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C.O.I.D. Inc. & Anr. Through D.C.Singhania, D.K.Syal, assisted by Mr.Carl F.Goodman

Steel Authority of India Through Mr.K.Parasaran, A.G., with Mr.C.M.Oberoi, Mr.Arun K.Sharma Mr.S.N.Grover, Mr.S. Swarup, Mr.Major Verma & Mr.M.J. John, Adv.

YCA XI/1986/India no.11

D.P. Wadhwa

YES

This is a petition u/s 5 & 6 of the F.A. (Recog. & Enfor. Act, 1961 ('the Act' for short) for ordering that award dt. March 1, 1981 made in London by Mr. Michael Kempster of Court of Arbitration of the International Chamber of Commerce be filed and for pronouncement of judgment in terms of the award. The award in question is stated to be a foreign award within the meaning of s. 2 of the Act.

The preamble of the Act would show that this is an Act to enable effect to be given to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on the tenth day of June, 1958 to which India is a party and for purposes connected therewith.

Under the award the arbitrator awarded a sum of US $ 1,647,495.9 as damages to COSID INC., petitioner No.1 ("COSID" for short) and also awarded interest at the rate of twelve per cent per annum on this amount from the date of the award till payment. The arbitrator also awarded costs of the arbitration proceedings to COSID.

The award has been challenged on various grounds by the respondent, Steel Authority of India Ltd. ("SAIL" for short).

On pleas of the parties following issues were framed:-

1. Whether the petition under Sections 5 and 6 of "Foreign Awards (Recognition and Enforcement) Act, 1961 by plaintiff No.2 is maintainable?

2. Whether provisions of Foreign Awards (Recognition and Enforcement) Act 1961 are applicable in the present case?

3. Whether the award is not enforceable for the reasons stated in the objection petition?

4. Whether the petition under Section 5 and 6 of Foreign Awards (Recognition and Enforcement) Act, 1961 is competent in view of the averments contained in paragraph 3 of the objections petition?

5. Relief.

Facts are quite brief.

SAIL entered into a contract with COSID for supply of 20,000 MT (+ 10%) of Hot Rolled Steel Sheet Coils (HR Coils). This was by means of two letters, one dated August 10, 1977 of SAIL to COSID and the other dated September 20, 1977 of COSID to SAIL. Conditions 12 and 15 of the Terms and Conditions mentioned in the letter dated August 10, 1977 of SAIL would be relevant:-

[12. If the Seller and/or the Buyer be prevented from discharging its or their obligation under this agreement by reason of arrests or restraints of princes or Rulers, Government of People, War, Blocked, Revolution, Insurrection, Mobilisation Strikes, Lockouts, Civil Commotions, Riots, Accidents, Acts of God, Plague or other epidemics destruction of the material by fire or floods or other

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natural calamity or on account of any other cause beyond the Seller's or the Buyer's control and interfering with the production and/or delivery as hereinabove contemplated, the time for delivery shall be postponed by the time or times during which production and/or delivery is prevented by any such causes as hereinabove mentioned, provided that in the event of such delay exceeding ninety days either the Seller or the Buyer may at their option cancel this agreement by notice in writing in respect of the undelivered quantity of the material without, however, any right against or being responsible to the other party for such cancellation.

15. Any dispute arising in connection with this agreement shall, unless amicably settled between the parties hereto, be referred to arbitration and shall be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The venue of the arbitration proceedings shall be London, England.

Under the terms of the contract supplies were to be effected in two instalments. Half of the quantity approximating 25,000 M/T against the first

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instalment was shipped but it is alleged that SAIL failed to deliver the balance quantity. The plea of the SAIL was that it was excused from performing the contract based on force majeure clause (Clause-12) in the contract because of a ban imposed on exports of HR Coils by the Government of India. However, this contention was disputed by COSID which alleged breach of contract by SAIL and, therefore, claimed damages. Under the terms of arbitration agreement the parties went in for arbitration and the arbitrator upheld the claim of the COSID.

Before I deal further with facts of the case and rival contentions, it would be appropriate to refer to relevant provisions of the Act.

Under Section 2 of the Act "foreign award", unless the context otherwise requires, means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies. It is not disputed that India is a contracting party on the basis of reciprocity with the countries concerned in the present case. Under Section 4 a foreign award is enforceable in India as if it was an award made on a matter referred to arbitration in

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India. Sub-section (2) of Section 4 of the Act is as follows:-

> " Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award."

Under Section 5 of the Act any person interested in a foreign award may apply that the award be filed in Court. On filing of such an application the Court is to direct notice to be given to the parties to such application other than the applicant, requiring them to show cause why the award should not be filed. Under Section 6 of the Act when the Court is satisfied that the foreign award is enforceable under the Act, the Court shall order the award to be filed and then to proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree shall follow. Section 7 sets out the conditions for enforcement of foreign awards:-

> "7. (1) A foreign award may not be enforced under this Act —

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(a) if the party against whom it is sought to enforce the award proves to the Court dealing with the case that –

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

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

iii) the award deals with questions not referred or contains decisions on matters beyond the scope of the agreement;

Provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the law of the country

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... (8) ...

where the arbitration took place; or

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

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

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

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

(2) If the Court before which a foreign award is sought to be relied upon is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority referred to in sub-clause (v) of clause (a) of sub-section (1), the Court, if it deems proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to furnish suitable security."

This Act, however, does not apply to any award made on an arbitration agreement governed by the law of India (Section 9 (b)).

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Then the Schedule to the Act sets out the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The petitioners are two in number. Petitioner No.1, COSID INC., is a company incorporated under the laws of State of New York (USA) and had been adjudged and declared bankrupt by the U.S. Bankruptcy Court, Southern District of New York under an act to establish a uniform law on the subject of bankruptcy passed by the Congress of the United States of America. Title of the petition shows that COSID has been sued through Barbara Belaber Strauss Trustee in Bankruptcy but the petition does not appear to bear the signatures of any person on behalf of COSID. Petitioner No.2 is J. Henry Schroder Bank & Trust Co. ("Schroder" for short.). It is stated that Schroder was authorised and empowered by an order dated March 19, 1982 of the U.S. Bankruptcy Judge to take all necessary steps to enforce the award in question obtained by COSID against SAIL. The petition bears the signatures of Mr. Peter Rona, Executive Vice President of Schroder who is stated to be duly authorised to sign and verify the petition.

The respondent SAIL is a Government company as defined in Section 617 of the Companies Act, 1956. Under this section Government company means any

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company in which not less than fifty per cent of the paidup shares capital is held by the Central Government.

On March 12, 1979 a communication was addressed by the Government of India to the SAIL informing the decision of the Central Government to ban export/shipments of HR Coils. I may quote hereunder this letter of ban in full:-

"Telegraphic Address: "MINISTEEL"

CONFIDENTIAL

No. SCD.4(2)/78-D IIA
GOVERNMENT OF INDIA
Ministry of Steel And Mines
(Department of Steel)

Dated New Delhi-110 001, March 12, 1979.

To

The Chief Executive,
S&M Division,
Steel Authority of India Ltd.,
Kasturba Gandhi Marg,
New Delhi.

(Attn. Shri P.K. Sireen, s.n.n.)

Subject: Export of HR Coils

Sir,

I am directed to say that in view of the present acute shortage of HR Coils, it has been decided to ban export/shipments of HR Coils in all specifications with immediate effect.

Yours faithfully,

Sd/- M.L. Ghosh
12.3.79
UNDER SECRETARY TO THE GOVT. OF INDIA"

SAIL, therefore, informed COSID that in view of this decision of the Government of India it could not ship the balance quantity of HR Coils until the ban was lifted and that this constituted restraint imposed by the Government within the meaning of Clause 12 of the Terms and Conditions of Contract. COSID, however, did not accept the stand of SAIL and alleged breach of contract by it and claimed damages. Disputes and differences having thus arisen, COSID requested the International Chamber of Commerce, Paris (France) for appointment of an arbitrator in terms of arbitration agreement of the contract (clause-15). The Court of Arbitration of the International Chamber of Commerce appointed Mr. Michael Kempster Q.C. as the sole arbitrator.

Reference may be made to relevant Articles of Conciliation and Arbitration of the International Chamber of Commerce, Paris (ICC for short). The rules relating to arbitration start with the recommendation of the ICC to all the parties wishing to make reference to ICC arbitration in their foreign contracts to use the standard clause; i.e. "All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules".

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Under Article III a party wishing to have recourse to arbitration by ICC is to submit his request for arbitration and the date when the request is received is to be for all purposes, deemed to be the date of commencement of the arbitral proceedings. The request for arbitration is to contain the information prescribed which includes a statement of the claimant's case and other relevant documents. The Secretariat of the ICC sends a copy of the request and the documents annexed thereto to the opposite side for his answer who is to give his comment within thirty days and it is also to send his defence with relevant documents (Article IV). Thereafter under Article-X the Secretariat transmits the file containing the pleadings, written statement and documents to the arbitrator. Then under Article XIII, before proceeding with the preparation of the case, the arbitrator is "to draw up, on the basis of the documents or in the presence of the parties and in the light of their most recent submissions a document defining his Terms of Reference". This document is to be include apart from the description of the parties, a summary of the parties' respective claims and "definition of the issues to be determined". Under Clause-3 of Article XIII the parties shall be free to determine the law to be applied by the arbitrator to the merits of the

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dispute, and in the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as per the proper law by the rule of conflict which he deems appropriate. Article XXIV is as follows:-

> " The arbitral award shall be final.
>
> By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made".

In the present case the Terms of Reference under Article XIII were drawn up by the arbitrator on July 29, 1980 in the presence of the parties. Para 4 of the Terms of Reference shows that the SAIL in their answer had challenged "the validity of these proceedings and the appointment of sole arbitrator and in any event denied liability in damages to the claimant." Para 5 is as follows:-

> " On the basis of the documents above referred to the issues of fact and law falling for determination are:-
>
> (a) The validity of the Applicant's Request for Arbitration

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(b) What law should govern the procedure of the arbitration

(c) What is the proper law of such relevant contract as may be found to bind the parties

(d) What documents comprise any such contract

(e) What, if any, obligation to deliver the coils described in paragraph 3 above was accepted by the Defendants

(f) Whether the Defendants are in breach of any such obligation

(g) Whether any breach by the Defendants of any such obligation resulted from force majure

(h) Whether the Claimants are entitled to claim damages from the Defendants having regard to the terms of clause 12 of the document dated August 10th, 1977

(i) The quantum of any damages which the Claimants may be found entitled to recover from the defendants.

(j) Whether any such damages should carry interest and if so at what rate

(k) Provision for costs as provided by Article 20 of the Rules of Conciliation and Arbitration."

As noticed above, the arbitrator gave his award on March 1, 1981. It is recorded in the award that on December 12, 1980 the arbitrator held that the contract in question was governed by the laws of India. It is also recorded in the award that it was

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agreed that procedure regarding arbitration should be governed by the ICC Rules and those of natural justice accruing to the laws of England and India. In para 7 of the Award it is stated that parties, by their respective counsel, appeared and adduced evidence before the arbitrator and made submissions to him in London from December 12 to 18, 1980 on the basis of pleadings previously delivered; the validity of the Claimants' request for arbitration being accepted. The arbitrator after examining the provisions of the Imports and Exports (Control) Act 1947, Article 77 (3) of the Constitution and the Government of India (Allocation of Business)Rule 1961 and also the Exports (Control) Order 1977 came to the conclusion that the letter dated March 12, 1979 of the Under Secretary to the Government of India and relied upon by the SAIL did not have the force of law, nor, consequently, the effect of constituting force majeure within the meaning of clause 12 of the letter dated August 10, 1977. He, therefore, held that there was repudiation of the contract by the SAIL and COSID thus entitled to damages. The measure of damages was the difference between the price of HR Coils in the USA at the time when repudiation was reasonably accepted by COSID, being September 7, 1979 and the contract price of the same. On the question of interest the arbitrator held that laws in India did not permit

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the award of interest during the period of the accrual of dramges till the date of award. The arbitrator, therefore, awarded interest at the rate of twelve per cent per annum from the date of the award till payment.

The first question that falls for consideration is whether any specific questions of law or fact were referred to arbitration. If so, the Court will not interfere with the award of the arbitrator on the ground that there is an error of law apparent on the face of the award even if the view of the law taken by the arbitrator does not accord with the view of the Court. It was the submission of Mr. D.C. Singhania, learned counsel for the petitioners, that specific questions had been referred to arbitrator for his decision and his having held that the letter of March 12, 1979 of Under Secretary to the Government of India to the SAIL was of no legal effect could not be challenged. This argument was based on general principles of law as applicable in this country when the award is sought to be made a rule of the Court under the Arbitration Act, 1940. It was also the submission of Mr. Singhania that the interpretation placed by the arbitrator on the various provisions of law, namely, the Imports and Exports (Control) Act, 1947, Export (Control) Order 1977 and Government India (Allocation of Business) Rules, 1961 made under

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Clause -3 of Article 77 of the Constitution in arriving at the conclusion that the letter dated March 12, 1977 of the Under Secretary to the Government of India in the Ministry of Steel and Mines (Department of Steel) was of no legal effect, could not be challenged. Of course, if I hold that parties did agree to refer specific questions of law to the arbitrator and desired to have a decision thereon from the arbitrator then I may not interfere with the award on the ground that there is an error of law apparent on the face of the award even if ... stated above, the view of law taken by the arbitrator does not accord with the view of the Court. The view that common law Courts were very reluctant to part with its jurisdiction has hardly any relevance where a specific question of law, including the one touching the jurisdiction of the arbitrator, is referred to the arbitrator for his decision. In this connection reference may be made to a recent decision of the Supreme Court in M/s Trropore and Company vs. Cochin Shipyard Ltd. (AIR 1981 SC 1072). But, in the present case it appears to me that no such specific questions were referred to the arbitrator. It was a general reference. In fact the relevant Articles relating to arbitration of ECC, which I have referred to above, do not envisage reference of any specific question for determination to the arbitrator, though I would not say that there is any bar for such

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a reference of any specific question. [Specific questions ~~although~~ have to be referred to the arbitrator if an award is held to be binding even though containing erroneous interpretation of law. In the present case what has happened is that COSID made a request for arbitration and therewith send its statement of case. There was an answer to this by SAIL and the matter was referred to arbitration. It was under Article ~~X~~XIII (that the arbitrator carved out the disputes between the parties or I would say, as is generally understood, that the arbitrator framed issues. This was after reference of the disputes had been made to the arbitrator. So it cannot be said that any specific questions were referred to the arbitrator. In Union of India vs. A.L. Sethia Ram (1964 (3) SCR 164) the Supreme Court held that agreeing to a trial of the dispute on the issues raised by the arbitrators could not be regarded as reference of specific questions of law implying an agreement between the parties that they intended to give up their right to challenge the award before the Court even if the award was vitiated on account of an error apparent on the fact thereof. The parties merely agreed to have their differences adjudicated on the issues raised, and not to submit the issues raised for adjudication. In M/s Alopi Prashad & Sons Ltd. vs. The Union of India (1960 (2) SCR 793) the Supreme Court, with respect to the facts

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of the case said that there was a general reference and not a specific reference on any question of law, and that the arbitrator incorporated the points of content in the form of issues. It was observed that "the award was liable to be set aside because of error apparent on the face of the award. An arbitration award may be set aside on the ground of an error on the face of it when the reasons given for the decision, either in the award or in any document incorporated with it, are based upon a legal proposition which is erroneous. But, where a specific question is referred, the award is not liable to be set aside on the ground of an error on the face of the award even if the answer to the question involves an erroneous decision on a point of law."

The next question that arises for consideration is that if the award in question is a foreign award within the meaning of Section 2 of the Act. Foreign Award means an award on differences between persons arising out of legal relationship in pursuance of an agreement in writing for arbitration to which the Convention on the recognition and enforcement of foreign arbitral award applies. The terms of the Convention have been set out in the Schedule to the Act. The Convention applies to the

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recognition and enforcement of arbitral award made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. It also applies to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. The term "arbitral awards" includes not only awards made by arbitrators appointed for each case but also those made by the permanent arbitral bodies to which the parties have submitted (Article I). Under Article II (1) each Contracting State recognises an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them and (2) the term "agreement in writing" includes an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. It would thus appear that conditions stipulated in the Convention would apply in the present case and the award in question would be a foreign award within the meaning of Section 2 of the Act. The provisions of the Act, which is a complete Code in itself, in respect of foreign award would apply. I am unable to appreciate the argument of [SAIL] the respondent that since the arbitrator has held that the contract was governed by the laws of India, the arbitration agreement which is

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incorporated in the contract would also be so governed. In spite of the fact that the contract between the parties would be governed by the laws of India the parties can nevertheless agree that the arbitration agreement would be governed otherwise. As a matter of fact under Article II (2) of the Convention, the term "agreement in writing" under which the parties undertake to submit to arbitration their differences would include an arbitral clause in a contract. The Convention applies to the recognition and enforcement of arbitral award made in London, U.K. and the recognition and enforcement of this award is being sought in New Delhi in India.

Conditions for enforcement of a foreign awards are given in Section 7 of the Act. The foremost of these conditions as contended by Mr. K. Parasaran, Attorney General for India, is that the award in question may not be enforced as the enforcement thereof would be contrary to public policy.

Before I deal with this contention, I would refer to another argument of the Attorney General that a judgment and decree had been passed in terms of the award in question by a English Court and the award, therefore, merged in the said judgment and decree and the present proceedings for enforcement of the award were not maintainable under the Act. During the pendency of this petition, it was

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submitted by the respondent that COSID was also seeking enforcement of this very award in England. This was on March 24, 1983. According to the learned counsel for SAIL the proceedings in England were pending at that time. The counsel for the petitioner took time to seek instructions. On the adjourned date, however, he stated that he had not been able to find out whether any proceedings for seeking enforcement of the award in question were pending. During the course of final arguments, however, an affidavit was filed by COSID wherein it was stated that COSID had moved an application in England in the High Court of Justice, Queen's Bench Division, in May 1981 and the Court had ordered on May 30, 1981 that COSID be at liberty to enforce the award in question in the same manner as a judgment or order to the same effect pursuant to Section 26 of the English Arbitration Act, 1950. [It was submitted that COSID having invoked the provisions of Section 26 of the English Arbitration Act, 1950 resulting in the award being enforced as a judgment and order, the award thus became merged into an order and decree of the Court and was no more actionable as an award and no enforcement and recognition thereof could be sought. ~~It was submitted that foreign judgment according to the well settled principles of law created new legal obligations and that a suit could be filed on the basis of the original cause of action if it was~~

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~~permissible to how much a recourse.~~ COSAB ~~Mr. Singhania~~ submitted that plea of merger could not be allowed to be raised at this stage and that ~~he~~ it had filed a copy of the order of the English Court merely to show that the award in question had become final in the country where it was made and that this document could not be used by the GAIL for raising a new plea not contained in the pleadings of the parties and in respect of which no issue had been framed. I do not think ~~Mr. Singhania~~ COSAB is quite correct. ~~He had reported no instructions on this point when the matter was heard on April 13, 1983 and Mr. C.M. Chavri, learned counsel for the respondent, had raised a plea that Civil was seeking enforcement of this mere award in England.~~ Filing of the order of the English Court cannot be limited only to show that the award had become final. ~~But, than~~ I am not quite satisfied that plea of merger would be raised in the present case. For one thing doctrine of merger as contended, is no bar to the enforcement of the foreign award. The foreign award cannot be enforced if it has yet not 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 or which that award was made. Section 7 (1) (a) (v) of the Act refers. Recently as held by Anand, J. in M/s Gopal Singh Hira Singh v/s ~~Punjab National Bank and another~~ Punjab National Bank (AIR 1976 Delhi 115) that a foreign judgment only creates a new obligation

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to pay but does not extinguish the original cause of action for the debt, and that a foreign judgment involves no merger of the original cause of action and creditor who obtained a foreign judgment has two remedies open to him; either to bring an action in the domestic Tribunal on the foreign judgment or to bring an action in the domestic Tribunal on the original cause of action. In this context Anand, J. referred to a decision of the Supreme Court in Bedut and Co. vs. East India Trading Co. (AIR 1964 SC 538). According to ~~the Supreme~~ CRMI original cause of action in this case has been the award in question. Moreover, it is apparent that there have been some further proceedings in the High Court of Justice (Queen's Bench Division). COSID has placed on record an affidavit dated May 15, 1981 filed by SAIL in that case wherein it was stated that the award in question contained a manifest error of law and that it was contrary to public policy and that the award was unenforceable under Section 7 of the Act in India. This affidavit also mentioned that the defendants (SAIL) had envisaged that the enforcement of the award would be sought in India where it could be challenged under the Indian law which gave effect to the New York Convention dealing with the enforcement of Convention awards and in that case SAIL would be entitled to resist enforcement of the award on the

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grounds that the ban on export of steel being valid, the enforcement of the award would be contrary to public policy and further that the SAIL being a company fully owned by the Government of India could not be seen treating the order banning steel exports as a nullity even indirectly. The affidavit of Mr. S.R. Grover, an Officer of the SAIL filed in this Court on April 23, 1983 would show that SAIL had moved the High Court in England for discharge/ variation of the order May 13, 1981 and by order November 29, 1981 the aforesaid order was modified. That order is, however, not on record of this Court. Then, the affidavit dated November 21, 1984 of Mr. Peter Rona, Executive Vice President of Schroder would show that on an undertaking given by SAIL to the Court in England a sum of $ 4560 was deposited in that Court by SAIL in part satisfaction of the award. [Reference was made by Mr. COSTA Singhania to a well known commentry on the The New Yord Arbitration Convention of 1958 (Towards a Uniform Judicial Interpretation) by Albert Jan van den Berg (1981 edition wherein the learned author dealt with the question of merger of award into judgment (page 346). The learned author has referred to a decision of the Court of Appeal of Hamburg in respect of an award made in London, on which award the High Court in London had given a judgment in terms of the award pursuant to Section 26 of the English Arbitration Act. The argument of the respondent was that the award

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could not be enforced under the Convention because it had been merged into the judgment of the English High Court. The Court rejecting the defence observed that although it can be assumed that under English Law the award merges into the judgment, in view of Article V (1) (e) of the Convention which requires the award to be "binding", and which Convention has the purpose of facilitating enforcement of foreign awards, in Germany the award must be considered as not having been absorbed by the English judgment. The Court also held that the effects of the merger were limited to English jurisdiction only and observed that English Courts do not apply the merger doctrine to foreign awards declared enforceable by judgment in the country of origin either. The learned author, therefore, answered the question as to whether the merger of the award into the judgment in the country of origin has an extra territorial effect, in the negative. Thus, according to the learned author "the award can therefore, be deemed to remain a cause of action for enforcement in other countries". I have already observed above that the merger of the foreign award into judgment under Section 26 of the English Arbitration Act would be no bar to the enforcement of the same in the present case. This is not one of the conditions on the basis of which a foreign award may not be enforced under the Act.

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The foremost argument of the learned Attorney General, as noted above, has been that the enforcement of the award in question will be contrary to public policy. Mr. Singhania had submitted that this Court would not go into the merit of the award and would not upset the finding of the arbitrator that the letter dated March 12, 1979, imposing ban on the export of HR Coils, was not legal. In this context he has referred to various decision of the Supreme Court that when specific questions of law have been referred to the arbitrator, his decision would not be upset even though he may have gone legally wrong. I have already dealt with this aspect in the earlier portion of this judgment and I am of the opinion that if the award shows an error apparent on the face of it, the Court would interfere. Even otherwise, I am of the opinion that Court can independently examine this aspect about the validity of the order of the Government of India banning export in view of the provisions of Section -7 (1) (b) (ii) of the Act. In this case relevant provisions of Section 7 would read as follows-

> " A foreign award may not be enforced under this Act if the Court dealing with the case is satisfied that the enforcement of award will be contrary to public policy."

It would also appear to me that even after the pronouncement of the award if circumstances come

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into being which would make the enforcement of the same contrary to public policy, it would not be enforced. However, this question is not exactly before me in this case.

In Chunilal Parekh vs. Mehrdandas Hajra and others (AIR 1959 SC 781) the Supreme Court summarised the doctrine of public policy as under:-

> " Public policy or the policy of the law is an illusive concept; it has been described as "untrustworthy guide", "variable quality", "uncertain one" "unruly horse", etc.; the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy, for want of better words Lord Atkin described that something done contrary to public policy is a harmful thing, but the doctrine is extended not only harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles have been crystallised under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestible cases of harm to
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the public, though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days."

Reference may also be made to the definition of the words "public policy" as given in the Legal Glossary prepared by Ministry of Law, Justice and Company Affairs, Government of India, New Delhi (1983 edition):

> "Public Policy - principles in accordance with which actions of men and communities need to be regulated to achieve the good of the entire community or public."

It will also be useful to refer to a Division Bench judgment of the Andhra Pradesh High Court in Motichand Hirachand vs. Asker Nawaz Jung and others (AIR 1976 AP 112). In this case the plaintiff had agreed to finance and use his influence with the Ministers of the Government and secure the estate to the defendants' predecessor for which the plaintiff was to be given a share in the estate as and when it was got. It was held that the agreement was disctructive of all sound and good administration

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and that the agreement disclosed a tendency to corrupt or influence public servants to decide matters otherwise than on their own merits. The agreement was held to be void as being opposed to public policy. Rejecting the argument that new heads of public policy should not be evolved for the risk of unruliness and uncertainty involved in such an attempt, the court observed:-

> " that in a modern progressive society with fast changing social values and concepts, new heads of public policy need be evolved whenever necessary. Law cannot affor to remain static. It has, of necessity, to keep pace with the progress of society and judges are under an obligation to evolve new techniques or adopt old techniques to meet the new conditions and concepts. Even where the prties have waived the objection, the Judge seeing to notice it should held the agreement void."

Applying these principles to the policies of import and export, reference may be made to some of the decisions cited at the bar. In The Deputy Assistant Iron and Steel Controller, Madras and another vs. L. Manichchand Proprietor, Ratnolia Metal Corporation, Madras (AIR 1972 SC 935) the Court observed as under-

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" Now, it has to be borne in mind that in the present stage of our Industrial development imports requiring foreign exchange have necessarily to be appropriately controlled and regulated. Possible abuses of import quota have also to be effectively checked and this inevitably requires proper scrutiny of the various applications for import licence. In granting licences for imports, the authority concerned has to keep in view various factors which may have impact on imports of other items of relatively greater priority in the larger interest of the over-all economy of the country which has to be the supreme consideration....."

This decision was followed in M/s Andhra Industrial Works vs. Chief Controller of Imports and others (AIR 1974 SC 1539) wherein the Court observed that the instructions imposing restrictions are issued in the interest of the general public and national economy. In the Union of India and others vs. M/s C.Jamani & Co. and others etc. (AIR 1980 SC 1149) a dealer in export of silver had entered into agreement with the State Trading Corporation for purposes of exporting silver to foreign buyer and had made all arrangements to perform the agreement. In the meanwhile the Export (Control) Fifteen Amendment Order (1979) came into force which imposed a complete ban on the export of silver including pre-ban contracts.

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The Court observed, in the circumstances of the case, that even though the contract to export silver related to pre-ban period, the Court would not interfere with the Government order prohibiting export of silver as it was of the view that prima facie national policy in this area should not be interfered by Courts unless compelled by glaring unconstitutionality. The following observations in this judgment would also be relevant:-

> " The national lives not for the benefit of big Business but for conservation of its own resources, and export policy is dictated by a host of considerations ordinarily imponderable for the court. Although its reasonableness is not beyond the power of this Court to examine when constitutionality is in issue, the zone is so sensitive, the subject is so strategic and the import and impact so intricate and Judges do not rush in where administrators fear to tread."

In this case the Government of India had filed an affidavit giving the reasons which led to the issuance of the Export (Control) Fifteenth Amendment Order. It was stated that on a full review of the prevailing conditions in the country, in the public interest, for the conservation of national resources and to meet the internal demand in the country itself, the action was taken. Ban to export of silver on large

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scale, its availability in the country became considerably reduced giving rise to an increase in the price of silver. The action was taken in the interest of national economy and for the conservation of national economy and to meet the local demand for silver. The Court then observed that "we see no ground to discredit this policy nor demolish this prohibition. Courts cannot deal ancillary with administrative policy where the judicial process is functionally under a handicap."

Facts in the case C. Czarnikow Ltd. vs. Centrala Handlu Zagranicznego Rolimpex (1979 Law Reports 351) (House of Lords) may be taken from the headnote of the Report. "Under the Polish national economic plan the greater part of home-produced beet sugar was allocated to the domestic market and a proportion was sold on world markets through a Polish state enterprise, Rolimpex, which was a separate and, although subject to ministerial directions, had considerable freedom of decision and action. In May and July 1974 Rolimpex contracted with an English company to sell them 17,000 metric tonnes of sugar, part of the export quota. The contract terms incorporated the Rules of the Refined Sugar Association, rule 13 (a) of which — the force majeure clause — provided that if delivery was prevented, inter alia, by "government intervention.... beyond the seller's control" the contract would be

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void without penalty. Rule 21 made the seller "responsible for obtaining any necessary export licence" and added that "the failure to obtain such licences shall not be sufficient grounds for a claim of force majeure if the regulations in force ... when the contract was made, called for such licences to be obtained.

Owing to floods and heavy rain the 1974 sugar beet crop was so poor that the whole of it was required for home needs, and on November 5, 1974, the Council of Ministers resolved on an immediate ban on the export of all sugar and a formal decree was issued on the same date giving legal effect to the ban, though it did not in terms revoke the export licences already obtained timeously by Rolimpex in compliance with Rule 21.

Rolimpex thereupon in reliance on the force majeure clause informed the buyers that the contracts could not be fulfilled by reason of "government intervention beyond their control"; and they carried out all consequential steps required by the contracts."

The arbitrators found in favour of Rolimpex that it was a legal entity separate from the Polish government and could rely on the force majeure rule 18(a). The award was upheld.

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Both this decision and that of the Supreme Court in The Union of India vs. M/s C. Dwarani & Co. (supra) are quite apt in the case before me but these were sought to be distinguished by Mr. Singhania on the ground that in both these cases there was a legal and valid ban on the export of sugar in the first case and the silver in the second.

It was not disputed and indeed could not be disputed, in view of the letter of ban that there was an acute shortage of HR Coils in the country.

It was also one of the arguments of Mr. Singhania that the arbitrator had merely awarded damages and had not given an award directed SAIL to export HR Coils in terms of the contract. He, therefore, submitted that no question of any public policy was involved. I think this argument is just stated to be rejected. After all it was a commercial transaction and the breach of the contract had to be measured in terms of damages. I fail to see how any arbitrator could have given an award directing specific performance of the contract. If the ban is legal, valid and binding, the award of damages would also fail. A person cannot do indirectly which he cannot do directly.

Article 38 of the Articles of Association of SAIL is as under:-

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" Notwithstanding anything contained in all these Articles the President may from time to time issue such directives or instructions as may be considered necessary in regard to conduct of business and affairs of the Company and in like manner may vary and annul any such directive or instruction. The Directors shall give immediate effect to the directives or instructions so issued. In particular, the President will have the powers

(i) to give directives to the Company as to the exercise and performance of its functions in matters involving national security or substantial public interest;

(ii) to call for such returns, accounts and other information with respect to the property and activities of Company as may be required from time to time;

(iii) to determine in consultation with the Board annual, short and long-term financial and economic objectives of the Company.

Provided that all directives issued by the President shall be in writing addressed to the Chairman. The Board shall, except where the President considers that the interest of the national security requires otherwise, incorporate the contents of directives issued by the President in the annual report of the Company and also indicate its impact on the financial position of the Company."

It was contended on behalf of SAIL, and I think rightly, that the letter of bon could be well

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treated as a directive/instructions to the SAIL in terms of the above said Article 38 and that SAIL was bound to follow the same.

Under the Government of India (Allocation of Business) Rules, 1961 made under Article 77 (3) of the Constitution, the business of the Government of India is to be transacted in various departments specified in the first Schedule to the Rules. Ministry of Commerce (Department of Commerce) has been assigned the work of foreign trade which includes import and export trade policy and control. Ministry of Steel and Mines (Department of Steel) has been assigned the work of "production, distribution, prices, imports and exports of iron and Ferro Alloys". Under the licensing policy statement concerning export policy for the relevant period export of HR Coils has been canalised through SAIL. The export of HR Coils is allowed on merits and subject to ceiling or other conditions to be specified from time to time. Then came the letter of ban. According to SAIL the ban was legal and valid, and absolves SAIL from performance or supplies of balance quantity of HR Coils or any liability concerning the same. CORUD contends otherwise. The arbitrator, with reference to the provisions of the Imports and Exports Control Act, 1947 and the Export (Control) Order came to the conclusion that

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this letter of ban could not have been issued by Department of Steel, Ministry of Steel and Mines so as to have the force of law. To this Mr. Singhania added that under Section 11 of the Customs Act, 1962 the export could be prohibited only a notification in the official gazette by the Central Government if it was so specified. It was also contended by Mr. Singhania that the Hand-Book of Import-Export Procedures clearly specified that changes/amendments in the Import or Export policy that became necessary from time to time were to be separately notified by means of public notices. He, therefore, submitted that the letter of ban which was marked "Confidential" and which originated from the Department of Steel addressed to the Chief Executive of the SAIL would be of no legal effect. The Attorney General submitted that these arguments missed the real mark. He submitted that even administrative instructions could be followed and in support of his argument he referred to a decision of the Supreme Court in The Union of India and others vs. M/s Anglo Afghan Agencies etc. (AIR 1968 SC 718). This was in the context that the export of HR coils which fell in Part 'b' of Schedule -I of the Export (Control) Order was allowed on merits or subject to ceiling or other conditions to be specified from time to time. He submitted that the letter of ban was valid inasmuch as it was issued by the Department of Steel dealing with the import and export of the item

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in question. He also submitted that it was nobody's case that an Under Secretary to the Government of India was not authorised to communicate to the decision of the Government. He submitted that it was impossible for the SAIL to ignore the letter of ban coming as it did from the concerned department of the Government. He submitted that it was immaterial if the letter of ban was marked "Confidential" inasmuch as the HR Coils was a canalised item and the canalising agency was SAIL itself.

It was then submitted by the learned Attorney General that it could not be disputed that the matter governing import and export of goods were matters covered both by law and public policy of the country governing imports and exports as was invogue from time to time. When an order is made or ban imposed or a restriction/prohibition on export is effected by reason of need for priority for domestic needs on account of an acute shortage for a commodity in the country, such a matter would involve consideration of public good and, therefore, public policy. The Attorney General said that a contract which was contrary to public policy would be void and unenforceable under Section 23 of the Contract. He said that a contract which becomes impossible or by reason of some event which the promisor could not

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prevent unlawful, becomes void and when the act becomes impossible or unlawful the performance for such a contract would be contrary to law or public policy and the Court would not enforce such a contract. Public policy involves that which is for general public good and that which conforms the policy of law. What violates the policy of law is not in general public interest and would be contrary to public policy, so he argued. Then he said: "It is public policy as generally understood and comprising of policy of law and other provisions intended for common good or involving general public interest or national economic policy and such like matters that have to be kept in view. It would embrace within its ambit all such situations as are envisaged as rendering void contracts under the provisions of Section 23 and/or Section 56 of the Contract Act."

Mr. Singhania, however, submitted that this Court should not establish a new head of public policy to the effect that whenever there is scarcity of any commodity in India the export contract, lawfully and validly entered into for export of that commodity by Indian exporters, would automatically be excused of performance. He submitted that the plea of SAIL that if there was scarcity of a commodity in the country, an Indian exporter would be acting against

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public policy if it exported the commodity in the face of such scarcity would be untenable. He submitted that in view of the paramount national policy in the matter of exports, such plea could not be considered. He said that the fundamental national policy is to earn maximum foreign exchange by optimum exports and that exports have been allowed and encouraged even in cases of sacrificing domestic demand and in cases of commodities which were scarce in the country. He further submitted that if the argument of SAIL was accepted, India's future ability to earn foreign exchange through international trade would be greatly compromised as serious jeopardy to public interest. He said that as an under developed country, India was definitely in scarcity of most commodites even those exported to earn foreign exchange. He expressed apprehension that if the argument of the SAIL was to be upheld, Indian enterprises could breach virtually any contract without being required to pay any damages and that if such were to be the rule, there would be no binding value to a contract with an Indian enterprise Then Mr. Singhania submitted that there must be some rules as to who was to determine scarcity and how the policy to restrict export of scarce products was to be regulated. He said that according to the Government of India (Allocation of Business) Rules, 1961, it was the Ministry of Commerce and no other.

Mr. Singhania again referred to Chapter -III (page 399)

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of the book New York Arbitration Convention of 1958 where the learned author dealt with the subject of public policy as a ground for refusal of enforcement of a foreign award. With reference to Article V (2) of the Convention as given in the Schedule to the Act, the learned author observes that there could be international public policy and domestic public policy and that there was important distinction between two. He further observes that "this distinction is gaining increasing acceptance in matters of arbitration as well. According to this distinction what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. It seems that the number of matters considered to fall under public policy in international cases is smaller than that in domestic cases. The distinction is justified by the differing purposes of domestic and international relations." And further that "considering the legislative history of Article V (2) (b), the Convention can be said to refer to "international public policy" as distinct from "domestic public policy." Reference was made to a decision of the United States Court of Appeals for the Second Circuit in Parsons & Whittemore Overseas Inc. vs. RAKTA wherein the Court observed that "..... the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would

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violate the forum State's most basic notions of morality and justice."

After examining the position of law in various countries, the learned author comes to the following conclusions:-

> " It is true that in the above cases not all courts make the distinction in express terms between domestic and international public policy. However, it is clearly apparent from these and other cases decided under the Convention that the courts are prepared to refuse enforcement of an arbitration agreement or arbitral award in very serious cases only. To this extent it is justified to use the helpful distinction between domestic and international public policy also in those cases where the courts do not resort expressly to the distinction."

The RANTA case, referred to above, concerned a contract from 1962 between the United States corporation Overseas and the Egyptian corporation RANTA for the construction of a paperboard mill in Egypt, financed by the United States Agency for International Development (AID). The construction was near completing when the six-day Arab-Israeli war was about to break out. Egypt expelled all Americans except those who

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would apply and qualify for a special visa. AID informed Overseas that it was withdrawing financial backing. Thereupon, Overseas abandoned the project and notified RAETA that it regarded itself as excused by force majeure. RAETA disagreed and obtained an award largely in its favour. In the award Overseas' force majeure defence was considered as valid only during the period from May 28 to June 30, 1967. Furthermore, Overseas was considered to have made no more than a perfunctory effort to secure special visas. Finall, AID's notification was held as not justifying Overseas' unilateral decision to abandon the project.

In the enforcement action Overseas argued before the United States Court of Appeals that the various actions by United States officials, most particularly AID's withdrawal of financial support, required Overseas "as a loyal American citizen" to abandon the project. Enforcement of an award predicted on the feasibility of Overseas' returning to work in defiance of these expressions of national policy would therefore contravene United States public policy.

The Court made observations quoted above and held that "national" policy could not be equated with the United States "public" policy. The Court disallowed

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Overseas' public policy defense. It would thus appear that facts in this case were quite different and this judgment, though relied upon by Mr. Singhania, would be of no avail.

I am afraid I also cannot agree to other submissions of Mr. Singhania on this question. As observed by the Supreme Court, it is not a case where I should sit on the judgment of the Government holding that there was an acute shortage of HR Coils and for that reason to ban export/shipments of HR Coils in all specifications with immediate effect. This letter of ban, to my mind, was rightly issued by the Department of Steel and Mines, Government of India, as this was the department concerned with the production, distribution, prices, imports and exports of iron and steel and ferro - alloys. Normally the Court would assume that the Government is well informed about the availability of a commodity in the country and to pass orders in the national interest regulating its distribution and import and/or export. It is no doubt true that primary object of the Government is to promote exports to the maximum extent as given in the export policy of the relevant period, but that is to be done in such a manner that the economy of the country is not affected by un-regulated exports of items essentially needed within the country. Earning of foreign exchange is not something like a magic

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formula to over-ride all other considerations. I am also not quite impressed with the argument of Mr. Cosib making distinction between domestic and international public policy. The provisions of Section -7 (1)(b) (ii) of the Act do not make any such distinction and to interpret this plain provision of law, I need not go into the legislative history of Article V (2) (b) as stated by the learned author in his book the New York Arbitration Convention of 1958. As to whether the enforcement of the award would be contrary to public policy of the country, I have not to see whether it is domestic, public policy or international public policy and whether international public policy should over-ride domestic public policy. Nothing has been brought on the record to show that there was no scarcity of HR Coils during the relevant period and that it was not necessary to ban the export/shipments of HR Coils with immediate effect. In fact, as observed above, this was not challenged.]

Thus, while I have upheld the validity of the arbitration agreement, I cannot persuade myself to enforce the award as it appears to me that enforcement of the award would be contrary to public policy of the country. Provision of public policy is not for the benefit of the parties but for public good, as was rightly contended by the Attorney General.

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Use of the expression "public policy" in Section 7(1) (b) (ii) of the Act would mean public policy of the country, i.e., India. Article 7 (2) (b) of the Convention is also to the same effect. I also fail to understand what international public policy is involved in the present case which should have preference over the order of the Central Government banning export/shipment of HR Coils with immediate effect on the ground that there was acute shortage of this commodity in the country. If I have to accept the submissions of Mr. Singhania on his concept of international public policy, as referred to above, then a foreign award like the present one has invariably to be enforced.

Having examined all the aspects of the case on the question of public policy I think the answer is quite simple and that is that the enforcement of the award in question would be against public policy principally for the two reasons: (1) under Article 38 of the Articles of Association of SAIL it was bound by the directive/order of the Government and (2) the Government's decision to ban the export/shipments of hot rolled HR Steel coils with immediate effect in view of acute shortage of HR coils existing in the country at the relevant time.

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Serious objection was raised by SAIL to the maintainability of the present petition on the ground that it was not properly instituted and that none of the two petitioners were entitled to maintain it. I have already observed in the beginning of this judgment that the petition has not been signed or verified by any one on behalf of COSLO, petitioner No.1. It was submitted by SAIL that the trustee of petitioner No.1 did not even claim to be authorised or empowered to take any step to enforce and recover upon the arbitration award. It was submitted that second petitioner was not " a person interested in a foreign award" and was not competent to file the present petition.

The petitioners have relied upon the order dated March 19, 1982 of the United States Bankruptcy Judge whereby the Schroder has been authorised and empowered to take all steps which it might deem necessary and reasonable to enforce the award in question. The petitioners have also filed two affidavits, one is of Mr. Carl F. Goodman, an attorney practising in the States of New York and other places in the United States and is with reference to the proceedings pending in the Court of the United States Bankruptcy Judge and the second is of Barbara Balsher-Strauss, Trustee appointed by the United States Trustee and the United States Bankruptcy Court of

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Southern District of New York of COSID, the first petitioner. In this affidavit of the Trustee which is dated October 2, 1984, it has been stated that Schroder, petitioner No.2, has been authorised by order March 19, 1982 of the United States Bankruptcy Court of the Southern District of New York "to take all steps it deem necessary and reasonable to enforce the arbitration award in favour of COSID and against the SAIL and to proceed on behalf of COSID INC to recover on account of that award." It has been further stated that Schroder is fully authorised to so proceed and that the aforesaid order dated March 19, 1982 was passed under Section 362 of the Bankruptcy Code. This order of the Bankruptcy Court has also been placed on record. As against this, SAIL has filed an affidavit of Mr. S.R. Grover, who is stated to be the Chief Legal Adviser of the SAIL. He has stated that the order of March 19, 1982 of the U.S. Bankruptcy Court was merely an interim order and could not be made the basis for maintaining the present petition. Mr. Grover then stated that he made enquiries which revealed that some action by Schroder was pending tirel before the said U.S. Bankruptcy Court and further the rights which Schroder allegedly claimed in that proceedings were being disputed/contested "in the adversary action and a number of affirmative evidences including, inter alia, the defendant that the assignment claimed by plaintiff No.2 (Schroder) was in fact a fraudulent conveyance and

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a preferance have raised and are pending trial." Mr. Grover further goes on saying "that inquiries have revealed that some sort of a consent order in the form of an interlocutory order was obtained by the parties and I am advised that such an order is not an order in rem nor final nor can form the basis of any assertion or recognition" and "that some further interim orders were also sought for and obtained by the plaintiff No.2 (Schroder) which have been suppressed from and not disclosed to this Hon'ble Court."

I think this affidavit of Mr. Grover is as vague as it could be and I will not place any reliance on the averments made therein. A certified copy of the order dated March 19, 1982 of the United States Bankruptcy Judge, Southern District of New York has been placed on record. The Trustee had supported the stand taken by Schroder, petitioner No.2. It has been admitted in the affidavit of Mr. Goodman that a dispute exists between Schroder and the Trustee in Bankruptcy but that is only as to what ultimately is to be done with the proceeds of the award. Mr. Goodman has controverted the affidavit of Mr. Grover on all the points and has submitted that the present motion by petitioner No.1

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was valid on an order made under Section 362 of the Bankruptcy Code of the United States. Mr. Grover in his affidavit did not state as to how the order dated March 19, 1982 could not authorise or empower Schroder, petitioner No.2, to file the present proceedings except to say that it was an interim order or that it was an unattested copy of the order. Mr. Goodman has stated on oath that apart from order of March 19, 1982 there was no order of any relevance and that this order had never been reversed, modified or changed in any manner and that it had become final. I am inclined to accept the submissions of the petitioners and hold that present petition is competent and that Schroder, petitioner No.2, is a person interested in the award in question. In this view of the matter perhaps it is not necessary for me to go into the question if the present petition should have been signed by petitioner No.1 as well. But, since there is no contest between two petitioners, signing of the present petition by petitioner No.1 would be a mere formality and that could be corrected at any stage.

In view of my above discussion, I would hold issues No.1, 2 and 4 in favour of the petitioners and issue No.3 against them.

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Accordingly, on my decision on issue No.3 the present petition is dismissed. There will, however, be no order as to costs.

July 12, 1985

(D.P.Wadhwa)
Judge