future interest and if so, at what rate?

(IX) What should be the rate for conversion into U.S. dollars of the amount of Rs 10.92 crores deposited by Renusagar in pursuance to the interim orders passed by this Court on February 21, 1990 and November 6, 1990 and which has been withdrawn by General Electric?

1. Scope of enquiry in proceedings for recognition and enforcement of a foreign award under the Foreign Awards Act

31. During the course of his submissions, Shri Venugopal has assailed the award of the Arbitral Tribunal on grounds touching on the merits of the said award insofar as it relates to the award of compensatory damages on regular interest (item No. 2), delinquent interest (item No. 3), compensatory damages on delinquent interest (item No. 4) and compensatory damages on the price of spare parts (item No.

6). This gives rise to the question whether in proceedings for enforcement of a foreign award under the Foreign Awards Act it is permissible to impeach the award on merits.

32. With regard to enforcement of foreign judgments, the position at common law is that a foreign judgment which is final and conclusive cannot be impeached for any error either of fact or of law and is impeachable on limited grounds, namely, the court of the foreign country did not, in the circumstances of case, have jurisdiction to give that judgment in the view of English law; the judgment is vitiated by fraud on part of the party in whose favour the judgment is given or fraud on the part of the court which pronounced the judgment; the enforcement or recognition of the judgment would be contrary to public policy; the proceedings in which the judgment was obtained were opposed to natural justice. (See : Dicey & Morris, The Conflict of Laws, 11th Edn., Rules 42 to 46, pp. 464 to 476; Cheshire & North, Private International Law, 12th Edn., pp. 368 to

392.)

33. Similarly in the matter of enforcement of foreign arbitral awards at common law a foreign award is enforceable if the award is in accordance with the agreement to arbitrate which is valid by its proper law and the award is valid and final according to the arbitration law governing the proceedings. The award would not be recognised or enforced if, under the submission agreement and the law applicable thereto, the arbitrators have no justification to make it, or it was obtained by fraud or its recognition or enforcement would be contrary to public policy or the proceedings in which it was obtained were opposed to natural justice (See: Dicey & Morris, The Conflict of Laws, 11th Edn., Rules 62-64, pp. 558 & 559 and 571 & 572; Cheshire & North, Private International Law, 12th Edn., pp. 446-447). The English courts would not refuse to recognise or enforce a foreign award merely because the arbitrators (in its view) applied the wrong law to the dispute or misapplied the right law. (See : Dicey & Morris, The Conflict of Laws, 11th Edn., Vol. II, p. 565.)

34. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clauses (a) to (e) of Article I had to be fulfilled and in Article 11, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition and enforcement of the award would be refused if the Court was satisfied in respect of matters mentioned in clauses (a), (b) and (c). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. (See : Dicey & Morris, The Conflict of Laws, 11th Edn., Vol. I, p. 578). It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. Under the New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in sub-clauses (a) to (e) of clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (a) and (b) of clause (2) of Article V. None of the grounds set out in sub-clauses (a) to (e) of clause (1) and subclauses

(a) and (b) of clause (2) of Article V postulates a challenge to the award on merits.

35. Albert Jan van den Berg in his treatise The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation, has expressed the view:

> "It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought ma y not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international

commercial arbitration that a national court should not interfere with the substance of the arbitration." (p. 269)

36. Similarly Alan Redfern and Martin Hunter have said:

"The New York Convention does not permit any review on the merits of an award to which the Convention applies and in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted." (Redfern & Hunter, Law and Practice of International Commercial Arbitration, 2nd Edn., p. 46 1.)

37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits. II. Bar to the enforcement of the award under Section 7(1)(a)(ii) of the Act

38. As indicated earlier, the grievance of Renusagar is that the Arbitral Tribunal on October 1, 1985 decided the preliminary objection raised by Renusagar that the Arbitrators had become functus officio and were not entitled to proceed with the arbitration proceedings on merits and that the Arbitral Tribunal thereafter proceeded to deal with the merits of the claim of General Electric without any further notice to Renusagar and as a result Renusagar was unable to present its case before the Arbitral Tribunal. This objection was not raised by Renusagar either before the learned Single Judge or before the Division Bench of the High Court. We have, however, considered the same and we do not find any substance in it. After the Terms of Reference had been drawn before the Arbitral Tribunal on February 8, 1984, the parties had appeared before the Arbitral Tribunal at Paris for hearing which lasted for ten days between February 25 to March 8, 1985 and during the course of the said hearing Renusagar presented typed submissions and legal authorities before the Arbitral Tribunal. In these hearings, the Arbitral Tribunal concluded hearing on issues 22(g) to (p) and the matter was thereafter adjourned by the Arbitral Tribunal to June 10 but on account of sudden illness of Dr Dixit, one of the arbitrators, the matter had to be adjourned and it was ultimately fixed for October 1, 1985. On June 26, 1988, the Chairman of the Arbitral Tribunal sent a notice to the parties wherein it was stated that the adjourned hearing would take place in London on Tuesday from October 1 to 4 and to continue if necessary during the following week from October 7 to 11. In the said communication, it was further stated:

"5. At the beginning of the hearing, the Tribunal will be prepared to hear submissions if necessary on the adequacy of the evidence before us on the relevant issues of U.S. foreign tax credit. But the main purpose of the meeting is to deal with the respondent's counter-claims together with the claimant's claims for 119,053 U.S. dollars (unpaid purchase price of spare parts) and 103,500 U.S. dollars (unpaid repairs on 75 M.V.A. Transformers).

> 6. All the above counter-claims and claims are old, so before going into details as to merit, the Tribunal will wish to consider submissions on the raised issues of limitation, laches, estoppel, abandonment and whether the right party is being sued."

39. On July 23, 1985, M/s Khaitan & Partners, on behalf of Renusagar, sent a communication to the Arbitrators giving notice that Renusagar was abandoning and withdrawing items

(ii) to (vi) and (viii) of its claim set forth in para 19(g) of the Terms of Reference as amended by Paris hearings. On August 10, 1985, M/s Khaitan & Partners, on behalf of Renusagar, sent a communication to the Arbitrators wherein a reference was made to the notice issued by Renusagar to the effect that the ICC Arbitration Tribunal had become functus officio and neither the ICC Arbitration Tribunal could proceed with the arbitration nor Renusagar could participate in the same on the ground that the application submitted by General Electric under Section 3 of the Foreign Awards Act had been rejected by Mirzapur Civil Court and the said order of the court had not yet been set aside or stayed by the Allahabad High Court in the revision petition filed by General Electric. Renusagar, through their advocates (M/s Khaitan & Partners) also sent petition dated August 23, 1985 to the Secretary-General, ICC as well as Secretariat, ICC of Arbitration reiterating their objection that the arbitrators had become flinctus officio and could not proceed and/or function. In his communication to M/s Khaitan & Partners dated September 2, 1985 the Chairman of the Arbitral Tribunal intimated that the question as to the effect of the suit filed in the Mirzapur Court on the arbitration would be considered as a preliminary issue at the scheduled meeting on October 1, 1985. On September 23, 1985, M/s Khaitan & Partners, on behalf of Renusagar, addressed a communication to Mr Roberto Power in the ICC (copies of the same were sent to the Arbitrators as well as to General Electric) wherein it was stated: "Our plea is totally different. It is that the Arbitrators have become functus officio in the facts and law stated by us in the 23rd August, 1985 document and our telexes to the Arbitrators copies of which have been sent to ICC. Therefore, the question of our appearing before the Arbitrators or their determining the plea raised by us cannot and does not arise." In the communication dated September 28, 1985 from M/s Khaitan & Partners, it is stated: "We have been repeatedly informing you that the Arbitrators have become functus officio. Therefore, be so kind as not to communicate with us any further regarding the arbitration which has become infructuous." From these documents, it would appear that the stand of Renusagar was that the Arbitrators had become functus officio and they could not proceed with the arbitration and there was, therefore, no question of Renusagar appearing before the Arbitral Tribunal on the dates fixed for hearing. In these circumstances, it is not open to Renusagar to say that the Arbitral Tribunal, after having rejected, (by majority) the said objection raised by Renusagar, by order dated October 1, 1985 should have given a further notice to Renusagar asking them to appear to make their submission before the Arbitral Tribunal on the merits on issues 22(q) to 22(bb). In this context, it may also be stated that issues 22(q) and 22(r) relate to the claim of US $ 119,053.91 for purchase price of spare parts which is not disputed by Renusagar and issue 22(s) relates to claim for compensatory damages on the said amount which has been allowed on the same basis as the claim for compensatory damages on regular interest (Item No.

2) under issue 22(k). Rest of the matters covered by issues 22(t) to 22(bb) related to counter-claims of Renusagar and claims by General Electric against counter-claims which have been disallowed by

the Arbitral Tribunal.

40. We are, therefore, of the opinion that the enforcement of the arbitral award is not barred by Section 7(1)(a)(ii) of the Foreign Awards Act on the ground that Renusagar was unable to present its case before the Arbitral Tribunal. III. Objection to the enforceability of the award on the ground that it is contrary to the public policy of the State of New York

41. Shri Venugopal has urged that although under sub-clause

(b) of clause (2) of Article V of the New York Convention the recognition and enforcement of an arbitral award can be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country, i.e., the country where the award is sought to be enforced, a departure has been made in Section 7(1)(b)(ii) of the Foreign Awards Act which prescribes that the foreign award may not be enforced under the said Act if the court dealing with the case is satisfied that the enforcement of the award would be contrary to public policy. The submission of Shri Venugopal is that in Section 7(1)(b)(ii) of the Act, the Parliament has deliberately refrained from using the words "public policy of India" which implies that the words "public policy" are not restricted to the public policy of India but would cover the public policy of the country whose law governs the contract or of the country of the place of arbitration and the enforcement of an award would be refused if it is contrary to such public policy. In this context Shri Venugopal has invited our attention to the provisions of Section 7(1) of the Arbitration (Protocol & Convention) Act, 1937 wherein the words used are "and enforcement thereof must not be contrary to the public policy or law of India". According to Shri Venugopal while under the 1937 Act, objections to enforcement are limited to the public policy of India or law of India, there is no such limitation in Section 7(1)(b)(ii) of the Foreign Awards Act. Shri Venugopal has also placed reliance on the decision of this Court in V/0 Tractoroexport, Moscow v. Tarapore & Co.5 wherein this Court has held that there was clear deviation from the rigid and strict rule that the courts must stay a suit whenever an international commercial arbitration as contemplated by the Protocol and the Conventions, was to take place and that it was open to the legislature to deviate from the terms of the Protocol and the Convention and that it appears to have given only a limited effect to the provisions of the 1958 Convention. We find it difficult to accept this contention. It cannot be held that by not using the words "public policy of India" and only using the words "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act, Parliament intended to deviate from the provisions of the New York Convention contained in Article V(2)(b) which uses the words "public policy of that country" implying public policy of the country where recognition and enforcement is sought. That Parliament did not intend to deviate from the terms of the New York Convention is borne out by the amendment which was introduced in the Act by Act 47 of 1973 after the decision of this Court in Tractoroexport case5 whereby Section 3 was substituted to bring it in accord with the provisions of the New York Convention. The Foreign Awards Act has been enacted to give effect to the New York Convention which seeks to remedy the defects in the Geneva Convention of 1927 that hampered the speedy settlement of disputes through arbitration. The Foreign Awards Act is, therefore, intended to reduce the time taken in recognition and enforcement of foreign arbitral awards. The New York Convention seeks to achieve this objective by dispensing with the requirement of the leave to enforce the award by the courts where

the award is made and thereby avoid the problem of "double exequatue'. It also restricts the scope of enquiry before the court enforcing the award by eliminating the requirement that the award should not be contrary to the principles of the law of the country in which it is sought to be relied upon. Enlarging the field of enquiry to include public policy of the courts whose law governs the contract or of the country of place of arbitration, would run counter to the expressed intent of the legislation.

42. With regard to the provisions of the Arbitration (Protocol & Convention) Act, 1937, it may be stated that Section 7(1) of the said Act, as originally enacted, read as under:

> "7. Conditions for enforcement of foreign awards.- (1) In order that a foreign award may be enforceable under this Act it must have-
>
> (a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed, 5 (1969) 3 SCC 562: (1970) 3 SCR 53
>
> (b) been made by the Tribunal provided for in the agreement or constituted in manner agreed upon by the parties,
>
> (c) been made in conformity with the law governing the arbitration procedure,
>
> (d) become final in the country in which it was made,
>
> (e) been in respect of a matter which may lawfully be referred to arbitration under the law of British India, and the enforcement thereof must not be contrary to the public policy or the law of British India.
>
> (2) A foreign award shall not be enforceable under this Act if the Court dealing with the case is satisfied that-
>
> (a) the award has been annulled in the country in which it was made, or
>
> (b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented or,
>
> (c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration:
>
> Provided that if the award does not deal with all questions referred the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

> (3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non- existence of the conditions specified in clauses (a), (b) and (c) of sub-section (1), or the existence of the conditions specified in clauses (b) and (c) of sub-section (2), entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal."

43. By Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 the words "British India" were substituted by the words "the Provinces", which words were substituted by the words "the States" by the Adaptation of Laws Order, 1950. By Part B States (Laws) Act, 1951, the words "the States" were substituted by the word "India". The aforesaid amendments introduced from time to time indicate that the words "public policy" and "the law of India" are independent of each other and the words "public policy" are not qualified by the words "of India" which follow the word "law" because there was no separate public policy for each Province or State in India. This means that even in the Protocol and Convention Act of 1937 the legislature had used the words "Public Policy" only and by the said words it was intended to mean "the public policy of India". The New York Convention has further curtailed the scope of enquiry by excluding contravention of law of the court in which the award is sought to be enforced as a ground for refusing recognition and enforcement of a foreign award. The words "law of India" have, therefore, been omitted in Section 7(1)(b)(ii) of the Foreign Awards Act. It cannot, therefore, be said that by using the words "Public Policy" only Section 7(1)(b)(ii) of the Foreign Awards Act seeks to make a departure from the provisions contained in the Protocol and Convention Act of 1937 and, by using the words "Public Policy" without any qualification, Parliament intended to broaden the scope of enquiry so as to cover public policy of other countries, i.e., the country whose law governs the contract or the country of the place of arbitration. In the U.K., the Arbitration Act, 1975 has been enacted to give effect to the provisions of the New York Convention. Section 5(3) of the said Act provides as under:

> "Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award."

44. Although the words "public policy" only are used without indicating whether they refer to public policy of England, authors of authoritative textbooks have expressed the view that they only mean "English public policy". In Russel on Arbitration, 12th Edn. at p. 384 it is stated:

> "The New York Convention is to the same effect. Accordingly, though the 1975 Act does not so specify, it must be taken that reference is intended to English public policy which indeed is the only public policy into which the English courts can sensibly inquire."

> The same view is expressed in Dicey & Morris on The Conflict of Laws, 11th Edn., Vol. I at pp. 586-7.

45. We are, therefore, of the view that the words "public policy" used in Section 7(1)(b)(ii) of the Foreign Awards Act refer to the public policy of India and the recognition and enforcement of the award of the Arbitral Tribunal cannot be questioned on the ground that it is contrary to the public policy of the State of New York.

IV. Meaning of 'public policy' in Section 7(1)(b)(ii) of the Act

46. While observing that "from the very nature of things, the expressions 'public policy', 'opposed to public policy' or 'contrary to public policy' are incapable of precise definition" this Court has laid down: (SCC p. 217, para 92) "Public policy ... connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time." (See : Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly6.)

47. The need for applying the touchstone of public policy has been thus explained by Sir William Holdsworth:

"In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them."

(History of English Law, Vol. III, p. 55)

48. Since the doctrine of public policy is somewhat open-textured and flexible, Judges in England have shown certain degree of reluctance to invoke it in domestic law. There are two conflicting positions which are referred as the 6(1986)3SCC 156, 217: 1986 SCC (L&S) 429:

(1986) 1 ATC 103: (1986)2 SCR 278 ,372 ,narrow view' and the 'broad view'. According to the narrow view courts cannot create new heads of public policy whereas the broad view countenances judicial law making in this areas. (See : Chitly on Contracts, 26th Edn., Vol. I, para 1133, pp. 685-686). Similar is the trend of the decision in India. In Gherulal Parakh v. Mahadeodas Maiya7 this Court favoured the narrow view when it said:

"... though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these days" (p. 440)

49. In later decisions this Court has, however, leaned towards the broad view. [See : Murlidhar Agarwal v. State of U.P.8; Central Inland Water Transport Corpn. v. Brojo Nath Ganguly6 at p. 373; Rattan Chand Hira Chand v. Askar Nawaz Jung9.]

50. In the field of private international law, courts refuse to apply a rule of foreign law or recognise a foreign judgment or a foreign arbitral award if it is found that the same is contrary to the public policy of the country in which it is sought to be invoked or enforced. The English courts follow the following principles:

> "Exceptionally, the English court will not enforce or recognise a right conferred or a duty imposed by a foreign law where, on the facts of the particular case, enforcement or, as the case may be, recognition, would be contrary to a fundamental policy of English law. The court has, therefore, refused in certain cases to apply foreign law where to do so would in the particular circumstances be contrary to the interests of the United Kingdom or contrary to justice or morality." (See : Halsbury's Laws of England, 4th Edn., Vol. 8, para 418.)

51. A distinction is drawn while applying the said rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. The application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved. (See : Vervaeka v. Smith10; Dicey & Morris, The Conflict of Laws, 11 th Edn., Vol. I p. 92; Cheshire & North, Private International Law, 12th Edn., pp. 128-129). The reason for this approach is thus explained by Professor Graveson:

> "This concern of law in the protection of social institutions is reflected in its rules of both municipal and conflict of laws.

Although the concept of public policy is the same in nature in these two spheres of law, its application differs in degree and occasion, corresponding to the fact that transactions containing a foreign element may constitute a less serious threat to municipal institutions than would purely local transactions." (R.H. Graveson : Conflict of Laws, 7th Edn., p. 165) 7 1959 Supp 2 SCR 406: AIR 1959 SC 781 8 (1974) 2 SCC 472, 482: (1975) 1 SCR 575, 584 9 (1991) 3 SCC 67, 76-77 10 (1983) 1 AC 145,164: (1982) 2 All ER 144,158

52. In Louchs v. Standard Oil Co. of New York' I Cordozo, J. has said:

"The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." (p. 111)

53. The particular rule of public policy that the defendant invokes may be of this overriding nature and therefore enforceable in all actions, or it may be local in the sense that it represents some

feature of internal policy. If so it must be confined to cases governed by the domestic law and it should not be extended to a case governed by foreign law. In order to ascertain whether the rule is allpervading or merely local, it must be examined in the light of its history, the purpose of its adoption, the object to be accomplished by it and the local conditions. (See : Cheshire and North, Private International Law, 12th Edn., p. 129.)

54. The cases in which the English courts refuse to enforce a foreign acquired right on the ground that its enforcement would affront some moral principle the maintenance of which admits of no possible compromise, have been classified as under:

> "(i) Where the fundamental conceptions of English justice are disregarded;
>
> (ii) Where the English conceptions of morality are infringed;
>
> (iii) Where a transaction prejudices the interests of the United Kingdom or its good relations with foreign powers;
>
> (iv) Where a foreign law or status offends the English conceptions of human liberty and freedom of action;"
>
> (See : Cheshire and North, Private International Law, 12th Edn.,pp. 131-133.)

55. As observed by Lord Simon of Glaisdale "an English Court will exercise such a jurisdiction with extreme reserve". (Vervaeka v. Smith10)

56. In Dalmia Dairy Industries Ltd. v. National Bank of Pakistan12 the Court of Appeal refused to extend the doctrine of public policy to embrace the principle that the English courts should refuse to enforce an award arising out of a contract between persons who are nationals of foreign States which were at war with each other but each of which was in friendly relationship with England. In support of the applicability of the doctrine, it was argued that it would be harmful to international relations of the United Kingdom with friendly countries if it were to allow the machinery of its courts to be used to enforce a judgment, or an arbitral award in favour of a national of one foreign State friendly to the United Kingdom, against the national of another foreign State, also friendly to the United Kingdom, when the two foreign States are enemies of one another. Negativing the said contention, the Court of Appeal (Megaw, L.J.) has held:

> " If there is no authority binding on us which specifically adopts that supposed doctrine, or principle, we should unhesitatingly decline to make 11 224 NY 99 (1918) 12 (1978) 2 Lloyd's LR 223 new law to that effect in this case. We should regard it, on balance, as being contrary to public policy for such a principle to apply." (p. 300)
>
> 57. In Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Ras Al Khaima h National Oil Co.13 decided by the Court of Appeal, Sir John Donaldson M.R. has said: "Consideration of public policy can never be exhaustively defined, but they should be

approached with extreme caution. As Burrough J. remarked in Richardson v. Mellish14: 'It is never argued at all but when other points fail.' It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully-informed member of the public on whose behalf the powers of the State are exercised." (p. 779)

58. The approach of the American courts to the doctrine of public policy in its application to recognition and enforcement of foreign arbitral awards under the New York Convention is reflected in the decision of the US Court of Appeals in Parsons & Whittemore Overseas Co. Inc. v. Societe Generale De L'Industrie Du Papier (Rakta) and Bank of America15 wherein it has been observed: "The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement. ... We conclude, therefore, that the convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice." (pp. 973-974)

59. While dealing with arbitration agreements in international business transactions, the U.S. Supreme Court, has disapproved a parochial refusal by the courts of one country to enforce an international arbitration agreement as well as the "parochial concept that all disputes must be resolved under our laws and in our courts". It has been observed:

"We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our Courts." (Fritz Scherk v. Alberto-Culver Co. 16)

60. Similarly in Mitsubishi Motors Corpn. v. Soler Chrysler-Plymouth Inc. 17 it was observed:

"We conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercia l system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that 13 (1987) 2 All ER 769 14 (1824) 2 Bing 229, 252: (1824-34) All ER Rep 258, 266 15 508 F 2d 969 (1974) 16 41 L Ed 2d 270, 279, 281 : 417 US 506 17 87 L Ed 2d 444 a contrary result would be forthcoming in a domestic context." (pp. 456457)

61. In France, a distinction is made between international public policy ("order public international") and the national public policy. Under the new French Code of Civil Procedure, an international arbitral award can be set aside if the recognition or execution is contrary to international public policy. In doing so it recognises the existence of two levels of public policy the

national level, which may be concerned with purely domestic considerations, and the international level, which is less restrictive in its approach. (See : Redfern and Hunter, Law and Practice of International Commercial Arbitration, 2nd Edn., p. 445.)

62. According to Redfern and Hunter, "if a workable definition of 'international public policy' could be found, it would be an effective way of preventing an award in an international arbitration from being set aside for purely domestic policy considerations". But in the absence of such a definition "there are bound to be practices which some States will regard as contrary to international public interest and other States will not" [See : Redfern & Hunter (supra) pp. 445-446.]

63.In view of the absence of a workable definition of "international public policy" we find it difficult to construe the expression "public policy" in Article V(2)(b) of the New York Convention to mean international public policy. In our opinion the said expression must be construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced. Consequently, the expression 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act means the doctrine of public policy as applied by the courts in India. This raises the question whether the narrower concept of public policy as applicable in the field of public international law should be applied or the wider concept of public policy as applicable in the field of municipal law.

64. Keeping in view the object underlying the enactment of the Foreign Awards Act, this Court has also favoured a liberal construction of the provisions of the said Act. In Renusagar case I1 it has been observed: (SCC p. 723, para

50) "It is obvious that since the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consisting with its literal and grammatical sense, a liberal construction." (p. 492)

65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(b)

of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article 1(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

V. Is the award contrary to public policy of India?

67. Having examined the scope of public policy under Section 7(1)(b)(ii) of the Foreign Awards Act, we will now proceed to consider the various grounds on the basis of which the said provision is invoked by Renusagar to bar the enforcement for the award of the Arbitral Tribunal. As indicated earlier, Renusagar has invoked the said provision on the ground that enforcement of the award would be contrary to the public policy for the reason that such enforcement-

(a) would involve contravention of the provisions of FERA;

(b) would amount to penalising Renusagar for not disregarding the interim orders passed by the Delhi High Court in the writ petition filed by Renusagar;

(c) would enable recovery of compound interest on interest;

(d) would result in payment of damages on damages;

(e) would result in unjust enrichment by General Electric;

We will examine the submissions of learned counsel under each head separately.

(a) Violation of FERA

68. As mentioned in the Preamble, FERA is a law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency for the conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country. It was preceded by Foreign Exchange Regulation Act, 1947. Similar enactments providing for exchange control exist in other countries. In the United Kingdom, there is a similar enactment, viz., Exchange Control Act, 1947, which remains in force but its operation has been suspended since 1979. The view of the English courts is that the exchange control legislation does not belong to the field of revenue

laws and application of such law is not obnoxious to English public policy. (See : Kahler v. Midland Bank Ltd.18; Zivnostenska Banka National Corpn. v. Frankman19.) In Herbert Wagg & Co. Ltd., Re2O, Upjohn J., has said:

> "It cannot be doubted that legislation intended to protect the economy of the nation and the general welfare of its inhabitant s regardless of their nationality by various measures of foreign exchange control or by altering the value of its currency, is recognised by foreign courts although its effect is usually partially confiscatory. Probably there is no civilized country in the world which has not at some stage in its history altered its currency or restricted the rights of its inhabitants to purchase the currency of another country. (p. 349) In my judgment these courts must recognize the right of every foreign State to protect its economy by measures of foreign exchange control and by altering the value of its currency. Effect must be given to those measures where the law of the foreign State is the proper law of the contract or where the movable is situate within the territorial jurisdiction of the State."(p.351)
>
> 69.The following principle of Private International Law is applicable in relation to such legislation:
>
> "212. (1) A contractual obligation may be invalidated or discharged by exchange control legislation if-
>
> (a) such legislation is part of the proper law of the contract; or
>
> (b) it is part of the law of the place of performance; or
>
> (c) it is part of English law and the relevant statute or statutory instrument is applicable to the contract:
>
> Provided that foreign exchange legislation will not be applied if it is used not with the object of protecting the economy of the foreign State, but as an instrument of oppression or discrimination." (See : Dicey & Morris, The Conflict of Laws, 11 th Edn., Vol. II, 1466.)
>
> 70. In the comments on the said rule, it is stated:

"An English court would clearly refuse to enforce a contract the making or performance of which was prohibited by the Exchange Control Act, 1947 (now suspended) or by any statutory instrument made in virtue of that Act, or which was prohibited by earlier United Kingdom exchange control legislation. This would apply irrespective of the proper law of the contract and irrespective of the place of performance. The question whether the Act or statutory instrument applied to the transaction would have to be answered by construing it in accordance with the principles of statutory interpretation which are part of English law. If it did so apply , it would be an example of an 'overriding statute'."

18 1950 AC 24, 27, 36, 46-47, 57 : (1949) 2 All ER 621 19 1950 AC 57,72, 78: (1949) 2 All ER 671 20 (1956) 1 Ch 323 (See: Dicey & Morris, op. cit. p. 1469.)

71. In support of this statement of law reference has been made to the decision of House of Lords in Boissevain v. Weil21. In that case, the respondent, a British subject, and the appellant, a Dutch subject, were involuntarily resident in Monaco an enemy-occupied territory, in 1944, due to war conditions. The respondent borrowed a sum of 960,000 French francs from the appellant in Monaco on an undertaking to repay the money in sterling in London at an agreed rate of 160 francs to the pound and drew cheques in blank for the full amount on English Bank. The appellant filed a suit in England claiming 6000 pounds from the respondent. The said claim was opposed by the respondent on the ground that the loans given by the appellant to the respondent were invalid and illegal being contrary to Regulation 2(1) of the Defence (Finance) Regulations, 1939. The said claim of the appellant was allowed by the trial Judge, but on appeal, it was dismissed by the Court of Appeal. The House of Lords agreed with the view of the Court of Appeal that Regulation 2(1) prohibited this borrowing and therefore rendered the appellant's claim for repayment unmaintainable. Lord Radcliffe, who delivered the main speech, has observed:

> "If Regulation 2 did extend to this transaction it forbade the very act of borrowing, not merely the contractual promise to repay. The act itself being forbidden, I do not think that it can be a source of civil rights in the courts of this country. ... A court that extended a remedy in such circumstances would merit rather to be blamed for stultifying the law than to be applauded for extending it." (p. 341)

72. Another interesting case is that of Wilson, Smithett & Cope Ltd. v. Terruzzi22. In that case, the plaintiffs were brokers on the London Metal Exchange and the defendant, Terruzzi, was a dealer and speculator in metals who lived in Italy. The defendant entered into various contracts for the sale and purchase of metals with the plaintiffs and a sum of 195,000 pounds was payable by the defendant to the plaintiffs in respect of those contracts. Before entering the said contracts, defendant had, however, not obtained ministerial authorisation as required by the Italian Exchange Control Regulations. An action was brought in the English court by the plaintiffs against the defendant in which the defendant pleaded that it was unlawful for him under Italian law to enter into any of the contracts which were "exchange contracts" within the meaning of Article VIII, Section 2(b) of the Bretton Woods Agreement and unenforceable by reason of the Bretton Woods Agreements Order in Council, 1946. The said plea of the defendant was rejected by the trial Judge who gave a judgment in favour of the plaintiffs and the said judgment was affirmed by the Court of Appeal. It appears that the judgment of the English court was sought to be enforced by the plaintiffs in Italy but the Italian courts refused to recognise and enforce the said judgment on the view that since the contracts ' were entered in violation of the Italian Exchange Control Regulations their enforcement would amount to infringement of Italian public policy and the contracts were unenforceable in Italy. (See : Mauro Rubino-Sammartano, Public Policy in Transnational Relationships, p. 91.) 21 1950 AC 327: (1950) 1 All ER 728 22 (1976) 1 QB 683 :(1975) 2 All ER 649

73. Our attention has also been invited to a decision of the Supreme Court of Austria dated May 11, 1983 which is extracted, in brief, in Yearbook of Commercial Arbitration, Volume X (1985) pp.

421-23. In that case, an award had been made in favour of the appellant who was a national of Holland against the respondent who was an Austrian whereby the respondent was directed to pay to the appellant DM 667,500. The appellant sought enforcement of the award in Austria and the said enforcement was opposed by the respondent on the ground that the underlying contracts, though nominally delivery contracts, were in reality sales and purchases on a margin basis and such contracts are contrary to Austrian foreign exchange law, unless specific authorisation therefor was given by the competent authorities. The respondent invoked Article V(2)(b) of the New York Convention, 1958 to oppose the recognition and enforcement of the award. The Austrian Supreme Court dismissed the claim of the Dutch national and held that the award could not be recognised and enforced by the court in view of Article V(2)(b) of the New York Convention and, in that context, it was held:

> "That the transactions concluded between the parties are not subject to Austrian but to Dutch law is irrelevant because domestic law is applicable to the examination whether there has been a sale and purchase on a margin basis, for determining whether enforcement is to be refused. According to Article 81, para 4, of the Austrian Law on Enforcement Procedure, enforcement has to be refused if sought for awards rendered in respect of claims which, under Austrian law, cannot be brought before Austrian courts. This is a specific, special provision of domestic Austrian law on public policy." (p. 422)
>
> 74. Dr F.A. Mann has also expressed views to the same effect. He has said: "There remains the question whether a foreign judgment rendered in disregard of foreign exchange regulations operating in the country in whic h it is to be enforced, may or must be rejected by the courts of the latter country as being contrary to order public. Subject to local regulations the answer would seem to be in the affirmative."
>
> (See: F.A. Mann, The Legal Aspect of Money, 5th Edn., (1992) p. 403,note 31.)

75. As laid down by this Court, FERA is a statute enacted for the "national economic interest" and the object of various provisions in the said Act is to ensure that the nation does not lose foreign exchange which is very much essential for the economic survival of the nation. (See : LIC of India v. Escorts Ltd. 23 and M.G. Wagh v. Jay Engineering Works Ltd. 24)

76. Keeping in view the aforesaid objects underlying FERA and the principles governing enforcement of exchange control laws followed in other countries, we are of the view that the provisions contained in FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India as envisaged in Section 7(1)(b)(ii) of the Act. The submissions urged by Shri Venugopal to show that there has been a violation of the provisions of FERA, therefore, need examination.

23 (1986) 1 SCC 264, 314: 1985 Supp 3 SCR 909, 981 24 (1987) 1 SCC 542, 546: (1987) 1 SCR 981, 987

77. Shri Venugopal has made a two-fold submission in this regard. In the first place, he has urged that in awarding delinquent interest, under item No. 3 the Arbitral Tribunal has acted in disregard of the provisions of FERA and secondly the enforcement of the award of the Arbitral Tribunal would result in violation of the provisions of FERA. As regards the first submission relating to award of delinquent interest, it may be stated that the said submission involves an attack on the merits of the award which is impermissible at the stage. of enforcement. We have, however, examined this submission on merits and are of the view that it is without substance. Shri Venugopal has urged that under the original approval of January 2, 1964 by the Government of India of the terms of the loan by General Electric to Renusagar the total amount of loan was to be repaid in 16 equal semi-annual instalments between the 30th and the 120th month from the effective date of the contract with specific provision for interest from the 16th to the 30th month to be capitalised and the interest was specifically restricted to the period from the 16th to the 30th month and thereafter on capitalisation from the 30th month to the 120th month and that no interest was payable without FERA sanction after the due date of each instalment. This contention is no longer open to Renusagar in view of the earlier decision of this Court in Renusagar Case 11, wherein this Court has considered the question whether there was an obligation to pay further interest after June 30, 1967 till payment under the contract. This Court has referred to Articles IIIA3(c) and XIV-B of the contract and has held: (SCC p. 710, paras 32 and 33) "In our view these provisions which are to be found in the contract clearly show that the promissory notes are not sole and exclusive repository of GEC's right to claim and receive future interest on unpaid price after June 30, 1967 but that the contract itself provides for the obligation to pay such interest after that date till payment.

obligation to pay future interest from June 30, 1967 onwards till payment and that these two claims have been preferred by GEC before the Court of Arbitration of I.C.C. as arising not merely 'out of' but 'under the contract'." (pp. 477-478)

78. Shri Venugopal has, however, urged that the earlier approval to the terms of the contract was of no consequence in view of the subsequent refusal by the Government on August 1, 1969 to approve the agreement between General Electric and Renusagar with regard to the rescheduling of the dates of payment of instalments 1, 2, 4 and 5. This contention also stands concluded by the decision in Renusagar Case II wherein it has been observed: (SCC p. 691, para 7) "In July 1969 Renusagar sought the Central Government's approval to the rescheduling of the dates of payment as embodied in October 1968 Amendment as also in the Memorandum of the Meeting held in December 1968 but by letters dated August 1, 1969 and August 4, 1969 the Central Government declined to approve the rescheduling of the dates of payment on the ground that it would result in larger outflow of foreign exchange and advised Renusagar to effect payments as per the original schedule including instalments which had since fallen due. The result was that the original schedule of payment remained operative and there was delay on the part of the Renusagar to make payment of certain instalments on due dates." (p. 457)

79. From the observations aforementioned in Renusagar Case II it is apparent that the original contract postulates payment of interest till payment and the effect of the order of the Government of India dated August 1, 1969 was that the original schedule of payment remained operative. Since the original contract had been approved by the Government of India it cannot be said that the award of

interest for delayed payment of instalments involved violation of the provisions of FERA.

80. Shri Venugopal has submitted that in Renusagar Case I1 this Court was only required to consider the question of arbitrability of the disputes and was not concerned with the merits of the claim and, therefore, the said decision cannot be held to conclude the matter. We are unable to agree. It is true that in that case this Court was considering the question of arbitrability of the disputes but for the purpose of deciding that issue it was necessary to consider whether disputes arose out of or are related to the contract and for that purpose it was necessary to construe the terms of the contract and it cannot, therefore, be said that the said decision does not conclude this aspect of the matter. In this context, it may also be pointed out that after the decision in Renusagar Case I, an application for clarification of the said judgment was moved by Renusagar in this Court wherein clarification was sought in respect of certain paragraphs in the judgment and in the said application no objection was raised with regard to the observations quoted above. Moreover, the said application was dismissed by this Court by order dated October 29, 1988.

81. As regards the second submission of Shri Venugopal that the enforcement of the Arbitral award would constitute violation of Section 9(1) of FERA which imposes prohibition to make any payment to or for the credit of any person resident outside India except in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally by the Reserve Bank. The submission is that in view of the earlier order of the Government of India dated August 1, 1969 refusing to approve rescheduling of payments the bar of Section 9 will operate and no order for enforcement of the award can be made. The High Court in this regard has placed reliance on the provisions of Section 47(3) of FERA which provides as follows:

> "Neither the provisions of this Act nor any term (whether express or implied) contained in any contract that anything for which the permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions and any such term, would be due, whether as debt, damages or otherwise, but-
>
> (a) the said provisions shall apply to sums required to be paid by any judgment or order of any court as they apply in relation to other sums;
>
> (b) no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank, as the case may be, may permit to be paid; and
>
> (c) for the purpose of considering whether or not to grant such permission, the Central Government or the Reserve Bank, as the case may be, may require the person entitled to the benefit of the judgment or order and the debtor under the judgment or order, to produce such documents and to give such information as may be specified in the requisition."

82. In Dhanrajamal Gobindram v. Shamji Kalidas & Co.25 this Court has construed the provisions of Section 21 of the Foreign Exchange Regulation Act, 1947. Sub-section (3) of Section 21 of the said Act was more or less similar to Section 47(3) of FERA. This Court has held:

"Sub-section (3) allows legal proceedings to be brought to recover sum due as a debt, damages or otherwise, but no steps shall be taken to enforce the judgment, etc., except to the extent permitted by the Reserve Bank. The effect of these provisions is to prevent the very thing which is claimed here, namely, that the Foreign Exchange Regulation Act arms persons against performance of their contracts by setting up the shield of illegality. An implied term is engrafted upon the contract of parties by the second part of sub-section (2), and by sub-section (3), the responsibility of obtaining the permission of the Reserve Bank before enforcing judgment, decree or order of Court, is transferred to the decree-holder. The section is perfectly plain, though perhaps it might have been worded better for which a model existed in England." (p. 1031)

83. To the same effect is the law laid down by the House of Lords in England in Contract and Trading Co. (Southern) Ltd. v. Barbey26 wherein the following observations from the judgment of Somerwell LJ in Cummings v. London Bullion Co. Ltd.27 have been quoted with approval:

"The person entitled to the payment issues a writ. The fact that permission has not been obtained is not a defence to the action. On the one hand, the plaintiff can obtain judgment, the money due under the judgment being subject to Part 11 of the Act and the Rules to which I have referred. The defendant assuming that he is admitting liability, apart from the provisions of the Act, can make a payment into court. The Act,is not to be used to enable the defendant to retain the money in his pocket but to control its reaching its destination, namely, the plaintiff." (p. 253)

84.Shri Venugopal has urged that Section 47(3) cannot be applied in the present case because it postulates a situation where permission of the Central Government has not been sought and that in the present case permission was sought but was refused earlier. In our view the earlier refusal by the Government to give its approval to the rescheduling of payment of instalments does not in any way preclude the Government of India from considering the matter in the light of the subsequent developments and it cannot be said that merely because the Government of India had refused to give its approval to rescheduling of payment of instalments it would not grant permission under Section 47(3) of FERA to the enforcement of the judgment that may be passed in these proceedings. It has also been urged that Section 47(3) of FERA is applicable where the legal proceedings are brought in India to recover a sum 25 (1961) 3 SCR 1020: AIR 1961 SC 1285 26 1960 AC 244: (1959) 3 All ER 846 27 (1952) 1 KB 327 :(1952) 1 All ER 383 which is 'due', i.e., as liquidated sum presently owing and the said provision would not apply to an obligation to pay on a future date. We do not find any support for this submission from the language of Section 47(3) of FERA wherein the words used are "to recover any sum which, apart from the said provisions and any such term, would be

due, whether as debt, damages or otherwise". The words "would be" which precede the word "due" indicate that the quantum of the amount has to be fixed in the legal proceedings and that it need not be a predetermined amount. Moreover in the present case, we are concerned with the proceedings for the enforcement of the award wherein the amount due has already been determined by the Arbitral Tribunal. We are, therefore, unable to hold that the enforcement of the award would involve violation of any of the provisions of FERA and for that reason it would be contrary to public policy of India so as to render the award unenforceable in view of Section 7(1)(b)(ii) of the Act.

(b) Disregard of the orders of Delhi High Court

85. It is the fundamental principle of law that orders of courts must be complied with for any action which involves disregard for such orders would adversely affect the administration of justice and would be destructive of the rule of law and would be contrary to public policy. The question, however, is whether the enforcement of the award of the Arbitral Tribunal would involve disregard of any order of a court. The submission of Shri Venugopal is that in the matter of withholding of payment of regular interest Renusagar were acting in accordance with the interim orders that were passed by Delhi High Court in the writ petition filed by Renusagar which remained in operation from 1970 to 1980 and, therefore, the Arbitral Tribunal was in error in awarding compensatory damages for retention by Renusagar of the amount of income tax payable on the regular interest during the period the writ petition was pending in the Delhi High Court and enforcement of the award of compensatory damages on regular interest under item No. 2 is, therefore, contrary to public policy. We find it difficult to accept this contention. Renusagar had filed an application, C.M. No. 286-W/70, in C.W. No. 170 of 1970 in the Delhi High Court. Prayer (i) of C.M. No. 286-W/70 was as under:

> "Pending the hearing and final disposal of this petition for an interim order an injunction restraining the respondent and its officers, servants and agents from taking any steps on proceedings in enforcement furtherance, pursuance or implementation or in any manner giving effect to the said orders both dated September 11, 1969 or from preventing the payment by the petitioner of tax free interest of 6 per cent per annum to IGE in accordance with the approval granted by the respondent Orders dated September 8, 1965 and June 7, 1967 and to grant an ex parte order pending notice."
>
> 86. On February 24, 1970, the following interim order was passed in C.M. No. 286-W/70: "There shall be interim injunction as prayed for. Mr Kirpal to file his counter by March 24, 1970."
>
> 87. The matter came before the court after notice on May 18, 1970 on which date the following order was passed:
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> "Mr Ravinder Narain states that he will give security, of the assets of the company to the satisfaction of the Commissioner of Income Tax, Lucknow for Rs Four lakhs. Let this be done within a month from today. Interim injunction and stay to continue. In

default of compliance, as above, petition for stay will stand dismissed."

88. From the prayer contained in C.M. 286-W and the orders dated February 24, 1970 and May 18, 1970 passed on the said application, it would appear that pending the hearing and final disposal of the writ petition, there was an interim injunction restraining the Union of India, the respondent in the said writ petition, and its officers, servants and agents from taking any steps on proceedings in enforcement, furtherance, pursuance or implementation or in any manner giving effect to the said orders dated September 11, 1969 whereby tax exemption had been withdrawn and also restraining from preventing Renusagar from paying tax on interest of 6 per cent per annum to General Electric in accordance with the approval granted under orders dated September 3, 1965 and June 7, 1967. The only condition imposed by the Court was that Renusagar was required to give security for Rs 4,00,000 to the satisfaction of Commissioner of Income Tax, Lucknow within one month. These orders would, therefore, show that on furnishing of the said security Renusagar was free to remit regular interest @ 6 per cent per annum to General Electric as per the approval granted under orders dated September 8, 1965 and June 7, 1967. The said orders of the Delhi High Court did not also prevent Renusagar from depositing in the Government Treasury the income tax payable on the amount of regular interest payable @ 6 1/2 per cent per annum. The said orders instead of preventing Renusagar from remitting the said amount of tax free interest in fact permitted Renusagar to make the said payments to General Electric. It cannot, therefore, be said that in retaining the said amount with itself while the writ petition was pending in the Delhi High Court during the period from 1970 to 1980 Renusagar was acting in accordance with the orders passed by the Delhi High Court and the payment of the said amount by Renusagar to General Electric or depositing in the Government Treasury the income tax on the amount of regular interest payable to General Electric would have amounted to disregard of the said orders. In the circumstances, it is not possible to hold that in awarding compensatory damages under item No. 2 for wrongfully withholding the amount of regular interest during the period from 1970 onwards the Arbitral Tribunal has penalised Renusagar for not disregarding the orders of the Delhi High Court and the enforcement of the said award would be contrary to public policy of India.

(c) Interest on Interest (Compound Interest)

89. This relates to award of compensatory damages under item Nos. 2, 4 and 6. It has been urged that the award of interest on interest (compound interest) is not permissible under the law of New York as well as the law in India and is also contrary to public policy of the State of New York as well as the public policy of India. While construing the provisions of Section 7(1)(b)(ii) of the Foreign Awards Act, we have held that under the said provisions the enforcement of a foreign award can be objected to only on the ground of such enforcement being contrary to public policy of India and that public policy of other countries e.g. country of the law of contract of the courts of the place of arbitration cannot be taken into consideration. For that reason an objection to the enforceability of the award of the Arbitration Tribunal cannot be entertained on the ground it is contrary to the public policy of the State of New York. We would, however, examine whether award of interest on interest or compound interest is contrary to public policy of India. Before we refer to the law in India in this regard, we may take note of the law in England to which reference has been made by Shri Venugopal during the course of his submissions. At common law in England the principle that is

applied is that laid down in "the reluctant decision" of the House of Lords in London Chatham and Dover Rly. Co. v. South Eastern Rly. Co.28 that in the absence of any agreement or statutory provision for the payment of interest, a court has no power to award interest, simple or compound, by way of damages for the detention (i.e., tile late payment) of a debt. The injustice resulting from this rule has been sought to be removed by legislative intervention. By Section 3 of the Law Reform Miscellaneous Provisions) Act, 1934 power was conferred on the court of record to award interest in proceedings for recovery of any debt or damages where the debt remained unpaid until the judgment was given. Section 3 of the 1934 Act was repealed and replaced by Section 35-A inserted in the Supreme Court Act 1981 by the Administration of Justice Act 1982 and power to award interest was extended to cover a case where the debt is paid late, after Proceedings for its recovery have begun but before they have been concluded. The power to award interest does not extend to a case where a debt is paid later but before any proceeding for its recovery have begun. The rule in Lo don Chatham and Dover Rly V. case 28 has been qualified by the Court of Appeal in Wadsworth v. Lydall29 to apply only to claims for interest by way of general damages and does not extend to claims for special damages. In the field of Admiralty law simple interest is awarded, as a matter of course, on damages recovered in a damage action. In the area of equity the Chancery Courts, differing from the common law courts, have regularly awarded simple interest is ancillary relief in respect of equitable remedies, such as specific Performance, recession and the taking of an account and the Chancery Courts gave regularly awarded interest, including not only simple interest but also compound interest, when they thought that justice so demanded, that is to say in cases where money had been obtained and retained by fraud or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position. See : President of India v. La Pintada Cia Navegacion SA 30.)

90. In Australia, the matter has been considered by the Australian High Court in the recent decision in Hungerfords v. Walker31. Mason, CJ and Wilson, I., after referring to the decisions of the House of Lords in London Chatham and Dover Rly. Co. v. South Eastern Rly. Co. 28 and President of India v. La Pintada, Cia30) have observed:

> "But we see no reason for allowing the reluctance of the common law to extend to cases where the defendant's breach of contract or negligence has caused the plaintiff to pay away or the defendant to withhold money and, as a result, the plaintiff has been deprived of the use of the money so paid away or withheld." (p. 218) 28 1893 AC 429 : (1891-94) All ER Rep Ext 1610 29 (1981) 2 All ER 401 30 (1984) 2 All ER 773 31 (1989) 63 Aus LJR 210 They upheld the decision of the Full Court of South Australia awarding damages for the added cost of funding the business with borrowed money as result of the loss of the use of money overpaid in tax by awarding compound interest for the reason that simple interest would not reflect accurately the extent of the respondent's loss since simple interest almost undercompensates the injured party's true loss. It was observed:
>
> "The disdain of the common law for interest especially compound interest, is a relic from the days when interest was regarded as necessarily usurious." (p. 218) Brennan and Deane JJ. have expressed their general agreement with the reasons given by Mason, C.J. and Wilson, J. but Dawson, J. has given a dissenting judgment.

91. It appears that in Canada also, the Canadian Federal Court of Appeal has expressed the view that there is no longer any reason to retain the common law rule against interest as damages and the said rule has been described as "a judge-made limitation on the awarding of interest which is clearly no longer seen to be good public policy". (See :

Algonquin Mercantile Corp. v. Dart Industries Canada Ltd.32)

92. This would show that award of interest on damages or interest on interest i.e. compound interest is not regarded as being against public policy in these countries.

93. We may now examine the law governing award of interest in India. Shri Venugopal has placed reliance on the provisions of Section 3(3)(c) of the Interest Act, 1978. Section 3 empowers a court to allow interest and sub-section (3) of the said section provides exceptions to the main provision. In clause (c) of sub-section (3) it is laid down that nothing in this section shall empower the court to award interest upon interest. Shri Venugopal has also placed reliance on the decision of the Judicial Committee of the Privy Council in Bengal Nagpur Rly. Co. Ltd. v. Ruttanji Ramji33 and the decisions of this Court in Union of India v. West Punjab Factories Ltd.34; Union of India v. Watkins Mayor & Co.35; Union of India v. A.L. Rallia Ram36 and Thawardas Pherumal v. Union of India37. The decision of the Judicial Committee of the Privy Council in Bengal Nagpur Rly. Co. v. Ruttanji Ramji33 is based on London Chatham & Dover Rly. Co. case28 and following the said decision, it has been laid down that "interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or in the provision of any substantive law entitling the plaintiff to recover interest". The said decision of the Privy Council has been followed by this Court in Thawardas Pherumal v. Union of India37, Union of India v. Rallia Ram36, Union of India v. Watkins Mayor & Co.35 and Union of India v. West Punjab Factories34 and it has been held that in the absence of any agreement, express or implied, or any provision of law, it is not 32 (1987) 16 CPR (3d) 193, 201 33 AIR 1938 PC 67: 65 IA 66: (1938) 1 MLJ 640 34 (1966) 1 SCR 580: AIR 1966 SC 395 35 AIR 1966 SC 275 36 (1964) 3 SCR 164: AIR 1963 SC 1685 37 AIR 1955 SC 468 : (1955) 2 SCR 48 possible to award interest by way of damages. This would show that there is no absolute bar on the award of interest by way of damages and it would be permissible to do so if there is usage or contract, express or implied, or any provision of law to justify the award of such interest. Merely because in Section 3(3)(c) of the Interest Act, 1978, the court is precluded from awarding interest on interest does not mean that it is not permissible to award such interest under a contract or usage or under the statute. It is common knowledge that provision is made for the payment of compound interest in contracts for loans advanced by banks and financial institutions and the said contracts are enforced by courts. 'Hence, it cannot be said that award of interest on interest, i.e., compound interest, is against the public policy of India. We are, therefore, unable to accept the contention that award of interest on interest, i.e., compound interest is contrary to public policy of India and the award in respect of compensatory damages awarded under item Nos. 2, 4 and 6 cannot be enforced under Section 7(1)(b)(ii) of the Act.

(d) Damages on Damages

94. This objection relates to award of compensatory damages under item No. 4. The submission of Shri Venugopal is that since the contract did not provide for payment of interest for the period subsequent to the date of maturity, the delinquent interest that has been awarded under item No. 3 is in the nature of damages and the award of compensatory damages under item No. 4 amounts to award of damages on damages which is impermissible and is contrary to public policy of India. In support of this submission, Shri Venugopal has placed reliance on the decision of this Court in Trojan & Co. Ltd. v. Nagappa Chettiar38 wherein interest had been allowed on damages and it was contended before this Court that the said interest could not be allowed on damages because it would amount to awarding damages on damages which is opposed to precedent and principle. The Court rejected the said contention and held that interest is allowed by court of equity in the case of money obtained or retained by fraud and in that case, the plaintiff had paid the money to defendants on account of fraudulent practices by the defendants on the plaintiffs.

95. In the present case, the said decision has no application because the basic postulate of the contention of Shri Venugopal is that the contract did not make any provision for payment of interest for the period subsequent to the date of maturity of the promissory notes. This contention has been considered by us and it has been negatived and in view of the earlier decision of this Court in Renusagar Case 11 we have held that the contract provided for payment of interest for the period subsequent to the date of maturity of the promissory notes till actual payment was made. In the circumstances, it cannot be said that the delinquent interest that has been awarded under item No. 3 has been awarded by way of damages and not by way of interest. Once it is held that delinquent interest awarded under item No. 3 is by way of interest then there is no question of damages being awarded on damages and it is, therefore, not necessary to go into the question whether awarding damages on damages is contrary to public policy of India.

38 1953 SCR 789 : AIR 1953 SC 235 : (1953) 23 Comp Cas 307

(e) Unjust Enrichment

96. Relying upon the decision of the Supreme Court of Romania date(February 16, 1985, which is extracted, in brief, in the Year Book of Commercial Arbitration, Vol. XIV (1989) pp. 689 to 691, Shri Venugopal has submitted that unjust enrichment is contrary to public policy of India and since the enforcement of award of the Arbitral Tribunal would result in unjust enrichment of General Electric it cannot be enforced under Section 7(1)(b)(ii) of the Foreign Awards Act. This contention of Shri Venugopal has a bearing on the award of delinquent interest under item No. 3, as well as on the award of compensatory damages under item Nos. 2 and 4 and award of costs under item, No. 7.

97. In the case decided by the Romanian Supreme Court, a Lebanese shipowner had agreed by a charter party with the Romanian State enterprise to transport from Costantza (Romania) to Bandar Abbas (Iran) certain goods which had been sold C&F to an Iranian buyer. The voyage was interrupted at Tripoli (Lebanon) where the shipowner had its seat. At Tripoli all merchandise disappeared, according to the shipowner because of war, and according to the Romanian enterprise because of a local fraudulent sale. The dispute was referred to arbitration and in the arbitration award, the shipowner was directed to refund to the Romanian enterprise part of the freight it had

received as well as the value of the lost goods. The Romanian enterprise sought enforcement of the arbitration award in Romania. The Lebanese shipowner objected to the request on various grounds including the ground that it was not obliged to refund the value of the goods since they had been fully paid for by the Iranian buyer. It was submitted that the enforcement of the award was contrary to Romanian public policy since it resulted in unjust enrichment of the Romanian enterprise inasmuch as the said enterprise was allowed to receive for the second time the price of goods which had already been paid by the Iranian buyers. Rejecting the said objection the Romanian Supreme Court held that the arbitral award showed that the Romanian enterprise meant to obtain repayment of the value of the cargo and the freight on behalf of the Iranian buyer acting as agent or trust and since the Romanian enterprise did not act on its own behalf, although it had no express mandate, the conditions for unjust enrichment were not met in the case at issue and, consequently, the public policy of Romanian international private law had not been violated. The said decision has proceeded on the basis that unjust enrichment was part of the public policy of Romanian international private law but in that case it was found that there was no violation of the said principle of public policy.

98. The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. It provides the theoretical foundation for the law governing restitution. The principle has, however, its critics as well as its supporters. In the words of Lord Diplock : "... there is no general doctrine of unjust enrichment in English law. What it does is to provide specific remedies in particular cases of what might be classed as unjust enrichment in a legal system that is based upon civil law." (See : Orakpo v. Manson Investments Ltd.39) In The Law of Restitution by Goff and Jones, it has, however, been stated "that the case-law is now sufficiently mature for the courts to recognise a generalised right of 39 1978 AC 95, 104: (1977) 3 All ER 1 restitution" (3rd Edn., p. 15). In Chitty, on Contracts, 26th Edn., Vol. I, p. 1313, para 2037, it has been stated that "the principle of unjust enrichment is not yet clearly established in English law". The learned editors have, however, expressed the view:

> " Even if the law has not yet developed to that extent, it does not follow from the absence of a general doctrine of unjust enrichment that the specific remedies provided are not justifiable by reference to the principle of unjust enrichment even if they were originally found without primary reference to it." (pp. 1313-1314, para 2037)

99. In Indian law the principle of unjust enrichment finds recognition in the Indian Contract Act, 1872 (Sections 70 and 72).

100. We do not consider it necessary to go into the question whether the principle of unjust enrichment is a part of the public policy of India since we are of the opinion that even if it be assumed that unjust enrichment is contrary to public policy of India, Renusagar cannot succeed because the unjust enrichment must relate to the enforcement of the award and not to its merits in view of the limited scope of enquiry in proceedings for the enforcement of a foreign award under the Foreign Awards Act. The objections raised by Renusagar based on unjust enrichment do not relate to the enforcement of the award because it is not the case of Renusagar that General Electric has already received the amount awarded under the arbitration award and is seeking to obtain

enforcement of the award to obtain further payment and would thus be unjustly enriching itself. The objections about unjust enrichment raised by Renusagar go to the merits of the award, that is, with regard to the quantum awarded by the Arbitral Tribunal under item Nos. 2, 3, 4 and 7, which is beyond the scope of the objections that can be raised under Section 7(1)(b)(ii) of the Foreign Awards Act. To hold otherwise would mean that in every case where the arbitrators award an amount which is higher than the amount that should have been awarded, the award would be open to challenge on the ground of unjust enrichment. Such a course is not permissible under the New York Convention and the Foreign Awards Act. We have, however, examined the objections raised by Renusagar relating to unjust enrichment even on merits and we are not satisfied that the amounts awarded under item Nos. 2, 3, 4 and 7 are so excessive as to result in unjust enrichment of General Electric.

101. One of the contentions that was urged by Shri Venugopal in support of the objections relating to unjust enrichment was that the compensatory damages should have been awarded after deducting the US tax payable by General Electric on the amount of regular interest as well as delinquent interest. Reliance, in this regard, has been placed on the decision of the House of Lords in British Transport Commission v. Gourley40 wherein it has been laid down that when assessing damages for loss of actual or prospective earnings allowance must be made for any income tax on the earnings. This rule in Gourley case40 will, however, apply only where two conditions are satisfied : (

1) the money, for the loss of which damages are awarded, would have been Subjected to tax as income; and (2) the damages awarded to the plaintiff are not subject to tax in his hands. (See : Chitty on Contracts, 26th Edn., Vol. I, pp. 1186-87, para 1841.) 40 (1955) 3 All ER 796 : 1956 AC 185

102. In Hanover Shoe v. United Shoe Machinery v Corpn.41 the Court of Appeal had remanded the matter to the District Court to take account of the additional taxes Hanover would have paid for computation of damages, on the view that since only after-tax profits can be reinvested or distributed to shareholders, Hanover was damaged only to the extent of the after-tax profits that it failed to receive. The U.S. Supreme Court reversed the said decision of the Court of Appeal and held that the District Court did not err on the question of computation. The Court observed:

> "As Hanover points out, since it will be taxed when it recovers damages from United for both the actual and the trebled damages, to diminish the actual damages by the amount of the taxes that it would have paid had it received greater profits in the years it was damaged would be to apply a double deduction for taxation, leaving Hanover with less income than it would have had if United had not injured it." (p. 1247)

103. Since General Electric would be liable to pay U.S. tax on the amount of compensatory damages awarded under item Nos. 2 and 4 of the Award, it cannot be said that there would be unjust enrichment by General Electric on account of non-deduction of U.S. tax payable on the amount of regular interest and delinquent interest while assessing compensatory damages under item Nos. 2 and 4.

104. As regards amount of delinquent interest awarded under item No. 3, it has been submitted that since interest is not payable under the contract in respect of the period subsequent to the date of

maturity of the promissory notes, the award of delinquent interest for the said period would result in unjust enrichment. This argument about liability for such interest has already been considered by us and we have found that under the contract interest is payable for the period subsequent to the maturity of the promissory notes till payment. There is, therefore, no substance in the contention about unjust enrichment on this account. With regard to the award of delinquent interest Linder item No. 3 and compensatory damages on the delinquent interest under item No. 4 it has been contended that in view of the agreement between General Electric and Renusagar for rescheduling of the instalments Renusagar were not required to pay the instalments as per the original schedule and, therefore, Renusagar could not be held liable for interest for delayed payment of the instalments which fall due till August 1, 1969, and they could not also be saddled with compensatory damages for non-payment of instalments that fall due till August 1, 1969 as per the original schedule. We have dealt with the effect of order of the Government of India dated August 1, 1969, refusing to give its approval to the proposed arrangement for rescheduling of payment of instalments and we have held that as a result of such refusal the original contract regarding payment of those instalments would revive and Renusagar were required to pay the instalments in accordance with the terms of the said contract and were required to pay interest for delayed payment of those instalments and therefore, it cannot be said that award of delinquent interest for the period during which the matter was pending consideration with the Government of India, would result in unjust enrichment of General Electric.

41 20 L Ed 2d 1231 : 392 US 481 (1968)

105. As regards item No. 7 relating to costs, the case of Renusagar is that the costs awarded by the arbitrators are excessive and unconscionable and further that the costs incurred in relation to the litigation in India, which has been found inadmissible earlier by the Arbitral Tribunal has been included in the costs of arbitration that have been awarded resulting in unjust enrichment of General Electric. We have considered this objection of Renusagar and we do not feel that it can be a ground for refusal of enforcement of award under Section 7(1)(b)(ii) of the Foreign Awards Act.

106. For the reasons aforesaid, none of the objections raised by Renusagar against the enforcement of the award under Section 7(1)(b)(ii) of the Foreign Awards Act for the reason that such enforcement is contrary to public policy of India merits acceptance.

VI. Relevant date for conversion of the amount awarded front foreign currency to Indian currency

107. In the field of conflict of laws money serves a two- fold function, viz., (i) as a means of measurement; and (ii) medium of payment. The currency in which a debt is expressed or a liability to pay damages is calculated is called the " money of account" or "money of contract" or "money of measurement" and the currency in which the said debt or liability is to be discharged is called the " money of payment". The money of account is to be ascertained from the terms of the contract construed in accordance with the proper law of the contract and the money of payment is determined by the law of the country in which such debt or liability is payable i.e. lex loci solutionis. (See : Dicey & Morris, The Conflict of Laws, 11 th Edn., Vol. 2, Rules 209 and 210.)

108. Where the money of account and the money of payment are not identical the amount of units of the currency of account owed by the debtor must, by an exchange operation, be translated into the currency in which he is obliged to pay. This is a matter of substance and the rate of exchange for such conversion is determined by the proper law of the contract or the law governing the liability. (See : Dicey & Morris, The Conflict of Laws pp. 1442 and 1453.) By this process the quantum of the monetary obligation is determined. The questions relating to conversion of currency often arise at the stage of discharge of the monetary obligation when the debtor makes the payment in a currency other than the money of payment. Such conversion is to be made on the basis of the exchange rate prevailing on the date of payment at the place of payment. (See : Dicey & Morris, The Conflict of Laws, Rule 210(2) at pp. 1453-54; Mann: The Legal Aspect of Money, 5th Edn., p. 323.) Conversion of the currency is also necessary in cases where legal proceedings have to be instituted by the creditor. In some legal systems the judgment can be given by the courts in the currency of that country only and, therefore, it becomes necessary to convert the monetary obligation into the currency of that country at the time of institution of the legal proceedings. The exchange for such conversion will depend on the lex fori, i.e., the law of the forum and in many legal systems it is the date the cause of action arose, i.e., the date of breach while in some systems it is the date of judgment. In legal systems where it is permissible to obtain a judgment in foreign currency conversion would be necessary at the stage of enforcement or execution of the judgment. Same problem would arise when a judgment of a foreign court is sought to be enforced. The relevant date for applying the exchange rate for such conversion depends upon the lex for, i.e., the law of the forum because it is a matter relating to the procedure. (See : Cheshire & North, Private International Law, 12th Edn., p. 106.) What applies to enforcement of judgments equally applies to enforcement of arbitral awards.

109. In the instant case, there is no dispute that the money of account as well as the money of payment is the same, namely, U.S. dollar. Here, the question of convertibility from U.S. dollars to Indian rupees arises in the context of enforcement of the award of the Arbitral Tribunal which is in U.S. dollars. We are, therefore, required to examine the position under the Indian law with reference to conversion of foreign currency into Indian currency at the stage of enforcement of a judgment or award in foreign currency.

110. Prior to 1975, the law in England, was that an English court will not give judgment for the payment of an amount expressed in foreign currency and the amount of any foreign currency had to be converted in sterling on or before the date of judgment and the date for the purpose of such conversion was the date when the cause of action arose. This was the law laid down by the House of Lords in United Railways of Havana & Regla Warehouses Ltd., Re42. This decision was overruled by the House of Lords (by majority) in 1975 in Miliangos v. George Frank (Textiles) Ltd.43 In that case, a Swiss seller had agreed to supply English buyers with goods at a price expressed in the contract in Swiss francs. The goods and invoices were delivered but the price was not paid and bills of exchange drawn in Switzerland and accepted by the buyers were dishonoured on presentation. The seller brought action in England wherein he claimed the sums due in Swiss francs. Originally he had asked for conversion of Swiss francs into sterling at the breach date in view of the law laid down in United Railways of Havana, Re, case42 but subsequently in view of the decision of the Court of Appeal in Schorsch Meier G.m.b.H. v. Hennin44 the seller amended his statement of claim so as to claim the

amount due to him in Swiss francs as an alternative to claiming judgment in sterling. Bristow, J. gave judgment for the moneys due expressed in sterling, holding that the rule that the English courts could express their judgments only in sterling had not been altered either by Parliament or by any decision of the House of Lords. The Court of Appeal reversed the said decision and, following Schorsch Meier G.m.b.H. v. Hennin44 gave judgment for the seller ordering the buyers to pay the sum due in Swiss francs, or the equivalent in sterling at the time of payment. Affirming the said decision of the Court of Appeal and departing from its earlier decision in the Havana Railways case42 the House of Lords has held that it was legitimate for the House of Lords to depart from the "breach date conversion" rule and recognise that an English court was entitled to give judgment for a sum of money expressed in a foreign currency in the case of obligations of a money character to pay foreign currency arising under a contract, the proper law of which was that of a foreign country and where the money of account and payment is that of that country, or possibly of some other country but not of the United Kingdom. It was further held that the claim had to be specifically for the 42 1961 AC 1007 : (1960) 2 All ER 332 sub nom Tomkinson v. First Pennsylvania Banking and Trust Co.

43 1976 AC 443: (1975) 3 All ER 801 44 1975 QB 416: (1975) 1 All ER 152 foreign currency or its sterling equivalent and the conversion shall be at the date of payment, i.e., the date when the courts authorise enforcement of the judgment in terms of sterling. The said decision was, however, confined in its application to foreign money obligations and the court left open for future discussion the question whether the rule applying to money obligations should apply as regards claims for damages for breach of contract or for tort. In his dissenting opinion, Lord Simon, has reiterated the law laid down in Havana Railways case 42. it may be of interest to note that Lord Wilberforce, who gave the leading speech in Miliangos case 43 had appeared in Havana Railway case 42 but failed to persuad the House of Lords to accept his contention. He, however, succeeded 15 years later, in having his views accepted by the House of Lords. Subsequently in Services Europe Atlantique Sud (Seas) of Paris v. Stockholms Rederiaktiebolag Svea of Stockholm45 the House of Lords has extended the rule laid down in Miliangos case 43 to claims for damages for tort and breach of contract. The rule laid down in Miliangos case 43 has been held to be applicable to an action at common law on a foreign judgment (See : Dicey & Morris, The Conflict of Laws, 11 th Edn., Vol. 2, p. 146 1.) In relation to arbitral awards the matter had come up before the Court of Appeal in Jugoslavenska Oceanska Plovidba v. Castle Investment Co. InC.46 wherein it was held that an award could be made by the arbitrators in England in terms of U.S. dollar and that the same could be enforced by converting the foreign currency into sterling at the rate prevailing at the date of the award. While referring the said decision, Lord Wilberforce, in Miliangos case 43 has said:

> "In the case of arbitration, there may be a minor discrepancy, if the practice which is apparently adopted (see the Jugoslavenska case(46) remains as it is, but I can see no reason why, if desired, that practice should not be adjusted so as to enable conversion to be made as at the date when leave to enforce in sterling is given." (p. 469)

111. The impact of Miliangos case43 was not confined to the British shores. It has been felt across the Atlantic and there is a perceptible change in the law in Canada as well as in the United States.

112. Following the law in England, the Supreme Court of Canada had applied the breach date rule for converting foreign currency into Canadian dollar in two earlier decisions. (See : The Custodian v. Bhucher47; Gatineau Power Co. v. Crown Life Insurance Co.48) But subsequent to Miliangos cas43 Carruthers J. of the High Court of Ontario, in Batavia Times Publishing Co. v. Davis49 applied the judgment date rule in a suit for enforcement of a foreign judgment. Distinguishing the earlier judgments of the Supreme Court as dealing with actions based on the original cause of action, the learned judge held that in a proceeding to enforce a foreign judgment he was free to adopt that conversion date which in his view "avoids an injustice" and is "in step with commercial needs". The said judgment was affirmed by the Court of Appeal.50 In Clinton v. 45 1979 AC 685 : (1979) 1 All ER 421 sub nom Eleftherotria (M. V.) (Owners) v. Despina (M. V.) (Owners) sub nom Despina R. The 46 1974 QB 292 :(1973) 3 All ER 498 47 1927 SCR 420, 427 (Can) 48 1945 SCR 655, 658 (Can) 49 1978 DLR 3d 144 50 (1980) 102 DLR (3d) 192 Ford51 the Court of Appeal of Ontario affirmed the order of the trial Judge applying the rate prevailing at the date of the Statement of Claim on the view that in awarding judgment on a foreign judgment the trial Judge should be free to adopt a date for the conversion of foreign currency into domestic currency which avoids injustice and which is in step with commercial needs.

113. The federal law in the United States is thus explained by Prof. F.A. Mann:

"Where the breach or wrong occurred in a foreign country (especially by non-payment of money due there), the damages are measured in the currency of that country and the dollar equivalent calculated at the rate of exchange obtaining at the date of judgment can be recovered; where the breach or wrong occurred in the United States (especially by non-

payment of foreign money due there), the damages, being measured in dollars, are to be converted at the rate of exchange of the date of breach or wrong."

(Mann: Legal Aspects of Money, 5th Edn., p. 347)

114. According to the learned author the first part of the above statement is based on the decision of the U.S. Supreme Court in Deutsche Bank Filiale Nurenberg v. Humphrey52 and the latter part of the statement is supported by the decision of the U.S. Supreme Court in Hicks v. Guinness53.

115. Most of the States, including the State of New York (till recently), follow the old English rule and apply the rate of exchange prevailing at the date of breach. In the State of New York, however, there has been a departure in some cases where the judgment-date rule has been applied. (See : John S. Metcalf Co. v. Mayer54 and Sirie v. Godfrey55.) Even in the matter of application of the breach date rule in actions for enforcement of a foreign judgment, the New York courts have applied the breach date rule with effect from the date of the judgment sought to be enforced. In Indag v. Irridelco Corpn.56 one of the cases on which reliance was placed by Shri Venugopal, the action was brought to enforce a judgment entered in favour of the plaintiff by the courts of Switzerland and the United States District Court in New York held that the date of entry of Swiss judgment, rather than the date of breach of underlying obligation, i.e., its agreement to repay certain notes, was controlling as to application of breach-day conversion rule. It was held that the date of award for damages by

Cantonal Court was the relevant date for application of breach date conversion rule even though that judgment was subsequently appealed. In taking this view, the Court relied upon the decision in Competex S.A. v. Lalord57. It appears that the provisions in this regard contained in Section 27 of the Judiciary Law of the State of New York have now been amended in 1987. Earlier Section 27 provided that all judgments or decrees rendered by any court for any debt, damages or costs, all executions issued thereupon, and all accounts arising from judicial proceedings shall be computed, as near as may be, in U.S.

51 (1982) 137 DLR 3d 192 52 272 US 517 : 71 L Ed 383 (1926) 53 269 US 71 : 70 L Ed 168 (1925) 54 (1925) 211 NY Supp 53 55 (1921) 188 NY Supp 52 56 (1987) 658 F Supp 763 57 (1986) 783 F 2d 333 dollars and cents, rejecting lesser fractions, and no judgment or other proceeding, shall be considered erroneous for such means. Section 27 as amended reads as under:

> "27. (a) Except as provided in sub-division
>
> (b) of this section, judgments and accounts must be computed in dollars and cents. In all judgments or decrees rendered by any court for any debt, damages or costs, all executions issued thereupon, and all accounts arising from judicial proceedings shall be computed, as near as may be, in U.S. dollars and cents, rejecting lesser fractions, and no judgment or other proceeding, shall be considered erroneous for such means.
>
> (b) In any case in which the cause of action is based upon an obligation denominated in a currency other than currency of the United States, a court shall render or enter a judgment or decree in the foreign currency of the underlying obligation. Such judgment or decree shall be converted into currency of the United States at the rate of exchange prevailing on the date of entry of the judgment or decree."

116. As a result of this amendment, instead of breach-date rule which was prevailing earlier the judgment-date rule has been introduced. This amendment came into operation on July 20, 1987. It was introduced at the request of New York State Bar Association and the Erie County Bar Association and it was supported by the Association of the Bar of the City of New York. According to the chairman of the Committee on International Trade and Transactions of the New York State Bar Association the said amendment was necessary because in view of the decision of House of Lords in Miliangos case 43 " a number of transactions which would otherwise be governed by New York law, and, involve professional and financial advisors in New York, have been structured in England and covered by English law".

117. In India, the law relating to conversion of foreign currency into Indian currency in the matter of enforcement of judgments or awards is governed by the decision of this Court in Forasol case 4. That case arose out of a contract between Forasol, a foreign company and the Oil and Natural Gas Commission, a Government of India Undertaking. Certain disputes arose between the parties which were referred to arbitration in accordance with the arbitration clause contained in the contract. The said arbitration was governed by the Indian Arbitration Act, 1940. The award directed certain payments to be made in French francs but did not specify the rate of exchange at which the French

francs were to be converted into Indian rupees. Proceedings were initiated ill Delhi High Court for passing a decree in terms of the award and a question arose as to the exchange rate for conversion of French francs into Indian rupees. This Court examined the question with reference to the following dates:

(1) the date when the amount become due and payable;

(2) the date of the commencement of the action;

(3) the date of the decree;

(4) the date when the court orders execution to issue; and (5) the date when the decretal amount is paid or realised.

118. The court also pointed out that in a case where a decision has been passed by the court in terms of an award made in a foreign currency a sixth date, namely, the date of award also enters the competition. As there was lack of authority of any Indian court, this Court has considered the decision of English Courts including the Miliangos case43.

119. The first date, i.e., the date when the amount became due and payable, was not accepted by the Court for the reason that it cannot be said to be just, fair or equitable because in a case where the rate of exchange has gone against the plaintiff, the defendant escapes by paying a lesser sum than what he was bound to and thus is the gainer by his default while in the converse case where the rate of exchange has gone against the defendant, the defendant would be subject to a much greater burden than what he should bear. The Court felt that the same criticism would apply to the second of the dates, namely, the date of the commencement of the action or suit because suits are not often disposed of for an unconscionably long time and if we take into account the time that would be spent in appeals, further appeals, and revision and review applications which may be filed, the longevity of the litigation is doubled, if not tripled, so that none can with any certainty predict even a probable date for its termination. As regards the third date, namely, the date of the decree, the Court observed that a decree crystallizes the amount payable by the defendant to the plaintiff and it is the decree which entities the judgment-creditor to recover the judgment debt through the processes of law. Dealing with the objection that the date of tile decree of the trial court is not final decree for there may be appeals or other proceedings against it in superior courts and by the time the matter is finally determined, the rate of exchange prevailing on that date may be nowhere near that which prevailed at the date of the decree of the trial court, it was observed that this difficulty is easily overcome by selecting the date when the action is finally disposed of, in the sense that the decree becomes final and binding between the parties after all remedies against it are exhausted. As regards the fourth date, i.e., the date when the court orders execution to issue, it was felt that execution of a decree is not a simple matter because it involves execution of a money decree and the judgment-debtor's property has to be attached and pending attachment a third party, at times set up by the judgment-debtor, may prefer a claim to the attached property which will have to be investigated and determined by the executing court and even where no claim is preferred the attached property cannot be brought to sale immediately and certain formalities have to be

complied with and even after the sale has taken place, the judgment debtor may further hold up the receipt of the sale proceeds by the decree- holder by raising objection to the conduct of the sale and at times, a fresh auction sale may be have to be held if the auction-purchaser commits default in paying the balance of the purchase price and a considerable time would thus elapse between the date when the court orders execution to issue and the date of the receipt of the sale proceeds by the decree-holder. It was also pointed out that at times the judgment debt is not recovered in full when the attached property is sold in execution and further application for execution may become necessary and this would lead to an anomalous position for the Court would have to fix the rate of exchange, which may be different from each application for execution. A further difficulty that was pointed out by the court was that execution can only issue for a sum expressed in Indian currency and it cannot be for a sum which would be determined and fixed by the executing court at the time of granting an execution application. With regard to the fifth date, namely, the date of payment, the Court felt that there were three practical and procedural difficulties namely, payment of court fees, the pecuniary limits of the jurisdiction of courts and execution. Keeping in view the considerations referred to above, this Court declined to adopt the rule laid down in Miliangos case 43 and held that it would be fair to both the parties to take the date of passing the decree, i.e., the date of judgment. The said date was also held applicable to a case where a decree is made in terms of an award made in a foreign currency.

120. The practice which ought to be followed in suits in which a sum of money expressed in a foreign currency can legitimately be claimed by the plaintiff and decreed by the court, has been thus indicated:

> "... the plaintiff, who has not received the amount due to him in a foreign currency and, therefore, desires to seek the assistance of the court to recover that amount, has two courses open to him. He can either claim the amount due to him in Indian currency or in the foreign currency in which it was payable. I f he chooses the first alternative, he can only sue for that amount as converted into Indian rupees and his prayer in the plaint can only be for a sum in Indian currency. For this purpose, the plaintiff would have to convert the foreign currency amount due to him into Indian rupees. He can do so either at the rate of exchange prevailing on the date when the amount became payable for he was entitled to receive the amount oil that date or, at his option, at the rate of exchange prevailing on the date of the filing of the suit because that is the date on which he is seeking the assistance of the court for recovering the amount due to him. In either event, the valuation of the suit for the purposes of Court-fees and the pecuniary limit of the jurisdiction of the court will be the amount in Indian currency claimed in the suit. The plaintiff may, however, choose the second course open to him and claim in foreign currency the amount due to him. In such a suit, the proper prayer for the plaintiff to make in his plaint would be for a decree that the defendant do pay to him the foreign currency sum claimed in the plaint subject to the permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973, being granted and that in the event of the foreign exchange authorities not granting the requisite permission or the defendant not wanting to make payment in foreign currency even though such permission has been

granted or the defendant not making payment in foreign currency or in Indian rupees, whether such permission has been granted or not, the defendant do pay to the plaintiff the rupee equivalent of the foreign currency sum claimed at the rate of exchange prevailing on the date of the judgment. For the purposes of court- fees and jurisdiction the plaintiff should, however, value his claim in the suit by converting the foreign currency sum claimed by him into Indian rupees at the rate of exchange prevailing on the date of the filing of the suit or the date nearest or most nearly preceding such date, stating in his plaint what such rate of exchange is. He should further give an undertaking in the plaint that he would make good the deficiency in the court-fees, if any, if at the date of the judgment, at the rate of exchange then prevailing, the rupee equivalent of the foreign currency sum decreed is higher than that mentioned in the plaint for the purposes of court-fees and jurisdiction. At the hearing of such a suit, before passing the decree, the court should call upon the plaintiff to prove the rate of exchange prevailing on the date of the judgment or on the date nearest or most nearly preceding the date of the judgment. If necessary, after delivering judgment on all other issues, the court may stand over the rest of the judgment and the passing of the, decree and adjourn the matter to enable the plaintiff to prove such rate of exchange. The decree to be passed by the court should be one which orders the defendant to pay to the plaintiff the foreign currency sum adjudged by the court subject to the requisite permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973, being granted, and in the event of the Foreign Exchange authorities not granting the requisite permission or the defendant not wanting to make payment in foreign currency even though such permission has been granted or the defendant not making payment in foreign currency or in Indian rupees, whether such permission has been granted or not, the equivalent of such foreign currency sum converted into Indian rupees at the rate of exchange proved before the court as aforesaid. In the event of the decree being challenged in appeal or other proceedings and such appeal or other proceedings being decided in whole or in part in favour of the plaintiff, the appellate court or the court hearing the application in the other proceedings challenging the decree should follow the same procedure as the trial court for the purpose of ascertaining the rate of exchange prevailing on the date of its appellate decree or of its order on such application or on the date nearest or most nearly preceding the date of such decree or order. If such rate of exchange is different from the rate in the decree which has been challenged, the court should make the necessary modification with respect to the rate of exchange by its appellate decree or final order. In all such cases, execution can only issue for the rupee equivalent specified in the decree, appellate decree or final order, as the case may be. These questions, of course, would not arise if pending appeal or other proceedings adopted by the defendant the decree has been executed or the money thereunder received by the plaintiff." (pp. 587-589)

121. Referring to arbitrations, this Court has held that, on principle, there can be and should be no difference between an award made by arbitrators or an umpire and a decree of a court and has observed:

"In the type of cases we are concerned with here just as the courts have power to make a decree for a sum of money expressed in a foreign currency subject to the limitations and conditions we have set out above, the arbitrators or umpire have the power to make an award for a sum of money expressed in a foreign currency. The arbitrators or umpire should, however, provide in the award for th e rate of exchange at which the sum awarded in a foreign currency should be converted in the events mentioned above. This may be done by the arbitrators or umpire taking either the rate of exchange prevailing on the date of the award or the date nearest or most nearly preceding the date of the award or by directing that the rate of exchange at which conversion is to be made would be the date when the court pronounces judgment according to the award and passes the decree in terms thereof or the date nearest or most nearly preceding the date of the judgment as the court may determine. If the arbitrators or umpire omit to provide for the rate of conversion, this would not by itself be sufficient to invalidate the award. The court may either remit the award under Section 16 of the Arbitration Act, 1940, for the purpose of fixing the date of conversion or may do so itself taking the date of conversion as the date of its judgment or the date nearest or most nearly preceding it, following the procedure outlined above for the purpose of proof of the rate of exchange prevailing on such date. If however, the person liable under such an award desires to make payment of the sum in foreign currency awarded by the arbitrators or umpire without the award being made a rule of the court, he would be at liberty to do so after obtaining the requisite permission of the concerned authorities under the FERA." (pp. 589-590)

122. While passing the decision in terms of U.S. dollars the learned Single Judge has not considered the matter of conversion of US dollars into Indian currency. The Division Bench has, however, adverted to this aspect and applying the law laid down in Forasol case4 the decree has been passed in terms of US dollars as well as Indian rupees on the basis of the rupee-dollar exchange rate prevailing on the date of the decree passed by the learned Single Judge. The said date was applied for the reason, that according to the Division Bench the letters patent appeal filed by Renusagar was not maintainable.

123. It appears that both the parties are not satisfied with said view of the Division Bench of the High Court in applying the decision in Forasol case4 to the present case.

124. Shri Venugopal has urged that in Forasol case4 this Court was dealing with the enforcement of an award governed by the Indian Arbitration Act and that the principles laid down in the said decision cannot be applied to the present case arising out of a foreign award which is not governed by the provisions of the Indian Arbitration Act but is" governed by the provisions of the Foreign Awards Act. It is no doubt true that in the Forasol case4 this Court was dealing with an award governed by Indian Arbitration Act but that does not affect the applicability of the said decision to proceedings for enforcement of a foreign award in Indian courts because the matter of conversion of foreign currency into Indian currency at the stage of enforcement of an award is governed by the same principle irrespective of the fact whether the award is governed by the Indian Arbitration Act or a foreign award governed by the Foreign Awards Act. Moreover the position has been made clear by Section 4(1) of the Foreign Awards Act which lays down that a foreign award shall subject to the provisions of this Act be enforceable in India as if it were an award made on a matter referred to arbitration in India. The said provision equates a foreign award to an Indian award for the purpose

of enforcement with the exception that such enforcement will be subject to the provisions of the Foreign Awards Act. There is nothing in the provisions of the Foreign Awards Act which excludes the applicability of the principles laid down in Forasol case4 with regard to enforcement of foreign awards. In our opinion, therefore, the enforcement of the award in the instant case is governed by the law laid down in Forasol case4.

125. Shri Venugopal has further urged that the matter of conversion of foreign currency and the rate of exchange for such conversion is not a matter of procedure but is a matter of substance and it is governed by the proper law and that since the contract as well as performance of the contract are both governed by the New York law, the breach-date rule which was applicable in the State of New York at the relevant time, should be applied for the purpose of ascertaining the exchange rate for conversion of U.S. dollars into Indian rupees and that the rule in Forasol case4 can have no application to the present case. Shri Venugopal has in this regard placed reliance on certain observations in Legal Aspects of Money by F.A. Mann, 5th Edn. at pp. 326-327 and The Conflict of Laws by Dicey & Morris, 11th Edn., Vol. II, p. 1454. We are unable to agree with this submission of Shri Venugopal. The manner in which the court should pass the decree in a case where a foreign award is sought to be enforced is a matter of procedure and not of substance and is governed by lex fori, i.e., the law of the forum. The rule laid down in Miliangos case43 has been described as a rule of procedure. (See : Services Europe Atlantique Sud (Seas) of Paris v. Stockholms Rederiaktiebolag Svea of Stockholms45 at p. 704; Cheshire & North, Private International Law, 12th Edn., p. 100). For the same reasons, the principles laid down in Forasol case4 must be held to be rule of procedural law and would be applicable to the proceedings for enforcement of a foreign award under the Foreign Awards Act.

126. The passage from Legal Aspects of Money by F.A. Mann, on which reliance has been place d by Shri Venugopal reads thus:

"This situation involves two distinct questions: which is the legal system that determines whether there exists a right or a duty to convert the money of account into the (local) money of payment? Which is the legal system that governs the mechanics of the conversion (the type of the rate of exchange to be employed, tile date and the place with reference to which the rate is to be ascertained)?

As regards the first point it is necessary to repeat that, except in unusual circumstances, the creditor suffers no prejudice from payment in the moneta loci solutionis. It is suggested, therefore, that in general, i.e., where no problem of construction arises, the question of the right or duty of conversion may be treated as one relating to the mode of performance and, consequently, subject to the lex loci solutionis. The decision on the second point, however, is liable to encroach severely upon the substance of the obligation: whether the creditor who is entitled to be paid 1000 Spanish pesetas in Gibraltar must accept the pound equivalent calculated at the rate of peseta notes or of cable transfers to Madrid, or calculated with reference to the rate prevailing at the date of maturity or payment, or calculated at the Gibraltar or Madrid rate these are substantial matters on which the quantum eventually received by the creditor depends, if payment is not made in actual pesetas. These aspects, therefore, cannot be described as relating merely to the mode of performance, but

ought to be subject to the proper law of the contract." (pp. 326-

327)

127. We find that in the said passage which falls in Chapter XI relating to "The Payment of Foreign Money Obligations" the learned author is dealing with the conversion of the money of account to the money of payment and he has not considered the matter of convertibility of the foreign currency at the stage of enforcement of a judgment or award. We have already indicated that convertibility of the money of account into the money of payment involves determination of the liability and is a matter of substance governed by tile proper laws of contract. This question arises prior to the stage of the judgment or award. Here we are dealing with a case where the award has already been made and is sought to be enforced in India and the question is about the conversion of the foreign currency in which the award has been made into Indian currency. This question has been dealt with by Dr F.A. Mann in Chapter XII relating to "The Institution of Legal Proceedings and its effect upon Foreign Money Obligations" and the learned author has stated:

> " It is now clear that English law does not require any foreign money obligation to be converted into sterling for the purpose of instituting proceedings or of the judgment; on the contrary, where the plaintiff claims a sum of foreign money, he is both entitled and bound to apply for judgment in terms of such foreign money and it is only at the stage of payment or enforcement that conversion into sterling at the rate of exchange then prevailing takes place. This is so whether the claim is for payment of a specific sum contractually due or for damages for breach of contract or tort or for a just sum due in respect of unjustified enrichment or for restitution. Nor does it matter whether the contract sued upon is governed by English or by foreign law. Nor is it necessary to ask for specific performance rather than payment: in either case the defendant will be ordered to pay foreign money. Moreover an award in an English arbitration may be expressed and enforced in foreign currency and a foreign award or judgment so expressed may be enforced like the English award or judgment." (p. 352)
>
> 128. The entire position has been thus summed up by Dr Mann:
>
> "As regards the date with reference to which the rate of exchange is to be ascertained, the law is to a large extent settled. In connection with conversion for the purpose of proceedings the payment-date rule is firmly established. Outside proceedings the date depends on the construction of the contract, but there exists a strong tendency to apply the payment-date rule." (p. 436)
>
> 129. Same is the position with regard to the passage at p. 1454 of The Conflict of Laws by Dicey & Morris, 11th Edn., Vol. II, which reads thus:
>
> "The quantum of money tokens to be tendered is, however, always a matter of substance and not a question of the manner of performance. Hence it should always be governed by the proper law, irrespective of the place of payment." (p. 1454)

130.The said passage falls under Rule 210 relating to discharge of foreign currency obligations which is in following terms:

"210. Irrespective of the currency in which a debt is expressed or damages are calculated (money of account), the currency in which th e debt or liability can and must be discharged (money of payment) is determined by the law of the country in which such debt or liability is payable, but (semble) the rate of exchange at which the money of account must be converted into the money of payment is determined by the proper law of the contract or other law governing the liability.

If a sum of money expressed in a foreign currency is payable in England, it may be paid either in units of the money of account or in sterling at the rate of exchange at which units of the foreign legal tender can, on the day when the money is paid, be bought in London in a recognised and accessible market, irrespective of any official rate of exchange between that currency and sterling. Quaere, whether this rate of exchange also applies if English law is not the proper law of the contract."

At the beginning of the comment on the said rule, it has been stated: "This Rule deals with the question whether a debtor has, by making a payment in a given currency discharged the debt. The effect of proceedings in English court on a foreign currency obligation is not considered in this rule but in Rule 21 1." (pp. 1453-54). This would indicate that the observations relied upon (at p. 1454) which follow this statement have no bearing to the proceedings in a court on foreign currency obligations and have to be confined to payments by a debtor in discharge of the debt.

Reconsideration of Forasol Case

131. Shri Shanti Bhushan also does not wish to go by the principles laid down in Forasol case4 and has submitted that the exchange rate for conversion of foreign currency to Indian currency should be that prevailing on the date of actual payment and that the law laid down in Forasol case4 that the conversion should be on the basis of exchange rate prevailing on the date of judgment does not lay down the correct law and that it needs reconsideration. In this regard Shri Shanti Bhushan has urged that the purpose of the rule relating to conversion of foreign currency into Indian rupees at the stage of enforcement of a foreign award should be to ensure that the amount that has been awarded under the award in foreign currency is available in full to the creditor and this can be achieved only if the exchange rate for the purpose of such conversion is that prevailing on the date of payment as held by the House of Lords in Miliangos case43. According to Shri Shanti Bhushan the practical and procedural difficulties pointed out by this Court for rejecting the date of, payment rule are not of such significance so as to render the said rule inapplicable. Shri Shanti Bhushan has also relied on the following passage from The Conflict of Laws by Dicey & Morris:

"If a debt or other liability expressed in a foreign currency is payable in England, the debtor may tender pounds in discharge. This is 'primarily a rule of construction' which was 'understandable at a time when foreign exchange was freely obtainable'. Where this is not the case, the rule may defeat the intention of the parties, and it may therefore 'require reconsideration. Despite a number of dicta to the contrary, the debtor may also discharge his liability by tendering the foreign currency in specie, but

the creditor cannot compel him to do so. The rate of exchange to be applied is that of the day when the debt is paid." (11th Edn., Vol. II, p. 1454)

132. These observations have been made in comment under Rule 210 and, as pointed out earlier, the said rule relates to payment made by a debtor in discharge of the debt and does not deal with proceedings in courts for enforcement of foreign currency obligations which have been dealt with in Rule 211, which is in following terms:

"211. (1) An English court can give judgment for an amount expressed in foreign currency. (2) For procedural reasons the amount of the judgment must be converted into sterling before execution can be levied. The date for conversion will be the date of payment, i.e., the date when the court authorises enforcement of the judgment, unless some other date is prescribed by statute."

133. As regards the submissions of Shri Shanti Bhushan assailing the correctness of the decision in Forasol case4 it may be stated that even Miliangos case43 does not provide for conversion on the basis of the exchange rate prevailing on the date of actual payment and it postulates conversion on the basis of the date when the court authorises enforcement of the judgment. The rule in Miliangos case43 has not been adopted in Section 27 of the Judiciary Act of New York, as amended in 1987 and it provides that a judgment or decree in foreign currency shall be converted into currency of the United States at the rate of exchange prevailing on the date of entry of the judgment or decree. "The Legislature's concern of how this could be effected by a sheriff' appears to be the reason for not adopting the date of execution of the judgment in the amended provision. The practical and procedural difficulties pointed out by this Court in Forasol case 4 against adopting the date of payment cannot, therefore, be ignored. As at present advised, we are not satisfied that the decision in Forasol case4 calls for reconsideration. Since this is the only question raised in C.A. No. 379/92 filed by General Electric, the said appeal must fail. VIII. Interest pendente lite and future interest

134. In an international commercial arbitration, like any domestic arbitration, the award of interest would fall under the following periods:

(i) period prior to the date of reference to arbitration;

(ii) period during which the arbitration proceedings were pending before the arbitrators;

(iii) period from the date of award till the date of institution of proceedings in a court for enforcement of the award;

(iv) period from the date of institution of proceedings in a court till the passing of the decree; and

(v) period subsequent to the decree till payment.

135. The interest in respect of the period covered by item

(i), namely, prior to the date of reference to arbitration would be governed by the proper law of the contract and the interest covered by items (ii) and (iii), i.e., during the pendency of the arbitral proceedings and subsequent to the award till the date of institution of the proceedings in the court for the enforcement of the award would be governed by the law governing the arbitral proceedings. These are matters which have to be dealt with by the arbitrators in the award and the award in relation to these matters cannot be questioned at the stage of enforcement of the award. At that stage the court is only required to deal with interest covered by items (iv) and (v). The award of interest in respect of these periods would be governed by lex fori, i.e., the law of the forum where the award is sought to be enforced. According to Alen Redfern and Martin Hunter "once an arbitral award is enforced in a particular country as a judgment of a court, the arbitral post-award interest rate may be overtaken by the rate applicable to civil judgments." [See : Redfern & Hunter, Law and Practice of International Commercial Arbitration, 2nd Edn., p. 406.]

136. Moreover, Section 4(1) of the Foreign Awards Act lays down that the foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India. The provisions of the Arbitration Act, 1940 would, therefore, apply in the matter of enforcement of awards subject to the provisions of the Foreign Awards Act. With regard to interest, the following provision is made in Section 29 of the Indian Arbitration Act:

> "Interest on Awards.- Where and insofar as award is for the payment of money the Court may in the decree order interest, from the date of the decree at such rate as the Cour t deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree."

137. Unlike Section 34 of the Code of Civil Procedure, whereunder the Court can award interest for the period of pendency of the suit as well as for the period subsequent to the decree till realisation, Section 29 of the Arbitration Act empowers the court to award interest from the date of decree only. It has, however, been held that while passing a decree in terms of the award, the Court can award interest for the period during which the proceedings were pending in the Court, i.e., the period from the date of institution of proceedings for the enforcement of the award in the court till the passing of the decree in cases arising after the Interest Act, 1978. (See : Gujarat Water Supply & Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. 58

138. In the instant case, the Arbitral Tribunal has awarded interest by way of compensatory damages in respect of the period prior to the date of reference as well as for the period covered by the arbitral proceedings up to March 31, 1986. In respect of the period subsequent to March 31, 1986, the Arbitral Tribunal has awarded interest only on item No. 1 (regular interest), item No. 3 (delinquent interest) and item No. 5 (costs of spare parts) until the payment. No direction with regard to the payment of interest pendente lite, i.e., for the period the proceedings were pending in the Bombay High Court till the date of decree as well as for the period subsequent to the decree, has been given either by the learned Single Judge or by the Division Bench of the High Court. Taking into consideration the facts and circumstances of the case we are not inclined to interfere with that

part of judgment of the High Court and to award interest for the period the proceedings for enforcement of the award were pending in the Bombay High Court and in this Court.

139. Shri Shanti Bhushan has, however, placed reliance on the interim order passed by this Court on February 21, 1990 whereby this Court stayed the operation of decree and order under appeal subject to Renusagar depositing the sum equivalent to one-half of the decretal amount calculated as on date and furnishing security to the satisfaction of the High Court in respect of the balance of the decretal amount and further directed that interest in respect of the rest of the one-half of the decretal amount which was not recoverable by General Electric by virtue of the said order would be @ 10 per cent per annum calculated from this day on the entirety of the balance irrespective of the terms as to the rate and mode of calculation of interest granted in or permitted by the decree under appeal. Shri Shanti Bhushan has urged that in view of the said order passed by this Court on February 21, 1990, General Electric is entitled to award of interest @ 10 per cent per annum on the decretal amount after deducting the amounts deposited by Renusagar in pursuance to the orders dated February 21, 1990 and November 6, 1990. The order dated February 21, 1990 was, in our opinion, in the nature of an interlocutory order and the directions contained therein were also interlocutory in nature which are subject to the final orders that are passed in the appeals. We ought, here, to take notice of the developments in the international monetary exchange system insofar as Indo American currencies are concerned. The effect of these changes in the exchange rates made a landslide change in the size of the financial obligations of Renusagar under the Award. The liability thereunder in terms of Indian rupees virtually became double. It is, however, true that that so far General Electric is concerned, it secures no more than what the Award gave it in terms of U.S. dollars. This judgment assures to General Electric that quantum of U.S.

58 (1989) 1 SCC 532, 541-42: (1989) 1 SCR 318, 328 currency. But the area of the discretion of the court is in the interlocutory dispensation. We are, therefore, not inclined to award interest pendente lite, i.e., during the pendency of the proceedings for enforcement of the award in the High Court as well as this Court and we hereby recall the directions contained in the order dated February 21, 1990 as regards payment of interest on the balance of the decretal amount. The award of interest for the period subsequent to the date of passing of the award till the passing of this judgment in these appeals is, therefore, confined to the period till the date of institution of the proceedings for enforcement of the Arbitration Award in the Bombay High Court i.e. up to October 15, 1986.

140. As regards future interest, we are inclined to take the view that for the period subsequent to the date of this judgment Renusagar should pay interest @ 18 per cent on the decretal amount that remains due after adjusting the sum of Rs 10,69,26,590 paid by Renusagar to General Electric in pursuance to the directions given by this Court on February 21, 1990 and November 6, 1990 till the payment of the said balance amount.

IX. Adjustment of the sum of Rs 10,69,26,590 deposited by Renusagar against the decretal amount:

141. As indicated earlier, in pursuance to the orders of this Court dated February 21, 1990, Renusagar deposited a sum of Rs 9,69,26,590 on March 20, 1990 and a further amount of Rs 1,00,00,000 was deposited by Renusagar in pursuance to the order dated November 6, 1990 on

December 3, 1990. These amounts have been withdrawn by General Electric. The question is how and at what rate the said amount should be adjusted against the decretal amount. It is not disputed that on the date when the said deposits were made by Renusagar and were withdrawn by General Electric, rupee- dollar exchange rate was Rs 17 per dollar. Shri Shanti Bhushan has, however, submitted that although General Electric had withdrawn the amount deposited by Renusagar, it was not able to use the same because the Reserve Bank of India did not grant the permission to General Electric to remit the amount by converting the same into U.S. dollars on account of the pendency of these appeals in this Court. In this regard, Shri Shanti Bhushan has placed before us copies of the letters dated April 30, 1990, June 25, 1990, September 10, 1990 and November 29, 1990 of the Reserve Bank of India. On the basis of the said letters, Shri Shanti Bhushan has submitted that out of a sum of Rs 10.69 crores which was received by General Electric it was permitted by the Reserve Bank of India to utilise only Rs 3.52 crores for meeting administrative and operational expenses of the Liaison Office of General Electric and the rest of the amount would be converted only after the decision in these appeals. Shri Shanti Bhushan has, therefore, submitted that the amounts deposited by Renusagar should be converted from Indian rupees into U.S. dollars at the exchange rate prevalent on the date of the judgment of this Court and not on the basis of the rate of exchange prevalent at the time of the said payments by Renusagar. We are unable to agree with this submission. The convertibility into U.S. dollars of money paid by Renusagar in Indian rupees is not the condition for discharge of the decree and as laid down in Forasol case the decree can be discharged by payment in Indian rupees and it is for General Electric to obtain the necessary permission from the Reserve Bank of India for such conversion of Indian rupees to U.S. dollars and the transfer thereof to the United States. If General Electric were finding a difficulty in such transfer on account of the pendency of these appeals in this Court they could have moved this Court and obtained necessary clarification in this regard. They did not choose to do so. In these circumstances, the amount of Rs 10,69,26,590 which has been paid by Renusagar in pursuance to the orders dated February 21, 1990 and November 6, 1990 has to be converted into U.S. dollars on the basis of the rupee-dollar exchange rate of Rs 17.00 per dollar prevalent at the time of such payment and calculated on that basis the said amount comes to US $ 6,289,800.00.

142. The judgment of the High Court passing a decree in terms of the award is, therefore, affirmed. This would cover the amount awarded by the Arbitral Tribunal in U.S. dollars and interest on amounts awarded under item Nos. 1, 3 and 5 for the period from April 1, 1986 to October 15, 1986, the date of filing of the petition by General Electric for enforcement of the award in the Bombay High Court. The amount paid by Renusagar during the pendency of these appeals will have to be adjusted against the said decretal amount and the present liability of Renusagar under this decision has to be determined accordingly. Calculating on this basis the amount payable by Renusagar under the decree in terms of U.S. dollars is:

Amount awarded by the Arbitral Tribunal : 12,215,622.14 Interest on US $ 2,716,914.72 (the total amount awarded under item Nos. 1, 3 and 5) @ 8% per annum from 1-4-1986 to 15-10-1986 in terms of theaward 117,733.00

12,333,355.14 Less: Amount paid by Renusagar in pursuance of the orders dated 21-2-1990 and 6-11-1990 during the pendency of the appeals in this Court 6,289,800.00

6,043,555.14

143.In accordance with the decision in Forasol case the said amount has to be converted into Indian rupees on the basis of the rupee-dollar exchange rate prevailing at the time of this judgment. As per information supplied by the Reserve Bank of India, the Rupee-Dollar Exchange (Selling) Rate as on October 6, 1993 was Rs 31.53 per dollar.

144.At this stage it may be mentioned that after the arguments were concluded and the judgment had been reserved, an application [I.A. No. 9 of 1993 in C.A. Nos. 71 and 71-A of 1990] was filed on behalf of Hindalco Industries Ltd. for amendment of the cause title to substitute the applicant as appellant in C.A. No. 71 of 1990 in place of Renusagar. The said application has been moved on the ground that after the filing of the said appeal the Bombay High Court, by its order dated April 22, 1993, has sanctioned a scheme of amalgamation of Renusagar with Hindalco Industries Ltd. and the said scheme has also been sanctioned by the Allahabad High Court by its order dated March 26, 1993. A true copy of the said scheme of amalgamation has been filed along with the said application. In clause (i) of para 4 of the scheme, it is stated:

> "(i) If any suit, appeal or other proceedings of whatever nature (hereinafter called 'the proceedings') by or against the Transferor Company be pending, the same shall not be abate, be discontinued or be in any way prejudicially affected by reason of the transfer or the undertaking of the Transferor Company or of anything contained in this Scheme but the said proceedings may be continued, prosecuted and enforced by or against the Transferor Company as if this Scheme had not been made."

145.In view of the aforesaid provision in the scheme, all pending suits, appeals or other proceedings of whatever nature by or against the transferor company, viz., Renusagar shall not abate or be discontinued or in any way be prejudicially affected by reason of the transfer of the undertaking of Renusagar and that the said proceedings may be continued, presented and enforced by or against Renusagar as if the scheme had not been made. The scheme of amalgamation does not, therefore, in any way affect the continuance of the proceedings in the above appeals in this Court by Renusagar and in these circumstances, we find no ground for substituting the name of Hindalco Industries Ltd. as the appellant in place of Renusagar in C.A. No. 71 of 1990. The said application is, therefore, rejected.

146.In the result, C.A. Nos. 71 and 71-A of 1990 and C.A. No. 379 of 1992 are dismissed and the decree passed by the High Court is affirmed with the direction that in terms of the award an amount of US $ 12,333,355.14 is payable by Renusagar to General Electric out of which a sum of US $ 6,289,800.00 has already been paid by Renusagar in discharge of the decretal amount and the balance amount payable by Renusagar under the decree is US $ 6,043,555.14 which amount on

conversion in Indian rupees at the rupee-dollar exchange rate of Rs 31.53 per dollar prevalent at the time of this judgment comes to Rs 19,05,53,293.56. Renusagar will be liable to pay future interest @ 18 per cent on this amount of Rs 19,05,53,293.56 from the date of this judgment till payment. The parties are left to bear their own costs.