AP No. 172 of 2002

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION

COAL INDIA LIMITED

-Versus-

CANADIAN COMMERCIAL CORPORATION

For the Petitioner:	Mr Anindya Kumar Mitra, Advocate General, Mr Abhrajit Mitra, Adv., Mr Anirban Ray, Adv., Mr Arunava Sarkar, Adv., Mr Pradyot Kumar Das, Adv., Mr Debabrata Das, Adv.
For the Respondent:	Mr Tilok Kumar Bose, Sr Adv., Mr Anubhav Sinha, Adv., Mr A.K. De, Adv., Mr Arnab Chakraborty, Adv., Ms Ditipriya Bagchi, Adv.

Hearing concluded on: March 15, 2012.

BEFORE

The Hon'ble Justice
SANJIB BANERJEE
Date: March 20, 2012.

SANJIB BANERJEE, J. : –

The preliminary objection raised by the respondent, a commercial arm of the Canadian government, as to the authority of any Indian court to receive a challenge to an arbitral award passed in a reference conducted beyond the territorial limits of this country, brings to the fore a vexed issue that appears to have been variously answered by courts in the country.

For the purpose of the point of demurer it is only necessary to recognise some admitted facts. The parties entered into an agreement sometime in the year 1989 for the respondent to set up a coal extracting facility for the petitioner in the Rajmahal area in the state of Jharkhand. The parties are agreed that the agreement was to be governed by the laws in force in India; that the dispute-resolution mechanism envisaged thereunder was of arbitration; and, that the arbitration was to take place under the rules of the International Chamber of Commerce (ICC) with the place of the arbitration in Geneva, Switzerland. Upon disputes arising between the parties as to whether the petitioner was entitled to more money by way of penalty than the respondent was to get bonus, the petitioner sought a reference. The parties nominated their representatives on the arbitral tribunal and the presiding arbitrator was filled in by the ICC. The arbitral tribunal held its meetings in the United Kingdom but recognised that the seat of the arbitration was Switzerland. It is not necessary at this juncture to either look at the merits of the disputes between the parties under the agreement or the award rendered thereon by the arbitral tribunal. The respondent, which is entitled to costs under the award, has not sought to implement it yet. The petitioner insists, however, that courts in this country - this High Court on its Original Side being one of them - is competent to receive a challenge to the award notwithstanding the place of the arbitration having been outside India and despite the respondent not having attempted to implement it. The petitioner wants to have the award set aside to be able to pursue afresh in support of its claim.

It may be of some relevance, however, that the petitioner has fashioned the challenge under Section 48 of the Arbitration and Conciliation Act, 1996 and, for good measure, has also invoked the provisions of Section 34 of the 1996 Act and Sections 47 and 151 of the Code of Civil Procedure, 1908. Section 48 of the 1996 Act does not recognise a right to apply thereunder for having any award set aside; it only sets down the conditions for enforcement of a foreign award governed by the New York Convention upon such an award being sought to be

enforced. The right to apply for the enforcement of a New York Convention award is under Section 49 of the 1996 Act, whereupon the grounds under Section 48 of the Act may be cited by the party against whom it is sought to be enforced to resist the enforcement thereof. Such right will be available to the party against whom such award is sought to be enforced irrespective of whether such party makes a supplemental application to resist it. The right to resist the enforcement of a New York Convention award is conditional upon such an award being endeavored to be enforced and does not appear to be independent of any attempt at enforcement. At any rate, nothing in Section 48 of the Act, or elsewhere in the first chapter of Part II of the 1996 Act which deals exclusively with New York Convention awards and matters relating thereto, confers any right on any person to apply to have any award set aside thereunder. The petitioner cannot show that Section 47 of the Code gives an award-debtor the right to initiate a challenge to the award even without the award ripening for enforcement. Section 151 of the Code does not expressly recognise any right to apply thereunder nor has the petitioner urged that its right to apply is founded on such provision.

Courts in this country operating under the Constitutional scheme of things do not have plenary, all-pervasive authority to receive any grievance and proceed to redress the perceived wrong. Courts in this country function under statutory mandates and are authorised to entertain such matters as are ordained by law or, in respect of civil suits, such claims as are not expressly prohibited by law or by necessary implication. An arbitration Judge in this court is competent to receive only such matters as have been administratively assigned by the Chief Justice and as are governed by the applicable statutes: the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996. For instance, the arbitration Judge in this court can receive a request under Section 11 of the 1996 Act but, by dint of the allocation of business by the Chief Justice, cannot name the arbitrator even if a request under Section 11 of the 1996 Act is otherwise found to be meritorious and entitling the party carrying the request to have an arbitrator named or the arbitral tribunal constituted to take up the reference.

The business of naming the arbitrator has, at times, been allocated to Judges other than the arbitration Judge and is now retained by the Chief Justice. If the arbitration Judge in this court finds a request under Section 11 of the 1996 Act to be in order, a finding to such effect is returned and the matter is then directed to be placed elsewhere for the naming of the arbitrator or the constitution of the arbitral tribunal.

The respondent's challenge to the maintainability of the present proceedings is founded on the exclusion of Part I of the 1996 Act to arbitration matters where the place of arbitration is not in India. That is how the respondent reads section 2(2) of the 1996 Act that says that Part I of the 1996 Act "shall apply where the place of arbitration is in India." If the relevant provision is to be understood as the respondent desires it to be, the present petition may not be maintainable. If the provision is seen to give a positive mandate and not imply the negative that the respondent suggests, there may yet be other hurdles before the petition can progress to the merits of the challenge to the award.

The respondent, with commendable industry on a thorny issue that will certainly not rest with this judgment, has begun with the rudiments of the law of arbitration and quoted from revered texts and erudite opinions rendered in other jurisdictions to assert that the relevant principles have undergone such a momentous transformation since 1996 that to draw from the wealth of the previous pronouncements on arbitration law on such aspect would be a retrograde step. The authorities can wait; the fundamental submission of the respondent has first to be noticed. The respondent says that there could be four sets of rules at play together in a matter of the present kind. There would first be, according to the respondent, the law governing the main or the matrix contract; then, the law governing the arbitration agreement in its interpretation, enforcement, effect and extent; thirdly, the law governing the supervision of the arbitration and covering matters connected therewith; and, finally, the procedural rules, whether of the institution in case of an institutional arbitration

or upon the agreement of the parties, relating to the conduct of the reference. Counsel for the respondent, with the considerable weight of scholarly views on the law of arbitration, describes the four as, the law governing the matrix contract, the law of the arbitration agreement, the law of the arbitration (or curial law) and the procedural law of the arbitral tribunal, respectively.

The respondent draws on a recent pronouncement of the Supreme Court and seeks to confine a previous Supreme Court judgment extending the applicability of Part I of the 1996 Act to foreign arbitrations to being limited in its operation to the purpose of interim measures. The substance of the respondent's argument is that in an international commercial arbitration if the parties agree to a seat of the reference, the law of the seat of the reference would govern a challenge in the nature of setting aside the award unless the parties have expressly agreed otherwise. As a corollary, it is the respondent's suggestion that only a competent authority in the country which is the seat of the arbitration that may receive such a challenge to the exclusion of all other forums. It is such legal question, in its various hues, which is at the heart of the respondent's objection to the maintainability of the present proceedings.

Both parties have referred to Russel on *Arbitration* (23rd Ed., South Asian Edition, 2009) and Redfern and Hunter on *International Arbitration* (5th Ed., 2009). The respondent has placed passages from Dicey, Morris and Collins on *The Conflict of Laws* (14th Ed., 2006) and *Commercial Arbitration* by Mustill and Boyd (2001 Companion Volume to the 2nd Ed.). The respondent has also relied on the United Nations Commissions on International Trade Laws (Uncitral) Model Law on international commercial arbitration and the ICC rules of arbitration.

According to Russel, the parties to an agreement governed by an arbitration clause are free to choose the applicable laws and the choice may be express or implied. At paragraph 2–088, Russel says that the performance of the obligations under the matrix contract is covered by the governing law or the proper law of the contract. Then there is the law of the arbitration agreement

which governs the obligation to submit the disputes to arbitration and to honour any award. Next there is the procedural law which is the law governing the conduct of the arbitration, also known as the curial law or *lex arbitri*. Russel opines, at paragraph 2-089, that if the arbitration agreement forms a part of the matrix contract, it "will often, but not always, be governed by the same law" as that which governs the matrix contract. The author, however, concludes that the procedural law which governs arbitration proceedings "will usually be that of the seat of arbitration unless for example the parties have expressly chosen a different law" for such purpose. At paragraph 2-092, it is said that "where the parties have neither chosen a law nor agreed *(on)* other considerations to govern the substance of their dispute, the *(arbitral)* tribunal has to apply the law as determined by the conflict of laws rules it considers applicable." Paragraph 2-095 of the venerable text deals with the law of the arbitration agreement:

> "**The law of the arbitration agreement.** As a matter of English law however the arbitration agreement will be governed by the law chosen by the parties. Where the arbitration agreement is contained in a matrix contract, the law of the arbitration agreement will often follow the proper law of that matrix contract. However an arbitration agreement is separable from the matrix contract between the parties, and an arbitration agreement may be subject to a different law from that of the matrix contract in which it is contained. Not only may the parties choose different laws for the matrix agreement and the arbitration agreement, other factors may indicate that different laws should apply. Within the arbitration agreement itself it is also open to the parties to specify a procedural law for the arbitration which is different from the law governing the arbitration agreement and, again, other factors may indicate that different laws should apply. In particular, ad hoc submission agreements drawn up after disputes have arisen do not form part of any matrix contract, and there may be less reason to imply that the same law is applicable to the arbitration agreement as to the underlying contract in respect of which disputes have arisen. Where the parties have made no specific choice of law for the arbitration agreement, the applicable law may be the law of the country where enforcement is sought under the New York Convention."

In the succeeding paragraphs the author refers to the effect of the seat of arbitration on the law of the arbitration agreement and suggests that where there is no express choice of a proper law of the matrix contract nor of the arbitration

agreement, but the seat of arbitration is specified, the law of that place may govern both the matrix contract and the arbitration agreement; but the express reference to the law of the seat may determine the law of the arbitration agreement even if the proper law of the contract is otherwise. As to the matters covered by the law of arbitration agreement, Russel says that it regulates substantive matters relating to the arbitration agreement, "including in particular the interpretation, validity, effect and discharge of the agreement to arbitrate." The law of the arbitration agreement, according to Russel, would also govern similar issues relating to the reference and enforcement of the award and as to whether a particular dispute falls within the scope of the arbitration agreement. Russel recognises the English law upon the choice of an English seat, subject to agreement otherwise, to govern various matters addressed in the English Arbitration Act, 1996, "including questions relating to the appointment and revocation of the authority of the arbitral tribunal, the powers and duties of the tribunal and remedies for breach of duty, and any challenges to the award." Thus, in England, the statute on arbitration sets down the conflict of laws rules governing arbitrations. The parties to the present proceedings, however, appear to suggest that the Arbitration and Conciliation Act, 1996 that is applicable in this country does not throw any light on such aspect.

Redfern and Hunter observe that an agreement to arbitrate may be set out in a "purpose–made submission agreement" or in an arbitration clause contained in the matrix agreement. It is such authors' opinion that it might be assumed that the law governing the agreement to arbitrate is the same law as that which the parties have chosen to govern the substantive issues in dispute; but that is not necessarily a safe assumption. The authors proceed to suggest that if there is no express designation as to the law applicable to the agreement to arbitrate, "the principal choice – in the absence of any express or implied choice by the parties – appears to be between the law of the seat of the arbitration and the law which governs the contract as a whole." At paragraph 3.12 of the text it is said that since the arbitration clause "is only one of many clauses in a contract, it might

seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause." As to the distinction between the arbitration clause and the principal contract on the much-maligned doctrine of severability, Redfern and Hunter quote French commentator Derains at paragraph 3.13 of the book:

> "The autonomy of the arbitration clause and of the principal contract does not mean that they are totally independent one from the other, as evidenced by the fact that acceptance of the contract entails acceptance of the clause, without any further formality."

The authors, however, refer to the concept of the autonomy of the arbitration clause and recognise that the separability of an arbitration clause from the matrix contract "opens the way to the possibility that it may be governed by a different law from that which governs the main agreement." The authors then notice the clause in the New York Convention that the agreement under which the award is made must be 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." (Section 48(1)(a) of the 1996 Act applicable in this country in respect of New York Convention awards reflects the same sentiment in enunciating that the "enforcement of a foreign award may be refused, at the request of a party against whom it is invoked, only if that party furnishes to the court proof that … the said agreement *[meaning, the arbitration 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 …")

Redfern and Hunter have listed several English cases and judgments from elsewhere in Europe on how the seat of the arbitration has weighed with courts in deciding what law would be applicable to the arbitration agreement and what law would relate to the arbitration. Several of these judgments have been carried by the respondent in support of its challenge to the maintainability of the present proceedings in an Indian court. At paragraph 3.34 of their treatise, Redfern and Hunter begin the discussion on the effect of the law governing the arbitration.

The passage has to be appreciated with the caveat that the law governing the arbitration may not necessarily be the law governing the arbitration agreement. The authors recognise that it is not uncommon for an international commercial arbitration to take place in a neutral country, "in the sense that none of the parties to the arbitration has a place of business or residence there." The immediate implication of such a situation, according to the authors, is that "the law of the country in whose territory the arbitration takes place, the *lex arbitri*, will generally be different from the law that governs the substantive matters in dispute." Redfern and Hunter cite several aspects pertaining to an arbitration that the *lex arbitri* might cover, "although the exact position under the relevant *lex arbitri* should be checked, particularly where these legal provisions are mandatory." With such qualification, the authors suggest that the *lex arbitri* "is likely to extend to," inter alia: the definition and form of an agreement to arbitrate; whether a dispute is arbitrable; the constitution of the arbitral tribunal and grounds for challenge of that tribunal; the entitlement of the arbitral tribunal to rule on its own jurisdiction; the freedom to agree upon detailed rules of procedure; interim measures of protection; court assistance if required; the powers of the arbitrators; the form and validity of an arbitral award; and, the finality of the award, including any right to challenge it in the courts of the place of arbitration.

As to the seat theory, Redfern and Hunter ascribe the origin of the concept - that the arbitration is governed by the law of the place in which it is held - to the 1923 Geneva Protocol to the New York Convention. Redfern and Hunter refer to the synonymous use of the expressions "the law of the country where the arbitration took place" and "the law of the country where the award is made" in the New York Convention to suggest a clear nexus based on territoriality between the place of the arbitration and the law governing that arbitration, the *lex arbitri*. The authors trace the same territorial link to Article 1(2) of the Uncitral Model Law that provides that the "provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State." Articles 8

and 9 of the Uncitral Model Law relate to the enforcement of the arbitration agreement and the interim measures of protection, respectively; and Articles 35 and 36 deal with the recognition and enforcement of the award. The extra-territorial operation of the said four provisions, beyond the country which is the seat of the arbitration, is dictated by the nature of the matters covered thereby. Article 8 of the Model Law, which is similar to Sections 8, 45 and 54 of the 1996 Act, is for the furtherance of the arbitration agreement between the parties and, in the context of an international commercial arbitration where such arbitration is to be held outside a country in terms of the agreement between the parties, has necessarily to be made applicable to a country where an action is brought in breach of the arbitration agreement to enable the law of such country to provide for the arbitration agreement to be honoured. Article 9 of the Model Law provides for interim measures before or during the arbitral proceedings. To make an interim order effective, a party seeking such measure has, as in the case of enforcement, to approach the competent authority of a country that would be able to make the interim measure real; usually such a country would be the country where the other party is a domicile or such other party has its assets or the country which has a nexus with the performance of the work under the matrix contract. Articles 35 and 36 of the Model Law have the very essence of the New York Convention (and the Geneva Convention) embodied therein. Article 35 covers the recognition and enforcement of an award and an application for such purpose has, per force, to be carried to the country where the enforcement will be effective and, usually, such a country may not be the country in which the award was rendered. Article 36 of the Model Law is incidental to Article 35 and affords the party against whom recognition or enforcement of an award is sought to resist the same.

A question is posed by Redfern and Hunter as to whether the *lex arbitri* is merely a procedural law. The authors suggest that the *lex arbitri* may deal with procedural matters but it is much more than purely procedural law. For instance, the *lex arbitri* may stipulate that a certain type of dispute is not capable

of settlement by arbitration: that would not be a matter of mere procedure. The authors say that the belief that in providing for arbitration in a particular country the parties may have only selected the procedural law that will govern their arbitration "is too elliptical and … it does not always hold true." They suggest that the "choice brings with it submission to the laws of that country, including any mandatory provisions of its law on arbitration." The principle is illustrated with an allegory at paragraph 3.61:

> " … To say that parties have 'chosen' that particular law *(of the country to which they agree to carry their arbitration)* to govern the arbitration is rather like saying that an English woman who takes her car to France has 'chosen' French traffic law, which will oblige her to drive on the right side of the road, to give priority to vehicles approaching from the right and generally to obey traffic laws to which she may not be accustomed. But it would be an odd use of language to say that this motorist had opted for 'French traffic law'. What she has done is to choose to go to France. The applicability of French law then follows automatically. It is not a matter of choice."

Redfern and Hunter observe that among modern laws on arbitration, those of Switzerland and of England are perhaps particularly clear on the link between the seat of the arbitration and the *lex arbitri*. The authors quote the Swiss law on such aspect to state:

> "The provisions of this chapter shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland. *(Swiss Private International Law Act, 1987; Ch. 12, Art 176 (1)).*"

The respondent has relied on Mustill and Boyd only to suggest that after the Uncitral Model Law has been accepted, whether *en bloc* by some countries or in part by others, the conflict of laws rules pertaining to the applicable law in matters of arbitration have undergone a sea change. A passage in the 2001 Companion Volume by Mustill and Boyd to the second edition of the book is almost a disclaimer as to the views expressed in the second edition.

Dicey, Morris and Collins in the latest edition of the authoritative text on the subject recognise the various possibilities on the conflicting laws that could apply to different aspects pertaining to arbitration in Rule 57:

> "Rule 57 – (1) The material validity, scope and interpretation of an arbitration agreement are governed by its applicable law, namely:
>
> (a) the law expressly or impliedly chosen by the parties; or,
>
> (b) in the absence of such choice, the law which is most closely connected with the arbitration agreement, which will in general be the law of the seat of the arbitration.
>
> (2) In general, arbitral proceedings are governed by the law of the seat of the arbitration.
>
> (3) The substance of the dispute is governed by either:
>
> (a) the law chosen by the parties; or
>
> (b) if the parties so agree, such other considerations as are agreed by the parties or determined by the tribunal; or
>
> (c) if there is no such choice or agreement, the law determined by the conflict of laws rules which the arbitral tribunal considers applicable."

The authors suggest that it is part of the very alphabet of arbitration law that an arbitration agreement, even if it is contained in an arbitration clause within the body of a larger contract, forms a separate and distinct agreement. This principle, which is traced to *Heyman v. Darwins Ltd* [(1942) AC 356], is also recognised in India under which the validity, scope and interpretation of an arbitration clause contained in the body of the matrix contract falls to be considered separately from that of the main contract, and is not necessarily affected by the invalidity or avoidance of the main contract. The authors reason that it follows from the concept of the autonomy of the arbitration agreement, "that the law applicable to it must be determined separately from that applicable to the main contract … *(and though)* in many cases, the law applicable to the main contract will have a strong influence on the law applicable to the arbitration agreement, this will not be so in every case." At paragraphs 16-017 and 16-018 of the text, it is said that if there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be

governed by that law: whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat. It is, however, only "in exceptional cases, *(that)* the parties' express choice of a governing law for the main contract may be held not to apply to the arbitration agreement, where there are, as a matter of construction, contrary indications." The following passage, at paragraph 16-019, is of some relevance:

> "If there is no express choice of law, and no choice of the seat of the arbitration, the applicable law of the main contract will be determined in accordance with the principles in the Rome Convention, and the arbitration agreement will be governed by the law so determined. If there is no express choice of the law to govern either the contract as a whole or the arbitration agreement, but the parties have chosen the seat of the arbitration, the contract will frequently (but not necessarily) be governed by the law of that country on the basis that the choice of the seat is to be regarded as an implied choice of the law governing the contract. In each of these cases, the main contract and the arbitration agreement will be governed by the same law."

The view expressed in one of the sentences in paragraph 16-017 of the book has been doubted by the respondent. According to the respondent, the view that "*(i)*f there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law… whether or not the seat of arbitration is stipulated, and irrespective of the place of the seat," is not supported by any of the judgments cited in the book in such context. The respondent demonstrates that one of such noted cases, which the petitioner has carried in support of the proposition, pertained to a matter where the law governing the matrix contract was specified but there was no express choice of the law governing the arbitration agreement and the parties did not stipulate any seat of the arbitration.

The respondent says that it is not without any basis that it suggests that the law relating to international commercial arbitration is vastly changed after the Uncitral Model Law came to be accepted by most countries. The Uncitral Model Law on international commercial arbitration was adopted in June, 1985 but it was only in the middle of the 1990s that a number of member states of

the United Nations based the arbitration law in such countries on the Uncitral Model Law. The respondent refers to Rule 57 in the 12th Edition of *The Conflict of Laws* (1993) by Dicey and Morris which is completely at variance with the rule as it was modified in the 2006 edition of the text which has been quoted above. The respondent says that it is the old Rule 57 and the commentary on such old rule that may have guided three of the principal Indian judgments which the petitioner has cited to repel the challenge to the maintainability of the present proceedings. Old Rule 57 appears, indeed, to have been altered beyond recognition in the 2006 edition of the text. The old rule as it stood in 1993 read thus:

> "Rule 57 – (1) The validity, effect and interpretation of an arbitration agreement are governed by its applicable law.
>
> (2) The law governing arbitration proceedings is the law chosen by the parties, or, in the absence of agreement, the law of the country in which the arbitration is held."

It is thus apparent that the seat of the arbitration has been given more prominence in indicating the choice of law relating to the arbitration agreement in the rule standing altered in 2006. Though the second sub-rule in old Rule 57 gave primacy to the agreement between the parties in assessing the law governing the arbitration proceedings, the second sub-rule in new Rule 57 acknowledges that arbitration proceedings would generally be governed by the law of the seat of the arbitration. That would imply that as a rule the law of the seat of the arbitration would govern the arbitration; and it would be an exception for any other law to govern the arbitration. Such view may have an impact, on the basis of a cardinal rule of evidence, on the understanding of the several clauses of Article V of the New York Convention which are reflected in the 1996 Act.

It is necessary at this stage to notice the governing law and the arbitration clauses contained in the agreement of January 12, 1989 between the parties to the present proceedings. Clause 32.0 of the agreement indicates the governing

law, or the law of the matrix contract, and Clause 34.0 lays down the mechanism for resolution of the disputes arising under the matrix agreement. The petitioner says that the governing law clause will not only be the law of the matrix contract but it will also be the law governing the arbitration agreement since the parties have not clearly indicated any other law to govern the arbitration agreement. The relevant clauses are set out:

> "32.0 GOVERNING LAW
>
> This Contract shall be subject to and governed by the laws in force in India."

> "34.0 DISPUTES
>
> 34.1 The Parties mutually agree that in the event of a dispute of any nature whatsoever, related directly or indirectly to this Contract, they shall use every means at their disposal to settle said disputes on an amicable basis.
>
> 34.2 Should the Parties fail to reach an agreement within thirty (30) days after the dispute arises or any such greater period as may be mutually agreed upon the dispute may be submitted by either Party to Arbitration for final settlement under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris, France, by one or more arbitrators appointed in accordance with the Rules.
>
> 34.3 Said arbitration shall be held in Geneva, Switzerland and be conducted in the English language.
>
> 34.4 The Parties mutually agree that if the decision rendered as a result of the aforementioned conciliation or arbitration involves the payment of compensation, the amount of such compensation shall be expressed and payable in Dollars.
>
> 34.5 Both Parties shall make endeavours not to delay the arbitration proceedings. The decision of the arbitrator(s) shall be final and binding on both the Parties. Enforcement thereof may be entered in any court having jurisdiction."

Certain matters are plain to see in the instant case. The agreement appears to have been concluded and executed in India and the petitioner claims that it was signed by the parties at the petitioner's registered office within the jurisdiction of this court on the Original Side. The place of performance of the

agreement was India. There is also an averment in the petition that payments were made and received from or at places in India, including at places within the territorial limits of this court on its Original Side. The matrix contract is so intricately connected with India that in the absence of the governing law clause, and without other considerations, the logical inference as to the proper law of the contract would inescapably have been Indian law. The question that next arises is whether the parties intended, merely by choosing the venue of the arbitral reference to be in Switzerland, that the arbitration agreement or the arbitration would be governed by Swiss law when neither party to the contract had any connection with Switzerland. The petitioner suggests that nothing significant must be read into the parties' selection of the seat of the arbitration since such choice may either have been for locational convenience as Switzerland was, roughly, midway between Ottawa and Calcutta; or, Geneva by the lake was regarded by the parties to be sufficiently close to the ICC headquarters in Paris and a more relaxed setting than the hustle and business of Paris. The petitioner insists that it is for the court to assess, by applying the rudimentary tests of interpretation of contracts, as to whether the parties intended to embrace Swiss law as the law applicable to all matters pertaining to the arbitration agreement and the arbitration by merely choosing Geneva as the seat of the arbitration. The answer to the question could simply be found by ascertaining the intention of the parties in their choice of the seat of the arbitration, but for the respondent's insistence that the question of assessing the parties' intention is irrelevant after their express choice of the seat of the reference; as the choice of the seat implies the choice of the law governing the arbitration, including the mechanism for challenging the award. The respondent, however, suggests that nothing like the beauty of the lake against the sylvan backdrop of the salt and pepper Alps attracted the parties to Geneva or Switzerland. The respondent claims that it was the clarity of the conflict of laws rules in Switzerland that guided the Canadian company to the venue, whether or not the petitioner was alive to such position. The respondent asserts that the choice of the seat of the arbitration operates like a jurisdiction and forum selection clause and, never mind the principles

governing international commercial arbitration, it is now accepted in Indian law as the statute that is now in force in this country refers to and draws from the Uncitral Model Law. More importantly, the respondent contends, the first chapter in the second part of the 1996 Act is based on the New York Convention to which India is a signatory. The respondent demonstrates, with reference to the opening article of the New York Convention, which is appended as the first schedule to the 1996 Act, that territoriality is a fundamental feature of such Convention as it emphasises on "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 …"

The respondent laces such argument by referring to Redfern and Hunter and such authors' opinion that Switzerland is a preferred venue for international commercial arbitrations because of the clarity of Swiss law in its statute on private international law that allows the "maximum opportunity to uphold the validity of the arbitration agreement." That implies that the choice of venue in international commercial arbitrations is sometimes guided by the felicity of the body of law designed for international arbitrations in a particular country. The relevant Swiss statue, the authors note, contains only 23 articles, some of which consist of a single sentence.

What appears clear from the learned views of the several English authors on the principles governing such aspect of international commercial arbitration is that the English law under their 1996 Act tilts heavily in favour of English law being applicable to matters relating to the arbitration, including the challenge to the award, if the seat of the arbitration is England. But the English outlook on jurisdiction and the applicable law may not necessarily be a safe guide since that tends to favour the implied choice of English law and the procedure for challenge to an award to be under the English law and in England. This is not intended to be, as it should not be, any aspersion on English law or a veiled commentary on English courts usurping jurisdiction, but merely an observation on the

jurisprudence that has developed in what is, inarguably, an older and more developed system guided by common law principles.

The parties have referred to several judicial pronouncements that could be chaperons to answering the primary question raised in the respondent's challenge to the maintainability of the proceedings for annulment of a New York Convention award in this country. Several of the authorities noticed in this judgment have been relied upon by both parties, whether by referring to different passages from the same judgments to further the opposing causes or by variously interpreting the same passages. The precedents have been appreciated in this judgment not in the historical perspective of the development or understanding of the appropriate principles but on the proximity of the authorities to the matters in issue in the instant case.

There is, first, a judgment of a Division Bench of this court reported at (2004) 2 Cal LJ 197 (*White Industries Australia Limited v. Coal India Limited*) where the matter involved a similar contract as the one in the present case. The agreement in that case was between Coal India Limited, the petitioner herein, and an Australian company for developing an open cast coal mine in India. The agreement contained an arbitration clause which provided for a reference "for final settlement under the rules of conciliation and arbitration of the International Chamber of Commerce, Paris, France by one or more arbitrators appointed in accordance with the Rules" on much the same lines as the arbitration agreement in the present case. The governing law clause stipulated that the "agreement shall be subject to and governed by the laws in force in India except that the Indian Arbitration Act of 1940 shall not apply." The arbitration agreement in that case did not indicate any chosen seat of arbitration. The issue that arose in *White Industries*, as is evident from paragraph 5 of the report, was as to whether this High Court could continue with the petition for setting aside the arbitral award despite the award-holder having applied for enforcement of the foreign award in the Delhi High Court.

The petition for setting aside the award was filed in this court and the proceedings for enforcement of the award were thereafter instituted before the Delhi High Court without, probably, the award-holder being aware of the challenge to the award having already been launched in this court. The award-holder then applied before the Supreme Court for transfer of the Calcutta proceedings to Delhi under Section 25 of the Code of Civil Procedure read with Article 139A of the Constitution of India. Such petition was ultimately withdrawn. The award-holder thereafter applied in this court for rejection of the petition challenging the award on the ground that this court had no jurisdiction to entertain the same and such petition could only be filed in Delhi where the award-holder had applied for implementation of the foreign award. Paragraph 57 of the report records a concession made by the award-holder that a foreign award could be challenged before an Indian court in view of Section 48(1)(e) of the 1996 Act applicable in this country. The Division Bench accepted, at paragraph 83 of the report, "that in a case in which there is an express choice of Indian law, competent Indian courts can entertain applications for setting aside under Section 34" of the 1996 Act. In arriving at such conclusion, the Division Bench founded its opinion on, primarily, the views expressed by the Supreme Court in a judgment reported at (1998) 1 SCC 305 (*Sumitomo Heavy Industries Ltd v. Oil and Natural Gas Commission Ltd*) which held that the applicability of the curial law would cease when the arbitral proceedings are concluded; another Supreme Court pronouncement on the applicability of Part I of the 1996 Act to arbitrations where the place of arbitration is not in India reported at (2002) 4 SCC 105 (*Bhatia International v. Bulk Trading S.A.*); and, a judgment reported at AIR 2003 Guj 145 (*Nirma Ltd v. Lurgi Energie Und Entsorgung GmbH, Germany*) which recognised that an award made in another country could sometimes be subjected to a challenge under Section 34 of the 1996 Act.

Before noticing the other authorities, it must be said that there appears to be some room for doubt as to whether the Division Bench accepted that a

challenge to a foreign award could be received directly under Section 48 of the 1996 Act or whether the opinion was that the challenge could be made under Section 34 of the 1996 Act with the substantive grounds as recognised in Section 48 of the Act being also available in course of the challenge. This is an important aspect since the applicable grounds for resisting the enforcement of an award have to be seen as distinct from the substantive right to challenge an award by applying for setting it aside. The setting aside of an award amounts to its annulment (or *vacatur*, as it is otherwise known in international legal parlance) and has the effect of obliterating the award; whereas a successful resistance to the implementation of an award like a New York Convention award in a particular jurisdiction will not preclude the award being enforced in other jurisdictions. The right to a defence against something is not synonymous with a right to be the aggressor to liquidate or remove that thing against which a defence is permitted, though it may be of no practical distinction in the context of a foreign award within a particular jurisdiction.

Again, in the juridical sense, the right to urge the grounds contained in a provision is far removed from the right to launch any proceedings founded on the same grounds. For instance, a foreign award rendered under the New York Convention may be sought to be implemented in myriad ways: the direct way would be by executing the award in India where Section 48 of the 1996 Act would come into play and, if the award crosses the threshold, the provisions of the Code of Civil Procedure would apply; the indirect ways of implementing such an award could be by founding a creditor's winding-up petition on it, or by urging it in course of any other judicial or quasi-judicial proceedings – whether on behalf of the claimant or in defence – where the factum of the award may be relevant to the object of the proceedings. The indirect means of implementing or relying on such a foreign award may be in proceedings before the Company Law Board or a Debts Recovery Tribunal or a Consumer Forum or even in a civil suit. Even though it may not have been necessary to specifically provide for the same, Section 46 of the 1996 Act expressly makes a "foreign award which would be

enforceable under this Chapter" to be "binding for all purposes on the persons as between whom it was made... in any legal proceedings in India..." The grounds available under Section 48 of the 1996 Act will then be available to the party against whom such an award is cited in any legal proceedings in this country. The applicability of the grounds under Section 48 of the 1996 Act may be universal in the context of any proceedings launched in India, but it would not follow that such grounds can be made the subject-matter of any proceedings seeking specifically to have the award set aside except as would be recognised by Indian law. Under Indian law such an award may be capable of a direct challenge for the purpose of having it declared invalid (in effect, having the award set aside) if there is no bar – whether direct or by obvious necessary implication – to the institution of a civil suit towards such end. Or else, the direct challenge to such an award for the purpose of having it set aside may be, by judicial interpretation, under Section 34 of the 1996 Act as is evident from the opinion in *White Industries*, but restricted to cases where the seat of arbitration is not agreed upon. Further, the fact that such an award is adjudged invalid or otherwise set aside in India may only be a factor to be taken into consideration if such an award is sought to be implemented or relied upon in other jurisdictions; the conflict of laws rules applicable in such other jurisdictions will be the tools to assess whether the declaration as void or the setting aside of such an award by an Indian forum would conform to the legal sensibilities in such other jurisdictions. It is much like the ruling by a competent Indian forum in course of an attempt to rely on a foreign award that will either be binding or a relevant consideration when the award is sought to be relied on in another competent Indian forum, but it may not be of any legal import when such an award is sought to be implemented or relied on in other countries.

A statutory right to apply is, almost invariably, tinged with certain conditions. First, there would be an indication of the forum; next, there would, more often than not, be other conditions attached that the applicant has to fulfil in order to exercise the right to apply. Section 48 of the 1996 Act does not

indicate any forum, Section 49 does and the appropriateness of the court entitled to record its satisfaction that "a foreign award is enforceable under this Chapter" will be such court that answers to the description in the explanation to Section 47 of the statute. Section 47 of the Act imposes conditions on the "party applying for the enforcement of a foreign award" for that which is sought to be enforced to be regarded as a foreign award by the court; but nothing in such section or, indeed, in the entirety of the chapter sets any precondition for "the party against whom it is invoked" to qualify to urge the grounds for resisting the enforcement of the award. This is in keeping with the ambit and the avowed purpose of the New York Convention which is restricted only to the recognition and enforcement of the awards covered thereby.

It is not necessary that the right to apply for the purpose of complaining of the breach of any provision of law is also contained in the same provision that outlines the contours of any valid act or conduct. The substantive provisions governing an act or conduct may be found in a particular section of a statute but the right to apply to assert any right thereunder or complain of the breach of such provisions may be found elsewhere in the same statute or in an altogether different statute. For instance, the Contract Act, 1872, defines and determines certain parts of the law relating to contracts. But such statute does not confer any right on any person to apply thereunder. The provisions of the Contract Act would be applicable in proceedings before several forms of forums, but the right to apply to enforce the obligations enjoined by the Contract Act would depend on the nature of the claim and the statute under which a claimant has the right to approach a particular forum. The applicability of any provision of law has, therefore, to be seen as distinct from the right to approach a forum to apply the law.

The Division Bench in *White Industries* disagreed with the view of the single Judge that the provisions of Sections 46, 47 and 48 of the 1996 Act "do not permit a challenge to the foreign award on merits under the Indian law and a

party resisting the award can raise the ground mentioned in Section 48 only by way of defence" and maintained that "it is not possible for this Court to accept the said interpretation." But the Division Bench opinion does not throw any further light on such aspect since the Bench was not called upon to do so as "learned Counsel for the petitioner did not argue that a foreign award cannot be challenged before an Indian Court in view of Section 48(1)(e)" of the 1996 Act. Since a challenge to an award can be in both resisting the award and launching proceedings to have the award set aside, there is no doubt that the challenge to a foreign award in course of resisting its implementation or the reliance thereon is clearly permissible by virtue of Section 48 of the 1996 Act; but the question remained unanswered in the Division Bench judgment as to whether the award-debtor in such a case could apply to have it set aside under Section 48 or the related provisions under the first chapter of Part II of the 1996 Act. Indeed, in the Division Bench accepting the Gujarat view that where "there is an express choice of Indian law, competent Indian courts can entertain applications for setting aside under Section 34" at paragraph 83 of the report, the judgment cannot be seen as an authority for the proposition that Section 48 of the 1996 Act or the related provisions in the first chapter of Part I of the 1996 Act confer any right on an award-debtor under an award governed by the New York Convention to apply to have the award set aside under such provisions.

The respondent argues that the opinion rendered in *White Industries* is no longer good law in view of several later Supreme Court pronouncements. At the very least, the respondent suggests, that in view of the body of judicial opinion rendered by other High Courts, it may be appropriate to refer the Division Bench opinion in *White Industries* to a larger Bench. For such proposition, the respondent has relied on a decision reported at (1968) 1 SCR 455 (*Tribhobandas Purshottamdas Thakkar v. Ratilal Motilal Patel*) that instructs that if a single Judge of the High Court feels that a decision of the Full Bench of that High Court did not lay down the correct law or rule or practice, it is open to him to

recommend to the Chief Justice that the question be considered by a larger Bench.

The respondent's contention that the dictum in *White Industries* no longer holds good is primarily in view of the Supreme Court judgment reported at (2011) 8 SCC 333 (*Fuerst Day Lawson Ltd v. Jindal Export Ltd*). The respondent submits that the ratio in *White Industries* should, in any event, not be applicable in the present case since, in that case, there was no express choice of venue or the seat of arbitration in the relevant agreement. The respondent says that, in such circumstances, the Division Bench was not called upon in *White Industries* to consider the effect of a chosen seat of arbitration and the implied submission by the parties to the arbitration to the *lex fori*. In *White Industries*, the respondent continues, the petition filed by the award-debtor was under Section 34 of the 1996 Act read with Section 48 thereof while the petition in the instant case has been filed under Section 48 of the 1996 Act read with Section 34 thereof. The respondent refers to the opening paragraph of the judgment in *White Industries* to establish that, at any rate, the Division Bench in that case regarded the award-debtor's petition to be one for setting aside the arbitral award, whereas the prayers in the present petition seek a declaration that the arbitral award "is bad in law and is liable to be suspended and/or set aside;" a further declaration that the award "is not enforceable and not binding upon the petitioner;" and, an injunction restraining the respondent from acting in furtherance of the award. The respondent asserts that in the context of the present petition, including the grounds indicated in paragraph 57 thereof in support of the case – not for the award to be set aside, but for a declaration or order that the award "is liable to be set aside" – the ratio in *White Industries* cannot be attracted here. The respondent also ventures to add that the opinion in *White Industries* should be treated as *obiter dictum* in view of paragraph 86 and 87 of the report:

> "86. In the instant case, the appellant also while filing its transfer petition before the Hon'ble Supreme Court accepted Calcutta High Court, as a Court of competent jurisdiction in which the setting aside application was filed by the respondent. (See para 14 of Transfer Petition)."

> "87. Transfer Petition was filed, *inter alia*, on the ground of convenience and to avoid a conflict of judicial decision. Therefore, having already accepted that Calcutta High Court is a Court of competent jurisdiction to entertain setting aside proceeding, the appellant should have not turned round and challenged the jurisdiction of Calcutta High Court after withdrawing its transfer proceeding from the Hon'ble Supreme Court."

The respondent contends that there are several other features in the judgment in *White Industries* that may appear to be anomalous. For instance, the respondent argues, the governing law clause in the relevant contract entered into in the year 1989 categorically stipulated that the agreement would be "subject to and governed by the laws in force in India except that the Indian Arbitration Act of 1940 shall not apply." The respondent urges that since the 1996 Act may not even have been contemplated in 1989 when the agreement in *White Industries* was executed, the implication of the express exclusion of the Arbitration Act, 1940 was that the statute governing the arbitration law in this country was not to apply which would have meant that the statute that succeeded or replaced the 1940 Act in this country was also not to apply. The respondent submits that the Division Bench found that the exclusion of the applicability of the 1940 Act did not have any impact on the applicability of the 1996 Act; which, according to the respondent, went against plainest meaning of the relevant clause. But such matters as to the criticism of a Division Bench judgment cannot be heard or accepted by a single Judge as even a seemingly erroneous view of a Division Bench of this court is binding on the single Judge of this court and has, per force, to be applied, unless the facts obtaining in the matter before the single Judge are otherwise than governed by the Division Bench judgment, or the Division Bench judgment is shown to have been clearly contrary to law or to a judgment of a superior forum that was not noticed or the Division Bench judgment has ceased to be good law upon a subsequent judgment of a superior forum having been rendered on the same legal issue or upon the law having changed.

It is in such context that the judgment in *Fuerst Day Lawson* needs to be appreciated since the respondent insists that a conjoint operation of the two disparate provisions that are Section 34 and Section 48 of the 1996 Act, as accepted in *White Industries*, cannot hold good after such Supreme Court pronouncement. In *Fuerst Day Lawson* the question that arose was whether an order which was not appellable under Section 50 of the 1996 Act could nevertheless be carried in appeal under the appellate provisions of the Letters Patent. The following passage from paragraph 3 of the report lays down the premise for the opinion:

> "**3**. … Do the provisions of the 1996 Act constitute a complete code for matters arising out of an arbitration proceeding, the making of the award and the enforcement of the award? If the answer to the question is in the affirmative then, obviously, all other jurisdictions, including the Letters Patent jurisdiction of the High Court would stand excluded …"

It must not be lost sight of that the opinion was rendered on the appellate provision contained in the first chapter of Part II of the 1996 Act, which covers New York Convention awards and is also relevant in the present case. More significantly, the judgment is not confined to the scope of the appellate provision; it considers the scheme of the 1996 Act and the treatment of matters pertaining to foreign awards thereunder.

The Supreme Court noticed that the Arbitration and Conciliation Act, 1996, which is based on the Uncitral Model Law and is compatible with the ICC rules of arbitration, replaced not only the Arbitration Act, 1940 but two other enactments of the same genre – the Arbitration (Protocol and Convention) Act, 1937 pertaining to the acceptance and execution of Geneva Convention awards and the Foreign Awards (Recognition and Enforcement) Act, 1961 pertaining to the recognition and enforcement of New York Convention awards in this country. The court cited the statement of object and reasons of the 1996 Act to observe that such Act "consolidates and amends the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and defines the law relating to conciliation and provides for matters connected

therewith and incidental thereto taking into account the Uncitral Model Law and Rules." The Supreme Court felt that the 1996 Act "is a loosely integrated version" of the three statutes that it replaced but "under its scheme the provisions relating to the three enactments are kept separate from each other." After going through the scheme of the 1996 Act and the arrangement of the provisions thereof, the court held, at paragraph 60 of the report:

> "60. It is also evident that Part I and Part II of the act are quite separate and contain provisions that act independently in their respective fields. The opening words of Section 2 i.e. the definition clause of Part I, make it clear that meanings assigned to the terms and expressions defined in that section are for the purpose of that part alone. Section 4 which deals with waiver of right to object is also specific to Part I of the Act. Section 5 dealing with extent of judicial intervention is also specific to Part I of the Act. Section 7 that defines arbitration agreement in considerable detail also confines the meaning of the term to Part I of the Act alone. Section 8 deals with the power of a judicial authority to refer parties to arbitration where there is an arbitration agreement and this provision to is relatable to Part I alone (corresponding provisions are independently made in Sections 45 and 54 of Chapter I and II, respectively of Part II). The other provisions in Part I by their very nature shall have no application in so far as the two chapters of Part II are concerned."

The Supreme Court went on to hold, at paragraph 89 of the report, that "if the Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the Uncitral Model must be held only to be more so." It proceeded to add that once a statute is regarded as a self-contained code and found to be exhaustive, it carries with it a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done. In its clear demarcation of the applicability of Part I of the 1996 Act to domestic arbitrations and Part II to the foreign arbitrations covered thereby, there is an implied bar that the Supreme Court read into the provisions of the 1996 Act, of the applicability of Part I of the Act to matters covered by Part II thereof, except to the extent permissible under the Uncitral Model Law and the ICC rules of arbitration.

Section 44 of the 1996 Act defines a New York Convention award to be an arbitral award on differences between persons arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India, made on or after October 11, 1960 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 …declare*(s)* to be territories to which the said convention applies." The place where an arbitral award to which the New York Convention applies is made is, thus, of some importance under the statute that recognises it and facilitates its implementation in this country. In this context, three oft-ignored sub-sections of Section 2 of the 1996 Act, even though contained in Part I thereof, may be of some relevance:

> "2. Definitions. –(1) …
>
> (3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.
>
> (4) This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder.
>
> (5) Subject to the provisions of sub-section (4), and save in so far as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto.
>
> …"

Section 2(5) of the 1996 Act brings out the purport and sense of Section 2(2) thereof which stipulates that Part I of the 1996 Act "shall apply where the place of arbitration is in India." As is evident from the statute itself and has been confirmed by the Supreme Court in *Fuerst Day Lawson*, the 1996 Act is a complete code which is self-contained and exhaustive. As a necessary corollary, such enactment is to be seen as governing all the arbitration law and matters pertaining to arbitration in this country. Section 2(3) of the Act says that Part I of

the Act "shall not affect any other law for the time being in force" by virtue of which certain disputes may not be submitted to arbitration, which implies that notwithstanding the parties' agreement, certain matters may not be arbitrable in view of some other law. Section 2(4) makes room for statutory arbitrations. Section 2(5), as the respondent rightly suggests, embraces all arbitrations and proceedings relating to arbitrations which are not expressly covered by Part I of the 1996 Act. Once section 2(5) of the 1996 Act is understood, it gives a new dimension to section 2(2) thereof and, in a sense, makes it wider than what section 2(2) of the Act, on its plain reading, seems to imply; yet restricts the expanse of the operation of Part I of the Act to such arbitration matters that are not expressly governed thereby to matters not covered, inter alia, "in any agreement in force between India and any other country or countries." If there is any arbitration where the place of arbitration is not in India and the arbitration (it needs to be emphasised that the relevant phrase in Section 2(5) speaks of "arbitration" and not "arbitration agreement") is not covered by any agreement (in the sense of a treaty or a convention) to which India is a party or signatory, then, subject to certain other considerations as recognised in Part I of the 1996 Act, the provisions of the such part would apply to such arbitration and all matters pertaining thereto. By necessary implication, and without any shadow of a doubt, Part I of the Act would not apply to any arbitration - or any proceedings relating thereto – if such arbitration is governed by a treaty or convention to which India is a party, unless the relevant arbitration agreement or the convention governing such arbitration to which India is a party allows Part I of the 1996 Act to be applicable in respect of certain matters relating thereto. The expression "save in so far as is otherwise provided … in any agreement in force between India and other country or countries" in Section 2(5) of the Act may hold the key to the present matter if the disagreement between the parties in the interpretation of a solitary clause in a crucial article in the New York Convention can be reconciled. But the rule in this country relating to an arbitration not held in India, as embodied in the simultaneous and harmonious operation of sub-sections (2), (5) and (7) of Section 2 of the 1996 Act, is that Part I of the Act will not apply to any

arbitration if it is governed by any treaty or convention to which India is a party. The exception to the rule is that if the relevant treaty or convention does not exclude, whether expressly or by necessary implication, the invocation of Part I of the Act or any provision contained therein, or any agreement between the parties to such arbitration does not provide for a similar exclusion, Part I of the Act, or any particular provision thereof, may apply to the relevant arbitration or matters connected therewith. If this is the correct interpretation, *Bhatia International* is understood and *Fuerst Day Lawson*, particularly the observation at paragraph 60 of that report, is given full effect. To hazard an example, if the parties to an agreement which has a nexus with India and is governed by an arbitration clause, have the reference conducted anywhere outside India but in a country which is not a party to the conventions covered by the three schedules to the 1996 Act, or the law governing the arbitration held in another country on a matter that has an Indian connection is Indian law, parts or the entirety of Part I of the 1996 Act may be invoked for matters pertaining to such arbitration. Conversely, if an arbitration is governed by any of the three conventions set forth in the three schedules to the 1996 Act, to all of which India is a party or a signatory, Part I of the 1996 Act may not be invoked in connection with such arbitration save to the extent permitted by the relevant convention, or as may be agreed upon by the parties to the arbitration agreement.

Read in such light, the Division Bench opinion in *White Industries* may either seem to have been impliedly overruled by *Fuerst Day Lawson* or the dictum therein must be confined to a challenge to a New York Convention award under Section 34 of the 1996 Act where the parties did not specify any seat of arbitration and, consequently, the law governing the matrix contract was also seen to be the law governing the arbitration. In all humility and with the deepest respect, the arbitral award in *White Industries* must, per force, be seen as an award that was made under the law of India if the Division Bench opinion is not to fall foul of the Supreme Court's reading of the 1996 Act in *Fuerst Day Lawson*.

The right to apply to have an award set aside is by no means a natural right. Such a right is a statutory right and if the relevant statute does not recognise the making of such an application, whatever may be the other remedies available to a party seeking to have an award effectively annulled – a civil suit, for example, if not expressly or impliedly prohibited – an award-debtor has no mandate to apply under the statute governing arbitrations to have the award set aside. Just as a right of appeal is a privilege bestowed by statute, so is the right to apply to have an award set aside. When the 1996 Act is regarded as the repository of the entire law on arbitration in this country, if such statute does not confer a class of award-debtors the right to apply to have the award set aside, the court cannot recognise such right.

At this stage, the Supreme Court's understanding of the legal position as expressed in *Bhatia International* must be seen, though the parties herein have not directly referred to the judgment but have only made passing references to it in course of citing other judgments. In *Bhatia International*, the matrix contract between the parties contained an arbitration clause which provided for arbitration as per the rules of the ICC with the reference to be held in Paris. One of the parties to the agreement invoked the arbitration clause and an ICC arbitrator was appointed. Such party thereafter applied under Section 9 of the 1996 Act before an appropriate court in Madhya Pradesh seeking, inter alia, an injunction restraining the other parties from dealing with or disposing of their business assets and properties. On the maintainability of such proceedings being challenged on the ground that Part I of the 1996 Act would not apply to arbitrations where the place of arbitration was not in India, the point of demurer was rejected. The High Court of Madhya Pradesh endorsed the view. The Supreme Court noticed that section 2(7) of the 1996 Act recognised that even when an arbitration reference is held outside India, the award rendered therein may sometimes be regarded as a domestic award by dint of the deeming provision therein. In other words, all awards passed in arbitral references held outside India would not be foreign awards under the 1996 Act as the expression

"foreign awards" has been defined in Section 44 in the context of the New York Convention and in Section 53 in the context of the conventions set forth in the second and third schedules to the Act. As to the immediate question raised before it, the three-Judge Bench in *Bhatia International* opined that the invocation of Section 9 of the 1996 Act in respect of matters where the place of arbitration was not in India would be permissible, if the parties had not contracted otherwise, in view of the Uncitral Model Law. In that particular case the invocation of Section 9 of the 1996 Act was also found to be sanctioned by Article 23 of the ICC rules on arbitration that permits the applicable municipal law to be invoked for interim or conservatory measures. In the larger context, though there is an observation at paragraph 35 of the report that "a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions," such observation has to be read in the light of paragraph 32 of the report:

> "32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

It is submitted that the dictum in *Bhatia International* can also be justified on a more rudimentary premise which is not altogether unnoticed in that judgment. The basic sentiment of the New York Convention is that an award rendered in an international commercial arbitration has to be effective and not reduced to the desiccated satisfaction of the successful party in such party's point of view having been vindicated by a forum. Since disparate systems – and, as a corollary, varying ethical and moral values and norms based on the societal needs – prevail in different countries, a body of acceptable rules was devised to

be adopted, in whole or in part, by consenting member States of the United Nations. The purpose was for the fruits of an award in an international commercial arbitration passed in the territory of a consenting State to be tasted in the territory of another consenting State. This was deemed imperative since party A from country X could obtain an award in country Y and need to enforce it against party B in country Z as the persona and all the property of party B may only be in country Z. Upon the New York Convention being put in place and a host of countries adopting it or acceding thereto, party A now has the choice to agree to go to country Y for a reference armed with the knowledge that its enforcement will be effective against party B in country Z since country Y and country Z have both adopted or acceded to the convention. Equally, party A may not accept a suggestion from party B, which only operates and has all its assets in country Z, to provide for country Y to be the seat of arbitration if neither country, or only either of them, has adopted or acceded to the convention. The need to vindicate a claim or a stand taken in a commercial matter arises only for the purpose of enjoying the consequence thereof and the avowed purpose of the New York Convention is to facilitate that. An award made in one jurisdiction would be useless in another jurisdiction unless recognised thereunder. An interim or a conservatory measure is generally in aid of the claim or the final relief that a party aspires to obtain. In the situation covered by parties A and B and countries X, Y and Z, where the New York Convention applies in both countries Y and Z and country Y is the chosen seat of arbitration, party A has to be seen to have a right to approach an appropriate forum in country Z to obtain any interim or conservatory measure falling within the scope of the arbitration and in aid of the arbitration, or the reliefs claimed or proposed to be claimed therein; unless party A has been foolish enough to agree to expressly exclude any access to country Z for such measures. The very nature of the rights – the right to seek interim or conservatory measures (like interlocutory orders in a civil suit) and the right to enforce an award (whether interim, partial or final) – put them in the same legal basket of rights as different species of the same genre or, nearer still, as closely-related sub-species. If country Z is the only country where party A

can enforce an award obtained by it, then it must necessarily be country Z that party A has to go to for the purpose of any interim or conservatory measure arising out of the relevant arbitration. It is submitted that even if the law governing the matrix contract is not the law of the country where the interim or conservatory measure is sought, the law governing either the arbitration agreement or the arbitration is also not the law of such country, and the seat of the arbitration is beyond the territorial limits of such country, such country has to open its forum to receive a request for any interim or conservatory measure if the award arising from the arbitration is enforceable in such country. Any other interpretation, it is submitted, will fly in the face of reason and good sense if that which may be the object or target for the enforcement of an award is lost prior to the award being obtained. Purely on first principles, the adoption of or the accession to the New York Convention by any State should make the competent authority in such State accessible for a request for any interim or conservatory measure covered by the arbitration in another convention State, unless the municipal law of such State or any agreement between the parties to the arbitration prohibits it. This would be particularly true of a convention country with which the matrix contract or the subject-matter of the arbitration has a nexus and the country in which the respondent is domiciled. The permissive jurisdiction is to be presumed, which may by rebutted by citing a bar that has to be express or by necessary implication.

Against the backdrop of the respondent's robust challenge to the maintainability of the present proceedings, the petitioner has referred to a judgment reported at (2008) 4 SCC 190 (*Venture Global Engineering v. Satyam Computer Services Ltd*) which drew inspiration from the dictum in *Bhatia International* that the provisions of Part I of the 1996 Act would be equally applicable to international commercial arbitrations unless any or all of such provisions have been excluded by an agreement between the parties, expressly or by implication. But in all fairness to the petitioner, it must be recorded that the petitioner has not thrown the book at the court to insist that there can be no

argument on the legal issue after the Supreme Court has spoken on it; the petitioner has also attempted to reason why Part I of the 1996 Act should govern international commercial arbitrations held outside India if the circumstances so demand. In *Venture Global*, the appellant before the Supreme Court, a company incorporated in the United States of America, and the first respondent, which was a company registered in India, entered into a joint venture agreement to constitute the second respondent company before the Supreme Court in which the parties to the joint venture agreement came to hold fifty per cent shares each. A second agreement was entered into on the same day as the first agreement that provided for disputes between the shareholders of the joint venture company to be resolved amicably and, failing such resolution, for them to be referred to arbitration under the London Court of International Arbitration. The Indian party to the joint venture agreement commenced a reference and an award was passed directing the American party to the joint venture agreement to transfer its shares in the joint venture company to the Indian party. The award-holder, the Indian party to the joint venture agreement, carried a petition to an American court for recognition and enforcement of the award. The American party to the joint venture agreement objected to the enforcement on the ground that such enforcement would be in violation of Indian laws, particularly the Foreign Exchange Management Act, 1999 and the notifications issued thereunder. The agreement in that case contained an overriding clause that read:

> "Notwithstanding anything to the contrary in this agreement, the shareholders *shall at all times* act in accordance with the Companies Act and other applicable Acts/rules being in force, in India at any time."

The award-debtor, the American party to the joint venture agreement, lodged a suit before a district court in Secunderabad seeking a "declaration to set aside the award and permanent injunction on the transfer of shares under the award." The award-holder applied under Order VII Rule 11 of the Code of Civil Procedure for rejection of the plaint. The trial court upheld the challenge and rejected the plaint. The resultant appeal before the High Court of Andhra Pradesh failed with the High Court holding that the validity of such an award could not be

challenged in India even if it was against the public policy of this country and in contravention of the applicable statutory provisions. It was such order that was before the Supreme Court.

The judgment in *Venture Global* quoted copiously from *Bhatia International* and concluded that "even in the case of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, excluded all or any of its provisions." The order recorded that "Part I of the Act is applicable to the award in question even though it is a foreign award." Though the petitioner herein seeks to give the judgment in *Venture Global* a larger field of operation, it cannot be lost sight of that it was rendered in the context of a challenge to a foreign award, within the meaning of that expression in the 1996 Act, by way of a suit and not directly for setting it aside under Section 34 of the 1996 Act.

The related argument of the petitioner is that if a foreign award within the meaning of the 1996 Act is also regarded as a decree, as in case of a domestic award, and is capable of enforcement, a suit to challenge such foreign award would not be maintainable in view of Section 47 of the Code. The petitioner contends that the *Venture Global* judgment must be appreciated with reference to the prohibition under Section 47 of the Code against the institution of a suit to annul a foreign award. With respect, such submission cannot be accepted, for, to equate a foreign award within the meaning of that expression in the 1996 Act with a decree within the meaning of that expression in Section 47 of the Code, would amount to overlooking a huge step between the rendering of the foreign award and it culminating into a decree. The 1996 Act has done away with the requirement of a domestic award being converted into a judgment of court for it to ripen for execution. But Section 36 of the 1996 Act has an important condition that cannot be missed. Such provision mandates that it is only when the time for making an application to set aside an arbitral award under Section 34 of the Act has expired, or upon such an application being carried it has been refused, that

the arbitral award "shall be enforced under the Code …in the same manner as if it were a decree of the Code." It is the same sentiment which is reflected in Part II of the Act where, in the context of a New York Convention award, an appropriate court has first to recognise an award as a foreign award under the Act by subjecting the party which seeks its enforcement to the tests laid down in Section 47 of the Act and by permitting the party against whom it is invoked an opportunity to ward off the enforcement on the grounds provided in Section 48 of the Act. That is the mandate of Section 49 of the Act as it enunciates that 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."

Section 47 of the Code stipulates that "*(a)*ll questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit." A foreign award, within the meaning of the 1996 Act, is not a decree by itself. Such a foreign award if governed by the New York Convention has to be found by a competent court in this country to be enforceable under the first chapter of Part II of the 1996 Act before it can be regarded as a decree. Any challenge to a foreign award, therefore, has necessarily to be made in course of the enforcement of such foreign decree, although a suit to challenge the validity or enforceability of a foreign award within the meaning of the 1996 Act does not appear to have been expressly prohibited by the 1996 Act. As to whether such a suit has been impliedly prohibited by the 1996 Act has to be answered in the negative on a reading of *Venture Global* which permitted the suit in that case to continue. The principle in *Venture Global* must be seen in such light and operates in such context.

In *Lurgi Energy*, a Division Bench of the Gujarat High Court found that the parties had agreed that the matrix contract, including the arbitration clause, would be governed by the laws of India. In such circumstances, it was held that

the award would be deemed to be a domestic award and amenable to Part I of the 1996 Act. A district court had rejected the prayer for setting aside an interim or partial award against which an appeal was carried under Section 37 of the 1996 Act. The matrix contract contained an arbitration clause that provided for arbitration by the ICC with London being the parties' chosen seat of arbitration. The next succeeding clause in the contract stipulated that the agreement would be governed by the laws of India. The Gujarat High Court held that the governing law clause covered the arbitration agreement which was contained in the same document and, as such, the award was capable of being assailed under Section 34 of the 1996 Act. In arriving at such conclusion, the court relied on the Supreme Court dicta in a judgment reported at (1992) 3 SCC 551 (*National Thermal Power Corporation v. Singer Company*) and in the judgment in *Sumitomo*. The Gujarat High Court did not make any distinction between the law governing the arbitration agreement and the law governing the arbitration even though the parties therein had chosen a seat of arbitration. The Division Bench of this court in *White Industries* accepted the Gujarat view and also relied on *NTPC* and *Sumitomo*, though in *White Industries* there was no chosen seat of arbitration.

In *NTPC*, the matter reached the Supreme Court from a judgment of the Delhi High Court dismissing *NTPC*'s application under Sections 14, 30 and 33 of the Arbitration Act, 1940 to set aside an interim award made in London by a tribunal constituted by the ICC in terms of an arbitration clause contained in a larger agreement executed in New Delhi for certain works to be performed in India. The Delhi High Court was of the view that the award was not governed by the 1940 Act as it was not governed by Indian law, but the award fell within the ambit of the Foreign Awards (Recognition and Enforcement) Act, 1961. The High Court reasoned that since the seat of the arbitration was London, only English courts would have the authority to set aside the award. The general terms governing the matrix contract in that case provided that the laws in force in India would be applicable to such contract and the courts of Delhi would have exclusive jurisdiction in all matters arising under such contract. The general

terms also contained an arbitration clause in the event the contractor was a foreign contractor. It stipulated that such arbitration would be conducted by three arbitrators, two of them being the parties' nominees and the third being named by the ICC. The rules of conciliation and arbitration of ICC were to apply to such arbitration. The arbitration was to be conducted at such places as the arbitrators would determine. There was an additional clause in the general terms that recognised that the "contract shall in all respects be construed and governed according to Indian laws." The disputes which arose between the parties were referred to an arbitral tribunal constituted in accordance with the agreement and the ICC rules. The ICC chose London to be the place of arbitration. The question that the Supreme Court posed was whether the award "which was made in London on an arbitration agreement was not governed by the law of India and that it was a foreign award within the meaning of the Foreign Awards Act and beyond the jurisdiction of the Indian courts except for the purpose of recognition and enforcement" under the 1961 Act. The related question framed was as to which law governed the arbitration agreement.

The argument made on behalf of the foreign company was that though the matrix contract was governed by Indian law, the arbitration clause being a collateral contract and procedural in nature was not necessarily bound by the proper law of the contract; and that the law applicable to the arbitration agreement ought to be determined with reference to other factors, the place of arbitration being the foremost of them. The court held that when the parties had not expressly or impliedly chosen the proper law, "the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the courts having jurisdiction and such other limbs are examined by the courts to determine the system of law with which the transaction has its closest and most real connection." The court hastened to add that the expression "proper law" referred to the substantive principles of the domestic law and not to its conflict of laws rules. The court relied on *The Conflict of Law*s (11th Ed.) to conclude that the proper law of the arbitration agreement is

normally the same as the proper law of the contract but where there is no express choice of law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. Paragraph 26 of the report makes a distinction between the law of the arbitration agreement and the law governing the arbitration proceedings and recognises that the courts of the seat of arbitration will have jurisdiction in respect of procedural matters concerning the conduct of the arbitration, but "the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure."

The legal basis for the judgment is, however, found in paragraphs 37 to 46 of the report. The Supreme Court held that a foreign award under the 1961 Act was not foreign merely because it was made in a territory of a foreign state, "but because it is made in such a territory on an arbitration agreement not governed by the law of India." The court referred to Section 9(b) of the 1961 Act that provided that "nothing in such Act shall apply to any award made on an arbitration agreement governed by the law of India." The judgment in *NTPC* must be understood in such perspective, particularly the Supreme Court's recognition that the parties to the arbitration agreement had not chosen London as the arbitral forum but it was only chosen by the ICC. That the parties to the agreement had provided for the exclusive jurisdiction of the courts in Delhi also weighed with the Supreme Court.

In *Sumitomo*, the appellant before the Supreme Court agreed to install and commission an oil platform for the Indian company at Bombay High. The contract stipulated that "*(a)*ll questions, disputes or differences arising under, out of or in connection with this contract shall be subject to the laws of India." The

next succeeding sub-clause in the same clause of the matrix contract provided for arbitration as the agreed mode of dispute resolution with London being the chosen seat of arbitration. The arbitration was to be held in accordance with the ICC rules. Upon an award being rendered on the parties' disputes, the Indian company applied before the Bombay High Court for a direction on the umpire, under Section 14 of the 1940 Act, to file the award in that court. The Indian company contended that the award was invalid, unenforceable and liable to be set aside under the provisions of the 1940 Act. A single Judge of the Bombay High Court directed the umpire to file the award in that court and it was such decision that was carried to the Supreme Court. The Supreme Court noticed that in previous proceedings between the parties to the agreement, it was held by an English court that upon the parties choosing London as the seat of arbitration, there was a strong prima facie presumption that the parties intended the curial law to be the law of the seat of the arbitration. The Supreme Court observed that such finding had attained finality between the parties. It then formed the question to be taken up for discussion: "What is the area of operation of the curial law." The Supreme Court concluded that "the curial law operates during the continuance of the proceedings before the arbitrator to govern the procedure and conduct thereof" and the "authority of the courts administering the curial law ceases when the proceedings before the arbitrator are concluded." At paragraph 15 of the report it was held that where the law governing the conduct of the reference is different from the law governing the underlying arbitration agreement, the court looks to the arbitration agreement to see if the dispute is arbitrable, then to the curial law to see how the reference should be conducted, and then returns to the first law in order to give effect to the resulting award. However, such opinion cannot be regarded to be a general proposition of law or any principle laid down as a conflict of laws rule. The view was based on the law then prevailing in the country as would be evident from the next two paragraphs of the judgment which refer to Section 47 of the 1940 Act and Section 9(b) of the 1961 Act. Section 47 of the 1940 Act mandated that subject to Section 46 of the Act (governing statutory arbitrations) "and save in so far as is otherwise provided

by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder." Section 9(b) of the 1961 Act, as noticed earlier, made such statute inapplicable to awards made on arbitration agreements governed by the law of India.

The authoritative value of a binding precedent is destroyed upon the law governing the subject being materially amended or replaced. It is true that *White Industries* relied on both *NTPC* and *Sumitomo* to found the opinion expressed therein and the law as it stood when the judgment in *White Industries* was delivered is the same as it is today. But the Division Bench view in *White Industries* has to be confined to an award passed in a foreign country when the parties did not choose the seat of arbitration and where the arbitration agreement and the arbitration were found to be governed by Indian law. Alternatively, the Division Bench view has, in all humility, to be regarded to not hold good any more upon *Fuerst Day Lawson* finding it impermissible for the provisions of Part I of the 1996 Act to be made applicable to matters covered by Part II of the Act unless the parties by agreement provide for the same or the relevant convention recognises it.

The respondent herein says that Section 9(b) of the 1961 Act does not find place in the 1996 Act. This, according to the respondent, makes a world of difference. The respondent reasons that if Section 47 of the 1940 Act covered all arbitrations and all proceedings thereunder unless otherwise provided for by any other law, and if the 1961 Act dealing with the recognition and enforcement of New York Convention awards excluded the applicability of the 1961 Act to any award made on an arbitration agreement governed by the law of this country, the decisions in *NTPC* and *Sumitomo* have to be viewed as reflecting the effect of the applicable statutes operating at that point of time and not any enunciation of any fundamental principle of arbitration law. The respondent emphasises that Section 51 of the 1996 Act is substantially the present avatar of Section 9 of the 1961 Act since Section 51 is in the first chapter of Part II of the 1996 Act that

governs New York Convention awards. Section 51 of the 1996 Act has retained clause (a) of Section 9 of the 1961 Act but is silent on clause (b). Such silence, the respondent contends, clamours aloud that New York Convention awards made on arbitration agreements governed by the law of India may still be amenable to Chapter 1 of Part II of the 1996 Act as it appears to be a deliberate legislative intention to exclude a previous provision from the relevant part of a subsequent enactment covering the same field.

It is on such lines that the respondent submits that the focus on the law governing the arbitration agreement and its consequent impact on how an award is to be received and dealt with has been shifted to the law governing the arbitration and the concept of territoriality involved therein. The respondent refers to Section 2(a) of the 1940 Act that defined arbitration agreement, Section 31(1) thereof that permitted an award to be filed in any court having jurisdiction in the matter to which the reference related and Section 31(2) of such Act – with its non-obstante clause – that mandated that the validity, effect or existence of an arbitration agreement was to be decided by the court in which the award had been or could be filed and by no other court. The respondent suggests that since the 1940 Act came before the doctrine of separability (as between the matrix contract and the arbitration agreement) came to be accepted in *Heyman v. Darwins*, it is evident that such Act made the law of the arbitration agreement subject to the law of the matrix contract or, at any rate, made much less of a distinction between the two than has now come to be accepted in arbitration law; and no distinction at all between the law governing the arbitration agreement and the law governing the arbitration. It is in such vein that the respondent cites several judgments, including two persuasive pronouncements of the Bombay High Court, on the inapplicability of Part I of the 1996 Act to awards made in a foreign land.

In a judgment reported at (2005) 2 Arb.LR 125 (*Inventa Fischer GmbH & Co., K.G. v. Polygenta Technologies Limited*), a single Judge of the Bombay High

Court expressed the view that a petition under Section 34 of the 1996 Act could not be received in respect of an award made in Switzerland. The award arose out of two related agreements which contained identical arbitration clauses that provided for reference of the disputes to institutional arbitration in accordance with the ICC rules with the seat of arbitration being Geneva, Switzerland. The arbitration clauses also stipulated that the parties would not seek recourse to a law court or other authorities for revising the decision of the arbitral tribunal. The court noticed the submission on behalf of the award-holder that since the arbitration was agreed to be, and was, conducted in Geneva it was governed by Swiss law which was the applicable curial law. The court recorded a further argument that upon Section 9(b) of the 1961 Act not being included in Section 51 of the 1996 Act, an anomaly in the previous Indian law was removed since Section 9(b) of the 1961 Act was inconsistent with the New York Convention as an award made in a notified foreign country would be a foreign award irrespective of the law governing the arbitration agreement. The principal challenge by the award-holder to the maintainability of the petition under Section 34 of the 1996 Act is captured at paragraph 10 of the report:

> "10. Shri Chinoy was at pains to point out that deletion of Section 9(e) *(sic, Section 9(b))* from the Foreign Act is something which cannot be brushed aside. He contends that Section 9(b) of Foreign Act and Section 44 of 1996 Act read with Article 1(1) of 1958 Convention deal with totally different aspect. Section 9(b) treated a class of foreign awards as domestic awards by excluding them from Foreign Act. Latter part of Article 1(1) of 1958 Convention treated class of local/domestic awards as foreign awards by including in from the definition of foreign award. After inviting my attention to the Convention and the provision of Foreign Act, Shri Chinoy contends that now the field is occupied and covered by Section 48(1)(e) of the Act which is on par with Article V(1)(e) of the Convention. He submits that bare reading of Section 48(1)(e) would demonstrate that a foreign award can be challenged in a country in which it was made or the country under law of which it was made. It provides that if the award has been challenged or suspended or set aside by any of these two statutory recognised forums, then it will provide a defence to the recognition and enforcement of the award. In the present case, the award was made in Geneva, Switzerland which is admittedly a notified country. Therefore, it can be challenged only in Switzerland. Similarly, other forum is the country under the law of which the award was made, which in the instant

> case, also is Switzerland and, therefore, the award could only be challenged in Swiss Courts. He submits that having regard to this provision no proceedings to set aside or suspend the award can be filed in a Indian Court. This even assuming that the substantive/proper law of the arbitration agreement (in contradistinction to the procedural/curial law which governs arbitration proceedings) was Indian law. This is because in the facts and circumstances of the present case, the proper law of arbitration agreement would also be Swiss law."

The single Judge referred to a previous judgment of the same court on such aspect which had quoted from paragraph 26 of the judgment in *Bhatia International* to conclude that when there were special provisions in the 1996 Act for enforcement of foreign awards, the general provisions in the Act, including the provisions for the challenge to an award, would stand excluded; which implied that if Part II of the Act became applicable to an award, Part I thereof would not apply. The single Judge also referred to two other single Bench opinions of the same court and held that a petition to set aside the award could not be entertained under Section 34 of the 1996 Act.

The respondent has next placed a Division Bench judgment of the Bombay High Court reported at (2005) 3 Arb.LR 58 (*Goldcrest Exports v. Swissgen NV*). The appeal in that case was against an order dismissing a petition under Section 34 of the 1996 Act to challenge an award passed in an institutional arbitration held in England. The appellant denied entering into the contracts which, according to the award-holder, contained identical arbitration clauses. The Division Bench referred to an observation in *Bhatia International* that "*(t)*o the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards." The court held that Part II of the 1996 Act specifically provided separate provisions "not merely for the enforcement of foreign awards but even for the challenge thereto by the party against whom it is sought to be enforced." The following paragraphs from the report are apposite:

"18. If it is held that an application to challenge a foreign award is maintainable under Section 48 before or even in the absence of an application for the enforcement thereof, an application under Section 34 would clearly not be maintainable for in that event Part II would be held to have provided a specific provision for the challenge to a foreign award."

"19. In our opinion, however even if this question is answered in the negative the provisions of Section 34 are not available to challenge a foreign award. We proceed, therefore, at this stage on the basis that under Part II a party aggrieved by a foreign award is not entitled to maintain an application for the challenge to a foreign award before or in the absence of an application for the enforcement thereof. Part II in any event provides an opportunity for a party aggrieved by a foreign award to oppose the enforcement thereof. It however restricts the circumstances in which such right can be exercised. The scheme of the Act indicates clearly the intent of the legislature to provide a party with a right to challenge a foreign award only in certain circumstances. By necessary implication it excludes the right of a party to challenge a foreign award except in cases where the enforcement thereof is sought."

"20. It is true that in some cases, including in the impugned judgment, it has been held that the grounds for challenging a domestic award and a foreign award under Sections 34 and 48 of the Act respectively are identical. There are however certain nuances, albeit minor, which indicate quite clearly that the provisions of Section 34 do not and cannot apply to a foreign award."

"21. The scheme of Section 48 and the language used therein clearly establishes that the provisions thereof pertain to a foreign award. This is not so in the case of Section 34. For instance under Section 48(1)(a) the incapacity of a party against whom an award is made is to be determined under the law applicable to them. This provision is inapplicable to a similar challenge under Section 34. Further, under Section 48(1)(a) the enforcement of a foreign award may be refused if the party against whom it is made furnishes proof to the Court that the 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. The corresponding provision in Section 34 does not provide the latter qualification viz "under the law of the country where the award was made"."

"22. Thus even assuming that the grounds of challenge to an award under Sections 34 and 48 are identical the circumstances in which and the manner in which the defence is applicable are different. Section 34, therefore, by necessary implication does not apply to foreign awards. The judgment of the Supreme Court in Bhatia's case is, therefore, inapplicable."

> "23. To hold to the contrary would lead to absurd results. It would permit a party aggrieved by a foreign award a right to challenge the same both under Sections 34 and 48 of the Act. The applicable law on the basis whereof an award is challenged would be different under the two sections. This is clearly not the intention of the legislature it would involve legislation, an exercise not open to this Court."

An opinion rendered by a single Judge of the Delhi High Court in the judgment reported at (2005) 2 Arb.LR 561 (*Bharti Televentures Limited v. DSS Enterprises Pvt. Limited*) is next placed by the respondent. It was held in such case that the concept of territoriality, in the context of foreign awards, is recognised by the 1996 Act. A judgment of a single Judge of the Karnataka High Court reported at 2005 (Suppl.) Arb.LR 454 (*Vikrant Tyres Limited v. Techno Export Foreign Trade Company Limited*) has also been placed by the respondent. The matrix contract in that case was governed by the law of the country of the foreign party and the arbitration clause therein provided for the reference to be conducted in Prague. The foreign party invoked the arbitration clause whereupon the Indian buyer lodged a suit against the foreign seller and another for a declaration that there was no arbitration agreement between the parties and that the arbitration proceedings commenced by the foreign seller were null and void. Following an award made in Prague, the Indian award-debtor applied for setting it aside before a district court in Mysore and also sought an injunction against the award-holder from exercising any rights thereunder. The trial court rejected the petition in so far as it sought the award to be set aside but found the prayers to resist the implementation of the award to be maintainable. The civil suit was dismissed on the ground that the parties thereto were bound by the arbitration agreement and the plaintiffs had not specifically challenged the validity of such arbitration agreement. The order dismissing the suit and the order passed in the petition under Section 34 of the 1996 Act were challenged by both sets of parties; the Indian party assailing the dismissal of the suit and the rejection of the prayer for setting aside the award and the foreign party challenging the continuation of the petition in so far as it related to resisting the exercise of rights under the

award. The court framed two questions. The first was whether the Indian party was entitled to reliefs under Section 34 of the 1996 Act; the other being whether an application under Section 48 of the Act was premature without any execution proceedings in respect of the award. The court relied on the Uncitral Model Law, noticed that Section 34 of the 1996 Act corresponded to Article 34 of the Model Law and concluded that an application for setting aside the award is to be made in the court of a country where the award was passed.

An unreported judgment of a Division Bench of the Karnataka High Court of September 9, 2011 in MFA No. 1735/2011 (AA) (*Ferrostaal AG v. Bharati Shipyard Limited*) and a Division Bench judgment of the Madras High Court reported at (2009) 4 MLJ 633 (*Tamil Nadu Electricity Board v. Videocon Power Ltd*) have also been cited by the respondent. In the Karnataka case the Indian party to the arbitration involving a foreign party instituted proceedings in a district court under Section 9 of the 1996 Act. The court found that the law of the arbitration agreement was the same law that covered the matrix contract which stipulated that it would be governed by the laws of England. Upon an interpretation of *Bhatia International*, the court held that Part I of the 1996 Act was not available to the parties to the relevant arbitration agreement. In the Madras case an award made in a foreign country was sought to be challenged before the Madras High Court following the award-holder applying in the same court for enforcement of the award. A clause in the relevant matrix contract provided that the validity, interpretation, construction, performance and enforcement of the arbitration agreement and any other question of arbitration law would be governed by the laws of England. The appeal arose from the order of the single Judge dismissing the award-debtor's petition under Section 34 of the 1996 Act and receiving the award-holder's petition for enforcement of the award. The Division Bench repelled the contention of the appellant that the award was to be considered as a domestic award as two of the three arbitrators had signed it in India. The court held that to determine as to whether an award is a foreign award, "the relevant test would be, firstly, the relationship between the parties must be commercial;

secondly, the award must be made in pursuance of the agreement in writing; and thirdly, the award must be made in convention country."

From further afield, the respondent has carried English and other European judgments and opinions expressed by American courts. In the judgment reported at (2008) 1 LLR 239 (*C v. D*), the Court of Appeal considered an agreement in what has come to be known as the Bermuda Form where two American corporations agreed to arbitrate in England but provided for the proper law of the relevant insurance contract to be the internal laws of the state of New York. The award-holders applied in an English court for an anti-suit injunction to prevent the award-debtor from bringing an action in the United States of America to challenge the award. The other reliefs sought in the suit were for restraining the award-debtor from impeding the award-holder in enforcing the award. The trial court held that since the seat of the arbitration was England and Part I of the English Arbitration Act, 1996 used the concept of seat as the test for the applicability of such part to an arbitration matter, the plaintiffs as award-holders were entitled to the reliefs sought. The trial court reasoned that the seat of arbitration and the choice of procedural law would almost invariably coincide apart from the possibility that the parties might choose another procedural law in relation to matters covered by the non-mandatory provisions of Part I of the English Act; and that by agreeing to the seat, the parties had agreed that an award passed on the reference could only be challenged in the place designated as the seat of the arbitration. The appellant contended that the trial court was wrong to hold that the arbitration agreement was governed by English law merely because the seat of the arbitration was London. It asserted that the fact that the arbitration itself was governed by English procedural law did not mean that it followed that the arbitration agreement itself had to be governed by English law. The respondent argued that the points raised by the appellant were irrelevant once it was clear that England was the seat of the arbitration and English law was, therefore, the curial law of the arbitration; and that it would follow that the parties intended the award to be challenged as permissible by English law and

not under the law of the matrix contract or under the law of the arbitration agreement, if the two were different. The Court of Appeal opined that "by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law." The Court of Appeal endorsed the view that "an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause" and any question "going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an … award is agreed to be made only in the courts of the place designated as the seat of the arbitration." The court also held that in a case where there is no express choice as to the law of the arbitration agreement, the law with which the arbitration agreement has its closest and most real connection is the law of the seat of arbitration and not the law of the underlying contract. Paragraph 23 and 24 of the report are relevant for the present purpose:

> "23. In the days before the separability of the arbitration agreement was fully apparent it was often said that if a contract chose a place of arbitration, the law of that place was the proper law of the contract on the principle of "*Qui elegit judicem elegit jus*" see *Tzortzis v Monark Line AB* [1968] 1 Lloyd's Rep 337. (No doubt it would conversely have been said that, if a contract had an express choice of law clause, the law of the arbitration agreement would have been the same as the proper law of the contract.) This convenient but stark proposition was departed from by the House of Lords in *Compagnie Tunisienne De Navigation SA v Compagnie D' Armement Maritime SA* [1970] 2 Lloyd's Rep 99 in which it was pointed out that the inquiry must always be to discover the law with which the contract has the closest and most real connection. It was there decided that the mere fact that arbitration was to be in London did not mean that what was in reality a French contract of affreightment had to be governed by English rather than French law. It did not matter at all that English arbitrators would have to apply French law. In these circumstances it cannot be automatic that if the relevant inquiry is the converse inquiry (namely to discover the proper law of an arbitration agreement) the answer to that inquiry is to be the proper law of the agreement. The inquiry is, as I have said, to discover the law with which the agreement to arbitrate has the closest and most real connection."
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> "24. The matter is not entirely free from authority. In *Black Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 at page 483 Mustill J set out the three potentially relevant laws, namely (i) the law governing the substantive agreement; (ii) the law

governing the agreement to arbitrate and the performance of that agreement; and (iii) the law of the place where the reference is conducted (the *lex fori*). He then said:

> In the great majority of cases, these three laws will be the same. But this will not always be so. It is by no means uncommon for the proper law of the substantive contract to be different from the *lex fori*; [The *Compagnie Tunisienne De Navigation SA* case was then one such an example]; and it does happen, although much more rarely, that the law governing the arbitration agreement is also different from the *lex fori*.

Mustill J gave *Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 Lloyd's Rep 269; [1970] AC 583 as an example of this second situation. That was a case where the proper law of the building contract and the arbitration agreement was English but the reference was conducted in Scotland. Mustill J was, however, saying that it would be a rare case in which the law of the arbitration agreement was not the same as the law of the place (or seat) of the arbitration."

The respondent next refers to a judgment of the Commercial Court in England reported at (2009) 2 LLR 376 (*Shashoua v. Sharma*). In an action for an anti-suit injunction, the plaintiffs applied for an interlocutory order. The disputes arose in that case out of a shareholders' agreement relating to a joint venture company which was governed by Indian law but provided for ICC arbitration in London. An ex parte ad interim anti-suit injunction was issued. There was a disagreement between the parties as to the law of the arbitration agreement, with the defendant contending that it was governed by Indian law and the claimant insisting that it was subject to English law. A further dispute arose "in relation to the curial law of the arbitration … in the context of deciding where a challenge can be mounted to any arbitration award." Prior to the commencement of the reference, the plaintiffs had invoked Section 9 of the 1996 Act by applying before the Delhi High Court for interim measures. The prayers made under Section 9 of the 1996 Act related to inspection of the joint venture company's books of account and the stopping of its board meetings, the operation of the joint venture company's bank accounts and of the disposal of its assets. In such application the foreign parties stated that the arbitration agreement was governed by English

law and the arbitration was to be held in London as the chosen seat, but because of the domicile of the second respondent to the proceedings and the location of joint venture company's records, the application for interim protection could be made before an Indian court. The English court noticed that upon the application under Section 9 of the 1996 Act being made in India, there arose an issue in Indian law as to whether such application amounted to a submission to the jurisdiction of Indian courts for all purposes connected with the arbitration. In the time between the plaintiffs in the English court invoking Section 9 of the 1996 Act before the Delhi High Court and instituting the suit before the English court, the arbitral reference was conducted but the award was awaited. After the foreign parties invoked the arbitration agreement but prior to the reference being taken up, the second respondent to the original application under Section 9 of the 1996 Act, which was an associate of the defendant in the English suit, applied to the Delhi High Court for a declaration that there was no valid arbitration agreement between it and the other parties to the arbitration. Such application was rejected by the Delhi High Court and an internal appeal was preferred therefrom. The arbitration progressed against the defendant in the English suit but not against the second respondent to the original proceedings filed under Section 9 of the 1996 Act before the Delhi High Court.

In course of the arbitral reference, the defendant before the English court and the joint venture company challenged the jurisdiction of the arbitral tribunal. Such challenge was heard as a preliminary issue and rejected by confirming the existence of the shareholders' agreement and the arbitration agreement within it. The defendant in the English suit then applied to the arbitral tribunal for permission to apply to an English court to use the court's process to compel the production of documents and oral evidence from third parties. Such application was also dismissed by the arbitral tribunal. The arbitral tribunal thereafter made an award dealing with the costs of the hearing of the jurisdictional challenge, the advance on costs and the defendant's disclosure application in the English action. The defendant in the English suit failed to make any payment at all under

such costs award. On an application by the claimants in the reference (the plaintiffs in the English suit), the Commercial Court granted leave to the claimants to enforce the costs award against the defendant as if it were a judgment of the court. The defendant in the English suit petitioned under Section 34 of the 1996 Act before the Delhi High Court for setting aside the award on costs. The defendant in the English action also sought to challenge the award on costs in the Commercial Court in England but since such application was made outside the requisite 28-day period a connected application was filed for extension of the time. The Commercial Court refused to extend the time and dismissed the relevant application with costs. A further attempt by the defendant in the English suit to have the order of the Commercial Court granting leave to enforce the costs award to be set aside also failed with such defendant being saddled with further costs for the endeavour. In aid of the costs award, a property of the Indian party in England was attached.

In the meantime, the defendant in the English suit applied before the Delhi High Court for an order restraining the English parties from taking any steps to enforce the costs award. The application failed and an appeal therefrom was also rejected. The defendant in the English suit then applied to the ICC Court for removal of one of the arbitrators on the ground of a perceived failure by such arbitrator to make an appropriate disclosure as mandated by the ICC rules. The aforesaid facts are recorded in the cited judgment which was rendered at the final stage of the principal interlocutory application in the anti-suit action. In course of confirming the interim anti-suit injunction in a modified form, the Commercial Court observed that there were a serious dispute on questions of Indian law in the light of "conflicting statements from two former Chief Justices of India on the law of India," but maintained that an arbitration clause which provided for arbitration to be conducted in accordance with the ICC rules with London as the chosen venue amounted to the designation of a juridical seat.

The respondent cites a not-so-recent American judgment reported at 745 F. Supp. 172 (1990) (*International Standard Electric Corporation v. Bridas Sociedad Anonima*). The parties to that matter were an American company and an Argentine company. The situs of the award was Mexico City, a location chosen by the ICC pursuant to the rules of procedure explicitly agreed to by the parties. The American company sought the annulment of the arbitral award made outside the United States of America in an American court. The Argentine company argued that under the New York Convention only the courts of the place of arbitration had jurisdiction to set aside such an arbitral award. The American award-debtor asserted that under such convention both the courts of the place of arbitration and the courts of the place whose substantive law had been applied in course of the arbitration had jurisdiction to set aside the award. The American award-debtor relied on Article V(1)(e) of the New York Convention and suggested that since it was an admitted position that the substantive law governing the contract was American law, appropriate courts in the United States of America had the jurisdiction to set aside the award. The court concluded that since "the parties subjected themselves to the procedural law of Mexico, … the situs, or forum of the arbitration is Mexico, and the governing procedural law is that of Mexico, only the courts of Mexico have jurisdiction under the Convention to vacate the award."

A judgment rendered by an Austrian court noticed in 32 YB 291 (*M GmbH v. M Inc. USA*) has been placed by the respondent. The relevant contract provided for the application of American law and the reference of the disputes to an institutional arbitration in Austria. The disputes between the parties were referred to arbitration in Vienna and an interim award rendered, upholding the validity of the arbitration clause. Subsequent awards on merits were also passed. The award-debtor sought annulment of the awards in Austria under Austrian law claiming that there was no valid arbitration agreement between the parties. A commercial court in Vienna set aside the awards but an appellate court reversed the decision. The Austrian Supreme Court affirmed the appellate decision. The

Supreme Court observed that where the recognition and enforcement of an arbitral award rendered in Austria could be sought in another country under the New York Convention, the validity of the arbitration agreement had to be assessed solely on the basis of the convention. But the court was not required to apply the principle in the matter since it found the arbitration agreement to be valid even under Austrian law.

The next judgment that the respondent cites is well known in international commercial arbitration and has been referred to in many academic articles and research papers. The matter in the judgment reported at 2004 US App. LEXIS 5445 (*Karaha Bodas Co., LLC (Cayman Islands) v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Indonesia)*) related to the development of a geothermal project in Indonesia by a State-owned Indonesian oil company which was to be financed by a company registered in the Cayman Islands. There was a joint operation contract that envisaged that foreign company KBC would build, own and operate the generating facilities and Indonesian company Pertamina would manage the geothermal operations. There was an energy sales contract under which an Indonesian State-owned electricity utility was to purchase electricity at specified prices. Both contracts provided for the application of Indonesian law and for arbitration of disputes in Switzerland according to Uncitral rules. The Indonesian government suspended the project indefinitely citing a financial crisis. KBC initiated a reference in Switzerland. The arbitral tribunal rejected the Indonesian companies' plea against consolidation of the claims under the two agreements and proceeded to make a final award. Pertamina applied in Switzerland to annul the award but the court declined to receive the matter on Pertamina's failure to pay the filing costs in time. KBC applied for enforcement of the award in several countries, including in the United States and Hong Kong.

Pertamina then applied for annulment of the award in Indonesia on the ground that since the contracts were governed by Indonesian law, both

Indonesian substantive law and Indonesian procedural law would be applicable to the arbitration and the award could be set aside in Indonesia. Then followed a series of anti-suit and anti-anti-suit proceedings in Indonesia and in the United States which, though not relevant in the present context, highlights the acute conflict of laws that still remains between States that are parties to the New York Convention. A Texas district court ruled that the award could be enforced in its territorial jurisdiction, but that was before an Indonesian court annulled the award. The Texas court was thereafter called upon to vacate its order, but refused to do so on the ground that the award was made under the law of Switzerland, pursuant to the agreement of the parties, and the setting aside of the award in Indonesia was no ground for vacating the enforcement order. The original order for enforcement and the subsequent order refusing to vacate the original order were carried in appeal. The judgment cited by the respondent here was rendered in such appeals where a concept of "primary jurisdiction" and "secondary jurisdiction" qua New York Convention awards was enunciated.

The United States Court of Appeals, Fifth Circuit, held that under the New York Convention, only courts in a country with primary jurisdiction over an award may annual such award and the relevant courts would only be the courts in the country in which or, under the law of which, the award was made; courts in other countries would only have secondary jurisdiction to refuse to enforce the award in their jurisdiction upon a request for enforcement being made. In that case it was held since the parties had agreed on Switzerland as the seat of the arbitration, only courts in Switzerland had primary jurisdiction over the award as "an agreement specifying the place of arbitration creates a presumption that the procedural law of such place applies to the arbitration." The court found that there was no indication of any contrary intention of the parties, but it also found that Pertamina was estopped from urging any contrary intention since it had approached a Swiss court in the first place for annulment of the award. The court also declined to interfere with the order for enforcement of the award in the United States on the grounds put forth by Pertamina.

The following passages from the judgment as extracted in 29 YB 482 capture the basis for the opinion:

> "[9] Art. (V)(1)(e) of the Convention provides that the court of secondary jurisdiction may refuse to enforce an arbitral award if it '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.' Courts have held that the language, "the competent authority of the country … under the law of which, that award was made" refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted and not the substantive law … applied in the case. … Pertamina and the Republic *(of Indonesia)* argue that in the arbitration agreements, the parties chose Indonesian procedural, as well as substantive, law to govern the arbitration. Pertamina and the Republic assert that, as a result: (1) the arbitration must be examined for compliance with Indonesian procedural law; and (2) the Indonesian court had primary jurisdiction to annul the Award, providing a defence to enforcement in the United States. KBC responds that the Tribunal properly interpreted the parties' contracts in deciding that Swiss procedural law applied and the District Court properly applied the New York Convention in affirming that decision. This court agrees with KBC."
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> "[11] Under the New York Convention an agreement specifying the place of the arbitration creates a presumption that the procedural law of that place applies to the arbitration. Authorities on International Arbitration describe an agreement providing that one country will be the site of the arbitration but the proceedings will be held under the arbitration law of another country by terms such as 'exceptional'; 'almost unknown'; a 'purely academic invention'; 'almost never used in practice'; a possibility 'more theoretical than real'; and a 'once–in–a–blue-moon set of circumstances'. Commentators note that such an agreement would be complex, inconvenient, and inconsistent with the selection of a neutral forum as the arbitral forum."
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> "[12] … In selecting Switzerland as the site of the arbitration the parties were not choosing a physical place for the arbitration to occur, but rather the place where the award would be 'made'. Under Art. 16(1) of the UNCITRAL Rules, the 'place' designated for an arbitration is the legal rather than physical location of the forum."

Another American judgment, rendered by the United States Court of Appeals, Third Circuit, reported at (2009) US App. LEXIS 25404 (*Steel Corporation of the Philippines v. International Steel Service, Inc.*) as noticed in 35

YB 688 has next been placed by the respondent. The disputes, between a corporation registered in the Philippines and a body incorporated in the United States, and the several sets of proceedings arising in connection therewith have also been widely noticed in international commercial arbitration circles. The Philippine corporation engaged the American company to build an acid regeneration plant. Under a subsequent agreement, the US company was to buy iron oxide produced at the plant. Both agreements provided for the application of Philippine law to the validity, performance and enforcement of the agreements and contained clauses for referring the disputes thereunder to ICC arbitration in Singapore. Upon disputes arising between the parties, the US company commenced an institutional arbitration in the Philippines instead of the agreed ICC arbitration in Singapore. The Philippine party consented to the arbitration. The tribunal rendered an award in favour of the US company. Subsequently, the Philippine party filed a request for an ICC arbitration in Singapore of a dispute arising under the second agreement. The award went in favour of the Philippine party with the tribunal recording that it had applied Singapore law to the proceedings and Philippine law to the merits of the disputes. The US company brought two separate actions in the Philippines to annul the Singapore award and to execute the Philippine award. In the annulment proceedings, the Philippine party applied for dismissal of the same but failed to pursue the application, whereupon the US company's annulment petition was allowed to progress *ex parte*. The Philippine party applied for reconsideration of the matter and the trial court temporarily stayed the annulment proceedings and referred the dispute to mediation. In the enforcement proceedings, the trial court issued a writ of execution. The Philippine Court of Appeals set aside the writ upon accepting the Philippine party's argument that the monetary grant in the Philippine award was extinguished by the greater quantum awarded in favour of the Philippine party in the Singapore arbitration. The court also rejected the US company's contention that the Singapore award could not be looked into as an annulment petition relating thereto was pending in a Philippine court, on the

ground that only courts in Singapore, as the country with primary jurisdiction, could annul the award.

The Philippine party sought thereafter to enforce the Singapore award that it obtained in an American court in Pennsylvania. The US company removed the action to a federal court and asserted that the Singapore award had been annulled by a default judgment of a Philippine court. Such plea failed. The court also rejected the US company's petition to disallow enforcement of the Singapore award made in the Philippine party's favour. The court referred to *Karaha Bodas* and held that the expression "under the law of which" in Article V(1)(e) of the New York Convention refers exclusively to the procedural law of the arbitration. It also recorded that it was for a party asserting that a different procedural law other than that of the seat of the arbitration applied to the award to rebut the presumption of the applicability of the procedural law of the seat of the arbitration; and, the US company had failed to discharge such onus.

An opinion of the Swedish Supreme Court noticed in 26 YB 291 (*Bulgarian Foreign Bank Ltd v. AI Trade Finance Inc.*) has also been placed by the respondent. In that case, a Bulgarian bank concluded a loan contract with an Austrian bank. The Austrian bank transferred its right to receive payment under the loan contract to an American company. A dispute arose between the Bulgarian and the American parties concerning the risk transfer. Arbitral proceedings were initiated in Stockholm based on the arbitration clause in the loan contract between the Bulgarian and the Austrian banks. The tribunal held by way of an interim award that it possessed the jurisdiction to deal with the dispute as the arbitration agreement was binding on the American company. The American company had the interim award published in an arbitration journal. The Bulgarian bank alleged in the arbitration proceedings that followed that in the American company's breach of the confidentiality clause by disclosing the interim award to a third party, it had rendered the arbitration agreement void. The arbitral tribunal rejected the argument and issued a final award. The

Bulgarian bank challenged the award in a Stockholm court. The court held that there was an arbitration agreement between the parties, but in the American company having publicised the interim award the Bulgarian bank had valid grounds to avoid the contract. An appeal to the Svea Court of Appeals resulted in the confirmation of the validity of the arbitration agreement and the overturning of the ruling concerning the requirement of confidentiality. The Bulgarian bank carried the decision to the Swedish Supreme Court, seeking a deceleration of invalidity or revocation of the arbitral award. The Supreme Court held against the Bulgarian bank. The decision, however, does not appear to be relevant to the principal issue that arises in the instant case.

The only foreign judgment that the petitioner has relied on in support of its contention that the arbitration agreement should be deemed to be governed by the law governing the matrix contract, and, as a consequence, such law would also govern the award, is an opinion of the Commercial Court in England reported at (2006) 1 LLR 181 (*Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania*). Such judgment is noted at paragraph 16-017 of the text by Dicey, Morris and Collins in support of a sentence in the relevant paragraph that if there is an express choice of law to govern a contract as a whole, the arbitration agreement will also normally be governed by that law, whether or not the seat of the arbitration is stipulated and irrespective of the place of the seat. As noticed earlier, the respondent suggests that this is an incorrect proposition and none of the cases recorded in the relevant footnote supports it.

In *Svenska Petroleum*, a Swedish company had entered into a joint venture agreement with the government of the Republic of Lithuania and a Lithuanian state-owned company for the planned exploitation of oil fields in Lithuania. The joint venture agreement incorporated an arbitration clause that provided for arbitration under ICC rules but did not specify any seat for the arbitration. On a claim by the Swedish company, an interim award was passed on a question of

jurisdiction by an ICC arbitral panel siting in Denmark and a final award was passed, finding both the Republic of Lithuania and the state-owned company liable to pay a substantial sum of money to the Swedish claimant. The point of jurisdiction on which the interim award was passed was upon the Republic urging that it was not a party to the joint venture agreement notwithstanding the agreement recording that the Republic "acknowledges itself to be legally and contractually bound as if the Government were a signatory to the Agreement." The Swedish party applied for the enforcement of the final award in England and obtained the requisite permission, subject to a period within which the Lithuanian state-owned company could apply for refusal to recognise and enforce the award. The Lithuanian company's application failed whereupon the Republic applied for setting aside the order of enforcement by disputing the jurisdiction of the English court and asserting sovereign immunity. The judgment cited allowed the award to be enforced in England. The petitioner, however, refers to paragraphs 76 and 77 of the report where the court observed that in the absence of exceptional circumstances, the applicable law of an arbitration agreement is the same as the law governing the contract of which it forms a part. There is a further finding in the cited passage, that from the relevant clause in that case it was clear that "the applicable law of the arbitration agreement contained within the JVA is therefore Lithuanian law …" The issue did not arise in that case as to whether the award was to be governed by Lithuanian law notwithstanding the arbitration having been held in Denmark, though Denmark was not the chosen seat therefor. Indeed, there are references in this and another judgment of the Commercial Court at an earlier stage of the proceedings which refer to the Republic of Lithuania being estopped from questioning the merits of the interim and final awards for it not having challenged either in the Danish courts.

The respondent has relied on three recent judgments of the Supreme Court to suggest that the agreed seat of arbitration is now regarded as an agreement between the parties that the procedural law of the place of the seat would govern the arbitration. The respondent says that, as a consequence, any petition for

annulment of an award that is rendered in an international commercial arbitration will be subject to the law of the seat of the arbitration unless the parties specify otherwise.

The first of the judgments is reported at (2011) 6 SCC 179 (*Dozco India Pvt. Ltd v. Doosan Infracore Company Ltd*). The designate of the Chief Justice of India considered a request for the constitution of an arbitral tribunal in an international commercial arbitration and made a distinction between the juridical seat of the arbitration and the physical or geographical value thereof. In that case the Indian party to an agreement containing an arbitration clause applied under Section 11(6) of the 1996 Act to the designate of the Chief Justice of India for the constitution of an arbitral tribunal. The contract provided that it would be governed and construed in accordance with the laws of the Republic of Korea. The arbitration clause stipulated that the reference would be in Seoul, or at such other place as the parties may agree in writing, and conducted under the rules of the ICC. The Korean party contended that since the proper law of the contract and the law of the arbitration agreement was Korean law with Seoul being the agreed seat of arbitration, the request for constituting an arbitral tribunal could not be made before any authority in India. The Supreme Court held that the governing law clause in the matrix contract also covered the arbitration agreement and with the seat of arbitration being Seoul, the "clear language of … the distributorship agreement between the parties … spells out a clear agreement between the parties excluding Part I of the Act" and, in such circumstances, "there will be no question of applicability of Section 11(6) of the Act and the appointment of arbitrator in terms of that provision."

In the judgment reported at (2011) 6 SCC 161 (*Videocon Industries Ltd v. Union of India*), the Supreme Court overturned the Delhi High Court view that it had the authority to receive a petition under Section 9 of the 1996 Act for a declaration that a particular venue was the contractual and juridical seat of arbitration with a consequential direction on the arbitral tribunal to conduct the

reference at such venue. The first respondent before the Supreme Court entered into an agreement with a consortium of four companies, including the appellant before the Supreme Court, under which it granted a licence for the exploration of oil resources in India's territorial waters and exclusive economic zones. A clause in the matrix agreement provided that the agreement would be governed and interpreted in accordance with the laws of India but such clause was subject to another clause that stipulated the venue of the arbitration and the law of the arbitration agreement. The venue was to be Kuala Lumpur, unless the parties agreed otherwise, and the arbitration agreement was to be governed by the laws of England. Disputes between the parties were referred to arbitration which was due to be held in Kuala Lumpur, but due to the outbreak of an epidemic in Malaysia, the arbitral tribunal shifted the venue of its sittings to Amsterdam and then to London. In course of a procedural hearing, the arbitral tribunal recorded that by consent of the parties the seat of the arbitration stood shifted to London in respect of one of the three matters. In such matter a partial award was passed which was challenged by the first respondent before the Supreme Court in a Malaysian court. The appellant before the Supreme Court resisted the petition by citing the clause in the agreement that provided that the arbitration agreement would be governed by the laws of England. The respondents before the Supreme Court then requested the arbitral tribunal to conduct the further proceedings in Kuala Lumpur but the request was rejected. It was at such stage that the respondents before the Supreme Court brought a petition under Section 9 of the 1996 Act before the Delhi High Court for a direction on the arbitral tribunal to conduct further proceedings in the reference in Kuala Lumpur. The respondents also challenged a partial award passed in the third matter in the Delhi High Court. The appellant before the Supreme Court pleaded that courts in India lacked jurisdiction to entertain either matter. A single Judge of the Delhi High Court held that such court had the authority to entertain the petition filed under Section 9 of the 1996 Act on the basis of the Supreme Court dictum in *Bhatia International*. While assailing such order, the appellant argued that the Delhi High Court had no jurisdiction to entertain the petition under Section 9 of the

Act and, in any event, the order sought in that petition was beyond the scope of the section.

The Supreme Court noticed Section 3 of the English Arbitration Act, 1996 that refers to the seat of the arbitration to be the juridical seat and Section 53 of the same statute that provides, inter alia, that where the seat of the arbitration is in England, any award in the proceedings shall be treated as made there. The court next referred to the judgment in *Dozco India* for the proposition that each move of the arbitral tribunal to a convenient place for any sitting "does not of itself mean that the seat of the arbitration changes." The court quoted from *Bhatia International* and *Venture Global* before concluding that since the parties had agreed that the arbitration agreement was to be governed by the laws of England, it "necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act."

The most recent judgment cited on the effect of an agreed seat of arbitration is the one reported at (2011) 9 SCC 735 (*Yograj Infrastructure Ltd v. Ssang Yong Engineering and Construction Company Ltd*). In that case, the National Highways Authority of India awarded a contract to a Korean company for the upgradation of a stretch of a highway. The Korean company, in turn, engaged the appellant before the Supreme Court to perform the work on back-to-back basis. The agreement between the parties before the Supreme Court provided for the resolution of disputes thereunder by arbitration and, as noticed in paragraph 3 of the report, for the governing law thereof to be the Indian Act of 1996. The appellant, an Indian company, applied for interim measures under Section 9 of the 1996 Act before a court in Madhya Pradesh following the Korean respondent issuing a notice of termination of the agreement on the ground of delay in performance. The arbitration was thereafter commenced before the Singapore International Arbitration Centre (SIAC) and both parties applied before the arbitral tribunal for interim reliefs. The Supreme Court noted that the applications for interim reliefs were filed before the arbitral tribunal under

Section 17 of the Indian Act of 1996. Aggrieved by an interim order passed by the arbitral tribunal, the appellant before the Supreme Court preferred an appeal therefrom under Section 37(2)(b) of the 1996 Act before the Madhya Pradesh court. The Korean respondent urged in such court that since the seat of the arbitration was in Singapore, the appeal filed under Section 37 of the 1996 Act was not maintainable. The Madhya Pradesh court accepted such submission and rejected the appeal without entering into the merits thereof. A revisional petition before the High Court of Madhya Pradesh was dismissed against which a special leave petition was filed before the Supreme Court, which resulted in the appeal upon leave being granted. After noticing the earlier judgments of that court in *NTPC*, *Sumitomo*, *Bhatia International* and *Venture Global*, the Supreme Court concluded that since the arbitration was to be governed by SIAC rules, which stipulated that where the seat of arbitration was Singapore the law governing the arbitration would be the International Arbitration Act, 2002 of Singapore or its modification or reenactment, the parties had agreed to the applicability of the Singapore Act. The respondent has also referred to a subsequent correction of the order by the Supreme Court made on December 15, 2011 which is not reflected in the report.

The petitioner has referred to two judgments reported at (1996) 1 SCC 54 (*Indian Drugs and Pharmaceuticals Ltd v. Indo Swiss Synthetics Gem Mfg Company Limited*) and at (2007) 5 SCC 510 (*India Household and Healthcare Ltd v. LG Household and Healthcare Ltd*) on the doctrine of the separability of the arbitration agreement from the matrix contract even if the arbitration clause is contained in the main agreement. Such principle is beyond question and is not of any great relevance in the present matter. The respondent has relied on two judgments reported at (2009) 2 SCC 494 (*P. Manohar Reddy and Bros v. Maharashtra Krishna Valley Dev Corporaton*) and at (2009) 10 SCC 103 (*Magma Leasing & Finance Ltd v. Potluri Madhavilata*) on the doctrine of the severability of the arbitration agreement from the main agreement and urges that such

guideline should not be restricted to cases of termination or repudiation of the matrix contract, but it should also be applied to not allow the governing law clause contained in a matrix contract to apply to the arbitration clause contained therein unless the arbitration clause inescapably embraces the same law. The respondent asserts that the doctrine of the separability of the arbitration clause contained in a matrix contract will also apply in confining the operation of the governing law clause in the matrix contract to the matrix contract alone, if the arbitration clause stipulates a seat of arbitration outside the territory of the country whose laws are to apply to the matrix contract.

A judgment reported at (2007) 5 SCC 692 (*National Agricultural Coop. Marketing Federation India Ltd v. Gains Trading Ltd*) has been relied upon by the petitioner on the doctrine of separability. The Supreme Court reiterated the accepted legal position that a decision that the matrix contract is null and void will not *ipso jure* render the arbitration clause contained in the matrix contract invalid and observed on the statutory recognition of the principle in Section 16 of the 1996 Act. But the judgment, rendered on a request to the designate of the Chief Justice of India under Section 11(5) of the 1996 Act, has an interesting side issue that may be germane to the primary question that has arisen in the present proceedings. That case covered a situation that can be seen to be the exact converse scenario as in the instant case. The arbitration clause in that case provided for the reference to be held in Hong Kong but stipulated that the arbitration would be in accordance with the Indian Act of 1996. The relevant part of the clause recorded that "the matter in dispute shall … be referred to and finally resolved by arbitration in Hong Kong in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any other statutory modification, enactment or amendment thereof for the time being in force." The Supreme Court found that the expression "in accordance with the provisions of the Arbitration and Conciliation Act, 1996 …" governed the arbitration and only the venue of the arbitration was agreed to be in Hong Kong. That case appears to be one of those rare cases that commentators have referred to where the parties go to arbitration

in one country but stipulate that it will be governed by the law of another country. But it is implicit from the Supreme Court's reasoning in that case that if the relevant clause was worded otherwise, such that the arbitration was not specifically governed by the Indian statute, the request for the naming of the arbitrator could not have been carried to any authority in this country.

The last of the authorities that the parties have referred to on the question of the maintainability of the present proceedings is a judgment reported at (2012) 2 SCC 489 (*Regional Provident Commissioner v. Hooghly Mills Company Ltd*). The petitioner has placed reliance on such judgment in emphasising on the principles that should be applied while interpreting a statue. The petitioner has referred to paragraphs 27 to 40 of the report where the Supreme Court noticed an article by Felix Frankfurter J. published in 1947 that traced the judges' problem of construing legislation to the uncertainty of the meaning of anything that is written, since words are only "symbols of meaning." The passage that the petitioner has placed is instructive on the principles of statutory interpretation.

The rather broad proposition put forward by the respondent - that nothing outside Chapter I of Part II of the 1996 Act in India would apply to a New York Convention award - does not appear to be correct. It is true that the respondent has confined the proposition to New York Convention awards and does not extend it to other matters pertaining to an arbitration governed by the New York Convention, but it still does not appeal. This brings to the fore the question whether the New York Convention governs anything more than arbitration awards. In more than one judgment, *Bhatia International* being one of them, it has been said that the 1996 Act is not a happily-worded legislation. But the problem with the draftsperson may have been in the adoption of an internationally accepted model law and the amalgamation of at least two other international conventions therewith to replace the three statutes that held the field prior thereto. Unlike a bilateral treaty, an international convention has to be much less specific in certain areas for it to be acceptable to the larger number of

countries proposed to be brought into its fold. So it is with the New York Convention. The Uncitral Model Law is more specific in its wording, but unlike the New York Convention which most countries were expected to accept and have accepted in its totality, the Uncitral Model Law was fashioned as the model or suggested basic law of arbitration of a country with individual countries being free to tweak a provision or modify another or delete or alter other parts.

Since the purpose of the New York Convention is to allow an award-holder in an international commercial arbitration the opportunity to implement the award beyond the countries of the parties' domicile and wherever deemed to be effective, it formulated certain uniform ground rules to be applied by the adopting countries to facilitate the enforcement of a foreign award in their jurisdictions. If the convention had insisted on the finality of an award in international commercial arbitrations, in the sense of precluding any recourse against it for annulment, the convention would have been less acceptable and the very purpose thereof would have been defeated. It, therefore, restricted the choice of the applicable law relating to an award to either of two and specified the two possible forums for annulment proceedings ("competent authority of the country in which, or under the law of which, that award was made" in Article V(1)(e) thereof); and, formulated non-mandatory grounds for the refusal to allow enforcement in other countries. The grounds in Article V of the convention do not bind the forums before which the enforcement of an award is sought in a convention country to refuse enforcement. But in the use of the word "may" it makes out considerations that would be relevant in exercising a discretion to refuse enforcement by forums of a convention country, just like Section 48 of the 1996 Act in this country does not make out any absolute grounds for refusal to enforce such an award. Again, Articles V(1) and V(2) of the convention – as incorporated in Sections 48(1) and 48(2), respectively, of the 1996 Act in this country – make a distinction between the discretionary grounds for refusing to enforce an award at the behest of the party against whom it is invoked and the

discretion that may be exercised *suo motu* by the forum before which enforcement is sought in a convention country.

To return to the respondent's contention that nothing in the 1996 Act outside Chapter I of Part II thereof would apply to a New York Convention award, such argument appears to be incongruous with the object and the scheme of the Act since there could be a New York Convention award where the award could be subject to the law of India. Such a situation might arise in a rare case where the intention of the parties to subject the award to a law other than the law of the country in which the arbitration is held must be manifest, but it is, no doubt, a possibility; and a possibility that has been recognised in Article V(1)(e) of the convention and is echoed in Section 48(1)(e) of the 1996 Act. There is a ready example of such a situation in the 2007 case of *National Agricultural Coop. Marketing Federation*. The New York Convention requires, under Article II, that the arbitration agreement must be "in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of arbitration." If there is such an agreement which culminates in an award made in another convention country which was the parties' agreed choice of seat of arbitration, such award will be governed by the New York Convention. But such an award may still be regarded as a domestic award in this country, by virtue of the New York Convention, if the award rendered was to be governed by the law of India. If an award in a commercial matter is rendered in another convention country but the award is governed by the law of India, a petition for annulment thereof would be under Section 34 of the 1996 Act and, by virtue of Section 2(7) of the 1996 Act, it would be an exception to the rule in Section 2(2) of the Act notwithstanding the award being a "foreign award" as defined in Chapter I of Part II of the Act. The legal basis in Chapter I of Part II of the 1996 Act of the situs of the award in another convention country would not apply to an award made in another convention country if such award is governed by the law of India. Only such an

interpretation would allow Part I and Part II of the 1996 Act to not be mixed up in the post-award stage. The conundrum is not as bad as the age-old riddle as to who would shave the village barber if he shaves all in the village who do not shave themselves. Part I and Part II of the 1996 Act cannot be applicable to the same matter at the post-award stage.

There is support for the proposition in the New York Convention itself. Though the place where an award is made is of paramount importance in the New York Convention, for that will decide whether another convention country recognises and enforces it, there is an exception carved out in Article I of the convention. But such exception may have to be read for what it clearly says rather than what it may appear to imply, or else the convention may be robbed of its essence. The first sentence in Article I, shorn of its other elements, makes the convention applicable to "awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought…" The second sentence makes the convention "also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

There is a history relating to the second sentence that must be noticed to put it in perspective and to appreciate its effect. In a 1985 article published in *Pace Law Review* (Vol. 6, Issue 1) entitled *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?* by Albert Jan van den Berg (the parties herein have been made aware of such article), the author criticised a 1983 judgment of an American court reported at 710 F. 2d 928 (*Bergesen v. Joseph Muller Corp.*) that ruled that an award made in the State of New York between two foreign parties was to be considered as non-domestic in that country on a reading of the New York Convention and its implementing legislation in the United States. It is in such connection that the author recounted what transpired prior to the second criterion being incorporated in the opening article of the convention. In *Bergesen*, a Norwegian ship-owner and a Swiss company entered

into charter-parties for the transportation of chemicals that contained arbitration clauses providing for arbitration in New York, to be governed by the laws of the State of New York, with the enforcement of the award being permissible in any court having jurisdiction and the award being final and binding on the parties anywhere in the world. The ship-owner claimed demurrage and instituted arbitration proceedings. The Swiss company denied liability and made a counter-claim. A net award in money was made in New York in favour of the Norwegian ship-owner and the award-holder commenced enforcement proceedings in Switzerland on the basis of the New York Convention. The Swiss company resisted by citing a provision in the law of the State of New York that required a court to confirm an award before it could be implemented. Though the New York Convention does not recognise such procedure, the Norwegian award-holder did not take any chance and applied before a New York court for confirmation of the award. Such application was made beyond the statutory permissible time. The legislation in the United States implementing the New York Convention, however, permitted enforcement of a convention award to be commenced within a larger period of time. It is in such connection that the question arose whether the award in that case was to be considered as a domestic award in the United States as it was made in its territory or as a foreign award to which the convention applied and deemed to be a foreign award as it involved parties not domiciled in that country. The district court construed the implementing legislation to imply that an award rendered in the United States on disputes between parties domiciled outside would be covered thereby. The Court of Appeals confirmed the decision by reasoning that the convention did not define non-domestic awards, thus making a distinction between the territoriality of an award and the nationality of an award. It held that "awards 'non considered as domestic' denotes awards which are subject to the convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction."

In noticing the legislative history of the New York Convention as recorded in the summary records of the conference held in New York in May and June, 1958 when the convention was born, the author refers first to a draft prepared in 1955 which formed the basis for the discussion at the conference and provided solely that the convention was to apply to "the recognition and enforcement of arbitral awards made in the territory of a state other than the state in which such awards are relied upon …" The Italian delegate at the conference objected to territoriality as the sole criterion and the French delegate echoed the same sentiment in suggesting that "the place of pronouncement *(of the award)* was often an insignificant factor, and the prominence given to it in the draft tended to obscure the strictly private nature of the arbitration operation." The German delegate added support that "(*i)*f it was agreed that the place where the award was made should not be considered a determining factor … whether an award was to be regarded as national or foreign could be made dependent on the nationality of the parties, the subject of the dispute, or the rules of procedure applied." Several civil law countries then suggested that the convention should apply to the recognition and enforcement of arbitral awards other than those considered as domestic in the country in which they are relied upon. Following such disagreement, the conference decided to refer the matter to a working group, which included the Indian delegate. Such working group suggested "an attempt to reconcile *(the)* divergent views" and proposed a text which was virtually the same as the final form of Article I of the convention.

That the convention is to apply to an award not considered to be domestic in the State where its recognition and enforcement is sought, does not imply that the convention will not apply to awards considered as domestic awards. But it leaves room for municipal laws to provide as such. That brings the focus back to Section 2(5) of the 1996 Act and the operative words therein that "save in so far as is otherwise provided … in any agreement in force between India and any other country or countries, this part shall apply to all arbitrations and to all proceedings relating thereto." An award rendered in a non-convention country

may be considered as a domestic award in this country. Again, if an award is rendered in a New York Convention country and appears to be a foreign award within the meaning of that expression in Section 44 of the 1996 Act, the test is to ascertain whether the convention precludes the operation of Indian law for Chapter I of Part II to exclusively apply to the award in derogation of Part I of the Act. If the convention indicates that the law of India would apply to the award, by virtue of Section 2(5) of the Act, Part I of the Act would be applicable to it and there would be no occasion for Part II to be invoked therefor. Such interpretation would keep Part I and Part II of the Act distinct and incapable of simultaneous operation to a matter at the post-award stage.

An arbitral award rendered in another New York Convention country will always be regarded as a New York Convention award in this country but the legal fiction that is evident from the 1996 Act may permit an arbitral award rendered in another New York Convention country to be regarded as a domestic award within the meaning of that expression in Section 2(7) of the 1996 Act. Say, an award is rendered in another New York Convention country in an arbitration (as distinct from the arbitration agreement) governed by the law of India. The award in such case would then be made under the law of India. By virtue of Article V(1)(e) of the New York Convention such award may be set aside or suspended by an appropriate court in India since such court would be "a competent authority of the country … under the law of which … that award was made." It is the New York Convention, in such case, that points to the forums authorised to receive proceedings for annulment of the award; the choice being between the "competent authority" of the country where the award was made and the "competent authority" of the country under the law of which the award was made. The party desirous of having such award annulled may then have to carry it to an appropriate court in India by way of a petition under Section 34 of the 1996 Act. As to whether the court to which the petition under Section 34 of 1996 Act is carried is competent or not to receive the petition has to be assessed with reference to the 1996 Act, particularly Sections 2(1)(e) and 42 thereof. That would

preclude any Indian court from receiving a Section 34 petition unless the situs of the respondent therein or a part of the cause of action relating to the subject-matter of the arbitration or a part of the immovable property which was the subject-matter of the arbitration is within the jurisdiction of the court. All three factors in assessing the territorial jurisdiction of a court under Indian law would then have been taken into account; and the word "domestic" in Section 2(7) of the Act would have been given its full meaning since in an imaginary case of two parties domiciled abroad, entering into an agreement that has no nexus with India or an agreement that relates to an immovable property which is not in India, a petition under Section 34 of the 1996 Act cannot be carried to any Indian court.

Thus, an award rendered in a foreign country and which may even be a "foreign award" within the meaning of Section 44 of the 1996 Act, can still be a domestic award and amenable to annulment proceedings under Indian law in this country if such award has been made, pursuant to an agreement between the parties, under the law of India. If such an award is not subjected to any annulment proceedings in India, there might be a question as to whether its enforcement in India would be under Chapter I of Part II of the 1996 Act. If such award is sought to be annulled – with Section 34 being the only applicable provision – and the attempt fails, no question would arise of the award being subjected to Chapter I of Part II of the 1996 Act since the issue as to the enforceability of such award would already have been decided and the award-holder can proceed to have it executed in this country as a deemed decree that is recognised by Section 36 of the 1996 Act. Even if such an award is not subjected to any annulment proceedings in India, upon the time for making an application to set aside such award under Section 34 of the Act expiring, the award would ripen to be executed under the Code of Civil Procedure in the same manner as if it were a decree of the court under Section 36 of the Act. At the post-award stage, therefore, and in keeping with several judicial pronouncements noticed above,

Part I and Part II of the 1996 Act will not overlap nor be seen to be alternative routes available in respect of the same award.

It is next to be considered as to when a New York Convention award will be regarded as a domestic award. Since the emphasis of the New York Convention is on the recognition and enforcement of certain awards in international commercial arbitration, as to whether an arbitration, or any matter relating thereto, would be governed by Chapter I of Part II of the 1996 Act is seen from the perspective of whether the award that may be rendered in the arbitration can be regarded as a New York Convention award. The matter can be appreciated with reference to Section 45 of the 1996 Act. Such section, which echoes the sentiment in Section 8 of the Act and can be loosely said to be a provision available to a party to an arbitration agreement to specifically enforce the arbitration agreement against another party thereto before a judicial authority in seisin of an action covered by the arbitration agreement, will necessarily come into play prior to any award being made and, more often than not, prior to a reference to arbitration. The juridical authority under Section 45 of the Act has first to consider whether it is "seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44" of the Act. Section 44 of the Act does not define any agreement, it defines a foreign award; and, in such context, says that, subject to certain other conditions which are irrelevant to be noticed at the moment, an award within such definition would be a foreign award if it is made "in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies …" The international charter that is christened as the New York Convention, in its full form, is the "Convention on the recognition and enforcement of foreign arbitral awards." Article I of the convention which specifies when the convention would apply, refers only to arbitral awards and the expression, 'arbitral award' is not defined in the convention save for the indication in Article I(2) that arbitral awards shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

The "agreement in writing" that Section 44 of the 1996 Act refers to, appears not only to be a pointer to Article II of the convention but also to such an agreement in writing that may result in the rendition of an award that would be governed by the New York Convention. The judicial authority under Section 45 of the Act has, therefore, to calculate backwards after gazing into the future as to whether an award in the arbitration covering the disputes that form the subject-matter of the action before the judicial authority will be an award governed by the New York Convention. It is the very wording of the New York Convention, that was inspired to make it acceptable to a larger number of countries with disparate legal systems, that makes the exercise of the jurisdiction by a judicial authority under Section 45 of the Act to be qualitatively different from the jurisdiction exercised by a judicial authority under Section 8 of the 1996 Act which has only to see if there is an arbitration agreement and whether such agreement covers the action that is before such judicial authority.

Article V of the New York Convention enumerates the non-mandatory grounds for the competent authority of a convention country before which the recognition and enforcement of a convention award is sought to refuse such recognition and enforcement. The first clause of the article sets down the grounds that may be cited by a party against whom the award is invoked; the second clause covers the grounds available to the competent authority of a convention country where the recognition and enforcement of a convention award is sought to *suo motu* refuse the same. The grounds in either clause are exhaustive and the recognition and enforcement of an award made in a convention country cannot be refused in another convention country on any other ground. In three of the five limbs of the first clause of the article, there is an indication of a choice of law or a choice of forum – not necessarily simultaneously – which is evident. It is apposite in the context for Article V of the New York Convention to be seen in its entirety:

> "**Article V:** 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party

furnishes to the competent authority where the recognition and enforcement is sought, proof that-

(a) the parties to the agreement referred to in Article II 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

(b) the party against whom the award is invoked 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

(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 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 recognised and enforced; 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

(e) 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.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that-

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country."

Sub-clauses (a), (d) and (e) refer either to a choice of law or a choice of forum or both. Sub-clause (a) has two parts to it. The first part deals with a defence of incapacity of either party to the arbitration agreement and is restricted

to such disability or infirmity as would be regarded as incapacity under the law applicable to them. Such first part of sub-clause (a) is not germane for the present purpose. The second part of sub-clause (a) permits a person against whom a New York Convention award is invoked for the purpose of recognition and enforcement thereof to claim that the arbitration agreement is not valid. The validity of the arbitration agreement has, however, to be tested under the law governing the arbitration agreement if the parties had agreed to such a law; if not, the validity of the arbitration agreement has to be tested under the law of the country where the award was made. Sub-clause (a), therefore, gives primacy to the law of the arbitration agreement in assessing its validity and, failing any indication thereon, to the law of the country where the award was made. The law of the country where the award was made will not imply, as judicial pronouncements in this country and abroad instruct, any importance being attached to the physicality of the place of the award but will signify the juridical seat of the arbitration – and, as a consequence, of the award – to be taken into account. The juridical seat of the arbitration will, thus, be the fallback or residuary law that would govern the arbitration agreement unless the parties had agreed otherwise.

Both sub-clauses (b) and (c), in the matter of assessment of the defences recognised thereunder, contain subjective and objective elements of assessment that may be of universal application or may be tinged by the municipal laws on such aspects that the competent authority before whom the recognition and enforcement of a convention award is sought may find to be relevant. But that is an entirely different matter altogether and not of any immediate relevance. Though it is equally irrelevant in the present context, it would do well to remember that an award may be made in a foreign country (when seen from an Indian perspective) in a matter where the parties did not specify any seat of arbitration.

Sub-clause (d) refers to the agreement of the parties on the composition of the arbitral authority or the arbitral procedure and, if there was no such agreement, to the law of the country where the arbitration took place, to test the validity of the composition of the arbitral authority or the propriety of the arbitral procedure. Again, as in sub-clause (a), the agreement of the parties is given primacy and the law of the juridical seat (or actual seat, when there is no express or implied stipulation as to the seat in any agreement between the parties) of arbitration is the back-up provision.

Under sub-clause (e), there are three related grounds of defence available to a party against whom a New York Convention award is invoked to resist its recognition and enforcement: it has not become binding on the parties; or, it has been set aside; or, it has been suspended. The first head of defence under sub-clause (e) is self-contained in the expression "has not yet become binding on the parties," and does not take colour from, nor is it governed by, the words that follow the expression in the sub-clause. The expression "by a competent authority of the country in which, or under the law of which, that award was made" governs the setting aside and the suspension of the award. The purpose of sub-clause (e) appears to be that the setting aside or suspending of a New York Convention award may be reckoned as a defence in resisting the recognition and enforcement thereof in a convention country only if the award has been set aside or suspended by either of the competent authorities recognised therein. It is a mandate to the competent authority of a convention country in seisin of an award for its recognition and enforcement to not give credence to any defence asserting that the award has been set aside or suspended unless the annulment or suspension is by either of the forums specified in sub-clause (e). It follows, therefore, that a New York Convention award may only be annulled by either forum and by none other. In the acceptance of the convention by the convention countries – and, in particular, Article V(1)(e) being reflected in Section 48(1)(e) of the 1996 Act in this country – no forum in a convention country may receive, or

recognise another forum receiving, any proceedings for the annulment or suspension of a New York Convention award in derogation of such provision.

It is plain to see that the law of the juridical seat (or even the actual seat, when there is no agreement as to the seat) of arbitration and the competent authority in the country of the juridical (or actual) seat of arbitration feature prominently in governing the basis for assessing the non-mandatory grounds for refusing to recognise and enforce a New York Convention award. That would give rise to a principle of evidence that there is a presumption that an application for the annulment or suspension of a New York Convention award has to be carried to the competent court of the country of the seat of arbitration; but the presumption may be rebutted by demonstrating that the parties had bargained otherwise. The attendant feature of such rule of evidence is that the onus to demonstrate otherwise would be on the party which seeks to rebut the presumption.

The petitioner suggests that the expression "under the law of which" in Article V(1)(e) of the New York Convention will point to the law governing the matrix contract or, at the very least, to the law of the arbitration agreement. The petitioner says that since sub-clauses (a) and (d) also refer to the law of the arbitration agreement, there does not appear to be any distinction in the New York Convention between the law of the arbitration agreement and the law governing an award. The petitioner contends that the mechanism for annulling an award must be searched in the law governing the arbitration agreement and not in any other law. The petitioner refers to Stroud's *Judicial Dictionary of Words and Phrases* (7th Ed., 2006) to demonstrate that the word "under" would more aptly imply "pursuant to" than "by virtue of." The petitioner says that if the word "under" in the relevant phrase in Article V(1)(e) of the New York Convention is understood to be "pursuant to" or "according to" and not "by virtue of" or "by reason of," there would be an element of consistency since the word "under" is also used in the same sense in Articles II, IV, V(1)(a) and V(2) thereof. The

petitioner submits that the same word, even if it is a preposition, should be understood to convey the same sense throughout the body of a statue or a legal document, unless the context absolutely demands otherwise. If then, the petitioner suggests, Article V(1)(e) of the convention implies that proceedings for setting aside or suspending a convention award can be carried to a competent authority according to the law of which the award was made, it would mean the law on the basis of which the disputes between the parties were decided. The petitioner says that if such interpretation is not acceptable, "a competent authority of the country … under the law of which … that award was made …" may then be seen to refer to the law of the arbitration agreement, but it cannot be understood to refer to the law of the arbitration if there is any distinction at all between the law of the arbitration agreement and the law of the arbitration.

The petitioner's contention as to the meaning of the word "under" in the relevant expression in Article V(1)(e) of the convention stands to reason. The most elementary canon of statutory interpretation requires that when interpreting an enactment – and the principle should apply with greater force to an international charter or convention - a particular word used at different places in the body of the statute should be understood to consistently convey the same sense, unless the context demands otherwise; though the proposition applies more to the major words than to the minor words like prepositions or articles. But without making such distinction in this case, a uniform meaning may be ascribed to the word "under" in the various places it has been used as part of the phrase "under the law" in the convention. But it would not further the petitioner's case that annulment proceedings in respect of a New York Convention award have to be carried to a competent authority of the country whose laws were to govern the matrix contract or to the competent authority of the country whose law governs the arbitration agreement.

In Article V(1)(a) of the convention there is a distinction made between the law applicable to the parties in the context of assessing whether they were under

some incapacity and the law of the arbitration agreement in the context of ascertaining the validity of the arbitration agreement thereunder. The expression "the law applicable to them" in the opening limb of sub-clause (a) may imply the law governing the matrix contract since an issue as to incapacity has to be adjudicated with reference to the law governing the matrix contract. The remainder of Article V(1)(a) of the convention deals with the validity of the arbitration agreement and such validity is to be tested on the basis of "the law to which the parties have subjected" the arbitration agreement "or, failing any indication thereon, under the law of the country where the award was made." In sub-clause (d) the assessment as to whether the composition of the arbitral authority or the arbitral procedure adopted has to be with reference to "the agreement of the parties" on such aspects of the matter, or otherwise, with reference to the law of the country where the arbitration took place. Thus, it is evident that the wording of the convention is specific and unambiguous in indicating the applicable law on the basis of which certain matters are to be assessed. Article V of the New York Convention may be seen as the very heart of the charter as it enumerates all of the cases when recognition and enforcement of an award governed thereby may be refused. There are four situations envisaged in Article V(1) of the convention where the agreement between the parties on a particular aspect or the agreed or deemed choice of law is relevant. In the first case, which is covered in the initial part of sub-clause (a), the existence of a circumstance has to be seen in the light of the proper law of the matrix contract, whether or not there is a governing law clause contained in the matrix contract. In the second case, which is referred to in the later part of sub-clause (a), the law governing the arbitration agreement is the backdrop for the assessment. In the third case, which is reflected in sub-clause (d), the specific agreement between the parties on such aspects or, failing such agreement, the law of the country where the arbitration took place would govern the matter. The fourth case is the one recognised in sub-clause (e).

Before considering sub-clause (e) in the present context, however, it must not be missed that Article V(1) of the convention contemplates three sets of laws covering the arbitration proceedings: the law of the matrix contract ("under the law applicable to them" in sub-clause (a)); the law of the arbitration agreement ("under the law to which the parties have subjected it" in sub-clause (a)); and, the law of the arbitration ("composition of the arbitral authority or the arbitral procedure" in sub-clause (d)). If sub-clause (e) is to take colour from what precedes it in Article V(1) – as it must – it cannot be accepted that the expression "under the law of which … that award was made" points to either the law of the matrix contract or the law of the arbitration agreement. If the convention intended the word "law" in the phrase "under the law of which" in Article V(1)(e) to refer to the law of the matrix contract or the law of the arbitration agreement, it would have said so as it did in sub-clause (a). By the same token, if the word "law" in the phrase "under the law of which" were to refer to the law of the arbitration, the convention should have been specific in saying so. It is here that it cannot be lost sight of that the primary focus in the second limb of sub-clause (e) is the situs of the annulment or suspension proceedings and the applicable law is incidental thereto.

An arbitral award can be said to be the product of an arbitration agreement and also a product of an arbitral reference (the arbitration). An award is also based on the application of the law of the matrix contract to the facts of the matter or the disputes between the parties. It is, in such circumstances, that the closest proximity test becomes relevant and decisive. By such yardstick, it is the arbitral reference (the arbitration) with which an arbitral award has the closest nexus. Since there is a distinction recognised in the New York Convention between the law of the arbitration agreement and the law of the arbitration, the law referred to by the expression "under the law of which … that award was made" necessarily implies the law of the arbitration unless the parties have specifically agreed for the award, or annulment proceedings relating thereto – which will include an agreement to waive annulment proceedings if the law

governing the award permits such waiver – to be administrated otherwise. If sub-clause (d) shows that the law of the country where the arbitration took place would be the law of the arbitration unless the parties agreed otherwise and, by applying the juridical seat test, there is no distinction between the law of the country where the arbitration took place and the law of the country in which the award was made, it is possible to see that, by virtue of the first part of the second limb of sub-clause (e), proceedings for annulment or suspension of an award can be carried to a competent authority of the country in which that award was made where it would be assessed under the law of that country which would also be the law of the arbitration, unless the parties had specified that a different law would govern the arbitration. It is in the rare case where the parties had specified a different law to govern the arbitration other than the law of the country where the reference took place (or, synonymously, where the award was made) that the competent authority of the country whose law governed the arbitration would also be authorised to receive proceedings for annulment or suspension of the award. Thus, under sub-clause (e), the expressions "competent authority of the country in which … that award was made" and "competent authority of the country … under the law of which … that award was made" would, more often than not, point to the same forum, other than those once-in-a-blue-moon situations.

That there are at least three possible laws affecting an international commercial arbitration has now come to be universally accepted and was recognised even in the *Sumitomo* judgment rendered in the year 1997. Some authors and judges have recognised a fourth and even a fifth set of laws that may be applicable. Article V(1) of the New York Convention demonstrably acknowledges the possibility of three sets of laws as noticed earlier: the proper law of the contract or the law governing the matrix contract; the law of the arbitration agreement; and, finally, the law of the arbitration. If the law of the arbitration is seen as distinct from the law of the arbitration agreement – and the New York Convention clearly makes out such distinction – it is the law of the

arbitration, by virtue of such law having the closest connection with the award, that has generally to be the basis for assessing the validity of an award in annulment proceedings. The choice of forums in Article V(1)(e) of the convention merely recognises the possibility in a stray case where the law of the arbitration would, by agreement of the parties, be other than the law of the juridical seat of the arbitration. Prior to the 1996 Act coming into operation in this country, Section 9(b) of the Foreign Awards (Recognition and Enforcement) Act, 1961 that made such Act inapplicable to "any award made on an arbitration agreement governed by the law of India" necessarily implied that a New York Convention award made on an arbitration agreement governed by the law of India was subjected to scrutiny under the 1940 Act since an award "made on an arbitration agreement governed by the law of India" in another New York Convention country was not covered by any law in this country within the meaning of the expression "save in so far as is otherwise provided by any law for the time being in force" in Section 47 of the 1940 Act. It was, in a manner of speaking, an exception to an exception; and, as a consequence, covered by the general rule. Upon the 1996 Act coming into force in this country, it does not make Chapter I of Part II of the Act inapplicable to "any award made on an arbitration agreement governed by the law of India." The law governing the arbitration agreement is no longer a statutory criterion for assessing whether an award is a domestic award or a foreign award.

Since an arbitral award is not defined in the New York Convention, for something to be regarded as an arbitral award it is the law with which the arbitral award has the closest connection that would tell upon its character or otherwise as an arbitral award. The closest proximity test is applicable to an arbitration reference and an arbitral award in the same manner as it is applicable to a matrix contract and an arbitration agreement. While the parties are free to choose the law that would govern their primary agreement or the agreement for resolution of their disputes under the primary agreement, if they do not specify such law in either case, the closest proximity test is to be applied

to ascertain the law that would govern the primary agreement and the law that would govern their dispute-resolution mechanism. If there is no express choice of the law governing the arbitration agreement and, in such a case, if the choice of the law as to the matrix contract (or, in the absence of any choice, the proper law of the matrix contract) may be seen as the applicable law governing the arbitration agreement when the arbitration clause is contained in the matrix contract, there is no reason that the same logic is not extended to the law governing the arbitration and the law governing the award. If the express choice of the seat of arbitration makes the law of the seat govern the conduct of the arbitration, it would be such law that would govern the award unless the parties have agreed otherwise.

Article V(1)(e) of the New York Convention, in its recognition of alternative forums without any indication as to the primacy between the two, leaves room for a possible conflict if two parties to the same award can institute annulment or suspension proceedings in respect thereof in two countries. To reconcile such conflict, a universal principle of comity of courts needs to be adhered to, much as there is a need for some basic laws to be universal in their content and application in a world shrunk by advanced communication, technology and trade. If mutual respect and the underlying sentiment of the brotherhood of nations demand that the competent authority of another country would not receive any annulment or suspension proceedings relating to a convention award if a competent authority in another convention country is already in seisin of it, it is possible to see that a competent authority of the country under the law of which a New York Convention award was made will yield to the assumption of jurisdiction in the matter of annulment or suspension of the award by the competent authority of the country in which that award was made. If this is a possible way of reading Article V(1)(e) of the New York Convention to reconcile the apparent conflict built in therein, it would lend more support to the rule of evidence and make it an overwhelming presumption that the annulment or

suspension proceedings have to be carried, under the convention, to a competent authority of the country in which the award was made.

In common law countries, the annulment of an award is generally granted for want of jurisdiction and serious irregularity. But the approach to annulment proceedings may vary from one country to another and in the New York Convention permitting a choice, there could be a serious risk of the parties to an award rushing to the competent authority in the more preferred jurisdiction to file – sometimes, even contrived – annulment proceedings and hope for the universal principle of comity of courts to guide the competent authority of the alternative jurisdiction to exercise self-restraint. It is in such context that commentators and courts in some countries have reasoned that an action to set aside an award can only be brought in the country of origin of the award.

Finally, a decision though rendered on facts and on the appreciation of the law applicable to the facts, ought to be rooted to a principle. Almost every judicial, or judicious, principle that is relevant in this country has to be traceable to the Constitution of India since it is ultimately under that charter that courts function. The Constitution instructs – nay, commands – that a judicial decision treads lightly on matters of policy save to help realise the aspirations of the people by nudging those responsible for policy-making in fulfilling the constitutional goals. The case at hand, after all, is a commercial matter; and in such arena the judiciary has to yield, under the constitutional scheme, to the wisdom of the executive and the sagacity of the legislature. If the executive has thought it fit that the New York Convention should be embraced and the legislature has fashioned a statute that upholds India's adoption of the New York Convention, it would be a misplaced sense of justice to discover some obscure principle to found a judgment that would be opposed to the stated policy; even if it is to shield or aid an arm of the State that is the petitioner in the present proceedings. The New York Convention is based on reciprocity which demands that adopting States and the authorities therein are guided by certain

rudimentary norms that would meet universal acceptability. If courts in other jurisdictions have veered around to accepting that there is a distinction between the law of the arbitration agreement and the law of the arbitration, and there is nothing in Indian law that militates against such view, such distinction is eminently qualified to be endorsed in this country as it is only a logical extension of conferring full meaning to the juridical seat of arbitration when the concept of the juridical seat of arbitration has been accepted by the Supreme Court. Indeed, the distinction and its implication resonate through the judgment in *Yograj Infrastructure Limited*, though there are sundry other internal supports therefor linked to the facts of that case; and the concept appears to be the plinth on which the opinion in *National Agricultural Coop. Marketing Federation* was constructed.

A note of caution is called for. A slavish acceptance of Western views and judgments should be guarded against, for false paradigms abound in economics models when Western approaches are aped without reference to the geography of another place or the history of its environs. That the judgments in *NTPC* and *Sumitomo* have met with Western academic criticism and have been bracketed with so-called "parochial" opinions of Pakistani and Indonesian courts, would count for very little – and none at all to any judge or any bench of judges of any High Court – if such judgments continue to hold the field, for they would be binding on all courts in the country. But the judgments in *NTPC* and *Sumitomo* were rendered in an another age and under a different dispensation when the legislative policy was otherwise than is evident now upon Section 9(b) of the 1961 Act, and the effect of it when read in conjunction with Section 47 of the 1940 Act, not being retained in the 1996 Act.

There must also be a degree of fairness in respecting a foreign party's understanding of the legal position that should be upon India having embraced the New York Convention. If the shoe were to be on the other foot it would begin

to pinch as Indian companies in increasing numbers venture out to do business elsewhere.

Notwithstanding the law of the matrix contract in this case being governed by the laws of India and despite the arbitration agreement appearing to be governed, in the absence of any contrary indication, by the governing law clause in the matrix contract, the arbitration does not appear to have been governed thereby. The law of the arbitration, as distinct from the law of the arbitration agreement, would then have been the law of the country where the arbitration was agreed to take place. The award that was rendered in the arbitration was then not subject to Indian law and any annulment proceedings in respect thereof could only have been made in the country that was the juridical seat of the arbitration.

The petition in AP No. 172 of 2002 is rejected as not being maintainable. This decision will not preclude the petitioner from urging any ground available to it in case the subject award is sought to be enforced in this country. Since the petition appears to have been filed bona fide in the belief that the award could be annulled in this country, there will be no order as to costs. The court only expresses its regret that the matter had to wait for a decade to be decided.

Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Sanjib Banerjee, J.)

Later:

The petitioner, Coal India Ltd, seeks a stay of operation of this order which is considered and declined.

(Sanjib Banerjee, J.)