GE v. RENUSAGAR

COURT OF ARBITRATION
COUR D'ARBITRAGE

CASE N°
AFFAIRE N° N°4367/AR/RP/BGD

GENERAL ELECTRIC COMPANY (U.S.A)

v/

RENUSAGAR POWER COMPANY, Ltd (India)

This document is an original of the award rendered in conformity with the Rules of the ICC Court of Arbitration.

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Ce document est un original de la sentence rendue conformément au Règlement de la Cour d'Arbitrage de la CCI.

International Chamber of Commerce
COURT OF ARBITRATION

AWARD
SENTENCE

Chambre de Commerce Internationale
COUR D'ARBITRAGE

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INTERNATIONAL CHAMBER OF COMMERCE

COURT OF ARBITRATION

CASE No 4367

16SE236-121048

ARBITRATION Between:

General Electric Company (USA)

Claimant

Renusagar Power Company Ltd

Respondent

AWARD OF ARBITRATORS

This the award of THE RT HON PETER THOMAS QC MP of Francis Taylor Building, London EC4 (Chairman) and PROFESSOR BORIS I BITTKER of Yale Law School, New Haven, Connecticut, 06520, USA to whom (together with DR R K DIXIT of International Bauxite Association, 65-67 Knutsford Boulevard, PO Box 551, Kingston 5, Jamaica, West Indies, who dissents from this Award) were referred for decision disputes between the above named parties as set out in the Arbitrators' Terms of Reference, a copy whereof is annexed to the Award, STATES FINDS and AWARDS as follows:

BACKGROUND

1. The Claimant is a company incorporated under the laws of the State of New York engaged in the business of manufacturing, selling and servicing electrical products and various ancillary activities.

2. The Respondent is a company incorporated under the Indian Companies Act 1956 engaged in the production and sale of electrical power in India.

3. By an agreement in writing dated the 24 August 1964 the Claimant agreed to sell and supply to the Respondent equipment and services for a new electric power generating plant to be known as the Renusagar Power Station in Renukoot, India, at a total contract base price of 13,195,000 United States dollars to be paid by the Respondent in lawful money of the USA as specified in Article III of the said Agreement.

4. By Clause 3 of Article IIJ of the said Agreement 90 percent of the base price was to be subject to deferred payments as set out in the Schedule therein and the obligation to make such payments was to be evidenced by four series of the Respondent's unconditional negotiable promissory notes guaranteed by a Bank.

5. By Clause 3(c) of Article IIIA of the said Agreement each promissory note was to bear interest on any outstanding principal balance at the rate of 6.5 percent per annum commencing 30 months after the Contract Effective Date.

6. By Clause 3(f) of Article IIIA of the said Agreement it was agreed that if the Claimant received an exemption from the Government of India from the payment of income taxes levied on interest payments made by the Respondent to the Claimant then the interest rate on that series of promissory notes as exempted was to be reduced from 6.5 percent to 6 percent per annum beginning on the date such exemption is made effective.

7. By Article XIVB of the said Agreement if the Claimant's application for exemption should be denied the Respondent could withhold the Indian Income Tax applicable to any payments of interest and in that event would be required to furnish the Claimant with tax receipts on all withheld amounts paid to the Central Government of India.

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8. Article XIVB envisaged that the application for exemption should be made by the Claimant with the assistance of the Respondent. In the event, at the insistence of the Indian authorities, and by agreement of the Parties, applications for exemption were made by the Respondent and by Orders dated 3 September 1965 and 7 June 1967 the Government of India granted exemption to the Claimant from payment of Indian income tax on the interest receivable by it from the Respondent with the effect that the Claimant became entitled to receive interest on any outstanding principal balance at the rate of 6 percent instead of 6.5 percent subject to tax.

9. On the 1 October 1968 the Claimant and the Respondent entered into formal amendment agreement in writing to the said 1964 Contract in order to reflect agreed changes in the structuring of promissory notes. These changes were not approved by the Government of India with the result that the original structure of payments remained operative and the Respondent became liable to pay to the Claimant 'delinquent interest' on the amounts of principal which remained unpaid after the dates of payment in the original structure of payment.

10. By Order dated 11 September 1969 the Government of India purported to cancel retrospectively the income tax exemptions. If this decision were to be effective the Respondent would be the main, if not sole, loser of the Parties in that it would be required to pay an extra half percent interest while, irrespective of the size of the interest, the Claimant could obtain a balancing tax credit in the United States. We refer to this in greater detail in paragraph 40 (vii) to (xi) inclusive of this Award.

11. By a writ petition in the Delhi High Court (Civil Writ No 179 of 1970) the Respondent challenged the above cancellation or revocation of tax exemption and sought an injunction restraining the Government of India from implementing the same.

12. In the above writ the Respondent complained that by reason of the Indian Government's order the Respondent was not in a position to honour its commitments to the Claimant: that its business relations with an internationally reputed firm of the standing of the Claimant were being imperilled and its business reputation was being gravely damaged. The Respondent sought inter alia an order from the Court to enjoin the Indian Government to continue to approve 6 percent as the rate of tax free interest on the payments due by the Respondent and 'to permit the (Respondent) to remit the amount of interest to (the Claimant) without deducting income tax therefrom.'

13. By Order dated 18 May 1970 on the Respondent's undertaking to furnish a bank guarantee for Rs 4 Lakhs, (approximately equivalent to 56,000 US dollars) the Delhi High Court stayed the above cancellation or revocation of exemption and by an interim injuction restrained the Government of India and its offices from enforcing or implementing the impugned Order dated 11 September 1969. The Respondent furnished the required security whereupon the effect of the above interim order was that the tax exemption continued and there was no necessity to deduct any amount from interest payable to the Claimant nor to deposit the same as tax with the Indian Government.

14. By letter dated 30 June 1970 the Respondent informed the Claimant of the existence of the above interim order and stated that, in view of a bank guarantee they were required to furnish and to protect their position against any liability for tax should their Writ Petition finally fail, they had no alternative than pay interest at the rate of 6.5 percent after deducting therefrom and retaining as a contingent reserve their calculation of tax liability on the total interest due.

15. The Respondent thereafter deducted about 73 percent of

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the interest payable to the Claimant and retained the same as an 'Income Tax Reserve'.

16. From 7 July 1970 to 22 December 1975 the Respondent withheld from the regular interest payable to the Claimant under the Contract a sum of 1,76,94,662.17 rupees being equivalent at the exchange rate then obtaining of 2,412,680.20 US dollars.

By letter dated the 11 May 1977 the Respondent stated that the above amounts had been deducted and withheld until the final disposal of the Writ Petition which was pending in the Delhi High Court.

17. Between June 1971 and July 1972 the Claimant pressed the Respondent either to pay the full interest at 6 percent or obtain tax receipts from the Indian Government and expressed concern about the 'status' of the Writ Petition, and urged the Respondent to press its suit to a conclusion.

The Respondent stated that it had been advised that as it had obtained a Stay Order any deposit of the money with the Indian Tax Department might be considered an infringement of the Order of the Court.

18. In September 1977 the Claimant, who was anxious about the delay in the progress of the Writ Petition, moved the Delhi High Court to be permitted to intervene.

19. On the 17 November 1980 the Delhi High Court quashed and set aside the Order of the Government of India of the 11 September 1969. That decision became final on the 1 April 1981 thereby holding that all payments of interest from the Respondent to the Claimant under the said Order were at all times tax exempted.

20. Following the above decision of the Delhi High Court the Respondent acknowledged to the Claimant that the amount in had withheld and credited to reserve (calculated on the basis of 6.5 percent subject to tax) was US$ 2,412,680.20

and in June 1981 made application to the Indian Commissioner of Income Tax and the Reserve Bank for a 'No Objection Certificate' and approval for remitting to the Claimant the sum of US$ 2,130,785.52 being the amount withheld calculated on the 6 percent tax free basis to which the Claimant became entitled as a result of the Delhi High Court decision of the 17 November 1980. On the 3 February 1982 on the application of the Claimant a 'No Objection Certificate' was granted.

21. In correspondence from October 1969 to March 1976 the Respondent acknowledged that 'delinquent interest' referred to in paragraph 9 hereof was owing to the Claimant and by telex dated 25 March 1976 stated that the full amount of delinquent interest payable, calculated at 6.5 percent subject to tax was US$ 8,48,010.52.

22. By a letter, with a note attached, dated the 21 September 1981 the Respondent put to the Claimant seven claims by the Respondent against the Claimant which it described as 'outstanding matters to be settled between (them)' and thereafter made it clear that it would only settle the Claimant's claims simultaneously with the settlement by the Claimant of the Respondent's claims.

23. On the 2 March 1982 the Claimant made request to this Court of Arbitration for arbitration of the disputes between it and the Respondent setting out its claims as the sum of US$ 2,130,785.52 (Regular Interest) and US$ 784,151.84 (Delinquent Interest) plus compensatory damages in respect of each sum.

24. The Respondent in reply submitted that the claims of the Claimant did not fall with the purview of the arbitration clause in the Contract and wholly challenged the arbitrability of the claims.

25. This Court of Arbitration accepted that there was a prima facie dispute within the arbitration agreement and

VOL. 8, #11, 11/93 - #05-931122-103

Indian

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appointed me, The Rt Hon Peter Thomas QC MP, as Chairman of the Arbitral Tribunal and confirmed the appointment of Dr R K Dixit and Professor Boris I Bittker as the other arbitrators.

26. On the 9 June 1983, under protest and without prejudice to its claim on arbitrability, the Respondent entered into the Arbitration proceedings and gave answer to the Claimant's claims and made counterclaims.

27. On the 7 and 8 February 1984 both parties met with the Tribunal in Paris and agreed and signed Terms of Reference. The Respondent did so again under protest and without prejudice. Both parties subsequently made amendments to the Terms of Reference all of which are incorporated in the Terms of Reference attached hereto.

28. It was agreed that issues (a) to (f) inclusive of paragraph 22 of the Terms of Reference should be determined by us by interim award preliminary to any consideration of the main claims and counterclaims. On the 11 December 1984, following an oral hearing in London, we found inter alia by interim award (copy attached hereto) that the Claimant and the Respondent were parties to a valid agreement to arbitrate all disputes between them arising out of or related to the 1964 Contract and that the issues referred to us, (apart from two minor exceptions where we reserved our determination) were such arbitral disputes and that we had jurisdiction to adjudicate on them. We also held that the applicable law was that of the State of New York, USA.

29. Prior to our interim award the Respondent, in June 1982, filed a suit in the Bombay High Court for an injunction restraining the Claimant and this Court of Arbitration from proceeding with this arbitration. The single Judge found against the Respondent and also made an order in a Petition brought by the Claimant, staying the Respondent's suit under Section 3 of the Indian Foreign Awards (Recognition and

Enforcement) Act 1961.

The Respondent appealed to the Division Bench of the Bombay High Court and on the 21 October 1983 the appeals were dismissed with costs.

The Respondent then appealed to the Supreme Court of India and on the 16 August 1984 the appeals were dismissed with costs.

30. Between the 25 February and 8 March 1985 both parties appeared before us in Paris for a hearing which lasted ten days. Each party was represented by Counsel and legal and other advisers. The Terms of Reference were amended by agreement, and the issues (g) to (p) of paragraph 22 of the Terms of Reference were argued and submitted for our consideration by both sides. The hearing was adjourned to a later date for more detailed consideration to be given to the remaining issues and for further written submissions to be made by both parties.

31. After some unavoidable delays the next hearing was fixed to be in London, to begin on the 1 October 1985, and both parties were summoned to appear.

32. By letter to us dated the 24 July 1985 the Respondent's lawyers, Khaitan and Partners, stated that an Indian Civil Court had seisin of the whole of the subject matter of the reference in this arbitration and submitted that in consequence we and this Court of Arbitration had become functus officio and that no further proceedings in this arbitration should be taken by us. They stated that they had been advised not to participate any further in the arbitration.

The Claimant strongly disputed the Respondent's submission and the parties were informed that the matter would be considered as a preliminary issue at the scheduled meeting in London on 1 October 1985.

33. The scheduled hearing took place in London on the 1

VOL. 8, #11, 11/93 - #05-931122-103

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October. The Claimant represented by Counsel and advisers appeared before us. The Respondent failed to appear. We considered the Respondent's written submissions on the issue of our jurisdiction and heard the arguments of the Claimant. By a majority of two to one (Dr. Dixit dissenting) we ruled that our jurisdiction remained and that the arbitration should proceed in the absence of the Respondent. Copies of the Respondent's written submissions and our ruling and Dr. Dixit's dissenting ruling are annexed hereto. We make our ruling that this Tribunal was not and is not 'functus officio', and that our jurisdiction remains, part of this our award.

34. Before the meeting on the 1 October each Arbitrator had received from the parties during the course of the arbitration a total of 33 bound volumes of typed submissions, exhibits and legal authorities. The Claimant presented 19 and the Respondent 14. In addition each party put before us a large number of papers. All these documents have been closely and carefully considered by us.

35. On the 2, 3 and 4 of October 1985 we considered the Respondent's written submissions on the issues (q) to (bb) of the Terms of Reference and heard the Claimant's arguments in reply. We also considered the Respondent's submissions on the validity of the Claimant's claim of entitlement to 'dollar for dollar' foreign tax credit at the relevant period in this action. We also heard the Claimant on the question of the costs.

OUR FINDINGS IN RESPECT OF THE ISSUES REMAINING TO BE DETERMINED ARE AS FOLLOWS:

36. **Issue 22 (q) 'Did the Respondent wrongfully withold the payment of US$ 2,130,785.52 regular interest or any part thereof to the Claimant and wrongfully retain the same?'**

(i) It is agreed that the above sum (calculated on the 6

percent tax free basis) was withheld and retained by the Respondent. The issue is whether by so doing the Respondent acted wrongfully.

(ii) The 1964 Contract required interest to be paid on specified dates; hence failure to pay is wrongful unless affirmatively justified. The justification offered by the Respondent for non-payment is that the interest was subject to tax withholding under Indian law.

(iii) While it was in force the September 1969 cancellation of the 1965 and 1967 tax-exemptions provided a proper basis for the Respondent's failure to pay the full interest otherwise due under the Contract, but any justification for this failure was eliminated by the Delhi High Court interim order of 18 May 1970. Certainly we agree with the Respondent that the 1969 cancellation order was not 'quashed' but it was rendered unenforceable. At that point the Respondent should either have (a) paid the Claimant at the tax exempt 6 percent rate or (b) paid the Claimant at the 6.5 percent rate less withheld tax and paid the withheld amount (if thought necessary 'under protest') to the Indian tax authorities.

(iv) The Respondent unilaterally decided to withhold about 73 percent of the interest due (calculated at 6.5 percent) and contended to us that they were legally obliged and entitled to do so under the provision of s.195 of the Indian Income Tax Act.

(v) If the Respondent had acted legally in accordance with s.195 it would have been obliged under s.200 and Rule 30 of the Act to pay tax to the Income Tax authorities within a prescribed period of 7 days of the date of deduction or 7 days of receipt by the Respondent of a challan and under s.203 to issue a certificate of deduction in form prescribed under Rule 31.

(vi) Apart from withholding tax at the source the

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Respondent did not comply with any of the statutory and administrative rules governing such withholding.

The amounts deducted were not paid within one week (or indeed ever) as required by s.200 and Rule 30, nor was the Claimant furnished with the certificate required by s.203.

(vii) At the Paris hearing we heard extensive argument on whether Rule 31(4A), requiring filing on Form No 19A, or Rule 31(5), requiring filing on Form No 20, applied. We need not decide this issue as neither form was filed.

The Respondent's contention that its letters to the Claimant consitituted 'substantial compliance' with Rule 31 is, in our opinion, totally without merit.

(viii) In a paper submitted to us at the Paris hearing the Respondent argued that it was 'duty bound under s.195 of the statute to deduct' but that it had 'reasonable cause or excuse' not to deposit the withheld amounts. But the 'reasonable cause or excuse' escape appears in s.276B which is concerned solely with criminal prosecutions for failure to pay over withheld amounts. We need not decide whether the Respondent's alleged belief that 'in the facts and circumstances of the case ... it had "reasonable cause or excuse" not to deposit' was well-founded or would have been an adequate shield against a criminal prosecution. We are concerned solely with whether the withholding and retention of the amounts in dispute (and the concomitant failure to pay them over) was wrongful vis-a-vis the Claimant, not with whether it was criminal.

(ix) These were not merely technical omissions by the Respondent, nor can it be said that they affected only its relationship with the Indian tax authorities and were of no concern to the Claimant. Section 205 exonerated the Claimant from any liability to the Indian tax authorities only 'to the extent to which tax has been deducted from that (ie the assessees') income'. It is far from self-evident that, given

the Respondent's failure to pay the amounts in question to the Indian tax authorities, the Claimant would have been protected by s.205. The Respondent therefore exposed the Claimant to at least the risk of a lawsuit if (a) the 1969 cancellation order had been upheld and (b) the Indian tax authorities called upon the Claimant to pay the taxes due. An internal Claimant memo of 14 March 1977, furnished to us at the Paris hearing, shows that the possibility of such exposure was not unreal.

It was suggested to us that the Claimant could have made application for a grant of a certificate (authorising it to receive tax free interest) under s.195 (3). Under Rule 29(B)(i) it appears that the Claimant would have been unable to do so as it did not qualify.

(x) Moreover, in our view, the Respondent's failure to pay the taxes over to the Indian tax authorities rendered it impossible for the Claimant to get the U.S. foreign tax credit to which it would otherwise have been entitled for the amounts withheld. As indicated by Rev. Rul. 70-290, the credit is allowed under U.S. law for taxes that are contested, provided the amount is actually paid to the foreign government. The Respondent submits that the Claimant could have obtained the U.S. credits on the basis of evidence establishing that the amounts were withheld, even though not paid, and that legal authorities generally support the conclusion that the tax is paid when withheld at the source. We find this a very dubious proposition. In this case we are not dealing with a legal withholding of an actual tax liability as in the cases of tax properly withheld at the source from dividends, interest, royalties, compensation and other forms of income. We are dealing with money unilaterally withheld as a contingent tax reserve with no legal justification and with no intention of paying it over to the tax authorities during the pendency of an interim High Court Order restraining the authorities from demanding tax. For the Claimant to establish that Rev. Rul. 70-290 was too restricted as applied to the facts of this case would

VOL. 8, #11, 11/93 - #05-931122-103

India

undoubtedly have required a lawsuit in the U.S. We cannot properly predict the outcome under U.S. law of such a suit but, on the authorities placed before us, we are of the opinion that such an attack on Rev. Rul. 70-290 would have failed.

(xi) The Respondent offered tactical reasons for not paying the tax over after entry of the interim order of 1970, namely (1) the possibility that the Delhi suit would be held moot if payment were made, even under protest; and (2) the delay that might be encountered in obtaining a refund if its exemption claim was eventually upheld. As to the first point, it is quite obvious that the issue of exemption vel non would have survived payment under protest; and we do not think we can properly impute to the Delhi Court, however heavy its calendar, an improper disposition of the case merely to lighten its judicial burdens. The second point must also be rejected, in our view, for substantially the same reason: we cannot properly speculate about the time it would take for the Indian tax authorities to make refunds required by a decision of an Indian court.

In any event, the Respondent is at best asserting it was wise for it, as a matter of tactics, to refrain from paying the amounts over even under protest. Since the purpose of the suit was to achieve a reduction for the Respondent of its interest obligation from 6.5 percent to 6 percent (at the Claimant's expense, given the fact that taxes paid to the Indian tax authorities would have qualified for the U.S. foreign tax credit) any tactical decisions made by the Respondent served its interests, not the Claimant's. The Respondent was acting solely for its own benefit.

Nothing in the 1964 Contract authorises non-payment of either the interest or the withheld taxes for tactical reasons arising out of litigation brought by the Respondent. Article XIV B, of course, recognises that taxes may be withheld if the interest is taxable under Indian law; but that is not an independent justification for withholding; it merely bows to the inevitable and clearly requires payment to

the tax authorities and the furnishing of tax receipts.

(xii) We conclude and determine, therefore, that the aforesaid sum of regular interest was wrongfully withheld and retained by the Respondent. We note that our conclusion coincides with the view expressed by the Indian Supreme Court in August 1984.

37. Issue 22 (h) ... is the Claimant's claim in respect of (regular interest) or any part thereof barred by the Statute of Limitation?'

(i) At the Paris hearing in February/March 1985 the Respondent did not press its contention that the claim for regular interest was time-barred. This was understandable as there was ample and irrefutable evidence before us of sufficiently reviving acknowledgements within the statutory period (whether it be 6 years or 4 years); in particular the 1981 applications by the Respondent to the Reserve Bank of India of 3 June and 29 August.

(ii) The Respondent submitted that the above acknowledgements did not revive any claim by the Claimant for pre-judgement interest and therefore would not permit the allowance by us of interest pursuant to Issue 22 (k) of the Terms of Reference. We reject this submission. The Claimant relies on the acknowledgements to avoid the statute of limitation on the claim for the withheld regular interest amount; it has no bearing on the issue of damages. The legal effect of an acknowledgement is a branch of contract law, dealing with the effect of the statute of limitation on contract claims; it is not a part of the law of damages.

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38. Issue 22 (i) '...is the said sum or any part thereof owed to the Claimant in US dollars or in Indian rupees at the rate of exchange when withheld?'

(i) Article III A of the 1964 Contract requires the total contract price to be paid 'in lawful money of U.S.A.' The Form of Promissory Note contained as Exhibit B in the Contract specified 'Both principal and interest on this note are payable in lawful money of the United States of America...' The Respondent's application to the Indian Commissioner of Income Tax and the Reserve Bank in June and July 1981 was for a No Objection Certificate for the payment in dollars.

(ii) We are satisfied that the total amount owed for regular interest (and any other amount owing under the Contract), must be computed in dollars, regardless of variations in the dollar-rupee exchange rate prevailing from time to time.

39. Issue 22 (j) 'Did the Respondent withhold and retain the said or any regular interest as stakeholder and/or constructive trustee? If so, what were its fiduciary obligations with respect to the money?'

(i) In the Terms of Reference the Claimant claims that $2,130,785.52 of regular interest withheld by the Respondent was held by it 'as stakeholder or constructive trustee'. This contention is strenuously denied by the Respondent and long oral and written arguments on this issue were presented to us by both parties.

(ii) If the Respondent held the withheld regular interest as stakeholder and/or constructive trustee, it would follow that this proceeding would constitute 'an action of an equitable nature' within the meaning of Section 5001(a) of the New York Civil Practice Law and Rules, and (as explained below in our findings on Issue 22(k)) this would affect our discretionary power to fix the rate, and the starting date,

of any interest to be awarded by us. Our finding on Issue 22(h) disposes of any relevance the question of stakeholder and constructive trustee may have had to the Statute of Limitations leaving it solely bearing on the amount of damages.

(iii) Because we conclude on other grounds in our findings on Issue 22(k) below that this proceeding is an 'action of an equitable nature' the Claimant's contention that the Respondent was a stakeholder and/or constructive trustee of the funds in dispute need not be decided.

40. Issue 22(k) 'Are compensatory damages payable by the Respondent to the Claimant for the withholding and retention of the said or any sum of regular interest? If so, in what amount?'

(i) The basic principle of damages for breach of contract, applicable throughout the U.S., including New York, is that 'a party to a contract who is injured by its breach is entitled to compensation for the injury sustained and is entitled to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed.' Since the Respondent's breach deprived the Claimant of the use of money, the best measure of damages is the amount that the Claimant would have had to pay to replace the improperly withheld funds by borrowing the same amount from a bank or other institutional lender. Anything less than the replacement cost of the funds would fail to put the Claimant in the position it would have occupied had the breach not occurred; anything more than replacement cost would impose on the Respondent a greater burden than the Claimant's loss.

(ii) The Claimant does not contend that to replace the $2,130,785.52 in dispute it would have had to pay more than the prime rate charged by New York banks on short-term loans

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York Court of Appeals stated that "An arbitrator's paramount responsibility is to reach an equitable result". Expanding on this theme, the same court observed in SCM Corporation v. Fisher Park Lane Co., 390 N.Y.S. 2d 398 (1976), that 'arbitrators have power to fashion remedies appropriate to the resolution of the dispute between the parties before them' and that their determinations are 'based on the ad hoc application of broad principles of justice and fairness in the particular instance', quoting with approval the much earlier observations of a New York court, which stated that the function of arbitrators is to 'find a just solution' to the controversy between the parties and which stressed the equitable character of the arbitrator's function. We note that in the case of Raisler Corp. v. N.Y.C. Housing Authority, 344 N.Y.S. 2d 917, 925 (1973) it was stated that the arbitrator's duty is to 'reach a just result regardless of technicalities'. In this connection, we note also the following observations by Weinstein, Korn, and Miller, in their commentary on the New York Civil Practice Act (Vol 5, 1981, at pp 50-23 and 50-24; footnote omitted):

> Questions of the proper scope of the court's discretionary power under subdivision (a) (of Section 5001) can be resolved readily in practice if the courts bear in mind the strong policy in favor of awarding interest. Interest will then be denied in any type of equitable action --- whether based on contract or some other theory --- only for some overriding reason of equity such as the plaintiff's laches or on some theory of estoppel. Similarly, if there is a doubt about whether the action is 'of an equitable nature', the court should attempt to bring the action within its discretionary power and interest should be awarded. Above all, the equity clause should not become a source of sterile controversy over the classification of causes of action.

(v) We conclude, therefore, that if Section 5001(a) applies to us, which we doubt, it vests us with discretionary

to their most creditworthy customers; conversely, the Respondent does not contend that the Claimant could have borrowed the funds for less than that rate; and we think that the prime rate is the best measure of the Claimant's damages. The Claimant has offered the Eurodollar and Indian rates as alternatives, but there is no reason to believe that either of these rates would measure its loss more accurately than the N.Y. prime rate, or that a New York court would select either one rather than the prime rate in fixing damages.

(iii) The Respondent argues that Sections 5001 and 5004 of the N.Y. Civil Practice Law and Rules, relating to pre-judgment interest, impose a ceiling on the rate of interest that this tribunal can use in computing damages. It is far from clear, however, that these provisions apply to an arbitration panel. Section 101 of the N.Y. Civil Practice Law and Rules states that 'The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges' (emphasis added) and Article 75 thereof prescribes a seemingly self-contained set of rules governing arbitration, which does not include any restriction on the rate of pre-award interest. Assuming, however, that Section 5001(a) applies to arbitration proceedings, it provides that 'In an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.' Since Section 5001(a) refers to the nature of the 'action', not to the nature of the underlying claims, counterclaims, or causes of action, the question is whether the proceedings before us are 'of an equitable nature' within the meaning of Section 5001(a).

(iv) In answering this question, we turn to the nature of arbitration proceedings as explained by the New York courts. The New York Court of Appeals --- the highest court in the New York judicial hierarchy --- has repeatedly stressed the equitable nature of the arbitrator's task. In Sprinzen v. Nomberg, 415 N.Y.S. 2d 974, 977 (1979), for example, the New

Page 10 of 19 Inmia

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authority to determine the rate of interest, and the date from which it shall be computed, when awarding compensatory damages to the Claimant for the Respondent's breach. Since nothing less than the prime rate will adequately compensate the Claimant for the Respondent's failure to pay the withheld amount either to the Claimant or to the Indian tax authorities, damages should be computed on that basis.

(vi) The Respondent contends that if pre-award interest is payable on the withheld funds, the amount thereof should be computed from the date when the debt was acknowledged, rather than from the dates specified by the 1964 contract for payment of the withheld amounts. Section 5001(b) of the N.Y. Civil Practice Law and Rules provides that 'interest shall be computed from the earliest ascertainable date the cause of action existed', but this rule is qualified by Section 5001(a), providing that the date from which interest shall be computed is discretionary with the court in the case of actions 'of an equitable nature'. Although neither party cited any New York cases that are directly in point, we conclude that the legal effect of the acknowledgement was to revive the Respondent's obligation to pay the $2,130,785.52 of regular interest on the due dates specified by the 1964 contract, and that interest should run from those dates. In so ruling, we are mindful of the admonition of the New York Court of Appeals, as quoted above, that 'An arbitrator's paramount responsibility is to reach an equitable result' and of the fundamental principle that damages should put the injured party in the same economic position, so far as feasible, that it would have occupied had the contract been performed in accordance with its terms.

(vii) The Respondent also contends that if pre-judgment interest is awarded to the Claimant, the base on which it should be computed is not the full amount of interest withheld ($2,130,785.52), but an unspecified lesser amount. In support of this contention, the Respondent argues that if it had paid the withheld amounts over to the Indian tax authorities and had supplied the Claimant with appropriate tax certificates, the Claimant might not have received dollar for dollar benefits from the resulting federal tax credits. In support of this claim, the Respondent points out that there are two limitations on the use by U.S. taxpayers of the foreign tax credits allowed by Sections 901-908 of the U.S. Internal Revenue Code, namely, (1) the so-called overall limitation imposed by IRC Section 904(a), limiting the credit to the same proportion of the U.S. tax against which the credit is taken that the taxpayer's taxable income from foreign sources bears to its world-wide taxable income for the same year; and (2) a special per-country limit on interest (formerly imposed by IRC Section 904(f), but now contained in Section 904(d)). The latter restriction, however, does not apply to interest derived from transactions directly related to the taxpayer's active conduct of a trade or business in a foreign country.

(viii) The Claimant has furnished affidavits stating that the overall limitation as applied to it during the relevant years would not have prevented it from obtaining a full dollar-for-dollar credit had it received proper tax certificates from the Respondent. These affidavits were buttressed at our London hearing in October 1985 by a summary of the data reported by the Claimant to the Internal Revenue Service on its Forms 1118 for 1970 through 1977, together with a copy of its 1970 Form 1118 (including a detailed 18-page summary of the nature and sources of its foreign income from interest, royalties, service charges, dividends, etc. and a computation of the overall limitation). We have no reason to question the validity of these statements and reports and the Respondent offered nothing to suggest that they are not accurate. The Claimant also represented by affidavit that no U.S. tax auditor had questioned its use of the credits generated by its interest income from the Respondent in computing its credits for the relevant years or asserted that the special limitation imposed by Section 904(f) applied to this interest income. Although the Respondent asserts, to the contrary, that Section 904(f) applies to this type of income, it cited no cases or rulings to this effect; and we see no reason in these circumstances

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to question the decision of the U.S. tax auditors, as represented to us by the Claimant, not to apply Section 904(f) to interest on trade receivables arising in the ordinary course of a U.S. corporation's export sales. In this connection, we note that the relevant U.S. Treasury regulations provide that 'The fact that a taxpayer is considered or not considered for purposes of a section of the Code other than Section 904(f), to be engaged in the active conduct of a trade or business in a foreign country ... may be taken into account, but shall not necessarily be controlling, for purposes of this subparagraph.' U.S. Treas. Regs. Section 1.904-4(b). The Internal Revenue Service's employees evidently interpreted this labyrinthine language to mean that interest income derived from trade receivables arising in the Claimant's export business is not embraced by IRC Section 904(f); and we are hardly in a position to rule that they were wrong.

(ix) Moreover, the Respondent's speculations about the possible effect of these limitations on the Claimant's foreign tax credits assume that the Claimant would have been defenceless if the Indian taxes had in fact threatened to pierce the limits in question. In point of fact, however, the Claimant might well have taken 'defensive' action to insure that the credits could have been used --- for example, by selling or transferring assets, causing subsidiaries to pay dividends, and other actions that are routinely used by American corporations to ensure that the limitations will not adversely affect their ability to get dollar-for-dollar credits for their foreign income taxes. Finally, if measures like these were not feasible, the Claimant might have been able to carry any unused credits over to other years. Thus, even if the Respondent had established that the special Section 904(d) limitation applied as a matter of law to the Claimant's interest income, its contention that this would have deprived the Claimant of a dollar-for-dollar credit for a large portion (or, indeed, any) of the Indian taxes would still have been far from established.

(x) In this connection, we note that on 22 April 1985 the Respondent requested the Claimant to supply certain additional information relating to its foreign tax credits, and that this letter was followed by later communications by letter and telex, which in turn led us to set this matter down for argument at the beginning of our London hearings in October 1985. The Claimant supplied substantial additional data at that time; and in the Respondent's absence, we had no basis for determining whether this material would have been deemed adequate by the Respondent or whether we would have ordered the Claimant to supply more data had the Respondent so requested.

(xi) We reject, therefore, the Respondent's submission that the Claimant has failed to establish that it would have benefitted dollar-for-dollar from the foreign tax credits that it could have claimed had the Respondent paid the disputed amounts over to the Indian tax authorities and supplied the Claimant with the appropriate tax certificates.

(xii) In order to compensate the Claimant fully for the Respondent's wrongful withholding of the $2,130,785.52 of regular interest, we award compensatory damages computed by applying the average prime rate to the amounts withheld. In view of our findings on Issue 22(g), set out in Paragraph 36, we have considered allowing interest from the due dates of the various notes; but the interest claimed by General Electric in the Terms of Reference is computed from the later dates set out in a detailed computation supplied to us by General Electric (entitled 'Statement Showing Computation of Compensatory Damages Interest Receivable from Renusagar Power Company Ltd. up to 31 March 1982 on Unpaid Regular Interest Still Withheld by Them Amounting to U.S. $2,130,725.52') Since GE has accepted these later dates in its submission to us, we award compensatory damages computed by applying

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VOL. 8, #11, 11/93 - #05-931122-103

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he average prime rate to the amounts withheld, commencing ith the dates listed in the statement and compounded annually ommencing with the last day of the calendar year for each mount. For example, if interest of $1,000 was due on 30 June 974, and the average prime rate for the 6-month period ommencing on 1 July 1974 was 12%, the compensatory damages wing as of 31 December 1974 would be $60 (ie, $1,000 at 2% for 6 months); and if the average prime rate for 1975 as 10%, the damages owing at the end of 1975 would be $106 $1,060 at 10% for 12 months); and so on to the date of his award.

(xiii) Compounding is essential in computing compensatory damages, because the Claimant would have had to pay compound interest if it had replaced the improperly withheld funds by

borrowing. Since the prime rate is applicable only to short-term loans, the Claimant would have had to borrow enough at each renewal date to pay not only the original amount borrowed, but also the interest thereon; thus, the current interest would be capitalized at the end of each loan period. Conversely, had the Respondent paid the withheld amounts either to the Claimant or to the Indian tax authorities, the Claimant could have deposited the amounts in question (whether received in cash or in the form of dollar for dollar tax reductions attributable to the foreign tax credits) in a bank, where the deposits would have been credited with interest compounded periodically. Moreover, in either case, interest would have been compounded under current U.S. banking practices much more frequently than annually; indeed, many U.S. banks credit deposits with interest compounded daily. The Claimant, however, has not proposed that interest be compounded more frequently than annually, and our award is similarly restricted.

(xiv) The Respondent offers two interrelated objections to any award of 'interest on interest' or of compound interest. In its broader form, the objection relates to the award of any interest on the $2,130,785.52 of withheld regular interest (and, as explained below in our findings on Issue 22(1), on the delinquent interest of $784,151.84 on late payments of principal). Because the underlying amount owing by the Respondent to the Claimant consists of interest (on the deferred purchase price of the equipment covered by the 1964 Contract), the Respondent contends that an award of interest on this amount --- even as compensatory damages --- would violate an asserted New York public policy against 'interest on interest.'

(xv) There are, indeed, many New York cases holding that contractual agreements to pay 'interest on interest', if made before the interest has accrued, violate public policy and are unenforceable; but we are concerned with a fundamentally different question --- the power of this tribunal, after a breach of contract has occurred, to award compensatory

VOL. 8, #11, 11/93 - #05-931122-103

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damages for a failure to pay interest on time. In this connection, we note that Section 5001(a) of the New York Civil Practice Law and Rules makes it mandatory for a court to award interest 'upon a sum awarded because of a breach of performance of a contract' at the statutory rate unless the action is 'of an equitable nature', in which case the rate is discretionary with the court. We can find no authority or reason requiring, or even permitting, this language to be construed and applied as though it read:

> Interest shall be recovered upon a sum awarded because of a breach of performance contract, unless the breach consists of a failure to pay interest.

After an extended analysis of the relevant cases, the New York Court of Claims concluded in City of New York v. State of New York, 408 N.Y.S. 2d 702, 707 (1978), that:

> The foregoing authorities indicate that 'interest upon interest' is not against public policy and may indeed be necessary to effectuate a just result (emphasis added).

The Respondent contends that this is dictum and that the court's reading of the prior cases is faulty, but we are loath to reject an analysis of New York law by an experienced New York court, particularly since the court's conclusion is consistent with the language of Section 5001(a) and with the fundamental principle that damages should place the injured party in the same economic position it would have occupied had the contract been duly performed. We conclude, therefore, that we can properly award compensatory damages in the form of pre-award interest on the $2,130,785.52 of regular interest withheld by the Respondent.

(vi) We also reject the Respondent's second, more restricted, 'interest on interest' contention, namely, that it would violate New York's public policy to award compound interest as compensatory damages. This contention, like the broader contention rejected by us in the preceding paragraph, rests on the familiar --- but inapposite --- body of New York law relating to agreements by debtors to pay compound

interest on borrowed funds. See Household Finance Corp. v. Goldring, 33 N.Y.S. 2d 514 (App. Div., 1st Dept., 1942):

> We think that the term 'compound interest', as it is commonly understood, applies to an agreement whereby interest thereafter to accrue automatically bears interest. Such agreements the law has refused to countenance principally for the reason that an improvident debtor is not likely to realize the extent to which the interest will accumulate. Though the term 'compound interest' may apply in certain other circumstances, we think that it does not apply where the interest has already fallen due and has become a debt which, like any other debt, may either be paid in cash or reloaned to the debtor under a new agreement that it shall bear interest.

We are not concerned with a contract to pay compound interest, but with the propriety of compounding interest in fashioning a remedy for a breach of contract, in order to put the injured party in the same economic position it would have occupied if the contract had been duly performed. Almost a century ago, interest was compounded in computing damages in Matter of Kernochan, 104 N.Y. 618 (1887), involving a testator who had received funds from the plaintiff 'for the purpose of investment and reinvestment, but mingled them with his own funds' and used them 'for his own convenience.' Although the testator may have been acting as a trustee for the plaintiff, the court does not say so; and the author of an article cited with approval by the Respondent observes that 'The reinvestment with which the court was concerned is not significantly different from a default on an interest payment where the debtor knew that the defaulted interest would be reinvested.' See Commercial Contracts Without Contractual Recourse: The Interest on Interest Rule in New York, 40 N.Y.U. Law Rev. 1159, 1170 (1965). The Respondent's description of Matter of Kernochan (in its Pre-Hearing Statement of 15 May 1985, p. 48, n. 30) as involving 'a breach of an express fiduciary duty' is not supported by the opinion, which does not characterize the relationship between

Page 14 of 94 India

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VOL. 8, #11, 11/93 - #05-931122-103

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the testator and plaintiff beyond the bare recital that 'the testator had the principal moneys in hand for the purpose of investment and reinvestment'. for all that appears, the testator may have been acting as the plaintiff's agent, or in some other non fiduciary capacity.

(xvii) Turning from the distant past to the present, the Respondent has not cited, nor has our independent research unearthed, any New York case holding that interest awarded as damages for breach of contract cannot be compounded; or that the discretionary authority granted by Section 5001(a) to fix the 'rate' of interest in actions of an equitable nature' does not encompass compound interest if the court deems it more appropriate than simple interest. In this connection, we note that for any period of time, a rate of simple interest can be converted into an equivalent rate of compound interest, and vice versa. For example, if A wrongfully fails to pay $1,000 to B on 1 January 1975 and a court enters judgment on 1 January 1985 ordering A to pay B the principal amount of $1,000 plus $1,600 of pre-judgement interest as compensatory damages, the latter amount can be described with equal accuracy as 16% simple interest per year or as about 10.03% compounded annually. Moreover, if an arbitrator awarded damages of $1,600 on these facts without explaining how the amount was computed (as he would be entitled to do), it would be impossible to determine whether the rate employed was 16% per year simple interest or 10.03% per year compounded annually. Finally, in China Union Lines, Ltd. v. American Marine Underwriters, Inc., 755 F.2d 26 (2d Circ. 1985), the U.S. Court of Appeals for the Second Circuit (with jurisdiction over New York, Connecticut, and Vermont) upheld a judgment of the United States District Court for the Southern District of New York that compounded pre-judgment interest annually for a 9-year period in fixing damages in a marine insurance case. One judge dissented, pointing out that interest was compounded even though the injured parties 'did not lose the use of the principal sums', but he did not suggest that compounding interest is not an appropriate or even a normal remedy for a wrongful deprivation of the use of

funds. To be sure, the case was governed by federal rather than New York law, but we have no reason to suppose that New York law is any stricter than federal law as respects a court's power to compound interest when computing damages for breach of contract; and the dissenting judge did not refer to any public policy against compounding interest in this situation.

Moreover, the China Union Lines case involved an admiralty matter, and federal admiralty courts apply 'equitable principles' to matters within their jurisdiction (see Gilmore & Black, The Law of Admiralty, 2d ed., 1975, pp. 41)., This suggests that the compounding of interest is equally appropriate in actions of an equitable nature' within the meaning of Section 5001(a) of the New York Civil Practice Act and Rules.

(xviii) We reject, therefore, the Respondent's submission that the compounding of interest in the circumstances of this case would violate the public policy of the state of New York.

41. Issue 2(i): 'Was the Respondent liable to the Claimant for the payment of U.S.$784,151.84 or any sum by way of delinquent interest on late payments of principal to the Claimant?'

(i) The Claimant claims the amount of $784,151.84 as 'delinquent interest', computed at the tax-exempt 6% rate, on late payments of principal. Under the 1964 Contract, the notes evidencing the Respondent's obligation to pay the purchase price 'shall bear interest, at the rate of 6.5% per annum on the outstanding principal balance', subject to the agreed reduction to 6% commencing with the date when tax exemption, if granted, is made effective. The model promissory note set out in Exhibit B to the Contract provides, in conventional form, that the Respondent will pay the principal sum of 'interest thereon from -------

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semiannually at the rate of percent [illegible] <u>until paid</u> (emphasis added)'. There is, in short, no difference between the Respondent's obligation to pay the so called 'regular interest' involved in Issue 22(g) and its obligation to pay the so-called 'delinquent interest' involved in Issue 22(i), except that the latter became due and payable only if the principal sum specified in the promissory note was not paid on the due date thereof.

(ii) The Respondent argues that the due dates of the payments as specified by the contract and the promissory notes were extended by agreement and/or that prompt payment was waived by the Claimant; but the evidence does not support these contentions. The rescheduling negotiations on which the Respondent relies never resulted in an effective agreement, and there is no evidence of a waiver by the Claimant of its right to be paid on the original due dates when the rescheduling plan collapsed. To the contrary, the Claimant asserted and the Respondent acknowledged that the Respondent was liable for interest on its late payments of principal in a telex dated 25 March 1976 --- long after the rescheduling proposal was abandoned.

(iii) We therefore find that, following late payments of principal to the Claimant, the Respondent became liable to the Claimant for the payment of delinquent interest.

42. Issue 22(m) '<u>... is the Claimant's claim in respect of the said (delinquent) sum or any part thereof barred by the statute of limitation?</u>'

(i) We reject the Respondent's submission that the Claimant's claim for interest on late payments of principal is barred by the statute of limitation because the claim was acknowledged by the Respondent within the applicable 6-year period preceding the commencement of this arbitration proceeding.

(ii) On 4 March 1976, the Claimant wrote to the Respondent with a copy to the United Commercial Bank, enclosing an invoice dated 18 February 1976, stating that 'the amount of delinquent interest due at February 18, 1976 is $849,476.16.' The invoice, which was accompanied by a detailed computation, shows that this amount was computed at the 6.5% taxable rate. On 25 March 1976 the Respondent sent a telex to Mr W R Strothotte, Vice President, ICC Metals, requesting him to convey 'the following message to Shri KS Bapna.' The message (described as "Revised Position of I.G.E. Account") included 'Delinquent Interest' in the amount of $848,010.52 (gross) under the heading 'Payables', against which were set off 'Receivables' aggregating $316,610.00.

(iii) The Respondent argued before us that this message was sent for internal purposes only, was not intended to be conveyed by Mr Bapna to the Claimant, and was not an acknowledgement of any liability for the delinquent interest. We reject these contentions. The evidence before us clearly establishes that Mr Bapna was often used as an intermediary by the Respondent in its relations with the Claimant; the telex was sent shortly after the Claimant's letter of 4 March 1976, which asked the Respondent to 'acknowledge receipt of this invoice and supporting details'; and it was actually received by the Claimant. We can find no plausible explanation for the telex except that it was a response to the Claimant's request in its 4 March letter, and that it was intended to acknowledge that delinquent interest was owing, but in an amount slightly less than claimed by the Claimant, and subject to the offsets discussed by us below.

(iv) We note that the Indian Supreme Court also described the telex as an acknowledgement by the Respondent, and it is also worth noting that the Court refused to alter its characterization of the telex even after the Respondent explicitly raised this issue in an 'Application for Clarification'. Moreover, the Respondent did not assert or even suggest in this application to the court that the telex

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was intended for internal purposes only, rather than for transmission by Mr Rajna to the Claimant.

(v) Not unnaturally, both the Claimant in its 1976 invoice and the Respondent in its telex computed the amount owing at the taxable rate of 6.5%, because its tax status was then still in litigation. The Claimant, however, concedes that the amount owing should be reduced to $784,151.85 to reflect the 6% tax exempt rate in the light of the 1981 decision of the Delhi High Court. To take account of the discrepancy of $465.64 between the amount claimed in the Claimant's invoice and the amount acknowledged as owing in the Respondent's telex, we reduce the recomputed amount of $784,151.84 by $465.64 to $783,686.20.

(vi) The Respondent argues that if the telex is viewed as an acknowledgement, it should be construed to acknowledge a debt to the Claimant of no more than $224,987.79, because the telex deducted Indian income tax of $624,022.73 (at the rate of 73.5%) from the gross amount of $849,010.52, and showed a balance owing to the Claimant of $224,987.79. This construction of the telex is unacceptable. The clear intent of the computation was to acknowledge that the delinquent interest amounted to $849,010.52, of which $624,022.73 would be payable to the Indian tax authorities to satisfy the Claimant's putative tax obligation if the taxable 6.5% rate applied, leaving only $224,987.79 to be remitted in cash to the Claimant.

(vii) Next, we note the Respondent's contention that the 'receivables' listed in the telex, aggregating $316,610, must be offset against the delinquent interest, whether the amounts were actually owing by the Claimant or not. We accept this contention and find that the net amount acknowledged by the Respondent as owing with respect to delinquent interest was $467,076.20 ($783,686.20 as computed above, less $316,610).

(viii) Finally, we turn to the Respondent's contention that

even if the statute of limitations was tolled by the telex of 23 March 1976, the amount of the Claimant's claim is nevertheless barred because this proceeding was not begun within the 4-year period prescribed by Section 2-725(1) of New York's version of the Uniform Commercial Code. If, however, the applicable period is the 6-year period prescribed by New York prior to 27 September 1964, when the UCC became effective, this proceeding (commenced by the Claimant's Request for Arbitration, dated 2 March 1982), was timely. We must decide, therefore, whether the pre-UCC 6 year period applies, or the 4-year period prescribed by Section 2-725(1).

(ix) The 4-year statute of limitations prescribed by Section 2-725(1) is subject to two transitional exemptions: first, Section 2-725(4), which provides that Section 725 does not 'apply to causes of action which have accrued before this Act becomes effective' (ie, 27 September 1964); second, Section 13-102(2), relating to 'transactions validly entered into before the effective date ... and the rights, duties and interests flowing from them.' The second of these two qualifications on the 4-year statute of limitations clearly applies to the facts before us. The underlying agreement was dated 24 August 1964 and it imposed, as of that date, substantial duties on both parties, including (1) an obligation on the Respondent to use its best efforts to obtain the approvals and commitments specified by Art. XVII-A and to bear all expenses incurred in doing so; (2) an obligation on the Claimant at its own expense to 'provide such reasonable and timely assistance' to this end as might be requested by the Respondent; and (3) an obligation on both parties to 'endeavour to agree upon appropriate and mutually acceptable modifications' of the contract if the approval referred to in Art. XVIII-A was made conditional on such modifications. Moreover, disputes arising out of alleged failures to comply with these obligations would have been subject to arbitration under Art. XVII.

(x) In our opinion, therefore, the Respondent's claim

VOL. 8, #11, 11/93 - #05-931122-103

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that there was no 'transaction' within the meaning of Section 13-102(2) until the 'Contract Effective Date' is without merit. If after signing the contract the Claimant had attempted to rescind or withdraw, its action would undoubtedly have been a breach of contract. Of what contract? Obviously, a breach of the contract of 24 August 1964. Indeed, even if the contract had been nothing more than a naked option until 31 December 1964, it would still have been a 'transaction validly entered into' before 27 September 1964. This construction of Section 13-102(2) not only is required by its language, but also carries out its remedial function, viz., to protect settled expectations from being undermined by a subsequently enacted statute. Once the Claimant signed the contract, it was committed, as just stated, and could not withdraw without breaching the contract. Thus, the contract was a 'transaction validly entered into' before the enactment of the Uniform Commercial Code, whether the approvals and commitments required by Art. XVII-A are characterized as 'conditions precedent' to the Claimant's obligation to manufacture the equipment or as 'conditions subsequent' the denial of which would negate that manufacturing obligation.

(xi) Our conclusion that the contract was a 'transaction' as of its date (24 August 1964) is no way undermined by the fact that it specified a later date --- the 'Contract Effective Date' --- in fixing the time allowed for such purposes as delivery and payment. When executing the contract, the parties could not know if or when the necessary approvals and commitments would be forthcoming, so it is quite understandable that they needed a secondary date, related to the fulfillment of these conditions, to start the time running for delivery and payment. As stated above, however, the contract imposed very important obligations on both parties before the Contract Effective Date, and it was therefore a 'transaction' that was 'validly entered into' within the meaning of Section 13-102(2) before 27 September 1964, when the UCC became effective in New York.

(xii) In addition to arguing that the 1964 contract was not a 'transaction' entered into before the Contract Effective Date (the contention we have just rejected), the Respondent makes a much broader contention, viz., that the pre-UCC 6 year statute of limitations does not apply because the Claimant's cause of action did not 'accrue' before 27 September 1964. In making this argument, the Respondent relies on Section 2-725(4), which preserves the 6-year statute for causes of action that accrued before the UCC was enacted in New York; but this provision does not support the Respondent's contention, since it does not purport to be the exclusive escape hatch from the 4 year period specified by the UCC. In effect, the Respondent asks us to construe Section 2-724(4) as though it provided that the 4-year period 'applies to all situations except causes of action which have accrued before this Act becomes effective' (emphasis supplied). To construe Section 2-725(4) in this way, we would have to disregard Section 13-102(2). There is obviously some overlap between the two provisions, but we cannot construe either one as exclusive.

(xiii) We note that in Great Atlantic & Pacific Tea Co. v. Rust Engineering Co., 349 N.Y.S. 2d 243 (Supreme Court, Chemung County), 1973), which applied the 6-year pre-UCC statute of limitations to a suit for breach of warranty, where the purchase order was dated 18 August 1964, the court held that Section 10-102(2) (which was renumbered as Section 13-102(2) of current law) controlled because the transaction was entered into before the UCC became effective. The court rejected the defendant's motion to dismiss 'so much of plaintiff's fourth cause of action as is based on breach of warranty on the ground that it was not commenced within four years after the cause of action accrued pursuant to Section 2-725 of the Uniform Commercial Code.' The contention rejected by the court is precisely the one that the Respondent makes here; and we follow the Great Atlantic & Pacific Tea Co., case in rejecting it.

VOL. 8, #11, 11/93 - #05-931122-10

Page 18 of 94 India

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43 Issue 22(n) 'Is the [delinquent] sum owed to the Claimant in U.S. dollars or in Indian rupees at the rate of exchange when withheld?'

In ruling on Issue 22(l), relating to regular interest payable by the Respondent to the Claimant, we held that the amount was payable at all times in dollars, regardless of fluctuations in the rupee/dollar exchange rate; and we now hold that the same is true of the 'delinquent' interest due on account of late payments of principal. Indeed, the Respondent itself recognised in the 25 March 1976 telex that the amount was owing in dollars.

44. Issue 22(o) 'Did the Respondent withhold and retain the delinquent interest ... as stakeholder and/or constructive trustee?'

Because of the way we decide Issue 22(p), a decision on 22(o) would have no effect on our award, and we therefore treat it as moot.

45. Issue 22(p) 'Are compensatory damages payable by the Respondent to the Claimant for the withholding and retention of ... delinquent interest? If so, in what sum?'

(i) Had the Respondent paid the interest owing on late payments of principal on the respective due dates thereof --- ie. on the dates when the principal amounts were paid --- the Claimant would have been able to invest and reinvest these amounts commencing on their respective due dates. Conversely, the Claimant could have put itself in the same position by borrowing the amounts of unpaid delinquent interest, in which event it would have had to pay interest to the lender on these amounts at the prime rate. In our

opinion, therefore, an equitable resolution of this matter requires an award of compensatory damages to the Claimant computed by applying the prime rate to the unpaid amounts of delinquent interest (adjusted as explained below) from their respective due dates, in the same manner that damages are to be computed on the unpaid amounts of regular interest --- ie. at the prime rate from the due date of each adjusted amount to the end of the year in which it fell due, and at the prime rate compounded annually thereafter. In making this computation, however, the interest due must be adjusted downward because the Respondent's 1976 acknowledgement was limited as explained above in our discussion of Issue 22(m). Since the Respondent acknowledged liability for only 59.6% of the interest actually due (ie, on $467,876/$783,686 - 59.6%), the Claimant's compensatory damages should be computed similarly, as 59.6% of the amount that would be due if the entire amount of US$783,686 had been acknowledged to be owing.

(ii) We have considered whether the damages in the form of interest running in the Claimant's favour should be reduced by damages in the Respondent's favour on its offsets of $316,500, and we have concluded that no basis has been established for such an adjustment. Unlike these offsets, the Claimant's claim for interest on the Respondent's late payments of principal was clearly shown to be a valid claim at the outset. The running of the statute of limitations merely barred the Claimant's remedy for the Respondent's breach, without eradicating the Claimant's rights; hence the acknowledgement did not create new rights, but rather removed a barrier to enforcement of the Claimant's rights as they originally existed. By contrast, there has been no showing that the amount claimed as offsets by the Respondent were ever actually owing to it. To be sure, we have allowed them as offsets, but that is because the acknowledgement was so limited, whether the claims were valid or not; and we have no independent evidence sufficient to establish that they were in fact valid.

Thus, the first two of the five offsets (liquidated damages, $132,500; man-months, $35,000) were accepted

VOL. 8, #11, 11/93 - #05-931122-103

India

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provisionally by the Claimant as a part of a proposed settlement with the Respondent, but the settlement did not materialize; and the record before us does not show that these amounts were actually owing by the Claimant to the Respondent. The third offset is for $26,110 of duplicate customs duties; as pointed out in our discussion below of Issues 22(aa) and 22(bb), Item 9, there is no evidence that the Claimant ever agreed to pay, or was otherwise liable for, these duties. The fourth offset listed in the Respondent's 'Details of Various Claims for Guest House and Stores Issues', is the aggregate amount of $13,000, but this compilation is not supported by evidence establishing that the Claimant was actually obligated to defray these expenses. Finally, evidence establishing the Claimant's liability for the fifth offset (duplicate ID fan, $110,000) is similarly lacking; although it was included in the proposed settlement, the arrangement fell through.

46. Issue 22(q) 'Is the Claimant's claim of US$119,053.31 for alleged purchase price of spare parts barred by the statute of limitations?'

(i) In our 'Findings and Determination On Preliminary Issues of Arbitrability', dated 11 December 1984, we reserved judgment on the question whether this claim fell within the purview of Art. XVII of the 1964 contract, because at that time we were not sure whether the spare parts in question were furnished pursuant to the 1964 contract or under some other arrangement between the parties. The Respondent concedes (Pre-Hearing Summary and Statement, undated but received by us in February 1985, p 22) that the spare parts in question 'were sold to Renusagar during the contract period and under the terms of the contract.' More specifically, they were supplied pursuant to an amendment to the 1964 contract dated 1 October 1968, which carries forward the arbitration provision by providing that all terms and conditions of the 1964 contract remain in full force and

effect, except as provided by the 1968 amendment or any other duly executed amendment.

(ii) This claim was acknowledged as payable by the Respondent's 25 March 1976 telex and, for the reasons set out in our discussion of Issue 22(m), it is accordingly not barred by the statute of limitations.

47. Issue 22(r) 'Is the claim owing?'

The Respondent offers no defence on the merits to this claim, and we find that the amount claimed, $119,053, is owing by the Respondent to the Claimant, as acknowledged by the telex of 25 March 1976.

48. Issue 22(s) 'Are compensatory delay damages payable? If so, in what amounts?'

Having been deprived of the use of the amount owing, the Claimant is entitled to compensatory damages for the Respondent's failure to pay for the spare parts, computed in the same manner as the damages for the Respondent's failure to pay the regular interest, as determined in our discussion of Issue 22(k). In the absence of evidence allocating the amount to be paid for the spare parts among the notes listed in the 1968 amendment to the 1964 contract, we award interest computed from the due date of the last note in the series (Dec. 31, 1974), at the prime rate compounded annually thereafter.

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49. Issue 22(t) 'Is the Claimant's claim/counterclaim of US$103,500 for alleged repairs to the 75 MVA transformer barred by the statute of limitations?'

(i) We reserved judgment in 1984 on whether this 'claim.counterclaim' by the Claimant for $103,500 is subject to the arbitration provision of the 1964 contract, because the bare description of the item in the Terms of Reference did not clearly indicate that the repairs were performed pursuant to that contract. On the evidence now before us, however, it is clear that the claim.counterclaim is encompassed by the 1964 arbitration provision, and we so find.

(ii) Although described as 'the Claimant's claim.counterclaim' in Issue 22(t) of the Terms of Reference, this item was described by the Claimant as a 'counterclaim' in its amended Rejoinder and Reply to Counter-Claims, dated 23 September 1983 (p 101). In any event, it is barred by the statute of limitations, except to the extent that it qualifies (as a so-called plaintiff's counterclaim) as an offset against the Respondent's counterclaims against the Claimant. So viewed, it fails because, as explained below in our findings on Issues 22 (aa) and 22(bb), we reject the counterclaims against which this claim could otherwise be applied as an offset.

50. Issues 22(u) and 22(v) 'Amount owing in respect of Issue 22(t) and compensatory damages thereon'

These issues are disposed of by our ruling on Issue 22(t).

51. Issue 22(w), 22(x), 22(y) and 22(z) 'The Claimant's claim for delinquent interest on late payments of regular interest'

(i) These issues concern the Claimant's claim for $358,778.91 as delinquent interest on delayed payments by the Respondent of regular interest, plus compensatory damages thereon. The Claimant has stated that it is 'prepared to withdraw' this claim (Claimant's Pre Hearing Submission with respect to October 1985 London Hearings, dated 12 August 1985, p 16), provided we award pre-judgment interest based on the so-called due date standard for the Respondent's failure to pay regular interest and interest on late payments of principal (Issues 22(k) and 22(p) respectively).

(ii) Consistently with our determination with respect to the Respondent's purported withdrawal of certain counterclaims, as explained in our ruling on 1 October 1985, we reject the Claimant's offer to withdraw the claim set out in Issues 22(w) through 22(z), since the Terms of Reference cannot be amended by one party and the other party is entitled to a determination by us despite a purported unilateral withdrawal of the claim in question.

(iii) Although described as a 'claim' in the Terms of Reference, the amount claimed by the Claimant as interest on late payments of regular interest is described as a counterclaim in the Claimant's letter of 18 November 1983 (which 'further amends its Amended Rejoinder and Reply of September 23, 1983, by adding a counterclaim'), which is presented as an 'offset' to the Respondent's counterclaims. Since we reject the Respondent's conterclaims, the Claimant's counterclaim is also rejected and is clearly barred by the statute of limitations.

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52. Issues 22(aa) and 22(bb) The Respondent's Counterclaims

(i) We turn now to the Respondent's counterclaims, which are set out in Paragraph 19(q) of the Terms of Reference.

As explained in the tribunal's ruling (Dr Dixit dissenting) on the Respondent's submission that the arbitration is functus officio, we reject the Respondent's purported withdrawal of the counterclaims designated below as Items 2-6 and 8, for the reasons set out in that ruling; and we proceed at this time to rule on all counterclaims set out in the Terms of Reference.

(ii) Item 1 5 claims aggregating $316,610 These claims (described in the Terms of Reference as listed in the 'March 25, 1975 Statement of Account,' which presumably was intended to refer to the Respondent's telex of 25 March 1976) have been allowed by us as offsets against the Respondent's liability to the Claimant in our decision on Isse 22(1). We therefore reject this counterclaim in order to avoid an unwarranted duplication of the same items and because, as we explain in Paragraph 45(ii) hereof, there is no evidence before us that the amount claimed as offsets by the Respondent were ever actually owing to it.

(iii) Item 2 'Damages for nondelivery of ID fans ($2,530,732)' This item, as described in Exhibit F of the Respondent's Reply of 9 June 1983 (p 70), consists of a 'revenue loss' of US$2,530,732 because of frequent forced shut downs due to ID Fans of less capacity supplied by G.E.C.

The claim is barred by Art. XII-B of the 1964 contract, in which the Claimant disclaims liability for 'any special or consequential damages including, but not limited to, damages for loss of revenue...' Art. XII-B does not apply to the liquidated damages provisions of Arts. IV-B and X-B, but the Respondent did not establish the conditions that bring these exceptions into force, nor did it make a claim for liquidated damages.

(iv) Item 3 'Repairs to Unit Auxiliary Transformer ($6,908)' The events giving rise to this item, which is computed in Exhibit D of the Respondent's Reply of 9 June 1983 and referred to in the Jain statement, occurred in 1968.

In brief the Respondent claims that the Unit Auxiliary Transformer of the Unit No 2 of the power plant at Renusagar developed a fault on the 1 July 1968. On inspection the Respondent further claims that the fault was due to a manufacturing defect and that at a meet held on the 10 December 1968 the Claimant accepted liability.

In written submissions to us the Claimant denied that liability had been acknowledged and pointed out that in the Memorandum of the 10 December 1968 meeting it was stated that this claim, along with other items, 'will now be handled by IGE (International General Electric) as warranty matters and IGE will report to Renupower as soon as possible on the status of these items and make sure that all matters relating to these items are concluded in the shortest possible time.' The Claimant submitted that the statement solely indicated a promise to investigate this claim to see whether there had been a breach of product warranty by the Claimant and did not amount to an acceptance of liability and that no evidence had been produced to show any acknowledgement thereafter.

At our meeting in London on the 3 October 1985 the Claimant did not contest the merits of this counterclaim but based its defence solely on the statute of limitations and laches.

The statute of limitations clearly applies since there is no evidence before us of any acknowledgement or other event during the six year period preceeding the commencement of this arbitration that tolled the statute or otherwise revived the claim. If however we were to accept this counterclaim on its merits as a valid claim in 1968 the fact that it is now stale does not prevent it from being revived by New York CPLR Section 203(c) as it is a counterclaim clearly arising from the same transactions or

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VOL. 8, #11, 11/93 - #05-931122-103

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series of transactions upon which the Claimant's claim is asserted.

We cannot however accept this claim on merits for, apart from the written statements by Jain and Taparia and the Memorandum of the 10 December 1968, the only relevant matter presented to us by the Respondent is contained in the letter to us of 23 July 1985 (sent by Khaitan and Partners on 'behalf of and on instructions from' the Respondent) informing us that this claim was abandoned and withdrawn.

This counterclaim is therefore rejected.

(v) Item 4 'Non-Delivery of Heavy Fuel Oil Supply System Equipment ($949,396)' This claim, as computed in Exhibit E of the Respondent's Reply of 9 June 1983 (p 69), is based on the extra cost to the Respondent of using HSD oil instead of bunker oil in operating the oil burners to start the power plant boilers.

The correspondence between the Respondent and the Claimant relating to this equipment shows that the Respondent cancelled its order for the heavy fuel oil supply system because it was refused an import license. In any event, liability is barred by Art.XII-B, disclaiming liability for special or consequential damages, including 'costs incurred in connection with substitute facilities or supply sources.'

This counterclaim is therefore rejected.

(vi) Item 5 'Half of costs and fees in Delhi litigation ($81,550)' No evidence has shown that the Claimant ever agreed to pay any part of these costs and fees; and it has no liability in quasi-contract because the primary if not the sole purpose of the litigation was to achieve a reduction of the interest rate from 6.5% to 6%, which redounded to the benefit of the Respondent since, as the Claimant has established to our satisfaction, any Indian taxes on the interest income could have been credited dollar-for-dollar against its US income taxes.

This counterclaim is also rejected.

(vi) Item 6 Costs of maintaining UCO bank guaranty ($306,264) These costs, as set out in Exhibit G of the Respondent's Reply of 9 June 1983 (p 71), were the Respondent's own liability under Art.III-A, Paragraph 3(e) of the 1964 contract. There was no showing that the Claimant acted improperly in refusing to release the original guarantee in exchange for a guarantee by Hindalco of the rescheduled notes, since the rescheduling was not approved by the Reserve Bank of India.

We also reject this counterclaim.

(vii) Item 7 'Damages incurred by defective 75 MVA transformer ($3,441,049)' This claim is detailed in Exhibit A of the Respondent's Reply of 9 June 1983 (p 65) and is discussed in the Jain and Taparia statements which were put before us.

A memorandum of discussions on 10 December 1968 between IGE and Renupower states that 'The problem regarding Item No 1 - the 75 MVA Transformer - will be referred to arbitration. Selection of arbitrators and cost of arbitration will be mutually agreed upon.' Kuljian Corp. was selected as arbitrator, but later withdrew by letter dated 1 October 1970. Since neither party claims that it or the other party has made any effort since 1970 to revive the ad hoc arbitration agreed upon during the 10 December 1968 meeting, it is our opinion that both parties have abandoned

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all claims arising from the malfunctions of the 75 MVA transformer. In this connection, we note that the Claimant's claim for the cost of repairs at the time of the 1968 agreement amounted to $103,500 while the Respondent's claim against the Claimant amounted at that time to only $65,620.

Because $3,375,429 of the Respondent's claim as now computed was not explicitly refered to in the documents relating to the 1968 arbitration agreement, however, we are loath to rest our decision solely on the procedural ground set out above. We turn, therefore, to the merits of this part of the claim, which is for the Respondent's 'revenue loss' because of the malfunctioning of the transformer -- a species of consequential damages for which the Claimant explicitly disclaimed liability by Art.XII-B of the 1964 contract. This disclaimer does not apply to the liquidated damages specified by Art.X-B, but the Respondent does not rest its claim on this exception, which in any event bases the amount of liquidated damages on the percentage 'drop in boiler efficiency' or 'increase in the turbine cycle heat rate' --- matters as to which the Respondent offered no evidence whatsoever. Hence, even if the liquidated damages provision of Art. X-B applied, we have no basis for computing the amount of the liquidated damages owing.

The Respondent's argument that the disclaimer-of-liability provision is 'unconscionable' in what it describes as 'the special circumstances of this grievous breach' is unpersuasive. Disclaimers of liability for consequential damages, as the Respondent itself acknowledges, are not by themselves objectionable as between experienced commercial companies (under either the Uniform Commercial Code or prior New York law); and the 1964 contract provides reasonable alternative liability provisions in the form of liquidated damages for delays in delivery and for failures to meet the guaranteed performance standards. Thus, the Respondent is driven to rely on cases that actually enforce disclaimer-of-liability provisions against commercially experienced businesses, but that leave room for exceptions if the purposes of the parties are utterly frustrated by a

breach or if bad faith, willful repudiation of a contractual obligation to repair or replace defective equipment, or similar improprieties are established. See, eg. Cayuga Harvester, Inc. v. Allis-Chalmers Corp., 465 N.Y.S. 2d 606 (N.Y. App. Div. 1983) (extensive analysis and review of earlier cases); Chatlos Systems, Inc. v. National Cash Register Corp., 635 F.2d 1081 (3d Cir. 1980); for decision on remand, see 670 F.2d 1304 (3d Cir. 1982), cert. dismissed, 457 US 1112 (1982).

The evidence before us falls far short of fitting into the narrow (and, so far as the New York case law goes, largely hypothetical) escape hatches that are left open to commercial purchasers by these cases. In this connection, we note that the report made to the Respondent by Raji Chopra & Sons, dated 19 October 1967, and supplied to us by the Respondent, states that the transformer 'suffered heavily from water damage at one/or other stage of its journey to the site (as) was evident from "general rusting", found all over and from top to bottom at various parts of the core', that 'there is on record evidence of heavy exposure to water damage to the consignment generally, eg, a report of the Starter No 1 being in knee-deep water, whilst stored in Calcutta Docks, where the whole consignment remained for several months', and that 'the Transformer went through the monsoon, when it was stored for 3 or 4 months at Renukoot, before being brought to site.' In the light of this evidence, we can give no credence to Mr Jain's unsworn 1985 statement that his inspection of the transformer after its arrival at the Renusagar site 'showed no damage or injury whatever,' particularly since on 3 August 1967 --- shortly after the events actually occurred --- he wrote to Mr Belsky, of the IGE Export Division, stating that 'the damage might have taken place either due to a defect in manufacture or due to some internal damage during transit.'

Finally, it should be remembered that, in passing on the validity of the disclaimer-of-liability provision of the 1964 contract, we have no way of knowing whether, if the Respondent had insisted when they were negotiating that the

VOL. 8, #11, 11/93 - #05-931122-103

Page 24 of 94 India

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actually directed to our consideration of this arbitration. In this respect it is obvious that much of the legal research and written submissions on arbitrability by the Claimant's lawyers during the period of the Bombay and Indian Supreme Court proceedings were also required for separate submission to us for use in this arbitration as the final decision on arbitrability rested with us.

(V) The Court of Arbitration at its Session on 23 July 1986, fixed the costs of arbitration (arbitrators' fees, arbitrators' expenses and the administrative expenses) at US$ 315,699. In consequence and in the light of the advances on costs paid by the parties to the Secretariat of the ICC, the Claimant's proportional costs at the Court of Arbitration are US$ 200,899. The Claimant has furnished us with detailed accounts and we are satisfied that its costs directly incurred in these arbitration proceedings (including the US $ 200,899 paid to the Court of Arbitration) can properly be assessed, up to date, at US $ 1,549,899.

54. **AWARD**

ACCORDINGLY WE AWARD THAT THE RESPONDENT SHALL PAY TO THE CLAIMANT:

1. Regular interest wrongfully withheld.	$2,130,785.52
2. Compensatory damages to 31 March 1986 on the above regular interest continuing at the annual rate of 8% on the said regular interest until payment.	6,347,748.50
3. Delinquent interest on late payments of principal.	467,076.20
4. Compensatory damages to 31 March 1986 on the above delinquent interest continuing at the annual rate of 8% on the said delinquent interest until payment	1,324,357.75

5. Spare parts.	119,053.00
6. Compensatory damages to 31 March 1986 on the above spare parts continuing at the annual rate of 8% on the said sum for the spare parts until payment.	276,702.17
7. Towards Claimant's costs	1,549,899.00
Total US$	12,215,622.14

SIGNED AND PUBLISHED by us on the day

of 1986

Paris, 12th September 1986

Pierre Thomas

Chairman of the Arbitration Tribunal

Arbitrator

Arbitrator

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Claimant accept liability for a loss of this type, the Claimant would have either (a) raised the purchase price to cover this risk or (b) refused to enter into the contract. Both are surely realistic possibilities.

We reject, therefore, the Respondent's 'revenue loss' as claimed in Item 7.

In a last ditch effort to salvage this counterclaim, the Respondent argues (Pre-Hearing Summary and Statement, p 47 et seq) that it claims 'Alternatively, at the very minimum' that it is entitled to liquidated damages under Art. IV-B for 'late delivery' of the transformer. The Respondent fails to mention the inconvenient fact that the contract provides for delivery alongside vessel, New York' (Art. IV-A). We have no evidence whatsoever that the transformer was not delivered in New York on time, or that when delivered, it constituted 'non-conforming' goods; and what evidence we do have relating to the failure to perform points overwhelmingly to water damage in transit to the site. The alternative claim, assuming it to be timely, must also be rejected.

(ix) Item 8 'Interest loss on 15,000,000 rupees kept in lien in UCO Bank ($896,000)' This counterclaim, computed in Exhibit H of the Respondent's Reply of 9 June 1983 (p 72), must also be rejected for the same reason as Item 6, namely, that Art. III-A of the 1964 contract requires the Respondent to maintain the UCO guarantee at its own expense.

(x) Item 9 'Further costs due to non-supply and defective supply of various items ($8,758)' This claim appears to be for the difference between the double payment of customs duty as detailed in Exhibit B of the Respondent's Reply of 23 June 1983 (p 66) ($34,868) and the amount offset by the Respondent as 'Customs Claims' in the 25 March 1976 telex ($26,110). The Claimant claims that these duties were the responsibility of GETSCO and, while it cannot maintain this position with respect to the amount set off in the 1976

telex while simultaneously relying on the telex to revive the Respondent's obligation to pay the amount detailed in Issue 22(1), it is not estopped to defend against the residual amount that is not listed in the telex. The Respondent has offered no evidence to establish that the Claimant ever owed this amount to the Respondent.

Moreover, while the inference set out above regarding the nature of this claim seems likely as a matter of arithmetic, nothing was presented to us to establish whether this inference is correct.

This counterclaim, therefore, is denied.

53. Issue 22(cc) 'Costs of the Arbitration'

(i) By reason of our findings it is clear that the Respondent must pay the costs of this Arbitration.

(ii) The Respondent has already put in a deposit of $120,000 towards the administrative expenses and arbitrators' fees fixed by this Court but has refused to pay its full equal share. The Claimant has been required to pay the balance, making its total payment $210,000, and is entitled to full reimbursement of this sum by the Respondent.

(iii) The Respondent must also pay a sum towards the normal legal costs incurred by the Claimant. The legal tactics employed by the Respondent in its conduct of this Arbitration over four years have enormously increased costs out of all proportion to what would normally have been incurred.

(iv) The Claimant has been awarded costs by the Indian Courts in respect of the litigation on arbitrability but we are told that the costs thus awarded are 'merely nominal or token' and do not reflect amounts actually incurred for legal fees. We do not think however that we can award any balance for costs incurred in that litigation unless it be costs

VOL. 8, #11, 11/93 - #05-931122-103

info, icc award

INTERNATIONAL
ARBITRATION REPORT

INTERNATIONAL CHAMBER OF COMMERCE

COURT OF ARBITRATION

CASE No 4367

GENERAL ELECTRIC COMPANY (USA)

and

RENUSAGAR POWER COMPANY LTD.

A R B I T R A T O R S' A W A R D

day of 1986.

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EUROPEAN GAS

General register no.: 92. 13 558

on appeal for annulment
of an arbitration ruling delivered
on 21 March 1992 by the ICC, Paris

Appeal partially rejected

PARIS COURT OF APPEALS

First Chamber, Section C

DECISION DATED 30 SEPTEMBER 1993

PARTIES IN THE MATTER:

1) The firm EUROPEAN GAS TURBINES S.A., French company, located at 38 avenue Kleber, Paris 16th arrondissement, FRANCE,

acting on the rights of ALSTHOM TURBINES A GAZ S.A., following a legal change of name, located at 38 avenue Kleber, Paris 16th arrondissement, FRANCE,

Petitioner in the appeal for annulment
represented by Maitre HUYGHE, solicitor
assisted by Maitre B. MORRAU, attorney

2) The firm WESTMAN INTERNATIONAL LIMITED, English company, located at Great Smith Street, Westminster, London SW1 3BU, GREAT BRITAIN,

Respondent in the appeal for annulment
represented by the firm of VALDELIEVRE GARNIER, solicitors
assisted by Maitre Ph. LETTE, attorney

COMPOSITION OF THE COURT
during hearings and deliberations

Presiding Judge:	Mr. Paul BRISSIER
Conseillers:	Mme Sabine GARBAN Mme A.F. PASCAL
Clerk:	Mme Nicole VERNON
Public Ministry:	Mme Monique BERNARD-CATAT, attorney general, whose observations were noted

HEARING -
in public session on 13 May 1993

DECISION - contradictory
Pronounced publicly by Mr. Paul BRISSIER, Presiding Judge, who signed the minutes of the decision with Mme Nicole VERNON, Clerk

Within the framework of a petrochemical project in Arak, IRAN, the head of which was the Iranian company, National Petrochimical Company (N.P.C.), the French company ALSTHOM TURBINES A GAZ S.A. (ALSTHOM), concluded a contract with the English company WESTMAN INTERNATIONAL LTD. (WESTMAN) on 11 December 1985, the object of which is defined thus:

"The role of WESTMAN will consist of ensuring the promotion of ALSTHOM gas turbines so that ALSTHOM will be specially prequalified for the project.

In case of special prequalification, WESTMAN shall transmit to ALSTHOM the maximum information possible and communicate its suggestions for defense of the bid made by ALSTHOM.

During negotiations, WESTMAN shall furnish ALSTHOM all useful advice to obtain the contract under the best conditions possible.

After signature of the contract, WESTMAN will be asked to furnish ALSTHOM all reasonably expected assistance for the proper execution of the contract."

(The translation of this contract and of the English language documents produced during the hearings, prepared by WESTMAN, received the approval of the Petitioner, EUROPEAN GAS TURBINES S.A., according to a declaration by its solicitor, noted in the register of the session.)

This contract, of three years duration if the "prequalification" was obtained within two years of its execution, foresaw payment of a commission which would "cover expenditures of any type that WESTMAN might make to fulfil its task," and which "would be set by mutual accord before ALSTHOM submitted its bid" (article 4), it being specified that "WESTMAN would have no claim to any sort of recompense" if ALSTHOM "did not receive an order for the project during the period of the contract" (article 6).

Article 6 of this contract stipulates, however, that "in case of prequalification of ALSTHOM for the project within the above-noted period of two years, and if it makes the deal within six months of the expiration of the present accord, ALSTHOM shall pay WESTMAN half of the commission foreseen in article 4 above."

This contract, which specifies that "the applicable law is French law," further includes an arbitration clause worded thus: "any contestation of the present accord will be settled in definitive fashion according to the rules of conciliation and arbitration of the International Chamber of Commerce in Paris, by three arbitrators named according to these rules."

In a letter dated 9 July 1987, N.P.C., head of the project, enquired of ALSTHOM if it was interested in the petrochemical project in Arak, and if yes, to convey all "useful" information to permit "evaluation of your company."

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INTERNATIONAL ARBITRATION REPORT

Vol. 7, #6

June 1992

INDIA HIGH COURT EXERCISES JURISDICTION OVER ICC AWARD

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The India Supreme Court ruled last month that the laws of India and not England should apply to an arbitration conducted in England by the International Chamber of Commerce's International Court of Arbitration. It thereby overturned a holding by the Delhi High Court that the award was not governed by India's Arbitration Act of 1940; that the arbitration agreement on which the award was made was not governed by the law of India; that the award fell within the ambit of the Foreign Awards Act, 1961, and that London, being the seat of arbitration, left English courts with sole jurisdiction to set aside the award (National Thermal Power Corp. v. The Singer Co. & Ors., Civil Appeal 1978 of 1992, India S.C., **Text in Section C; Also, See COMMENTARY by Jan S. Paulsson, Page 18**).

The Supreme Court said in its May 7 opinion, "The Delhi High Court was wrong in treating the award in question as a foreign award. . . .The award is governed by the laws in force in India, including the Arbitration Act, 1940. Accordingly, we set aside the impugned judgment of the Delhi High Court and direct that Court to consider the appellant's application on the merits in regard to which we express no views whatsoever."

The appellant, National Thermal Power Co. (NTPC), asked the Delhi High Court to set aside an interim award made in London by the ICC's International Court of Arbitration on behalf of The Singer Company. Their dispute arose out of two contracts for the supply of equipment and certain construction in India.

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

However, the contracts also contained an arbitration clause which said, "In the event of foreign Contractor, the arbitration shall be conducted by three arbitrators, one each to be nominated by the Owner and the Contractor and the third to be named by the President of the International Chamber of Commerce, Paris. Save as above all Rules of Conciliation and Arbitration of the International Chamber of Commerce shall apply to such arbitrations. The arbitration shall be conducted at such places as the arbitrators may determine."

When the dispute arose, it was referred to the ICC, which chose London to be the place of arbitration.

Contentions

The NTPC, citing various clauses in the contract, contended that the proper law governing it was the law in force in India, and that the competent courts to decide such questions as capacity, validity, effect and interpretation are the Indian courts.

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Singer, on the other hand, submitted that the arbitration agreement was a separate and distinct contract, collateral to the main contract. It said that although the main contract is governed by the laws in force in India, as stated in the General Terms, the arbitration agreement stands apart, and the governing law is that which is in force in the country in which the arbitration was conducted.

Acting As A 'Reasonable Person'

Writing for the court, Justice Dr. T. Kochu Thommen said, "Where the parties have not expressly or impliedly selected the proper law, the courts impute an intention by applying the objective test to determine what the parties would have as just and reasonable persons intended as regards the applicable law had they applied their minds to the question. The judge has to determine the proper law for the parties in such circumstances by putting himself in the place of a 'reasonable man.' He has to determine the intention of the parties by asking himself 'how a just and reasonable person would have regarded the problem.'

"For this purpose the place where the contract was made, 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 links are examined by the courts to determine the system of law with which the transaction has its closest and most real connection."

The jurist said that 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, "(b)ut that is only a rebutable presumption."

He continued, "On the other hand, where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract."

Justice Thommen concluded, "(T)he 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. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement. . . The proper law of the contract in the present case being expressly stipulated to be the laws in force in India and the exclusive jurisdiction of the courts in Delhi in all matters arising under the contract having been specifically accepted, and the parties not having chosen expressly or by implication a law different from the Indian law in regard to the agreement contained in the arbitration clause, the proper law in regard to the agreement contained in the arbitration clause, the proper law governing the arbitration agreement is indeed the law in force in India. . ."

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The court held that the arbitration agreement may allow the ICC and the London Court of International Arbitration to decide who will arbitrate the case, and where arbitration will be held, but that the proper law of arbitration and the competent courts "are both exclusively Indian."

AMERICAN ARBITRATION ASSN. GRANTS JUDGMENT TO BONDHOLDER

An American Arbitration Association panel recently granted summary judgment to Security Pacific Trade Finance Corp. (SPTF), ruling that its purchase of nearly $7.5 million in bank drafts was as a holder in due course, rather than as a successor in interest. Such a designation, the panel said, meant that the drafts must be honored by the People's Construction Bank of China (PCBC) (The People's Construction Bank of China, Claimant, and Security Pacific Trade Finance, Inc., Respondent-Counterclaimant, Arbitration No. 13 T 199 00665, American Arb. Assn., **Text in Section A**).

PCBC had refused payment of the drafts, contending that SPTF was not a holder in due course as defined in the Uniform Commercial Code, principally because it took the instruments as part of a "bulk transaction not in the regular course of business of the transferor."

The drafts were accepted by PCBC in 1988 to finance the sale of plywood by the drawer, L.K.F. Industries Pte. Ltd. of Singapore. LKF subsequently negotiated the instruments to Kaines (U.K.) Ltd., a U.K. forfeiting and commodities trading company. Four months later, Kaines sold the instruments to SPTF, which held them to maturity and then presented them for collection.

The UCC provides, among other things, that a purchaser in bulk of the assets of an insolvent is not to be considered a holder in due course. Neither are those who purchase or otherwise take in bulk the assets of a prior holder.

PCBC not only contended that SPTF obtained the bonds in a bulk transaction, but argued that Kaines was not a holder in due course because it purchased the instruments in bad faith, having conspired with LKF to secure PCBC's acceptance despite LKF's failure to deliver the promised goods. It argued, instead, that SPTF was a successor in interest to Kaines, and therefore would be barred by the UCC from collecting on the drafts.

SPTF contended that the accepted drafts were negotiable instruments, and that as a holder in due course it took the instruments free of all defenses. Alternatively, it argued that

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INTERNATIONAL ARBITRATION REPORT

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THE NEW YORK CONVENTION'S MISADVENTURES IN INDIA

By Jan Paulsson

(Mr. Paulsson is a partner at the firm of Freshfields, Paris; Vice-President, London Court of International Arbitration; Co-Author, ICC Arbitration [2nd Ed. 1990]. The author has had no involvement in the cases discussed.)

COMMENTARY

In two salient recent cases involving arbitral awards rendered in London, the courts of India have revealed an alarming propensity to exercise authority in a manner contrary to the legitimate expectations of the international community.

In Oil & Natural Gas Commission v Western Company of North America, 1987 All India Reports SC 674, excerpted in XIII Yearbook Commercial Arbitration 473 (1988), the Supreme Court held not only that the Indian courts had jurisdiction to hear an action brought by the losing Indian party to set aside the award, but upheld an Indian court's order that the winning American party desist from enforcement actions in the United States pending the Indian action.[1] The basis for the Court's decision was that Indian law applied to the arbitration agreement, and that the courts of the country whose law governs the arbitration agreement must have jurisdiction to deal with the subsequent award in the same way that it might deal with domestic awards.

In National Thermal Power Corporation v The Singer Corp. et al, 1992(3)7 Judgements Today SC 198, (See Page 3 of This Issue) the same Court on 7 May 1992 similarly decided that the Indian courts had jurisdiction to hear an action to set aside a partial award rendered in London. The award had held that while Indian law was the proper law of the contract, English law governed matters of procedure; that the arbitration was not prevented by contractual time bars; and that neither the claims nor the counterclaim were barred by time limitations under Indian law. Again, the Court focused on the fact that Indian law was substantively applicable, and that this applicability extended to the arbitration clause itself.

The Court writes, at paragraph 23: "The proper law of the arbitration agreement is normally the same as the proper law of the contract." This is unremarkable. But after embroidering on this theme, the judgment suddenly makes a quantum leap in paragraph 26:

> ". . . the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent

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> 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. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement."

This, it is submitted, is simply untrue. At the end of the just-quoted passage, the Court cites four well-known English treatises: Mustill and Boyd, Redfern and Hunter, Russell on Arbitration, and Cheshire & North. But it does so without referring to specific pages. The fact is that none of these authorities support the radical thesis propagated by the Indian court. The scholarly references are, to put it charitably, window dressing.

Under Article V(1)(a) of the New York Convention, it would be open to a losing party to argue before the enforcement court that the arbitration agreement was invalid "under the law to which [the parties] have subjected it." That might mean that evidence of Indian law would be relevant to an enforcement court in, say, New York. It does not mean that Indian courts have competence by virtue of some "overriding principle."

The earlier ONGC decision had held that the New York Convention was irrelevant, since the Indian courts had not been asked to enforce a foreign award. They had been asked to entertain an application to set aside an award which, although it had been rendered in London, was governed by Indian law; so the only question was whether as a matter of Indian law they had jurisdiction to do so.

The Singer decision took an entirely different course, stating in paragraph 8 that the "fundamental question" was whether the Foreign Awards Act 1961 (which implemented the New York Convention in India) was applicable. The Court considered that the award was not "foreign" for the purposes of the New York Convention, and that therefore the Convention did not apply — thus opening the door to whatever panoply of remedies might be available under local law.

It is submitted that these two Indian decisions misunderstand the New York Convention in a dangerous fashion, ONGC in subverting general principles of the post-award process which have emerged as international consensus over the course of the last 30 years and Singer in disregarding the text of the Convention. These are examples of parochial overreaching by a national legal system. It is to be hoped that the trend will be reversed in India, and not copied elsewhere. For now, India stands alone in this respect; no other legal system has adopted such an aggressively nationalistic posture. The position elsewhere is illustrated by the French Minister of Justice's Report to Parliament introducing what was to become the 1981 Decree on international arbitration, where it is flatly stated:

> "the possibility to bring before a French judge an action for annulment against an award made abroad is excluded." (Quoted in J.L. Delvolve, Arbitration in France, at 96 (1982).

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In Singer, the Court's reasoning is long on affirmation (one might be tempted to say repetition) and short on textual analysis. There are numerous citations to English authorities relating to the concept of the proper law, but the New York Convention is never quoted at all.

In fact, one need look no further than Article I(1) of the Convention to find the following relevant provision:

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

This language would clearly cover an award rendered abroad, even if - as was the case in Singer - the applicable substantive law was that of the enforcement jurisdiction. There is apparently a current of thinking in the Indian legal community which would want to change two words in the last sentence: to delete the word "also" and to move the word "not" so that the sentence would read:

> "It shall not apply to arbitral awards . . . considered as domestic awards in the State where their recognition and enforcement are sought."

In the Singer judgment, the only semblance of rebuttal of the true text of Article I(1) appears in paras. 37 and 38, where the Court writes:

> "To qualify as a foreign award under the Act, the award should have been made in pursuance of an agreement in writing for arbitration to be governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and not to be governed by the law of India. . .
>
> An award is 'foreign' not merely because it is made in the 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. An award made on an arbitration agreement governed by the law of India, though rendered outside India, is attracted by the saving clause in S.9 of the Foreign Awards Act and is, therefore, not treated in India as a 'foreign award'."

The crucial middle sentence of this passage has no foundation in the New York Convention. But apparently Section 9 of the Indian Foreign Awards Act 1961 provides that:

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"Nothing in this Act shall

. . .

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

If the effect of this Indian Act is to oblige Indian courts to rewrite Article I(1) of the New York Convention in the manner just described, then perhaps the Indian courts are correctly applying Indian law, but with a graver implication: India is in violation of its international obligations as a signatory of the New York Convention.

The unfortunate potential consequences of these two decisions can hardly be exaggerated. They could lead to dangerous and doubtless escalating rivalry between competing legal systems. As the Singer decision recognizes in paragraph 53, they would result in "concurrent" jurisdiction between the courts of the place of arbitration and those of the country whose law governs the arbitration agreement. Doubtless such a conception of the international arbitral process would ultimately lead some arbitrators not to confront the issue of applicable law until they have decided the merits of the case, and then to exercise their imagination to find that the law applicable to the arbitration agreement was not that of the losing party — so as to protect the award from attacks in that party's home courts. That would regrettably put expediency before principle. Furthermore, it could provoke courts into disregarding arbitrators' findings of applicable law. The result would be a grave erosion of the authority of arbitrators. Much of the international acceptance of arbitration, achieved by painstaking efforts since 1958, would be imperilled.

These kinds of reactions would likely be but the beginning of a spiral of one-upmanship, irreversibly damaging the valuable mechanisms of the international arbitral process.

It would be an unfortunate mistake to view this as a matter of favouring "Western" arbitration over Third World court systems. Rather, what is at stake is the reliability of neutral mechanisms for the resolution of international commercial disputes. That such mechanisms can be made to work in the interest of parties from developing countries should be beyond cavil. (See J. Paulsson, "Third World Participation in International Investment Arbitration," 1988 ICSID Review - Foreign Investment Law Journal 19.) To the extent that reliance on these mechanisms is shaken by attitudes like that shown in the Singer decision, parties will be more hesitant to venture into the international arena, and will insist on terms that compensate for the legal risk. There would be a disincentive to any long-term transactions (particularly investments) and to entrepreneurial cooperation.

Looking again at the Singer decision, one notes that, in addition to the arbitration clause, the relevant contract provided that:

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

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Furthermore, the contract did not specify a place of arbitration, but simply referred to the arbitration rules of the ICC. Under its rules, the ICC was thus to select the venue. It could have chosen Delhi (which would have been somewhat coherent with the just-quoted reference to the "exclusive jurisdiction" of the courts of that city), but it preferred London (doubtless justified by the weightier competing consideration of neutrality).

Under these circumstances, it would have been preferable for the Indian courts, if they were dead set on asserting jurisdiction, to have done so on the basis of the contractual reference to the courts of Delhi. That would still leave a contradiction with the New York Convention, but a more palatable one, since (1) the parties could be said to bear the responsibility for having brought the contradiction down upon themselves by drafting such a clause, and (2) this approach would allow one to view the Singer case as one of limited application. Although Article V(1)(e) of the New York Convention allows non-recognition of awards set aside by "a competent authority of the country in which, or under the law of which, that award was made," there are few illustrations in practice of international contracts that contemplate arbitration in country A all the while providing that the law of country B shall govern the conduct of the arbitration and that its courts shall have "exclusive jurisdiction".

The six just underlined words in Article V(1)(e) do not grant jurisdiction to the courts of the country whose laws govern the arbitration.[2] Jurisdiction would have to be asserted by those courts. The thrust of this commentary is that it would be grievously wrong for them to do so in the absence of an unusual contractual stipulation giving them such authority.

Unfortunately, while it is true that the Supreme Court in Singer repeatedly quotes the parties' contractual reference to the courts of Delhi, its purpose in so doing is not to act on the contractual stipulation of exclusive Indian jurisdiction, but simply to buttress the rather uncontroversial finding (already made by the arbitrators) that the applicable law was that of India. That in turn led it to the deeply regrettable conclusion that the Indian courts had jurisdiction because Indian law was applicable. Accordingly, Singer (like its predecessor ONGC) puts a cloud over all awards against Indian parties rendered outside India where Indian law may have some claim of substantive application.

It is to be hoped that the Indian legal system will find a way to reverse this deleterious holding and to reassure the international legal community of its intent to apply the New York Convention faithfully. Meanwhile, practitioners must be advised to attempt by all means, if they wish to ensure that contractual disputes may be resolved by arbitral awards enforceable anywhere under the New York Convention, to avoid subjecting their contracts to Indian law — or more specifically to subject the arbitration agreement to another law. Such is the practical effect of the ONGC and Singer decisions. Whether this evolution is in India's national interest would seem a fit subject of serious debate within its legal community.

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INTERNATIONAL ARBITRATION REPORT
Vol. 7, #6
June 1992

ENDNOTES

1. See the vigorous criticism of M. Tupman, "Staying Enforcement of Arbitral Awards under the New York Convention," 1987 Arbitration International 209; and a rebuttal by V.S. Deshpande, "Jurisdiction Over 'Foreign' and 'Domestic' Awards in the New York Convention," 1991 Arbitration International 123.

2. N.b. that Article V(1)(e) does not recognize any role for the courts of the country whose law governs the arbitration agreement (usually the same as that which governs the contract in general) What is contemplated here is a stipulation to the effect that the arbitration shall be conducted in accordance with the law of country X. Article V(1)(e) thus accommodates the rare cases where such a stipulation refers to a law other than the one of the place of arbitration.

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T.a.v. Jeanelle Weirs V. India

INTERNATIONAL ARBITRATION

New York Convention

SUIT TO OVERTURN LONDON AWARD MAY BE BROUGHT IN INDIAN COURT

An award issued in London by an International Chamber of Commerce tribunal was not a "foreign award" under the New York Convention and therefore was subject to challenge in the Indian courts under the Indian Arbitration Act, the Supreme Court of India held May 7. The court ruled that an award rendered outside India is not a foreign award when Indian law governs the contract and its arbitration clause. The decision reverses a judgment of the Delhi High Court. (*National Thermal Power Corp. v. The Singer Co.*, India SupCt, Civil Appeal No. 1978, May 7, 1992)

Singer Co. and the National Thermal Power Corp. (NTPC) entered into two contracts in 1982 in New Delhi. The choice-of-law clause stated that "the laws applicable to this Contract shall be the laws in force in India. The Courts of Delhi shall have exclusive jurisdiction in all matters arising under this Contract." The arbitration clause called for proceedings under the rules of the International Chamber of Commerce International Court of Arbitration, and the ICC Court chose London as the place of arbitration.

In an interim award, the tribunal held that English law applied to procedural matters in the arbitration; that the arbitration was not contractually time-barred; and that neither the claims nor the counterclaim were time-barred by Indian law.

NTPC brought suit to set aside the interim award under the Indian Arbitration Act 1940. The Delhi High Court dismissed the action, holding that the interim award was a foreign award within the meaning of the Foreign Awards (Recognition and Enforcement) Act 1961, which implements the New York Convention in India, and that it therefore lacked jurisdiction over any action except one for recognition and enforcement *(see 1 WAMR 67)*. NTPC appealed to the Supreme Court.

Indian Courts Have Jurisdiction

Justice Dr. T. Kochu Thommen, joined by Justice S.C. Agrawal, observed that because the parties had explicitly agreed that Indian law was to govern the contract, Indian law must also govern the arbitration clause, absent "an unmistakable intention to the contrary," which was not evident here. He then declared:

"[T]he 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. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement. ... Neither the rules of procedure contractually chosen by the parties (the ICC Rules) nor the mandatory requirements of the procedure followed in the courts of the country in which the arbitration is held can in any manner supersede the overriding jurisdiction and control of the Indian law and the Indian courts."

Award Was Not 'Foreign'

Justice Thommen noted that section 9(b) of the Foreign Awards Act 1961 provides: "Nothing in this Act shall ... apply to any award made on an arbitration agreement governed by the law of India." Thus, an "award is 'foreign' not merely because it is made in the territory of a foreign state," the court wrote, "but because it is made in such a territory on an arbitration agreement not governed by the law of India."

Where, as in this case, the arbitration agreement is governed by Indian law, the resulting award "necessarily falls under the Arbitration Act, 1940, and is amenable to the jurisdiction of the Indian courts ... just as in the case of any other domestic award," Justice Thommen said.

He further observed that the choice of London as the site of arbitration was "merely accidental" in that the selection was made not by the parties but by the ICC Court "for reasons totally unconnected" with either party. "On the other hand, ... the contract itself, including the arbitration agreement contained in one of its clauses, is redolent of India and matters Indian. The disputes between the parties ... have no connection with anything English, and they have the closest connection with Indian laws, rules and regulations."

"The Delhi High Court was wrong in treating the award in question as a foreign award," Justice Thommen concluded. "Accordingly, we set aside the impugned judgment of the Delhi High Court and direct that Court to consider the appellant's application on the merits, in regard to which we express no views whatsoever."

ICC Arbitration

ARBITRATOR MAY ASSESS LEGAL FEES AFTER ICC COURT APPROVES AWARD

An arbitrator's assessment of nearly $1 million in legal fees and costs—added to his award after it was approved by the ICC International Court of Arbitration—was enforced May 29 by the U.S. District Court for the District of Columbia. Chief Judge John Garrett Penn ruled that the complaining party did not show that the assessment denied it due process of law or violated ICC procedures. (*Compagnie des Bauxites de Guinee v. Hammermills Inc.*, USDC DC, No. 90-0169, May 29, 1992)

Background

In 1970, Compagnie des Bauxites de Guinee (CBG) signed a contract to buy ore-crushing equipment from Hammermills for use in CBG's bauxite facility in the Republic of Guinea. In 1985, CBG began arbitration proceedings, alleging that Hammermills had breached the contract by providing incorrect load data that CBG used to build a faulty support structure. CBG sought roughly $46 million in damages.

The arbitration was stayed in 1986, when Hammermills filed for bankruptcy, but resumed in 1987, CBG having obtained a declaratory judgment that Hammermills' insurer was to cover its legal costs.

Hearings were held before a single arbitrator in July and August 1988. The case remained under advisement until September 1989, when the arbitrator asked each party for a statement of its legal expenses. The parties replied by letter, CBG reporting costs of roughly $2 million and Hammermills roughly $1.1 million.

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It is obvious from the above background that the respondent had taken the advantage of the mining lease granted in his favour. Therefore, apart from the fact that he had already 8 shops and other houses to carry on his business, the bona fide claim is belied from the above evidence and his conduct. The finding of the appellate court that the respondent does not bona fide require the demised building for business is well founded. The High Court has not considered this question in its proper prospective.

7. The appeal is accordingly allowed. The judgment of the High Court is set aside and that of the appellate court is confirmed. Consequently the respondent's application for eviction stands rejected. But in the circumstances of the case parties are directed to bear their own costs.

[ADVOCATES ON RECORD:- A.Subba Rao and S.S.Rana]

1993(4) SCALE

RENUSAGAR POWER CO. LTD. 15 *Appellant*

VS

GENERAL ELECTRIC CO. *Respondent*

CORAM:- M.N. VENKATACHALIAH, CJI, S.C. AGRAWAL AND A.S. ANAND, JJ.

FOREIGN AWARDS (RECOGNITION AND ENFORCEMENT) ACT , 1961 — Ss.3, 4, 5 & 7 — Contract for supply and erection of thermal power plant — Contract governed by laws of State of New York, USA — Agreement that should GEC be denied exemption from payment of income tax on interest payments, Renusagar may withhold the income tax payable — Exemption obtained out subsequently withdrawn — Renusagar retained the amount of interest — Award of Arbitral Tribunal — (i) Whether in proceedings for enforcement of a foreign award under the Foreign Awards Act it is permissible to impeach the award on merits — (ii) Whether there is a bar to the enforcement of the Award under S.7(1)(a)(ii) of the Act (iii) Whether S.7(1)(b)(ii) of the Act precludes enforcement of the Award on the ground that it is contrary to the public policy of New York (iv) What is meant by 'public policy' in S.7(1)(b)(ii) of the Act (v) Whether the Award is unenforceable as contrary to public policy of India (vi) which law would govern the rate of exchange for conversion of foreign currency for enforcement of a foreign arbitral award (vii) Whether Forasol v. O.N.G.C. 1984(1) SCR 526 requires reconsideration (viii) Whether GEC is entitled to interest pendente lite and future interest (ix) What should be the rate of conversion into U.S. dollars of the amount deposited pursuant to interim orders of the Court — Dismissing the appeals, Held, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits (Para 37) — That the enforcement of the arbitral award is not barred by S.7(1)(a)(ii) of the Foreign Awards Act on the ground that Renusagar was unable to present its case before the Arbitral Tribunal (Para 40) — That the words "public policy" used in section 7(1)(b)(ii) of the Foreign Awards Act refer to the public policy of India and the recognition and enforcement of the award of the Arbitral Tribunal cannot be questioned on the ground that it is contrary to

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Judgment dated October 7, 1993 in C.A.Nos.71 & 71A of 1990 with C.A.No.379 of 1992 (General Electric Co. vs. Renusagar Power Co. Ltd.).

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the public policy of the State of New York (Para 45) — The enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India or (iii) justice or morality (Para 66) — Enforcement of the award would not be contrary to the public policy of India (Paras 84, 88, 93, 95, 104, 106) — The date of judgment in the relevant date for conversion of the amount awarded from foreign currency to Indian currency (Paras 119, 120 and 124) — Decision in Forasol case does not require reconsideration (Para 133) — The award of interest for the period subsequent to the date of passing of the award till the passing of this judgment in these appeals is, therefore, confined to the period till the date of institution of the proceedings for enforcement of the Arbitration Award in the Bombay High Court (Para 139) — Renusagar to pay interest @ 18% for period subsequent to this judgment (Para 140) — Amount paid by Renusagar permanent to interim orders has to be converted into U.S. dollars on the basis of the exchange rate prevalent at the time of such payment.

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

2. Renusagar Power Co. Ltd. (for short 'Renusagar'), the appellant in C.A. Nos.71 and 71A of 1990 and the respondent in C.A.No.370/92, is a company incorporated under the Indian Companies Act, 1956 engaged in the production and sale of electric power. General Electric Company (for short 'General Electric'), respondent in C.A.Nos.71 and 71A and appellant in C.A.No.370/92, is a company incorporated under the laws of the State of New York in United States of America and is engaged in the business of manufacturing, selling and servicing electrical products and various ancillary activities. After negotiations, the parties arrived at an arrangement whereunder General Electric was to supply to Renusagar the equipment and power services for setting up a thermal power plant to be known as 'Renusagar Power Station' at Renukoot and, on November 27, 1963, Renusagar moved the Government of India for its approval. By its letter dated January 2, 1964, the Government of India gave its approval to the proposals and thereafter a formal contract was executed by the parties on August 24, 1964. Under the said contract, General Electric undertook to supply equipment and services for a plant having a capacity of 135,800 K.W. The total price for the electrical and mechanical equipment, spare parts, freight forwarding services, plant design and consulting services was US $ 13,195,000. The contract price for all electrical and mechanical equipment and spare parts was FAS vessel, U.S.A. port so selected by seller (Article II). All items of the equipment were to be delivered alongwith vessel at New York not later than 15 months from the contract effective date (which was December 31, 1964) and the erection of the plant was to be completed within 30 months from the contract effective date (Article IV A 1). 10% of the total contract basic price (US $ 1,319,500) was to be paid either in cash or by Letter of Credit. The balance 90% of the price (US $ 11,875,500) plus interest at the rate of $6^1/_2$% per annum from the 16th to the 30th month of the contract effective date (US $ 900,558,75) totalling US $ 12,776,058.75 was to be paid in 16 equal six monthly instalments commencing from the date of the expiry of 30 months from the contract effective date, and the last instalment was payable on the date of expiry of 120 months from the contract effective date (Article III). Since the contract effective date was December 31, 1964 the first instalment was payable on June 30, 1967 and the last, i.e., 16th instalment was payable on December 31,

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1974. In the contract, it was also provided that Renusagar would execute unconditional negotiable promissory notes in four series (A-B-C-D) in respect of the 16 instalments [Article III A 31(a)] and that the notes shall be prepared substantially in the form shown in the attached Exhibit 'B' entitled "Promissory Note" and shall bear interest, at the rate of $6^1/_2\%$ per annum on the outstanding principal balance commencing from 30 months after contract effective date [Article III-A 3(a)]. A provision was also made that the payment of the full amount of each note shall be unconditionally guaranteed by the United Commercial Bank or other mutually acceptable bank. [Article III-A 3 (e)]. The contract contained an arbitration clause which provides that any disagreement arising out of or related to the contract which the parties are unable to resolve by sincere negotiation shall be finally settled in accordance with the Arbitration Rules of the International Chamber of Commerce (for short 'ICC'). Each party would appoint one arbitrator and the Court of Arbitration of the ICC would appoint a third arbitrator (Article XVII). It was also agreed that the rights and obligations of the parties under the Contract shall be governed in all respects by the laws of the State of New York, USA (Article XIX A).

3. It was, also, provided that if General Electric received an exemption from the Government of India from the payment of income-tax levied by the Government of India on interest payments made by Renusagar then the interest rate on that series of promissory notes as exempted shall be reduced from $6^1/_2\%$ to 6% per annum commencing on the date such exemption is made effective and the notes so affected shall be replaced by new notes [Article III A 3(b)]. In the contract it was stated that General Electric intended to apply to the Central Government of India for exemption from income tax on the interest (including capitalisation interest and interest thereon) and Renusagar undertook to assist General Electric in expediting the application of General Electric for exemption. It was also agreed that should the application of General Electric for exemption. It was also agreed that should the application of General Electric be denied Renusagar may withhold the Indian income-tax applicable to any payments of interest, but Renusagar was to furnish General Electric with receipts on all withheld amounts paid to the Government of India. [Article XIV B].

4. By its orders dated September 3, 1965 and June 7, 1967 the Government of India gave their approval under Section 10(15)(iv)(c) of the Income Tax Act, 1961 to the loan obtained by Renusagar from General Electric and thereby exempted the interest paid on the said loan from payment of income tax. The said exemption was, however, withdrawn by the order of the Government of India dated September 11, 1969 whereby the orders granting exemption were cancelled retrospectively and General Electric was held liable to pay Indian income tax on the interest payable @ $6^1/_2\%$ per annum.

5. Renusagar filed a writ petition [C.W. No. 179/70] before Delhi High Court on February 24, 1970 wherein it challenged the above order of the Government of India dated September 11, 1969 relating to cancellation or revocation of the tax exemption. In the said writ petition, the Delhi High Court on February 24, 1970 passed an ad-interim order restraining the Government of India and its officers from enforcing or implementing the said order dated September 11, 1969. The said order was continued by order dated May 18, 1970 subject to Renusagar furnishing security for Rs.4 lakhs to the satisfaction of Commissioner of Income-Tax, Lucknow. Renusagar furnished the necessary security and as a result, the operation of the order dated September 11, 1969 was suspended. Renusagar, however, did not remit the amount of interest calculated @ 6% per annum payable to General Electric in terms

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of the contract. Renusagar only remitted 27% of the amount of interest calculated @ $6^1/_2$% per annum and it did not deposit the balance amount of 73% by way of tax with the Government but retained the same with themselves. It, however, sent letters to General Electric to the effect that they had deducted the said amount towards tax and had retained the same with itself. Originally General Electric was not impleaded as a party in the writ petition before the Delhi High Court and it got itself impleaded as a respondent in the writ petition by moving an application dated October 28, 1977. The writ petition was decided by the Delhi High Court by its judgment dated November 17, 1980 whereby the writ petition was allowed and the order dated September 11, 1969 was set aside. As a result the exemption from the payment of income-tax on the interest payable by Renusagar was restored and the liability of Renusagar for interest was reduced from $6^1/_2$% to 6%. On June 3, 1981, Renusagar moved the Reserve Bank of India for permission to remit the balance amount of regular interest calculated @ 6% per annum to General Electric and on February 3, 1982, the Income-tax Officer, Bombay issued "No Objection Certificate" for repatriating the balance regular interest amount of US $ 2.130 million. The said amount was, however, not remitted by Renusagar o General Electric.

6. It appears that there was some delay on the part of the General Electric in adhering to the time schedule for the supply of equipment and keeping the same in view General Electric by their letter dated January 5, 1967 agreed to defer the payment of the first instalment payable on June 30, 1967 by six months and suggested that the promissory notes shall be recast into 15 notes instead of 16 which would commence on the 36th month from the contract effective date and capitalised interest shall be calculated for 20 months instead of 14 months and the said interest would then be reduced by a sum of 132, 500 US $. By another letter dated October 4, 1967, General Electric agreed to recast the note structure to provide for 14 notes with the first note becoming due on June 30, 1968 instead of December 31, 1967 and the capitalised interest was to be calculated for 20 months instead of 14 months and it would be reduced to 132,500 US $. It appears that during the course of supply of equipment and erection of the plant, some disputes arose between the parties and Renusagar made certain claims against General Electric some of which were accepted by General Electric and a settlement was arrived at on December 10, 1968 whereunder General Electric agreed that the payment of the instalments due on December 30, 1968 and June 30, 1969 with accrued interest would be deferred for payment with the result that there would be no payment on December 31, 1968 and June 30, 1969 both of interest and principal and that the interest accrued upto December 31, 1968 and to accrue upto June 30, 1969 on the outstanding balance due would be calculated at the rate provided for in the contract and capitalised and that the entire sum, namely, the principal and interest to be so capitalised would be reast in 13 notes, the first of which would be payable on December 31, 1969 and the last on December 31, 1975. As a result of these discussions and settlement, instalments nos. 1, 2, 4 and 5 were not paid by Renusagar on the due dates. Renusagar moved the Government of India for approval to the revised schedules regarding the payments of the instalments to General Electric. The said request of Renusagar was, however, not accepted by the Government of India and by their letter dated August 1, 1969, the Government of India expressed their inability to agree to the revised proposals for repayment in view of the larger outgo of foreign exchange (by way of interest) which was not contemplated when the loan was approved originally. Renusagar were, therefore, asked to take necessary action to effect payments of the past

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instalments immediately. The request for review of the said decision was rejected by the Government of India by their letter dated August 4, 1969. The first instalment which was payable on June 30, 1967 under the original contract was paid by Renusagar in instalments by July, 1970, the second instalment which was payable on December 31, 1967 was paid in instalments by December, 1971, the fourth instalment which was payable on December 31, 1968 was paid in instalments by December, 1973 and the fifth instalment which was payable on June 30, 1969 was paid in instalments by February, 1976.

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

8. On June 11, 1982, Renusagar filed a suit (Suit No.832/82) in the Bombay High Court, on its original side, against General Electric and the ICC seeking a declaration that the claims referred to the arbitration of ICC by General Electric were beyond the purview and scope of Article XVII of the contract dated August 24, 1964 and that General Electric was not entitled to refer the same to arbitration with consequential prayers for injunctions restraining the ICC and General Electric to proceed further with the reference and restraining ICC from requiring Renusagar to make any deposit towards administrative expenses and arbitration fees. Renusagar obtained an ex-parte ad-interim relief in the said suit. General Electric filed Arbitration Petition No.96 of 1982 under section 3 of the foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter referred to as 'the Foreign Awards Act') seeking stay of suit No.832 of 1982 and all proceedings therein with a prayer for vacating the ad-interim ex-parte reliefs obtained by Renusagar in the said suit. Both the matters, namely, stay petition of General Electric under section 3 of the Foreign Awards Act and Renusagar's notice of motion for confirmation of ad-interim relief were heard together and disposed of by a learned Single Judge of the Bombay High Court by a common judgment and order dated April 20, 1983 whereby the prayer for stay of the suit filed by General Electric under section 3 of the Foreign Awards Act was allowed and all proceedings in the said suit were stayed and all the interim reliefs which were granted earlier by ad-interim order were vacated. C.A. Nos.404-405 of 1983 filed by Renusagar against the said judgment of the learned Single Judge were dismissed by a division of the High Court by judgment dated October 21, 1983. The appeals filed by Renusagar against the said decision of the High Court were dismissed by this Court on August 16, 1984.[See: *Renusagar Power Co. Ltd. vs. General Electric Co. & Anr.*, 1985(1) SCR 432], hereinafter referred to as 'Renusagar Case I'. In the said case, this Court (Tulzapurkar & Pathak, JJ.) has held that the three claims referred by General Electric to the ICC do 'arise out of' and are 'related to the contract' and squarely fall within the widely worded arbitration clause contained in Article XVII of the Contract.

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9. On August 19, 1982, General Electric filed a suit in the Calcutta High Court against United Commercial Bank to enforce the bank guarantee given by the said Bank at the instance of Renusagar. As a counter to the said suit, Renusagar, on November 25, 1982, filed a suit (No.127 of 1982) in the Court of Civil Judge, Mirzapur, U.P. praying for a declaration that the guarantee given by United Commercial Bank for and on behalf of Renusagar stood discharged and had become ineffective and unenforceable and for a mandatory injunction directing and ordering General Electric to settle the claims of Renusagar regarding 75 MVA Transformers and to satisfy the settlement validly arrived at of the claim of Renusagar as mentioned in the plaint of the said suit. General Electric filed an application in the Mirzapur Court whereby it was prayed that the suit was liable to be stayed under section 10 and/or section 151 CPC in respect of the first relief and under section 3 of the Foreign Awards Act in respect of the second relief claimed by Renusagar in the plaint. The said application was rejected by Mirzapur Court and thereupon General Electric filed a petition under Article 227 of the Constitution before the Allahabad High Court for quashing the proceedings in the suit. The said petition was, however, dismissed by the High Court by order dated April 4, 1985. Thereupon General Electric filed Civil Appeal No.2319/86 in this Court which was allowed by this Court (Chinnappa Reddy & Jagannatha Shetty, JJ.) by judgment dated August 11, 1987 reported as *General Electric Co. Ltd. vs. Renusagar Power Co.* [1987 (3) SCR 858], hereinafter referred to as 'Renusagar Case II'. As a result of the said judgment, the proceedings in Suit No.127/82 in the Court of Civil Judge, Mirzapur were stayed under section 3 of the Foreign Awards Act.

10. We may now revert to the arbitration proceedings. After the decision of the learned Single Judge of the Bombay High Court staying further proceedings in Suit No.832/82 and vacating the interim order passed in the said suit, Renusagar entered into the arbitration proceedings on June 9, 1983 under protest and without prejudice to its claim on arbitrability and gave answer to the claims of General Electric and also made counter claims. On February 7 and 8, 1984 both the parties met with the Arbitral Tribunal in Paris and agreed to sign the terms of reference, though Renusagar did so under protest and without prejudice. Certain amendments were subsequently made in the Terms of Reference. In the said Terms of Reference the issues to be determined were defined in clauses (a) to (cc) of para 22. Issues in clauses (a) to (f) of para 22 of the Terms of Reference were determined by an interim award on December 11, 1984 wherein the Arbitral Tribunal found that General Electric and Renusagar were parties to a valid agreement to arbitrate all disputes between them arising out of or related to the 1964 Contract and that the issues referred to the Arbitral Tribunal, apart from two minor exceptions which were reserved for determination, were such arbitral disputes and that the Arbitral Tribunal had jurisdiction to adjudicate on them. The Arbitral Tribunal also held that the applicable law was that of the State of New york, U.S.A.

11. After the decision of this Court in Renusagar Case I, both the parties appeared before the Arbitral Tribunal in Paris for a hearing which lasted for ten days between February 25 and March 8, 1985. Each party was represented by counsel and legal and other advisers and Issues Nos.(g) to (p) of para 22 of the Terms of Reference were argued and submitted for consideration by both the sides and the hearing was adjourned to a later date for more detailed consideration to be given to the remaining issues and for further written submissions to be made by both parties. The next hearing was fixed to be in London to begin on October 1, 1985 and both parties were summoned to appear before the Arbitral Tribunal. Khaitan &

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partners, lawyers for Renusagar sent a letter dated July 24, 1985 to the Arbitral Tribunal, wherein they stated that an Indian Civil Court had seisin of the whole of the subject matter of the reference in this arbitration and submitted that in consequence the Arbitral Tribunal and ICC had become *functus officio* and that no further proceedings in this arbitration should be taken by the Arbitral Tribunal. The said submission by Renusagar was disputed by General Electric and the Arbitral Tribunal informed the parties that the matter would be considered as a preliminary issue at the scheduled meeting in London on October 1, 1985. The scheduled meeting took place in London on October 1, 1985. General Electric, represented by counsel and advisers, appeared before the Arbitral Tribunal but Renusagar failed to appear. The Arbitral Tribunal considered the written submissions of Renusagar on the issue of the jurisdiction of the Arbitral Tribunal and heard the arguments of General Electric and by majority (Dr. Dixit dissenting), the Arbitral Tribunal ruled that their jurisdiction remained and that the arbitration should proceed in the absence of Renusagar. It appears that before the meeting on October 1, 1985, each Arbitrator had received from the parties during the course of the arbitration a total of 33 bound volumes of typed submissions, exhibits and legal authorities, (General Electric having presented 19 and Renusagar 14) and in addition each party had put before the Arbitral Tribunal a large number of papers. On October 2, 3, and 4, 1985 the Arbitral Tribunal considered the said documents as well as the written submissions of Renusagar on issues (q) to (bb) of the Terms of Reference and heard the arguments of counsel for General Electric in reply. The Arbitral Tribunal also considered the submissions of Renusagar on the validity of the claim of entitlement of General Electric to 'dollar for dollar' foreign tax credit at the relevant period in this action and also heard General Electric on the question of costs. Thereafter, the Arbitral Tribunal by a majority (Dr. Dixit dissenting) made the award on September 16, 1986.

12. The Arbitral Tribunal upheld the claim of GEC for US $ 2, 130,785.52 towards regular interest which was withheld by Renusagar. It was not disputed by Renusagar that it had retained the said amount. The issue was whether by doing so Renusagar acted wrongfully. The Arbitral Tribunal has found that the said withholding or retention of the amount of interest by Renusagar was wrongful since the failure on the part of Renusagar to pay the taxes over to the Indian tax authorities rendered it impossible for General Electric to get the U.S. Foreign tax credit to which it would otherwise have been entitled for the mount withheld. It was also held that nothing in the 1964 contract authorises non-payment of either the interest or the withheld taxes for tactical reasons arising out of litigation brought by Renusagar. The Arbitral Tribunal rejected the contention of Renusagar that the claim in respect of regular interest was barred by limitation and held that the applications submitted by Renusagar to Reserve Bank of India on June 3, 1981 and August 29, 1981 for permission to remit the said amount to General Electric amount to acknowledgment. It was also held that the said sum had to be computed in U.S. dollars regardless of variation in dollar-rupee exchange rate prevailing from time to time. As regards claim from compensatory damages on the said amount of regular interest, which was withheld by Renusagar, the Arbitral Tribunal, after referring to the decisions of New York Courts, has held that an arbitrator's paramount responsibility is to reach an equitable result and that it is a basic principle of damages for breach of contract applicable throughout the U.S., (including New York) that a party to a contract who is injured by its breach is entitled to compensation for the injury sustained and is entitled to compensation for the injury sustained and is entitled to be placed in so far as this can be done

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by money in the same position he would have occupied if the contract had been performed. The Arbitral Tribunal found that General Electric would have benefitted from 'dollar for dollar' from the foreign tax credits that it could have claimed had Renusagar paid the disputed amounts over to the Indian tax authorities and supplied General Electric with the appropriate tax certificate. The Arbitral Tribunal, therefore, awarded compensatory damages and computed the same by applying the average prime rate to the amounts withheld and observed that although General Electric was entitled to interest from the due dates of the various notes but the interest that had been claimed by General Electric in the Terms of Reference was computed from the later dates set out in a detailed computation supplied to the Arbitral Tribunal and since General Electric had accepted these later dates in its submission, the Arbitral Tribunal awarded compensatory damages computed by applying the average prime rate to the amounts withheld commencing with the dates listed in the statement and compounded annually commencing with the last day of the calender year for each amount. The Arbitral Tribunal rejected the contention urged on behalf of Renusagar that award of interest on regular interest as compensatory damages would violate public policy of the State of New York against 'interest on interest'. Relying upon the decision of the New York Court of Claims in *City of New York vs. State of New York*, 408 N.Y.S. 2d 702, 707 (1978), the Arbitral Tribunal held that interest on interest is not against public policy in the State of New York. The Arbitral Tribunal also rejected the contention of Renusagar that it would violate New York's public policy to award compound interest as compensatory damages and, after referring to the various decisions of the courts in the State of New York, the Arbitral Tribunal has held that compounding of interest is equally appropriate in actions of an equitable nature and in the circumstances of this case compounding of interest would not violate the public policy of the State of New York. In this context the Arbitral Tribunal has pointed out that they were not concerned with a contract to pay compound interest but with the propriety of compounding interest in fashioning a remedy for a breach of contract in order to put the injured party in the same economic position it would have occupied if the contract had been duly performed. As regards the claim for delinquent interest on late payment of instalments by Renusagar, the Arbitral Tribunal held that Renusagar was liable to pay such delinquent interest. The Arbitral Tribunal found that under the 1964 Contract the notes evidencing the obligation of Renusagar to pay the purchase price 'shall bear interest, at the rate of 6.5% per annum on the outstanding principal balance', subject to the agreed reduction to 6% commencing with the date when tax exemption, if granted, is made effective and that the rescheduling negotiations on which Renusagar relied never resulted in an effective agreement and there was no evidence of a waiver by General Electric of its right to be paid on the original due dates when the rescheduling plan collapsed and further that Renusagar had acknowledged in telex dated March 25, 1976 that they were liable for interest on the delayed payment of the principal. The Arbitral Tribunal also rejected the contention that the claim of General Electric in this regard was barred by the statute of limitation. Taking into account the acknowledgment contained in the telex dated March 25, 1976, the Arbitral Tribunal deducted a sum of US $ 316,610 from the amount of US $ 783,686.20 computed as interest @ 6% and held that General Electric was entitled to net amount of US $ 467,076.20 by way of delinquent interest. The Arbitral Tribunal rejected the contention urged on behalf of Renusagar that even if period of limitation is computed from telex of March 25, 1976 the claim was barred by limitation in view of the four-year limitation prescribed by Section 2-275(1) of New

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York's Version of the Uniform Commercial Code which came into force with effect from September 27, 1964. The Arbitral Tribunal held that the said provision was not applicable to the present case and that it is governed by the 6-year period of limitation that was prescribed in the State of New York prior to the commencement of the said provision. The Arbitral Tribunal further held that General Electric was entitled to compensatory damages on the aforesaid amount of delinquent interest in the same manner as damages were to be computed on the unpaid amount of regular interest. The Arbitral Tribunal also upheld the claim of General Electric for US $ 119,053.31 towards purchase price of spare parts and further held that the said claim was not barred by limitation in view of the acknowledgment by Renusagar in the telex dated March 25, 1976. The Arbitral Tribunal also held that compensatory damages were payable on account of Renusagar's failure to pay for spare parts in the same manner as damages for failure of Renusagar to pay regular interest. With regard to the counter-claim made by Renusagar, the Arbitral Tribunal had earlier rejected the purported withdrawal of the said counter-claim in respect of items 2 to 8 by Renusagar and after considering the said counter-claim on merits, the Arbitral Tribunal rejected the same in respect of all the eight items. In view of the rejection of counter-claim of Renusagar, the Arbitral Tribunal rejected the claim made by General Electric by way of reply to the claim of Renusagar. In the matter of costs, the Arbitral Tribunal held that Renusagar must pay the costs of arbitration and apart from the amount which General Electric was required to pay towards administrative expenses and arbitration fees, the Arbitral Tribunal held that Renusagar must also pay the normal legal costs incurred by General Electric. The Arbitral Tribunal awarded the following amounts against various heads of claims:

1.	Regular interest wrongfully withheld	US$ 2,130,785.52
2.	Compensatory damages to March 31, 1986 on the above regular interest continuing at the annual rate of 8% on the said regular interest until payment.	US$ 6,347,748.50
3.	Delinquent interest on late payment of principal	US$ 467,076.20
4.	Compensatory damages to 31 March, 1986 on the above delinquent interest continuing at the annual rate of 8% on the said delinquent interest until payment.	US$ 1,324,357.75
5.	Spare parts	US$ 119,053.00
6.	Compensatory damages to 31 March 1986 on the above spare parts continuing at the annual rate of 8% on the said sum of the spare parts until payment.	US$ 276,702.17
7.	Towards costs of General Electric	US$ 1,549,899.00
	Total	US$ 12,215,622.14

The Arbitral Tribunal has awarded interest at the annual rate of 8% on items 1,3 and 5.

13. On october 15, 1986, General Electric instituted proceedings for enforcement of the award of the Arbitral Tribunal by filing Arbitration Petition No. 159/86 under section 5 of the Foreign Awards Act in the Bombay High Court. On October 17, 1986, Renusagar instituted a suit (Suit No. 265/86) in the Court of Civil Judge, Mirzapur, seeking a declaration that the award made by the Arbitral Tribunal was a nullity and for restraining General Electric by a perpetual injunction from denying Renusagar's rights and taking any action affecting

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Renusagar's right in any manner whatsoever on the basis of the award. General Electric filed a Transfer Petition (No.388/86) in this Court seeking transfer of the suit filed by Renusagar in the Mirzapur Court to the original side of the Bombay High Court. By order dated September 10, 1987, this Court stayed further proceedings in the suit filed by Renusagar in the Mirzapur Court and the stay was to remain in operation during the pendency of the petition filed by General Electric for enforcement of the award.

14. Renusagar contested the proceedings for enforcement of the award filed by General Electric in the Bombay High Court and submitted: (i) the award could not be filed as it did not become binding on the parties in the country in which the award was made as prescribed under Section 7(1)(a)(v) of the Foreign Awards Act and rule 801(c) of the Rules framed by the Bombay High Court under the Foreign Awards Act; (ii) the Bombay High Court did not have the territorial jurisdiction to entertain the petition of General Electric under section 5 of the Act; (iii) General Electric had failed to comply with the mandatory requirement of Section 8(1)(a) of the Foreign Awards Act and Rule 801(a) of the Rules framed by the Bombay HIgh Court under the Foreign Awards Act inasmuch as neither the original award nor a copy thereof duly authenticated as required by the law of the country had been produced along with the application; (iv) The award sought to be enforced was a nullity and should be ignored as the arbitrators had become functus officio in view of institution of Suit No. 127/82 by Renusagar in the Court of Civil Judge, Mirzapur and refused by the Mirzapur Court to stay the suit under section 3 of the Foreign Awards Act; (v) The award could not be enforced in view of section 7(1)(b)(ii) of the Foreign Awards Act because its enforcement was contrary to public policy; (vi) The claim for regular interest was barred by limitation; (vii) the claim for delinquent interest had been wrongly accepted by the arbitrators; (viii) the award of interest on interest or compensatory damages in lieu of interest on regular interest and delinquent interest and the award of compound interest is contrary to public policy; (ix) the compensatory damages were excessive and unusual; (x) the Chairman of the Arbitral Tribunal was biased against Renusagar; and (xi) the costs of arbitration were unconscionable and excessive.

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

16. Renusagar filed an appeal (Appeal No. 680/89) under clause 15 of the Letters Patent of the Bombay High Court against the said judgment of the learned Single Judge which was disposed of by a division bench of the said High Court (C. Mookerjee, CJ and Mrs. Sujata Manohar, J.) by judgment dated October 12, 1989. The learned Judges of the High Court held that the said appeal was not maintainable in view of section 6(2) of the Foreign Awards Act. The learned Judges, however, examined the matter on merits and found that there was no substance in the appeal. In this context the learned Judges have dealt with the objection about the arbitrators having become functus officio on account of the pendency of the civil suit filed by the Renusagar in the Mirzapur Court; the award being contrary to public policy; the award being not binding; the failure to file the authenticated copy of the award and the jurisdiction of the Bombay High Court to entertain the petition and they have rejected the contentions urged by Renusagar in respect of the said objections. Since the learned Single Judge had not

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specified the rate of exchange for conversion of the decretal amount expressed in U.S.dollars to Indian Rupees, the learned Judges have dealt with the said question and taking into consideration the decision of this court in Forasol vs. Oil and Natural Gas Commission [1984 (1) SCR 526] they have directed that the date of conversion of decretal amount which is in U.S. dollars to Indian rupees shall be the date on which the learned Single Judge completed pronouncing of judgment, i.e., October 21, 1988 and that opening the rate of exchange shall be the selling rate of U.S. dollars as ascertained by the State Bank of India. The learned Judges have granted a certificate for appeal to this Court under Article 134-A read with Article 133 of the Constitution since they felt that the case involves substantial questions of law of general importance which need to be decided by this Court.

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

18. During the pendency of these appeals this Court, by Order dated February 21, 1990 on I.A.No.1 of 1990 in Civil Appeal No. 71 of 1990, stayed the operation of the judgment and decree under appeal subject to Renusagar depositing in the Original side of the Bombay High Court, the sums equivalent to one-half of the decretal amount calculated as on date and furnishing security to the satisfaction of the High Court in respect of the decretal amount. General Electric was permitted to withdraw the deposit upon furnishment of security by way of bank guarantee for the sum to be withdrawn in excess of Rupees four crores to the satisfaction of the High Court. In the said order it was also directed that interest @ 10% per annum would be payable by Renusagar on the balance of the decretal amount in the event of its failing in the appeal and correspondingly General Electric would be liable to pay interest at the same rate on amount withdrawn by it in the event of the appeal succeeding. In pursuance of this order, Renusagar deposited, a sum of Rs.9,69, 26,590.00 on March 20, 1990 which was withdrawn by GEC after furnishing necessary bank guarantee. By another order dated November 6, 1990 on I.A. No. 3/90 in Civil Appeal No. 71/90, this Court directed Renusagar to deposit a further sum of Rs. 1 crore and to furnish a bank guarantee for Rs. 1.92 crores. In pursuance of the said order, Renusagar deposited, on December 3, 1990, a sum of Rs.1 crore which amount has also been withdrawn by General Electric. Thus, a total sum of Rs. 10,69,26,590-00 has been deposited by Renusagar and the same has been withdrawn by General Electric.

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

20. During the course of his submissions, Shri Venugopal did not pursue some of the objections that were raised by Renusagar before the High Court. But at the same time he has

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raised certain objections which were not raised before the High Court. Shri Venugopal has not disputed the liability of Renusagar for US$ 2,130,785-52 awarded under item No. 1 towards regular interest withheld by Renusagar and US$ 119,053-00 awarded under item No. 5 towards price of spare parts. The submissions of Shri Venugopal are confined to the award of compensatory damages under item Nos. 2,4, and 6, delinquent interest under item No.3 and costs under item No. 7. The submissions of Shri Venugopal broadly fall under two heads: (i) enforceability of the award; and (ii) the rate of exchange for conversion of the decretal amount from U.S. dollars to Indian rupees.

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

22. Arbitration is a well recognised mode for resolving disputes arising out of commercial transactions. This is equally true for international commercial transactions. With the growth of international commerce there was an increase in disputes arising out of such transactions being adjudicated through arbitration. One of the problems faced in such arbitrations related to recognition and enforcement of an arbitral award made in one country by the Courts of other countries. This difficulty has been sought to be removed through various international conventions. The first such international convention was the Geneva Protocol of 1923 which was drawn up on the initiative of ICC under the auspices of the League of Nations. The Geneva Protocol had two objectives, first, it sought to make arbitration agreements, and arbitration clauses in particular, enforceable internationally; and secondly, it sought to ensure that awards made pursuant to such arbitration agreements would be enforced in the territory of the state in which they were made. The Geneva Protocol of 1923 was followed by the Geneva Convention of 1927 which also drawn up under the auspices of the League of Nations. The purpose of this Convention was to widen the scope of the Geneva Protocol of 1923 by providing recognition and enforcement of protocol awards within the territory of contracting states, (not merely the state in which the award was made). (See: Alen Redfern and Martin Hunter: Law & Practice of International Commercial Arbitration, 2nd Ed.p.61-62]. India was a signatory to the Protocol of 1923 and the Convention of 1927. With a view to implementing the obligations undertaken under the said Protocol and Convention, the Arbitration (Protocol & Convention) Act, 1937 was enacted. A number of problems were encountered in the operation of the aforesaid Geneva treaties inasmuch as there were limitations in relation to their field of application and under the Geneva Convention of 1927, a party seeking enforcement had to prove the conditions necessary for enforcement and in order to show that the awards had become final in its country of origin the successful party was often obliged to seek a declaration in the countries where the arbitration took place to the effect that the award was enforceable in that country before it could go ahead and enforce the award in the courts of the place of enforcement. ICC, in 1953, promoted a new treaty to govern international commercial arbitration. The proposals of ICC were taken up by the United Nations Economic and Social Council and it led to the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards at New York, 1958 (hereinafter referred to as 'the New York Convention'). The New York Convention is an improvement on the Geneva Convention of 1927 in the sense that it provides for a much more simple and effective method of obtaining recognition and enforcement of foreign arbitral awards and it replaces Geneva Convention of 1927 as between the State which are parties to

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both the Conventions. The New York Convention also gives much wider effect to the validity of arbitration agreements than does the Geneva Protocol of 1923. [See: Alan Redfern and Martin Hunter, Law & Practice of International Commercial Arbitration, (1991) 2nd Ed. p. 62-63].

23. India was a party to the New York Convention. The Foreign Awards Act has been enacted to give effect to the New York Convention and for purposes connected therewith. In the Statement of Objects and Reasons, reference has been made to the defects in the Geneva Convention of 1927 which "hampered the speedy settlement of disputes through arbitration and hence no longer met the requirements of international trade" and which led to the adoption of the New York Convention. Section 2 of the Act defines the expression `foreign award'. Section 3 makes provision for stay of proceedings in respect of matters to be referred to arbitration. Section 4 deals with effect of foreign awards. Sub-s.(1) of Section 4 provides that a foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India. Sub-s.(2) prescribes that any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made and may be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India. Section 5 makes provision for filing of foreign awards in Court. In sub-s. (1) it is laid down that any person interested in a foreign award may apply to any court having jurisdiction over the subject matter of the award that the award be filed in Court. Sub-s.(2) requires that such an application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. Sub-s.(3) requires the court to give notice to the parties to the arbitration other than the applicant requiring them to show cause, within a time specified why the award should not be filed. Section 6 deals with enforcement of foreign awards. Sub-s. (1) lays down that where the Court is satisfied that the foreign award is enforceable under the Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Sub-s.(2) provides that upon the judgment so pronounced a decree shall follow, no appeal shall lie from such decree except insofar as the decree is in excess of or not in accordance with the award. Section 7 contains the conditions for enforcement of foreign awards and prescribes the circumstances under which foreign awards will not be enforced. Section 8 requires the production of the original award or a duly authenticated copy thereof as well as original agreement for arbitration or a duly certified copy thereof and the production of evidence to prove that the award is a foreign award. Section 9 is a saving clause which excludes the applicability of the Act to matters specified therein. Section 10 provides for repeal of the Arbitration (Protocol and Convention) Act, 1937, in relation to foreign awards to which the Act applies. Section 11 provides for rule making power of the High Court. The New York Convention is appended as a schedule to the Foreign Awards Act.

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

"7. CONDITIONS FOR ENFORCEMENT OF FOREIGN AWARDS.- (1) A foreign award may not be enforced under this Act -

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

(i) the parties to the agreement were under the law applicable to them, under some

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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 where the arbitration took place; or

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

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

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

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

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

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

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

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unpardonable violation of principles of natural justice and the elementary tenets of fair play inasmuch as on account of the said procedure adopted by the Arbitral Tribunal Renusagar was deprived of an opportunity to meet and deal with the entirety of claims of General Electric.

27. As regards bar to the enforcement of the award under section 7(1)(b)(ii) of the Foreign Awards Act, Shri Venugopal has argued that: (i) under section 7(1)(b)(ii), enforcement of the award could be refused by the courts in India not only on the ground that the award is against the public policy of India but also that it is against the public policy of the State of New York; (ii) the expression "public policy" in section 7(1)(b)(ii) of the Act has to be construed in a liberal sense and not narrowly and it would include within its ambit disregard of the provisions of the Foreign Exchange Regulation Act, 1973 (hereinafter referred as FERA) and would also cover unjust enrichment; (iii) it would be contrary to the public policy of India as well as of the State of New York to award interest on interest and compounding it further and to award damages on damages; (iv) under the contract interest was payable only upto the date of maturity of each promissory note and no interest payable for the period subsequent to the said date and the only remedy available to General Electric in the event of default in payment of an instalment on the due date was to enforce the bank guarantee or to recall all the promissory notes; (v) under the original approval dated January 2, 1964 given by the Government of India the total amount of loan was to be repaid in sixteen semi-annual instalments between 30 and 120 months from contract effective date and payment of interest was specifically restricted for the period from 16th to 30th month and thereafter upon capitalisation from the 30th month to the 120th month and no interest was payable without FERA sanction after due date of each instalment; (vi) no liability for interest for delayed payment of instalments would accrue in respect of the period from June 30, 1967 to August 1, 1969 while the application for approval under FERA was pending before the Government of India; (vii) after the refusal by the Government to give its approval to the rescheduling of the instalments the award of interest was in breach of the prohibition contained in FERA and was contrary to public policy of India; (viii) While awarding compensatory damages under items Nos. 2 and 4 the Arbitral Tribunal has failed to deduct 46 per cent U.S. tax payable by General Electric on the amount of regular interest and delinquent interest and compensatory damages could only be awarded on the amount receivable by General Electric after deducting the said tax and this has resulted in unjust enrichment which is contrary to public policy; (ix) compensatory damages have been awarded by way of interest on interest and that too by compounding the rate of interest which is contrary to public policy of India and New York; (x) compensatory damages awarded on delinquent interest under item No.4 constitutes award of damages upon damages which is contrary to public policy of India; (xi) award of compensatory damages on regular interest under item No.2 in respect of the period from 1970 to 1980 when the interim order passed by the Delhi High Court in the writ petition was operative was impermissible and against public policy; (xii) the amount awarded as costs is unconscionable and constitutes unjust enrichment inasmuch as it includes the amount which was admitted as part of the legal fees and expenses for proceedings in India and which was found to be inadmissible by the Arbitral Tribunal and the same amount was transposed into cost of the arbitration on the pretext that the material collected for litigation in India was also used in the arbitration proceedings; and (xiii) there has been violation of principles of natural justice inasmuch as the vouchers of costs regarding legal fees and expenses were never shown or given to Renusagar nor were its objections heard in this regard.

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28. With regard to rate of exchange for conversion of the decretal amount in U.S.dollars to Indian rupees, the submission of Shri Venugopal is that the date with reference to which conversion of foreign currency is to be made is a matter of substance and is governed by lex *contractus,* i.e., the law of the contract, and not by *lex fori,* i.e., the law of the forum. It has been urged that the law of the State of New York is the law of the contract and that the said law provides the date of breach as the date of conversion and therefore, the amount awarded in U.S. dollars under the award of the Arbitral Tribunal must be converted into Indian currency on the basis of the rate prevalent on the date of the breach. It has been submitted that the decision of this Court in *Forasol vs. O.N.G.C.* (supra) on which reliance has been placed by the division bench of the High Court, has no application to the present case because in that case the court was not dealing with a foreign award but was dealing with an award made under the Indian Arbitration Act, 1940.

29. Shri Shanti Bhushan, has, on the other hand, submitted that: (i) the scope of enquiry in proceedings under section 5 of the Foreign Awards Act is confined to questions relating to the enforcement of the award and does not comprehend a challenge to the merits and even if a question of law decided by the Arbitrators is incorrect, it is not a ground of challenge under Section 7 of the Foreign Awards Act; (ii) Renusagar cannot have any grievance that they were unable to present its case because it had voluntarily refused to appear before the Arbitral Tribunal when it met on October 1, 1985 and further that in the sittings of the Arbitral Tribunal from February to March, 1985 in which Renusagar had participated it had made oral submissions and had also produced documents before the Arbitral Tribunal, with regard to issues 22(g) to (p) and that in the sittings held from October 1, 1985 onwards, the Arbitral Tribunal had dealt with rest of the issues which related to the counterclaim of Renusagar as well as the claim made by General Electric against the counter claim which claims have been rejected by the Arbitral Tribunal; (iii) public policy, comprehended in section 7(1)(b)(ii) of the Foreign Awards Act is the public policy of India and does not cover the public policy of New York State; (iv) for the purpose of Section 7(1)(b)(ii) of the Foreign Awards Act the expression 'public policy' has a narrower connotation than in domestic law; (v) the regular interest was wrongfully withheld by Renusagar because as a result of the failure on the part of Renusagar to deposit the amount of tax with the Government of India. General Electric was not able to claim relief under the U.S. tax laws in respect of the amount payable as tax in India on the interest and that the interim order passed by the Delhi High Court in the writ petition filed by Renusagar did not preclude Renusagar from either depositing the tax amount with the Government or remitting the interest amount to General Electric at the rate of 6 per cent; (vi) for awarding compensatory damages for withholding of regular interest and on delinquent interest for delayed payment of instalments the tax payable in United States on the amount of regular interest and delinquent interest could not be deducted since tax would be payable in the United States by General Electric on the amount awarded as compensatory damages; (vii) the amount of compensatory damages awarded by the Arbitral Tribunal relates to the merits of the award and the same cannot be questioned in proceedings for enforcement of the award under Section 7 of the Foreign Awards Act; (viii) the challenge to the award on the basis of unjust enrichment, award of compound interest, award of damages on damages does not fall within the ambit of permissible objections on the ground of violation of public policy in Section 7(1)(b)(ii) of the Foreign Awards Act; (ix) there is no violation of the provisions of FERA because in view of the approval that had

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already been granted by the Government of India to the original contract, there was no prohibition against remittance of regular interest on the instalments which had become due and payable and the refusal on the part of the Government to give a approval to rescheduling of the payment of instalments did not in any way preclude the Government of India from granting necessary permission of remittance of the interest on the unpaid instalments under section 9 of FERA; (x) in any event, the bar of section 9 of FERA is not applicable to the proceedings for enforcement for the award in view of section 47(3) of FERA and the enforcement of the award does not involve contravention of the provisions of FERA; (xi) the costs that have been awarded are reasonable and that three copies of the supporting vouchers except for the vouchers relating to fees of M/s Amarchand Mangaldas, a Bombay/Delhi firm of Solicitors, were sent to all the three arbitrators and that one set of billings of M/s Amarchand Mangaldas was sent to the Chairman but copies of the letter addressed to Chairman were sent to the other Arbitrators and that the bills of M/s Amarchand Mangaldas were in respect of fees of Indian lawyers in Bombay High Court and Supreme Court which claim of costs has been disallowed by the Arbitral Tribunal; (xii) the rate of exchange for conversion of foreign currency in proceedings for enforcement of a foreign award is governed by lex fori. i.e., law of the forum in which the proceedings have been instituted and not by the proper law of contract or law of place of performance; (xiii) the relevant date for conversion of U.S. dollars into Indian rupees in proceedings for enforcement of a foreign award is the date of actual payment and not the date of judgment as held by the division bench of the High Court; (xiv) the decision of this Court in Forasol vs. O.N.G.C. (supra) on which the reliance has been placed by the division bench has no application and in any event the said decision does not lay down the correct law and needs reconsideration; (xv) although under the award interest has been awarded at 8 per cent in respect of items 1,3 and 5 only but in view of the interim order passed by this Court on February 21, 1990 interest at the rate of 10% is payable on the entire amount; (xvi) since the permission was not granted to General Electric by the Reserve Bank of India to transfer the sum of Rs. 10.92 crores deposited by Renusagar in pursuance to the orders of this Court dated February 21, 1990 and November 6, 1990 the said amount should be adjusted against the decree that is ultimately passed after converting the decretal amount in U.S.dollars to Indian rupees on the basis of the rate of exchange prevailing on the date of the judgment of this Court.

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

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

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

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

IV) What is meant by 'public policy' in section 7(1)(b)(ii) of the Foreign Awards Act?

V) Is the award of the Arbitral Tribunal unenforceable as contrary to public policy of India on the ground that -

a) it involves contravention of the provisions of FERA;

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

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

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

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

VII) Does Forasol vs. O.N.G.C. (supra) need reconsideration?

VIII) Is General Electric entitled to interest pendente lite and future interest and if so, at what rate?

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

I. SCOPE OF ENQUIRY IN PROCEEDINGS FOR RECOGNITION AND ENFORCEMENT OF A FOREIGN AWARD UNDER THE FOREIGN AWARDS ACT

31. During the course of his submissions, Shri Venugopal has assailed the award of the Arbitral Tribunal on grounds touching on the merits of the said award insofar as it relates to the award of compensatory damages on regular interest (item no.2), delinquent interest (item 3), compensatory damages on delinquent interest (item 4) and compensatory damages on the price of spare parts (item 6). This gives rise to the question whether in proceedings for enforcement of a foreign award under the Foreign Awards Act it is permissible to impeach the award on merits.

32. With regard to enforcement of foreign judgments, the position at common law is that a foreign judgment which is final and conclusive cannot be impeached for any error either of fact or of law and is impeachable on limited grounds, namely, the court of the foreign country did not, in the circumstances of case, have jurisdiction to give that judgment in the view of English law; the judgment is vitiated by fraud on part of the party in whose favour the judgment is given or fraud on the part of the court which pronounced the judgment; the enforcement or recognition of the judgment would be contrary to public polity; the proceedings in which the judgment was obtained were opposed to natural justice. [See: Dicey & Morris, The Conflict of Laws, 11th Ed., Rules 42 to 46, pp. 464 to 476; Cheshire & North, Private International Law, 12th Ed, pp.368 to 392)

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

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& Morris, Conflict of Laws, 11th Edn., Vol.II, p.565].

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

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

> "It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration". (p.269)

36. Similarly Alan Redfern and Martin Hunter have said:

> "The New York Convention does not permit any review on the merits of an award to which the Convention applied and in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted." [Redfern & Hunter, Law and Practice of International Commercial Arbitration, 2nd Edn., p.461].

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

II. BAR TO THE ENFORCEMENT OF THE AWARD UNDER SECTION 7(1)(a)(ii) OF THE ACT

38. As indicated earlier, the grievance of Renusagar is that the Arbitral Tribunal on October 1, 1985 decided the preliminary objection raised by Renusagar that the Arbitrators

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

> "5. At the beginning of the hearing, the Tribunal will be prepared to hear submissions if necessary on the adequacy of the evidence before us on the relevant issues of U.S. foreign tax credit. But the main purpose of the meeting is to deal with the respondent's counter claims together with the claimant's claims for 119,053 U.S. dollars (unpaid purchase price of spare parts) and 103,500 U.S.dollars (unpaid repairs on 75 M.V.A. Transformers).
>
> 6. All the above counter claims and claims are old, so before going into details as to merit, the Tribunal will wish to consider submissions on the raised issues of limitation, laches, estoppel, abandonement and whether the right party is being sued."

39. On July 23, 1985, M/s Khaitan & Partners, on behalf of Renusagar, sent a communication to the Arbitrators giving notice that Renusagar was abandoning and withdrawing items (ii) to (vi) and (viii) of its claim set forth in para 19(g) of the Terms of Reference as amended by Paris hearings. On August 10, 1985, M/s Khaitan Partners, on behalf of Renusagar, sent a communication to the arbitrators wherein a reference was made to the notice issued by Renusagar to the effect that the ICC Arbitration Tribunal had become functus officio and neither the ICC Arbitration Tribunal could proceed with the arbitration nor Renusagar could participate in the same on the ground that the application submitted by General Electric under section 3 of the Foreign Awards Act had been rejected by Mirzapur Civil Court and the said order of the court had not yet been set aside or stayed by the Allahabad High Court in the revision petition filed by General Electric. Renusagar, through their advocates (M/s Khaitan & Partners) also sent petition dated August 23, 1985 to the Secretary General ICC as well as Secretariat, ICC of Arbitration reiterating their objection that the arbitrators had become functus officio and could not proceed and/or function. In his communication to M/s Khaitan & Partners dated September 2, 1985 the Chairman of the Arbitral Tribunal intimated that the question as to the effect of the suit filed in the Mirzapur Court on the arbitration would be considered as a preliminary issue at the scheduled meeting on October 1, 1985. On September 23, 1985, M/s Khaitan & Partners, on behalf of Renusagar, addressed a communication to Mr. Roberto Power in the ICC (copies of the same were sent to the Arbitrators as well as to General Electric) wherein it was stated: "Our plea

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is totally different. It is that the Arbitrators have become functus officio in the facts and law stated by us in the 23rd August, 1985 document and our telexes to the Arbitrators copies of which have been sent to ICC. Therefore, the question of our appearing before the Arbitrators or their determining the plea raised by us cannot and does not arise." In the communication dated September 28, 1985 from M/s Khaitan & Partners, it is stated: "We have been repeatedly informing you that the Arbitrators have become functus officio. Therefore, be so kind as not to communicate with us any further regarding the arbitration which has become infructuous". From these documents, it would appear that the stand of Renusagar was that the Arbitrators had become functus officio and they could not proceed with the arbitration and there was, therefore, no question of Renusagar appearing before the Arbitral Tribunal on the dates fixed for hearing. In these circumstances, it is not open to Renusagar to say that the Arbitral Tribunal, after having rejected, (by majority) the said objection raised by Renusagar, by order dated October 1, 1985 should have given a further notice to Renusagar asking them to appear to make their submission before the Arbitral Tribunal on the merits on issues 22(q) to 22(bb). In this context, it may also be stated that issue 22(q) and 22(r) relate to the claim of US$ 119,053-91 for purchase price of spare parts which is not disputed by Renusagar and issue 22(s) relates to claim for compensatory damages on the said amount which has been allowed on the same basis as the claim for compensatory damages on regular interest (Item No. 2) under Issue 22(k). Rest of the matters covered by Issues 22(t) to 22(bb) related to counter claims of Renusagar and claims by General Electric against counter claims which have been disallowed by the Arbitral Tribunal.

40. We are, therefore, of the opinion that the enforcement of the arbitral award is not barred by S. 7(1)(a)(ii) of the Foreign Awards Act on the ground that Renusagar was unable to present its case before the Arbitral Tribunal.

III : OBJECTION TO THE ENFORCEABILITY OF THE AWARD ON THE GROUND THAT IT IS CONTRARY TO THE PUBLIC POLICY OF THE STATE OF NEW YORK

41. Shri Venugopal has urged that although under sub-clause (b) of clause (2) of Article V of the New York Convention the recognition and enforcement of an arbitral award can be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of *that country*, i.e., the country where the award is sought to be enforced, a departure has been made in Section 7(1)(b)(ii) of the Foreign Awards Act which prescribes that the foreign award may not be enforced under the said Act if the court dealing with the case is satisfied that the enforcement of the award would be contrary to public policy. The submission of Shri Venugopal is that in s. 7(1)(b)(ii) of the Act, the Parliament has deliberately refrained from using the words "public policy of India" which implies that the words "public policy" are not restricted to the public policy of India but would cover the public policy of the country whose law governs the contract or of the country of the place of arbitration and the enforcement of an award would be refused if it is contrary to such public policy. In this context Shri Venugopal has invited our attention to the provisions of section 7(1) of the Arbitration (Protocol & Convention) Act, 1937 wherein the words used are "and enforcement thereof must not be contrary to the public policy or law of India". According to Shri Venugopal while under the 1937 Act, objections to enforcement are limited to the public policy of India or law of India, there is no such limitation in section 7(1)(b)(ii) of the Foreign Awards Act. Shri Venugopal has also placed reliance on the decision of this Court in *V/O Tractoroexport,*

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Moscow vs. M/s Tarapore & Co. & Anr. [1970(3) SCR 53] wherein this Court has held that there was clear deviation from the rigid and strict rule that the courts must stay a suit whenever an international commercial arbitration as contemplated by the Protocol and the Conventions, was to take place and that it was open to the legislature to deviate from the terms of the Protocol and the Convention and that it appears to have given only a limited effect to the provisions of the 1958 Convention. We find it difficult to accept this convention. It cannot be held that by not using the words `public policy of India" and only using the words "public policy" in section 7(1)(b)(ii) of the Foreign Awards Act, Parliament intended to deviate from the provisions of the New York Convention contained in Article V(2)(b) which uses the words "public policy of that country" implying public policy of the country where recognition and enforcement is sought. That Parliament did not intend to deviate from the terms of the New York Convention is borne out by the amendment which was introduced in the Act by Act 47 of 1973 after the decision of this Court in *Tractoroexport case* (supra) whereby section 3 was substituted to bring it in accord with the provisions of the New York Convention. The Foreign Awards Act has been enacted to give effect to the New York Convention which seeks to remedy the defects in the Geneva Convention of 1927 that hampered the speedy settlement of disputes through arbitration. The Foreign Awards Act is, therefore, intended to reduce the time taken in recognition and enforcement of foreign arbitral awards. The New York Convention seeks to achieve this objective by dispensing with the requirement of the leave to enforce the award by the courts where the award is made and thereby avoid the problem of "double exequatur". It also restricts the scope of enquiry before the court enforcing the award by eliminating the requirement that the award should not be contrary to the principles of the law of the country in which it is sought to be relied upon. Enlarging the field of enquiry to include public policy of the courts whose law governs the contract or of the country of place of arbitration, would run counter to the expressed intent of the legislation.

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

"7. CONDITIONS FOR ENFORCEMENT OF FOREIGN AWARDS.- (1) In order that a foreign award may be enforceable under this Act it must have -

(a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed,

(b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties,

(c) been made in conformity with the law governing the arbitration procedure,

(d) become final in the country in which it was made,

(e) been in respect of a matter which may lawfully be referred to arbitration under the law of British India,

and the enforcement thereof must not be contrary to the public policy or the law of British India.

(2) A foreign award shall not be enforceable under this Act if the Court dealing with the case is satisfied that -

(a) the award has been annulled in the country in which it was made, or

(b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings insufficient time to enable him to present his case, or was under

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some legal incapacity and was not properly represented or,

(c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration:

Provided that if the award does not deal with all questions referred the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit,

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

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

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

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

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

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

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

V. MEANING OF 'PUBLIC POLICY' IN SECTION 7(1)(b)(ii) OF THE ACT

46. While observing that "from the very nature of things, the expressions `public policy' opposed to public policy' or `contrary to public policy' are incapable of precise definition" this Court has laid down -

> "Public policy connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time." (See : Central Inland Water Transport Corporation Ltd. & Anr. Vs. Brojo Nath Ganguly and Anr., (1986) 2 SCR 278 at p. 372).

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

> "In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and it it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them". (History of English Law, Vol. III, p.55).

48. Since the doctrine of public policy is somewhat open-textured and flexible, judges in England have shown certain degree of reluctance to invoke it in domestic law. There are two conflicting positions which are referred as the 'narrow view' and the 'broad view'. According to the narrow view courts cannot create new heads of public policy whereas the broad view countenances judicial law making in this areas. (See: Chitty on Contracts, 26th Ed., Vol. I, para 1133, pp.685-686). Similar is the trend of the decision in India. In *Gherulal Parakh Vs. Mahadeodas Maiya & Ors.*, 1959 Suppl. (2) SCR 392 this Court favoured the narrow view when it said:

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

49. In later decisions this Court has, however, leaned towards the broad view. (See: *Murlidhar Agarwal & Anr. etc. Vs. State of UP & Ors.*, 1975 (1) SCR 575 at p.584; *Central Inland Water Transport Corporation Vs. Brojo Nath Ganguly* (supra) at p.373; *Rattanchand Hira Chand Vs. Askar Nawaz Jung (Dead) by LRs and Ors.*, 1991 (3) SCC 67 at pp.76-77).

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

> "Exceptionally, the English court will not enforce or recognise a right conferred or a duty imposed by a foreign law where, on the facts of the particular case, enforcement or, as the case may be, recognition, would be contrary to a fundamental policy of English law.

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The court has, therefore, refused in certain cases to apply foreign law where to do so would in the particular circumstances be contrary to the interests of the United Kingdom or contrary to justice or morality". (See: Halsbury's Laws of England, IV Ed., vol.8, para 418).

51. A distinction is drawn while applying the said rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. The application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved. (See: *Vervaeka Vs. Smith*, 1983, 1988(1) A.C. 145 at p. 164 Dicey & Morris, Conflict of Laws, 11th Ed., Vol.1 p.92; Cheshire & North, Private International Law, 12th Ed., p.128-129). The reason for this approach is thus explained by Professor Graveson:

"This concern of law in the protection of social institutions is reflected in its rules of both municipal and conflict of laws. Although the concept of public policy is the same in nature in these two spheres of law, its application differs in degree and occasion, corresponding to the fact that transactions containing a foreign element may constitute a less serious threat to municipal institutions than would purely local transactions". (R.H.Graveson: Conflict of Laws, 7th Ed, p. 165).

52. In *Louchs Vs. Standard Oil Co. of New York* 224 NY 99 (1918) Cordozo, J. has said:

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

53. The particular rule of public policy that the defendant invokes may of this overriding nature and therefore enforceable in all actions, or it may be local in the sense that it represents some feature of internal policy. If so it must be confined to cases governed by the domestic law and it should not be extended to a case goverend by foreign law. In order to ascertain whether the rule is all-pervading or merely local, it must be examined in the light of its history, the purpose of its adoption, the object to be accomplished by it and the local conditions. (See: Cheshire and North Private International Law, 12th Ed, p.129)

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

"(i) Where the fundamental conceptions of English justice are disregarded;

(ii) Where the English conceptions of morality are infringed;

(iii) Where a transaction prejudices the interests of the United Kingdom or its good relations with foreign powers;

(iv) Where a foreign law or status offends the English conceptions of human liberty and freedom of action;" (See "Cheshire and North Private International Law, 12th Ed, p.131-133)

55. As observed by Lord Simon of Glaisdale "an English Court will exercise such a jurisdiction with extreme reserve". (*Vervaeka Vs. Smith*, 1983 (1) AC 145 at pp.164)

56. In *Dalmia Dairy Industries Ltd. Vs. National Bank of Pakistan* [1978 (2) Lloyd's Law Reports 223] the Court of Appeal refused to extend the doctrine of public policy to embrace

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

"If there is no authority binding on us which specifically adopts that supposed doctrine, or principle, we should unhesitatingly decline to make new law to that effect in this case. We should regard it, on balance, as being contrary to public policy for such a principle to apply." (p.300)

57. In *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH Vs. Ras Al Khaimah National Oil Co.* (1987 (2) All ER 769), decided by the Court of Appeal, Sir John Donaldson M.R. has said:

"Consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J, remanded in Richardson. Vellish (1824)2 Bing 229 at 252, (1824-34) All ER Rep 258 at 266; `It is never argued at all but when other points fail.' It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibily, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised".(p.779)

58. The approach of the American courts to the doctrine of public policy in its application to recognition and enforcement of foreign arbitral awards under the New York Convention is reflected in the decision of the US Court of Appeals in *Parsons & Whittemore Overseas Co. Inc. Vs. Societe Generale De L' Industrie Du Papier (Rakta) and Bank of America*, 508 F.2d 969 (1974), wherein it has been observed -

"The general pro-enforcement bias informing the Convention and explaining it supersession of the Geneva Convention points towards a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement". .....We conclude, therefore, that the convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice". (pp.973-974)

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

"We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our Courts". (Fritz Scherk Vs. Alberto-Culver Co., 41 L.Ed. 2d, 270 at pp.279 and 281)

60. Similarly in *Mitsubishi Motors Corporation Vs. Soler Chrysler-Plymouth Inc.*, 87 L Ed 2d 444, it was observed -

"We conclude that concerns of international comity, respect for the capacities of foreign

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and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context". (pp.456-457)

61. In France, a distinction is made between international public policy ("ordre public international")and the national public policy. Under the new French Code of Civil of Civil Procedure, an international arbitral award can be set aside if the recognition or execution is contrary to international public policy. In doing so it recognises the existence of two levels of public policy - the national level, which may be concerned with purely domestic considerations, and the international level, which is less restrictive in its approach. (See: Redfern and Hunter, Law and Practice of International Commercial Arbitration, 2nd Ed.p.445)

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

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

64. Keeping in view the object underlying the enactment of the Foreign Awards Act, this Court has also favoured a liberal construction of the provisions of the said Act. In *Renusagar case I,* it has been observed:

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

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

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66. Article V (2) (b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not prostulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

V. IS THE AWARD CONTRARY TO PUBLIC POLICY OF INDIA?

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

(a) would involve contravention of the provisions of FERA;
(b) would amount to penalising Renusagar for not disregarding the interim orders passed by the Delhi High Court in the writ petition filed by Renusagar;
(c) would enable recovery of compound interest on interest;
(d) would result in payment of damages on damages;
(e) would result in unjust enrichment by General Electric;

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

(a) Violation of FERA

68. As mentioned in the Preamble, FERA is a law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency for the conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country. It was preceded by Foreign Exchange Regulation Act, 1947. Similar enactments providing for exchange control exist in other countries. In the United Kingdom, there is a similar enactments, viz., Exchange Control Act, 1947, which remains in force but its operation has been suspended since 1979. The view of the English courts is that the exchange of control legislation does not belong to the field of revenue laws and application of such law is not obnoxious to English public policy. [See: *Kahler v. Midland Bank Ltd.*, 1950 A.C. 24, at p.27, 36, 46-47 and 57; *Zivnostenska Banka National Corporation v. Frankman*, 1950 A.C. 57, at p.72 and 78]. In re. *Herbert Wagg & Co. Ltd.*, 1956 (1) Ch. 323, Upjohn J., has said:

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"It cannot be doubted that legislation intended to protect the economy of the nation and the general welfare of its inhabitants regardless of their nationality by various measures of foreign exchange control or by altering the value of its currency, is recognised by foreign courts although its effect is usually partially confiscatory. Probably there is no civilized country in the world which has not at some stage in its history altered its currency or restricted the rights of its inhabitants to purchase the currrency of another country. (p.349)... In my judgment these courts must recognize the right of every foreign State to protect its economy by measures of foreign exchange control and by altering the value of its currency. Effect must be given to those measures where the law of the foreign State is the proper law of the contract or where the movable is situate within the territorial jurisdiction of the State." (pp. 351)

69. The following principle of Private International Law is applicable in relating to such legislation:

"Rule 212(1).- A contractual obligation may be invalidated or discharged by exchange control legislation if -

(a) such legislation is part of the proper law of the contract; or

(b) it is part of the law of the place of performance; or

(c) it is part of English law and the relevant statute or statutory instrument is applicable to the contract.

Provided that foreign exchange legislation will not be applied if it is used not with the object of protecting the economy of the foreign State, but as an instrument of oppression or discrimination."

[See" Dicey & Morris, The Conflict of Laws, 11th Ed. Vol. II, p. 1466]

70. In the comments on the said rule, it is stated:

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

[See: Dicey & Morris (supra) p. 1469]

71. In support of this statement of law reference has been made to the decision of House of Lords in *Boissevain vs. Weil* [1950 A.C. 327]. In that case, the respondent, a British subject, and the appellant, a Dutch subject, were involuntarily resident in Monaco an enemy occupied territory, in 1944, due to war conditions. The respondent borrowed a sum of 960,000 French francs from the appellant in Monaco on an undertaking to repay the money in sterling in London at an agreed rate of 160 francs to the pound and drew cheques in blank for the full amount on English Bank. The appellant filed a suit in England claiming 6,000 pounds from the respondent. The said claim was opposed by the respondent on the ground that the loans given by the appellant to the respondent were invalid and illegal being contrary to Regulation 2(1) of the Defence (Finance) Regulations, 1939. The said claim of the appellant was allowed by the trial judge, but on appeal, it was dismissed by the Court of Appeal. The House of Lords agreed with the view of the Court of Appeal that regulation 2(1) prohibited

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this borrowing and therefore rendered the appellant's claim for repayment unmaintainable. Lord Radcliffe, who deliverd the main speech, has observed:

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

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

73. Our attention has also been invited to a decision of the Supreme Court of Austria dated May 11, 1983 which is extracted, in brief, in *YEARBOOK* of Commercial Arbitration, Volume X (1985) pp. 421-23. In that case, an award had been made in favour of the appellant who was a national of Holland against the respondent who was an Austrian whereby the respondent was directed to pay to the appellant DM 667,500. The appellant sought enforcement of the award in Austria and the said enforcement was opposed by the respondent on the ground that the underlying contracts, though nominally delivery contracts, were in reality sales and purchases on a margin basis and such contracts are contrary to Austrian foreign exchange law, unless specific authorisation therefor was given by the competent authorities. The respondent invoked Article V(2)(b) of the New York Convention, 1958 to oppose the recognition and enforcement of the award. The Austrian Supreme Court dismissed the claim of the Dutch national and held that the award could not be recognised and enforced by the court in view of Article V(2)(b) of the New York Convention and, in that context, it was held:

> "That the transactions concluded between the parties are not subject to Austrian but to Dutch law is irrelevant because domestic law is applicable to the examination whether there has been a sale and purchase on a merging basis, for determining whether enforcement is to be refused. According to Art. 81, para.4, of the Austrian Law on Enforcement Procedure, enforcement has to be refused if sought for awards rendered in

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respect of claims which, under Austrian law, cannot be brought before Austrian courts. This is a specific, special provision of domestic Austrian law on public policy." (p. 422)

74. Dr.F.A.Mann has also expressed views to the same effect. He has said:

"There remains the question whether a foreign judgment rendered indisregard of foreign exchange regulations operating in the country in which it is to be enforced, may or must be rejected by the courts of the latter country as being contrary to ordre public. Subject to local regulations the answer would seem to be in the affirmative."

[See: F.A.Mann, The Legal Aspect of Money, 5th Ed., (1992) p.403 note 31]

75. As laid down by this Court, FERA is a statute enacted for the "national economic interest" and the object of various provisions in the said Act is to ensure that the nation does not lose foreign exchange which is very much essential for the economic survival of the nation. [See: *L.I.C. v. Escorts,* (1986) Supp. 3 SCR 909, at p.981 and *M.G.Wagh & Ors. v. Jay Engineering Works Ltd.* (1987) 1 SCR 981, at p. 987].

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

77. Shri Venugopal has made a two-fold submission in this regard. In the first place, he has urged that in awarding delinquent interest, under item No.3 the Arbitral Tribunal has acted in disregard of the provisions of FERA and secondly the enforcement of the award of the Arbitral Tribunal would result in violation of the provisions of FERA. As regards the first submissions relating to award of delinquent interest, it may be stated that the said submission involves an attack on the merits of the award which is impermissible at the stage of enforcement. We have, however, examined this submission on merits and are of the view that it is without substance. Shri Venugopal has urged that under the original approval of January 2, 1964 by the Government of India of the terms of the loan by General Electric to Renusagar the total amount of loan was to be repaid in 16 equal semi-annual instalments between the 30th and the 120th month from the effective date of the contract with specific provision for interest from the 16th to the 30th month to be capitalised and the interest was specifically restricted to the period from the 16th to the 30th month and thereafter on capitalisation from the 30th month to the 120th month and that no interest was payable without FERA sanction after the due date of each instalment. This contention is no longer open to Renusagar in view of the earlier decision of this Court in Renusagar Case I, wherein this Court has considered the question whether there was an obligation to pay further interest after June 30, 1967 till payment under the contract. This Court has referred to Articles III-A(c)(iii) and XIV(b) of the contract and has held:"

"In our view these provisions which are to be found in the contract clearly show that the promissory notes are not sole and exclusive repository of GEC's right to claim and receive future interest on unpaid price after June 30, 1967 but that the contract itself provides for the obligation to pay such interest after that date till payment..... It is, therefore, clear that the Contract contains the obligation to pay future interest from June 30, 1967 onwards till payment and that these two claims have been preferred by GEC before the Court of Arbitration of I.C.C. as arising not merely "out of" but under the

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contract." (pp.477-478)

78. Shri Venugopal has, however, urged that the earlier approval to the terms of the contract was of no consequence in view of the subsequent refusal by the Government on August 1, 1969 to approve the agreement between General Electric and Renusagar with regard to the rescheduling of the dates of payment of instalments 1,2,4 and 5. This contention also stands concluded by the decision in Renusagar Case I wherein it has been observed:

"In July 1969 Renusagar sought the Central Government's approval to the rescheduling of the dates of payment as embodied in October 1968 Amendment as also in the Memorandum of the Meeting held in December 1968 but by letters dated August 1, 1969 and August 4, 1969 the Central Government declined to approve the rescheduling of the dates of payment on the ground that it would result in larger out-flow of foreign exchange and advised Renusagar to effect payments as per the original schedule including instalments which had since fallen due. The result was that the original schedule of payment remained operative and there was delay on the part of the Renusagar to make payment of certain instalments on due dates." (p.457)

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

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

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

"Neither the provisions of this Act nor any term (whether expressed or implied) contained in any contract that anything for which the permission of the Central Government or the

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Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions and any such term, would be due, whether as debt, damages or otherwise, but -

(a) the said provisions shall apply to sums required to be paid by any judgment or order of any court as they apply in relation to other sums;

(b) no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank, as the case may be, may permit to be paid; and

(c) for the purpose of considering whether or not to grant such permission, the Central Government or the Reserve Bank, as the case may be, may require the person entitled to the benefit of the judgment or order and the debtor under the judgment or order, to produce such documents and to give such information as may be specified in the requisition."

82. In *M/s Dhanrajamal Gobindram vs. M/s Shamji Kalidas & Co.* 1961 (3) SCR 1020, this Court has construed the provisions of section 21 of the Foreign Exchange Regulation Act, 1947. Sub-section (3) of section 21 of the said Act was more or less similar to section 47(3)of FERA. This Court has held:

"Sub-section (3) allows legal proceedings to be brought to recover sum due as a debt, damages or otherwise, but no steps shall be taken to enforce the judgment, etc., except to the extent permitted by the Reserve Bank.

The effect of these provisions is to prevent the very thing which is claimed here, namely, that the Foreign Exchange Regulation Act arms persons against performance of their contracts by setting up the shield of illegality. An implied term is engrafted upon the contract of parties by the second part of sub-s.(2), and by sub-s.(3), the responsibility of obtaining the permission of the Reserve Bank before enforcing judgment, decree or order of court, is transferred to the decree-holder. The section is perfectly plain, though perhaps it might have been worded better for which a model existed in England." (p.1031)

83. To the same effect is the law laid down by the House of Lords in England in *Contract and Trading Co. Ltd. vs. Barbey* (1960) AC 244 wherein the following observations from the judgment of Somerwell LJ in *Cummings vs. London Bullion Company Ltd.*, (1952) 1 KB 327, have been quoted with approval:

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

84. Shri Venugopal has urged that section 47(3) cannot be applied in the present case because it postulates a situation where permission of the Central Government has not been sought and that in the present case permission was sought but was refused earlier. In our view the earlier refusal by the Government to give its approval to the rescheduling of payment of instalments does not in any way preclude the Government of India from considering the

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matter in the light of the subsequent developments and it cannot be said that merely because the Government of India had refused to give its approval to rescheduling of payment of instalments it would not grant permission under section 47(3) of FERA to the enforcement of the judgment that may be passed in these proceedings. It has also been urged that section 47(3) of FERA is applicable where the legal proceedings are brought in India to recover a sum which is 'due', i.e., as liquidated sum presently owing and the said provision would not apply to an obligation to pay on a future date. We do not find any support for this submission from the language of section 47(3) of FERA wherein the words used are "to recover any sum which, apart from the said provisions and any such term, would be due, whether as debt, damages or otherwise". The words "would be" which precede the word "due" indicate that the quantum of the amount has to be fixed in the legal proceedings and that it need not be a pre-determined amount. Moreover in the present case, we are concerned with the proceedings for the enforcement of the award wherein the amount due has already been determined by the Arbitral Tribunal. We are, therefore, unable to hold that the enforcement of the award would involve violation of any of the provisions of FERA and for that reason it would be contrary to public policy of India so as to render the award unenforceable in view of section 7(1)(b)(ii) of the Act.

(b) DISREGARD OF THE ORDERS OF DELHI HIGH COURT

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

> "Pending the hearing and final disposal of this petition for an interim order an injunction restraining the Respondent and its officers, servants and agents from taking any steps on proceedings in enforcement furtherance, pursuance or implementation or in and manner giving effect to the said order both dated 11.9.69 or from preventing the payment by the petitioner of tax-free interest of 6% per annum to IGE in accordance with the approval granted by the Responent Orders dated 8.9.65 and 7.6.67 and to grant an ex-parte order pending notice."

86. On February 24, 1970, the following interim order was passed in C.M.No. 286-W/70:

> "There shall be interim injunction as prayed for. Mr. Kirpal to file his counter by 24.3.70."

87. The matter came before the court after notice on May 18,1970 on which date the following order was passed:

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"Mr. Ravinder Narain states that he will give security, of the assets of the company to the satisfaction of the Commissioner of Income Tax, Lucknow for Rs. four lacs. Let this be done within a month from today. Interim injunction and stay to continue. In default of compliance, as above, petition for stay will stand dismissed."

88. From the prayer contained in C.M. 286-W and the orders dated February 24, 1970 and May 18, 1970 passed on the said application, it would appear that pending the hearing and final disposal of the writ petition, there was an interim injunction restraining the Union of India, the respondent in the said writ petition, and its officers, servants and agents from taking any steps on proceedings in enforcement, furtherance, pursuance or implementation or in any manner giving effect to the said orders dated September 11, 1969 whereby tax exemption had been withdrawn and also restraining from preventing Renusagar from paying tax on interest of 6% per annum to General Electric in accordance with the approval granted under orders dated September 3, 1965 and June 7, 1967. The only condition imposed by the Court was that Renusagar was required to give security for Rs. 4,00,000/- to the satisfaction of Commissioner of Income-Tax, Lucknow within one month. These orders would, therefore, show that on furnishing of the said security Renusagar was free to remit regular interest @ 6% per annum to General Electric as per the approval granted under orders dated September 8, 1965 and June 7, 1967. The said orders of the Delhi High Court did not also prevent Renusagar from depositing in the Government Treasury the income tax payable on the amount of regular interest payable @6.1/2 % per annum. The said orders instead of preventing Renusagar from remitting the said amount of tax free interest in fact permitted Renusagar to make the said payments to General Electric. It cannot, therefore, be said that in retaining the said amount with itself while the writ petition was pending in the Delhi High Court during the period from 1970 to 1980 Renusagar was acting in accordance with the orders passed by the Delhi High Court and the payment of the said amount by Renusagar to General Electric or depositing in the Government Treasury the income tax on the amount of regular interest payable to General Electric would have amounted to disregard of the said orders. In the circumstances, it is not possible to hold that in awarding compensatory damages under item No.2 for wrongfully withholding the amount of regular interest during the period from 1970 onwards the Arbitral Tribunal has penalised Renusagar for not disregarding the orders of the Delhi High Court and the enforcement of the said award would be contrary to public policy of India.

(c) Interest on Interest (Compound Interest)

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

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in this regard, we may take note of the law in England to which reference has been made by Shri Venugopal during the course of his submissions. At common law in England the principle that is applied is that laid down in "the reluctant decision" of the House of Lords in *London Chatham and Dover Rly. Co. vs. South Eastern Rly. Co.*, 1893 A.C. 429, that in the absence of any agreement or statutory provision for the payment of interest, a court has no power to award interest, simple or compound, by way of damages from the detention (i.e., the late payment) of a debt. The injustice resulting from this rule has been sought to be removed by legislative intervention. By Section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934 power was conferred on the Court of record to award interest in proceedings for recovery of any debt or damages where the debt remained unpaid until the judgment was given. Section 3 of the 1934 Act was repealed and replaced by Section 35-A inserted in the Supreme Court Act, 1981 by the Administration of Justice Act, 1982 and power to award interest was extended to cover a case where the debt is paid late, after proceedings for its recovery have begun but before they have been concluded. The power to award interest does not extend to a case where a debt is paid later but before any proceeding r its recovery have begun. The rule in *London Chatham and Dover Rly.* Case has been qualified by the Court of Appeal in *Wadsworth vs. Lydall* (1981) 2 All. E.R. 401 to apply only to claims for interest by way of general damages and does not extend to claim for special damages. In the field of Admiralty law simple interest is awarded, as a matter of course, on damages recovered in a damage action. In the area of equity the Chancery Courts, differing from the common law courts, have regularly awarded simple interest as ancillary relief in respect of equitable remedies, such as specific performance, recission and the taking of an account and the Chancery courts have regularly awarded interest, including not only simple interest but also compound interest, when they thought that justice so demanded, that is to say in case where money had been obtained and retained by fraud or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position. [See: *President of India vs. La Pintada Cia Navegacion SA*, (1984) 2 All. E.R. 773].

90. In Australia, the matter has been considered by the Australian High Court in the recent decision in *Hungerfords Vs. Walker,* (1989) 63 Aus. LJR 210. Mason, CJ and Wilson, J.. after referring to the decisions of the House of Lords in *London Chatham and Dover Rly. Co. Vs. South Eastern Rly. Co.* (supra) and *President of India Vs. La Pintada Cia* (supra) have observed -

> "But we see no reason for allowing the reluctance of the common law to extend to cases where the defendant's breach of contract or negligence has caused the plaintiff to pay away or the defendant to withhold money and, as a result, the plaintiff has been deprived of the use of the money so paid away or withheld".(p.218)

They upheld the decision of the full court of South Australia awarding damages for the added cost of funding the business with borrowed money as a result of the loss of the use of money overpaid in tax by awarding compound interest for the reason that simple interest would not reflect accurately the extent of the respondent's loss since simple interest almost undercompensates the injured party's true loss. It was observed:

> "The disdain of the common law for interest especially compound interest,is a relic from the days when interest was regarded as necessarily usurious". (p.218)

Brennan and Deane JJ. have expressed their general agreement with the reasons given by Mason, C.J. and Wilson, J. but Dawson, J. has given a dissenting judgment.

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91. It appears that in Canada also, the Canadian Federal Court of Appeal has expressed the view that there is no longer any reason to retain the common law rule against interest as damages and the said rule has been described as "a judge-made limitation on the awarding of interest which is clearly no longer seen to be good public policy". [See: *Algonguin Mercantile Corp. Vs. Dart Industries Canada Ltd.* (1987) 16 CPR (3d) 193 at 201].

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

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

(d) Damages on Damages

94. This objection relates to award of compensatory damages under item no.4. The submission of Shri Venugopal is that since the contract did not provide for payment of interest for the period subsequent to the date of maturity, the delinquent interest that has been awarded under item no.3 is in the nature of damages and the award of compensatory damages which is impermissible and is contrary to public policy of India. In support of this

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submission, Shri Venugopal has placed reliance on the decision of this Court in *Trojan & Co. Ltd. Vs. RM N.N. Nagappa Chettiar*, 1953 SCR 789, wherein interest had been allowed on damages and it was contended before this Court that the said interest could not be allowed on damages because it would amount to awarding damages on damages which is opposed to precedent and principle. The court rejecting the said contention and held that interest is allowed by court of equity in the case of money obtained or retained by fraud and in that case, the plaintiff has paid the money to defendants on account of fraudulent practices by the defendants on the plaintiffs.

95. In the present case, the said decision has no application because the basic postulate of the contention of Shri Venugopal is that the contract did not make any provision for payment of interest for the period subsequent to the date of maturity of the promissory notes. This contention has been considered by us and it has been negatived and in view of the earlier decision of this Court in Renusagar Case 1 we have held that the contract provided for payment of interest for the period subsequent to the date of maturity of the promissory notes till actual payment was made. In the circumstances, it cannot be said that the delinquent interest that has been awarded under item no.3 has been awarded by way of damages and not by way of interest. Once it is held that delinquent interest awarded under item no.3 is by way of interest than there is no question of damages being awarded on damages and it is, therefore, not necessary to go into the question whether awarding damages on damages is contrary to public policy of India.

(e) Unjust Enrichment

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

97. In the case decided by the Romanian Supreme Court, a Lebanese shipowner had agreed by a charter party with the Romanian State enterprise to transport from Costantza (Romania) to Bandar Abbas (Iran) certain goods which had been sold C&F to an Iranian buyer. The voyage was interrupted at Tripoli (Lebanon) where the shipowner had its seat. At Tripoli all merchandise disappeared, according to the shipowner because of war, and according to the Romanian enterprise because of a local fraudulent sale. The dispute was referred to arbitration and in the arbitration award, the shipowner was directed to refund to the Romanian enterprise part of the freight it had received as well as the value of the lost goods. The Romanian enterprise sought enforcement of the arbitration award in Romania. The Lebanese shipowner objected to the request on various grounds including the ground that it was not obliged to refund the value of the goods since they had been fully paid for by the Iranian buyer. It was submitted that the enforcement of the award was contrary to Romanian public policy since it resulted in unjust enrichment of the Romanian enterprise inasmuch as the said enterprise was allowed to receive for the second time the price of goods which had already been paid by the Iranian buyers. Rejecting the said objection the Romanian Supreme Court held that the arbitral award showed that the Romanian enterprise meant to obtain

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repayment of the value of the cargo and the freight on behalf of the Iranian buyer acting as agent or trust and since the Romanian enterprise did not act on its own behalf, although it had no express mandate, the conditions for unjust enrichment were not met in the case at issue and, consequently, the public policy of Romanian international private law had not been violated. The said decision has proceeded on the basis that unjust enrichment was part of the public policy of Romanian international private law but in that case it was found that there was no violation of the said principle of public policy.

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

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

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

100. We do not consider it necessary to go into the question whether the principle of unjust enrichment is a part of the public policy of India since we are of the opinion that even if it be assumed that unjust enrichment is contrary to public policy of India, Renusagar cannot succeed because the unjust enrichment must relate to the enforcement of the award and not to its merits in view of the limited scope of enquiry in proceedings for the enforcement of a foreign award under the Foreign Awards Act. the objections raised by Renusagar based on unjust enrichment do not relate to the enforcement of the award because it is not the case of Renusagar that General Electric has already received the amount awarded under the arbitration award and is seeking to obtain enforcement of the award to obtain further payment and would thus be unjustly enriching itself. The objections about unjust enrichment raised by Renusagar go to the merits of the award, that is, with regard to the quantum awarded by the Arbitral Tribunal under item nos.2, 3, 4 and 7, which is beyond the scope of the objections that can be raised under Section 7(1)(b)(ii) of the Foreign Awards Act. To hold otherwise would mean that in every case where the arbitrators award an amount which is higher than the amount that should have been awarded, the award would be open to challenge on the ground of unjust enrichment. Such a course is not permissible under the New York Convention and the Foreign Awards Act. We have, however, examined the objections raised by Renusagar relating to unjust enrichment even on merits and we are not satisfied that the amounts awarded under items Nos.2, 3, 4 and 7 are so excessive as to result in unjust enrichment of General Electric.

101. One of the contentions that was urged by Shri Venugopal in support of the

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objections relating to unjust enrichment was that the compensatory damages should have been awarded after deducting the US tax payable by General Electric on the amount of regular interest as well as delinquent interest. Reliance, in this regard, has been placed on the decision of the House of Lords in *British Transport Commission Vs. Gourley,* 1955(3) All Eng. R. 796, wherein it has been laid down that when assessing damages for loss of actual or prospective earnings allowance must be made for any income tax on the earnings. This rule in *Gourley's case* (supra) will, however, apply only where two conditions are satisfied : (1) the money, for the loss of which damages are awarded, would have been subjected to tax as income; and (2) the damages awarded to the plaintiff are not subject to tax in his hands. [See : Chitty on Contracts, 26th Edn., Vol. I, pp. 1186-87, para 1841].

102. In *Hanover Shoe vs. United Shoe Machinery Corporation,* (1968) 20 L.Ed. (2d) 1231, the Court of Appeal had remanded the matter to the District Court to take account of the additional taxes Hanover would have paid for computation of damages, on the view that since only after-tax profits can be reinvested or distributed to shareholders, Hanover was damaged only to the extent of the after-tax profits that it failed to receive. The U.S. Supreme Court reversed the said decision of the Court of Appeal and held that the District Court did not err on the question of computation. The Court observed:

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

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

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

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revive and Renusagar were required to pay the instalments in accordance with the terms o the said contract and were required to pay interest for delayed payment of thos instalments and therefore it cannot be said that award of delinquent interest for th period during which the matter was pending consideration with the Government of Indi would result in unjust enrichment of General Electric.

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

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

VI. RELEVANT DATE FOR CONVERSION OF THE AMOUNT AWARDED FRO FOREIGN CURRENCY TO INDIAN CURRENCY

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

108. Where the money of account and the money of payment are not identical the amo of units of the currency of account owed by the debtor must, by an exchange operation, translated into the currency in which he is obliged to pay. This is a matter of substa and the rate of exchange for such conversion is determined by the proper law of contract or the law governing the liability. (See: Dicey & Morris, "The Conflict of Law pp.1442 and 1453). By this process the quantum of the monetary obligation is determin The questions relating to conversion of currency often arise at the stage of discharge of monetary obligation when the debtor makes the payment in a currency other than the mo of payment. Such conversion is to be made on the basis of the exchange rate prevailing the date of payment at the place of payment. (See : Dicey & Morris, The Conflict Laws, Rule 210(2) at pp. 1453-54; Mann : The Legal Aspect of Money, 5th Ed, p.3 Conversion of the currency is also necessary in cases where legal proceedings have to instituted by the creditor. In some legal systems the judgment can be given by the co in the currency of that country only and, therefore, it becomes necessary to con the monetary obligation into the currency of that country at the time of institution the legal proceedings. The exchange for such conversion will depend on the *lex fori*, the law of the forum and in many legal systems it is the date the cause of action arc i.e., the date of breach while in some systems it is the date of judgment. In legal syste where it is permissible to obtain a judgment in foreign currency conversion would

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necessary at the stage of enforcement or execution of the judgment. Same problem would arise when a judgment of a foreign court is sought to be enforced. The relevant date for applying the exchange rate for such conversion depends upon the lex fori, i.e., the law of the forum because it is a matter relating to the procedure. (See : Cheshire & North, Private International Law, 12th Ed., p.106). What applies to enforcement of judgments equally applies to enforcement of arbitral awards.

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

110. Prior to 1975, the law in England, was that an English court will not give judgment for the payment of an amount expressed in foreign currency and the amount of any foreign currency had to be converted in sterling on or before the date of judgment and the date for the purpose of such conversion was the date when the cause of action arose. This was the law laid down by the House of Lords in Re. *United Railways of Havana & Regla Warehouses Ltd.* [1961 A.C. 1007]. This decision was overruled by the House of Lords (by majority) in 1975 in *Miliangos vs. George Frank (Textiles) Ltd.* [1976 A.C. 443]. In that case, a Swiss seller had agreed to supply English buyers with goods at a price expressed in the contract in Swiss francs. The goods and invoices were delivered but the price was not paid and bills of exchange drawn in Switzerland and accepted by the buyers were dishonored on presentation. The seller brought action in England wherein he claimed the sums due in Swiss francs. Originally he had asked for conversion of Swiss francs into sterling at the breach date in view of the law laid down in Re. United Railways of Havana's case (supra) but subsequently in view of the decision of the Court of Appeal in *Schorsch Meier G.M.B.H. vs. Hennin* [1975 Q.B. 416], the seller amended his statement of claim so as to claim the amount due to him in Swiss francs as an alternative to claiming judgment in sterling. Bristow, J. gave judgment for the moneys due expressed in sterling, holding that the rule that the English courts could express their judgments only in sterling had not been altered either by Parliament or by any decision of the House of Lords. The Court of Appeal reversed the said decision and, following *Schorsch Meier G.M.B.H. v. Hennin* (supra), gave judgment for the seller ordering the buyers to pay the sum due in Swiss francs, or the equivalent in sterling at the time of payment. Affirming the said decision of the Court of Appeal and departing from its earlier decision in the *Havana Railways* Case (supra), the House of Lords has held that it was legitimate for the House of Lords to depart from the "breach date conversion" rule and recognise that an English court was entitled to give judgment for a sum of money expressed in a foreign currency in the case of obligations of a money character to pay foreign currency arising under a contract, the proper law of which was that of a foreign country and where the money of account and payment is that of that country, or possibly of some other country but not of the United Kingdom. It was further held that the claim had to be specifically for the foreign currency or its sterling equivalent and the conversion shall be at the date of payment, i.e., the date when the courts authorise enforcement of the judgment in terms of sterling. The said decision was, however, confined in its application to foreign money obligations and the

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court left open for future discussion the question whether the rule applying to money obligations should apply as regards claims for damages for breach of contract or for tort. In his dissenting opinion, Lord Simon, has reiterated the law laid down in *Havana Railways* case (supra). It may be of interest to note that Lord Wilberforce, who gave the leading speech in *Miliangos case* (supra) had appeared in *Havana Railway case* (supra) but failed to persuade the House of Lords to accept his contention. He, however, succeeded 15 years later, in having his views accepted by the House of Lords. Subsequently in *Owners of M.V. Eleftherotria v. Owners of M.V. Despina and Services Europe Atlantique Sud (Seas) of Paris vs. Stockholms Rederiaktiebolag Sea of Stokholm*, 1979 A.C. 685, the House of Lords has extended the rule laid down in *Miliangos case* (supra) to claims for damages for tort and breach of contract. The rule laid down in *Miliangos case* has been held to be applicable to an action at common law on a foreign judgment [See : Dicey & Morris's The Conflict of Laws, 11th Edn, Vol.2, p. 1461]. In relation to arbitral awards the matter had come up before the Court of Appeal in *Jugoslavenska Oceanska Plovidba vs. Castle Investment Co. Inc.* [1974 Q.B. 292] wherein it was held that an award could be made by the arbitrators in England in terms of U.S. dollar and that the same could be enforced by converting the foreign currency into sterling at the rate prevailing at the date of the award. While referring the said decision, Lord Wilberforce, in *Miliangos case* (supra), has said:

> "In the case of arbitration, there may be a minor discrepancy, if the practice which is apparently adopted (see the Jugoslavenska case [1974] Q.B. 292, 305) remains as it is, but I can see no reason why, if desired, that practice should not be adjusted so as to enable conversion to be made as at the date when leave to enforce in sterling is given." (p.469)

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

112. Following the law in England, the Supreme Court of Canada had applied the breach date rule for converting foreign currency into Canadian dollar in two earlier decisions. (See : *The Custodian Vs. Bhucher*, 1927, SCR 420 at p.427; *Gatineau Power Co. Vs. Crown Life Insurance Co.*, 1945 SCR 655 at p.658). But subsequent to *Miliangos case* (supra), Carruthers J. of the High Court of Ontario, in *Batavia Times Publishing Co. Vs. Davis*, (1978) DLR (3d) 144, applied the judgment date rule in a suit for enforcement of a foreign judgment. Distinguishing the earlier judgments of the Supreme Court as dealing with actions based on the original cause of action, the learned judge held that in a proceeding to enforce a foreign judgment he was free to adopt that conversion date which is his view "avoids an injustice" and is "in step with commercial needs". The said judgment was affirmed by the Court of Appeal. {(1980) 102 DLR (3d) 192). In *Clinton Vs. Ford* {(1982) 137 DLR (3d) 281} the Court of Appeals of Ontario affirmed the order of the trial judge applying the rate prevailing at the date of the Statement of Claim on the view that in awarding judgment on a foreign judgment the trial judge should be free to adopt a date for the conversion of foreign currency into domestic currency which avoids injustice and which is in step with commercial needs.

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

> "Where the breach or wrong occurred in a foreign country (especially by non-payment of money due there), the damages are measured in the currency of that

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country and the dollar equivalent calculated at the rate of exchange obtaining at the date of judgment can be recovered; where the breach or wrong occurred in the United States (especially by non-payment of foreign money due there), the damages, being measured in dollars, are to be converted at the rate of exchange of the date of breach or wrong". (Mann : Legal Aspects of Money, 5th Ed., p.347)

114. According to the learned author the fist part of the above statement is based on the decision of the U.S. Supreme Court in *Deutsche Bank Filiale Nurenberg Vs. Humphrey,* (1926) 272 US 517 and the latter part of the statement is supported by the decision of the U.S. Supreme Court in *Hicks Vs. Guiness*, (1925) 271 US 711.

115. Most of the States, including the State of New York (till recently), follow the old English rule and apply the rate of exchange prevailing at the date of breach. In the State of New York, however, there has been a departure in some cases where the judgment-date rule has been applied. [See : *John S. Metcalf Co. V. Mayer,* (1925) 211 N.Y.Supp.53, and *Sirie V. Godfrey,* (1921) 188 N.Y. Supp. 52]. Even in the matter of application of the breach date rule in actions for enforcement of a foreign judgment, the New York courts have applied the breach date rule with effect from the date of the judgment sought to be enforced. In *Indaq vs. Irridelco Corpn.*, (1987) 658 F. Supp. 763, one of the cases on which reliance was placed by Shri Venugopal, the action was brought to enforce a judgment entered in favour of the plaintiff by the courts of Switzerland and the United States District Court in New York held that the date of entry of Swiss judgment, rather than the date of breach of underlying obligation, i.e., its agreement to repay certain notes, was controlling as to application of breach-day conversion rule. It was held that the date of award for damages by Cantonal Court was relevant date for application of breach date conversion rule even though that judgment was subsequently appealed. In taking this view, the court relied upon the decision in *Competex S.A.V. Lalord* (1986) 783 F. Zd 333. It appears that the provisions in this regard contained in section 27 of the Judiciary Law of the State of New York have now been amended in 1987. Earlier section 27 provided that all judgments or decrees rendered by any court for any debt, damages or costs, all executions issued thereupon, and all accounts arising from judicial proceedings shall be computed, as near as may be, in U.S. dollars and cents, rejecting lesser fractions, and no judgment or other proceeding, shall be considered erroneous for such means. Section 27 as amended reads as under:

"27. (a) Except as provided in subdivision (b) of this section, judgments and accounts must be computed in dollars and cents. In all judgments or decrees rendered by any court for any debt, damages or costs, all executions issued thereupon, and all accounts arising from judicial proceedings shall be computed, as near as may be, in U.S. dollars and cents, rejecting lesser fractions, and no judgment or other proceeding, shall be considered erroneous for such means.

(b) In any case in which the case of action is based upon an obligation denominated in a currency other than currency of the United States, a court shall render or enter a judgment or decree in the foreign currency of the underlying obligation. Such judgment or decree shall be converted into currency of the United States at the rate of exchange prevailing on the date of entry of the judgment or decree."

116. As a result of this amendment, instead of breach-date rule which was prevailing earlier the judgment-date rule has been introduced. This amendment came into operation

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on July 20, 1987. It was introduced at the request of New York State Bar Association and the Erie Country Bar Association and it was supported by the Association of the Bar of the City of New York. According to the chairman of the Committee on International Trade and Transactions of the New York State Bar Association the said amendment was necessary because in view of the decision of House of Lords in Miliangos case "a number of transactions which would otherwise be governed by New York law, and, involve professional and financial advisors in New York, have been structured in England and covered by English law".

117. In India, the law relating to conversion of foreign currency into Indian currency in the matter of enforcement of judgments or awards is governed by the decision of this Court in *Forasol case* (supra). That case arose out of a contract between Forasol, a foreign company and the Oil and Natural Gas Commission, a Government of India Undertaking. Certain disputes arose between the parties which were referred to arbitration in accordance with the arbitration clause contained in the contract. The said arbitration was governed by the Indian Arbitration Act, 1940. The award directed certain payments to be made in French Francs but did not specify the rate of exchange at which the French Francs were to be converted into Indian rupees. Proceedings were initiated in Delhi High Court for passing a decree in terms of the award and a question arose as to the exchange rate for conversion of French Francs into Indian rupees. This Court examined the question with reference to the following dates -

(1) the date when the amount become due and payable;
(2) the date of the commencement of the action;
(3) the date of the decree;
(4) the date when the court orders execution to issue; and
(5) the date when the decretal amount is paid or realised.

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

119. The first date, i.e., the date when the amount became due and payable, was not accepted by the Court for the reason that it cannot be said to be just, fair or equitable because in a case where the rate of exchange has gone against the plaintiff, the defendant escapes by paying a lesser sum than what he was bound to and thus is the gainer by his default while in the converse case where the rate of exchange has gone against the defendant, the defendant ..... to a much greater burden than what he should bear. The Court felt that the same criticism would apply to the second of the dates, namely, the date of the commencement of the action or suit because suits are not often disposed of for an unconscionably long time and if we take into account the time that would be spent in appeals, further appeals, and revision and review applications which may be filed, the longevity of the litigation is doubled, if not tripled, so that none can with any certainty predict even a probable date for its termination. As regards the third date, namely, the date of the decree, the Court observed that a decree crystallizes the amount payable by the defendant to the plaintiff and it is the decree which entitles the judgment-creditor to recover the judgment debt through the processes of law. Dealing with the objection that the date of the decree of

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the trial court is not final decree for there may be appeals or other proceedings against it in superior courts and by the time the matter is finally determined, the rate of exchange prevailing on that date may be nowhere near that which prevailed at the date of the decree of the trial court, it was observed that this difficulty is easily overcome by selecting the date when the action is finally disposed of, in the sense that the decree becomes final and binding between the parties after all remedies against it are exhausted. As regards the fourth date, i.e., the date when the court orders execution to issue, it was felt that execution of a decree is not a simple matter because it involves execution of a money decree and the judgment-debtor's property has to be attached and pending attachment a third party, at times set up by the judgment-debtor, may prefer a claim to the attached property which will have to be investigated and determined by the executing court and even where no claim is preferred the attached property cannot be brought to sale immediately and certain formalities have to be complied with and even after the sale has taken place, the judgment-debtor may further hold up the receipt of the sale proceeds by the decree-holder by raising objection to the conduct of the sale and at times, a fresh auction sale may be have to be held if the auction purchaser commits default in paying the balance of the purchase price and a considerable time would thus elapse between the date when the court orders execution to issue and the date of the receipt of the sale proceeds by the decree-holder. It was also pointed out that at times the judgment debt is not recovered in full when the attached property is sold in execution and further application for execution may become necessary and this would lead to an anomalous position for the Court would have to fix the rate of exchange, which may be different from each application for execution. A further difficulty that was pointed out by the court was that execution can only issue for a sum expressed in Indian currency and it cannot be for a sum which would be determined and fixed by the executing court at the time of granting an execution application. With regard to the fifth date, namely, the date of payment, the Court felt that there were three practical and procedural difficulties namely, payment of court fees, the pecuniary limits of the jurisdiction of courts and execution. Keeping in view the considerations referred to above, this Court declined to adopt the rule laid down in *Miliangos case* (supra) and held that it would be fair to both the parties to take the date of passing the decree, i.e., the date of judgment. The said date was also held applicable to a case where a decree is made in terms of an award made in a foreign currency.

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

> ".....the plaintiff, who has not received the amount due to him in a foreign currency and, therefore, desires to seek the assistance of the court to recover that amount, has two courses open to him. He can either claim the amount due to him in Indian currency or in the foreign currency in which it was payable. If he chooses the first alternative, he can only sue for that amount as converted into Indian rupees and his prayer in the plaint can only be for a sum in Indian currency. For this purpose, the plaintiff would have to convert the foreign currency amount due to him into Indian rupees. He can do so either at the rate of exchange prevailing on the date when the amount became payable for he was entitled to receive the amount on that date or, at his option, at the rate of exchange prevailing on the date

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of the filing of the suit because that is the date on which he is seeking the assistance of the court for recovering the amount due to him. In either event, the valuation of the suit for the purposes of court-fees and the pecuniary limit of the jurisdiction of the court will be the amount in Indian currency claimed in the suit. The plaintiff may, however, choose the second course open to him and claim in foreign currency the amount due to him. In such a suit, the proper prayer for the plaintiff to make in his plaint would be for a decree that the defendant do pay to him the foreign currency sum claimed in the plaint subject to the permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973, being granted and that in the event of the foreign exchange authorities not granting the requisite permission or the defendant not wanting to make payment in foreign currency even though such permission has been granted or the defendant not making payment in foreign currency or in Indian rupees, whether such permission has been granted or not, the defendant do pay to the plaintiff the rupee equivalent of the foreign currency sum claimed at the rate of exchange prevailing on the date of the judgment. For the purposes of court-fees and jurisdiction the plaintiff should, however, value his claim in the suit by converting the foreign currency sum claimed by him into Indian rupees at the rate of exchange prevailing on the date of the filing of the suit or the date nearest or most nearly preceding such date, stating in his plaint what such rate of exchange is. He should further give an undertaking in the plaint that he would make good the deficiency in the court-fees, if any, if at the date of the judgment, at the rate of exchange then prevailing, the rupee equivalent of the foreign currency sum decreed is higher than that mentioned in the plaint for the purposes of court-fees and jurisdiction. At the hearing of such a suit, before passing the decree, the court should call upon the plaintiff to prove the rate of exchange prevailing on the date of the judgment or on the date nearest or most nearly preceding the date of the judgment. If necessary, after delivering judgment on all other issues, the court may stand over the rest of the judgment and the passing of the decree and adjourn the matter to enable the plaintiff to prove such rate of exchange. The decree to be passed by the court should be one which orders the defendant to pay to the plaintiff the foreign currency sum adjudged by the court subject to the requisite permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973, being granted, and in the event of the Foreign Exchange authorities not granting the requisite permission or the defendant not wanting to make payment in foreign currency even though such permission has been granted or the defendant not making payment in foreign currency or in Indian rupees, whether such permission has been granted or not, the equivalent of such foreign currency sum converted into Indian rupees at the rate of exchange proved before the court as aforesaid. In the event of the decree being challenged in appeal or other proceedings and such appeal or other proceedings being decided in whole or in part in favour of the plaintiff, the appellate court or the court hearing the application in the other proceedings challenging the decree should follow the same procedure as the trial court for the purpose of ascertaining the rate of exchange prevailing on the date of its appellate decree or of its order on such application or on the date nearest or most nearly preceding the date of such decree or order. If such rate of exchange is different from the rate in the decree which has been challenged, the court should make the necessary modification with respect to the

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rate of exchange by its appellate decree or final order. In all such cases, execution can only issue for the rupee equivalent specified in the decree, appellate decree or final order, as the case may be. These questions, of course, would not arise if pending appeal or other proceedings adopted by the defendant the decree has been executed or the money thereunder received by the plaintiff." (pp.587-589)

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

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

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

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

124. Shri Venugopal has urged that in *Forasol case* (supra) this Court was dealing with the enforcement of an award governed by the Indian Arbitration Act and that the principles laid down in the said decision cannot be applied to the present case arising out of a foreign award which is not governed by the provisions of the Indian Arbitration Act but is governed by the provisions of the Foreign Awards Act. It is no doubt true that in the *Forasol case* (supra) this Court was dealing with an award governed by Indian Arbitration Act but that

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does not affect the applicability of the said decision to proceedings for enforcement of a foreign award in Indian courts because the matter of conversion of foreign currency into Indian currency at the stage of enforcement of an award is governed by the same principle irrespective of the fact whether the award is governed by the Indian Arbitration Act or a foreign award governed by the Foreign Awards Act. Moreover the position has been made clear by s.4(1) of the Foreign Awards Act which lays down that a foreign award shall subject to the provisions of this Act be enforceable in India as if it were an award made on a matter referred to arbitration in India. The said provision equates a foreign award to an Indian award for the purpose of enforcement with the exception that such enforcement will be subject to the provisions of the Foreign Awards Act. There is nothing in the provisions of the Foreign Awards Act which excludes the applicability of the principles laid down in Forasol case (supra) with regard to enforcement of foreign awards. In our opinion, therefore, the enforcement of the award in the instant case is governed by the law laid down in Forasol case (supra).

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

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

> "This situation involves two distinct questions: which is the legal system that determines whether there exists a right or a duty to convert the money of account into the (local) money of payment? Which is the legal system that governs the mechanics of the conversion (the type of the rate of exchange to be employed, the date and the place with reference to which the rate is to be ascertained)?
>
> As regards the first point it is necessary to repeat that, except in unusual circumstances, the creditor suffers no prejudice from payment in the moneta loci solutionis. It is suggested,therefore, that in general, i.e., where no problem of construction arises, the question of the right or duty of conversion may be treated as one relating to the mode of performance and, consequently, subject to the lex loci solutionis. The decision on the second point, however, is liable to encroach severely upon the substance of the

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obligation: whether the creditor who is entitled to be paid 1,000 Spanish pesetas in Gibraltar must accept the pound equivalent calculated at the rate of peseta notes or of cable transfers to Madrid, or calculated with reference to the rate prevailing at the Gibralter or Madrid rate - these are substantial matters on which the quantum eventually received by the creditor depends, if payment is not made in actual pesetas. These aspects, therefore, cannot be described as relating merely to the mode of performance, but ought to be subject to the proper law of the contract". (pp.326-327)

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

"It is now clear that English law does not require any foreign money obligation to be converted into sterling for the purpose of instituting proceedings or of the judgment; on the contrary, where the plaintiff claims a sum of foreign money, he is both entitled and bound to apply for judgment in terms of such foreign money and it is only at the stage of payment or enforcement that conversion into sterling at the rate of exchange then prevailing takes place. This is so whether the claim is for payment of a specific sum contractually due or for damages for breach of contract or tort or for a just sum due in respect of unjustified enrichment or for restitution. Nor does it matter whether the contract sued upon is governed by English or by foreign law. Nor it is necessary to ask for specific performance rather than payment: in either case the defendant will be ordered to pay foreign money. Moreover an award in an English arbitration may be expressed and enforced in foreign currency and a foreign award or judgment so expressed may be enforced like the English award or judgment." (p.352)

128. The entire position has been thus summed up by Dr. Mann:

"As regards the date with reference to which the rate of exchange is to be ascertained, the law is to a large extent settled. In connection with conversion for the purpose of proceedings the payment-date rule is firmly established. Outside proceedings the date depends on the construction of the contract, but there exists a strong tendency to apply the payment-date rule." (p.436)

129. Same is the position with regard to the passage at p.1454 of The Conflict of Laws by Dicey & Morris, 11th Edn., Vol.II, which reads thus -

"The quantum of money tokens to be tendered is, however, always a matter of substance and not a question of the manner of performance. Hence it should always be governed by the proper law, irrespective of the place of payment". (p.1454)

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

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

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

At the beginning of the comment on the said rule, it has been stated: "This Rule deals with the question whether a debtor has, by making a payment in a given currency discharged the debt. The effect of proceedings in English court on a foreign currency obligation is not considered in this rule but in Rule 211". (p.1453-54). This would indicate that the observations relied upon (at p. 1454) which follow this statement have no bearing to the proceedings in a court on foreign currency ..gations and have to be confined to payments by a debtor in discharge of the debt.

RECONSIDERATION OF FORASOL CASE

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

"If a debt or other liability expressed in a foreign currency is payable in England, the debtor may tender pounds in discharge. This is "primarily a rule of construction" which was "understandable at a time when foreign exchange was freely obtainable". Where this is not the case, the rule may defeat the intention of the parties, and it may therefore "require reconsideration". Despite a number of dicta to the contrary, the debtor may also discharge his liability by tendering the foreign currency in specie, but the creditor cannot compel him to do so. The rate of exchange to be applied is that of the day when the debt is paid." (11th Edn., Vol.II p.1454)

132. These observations have been made in comment under Rule 210 and, as point out earlier, the said rule relates to payment made by a debtor in discharge of the debt and does

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n deal with proceedings in courts for enforcement of foreign currency obligations which have been dealt with in Rule 211, which is in following terms:

"Rule 211 - (1) An English court can give judgment for an amount expressed in foreign currency.

(2) For procedural reasons the amount of the judgment must be converted into sterling before execution can be levied. The date for conversion will be the date of payment, .e., the date when the court authorises enforcement of the judgment, unless some other date is prescribed by statute".

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

VIII : INTEREST PENDENTE LITE AND FUTURE INTEREST

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

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

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

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

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

(v) period subsequent to the decree till payment.

135. The interest in respect of the period covered by item (i), namely, prior to the date of reference to arbitration would be governed by the proper law of the contract and the interest covered by items (ii) and (iii), i.e., during the pendency of the arbitral proceedings and subsequent to the award till the date of institution of the proceedings in the court for the enforcement of the award would be governed by the law governing the arbitral proceedings. These are matters which have to be dealt with by the arbitrators in the award and the award in relation to these matters cannot be questioned at the stage of enforcement of the award. At that stage the court is only required to deal with interest covered by items (iv) and (v). The award of interest in respect of these periods would be governed by *lex fori*, i.e., the law of the forum where the award is sought to be enforced. According to Alen Redfern and Martin Hunter "once an arbitral award is enforced in a particular country

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as a judgment of a court, the arbitral post-award interest rate may be overtaken by the rate applicable to civil judgments." [See : Redfern & Hunter, Law and Practice of International Commercial Arbitration, 2nd Edn., p.406].

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

"INTEREST ON AWARDS — Where and in so far as award is for the payment of money the Court may in the decree order interest, from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree."

137. Unlike Section 34 of the Code of Civil Procedure, whereunder the Court can award interest for the period of pendency of the suit as well as for the period subsequent to the decree till realisation, Section 29 of the Arbitration Act empowers the court to award interest from the date of decree only. It has, however, been held that while passing a decree in terms of the award, the Court can award interest for the period during which the proceedings were pending in the court, i.e., the period from the date of institution of proceedings for the enforcement of the award in the court till the passing of the decree in cases arising after the Interest Act, 1978. (See ; *Gujarat Water Supply & Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. & Anr.*, 1989 (1) SCR 318 at p.328)

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

139. Shri Shanti Bhushan has, however, placed reliance on the interim order passed by this Court on February 21, 1990 whereby this Court stayed the operation of decree and order under appeal subject to Renusagar depositing the sum equivalent to one half of the decretal amount calculated as on date and furnishing security to the satisfaction of the High Court in respect of the balance of the decretal amount and further directed that interest in respect of the rest of the one half of the decretal amount which was not recoverable by General Electric by virtue of the said order would be @ 10% per annum calculated from this day on the entirety of the balance irrespective of the terms as to the rate and mode of calculation of interest granted in or permitted by the decree under appeal. Shri Shanti Bhushan has urged that in view of the said order passed by this Court on February 21, 1990

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General Electric is entitled to award of interest @ 10% per annum on the decretal amount after deducting the amounts deposited by Renusagar in pursuance to the orders dated February 21, 1990 and November 6, 1990. The order dated February 21, 1990 was, in our opinion, in the nature of an interlocutory order and the directions contained therein were also interlocutory in nature which are subject to the final orders that are passed in the appeals. We ought, here, to take notice of the developments in the international monetary exchange system insofar as Indo-American currencies are concerned. The effect of these changes in the exchange rates made a land-slide change in the size of the financial obligations of Renusagar under the Award. The liability thereunder in terms of Indian rupees virtually became double. It is, however, true that that so far General Electric is concerned, it secures no more than what the Award gave it in terms of U.S. Dollars. This judgment assures to General Electric that quantum of U.S. currency. But the area of the discretion of the court is in the interlocutory dispensation. We are, therefore, not inclined to award interest pendente lite, i.e., during the pendency of the proceedings for enforcement of the award in the High Court as well as this Court and we hereby recall the directions contained in the order dated February 21, 1990 as regards payment of interest on the balance of the decretal amount. The award of interest for the period subsequent to the date of passing of the award till the passing of this judgment in these appeals is, therefore, confined to the period till the date of institution of the proceedings for enforcement of the Arbitration Award in the Bombay High Court i.e. upto October 15, 1986.

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

IX. ADJUSTMENT OF THE SUM OF RS.10,69,26,500/- DEPOSITED BY RENUSAGAR AGAINST THE DECRETAL AMOUNT:

141. As indicated earlier, in pursuance to the orders of this Court dated February 21, 1990, Renusagar deposited a sum of Rs.9,69,26,590/- on March 20, 1990 and a further amount of Rs.1,00,00,000/- was deposited by Renusagar in pursuance to the order dated November 6, 1990 on December 3, 1990. These amounts have been withdrawn by General Electric. The question is how and at what rate the said amount should be adjusted against the decretal amount. It is not disputed that on the date when the said deposits were made by Renusagar and were withdrawn by General Electric, rupee-dollar exchange rate was Rs. 17/- per dollar. Shri Shanti Bhushan has, however, submitted that although General Electric had withdrawn the amount deposited by Renusagar, it was not able to use the same because the Reserve Bank of India did not grant the permission to General Electric to remit the amount by converting the same into U.S. dollars on account of the pendency of these appeals in this Court. In this regard, Shri Shanti Bhushan has placed before us copies of the letters dated April 30, 1990, June 25, 1990, September 10, 1990 and November 29, 1990 of the Reserve Bank of India. On the basis of the said letters, Shri Shanti Bhushan has submitted that out of a sum of Rs. 10.69 crores which was received by General Electric it was permitted by the Reserve Bank of India to utilise only Rs. 3.52 crores for meeting administrative and operational expenses of the Liaison Office of General Electric and the rest of the amount would be converted only after the decision in these

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appeals. Shri Shanti Bhushan has, therefore, submitted that the amounts deposited by Renusagar should be converted from Indian rupees into U.S. dollars at the exchange rate prevalent on the date of the judgment of this Court and not on the basis of the rate of exchange prevalent at the time of the said payments by Renusagar. We are unable to agree with this submission. The convertibility into U.S. dollars of money paid by Renusagar in Indian rupees is not the condition for discharge of the decree and as laid down in Forasol case (supra) the decree can be discharged by payment in Indian rupees and it is for General Electric to obtain the necessary permission from the Reserve Bank of India for such conversion of Indian rupees to U.S.dollars and the transfer thereof to the United States. If General Electric were finding a difficulty in such transfer on account of the pendency of these appeals in this Court they could have moved this Court and obtained necessary clarification in this regard. They did not choose to do so. In these circumstances, the amount of Rs. 10,69,26, 590/- which has been paid by Renusagar in pursuance to the orders dated February 21, 1990 and November 6, 1990 has to be converted into U.S. dollars on the basis of the rupee-dollar exchange rate of Rs. 17.00 per dollar prevalent at the time of such payment and calculated on that basis the said amount comes to US $ 6,289,800.00.

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

Amount awarded by the Arbitral Tribunal	:	12,215,622.14
Interest on US$ 2,716,914.72 (the total amount awarded under item nos. 1,3 and 5) @ 8% per annum from 1.4.86 to 15.10.1986 in terms of the award	:	117,733.00
		12,333,355.14
Less: Amount paid by Renusagar in pursuance of the orders dated 21.2.1990 and 6.11.1990 during the pendency of the appeals in this Court	:	6,289,800.00
		6,043,555.14

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

144. At this stage it may be mentioned that after the arguments were concluded and the judgment had been reserved; an application [I.A.No. 9/93 in C.A.Nos. 71 and 71A/90] was filed on behalf of Hindalco Industries Ltd. for amendment of the cause title to substitute the applicant as appellant in C.A.No. 71/90 in place of Renusagar. The said application has

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been moved on the ground that after the filing of the said appeal the Bombay High Court, by its order dated April 22, 1993, has sanctioned a scheme of amalgamation of Renusagar with Hindalco Industries Ltd. and the said scheme has also been sanctioned by the Allahabad High Court by its order dated March 26, 1993. A true copy of the said scheme of amalgamation has been filed along with the said application. In clause (i) of para 4 of the scheme, it is stated:

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

145. In view of the aforesaid provision in the scheme, all pending suits, appeals or other proceedings of whatever nature by or against the transferor company, viz., Renusagar shall not abate or be discontinued or in any way be prejudically affected by reason of the transfer of the undertaking of Renusagar and that the said proceedings may be continued, presented and enforced by or against Renusagar as if the scheme had not been made. The scheme of amalgamation does not, therefore, in any way affect the continuance of the proceedings in the above appeals in this Court by Renusagar and in these circumstances, we find no ground for substituting the name of Hindalco Industries Ltd. as the appellant in place of Renusagar in C.A.No. 71/90. The said application is, therefore, rejected.

146. In the result, C.A. Nos. 71 and 71A of 1990 and C.A.No. 379 of 1992 are dismissed and the decree passed by the High Court is affirmed with the direction that in terms of the award an amount of US $ 12,333,355.14 is payable by Renusagar to General Electric out of which a sum of US$ 6,289,800.00 has already been paid by Renusagar in discharge of the decretal amount and the balance amount payable by Renusagar under the decree is US $ 6,043,555.14 which amount on conversion in Indian rupees at the rupee-dollar exchange rate of Rs. 31.53 per dollar prevalent at the time of this judgment comes to Rs. 19,05,53,293.56. Renusagar will be liable to pay future interest @ 18% on this amount of Rs. 19,05,53,293.56 from the date of this judgment till payment. The parties are left to bear their own costs.

[ADVOCATES ON RECORD:- Khaitan & Co and K.J.John]

1993(4) SCALE 16

BAKSHISH SINGH *Appellant*

VS

M/S. DARSHAN ENGINEERING WORKS & ORS. *Rspondents*

CORAM:- P.B.SAWANT AND YOGESHWAR DAYAL, JJ.

PAYMENT OF GRATUITY ACT , 1972 — S.4(1)(b) — Whether violative of Art. 19(1)(g) — Allowing the appeals, Held, that since the provisions for payment of gratuity contained in Section 4[1] (b) of the Act are one of the minimal service conditions which must be made available to the employees notwithstanding the financial capacity of the employer to bear its burden and that the said provisions

Judgment dated October 11, 1993 in C.A.No. 3599 of 1984 and C.A.No.3600 of 1984 (Cal.) [Darshan Engg. Sugg.)

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Page 94 of 94