THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A REVIEW OF INDIAN PRACTICE

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CERTIFICATE

This is to certify that the dissertation **THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A REVIEW OF INDIAN PRACTICE**, submitted by **Mr. Hegde Govindraj Ganapati**, is in partial fulfilment of the requirements for the award of the degree of **Master of Philosophy**. It has not been previously submitted for any other degree of this or any other University and is his own work.

We recommend that this dissertation may be placed before the examiners for evaluation and consideration.

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Hegde Govindraj G

CHAPTER I

CHAPTER I

INTRODUCTION

Arbitration, in its most elemental form has its roots in ancient past. Roman law did provide for the institution; private dispute resolution is as old as commerce. Merchants and traders who gathered at the market place to do business had their own crude and simple methods of dispute settlement. Over a period of time their practices and recognition by ordinary courts evolved what we now know as lex mercatoria. In Europe, especially the Christian era, arbitration was practiced by various clubs of the Churches of England, the Inns Courts and the stock exchanges. Arbitration was also a common practice for Christians living in Muslim states, and Jewish and Armenian communities in the United States. Thus we see that arbitration was practiced in non commercial matters too.

States from historical times have tried to bring about alternate judicial remedies apart from the state justice system. For instance, the Scandinavian countries, Finland, Germany and Austria, developed various codes on arbitral procedures and disputes. They often followed a dual system of justice. Arbitrators were either to decide a case according to the rules of the law (codes) or may be authorised by the parties to act as *amiables compositeurs* and to decide the case *ex aequo et bono*. Many a times equity was the sole

basis for deciding cases. The English concept of arbitration differed from civil law countries. Unlike the Scandinavian and countries of Western Europe, English law of arbitration did not provide the right to the parties to oust, the jurisdiction of the courts. There could not be an escape clause in the arbitral agreement. Thus, every state had a right as a sovereign to decide its own rules and procedures for arbitration. However, due to the lack of interdependence and traditional rivalry among various states no uniform rules of international arbitration could evolve.

To come to contemporary times, the Post-World War II period saw an explosive growth of international trade and foreign investment. Trade was essentially transnational in nature with a host of multinational corporations and international bodies showing a keen interest in the promotion of trade benefits and profits without regard to national boundaries. It was at this time, that bodies like, the International Chamber of Commerce (ICC) came forward to develop the rules of international commercial arbitration.

Towards this end some private organisations, such as the International Chamber of Commerce, the American Arbitration Association, had made significant contributions by providing rules of international commercial arbitration. Substantial amount of serious work on various aspects of arbitration was taken up by the United Nations Economic Commission for Europe (ECE) and the Economic Commission for Asia and the Far East(ECAFE), since 1954. This trend was also reflected in legislative enactments and international conventions. At the national level, for instance, the French law of December 31, 1925 had recognised the validity of arbitration agreement. The legal system which

once had held an agreement to arbitrate was irrevocable, enacted a legislation providing that an agreement to arbitrate future dispute was valid, irrevocable and enforceable.

The international business community is wary of non-uniform rules of arbitration. International commercial arbitration juxtaposed with national laws had various advantages. Arbitration was often faster and expeditious than litigation. Many countries are burdened with crowded court itineraries resulting in a large amount of pending cases. Arbitration as an alternate mode of settlement reduced their burden. Parties also found that recourse to judicial proceedings was expensive as it often took years for adjudication. Arbitration ensures that the arbitrator is a qualified expert, well aware of international business practices. Arbitration also ensures the choice of law forum, time and place, at the convenience of the parties. Furthermore, arbitration affords privacy to the parties unlike an open adjudication. These advantages afforded to the parties guarantees of a smooth and effective mode of dispute settlement.

This century has seen several multilateral efforts to reach a common understanding on aspects of international commercial arbitration. The Geneva Protocol 1923 was the first of this type. Although this protocol helped ensure respect of agreement to arbitrate it did not ensure that resulting arbitral awards would be enforceable. There was a need felt for a complementary treaty. The Geneva Convention, on the Execution of Foreign Awards, 1927, filled in this lacunae. Though this Convention was ratified by few states it suffered from a major anomaly, namely, **double exequatur** which meant that 'an award rendered in a convention state was required to be recognised in another

convention state only if it had first been judicially recognised where it had been rendered.

It was only after the Second World War that serious efforts were undertaken to adopt the multilateral arbitral conventions which would remedy the lacunae of the Geneva Convention. Two drafts, one was presented by the ICC, to the United Nations Economic and Social Council in 1953, and the second was presented to the 'United Nations Conference on International Arbitration' held in New York, 1958. The ICC draft, bearing in mind the fact that the ICC was the principal international arbitration institution advocated the concept of international or stateless awards, because such awards would have to be recognised in convention countries without regard to their status under the law of the country, where rendered. The conference did not accept such a concept. In the ensuing year the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also the New York Convention) came to be adopted in 1958. The New York Convention primarily aims at enforcement of an arbitral award made in the territory of a state other than the state where the recognition and enforcement is sought.

The United Nations Commission for International Trade Law (UNCITRAL) set up in 1966, soon placed arbitration on its agenda. Another notable development are efforts of the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Arbitration Rules, 1976 addressed the problem surrounding the adhoc arbitrations. It provided for a comprehensive set of rules framed by experts from developed and developing countries. These rules were acceptable to most of the states

inspite of their different ideological, cultural and socio-economic backgrounds.In 1985, the UNCITRAL, with the assistance of pre-eminent scholars in arbitration, produced the final draft of a 'Model Law' on international commercial arbitration. This Model Law involves the creation of uniform rules to eliminate local peculiarities which make international consistency impossible in certain areas.

Problems of Enforcement of Foreign Arbitral Awards

The area of international commercial arbitration is very vast. It comprises many fields. However, amongst them the most important aspect is that of enforcement of arbitral awards, in a state other than the state where such awards are rendered. This difficulty may arise because parties to an international contract may have belonged to or domiciled in two different states. Or the losing party may not have assets sufficient to satisfy the award situated in the jurisdiction of the award rendering state. The party in whose favour an award is made is to rely on the courts of another state for enforcement and execution. If this be the case, generally the court of the state where enforcement of award is sought apply the principles of private international law which is always guided by the domestic law of that state. National legal systems varied with each other with respect to the enforcement of award. Hence the uncertainty about the enforceability of arbitration agreement as well as the arbitral award. This attitude of states will definitely hinder the usefulness of arbitration in international trade. It will also be a stumbling block to the smooth functioning of international trade which is essential for the peaceful

co-existence of states.

Commercial arbitration, in order to be effective, needs the support of enabling legislation in municipal legal systems. An arbitration can be meaningful only when specific performance of an agreement to arbitrate can be readily ordered and arbitral award receive the benefit of enforcement proceedings, without being subject to extensive judicial review. However, states are under no obligation to enforce an arbitral award if they are not a party to an international convention. Nor is a state prohibited from discriminating against foreign as compared to domestic arbitration agreements and awards. There is seen a differing attitude of states towards enforcement of foreign arbitral awards. Bearing in mind the fact that the world has increasingly become inter-dependent, few states can however, afford to be outside the evolving international legal regime for commercial arbitration.

India is a party to the Geneva and the New York Conventions. To fulfil its international obligation India has enacted the Arbitration (Protocol & Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961. The Arbitration Act 1937 is not applicable with respect to awards made after the New York Convention came into effect. However, the Act is relevant so far as states which are parties to the Geneva Convention but have not become parties to the New York Convention are concerned.

The Supreme Court of India and various High Courts have decided cases concerning the recognition and enforcement of foreign arbitral awards. The jurisprudence

of the Supreme Court on Foreign arbitral matters is reflected in the National Thermal Power Corporation v. Singer Company (AIR SC 1993, 998), Renusagar Power Co. Ltd. v. General Electric Company (AIR SC 1994, 860) and Svenska Handelsbanken v. Indian Charge Chrome (SCC 1994, p.1156).

A comprehensive legislative bill, The Arbitration and Conciliation Bill, 1995, prepared by the Ministry of Law Justice & Company Affairs, has been placed before the Rajya Sabha for discussion and approval. The proposed bill seeks to embody the Indian Arbitration Act 1940, the Foreign Awards Act and the Geneva & New York Conventions, in a single text. The bill also seeks to bring about a uniform generic law bearing in mind the UNCITRAL Model Law on International Commercial Arbitration.

The present dissertation merely seeks to examine the Indian approach towards recognition and enforcement of foreign arbitral awards. It will analyse the extent to which and the manner in which the New York Convention has been given effect to in India. At the same time this is not an independent study or analysis of the New York Convention in its totality.

Chapter II examines the existing legal regime, international and national, with respect to the recognition and enforcement of foreign arbitral awards. It attempts to sketch the different provisions of Geneva Protocol, Geneva Convention and the New York Convention, laying emphasis on the contributions of these conventions. It also purports to point out the possible differences or the conflicting provisions occurring in the Foreign Awards Act and the New York Convention.

Chapter III shall deal with the Indian judicial responses to the subject of recognition and enforcement of foreign arbitral awards. It attempts to throw light on various nuances in the decisions of Indian courts towards the issue of recognition and enforcement of foreign arbitral awards under the Foreign Awards Act. Further it also offers an elaborate analysis, with the help of leading decisions of the Supreme Court and other courts on different issues like the meaning and conditionalities of foreign arbitral awards, to set aside an award rendered abroad by exercising extra territorial jurisdiction, and the concept of public policy as a ground for vacating a foreign arbitral award.

Chapter IV deals with the appraisal of the Arbitration and Conciliation Bill,1995. It examines the need for such a comprehensive legislation. It also focuses on the modifications brought about in the Foreign Awards Act.

The final chapter deals with suggestions and evaluation of judicial responses to enforcement of awards and their non-uniform stand; and proposes changes in the Bill of 1995.

CHAPTER II

CHAPTER II

THE EXISTING LEGAL FRAMEWORK

The most commonly asked question concerning commercial arbitration is: "what can one do with the award once it is rendered?" To this, one may say that, barring some exceptional circumstances, such as fraud or corruption in the procurement of the award, an arbitral award can easily be confirmed as a court judgement. It can then be used to collect payment from the erring party through judicial enforcement.[1] But domestic concepts of legality rarely serve as adequate instruments for the recognition and enforcement of an award which is foreign in character. The volatility of global politics and discordant national perceptions of legitimate lawful conduct constitute a precarious basis for an international rule of law.[2] Despite this and other obstacles[3] surrounding the

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[1] Joseph Colagiovanni and Thomas W.Hartman, "Enforcing Arbitration Awards", Dispute Resolution Journal, vol.50, no.1, January 1995, p.14.

[2] Thomas E.Corbonneau, "American and Other National Variations on the Theme of International Commercial Arbitration", Georgia Journal of International and Comparative Law, vol.18, no.2, 1988, p.143.

[3] The agreement to arbitrate and arbitral award themselves contribute major obstacles to the problem of recognition and enforcement of foreign arbitral awards. See, Frank E.Nattier, "International Commercial Arbitration in Latin America; Enforcement of Arbitral Agreements and Awards", Texas International Law Journal, vol.21, no.3, 1986, pp.399-400.

recognition and enforcement of foreign arbitral awards, the international community has been successful in adopting international conventions which bind states parties. In this chapter an endeavour is made to sketch the legal regime, both international and national, applicable to the subject of the recognition and enforcement of foreign arbitral awards.

I. INTERNATIONAL LEGAL REGIME

The need to formulate uniform legal rules and procedure to regulate the recognition and enforcement of foreign arbitral awards has led to the adoption of three international conventions of particular importance. These are: The Geneva Protocol on Arbitration Clauses, 1923 (hereafter referred to as the "Geneva Protocol");[4] The Geneva Convention on the Execution of Foreign Ar'bitral Awards, 1927 (hereafter referred to as the "Geneva Convention");[5] and The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereafter referred to as the "New York Convention").[6] The salient features of each of these international instruments may

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[4] Protocol on Arbitration Clauses, September 24, 1923, 27 LNTS, p.158.

[5] Convention for the Execution of Foreign Arbitral Awards, September 26, 1927, 92 LNTS, p.301.

[6] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 338 UNTS, p.38.

now be considered.

The Geneva Protocol

The Geneva Protocol was concluded under the auspices of the "League of Nations" on 24th September, 1923. The Protocol consisting of thirty four states parties came into force on 28th July, 1924.[7]

The scope of the Protocol is stated in the first paragraph of Article 1:

> Each of the Contracting States recognise the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different contracting states by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of a settlement by Arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Thus the application of the Protocol was limited to parties who were subject to the jurisdiction of different Contracting States. An arbitration agreement relating to existing or future differences was recognised as valid and the same was irrevocable.[8] The

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[7] For the purposes of the Protocol the states parties were: Albania, Austria, Belgium, Brazil, British Empire, New Zealand, India Denmark, Czechoslovakia, Estonia, Free City of Danzig, Finland, France, Germany, Greece, Iraq, Israel, Italy, Japan, Luxemburg, Monaco, The Netherlands, Norway Poland, Portugal, Romania, Spain, Sweden, Switzerland, Thailand, Ireland, Yugoslavia, Kenya, and Jamaica. At present the Protocol is seldom invoked as it was replaced by the New York Convention.

[8] Paolo Contini, "International Commercial Arbitration; The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", The American Journal of

Protocol did not proclaim rules of general application in international law; it aimed only at an amelioration of rules which may be of interest for citizens within the jurisdiction of the Contracting States.[9] The Contracting States could limit their obligations to "commercial contracts". The objectives of the Protocol were two fold: first, it sought to make arbitration agreements, especially arbitration clauses, enforceable internationally; 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.[10] The underlying philosophy behind this was to foster international trade.

If an arbitration clause has been stipulated in a contract to which the Protocol applies, the tribunals of the Contracting Parties, if they are presented with a dispute falling under the arbitration clause, must refer the parties to the arbitrators.[11] The Contracting States agree to facilitate all steps in the procedure required to be taken in their own territories in accordance with the provisions of their law governing arbitral

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Comparative Law, vol.8, 1959, p.288.

[9] Rene David, Arbitration in International Trade, (Kluwer, Deventer/Netherlands, 1985), p.143.

[10] See, Nattier, n.3, p.403.

[11] First sentence in Article 4 of the Protocol. See, Appendix.

procedure.[12] Speaking of the procedure to be applicable, Article 2 of the Protocol reads:

> The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

In addition, the contracting parties undertake to ensure the execution by their authorities of arbitral awards made in their territory.[13] Thus the matter of execution of arbitral awards is left entirely to the law of the state where such enforcement is to take place.

Neither did the Protocol provide anything for the unification of contract laws of various states. The reason for this may be the fact that the Protocol was in a nascent stage and did not want to create problems in the application of various rules of private international law.

The chief contribution of the Protocol was that it sought to improve what Professor Lorenzen called the prevailing chaotic condition.[14] Further, the Protocol by taking cognizance of the then prevailing situation in the field of international commercial arbitration, had brought to the notice of the international community that the problems surrounding the enforcement of arbitration clauses could be solved by similar

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[12] Second sentence in Article 2 of the Protocol. See Appendix.

[13] Article 3

[14] Quoted in Contini, n.8, p.288.

negotiations. The states for the first time realised that the requirement of enforceability had both national and international consequences.

Although the Protocol made a positive contribution towards the development of international commercial arbitration, its criticisms outweigh its contributions. The Protocol has been criticised for a variety of reasons. Firstly, it has been pointed out that there is some kind of ambiguity in the expression "subject respectively to the jurisdiction of different contracting states", in Article 3 of the Protocol. It is unclear whether it means subject to the sovereignty of a state in the sense of nationality, or subject to the jurisdiction of the courts of a state by reason of residence domicile, or other criteria.[15] Secondly, there is a duty on the states to ensure the execution of arbitral awards made in their own territories. But the same cannot be said of arbitral awards made in another country even if it were a Contracting State.[16] Although the Protocol helped ensure respect of agreements to arbitrate, it did not ensure that resulting arbitral awards would be enforceable.[17] Thirdly, the party seeking enforcement has the burden of proving that the clause or the award complied with all the requirements. Opponents needed only file

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[15] Ibid., p.289.

[16] See David, n.9, p.144.

[17] See, W.Laurence Craig, "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration", Texas International Law Journal, vol.30, no.1, Winter 1995, p.9.

"Shotgun" objections to make the proponents' burden virtually impossible.[18] Fourthly, the obligation of the states parties to the Protocol to recognise the validity of an agreement to arbitrate is diluted by the reservation clause which vests with the Contracting State the right to limit the said obligation to contracts which were considered as commercial under its national law. Lastly, few states acceded to the Protocol outside Europe, and doubts persisted among the newly, independent states.[19]

Despite the fact that the Protocol was the first step towards the elaboration of an international law of arbitration, it was by itself insufficient. The Economic Commission of the League of Nations had brought to the notice of the Council of the League of the above lacunae. Accordingly the Council decided that a complement was to be added to the Protocol. This feat was accomplished in 1927 by adopting the "Convention on the Execution of Foreign Arbitral Awards" in Geneva.

The Geneva Convention

The Geneva Convention, 1927 came into force on 25th July, 1929. There were twenty-nine states parties to the Convention. The Geneva Convention as a complementary to the Geneva Protocol, was open to states which were bound by the Protocol. The purpose of the Convention was to facilitate the recognition and

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[18] See, Nattier, no.3, p.401.

[19] See, David, n.9,p.145

enforcement of arbitral awards made pursuant to arbitration agreements covered by the Geneva Protocol.

The opening paragraph of Article 1 of the Geneva Convention provided that an award should be recognised as binding and should be enforced in the territory of any of the High Contracting Party, subject to the following conditions: that the award was made pursuant to an agreement to which the Geneva Protocol was applied; that the award was made in the territory of one of the High Contracting Parties; and that the parties to the award were subject to the jurisdiction of one of the High Contracting Parties.

In order to obtain such recognition or enforcement, the Geneva Convention had established a number of other requirements. These were:[20]

> (a) That the award was rendered pursuant to a submission to arbitration ;
>
> (b) That the subject matter of the award was capable of settlement ;
>
> (c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties ;
>
> (d) That the award has become final in the country in which it has been made ;
>
> (e) That the recognition or enforcement of the award was not contrary to public policy or to the principles of the law of the country in which it

[20] Second sentence in Article 1

was sought to be relied upon.

Article 2 of the Geneva Convention further mandated the court to refuse to recognise and enforce the award if it was satisfied:

> (a) That the award has been annulled in the country in which it was made;
>
> (b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that being under a legal incapacity, he was not properly represented;
>
> (c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

The above provisions bind the arbitral tribunal to respect the principles of natural justice. This notion was further supplemented by Article 3 of the Geneva Convention. It reads:

> If the party against whom the award has been made proves that under the law governing the arbitration procedure, there is a ground other than the grounds referred to in Article 1(a) and (c), and Article 2(b) and (c), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Another important provision which deserves mention is the provision contained in Article 4 of the Geneva Convention. It says that "the party seeking enforcement is required to supply the original award or duly authenticated copy of the award: documentary or other evidence to prove that the award has become final in the sense defined in Article 1(d) ...;[21] and if necessary documentary or other evidence to prove that the conditions specified in Article 1, paragraph 1[22] and paragraph 2(a) and (c) have been fulfilled".

The limitation of obligations under the Geneva Convention regarding commercial contracts is the same as in the Protocol. Only the parties to the Protocol, were entitled to ratify the Convention.

An overview of the provisions of the Geneva Convention reveals the fact that to a limited extent it dealt with the inadequacies contained in the Geneva Protocol. For instance, the Geneva Protocol had only provided for the enforcement of awards in the territory of the State in which they were made. Where as the Geneva Convention imposed an obligation on the states parties to the Convention to recognise and enforce

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[21] Article 1 (d) reads: ... in the sense that it will not be considered as such if it is open to opposition, appeal or pourvoi encalculation ... or if it is proved that any award for the purpose of contesting the validity of the award are pending.

[22] Paragraph 1 of Article 1 provided that an award should be recognised as binding and should be enforced in the territory of any of the High Contracting Party, subject to the conditions that, the award was made pursuant to an agreement to which the Protocol was applied, the award was made in the territory of any of the High Contracting parties and the parties to the award were subject to the jurisdiction of one of the High Contracting parties.

in the territory of any of the Contracting States, provided that certain conditions set in there were satisfied. Thus the scope of the Convention to that extent was broadened.[23] Further, unlike the Geneva Protocol, the Geneva Convention specified different grounds which might render an award unenforceable in the territory of the Contracting States. One more notable feature was that it provided for the evidence that was required to be submitted before the court by the party seeking such enforcement.

Despite the very considerable effort and skill that went into the preparation and negotiation of the Geneva Convention, it contributed little towards gaining enforcement of arbitral clauses or execution of foreign arbitral awards. Several criticisms have been levelled against the Geneva Convention. Firstly, the expression "subject to the jurisdiction of different Contracting States", appearing in Article 1 of the Geneva Convention, is not clear as to whether the expression is meant sovereignty of a state in the sense of nationality, or the jurisdiction of the courts of a state by reason of residence, domicile, or other criteria.[24] Secondly, the exclusion of awards rendered in a state not party to the Convention has been criticised as unnecessary on the ground that while it is normal for a state to require reciprocity for granting recognition and enforcement to

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[23] Bernard Colas,ed.,Global economic Co operation : A Guide to Agreements and Organisation.(Kluwer/Deventer,1994),p.410

[24] See,Contini,n.8,p.289

foreign judgements, which are acts of another state, there is less justification in case of arbitral awards, which are not rendered by a public authority. [25] Thirdly, it has been pointed out that plaintiff seeking enforcement in one country would find it particularly difficult to prove that the arbitral tribunal was constituted in conformity with the law of another country and that the award has become final in that country.[26] Fourthly, the possibility of contesting the validity of an award on grounds other than those listed in the Geneva Convention has been regarded as making it too easy for a recalcitrant defendant to avoid the enforcement of an award by resorting to obstructionist tactics.[27] Fifthly, the Convention, open for ratification by states which had signed the Protocol, was ratified by even fewer States than the Protocol.[28] Lastly, the Geneva Convention suffered from the disability that an award rendered in a Convention State was required to be recognised in another Convention State only if it had first been judicially recognised where it had been rendered (the "double exequatur").[29]

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[25]Ibid.

[26] Ibid.

[27] Ibid.

[28] See, Craig, n.17, p.9.

[29] Ibid.

However, it is difficult to subscribe to the views of writers who regard the Geneva Protocol and Geneva Convention as total failures. Rather, one may say that they did not live up to the expectations of those who had viewed them as a decisive step in the progress of international commercial arbitration. According to the International Chamber of Commerce (hereafter the ICC) the main defect of the Geneva Convention was the condition that to be enforced, an arbitral award must be'strictly in accordance with the rules of procedure laid down in the law of the country where arbitration took place.[30]

It is the ICC which took the initiative to adopt a new international arbitration convention which would remedy the defects of the Geneva Convention and obtain the adherence of the major trading countries. The ICC presented an initial draft of such a convention to the United Nations Economic and Social Council in 1953.[31] The Economic and Social Council, by resolution 520 (XVII) of April 6, 1954 took note of the ICC draft convention and established an Ad Hoc Committee of Governmental Experts from eight countries.[32] The Committee met in New York in 1955 and prepared a "Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards". Thereafter the

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[30] See, Contini, n.8, p.290.

[31] Ibid.

[32] These states were, Australia, Belgium, Ecuador, Egypt, India, Sweden, USSR and the United Kingdom.

Secretary-General of the United Nations transmitted the draft Convention to governments and interested organisations for their comments. As a result of a generally favourable response, the Council decided to convene a diplomatic conference to conclude a convention on the recognition and enforcement of foreign arbitral awards on the basis of the draft prepared by the Ad Hoc Committee. The New York Convention was adoptedin 1958 and entered into force on 7th June, 1959.[33] As of April 1994, ninety-six states have ratified the New York convention, making it the corner stone upon which the value of international arbital award is based. The principal provisions contained in the New York Convention shall now be considered.

The New York Convention

The New York Convention replaces the Geneva Convention as between states which are parties to both the Conventions.[34] It is a considerable improvement upon the Geneva Convention since it provides for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. It also gives much wider effect

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[33] Among the early parties to the Convention were: France, USSR, Morocco, India, Israel, Egypt, Czechoslovakia, and the Federal latecomer.

[34] Article VII, paragraph 2 reads:
The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent they beeome bound, by this Convention.

to the validity of arbitration agreements than that given under the Geneva Protocol and Geneva Convention. The principal features and obligations of the New York Convention are setforth in Article I through VI. For clarity, each of these provisions is treated separately.

Enforcement of Foreign Awards

In its opening sentence, the New York Convention incorporates the idea of internationalism:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State, other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.[35]

Enforcement of foreign arbitral awards involves the basic question whether an arbitral award should be qualified as a foreign award or a domestic award. The New York Convention nowhere mentions foreign award except in its title. In the absence of clear cut definition of foreign award one has to turn to the above provision (Article I (1)) for the meaning of a foreign award. This provision requires State Parties to recognise and enforce awards rendered in a foreign state and also awards not considered as domestic awards in the state where recognition and enforcement of such awards are sought. Here

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[35] Article I (1).

in order to determine whether an award should be qualified as foreign or domestic two criteria are given, namely the "territorial criterion"[36] and the "other criterion".[37] The legislative history of the New York Convention tells that on this fundamental question the Conference was split roughly between "Common law countries" on the one hand and "civil law countries" on the other. According to the former, the place of arbitration was the only criterion which determined whether an arbitral award was a foreign award. They argued that while the territorial criterion was clear, the other was vague, susceptible to different interpretations.[38] On the other hand, the latter contended that the territorial criterion which had also been used in the Geneva Protocol and Geneva Convention, was not adequate to establish whether an arbitral award should be regarded as foreign or domestic. To them nationality of the parties, the object of the dispute, and the rules of the arbitral procedure were other factors which should be taken into account in determining the nationality of an award.[39] In some countries, such as France and Germany, the nationality of an arbitral award depends on the law governing the

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[36] States who had supported this view were the United Kingdom, Israel, El Salvador, Argentina, the United States, Columbia, Guatemala and Japan.

[37] Proponents of this criterion were Italy, Western Germany, France and Turkey.

[38] See, Contini, n.9, p.293.

[39] Ibid.

procedure. Thus an arbitral award rendered in New York under the German law is considered as domestic award in Germany and an award rendered in Paris under a foreign law is considered as a foreign award. It had been insisted that states where this system prevailed should not be forced by the Convention to regard all awards made abroad as foreign awards.

The opening sentence of Article I(1) (meaning of foreign award) attempts to accommodate the interests of both the groups, common law countries as well as civil law countries. What is or should be the legal construction of Article I(1)? Does the other criterion that "the New York Convention should also apply to arbitral awards - not considered as domestic awards ..." restrict the territorial criterion? Commentators are divided in their opinion. One school of thought answers the above question in the negative. Paolo Contin observes:

> "The language of the first paragraph of Article I seems to permit only one construction, i.e., that except as provided in paragraph 3,the Convention applies to all arbitral awards rendered in a country other than the state of enforcement, whether or not any such awards may be regarded as domestic in that state". [40]

On the other hand,it is maintained that taking in to account the international conventions of the last quarter of a century and recent legislative texts, it is hardly possible today to abide by the territorial principle of the "nationality" of awards.[41]

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[40] Ibid., pp.293-94.

[41] Pierre Lalive "Enforcing Awards", ICC Bulletin, 1984, p.327.

However, the apparent conflict between the two criteria would be problematic in arriving at harmonious interpretation of Article I, paragraph 1 of the New York Convention.

(I) Proceedings of arbitration held in more than one state

There may be cases where the proceedings of arbitration may have taken place in more than one state. In such cases it is pointed out that the phrase "in the territory" of a state should be interpreted as "main proceedings of which occurs in the territory of the state".[42] If the important hearings or investigations are conducted in more than one state, any one of these states should be deemed to have made the award.

(II) "A-national Award"

In modern practice of international commercial arbitration we often come across with "a-national award" (also called "transnational" or "denationalized" arbitral awards). It is usually defined "as an award for which the procedure depends wholly on the agreement of the parties".[43] Can the New York Convention be applied to a-national award? Once again scholars are divided in their stand. One school of thought argues that since the second sentence of Article I(1) extends the application of the Convention to

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[42] Generally see, Young Joon Mok, "The Principle of Reciprocity in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958", Case Western Reserve Journal of International Law, vol.21, 1989, pp.128-29.

[43] See, Lalive, n.41, p.328.

awards not considered as domestic awards in the state where their recognition and enforcement are sought, a-national award must fall within the scope of the New York Convention.[44] The other school of thought argues that considering the drafting history of the New York Convention, the second sentence of Article I(1) is not intended to cover the enforcement of a national award.[45] It is rather intended to cover the enforcement of an award made in a state under the arbitration law of another state.[46] Even the position taken by the national courts towards the subject of enforcement of a-national award is also divided.[47]

Apart from the above uncertainties concerning the meaning of foreign award for the purposes of the New York Convention, the Convention allows States which adhere to it to make two reservations, namely the "reciprocity reservation" and "the commercial reservation". These reservations further limit the scope of the Convention.

(III) The Reciprocity Reservation

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[44] The proponents of this school are Fauchard and Paulsson. Quoted in Mok, n.50, p.132.

[45] Advocates of this argument are, P.Sanders, Van den Berg and Park. Ibid.

[46] Ibid,pp.133-35.

[47] Alan Redfern and Martin Hunter, 'Law and Practice of International Commercial Arbitration,(Sweet & Maxwell,1986),pp.344-45.

The New York Convention provides in Article I(3) that:

> When signing, notifying or acceding to this Convention, or ratifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state.

What is the significance of this reciprocity reservation? This reservation is of considerable practical importance for the conduct of international commercial arbitration. Instead of applying to all foreign awards wherever they may be made, the scope of the New York Convention will be limited by States which make the reciprocity reservation to awards made in a state which has adhered to the New York Convention.[48] Accordingly, when seeking a suitable state in which to hold an international commercial arbitration, it is advisable to select a state which has adopted the New York Convention. This would improve the chances of securing recognition and enforcement of the award in other Convention countries.

(IV) The Commercial Reservation

Article I(3) of the New York Convention further entitles a Contracting State to

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[48] However, the limiting effect of the first reservation should not be stretched too far, because the New York Convention links the world's major trading nations, socialist as wel as capitalist,Arab, African, Asian and Latin American, European and North American. Ibid, p.345;see also David,n.10. p.149.

declare that it will only apply the Convention to differences arising out of legal relationships, whether contractual or not, "which are considered as commercial under the national law of the state making such declaration". The effect of this reservation is to narrow the field of application of the New York Convention.

The fact that a contracting state may determine for itself what relationships it considers as "commercial" has proved problematic in the application of the New York Convention. Relationships which are considered as commercial by one state may not necessarily be so regarded by others. Therefore this does not assist in obtaining a uniform interpretation of the Convention. For instance, an award made between a German and an American party in a matter which is not regarded as commercial in France. Having made the reservation contemplated in the New York Convention, France is under no obligation in international law to recognise and execute the award, although the award is valid both in Germany and the United States. Moreover, the commercial reservation has led to difficulties of interpretations within the same state.[49] Besides the reservation does not make any distinction between submissions of existing or of future disputes. Criticising the "commercial reservation clause", Rene David observes:

> The words legal relationships, whether contractual or not, which are considered as commercial under the national law of (a State)' may receive a most restrictive interpretation contrary to what was most certainly the

[49] See, Redfirn and Hunter,n.47,pp.3445-46.

intention at the New York Conference.[50]

However, despite the fact that the scope of the New York Convention is limited to the extent as explained above, the provision in Article 1 does have certain merits. Unlike the Geneva Convention, it considers the nationality or citizenship of the party to arbitration irrelevant. Another merit of the New York Convention is that it has adopted a criterion which is clear, although some incongruous solutions may however result from the rules which it had adopted.[51]

Enforcement of the arbitration agreement

An agreement to submit to arbitration all or any disputes which have arisen or may arise under a contract would be meaningless if one of the parties to the contract could ignore it, either by refusing to participate in arbitration or by bringing an action on the same dispute. When such situation arises the courts be have empowered to recognise the validity of the arbitral agreement and lend their aid, negatively, by refusing to entertain a court action brought in violation of an agreement to arbitrate. To this effect Article II paragraph 1 provides:

> Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to

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[50] See David,n.9,p.150.

[51] Ibid,p.148.

> arbitration all or any differences which have arisen or may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Further paragraph 3 of the same Article states:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article II(1) obligates each contracting state to recognise an arbitration agreement which is in "writing" if the subject-matter is capable of settlement by arbitration. This is certainly a welcome development. All it has to say is that for the Convention to be applicable an arbitration agreement must be "in writing". Therefore, an oral agreement to arbitrate, recognised under some national arbitration laws such as the Netherlands will not suffice.[52] According to Article II (3) the courts, in an action in a matter governed by an arbitration agreement between the parties, shall refer the parties to arbitration unless it finds that the agreement is "null and void", "inoperative", or "incapable of being performed". A combined reading of Article II (1) and (3) raises one curious point for consideration, that is, whether courts should refuse to refer the parties to arbitration if the arbitration agreement did not comply with the requirement of being in writing.

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[52] Pieter Sanders," A Twenty Years Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards," International Lawyer, vol.13,1979,p.278

Atleast one scholar has answered it in the affirmative,[53] though the judicial practice is quite perplexing.[54]

It is noteworthy to point out that Article II (3) permits both the plaintiff and the defendant to request the court that the matter be referred to arbitration, since the provision used the words "... one of the parties". It may even be possible for a plaintiff who has commenced a suit at law, despite an agreement to arbitrate to request the court to refer the matter to arbitration.[55] But can a person who is interested in the pending suit but is not made a party to that suit be permitted to request the court to refer the matter to arbitration, is quite doubtful. The New York Convention, it appears, is not intended to cover such a situation.

Finally, the New York Convention has failed to state what law governs the determination of whether the dispute is "capable of settlement by arbitration" and whether the agreement is "null and void, inoperative, or incapable of being performed".[56] Thus it raises grave doubts as to the effectiveness of Article II, and is a significant

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[54] Ibid,pp.279-87. Author advocates for an harmonious interpretation of Article 2 of the New York Convention

[55] John P. Mc Mohan," Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States", Journal of Maritime Law and Commerce, vol.2,no.4,1971,p.756.

[56] Ibid,p.753.

inadequacy in a document dealing with international commercial transactions.[57]

RECOGNISING AND ENFORCING ARBITRAL AWARDS

The obligation on the contracting states to recognise an agreement in itself is insufficient for the purpose of the New York Convention, as the Convention is primarily aimed at enforcement of an arbitral award. The New York Convention in Article III states:

> Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules and the procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

The above provision contains a fundamental obligation of a contracting state. It suggests that arbitral awards within the scope of the convention are to be recognised as binding and enforced in accordance with the rules of procedure of the forum state. That is to say once an arbitral panel reaches its conclusion, Article III mandates that the final award be enforced in the contracting state where it is sought to be enforced without

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[57] However, it is suggested that a court would apply the usual choice of law rules or the law applicable under Article v of the New York Convention to determine whether the matter was 'capable of settlement by arbitration'. The same approach would also be taken to determine whether the agreement is "null and void", inoperative or incapable of being performed.

readjudication of the matter.

However, serious doubts may arise with respect to the question "what is the meaning of the "binding" effect of an award within the meaning of Article III of the New York Convention? This has been one of the unsettled issues of the law and practice of international commercial arbitration. For instance, according to German law an award has to be filed with the court pursuant to statutory provisions. It can be enforced only if it has been declared enforceable by the court's certification after the filing. But this is not the case with the United States practice where requirement of filing and certification was not a condition for enforcement of arbitral awards.[58] Thus, in some contracting states the requirement of filing and certification operates as a condition precedent that makes the award "binding", where as it is not so in other contracting states.

The second part of Article III requires the forum state not to impose "substantially more onerous conditions or higher fees or charges" on the enforcement of foreign arbitral awards than those imposed on domestic awards. Thus, on the one hand the New York Convention remits the parties to domestic laws already in place with respect to enforcing arbitral awards. On the other hand it does not preclude a contracting state from having

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[58] See Martin Domke, " The United States Implementation of the United Nations Arbitral Convention," The American Journal of Comparative Law ,vol.19,1971,p.578.

less onerous conditions for enforcement of foreign arbitral awards.[59]

Article III of the New York Convention is supplemented by Article IV, which deals with the subject of proving the award. According to this provision the proponent of the award is required to: (a) file an application for recognition and enforcement of the award with the competent authority in the contracting state; (b) supply the duly authenticated original award or a duly certified copy; (c) supply the original arbitration agreement or a duly certified copy; and (d) supply, if appropriate a translation of the award and agreement, which may be certified by an official or a sworn translator or by diplomatic or consular agent. This establishes a "prima facie" case and the burden shifts to the defendant to establish the invalidity of the award on one of the grounds specified in Article V.[60] The New York Convention by placing the burden of proving the invalidity of the award on the defendant sought to improve over the Geneva Convention, under the latter burden of proof was on the proponent.

Grounds for Vacating the Award

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[59] Eloise Henderson Bouzari," The Public Policy Exception to Enforcement of International Arbitral Awards: Implications for Post NAFTA Jurisprudence," Texas International Law Journal , vol.30, 1995,p.212.

[60] See Ramona Martinez, " Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: 'The Refusal Provisions'International Lawyer ,vol.24,no.2,1990,p.496.

The overall scheme of the New York Convention is to facilitate enforcement of arbitral awards. As far as possible, it expects the courts of the contracting states to assist the Convention in achieving this purpose by giving effect to the arbitration agreement. and by recognising and enforcing arbitral awards. However, some limits must obviously be imposed on the enforceability of awards: otherwise arbitrators could subject the parties to legal consequences as a result of dishonesty, bias, incompetence, or the arbitrary or capricious use of power.[61] Articles V and VI together prescribe various conditions for refusing arbitral awards.

Article V lists five different grounds the defendant may assert to argue for denial of the recognition and enforcement of the award and two additional grounds upon which the competent authority of the forum state may on its own motion, refuse recognition and enforcement. But before discussing the individual clauses of Article V two general remarks can be made. Firstly, in the Geneva Convention the plaintiff in the enforcement proceedings had the main onus probandi that the conditions for enforcing an award had been fulfilled. Whereas the New York Convention requires the defendant to show cause why the award should not be enforced. Secondly, the New York Convention liberalises the enforcement conditions of the Geneva Convention. Under the latter Article 3 provided that a court could refuse enforcement or stay the proceeding if it was established that there was a ground, other than those mentioned in the Convention, to contest the validity

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[61]Michael Kerr, "Arbitration and the courts: The UNCITRAL Model Law", International and Comparative Law Quarterly, 1990, p.2.

of the award under the law of the state where arbitration had taken place. It was possible, therefore, to challenge the enforcement of an arbitral award not only for failure to comply with the conditions prescribed in the Convention, but also for not being in conformity with the law of the place of arbitration.[62] By bridging the gap left open by the Geneva Convention, the New York Convention permits the court to refuse enforcement only on any of the grounds envisaged in Article V and VI. Now, we may turn to specific enforcement conditions set forth in the Convention.

(I) Incapacity of the parties or invalidity of the arbiration agreement

To succeed on this ground it must be shown that:

> The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.[63]

The first ground for refusing enforcement of an arbitral award is the "incapacity of the parties" or "invalidity of the arbitration agreement". A court should not enforce an award against a party that never agreed to arbitrate. This defect may involve the determination of several issues: whether there was an agreement; and, whether there was

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[62] See, Contini, n.8,p.299.

[63] The New York Convention, Article V(i)(a).

an agreement to be bound by the arbitrators decision.... A party may contend that the other party did not have the capacity to make the arbiration agreement or that the agreement is invalid under the applicable law.[64] The courts of the enforcing state are allowed to examine the validity of the agreement but only under the law selected by the parties or the law of the place of arbitration. The words "under the law applicable to them" convey the meaning that the court is free to make use of its own conflict of laws principles in arriving at the law governing the capacity of the parties.

The merit of the above provision lies in the fact that it makes a clear distinction between the law under which a court should examine the capacity of the parties.[65] In the former case it is the law which is applicable to them , that is conflict of laws of the enforcing state. In the latter case it is the law to which the parties have subjected to it , if there is no indication to that effect, the law of the country where the award was made applies. Further the provision also recognises the autonomy of the will of the parties to the extent that they may choose the law applicable to the arbitration agreement regardless of the place of arbitration, the nationality of the parties, or any other factors.

Despite the above merit, the provision, it appears, suffers from one infirmity. since it contains no requirement that the agreement be "in writing". It may be recalled that Article II of the New York Convention requires each of the contracting state to

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[64] See, Martinez,n.60,497.

[65] Ibid,p.498.

recognise an arbitration agreement which is "in writing". It is difficult to contemplate how the proponent could supply the enforcing state with a copy of the agreement, as required by article IV, unless it were in writing.[66] Is the court of the enforcing state bound to refuse enforcement of an arbitral award not based on an agreement "in writing"? There is at least one scholar who answers this question in the affirmative.[67]

Another worth noting criticism of Article V(1)(a) is the point that interpretation of invalidity of the arbitration agreement. If restrictively interpreted it would mean the court must base its decision regarding arbitrability upon an examination of the arbitration clause only. A broader interpretation would include invalidity of the entire contract. Expressing doubts as to the restrictive interpretation of the invalidity of the arbitration clause. Ramona Martinez observes:

> It is hard to imagine a case, however, in which one would have proof of the invalidity of the clause itself without proof of the entire contract. Since incapacity of the parties would seem to bring into question the validity of the entire contract .... [68]

(II) Lack of fair opportunity to be heard

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[66] Ibid.

[67] See, Sanders,n.52,p.279.

[68] See, Martinez,n.60,p.498-99.

> An award may be refused for recognition and enforcement if the court finds that:
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> > The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or otherwise unable to present his case.[69]

The second ground incorporates basic notion of the principle of natural justice. The enforcement of an award on this ground may be refused if the party was not given proper notice of either the appointment of the arbitrator or the arbitration proceedings, or if the party was unable to present his case". The word "proper" was adopted to cover the situation where the defendant was under some legal incapacity. The phrase "or was otherwise unable to present his case was needed to deal with circumstances where "force majeure" or other causes operated to prevent a party from presenting his case or where he was not given proper opportunity to do so.[70]

It may be noted that the state where enforcement of an arbitral award is sought is likely to have its own concept of what constitutes a fair hearing. Does the New York Convention "sanction the application of the forum state's standards of due process?" There is some judicial authority which says the Convention does sanction the application

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[69] The New York Convention,Article V(1)(b)

[70] See,Martinez,n.60,p.499.

of the forum state's standards of due process.[71] If the defendant was unable to present some part of his case, such as witness, or could not cross examine the other party's witness, do not overturn the arbitral awards from enforcement. Moreover, the phrase "fair hearing" does not mean that the hearing has to be conducted as if it were a hearing before the court of the forum state. It will suffice if the court is satisfied that the hearing was conducted with due regard to any agreement between the parties and in accordance with the principles of equality of treatment and right of each party to have a proper opportunity to present his case.

Although there is some judicial authority to support the view that the enforcing state may apply its own standards of fair hearing, the New York Convention did not spell out what law should govern the determination of whether or not there was a fair hearing. This inadequacy in the Convention has the potential of creating difficulties in arriving at harmonious construction of the provision, since what is fair hearing in one country may not be so in another.

(III) Excess of authority or lack of jurisdiction

The recognition and enforcement of an arbitral award may be refused if it is found that:

> The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the

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[71] Ibid.

> scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.[72]

This ground in a sense reiterates the principle of Article V(1)(a) (Incapacity of the parties or invalidity of the agreement to arbitrate). An award must not be enforced against a party that never agreed to arbitrate the subject matter in question. That apart, an award should not be enforced if it deals with matters not submitted or beyond the scope of the submission and these decisions cannot be separated from the rest of the award.

The language used in the above paragraph shows a bias in favour of enforcement by permitting the court to enforce a severable part of an award. Thus, that part of the award dealing with disputes within the scope of the submission may be recognised and enforced if they are severable. The New York Convention, here, once again fails to specify what law would govern severability. The best approach, it is suggested would be to analogies the provision with Article V(1)(a) by resorting to the law chosen by the parties or, absent such choice, to the law of the state where the award was made.[73]

But difficulties may also arise in interpreting whether there is excess of authority

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[72] The New York Convention,Article V(1)(c).

[73] See,Martinez,n.60,p.502.

exercised by the arbitrator or the lack of jurisdiction. For example, what should be the courts interpretation of an award for loss of production if the agreement says that "neither party shall have any liability for loss of production?" The court may determine that so long as it can reasonably believe that the arbitration panel has not ignored that provision, but has simply not interpreted it to deny its own jurisdiction, it may reject the defendants plea for nonenforcement. Such a restrictive interpretation would comport with the enforcement facilitating thrust of the New York Convention.[74]

(IV) Procedural Irregularities

To succeed on this ground it must be shown that:

> 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.[75]

In order to invoke the above ground to block the enforcement of an arbitral award the party must prove the following two conditions. First, it must be proved that the arbitral panel was not formed in accordance with the arbitration agreement or failing which the law of the state where the arbitration was held. Second, it must be proved that

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[4] Ibid.

[5] The New York Convention, Article V(1)(d)

the arbitration procedure was not in accordance with the terms of the agreement. The words "arbitral panel was not formed in accord with the arbitration agreement" covers the situation where the award was rendered by the sole arbitrator, despite the fact that the arbitration provision provided for an arbitration panel composed of one arbitrator appointed by each party, and if two arbitrators did not agree, an umpire appointed by the two arbitrators would render the decision.

In a similar situation described above a British court has held that "the fact that the award was made in accordance with the parties agreement was not fatal". The court's reason was that under British law a sole arbitrator could decide a dispute.[76] However, such construction of the provision must be doubted. Because according to the text of the provision, the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure ranks first and only failing an agreement on these matters, the arbitration law of the country where the arbitration took place must be taken into account.[77]

The above clause may be subjected to conflicting interpretations. Since the procedure must be in accordance with the law to which the parties agree, the argument can be made that it need not be in accordance with any institutionalised arbitration

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[76] See,Martinez,n.60,p.497.

[77] Albert Jan van den Berg,"New York Convention of 1958, Consolidated Commentary Cases, Reported in Volumes XV(1990)-XVI(1991),Year Book of Commercial Arbitration,vol.XVI,1991,p.500.

procedures. This view seeks delocalised arbitration, which need not be based upon the law of any particular country. Conversely, the provision can be construed as being restricted to the law of a particular country.

(V) Invalid Award

To succeed on this ground it must be proved that:

> 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.[78]

This provision contains two grounds for refusal of the enforcement of a foreign award: (a) the award has not yet become binding; or (b) the award has been set aside or suspended by the court of the country where the award was rendered.

(Va) Binding

The Geneva Convention required that the award had to become "final" in the country where the award was made.[79] In practice, the word "final" was interpreted as requiring a leave for enforcement in both the rendering state and in the state where

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[78] The New York Convention, Article V(I)(e).

[79] The Geneva Convention, Article 1(d) which required the award to become final inordered to be considered for the recognition and enforcement.

enforcement was sought: the so-called "double exequatur".[80] The process was too cumbersome for the parties to bear with. In fact no state wanted the New York Convention to require judicial proceedings in confirmation of the award in both the rendering and enforcing states.[81] Therefore the New York Convention substituted the word "binding" for the word "final". Accordingly, under the New York Convention no leave for enforcement in the rendering state is required.

What should be the meaning of the word "binding" within the meaning of the New York Convention? The determination of when an arbitral award has become "binding" causes difficulties, since the New York Convention has not spelt it out. Different bases for enforcement have different standards governing when an award is binding.[82] Thus, the international practice differs with respect to the issue whether the "binding" force is to be determined under the law applicable to the award or in an autonomous manner independent of the applicable law. Some courts investigated the applicable law in order to find out whether the award has become binding under that law. Others interpret the word "binding", without reference to an applicable law, as meaning that the award is no longer open to a genuine appeal on the merits to a second arbitral

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[80] See, van den Berg,n.77,p.501.

[81] See, Martinez,n.60,p.505.

[82] Ibid.

instance or to a court.[83] In other words an arbitral award is binding if ordinary means of recourse are no longer available. Moreover, the mere possibility of extraordinary means of recourse, such as an action for setting aside, does not prevent the award from becoming binding.

There are four reasons put forward by scholars as to why the word "binding" must be given an autonomous interpretation. Firstly, if the applicable law provides that an award becomes binding only after a leave of enforcement is granted by the court, the "double-exequatur" is in fact reintroduced into the New York Convention.[84] Thus it would in all probability defeat the purpose of the New York Convention to abolish this requirement. Secondly, the autonomous interpretation has the advantage that it dispenses with compliance with local requirements imposed on awards, such as deposit with a court, which are unnecessary and cumbersome for enforcement abroad.[85] Thirdly, an interpretation other than the autonomous interpretation of binding would render meaningless the limitation contained in ground 'e' of Article V(1) that the award has been set aside.[86] Lastly, the purpose of Article VI would also render worthless when the commencement of an action for setting aside the award would prevent the award from

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[83] See, van den Berg,n.77,p.501.

[84] Ibid,p.502.

[85]Ibid.

[86] See, Sanders, n.52,p.275.

becoming binding and lead to refusal of enforcement.[87]

Another point worth mentioning is with respect to the subject whether an award. which is merged into the judgement in the rendering state after a leave for enforcement is made by the court on the award, can be enforced as a foreign award under the New York Convention or as a foreign judgement on other basis. Generally, courts hold the view that the merger of the award into the judgment in the country of origin does not have extra-territorial effect and that the award remains a cause of action for enforcement in other states on the basis of the New York Convention.[88]

(Vb) "Set aside" or "suspended"

Clause 'e' of Article V(1) lays down the rule that enforcement of an award can be refused if the party against whom the award is invoked proves that the award has been set aside or suspended by a court of the state in which, or under the law of which, the award was made. Thus setting aside can only take place in the rendering state, or in the state under the law of which the award was made. Foreign courts can only refuse recognition and enforcement, they can not set aside a foreign arbitral award.

However, according to the language used by the provision it is quite possible for the state where the award was rendered to set aside a foreign award on other grounds

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[87] Ibid.

[88] See, van den Berg, n.77,p.503.

than those mentioned under paragraphs (a) - (d) of Article V(1). If the award in the rendering state be set aside on grounds other than those mentioned in the New York Convention, these grounds would be indirectly introduced as grounds for refusal in the state of enforcement.[89] It is likely that national arbitration laws are far from uniform in their formulation of grounds to the four mentioned under Article V, paragraphs (a)-(d).

With regard to the suspending of the enforcement of an award, it is not entirely clear what the drafters of the New York Convention exactly meant by the suspension of an award. It appears, however, that it refers to a suspension of the enforceability or enforcement of the award by the court in the country of origin.[90]

(VI) Arbitrability

Recognition and enforcement of an arbitral award may be refused, if it is found that:

> The subject-matter of the difference is not capable of settlement by arbitration under the law of that country.[91]

This clause is similar to Article 1(b) of the Geneva Convention. According to the

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[89] See,Sanders, n.77,p.506.

[90] See, van den Berg, n.77,p.506.

[91] The New York Convention, Article V(2)(a).

New York Convention the enforcing state is empowered to decide the "arbitrability" of the dispute under its national standards. A point of distinction, however, has to be made between the "arbitrability" of the dispute and the "scope of the agreement" (Article II(1) - the phrase "Subject matter capable of settlement"). The arbitrability of a dispute addresses the question whether a dispute is capable of settlement by arbitration under the applicable law. A dispute may be within the scope of the arbitration agreement but nevertheless be non-arbitrable because under the applicable law it may not be decided by arbitrators but by a court only.[92] This ground of non-arbitrable subject matter is raised relatively in small number of cases, although it is likely that the non-arbitrable subject matter differ from state to state.[93] And this ground may be deemed superfluous as the question of the non-arbitrability of a subject-matter is generally regarded as forming part of the general concept of public policy, set forth in Article V(2)(b).[94] The subject of "public policy" is discussed below.

(VII) Public Policy

Recognition and enforcement of an arbitral award may be refused, if it is found

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[92] See, van den Berg,n.77,p.451.

[93] Ibid, p.472.

[94] Ibid, p.508.

that:

> The recognition or enforcement of the award would be contrary to the public policy of that country.[95]

What is the scope of "public policy" defence provided for in the New York Convention. There is no guideline to determine the question as to what amounts to "public policy". Should it be given a broad interpretation or a narrow one? The philosophy of the New York Convention is based upon a liberal policy facilitating the recognition and enforcement of foreign arbitral awards. Thus a broad application of the public policy would defeat the very purpose of the New York Convention. This is again supported by the fact that the New York Convention sought to improve over the Geneva Convention. According to Article I(e) of the Geneva Convention, an award would be enforced if "the recognition or enforcement of the award is not contrary to the "public policy" or "to the principles of the law of the country in which it is sought to be relied upon". The words "to the principles of the law of the country in which it is sought to be relied upon" was intended a broader application than the New York Convention's provision. The latter uses the word "public policy" only.[96] Now, under the New York

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[95] The New York Convention, Article V(2)(b).

[96] For a detailed examination of the cocept of public policy and its role in international commercial arbitration, see Javier Garcia De Enterria," The Role of Public Policy in International Commercial Arbitration", Law & Policy in International Business, vol.21,1990,pp.389-440.

Convention a foreign arbitral award may violate principles of the law of the country in which recognition or enforcement is sought, and nevertheless, remain in accordance with that country's public policy rules. Therefore, by not referring to the words "to the principles of the law" of the enforcing state, the purpose of the New York Convention was intended to be more narrow.

(VIIa) Domestic public policy and international public policy

The modern trend of distinguishing "domestic public policy" from that of "international public policy" stems from the special features of international cases and problems with mechanical application of domestic public policy rules to international situations. Domestic public policy contains many peremptory norms which govern private actions in forming contracts.[97] On the other hand, international public policy allows a forum state to choose not to enforce foreign arbitral award when it would offend the most basic principles of the forum, such as those that must be maintained for the preservation of the legal and social order.[98] Thus, international public policy is characterised by a

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[97] Quoted in Enterria. Ibid,p.396.

[98] Ibid.

more limited content and a more narrow application than domestic public policy.[99]

Despite the criticism[100] levelled against the recognition of the international public policy, the distinction between domestic public policy and international public policy is of great importance in international commercial arbitration. Its acceptance by the various national courts represents a response to the inadequacy of national regulations to deal with international factors.[101] Although the application of international public policy could be a source of abuse its invocation may be inspired by the intent to serve transnational interests.[102]

Having considered the view that international public policy may be allowed to serve transnational interests, this concept should be considered as a creation of the individual national legal systems because it gives preferences to specific domestic principles of the sovereign state.[103] Generally speaking the concept of "public policy" evades a precise definition. It is one of the most elusive and divergent notions in the

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[99] Ibid.

[100] The recognition of the concept of "international public policy" has been criticised as a concept imposed by the international community rather than a state. Ibid, p.397.

[101] Ibid.

[102] Ibid.

[103] Ibid.

world of juridical science.[104] It is relative to place and time; it is essentially a national phenomenon, imbued with a particular content in every state.[105] Examining the concept of "public policy", one writer has said:

> In fact, not only is a definition of public policy meaningless without reference to the setting in which it is to be applied, but the public policy exception is a judicially administered legal principle which is continually shaped by judicial interpretation.[106]

Thus, if the "public policy" concept includes grounds like non-arbitrability of the subject matter, default of party, lack of impartiality of arbitrator, lack of reasons in award, irregularities in the arbitral procedure or some other cases,[107] it is guided by the time and circumstances prevailing in a particular case. However, for this very reason the extent to which the phrase public policy can be invoked for refusing the recognition and enforcement of foreign arbitral award is unsettled. This can be considered as a major draw back of the New York Convention.

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[104] Ibid,p.401.

[105] Ibid. The Author concedes the view that although public policy emerges essentially within the borders of each community,a multinatonal community formed within several countries can give rise to its own public policy.

[106] Ibid,p.402.

[107] van den Berg, n.77,pp.508-13.

Adjournment of decision on enforcement

With the subject "adjournment of decision on enforcement" we come to the last of the important provisions of the New York Convention, Article VI states:

> If an application for setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it 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 give suitable security.

The above provision provides that if the setting aside or suspension of the award is requested in the country in which, or under the law of which, the award was made, the court "may adjourn" its decision on enforcement to protect the interest of the losing party. If the court "considers it proper" may also, on the application of the petitioner, order the respondent to deposit suitable security to protect the interest of the winning party. It must be emphasised that Article VI of the New York Convention comes into operation only if an application for setting aside or suspension of the award is made in the country of origin.[108]

Further it may be noted that the words "may adjourn" and "if it considers it proper" indicate that the court has discretionary power to adjourn its decision on enforcement of the award and to order the respondent to provide security, pending the

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[108] Ibid,p.513.

setting aside or suspension proceedings in the country of origin.[109] This "unfettered grant of discretion" provided in Article VI of the New York Convention may be regarded as another innovation.[110]

II. NATIONAL LEGAL REGIME

India is a signatory to both the Geneva Convention and the New York Convention. It gave effect to the Geneva Convention by enacting the arbitration (Protocol and Convention) act, 1937 (hereafter the Protocol and Convention Act).[111] And the Foreign Awards (Recognition and Enforcement) Act, 1961 (hereafter the Foreign Awards Act)[112] was enacted by Parliament to implement India's ratification of the New York Convention. The Foreign Awards Act replaces the Protocol and Convention Act. The latter Act is not applicable in respect of awards made after 11th October 1960 in respect of states which have become parties to New York Convention. In this section certain important provisions of both the implementing legislation are highlighted.

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[109] Ibid.

[110] See, Sanders,n.42,p.277.

[111] The AIR Manual,no.2 Vth ed.,1989,pp.190-99. The Protocol and Convention Act is still in force, but is seldom revoked.

[112] The AIR manual, IVth.ed.,1972,pp.470-79.

The Protocol and Convention Act

The salient features of this Act are as follows. The meaning of a foreign award is given in Section 2 of the Protocol & Convention Act. The essential requirements of this section are (a) the award must be on differences or disputes relating to matters considered as commercial according to the law in force in India; (b) the award must be in pursuance of an arbitration agreement to which the protocol, 1923 applies; (c) the parties to the arbitration agreement must be subject to the jurisdiction of different contracting states who are parties to both the Protocol and the Convention; and (d) there must be no proceeding for the purpose of contesting the validity of the award pending in the country in which the award was made.

In Section 3, the Protocol and Convention Act provides for stay of proceedings in respect of matters to be referred to arbitration, provided the conditions set in are fulfilled. These conditions are:

(a) There must be a submission under a valid arbitration agreement.

(b) An application to stay the proceedings must be made by any party to the legal proceeding after appearance but before filing a written statement or taking any other steps in the proceedings.

Further, the court may not grant stay if it is satisfied that the arbitration agreement or arbitration has become inoperative or cannot proceed, or, there is not, infact, any dispute between the parties with regard to the matter agreed to be referred.

Section 4 deals with the enforceability and binding effect of a foreign award.

According to Section 5 "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". Then if the court is satisfied that the foreign award is enforceable under the Protocol & Convention Act,it is required to order the award to be filed and proceed to pronounce judgment according to the award. Once the judgment is pronounced a decree follows and there is no appeal except in the case that the decree is in excess of the award or is not in accordance with the award.[113]

Various conditions for enforcement of foreign awards are given in Section 7(1) and (2). Section 7 (1) states that in order that a foreign award may be enforceable under this Act it must have:

a. been made in pursuance of an agreement which is valid under the law by which it was governed;

b. been made by the tribunal provided for in the agreement or constituted in a 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 India.

In addition the enforcement there of must not be contrary to public policy or the law of India.

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[113] Section 6.

Sub section (2) further provides that a foreign award shall not be enforced under this Act if.

a. the award has been annulled in the country where the award was rendered or

b. the party against whom ... was not given proper notice of the arbitration proceedings ... or was under some legal incapacity and was not properly represented, or

c. the award does not deal with all the question referred or contains matters beyond the scope of the agreement.

In addition sub-section 3, empowers a court to adjourn the hearing or even refuse the enforcement on grounds other than the non-existence of the grounds mentioned to sub-section (1)(a)-(c), or the existence of the conditions specified sub-section (2)(b)(c).

Lastly, Section 8 requires variety of evidence to be produced by the party seeking enforcement.

The Foreign Awards Act

In its statement of objectives and reasons the Foreign Awards Act makes it clear that it would apply only to foreign awards made on or after 11th October, 1960. The Act was enacted to achieve speedy settlement of disputes through arbitration. The notable features of the Foreign Awards Act are given below.

The word "foreign award" is defined in Section 2, as "... an award on differences between persons arising out of legal relationships, whether contractual or not, considered

as commercial under the law in force in India ...", It further provides the information that India has made reciprocity reservation using the facility offered by the New York Convention.

Section 4 provides that a foreign award shall be enforceable in India as if it were an award made on a matter referred to arbitration in India and shall be treated as binding for all purposes. The proceedings for enforcing the award are embodied in Section 5, 6 and 8. Any person interested in a foreign award may apply to any competent court requesting that the award be filed in the court.[114] The application is to be in writing and must be accompanied by:[115]

i. the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it is made;

ii. the original arbitration agreement or a duly certified copy there of;

iii. such evidence that may be necessary to prove that the award is a foreign award, and

iv if necessary, English translation of the award or agreement, certified as correct by a diplomatic or consular agent of the country to which the applicant belongs.

Thereafter, the court is to direct notice to be given to the parties to the arbitration other than the applicant requiring them to show/cause within time specified by the court

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[114] Section 5(i)

[115] Section 8.

why the award should not be filed.[116] The court if satisfied that the condition set forth in section 7 are fulfilled will order the award to be filed. Then it will proceed to pronounce the judgment according the award to be followed by decree upon the judgment. There lies no appeal from such decree except in so far as the decree is in excess of or not in accordance with the award.[117]

Section 7 (1) which incorporates the provisions of Article V of the New York Convention lists out the various grounds upon which a court may refuse to enforce foreign awards namely:

i. Incapacity of parties to the arbitration agreement, or invalidity of the agreement under the applicable law, or failing any indication thereon in the arbitration agreement, invalidity of the agreement under the law of the country where the award was made;

ii. no proper notice was given of the appointment of the arbitrator or of the arbitration proceeding or facts showing that the defendant was otherwise unable to present his case;

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

iv. that the composition of arbitral authority or 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;

v. that 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

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[116] Section 5(3).

[117] Section 6(2).

which, that award was made;

vi. that the subject-matter of the difference is not capable of settlement by arbitration under the law of India, or;

vii. that the enforcement of the award will be contrary to public policy.

Section 7 (2) of the Foreign Awards Act, 1961 empowers the court before which enforcement is sought to adjourn the case if satisfied that an application for setting aside or suspension of the award has been made to the competent authority in which or under the law of which the award was made.

CHAPTER III

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INDIAN COURTS AND THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Keeping in mind, the fact that the previous chapter dealt with the international legal framework, especially the Geneva Protocol, Geneva Convention and New York Coonvention, one may proceed to ask: What is the response of the Indian Courts towards the interpretation and application of these conventions, when a case comes up before them? The Indian Courts have had often to deal with a complexity of issues such as established heads of public policy and the requirements of foreign awards. The present chapter shall examine the Supreme Court's views on issues such as: conditionalities of foreign awards; availability of stay of legal proceedings; procedures to be followed for enforcing of awards; refusal of enforcement awards; and exercising extraterritorial jurisdiction. We shall deal with them one by one.

Conditionalities of Foreign Awards

Let us make an attempt to see, as to what companies the conditionalities of an foreign award. The chief features of a conditionality are (a) Commercial nature of contractual relation ship.

(b) Reservation as to the determination of whether an award is 'foreign' or 'domestic'? This section throws light as to how the Indian Courts have 'interpreted the relevant

provisions.

To be enforceable under the Foreign Awards Act an award has to be qualified as a foreign award. A condition precedent is that the "arbitration agreement must arise out of a legal relationship which is considered as commercial under the law in force in India"[1]. Except for the words "considered as commercial under the law in force in India", the Foreign Awards Act does not indicate or list out what relationships according to Indian laws are not commercial in nature.

The question what is a commercial relationship, first, came up for examination before the High Court of Bombay in Kamani Engineering Corporation v. Societe de Traction[2]. defendant. In this case Kamani's were a company registered under the Indian Companies Act and carried on business as an engineering concern. The Traction was a foreign corporation incorporated under the laws of Belgium and carried on business as a consulting and construction engineers at Brussels. Kamani had entered into a collaboration agreement with Traction where by the latter undertook to provide to Kamani technical assistance for the construction of overhead railway electrification, tramway systems and trolly buses in India. The agreement contained an arbitration clause for arbitration under the arbitration

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[1] The Foreign Awards Act, Section 2, paragraph (1). It provides:
In this Act, unless the context otherwise requires, "foreign award" means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India...

[2] AIR Bom, 1965, pp. 114-20.

rules of the International Chamber of Commerce (ICC). Disputes having arisen between the parties, Kamani had instituted a suit in the Bombay High Court for damages. Tranction had, therefore, requested for stay of suit under Section 3 of the Protocol and Convention Act. In order to decide whether the suit be stayed under Section 3 of the said Act, the court had to determine the issue whether the contract was commercial in nature. While construing Section 2 and the Preamble of the Protocol and Convention Act the court held that the "contract between the parties was not commercial but a professional one"[3]. The court rejected the contention of the defendant company that in modern times collaboration agreements for "know-how" or technical assistance had come into existence. The court reasoned that the contract was on the face of it only a contract for technical assistance and that the defendant had kept themselves out of any commercial relations with the plaintiffs[4]. The contract was assimilated to a retainer or a

contract made between a solicitor, a counsel, or an advocate on the one hand and a client on the other. The court, hence, had found it difficult to consider the matters at issue as commercial matters according to law in force in India.[5]

Also in Indian Organic Chemicals Ltd., v. Chemtex Fires, Inc.,[6] the High Court of

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[3] Ibid, p.118

[4] Ibid.

[5] Ibid.

[6] Quoted in Rene David, Arbitration in International Trade, (Kluwer, Deventer/Netherlands 1995),p.150.

Bombay declined to give effect to an arbitration agreement relying on the words "considered as commercial under the law in force in India" in Section 2 of the Foreign Awards Act. There were three separate contracts for the construction of a polyester staple fibre plant. Arbitration clause provided for arbitration in London according to the Rules of the International Chamber of Commerce (ICC). Dispute having arisen between the parties, Indian Organic Chemical Ltd., filed a case before the High Court of Bombay. The defendant, Chemtex Fires Inc., filed an application under Section 3 of the Foreign Awards Act for the stay of the suit. The court in the instant case had to determine whether the contract was one considered as commercial "under the law in force in India". The court held that in common parlance the contracts might be commercial contracts, but they were not commercial contracts within the meaning of Section 2 of the Foreign Awards Act[7]. The court opined that the words "under the law in force in India" provided evidence that it was not enough for a relation to be a commercial relation in the ordinary sense of the term to fall under the application of the New York Convention; it must also be established that it was commercial by virtue of a specific provision of law or an operative legal principle in force in India.[8]

It is apparent that the court in the above two cases have interpreted restrictively the word "legal relationships whether contractual or not, considered as commercial under the national law". The court did not take notice of the modern day practice in agreements

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[7] Ibid.

[8] Ibid.

which include, in addition to the conventional sale of goods or contract affrightment, contracts to find and exploit petroleum resources, contracts for the sale and construction of plants and machinery, distribution agreements, patents, know-how, and the like.

However, the rigid interpretation of the nature of the commercial relationship has been disapproved by the courts in latter cases. Thus, in European Grain and Shipping Ltd.,(appellant) v. Bombay Extractions Pvt., Ltd., and others, (respondents),[99] the Division Bench of the Bombay High Court consisting of two justices observed that the mere use of the word "under" preceding the words "law in force in India" did not imply that reference is to a particular law specifically enacted for the purposes of the Foreign Awards Act. The facts of the case in brief were as follows. The appellant had entered into a contract with the respondents under which the respondents had agreed to ship to the appellant 250 metric tons of ground-nut extractions of the specified quality. The contract also included a provision which provided that in case of any dispute arising out of the contract it would be resolved according to the Rules of the Grain And Feed Trade Association (GAFTA). The respondents were unable to ship the goods even during the extended period. Subsequently, a dispute having arisen the appellants referred the matter to the arbitration. The respondents completely ignored the arbitration. The arbitrators proceeded to award. Since the liability under the award still remained undischarged the

[9] AIR Bom, 1983, pp. 36-49.

appellants filed the petition under Section 6 of the Foreign Awards Act. The single judge of the Bombay High Court relying on the decision of the Indian Organic case dismissed it stating that there was no positive legal provision which made the legal relationship a commercial one. Thus the relationship contemplated by the parties to the contract was not covered by Section 2 of the Foreign Awards Act. Aggrieved by the decision appellants appealed to the Division Bench of the Court. The Division Bench of the Bombay High Court had to decide the meaning of the words "under the law in force in India" in Section 2 of the Foreign Awards Act.

The court rejected the legal construction of the words "commercial under the law in force in India" given in Indian Organic case. The court said that the words "national law" in Article I (3) of the New York Convention or the words "the law of India" in Section 2 of the Foreign Awards Act were of such a wide import that they would envelope the entire body of laws which were effective or operative in India.[10] The court pointed out that when the parliament referred to the legal relationship considered as commercial under the law in force in India, it had in mind the general body of laws with reference to which the nature of the transaction would be considered.[11] If the transaction between the parties is one which partakes of commerce or which is in the nature of commerce then inevitably the relationship between the parties to the transaction will be clearly a commercial

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[10] Ibid, p.44.

[11] Ibid.

relationship.[12] The court stated:

> The nature of the relationship will depend on the nature of the transaction and whether the nature of the transaction is commercial or not will have to be determined with reference generally to the law in force in the country inclusive of ... an operative, legal principle in force in India. The mere use of the word 'under preceding' the words "law in force in India" would not, in our view, necessarily mean that you have to find a statutory provision or a provision of law which specifically deals with the subject of particular legal relationship being commercial in nature.[13]

It further noted:

> ..... The contract in the instant case, which was for the sale and purchase of a commodity was clearly a contract which brought about legal relationship which was commercial in nature under the Indian law.[14]

From the above it is evidenced that the court has while interpreting "commercial under the law in force in India"has taken into consideration the general concept of commerce under the law of India. Thus, so far as the commercial nature of the relationship is considered it is no longer necessary that such a relationship be defined as commercial by a particular law in force in India. The commercial contractual relationship in common parlance would suffice for the purposes of the Foreign Awards Act.

It is worth noting that the word "commercial" is increasingly getting more liberal

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[12] Ibid.

[13] Ibid, pp. 44-45.

[14] Ibid, p.48

interpretation by the courts. This marked change, perhaps, would be in view of the object of the Act and the manifold activities which are an integral part of international trade. Thus in R.M. Investment Trading Co., Pvt., Ltd., v. Boeing Co.[15] The Supreme Court of India ruled that an Indian party (R.M. Investment and Trading Co.,) agreeing to give consultancy service to a foreign aeroplane manufacturer (Boeing Co.) for promotion of their sale in India as "commercial in nature", within the meaning of Section 2 of the Foreign Awards Act. The court emphasised that the word "commercial" must be given broad construction and observed:

> While construing the expression "commercial" in Section 2 of the Act it has to be borne in mind that 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 and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction.[16]

Emphasising the ambit of an activity which takes the character of commercial relationship in the context of Article 301 of the Indian constitution,[17] it further noted:

> Trade and commerce do not mean merely traffic in good, i.e., exchange of commondities for money or other commondities. In the complexities of modern conditions, in their sweep are included carriage of persons and goods by road, rail, air and water ways, contracts, banking, insurance, transactions in the stock exchanges and forward markets, communication of information, supply of energy, postal and telegraphic services and many

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[15] AIR SC, 1994, 1136-1141

[16] Ibid, pp. 1139-40.

[17] Article 301 speaks for freedom of trade commerce and intercourse.

more activities -- to numerous to be exhaustively enumerated which may be called commercial intercourse.[18]

The Supreme Court relied on the phrase "communication of information" in the R.M.I. Case. It noted that the consultant R.M.I was required to play an active role in promoting the sale of the aircraft of Boeing to customers and was required to provide "commercial and managerial assistance and information which may be helpful to Boeing's sales efforts with customers".[19] Thus the relationship between R.M.I and Boeing was commercial in nature.

Now we come to the second aspect of conditions of Foreign Awards Act, namely 'reservation'.

Reservation

Fulfillment of requirement in Section 2 of the Foreign Awards Act is in itself not sufficient to qualify an award as a'foreign award'. This is so by reason of the reservation clause in the Foreign Awards Act. It is pertinent to refer to what the courts have decided on this issue. Section 9 clause (b) of the Foreign Awards Act empowers the Indian courts not to recognise and enforce an award which was made on an arbitration agreement governed by the law of India. The New York Convention expressly permits the

[18] See, n.15, p.1140.

[19] Ibid.

contracting states to make such reservation.

The courts have construed this Section to remove any obligations under the New York Convention with respect to the recognition and enforcement of awards rendered in other convention states where the agreement in which an arbitration clause is found is subject to Indian law. According to this interpretation, such awards are not foreign awards, and hence fall outside the purview of the Foreign Awards Act.

Section 9 (b) of the Foreign Awards Act was applied in National Thermal Power Corporation (NTPC) v. Singer Company.[20] The NTPC had entered into contract with Singer a foreign company for the supply of equipment, erection, and commissioning of certain works in India. The general terms and conditions of the contract provided that the law applicable to the contract should be the laws in force in India. It was further provided that the courts of Delhi should have exclusive jurisdiction in all matters arising under the contract. Being a foreign contractor the general terms were not applicable to Singer. Since there was a dispute between the parties and the same was referred to an Arbitral Tribunal constituted in terms of the "International Chamber of Commerce Rules". In accordance with the relevant rule, London was selected as the place of arbitration. An interim award was made in favour Singer by an ICC arbitration tribunal in London.

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[20] AIR SC, 1993, pp.998-1014. Similarly in Oil & Natural Gas Commission v. Western Co., of Northern America the Supreme Court of India by implication declined to follow the New York Convention pursuant to Section 9(b) of the Foreign Awards Act. It held that the provisions of the Foreign Awards act would be attracted only if a foreign arbitral award was sought to be enforced in an Indian court. See, AIR Supreme Court, 1987, pp. 674-89

Subsequently the NTPC filed an application before the Delhi High Court under the provision of the Indian Arbitration Act(1940), to set aside that award. The court held that the award was not governed by the Indian Arbitration Act, 1940, but was within the ambit of the Foreign Awards Act. The court said that London being the seat of arbitration, English courts alone had jurisdiction to set aside the award. Hence the NTPC appealed to the Supreme Court of India. The Supreme Court was concerned with the question "whether the arbitration agreement contained in the contract was governed by the law of India so as to save it from the ambit of Foreign Awards Act". In the absence of express stipulation, the Supreme Court found that the law governing the agreement to arbitrate was presumed to be the same as that governing agreement the in which the arbitration clause was found.[21] Arbitration agreement was contained in one of the clauses of the contract, and not in a separate agreement. Accordingly the court said the "the governing law of the contract being Indian law (as agreed by the parties), it was that system of law which must necessarily govern matters concerning arbitration, although in certain respects the law of the place of arbitration might have its relevance in regard to procedural matters.[22]

The Supreme Court then turned to the issue of the meaning of foreign awards. It is significant to note that while enumerating different conditions set forth in Section 2 of the Foreign Awards Act, the Supreme Court emphasised also the fact that Section 2 must

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[21] Ibid., p. 1012.

[22] Ibid.

be read with Section 9 (b) in order to understand the nature of the foreign award. Applying Section 9 (b) to the present situation it held:

> 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 saving clause in Section 9 of the Foreign Awards Act...[23]

An award of the above description, therefore, is not treated in India as a 'foreign award'. The court pointed out that such an award necessarily falls under the Arbitration Act, (1940), and was amenable to the jurisdiction of the Indian courts. It ruled that the Delhi High Court was wrong in treating the award in question as a foreign award. And the Supreme Court setting aside the impugned judgment of the High Court directed the latter to consider the matter on merits.

The above decision in the 'Singer' case does not appear to be sound.[24] Rather it is regarded as an unfortunate decision rendered by the Supreme Court of India in the

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[23] Ibid., p. 1011. To the same effect are the observations made by the Delhi High Court in Gas Authority of India v. SPIE CAPAG, S.A. and Ors., See, AIR, Del., pp.88-90.

[24] Later in Svenska Handelsbanken v. Indian Charge Chrome Ltd., a three judge Supreme Court bench missed an opportunity presented to it by the respondents to differ from and overrule the decision in Singers case.

matter of international commercial arbitration.[25] The Supreme Court's interpretation of "any award made on an arbitration agreement governed by the law of India" undoubtedly restricts the extent of India's treaty obligations as a matter of international law. It could be argued that the negotiating history of the Convention does not indicate that the draftsmen of Article I (1) of the New York Convention were thinking that a state might wish to accept a treaty obligation to enforce an award made in its terrified simply because one or more foreign parties were involved.[26] It is, however, true that the New York Convention as adopted leaves it to each contracting state to determine which awards made in another contracting state, if any, it will not consider as "domestic" awards. Section 9 (b) of the Foreign Awards Act had limited the scope of the New York Convention. This provision has been construed literally and textually in the Singer case: a purposive construction would have been to construe Section 9 (b) as meaning that nothing in the Foreign Awards Act would apply to an award considered as a "domestic award" in India.[27] An award made on an arbitration agreement "governed by the law of India" may not necessarily be a "domestic award", especially if the parties to it belonged to different contracting states.[28] Further, the interpretation of the provision would not

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[25] Fali S.,Nariman, "A Comment on two Recent Important Decisions of the Supreme Court of India", The ICC International Court of Arbitration, Vol.5, No.2, Nov.,1994, p.37.

[26] Mark B.Feldman, "An Award made in New York can be a foreign arbitral award", The Arbitration Journal, Vol.39, No.1, March 1984, pp.17-18.

[27] See, Nariman, n.25, p.37.

[28] ibid.

arrest in arriving at harmonious interpretation of the second sentence in Article I (3) of the New York Convention.[29] Moreover, businessmen may not prefer Indian law to govern not only an arbitration agreement but also the contract.

Stay of Legal Proceedings in Favour of Arbitration

Recognition and enforcement of arbitration agreement precedes the issue of recognition and enforcement of arbitral awards. Almost all the national legal systems have recognised this mechanism. Nevertheless the conditions under which arbitral agreements and arbitral awards may be given effect differ under the various National laws. The purpose of the New York Convention is to encourage the recognition and enforcement of Foreign arbitral awards. This very purpose would become futile if one of the parties to the arbitration agreement institutes a suit in the court of law of the contracting state inspite of the fact that there was an arbitration agreement between the parties to refer the dispute to arbitrator or arbitrators. Should such situations arise the court, where the suit is instituted, must be empowered to refer the parties back to arbitration viewed from this angle staying of legal proceedings in favour of arbitration becomes very much necessary.

Section 3 (as amended by Act 45 of 1973) of the Foreign Awards act is modelled

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[29] The second sentence in Article 1(3), of the New York Convention reads:
"... it will apply the convention only to differences arising out of legal relationship, whether contractual or not which are considered as commercial under the national law of the state making such declaration.

on Article II of the New York Convention, always down rules when and under what circumstances a court may refer the parties to an arbitration. Briefly stated Section 3 setsforth the following conditions: for a stay of legal proceedings, that:

(a) there must be an agreement to which Article II of the New York Convention applies;
(b) a party that agreement trust commence legal proceedings against the another party;
(c) the legal proceedings must be in repeat of any matter agreed to be referred to arbitration;
(d) the application for stay must be made before filing the written statement or taking any other step in the legal proceedings;
(e) the court has to be satisfied that the agreement is valid, operative, and capable of being performed (relates to the existence and validity of the arbitration).
(f) the court has to be satisfied that there are disputes between the parties with regard to the matters agreed to be referred (relates to the scope of the arbitration or arbitrability of the claims).

Applicability

From a reading of in Section 3 of the Foreign Awards Act it is clear that the provision refers to an arbitration agreement to which Article II of the Convention applies. The agreement of the nature mentioned in Article II qualify for referral to arbitration. This necessarily points out to the scope of Section 3. The case law on this point is the Gas Authority of India Ltd., (GAIL, appellant) v. SPIE CAPAG. S.A & Ors, (respondents)[30] before the Delhi High Court. Two contracts of different designation was entered into between the appellant and the respondents. The contract also provided for

[30] AIR Del, 1994, pp.75-98.

an arbitration agreement. Since there was a dispute of the nature referred to the arbitration agreement one of the respondents had instituted an arbitration proceeding against GAIL. Meanwhile GAIL had also filed a suit under the Indian Arbitration Act, 1940. To this the respondents had filed an application under Section 3 of the Foreign Awards Act. The High Court had to examine two legal issues; firstly, whether or not Section 3 of the Foreign Awards Act was applicable to the arbitration agreement; secondly, if foreign awards act was applicable;e then whether or not proceedings before the International Court of Arbitration of the ICC should be permitted to continue.

The main agreement of the respondents was that there was a valid agreement between the parties which was subject to the New York Convention and was covered by Section 3 of the Foreign Awards Act read with Article II (3) of the New York Convention. The proper law of the contract was ascertained to be the laws of India. The court said that since the laws of India was to govern the contract, the arbitration agreement was also governed by the same laws. Thus the Court relying on the Singer case said that the award to be made by the arbitrators would be a domestic award not governed by the Foreign Awards Act.[31]

Notwithstanding the above stand taken by the High Court, the respondents pleaded that the contention of the appellants that arbitration agreement not resulting in a foreign award would not be enforceable under the Foreign Awards Act was not maintainable. Having made a detailed study of the provisions of both the Foreign Awards Act and the

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[31] Ibid.,p.89.

New York Convention, the High Court made the following observation regarding the first issue:

> .....that the New York Convention will apply to an arbitration agreement if it has a foreign element of flavour involving international trade and commerce even though such an award does not lead to a foreign award.[32]

Applying the above criterion the High Court further stated:

> ...the agreement in question attracts Article II (3) of the New York Convention and cannot be termed as a domestic arbitration agreement in as much as the parties forming the consortium and their business are located outside India.[33]

Hence the High Court concluded that the Foreign Awards Act and the New York Convention would apply to the present case. With regard to the second issue it allowed the arbitration instituted to continue.

A perusal of the above judgement shows the fact that an arbitration agreement having international character is still be recognised and enforced by the Indian courts despite the fact that an arbitral award rendered on such agreement may not be considered as a foreign award. Under such circumstances Section 3 of Foreign Awards Act and be applied. For this the judgement of the High Court is significant). However, if must be borne in mind that, Section 3 of the Foreign Awards Act does not apply to purely domestic arbitration agreements. As per the High Court possible criteria for the

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[32] Ibid.,p.94.

[33] Ibid.

application of Article Section 3 may be: (a) foreign nationality of at least one of the parties; and/or (b) place of business must be located outside India.[34]

Right to arbitration.

The issue that may be asked under this Section is the question can the plaintiff by filing a (plaint) make the arbitration clause inoperative? This question came up for examination before the Supreme Court of India in Svenska Handelsbanken and Ors., (Appellants) V. Indian Charge Chrome Ltd., and Ors., (respondent)[35] where the respondents (plaintiff) have entered into separate contracts with appellants (defendants) 1 to 3 for setting up of a captive power plant in (Orissa). The credit agreement also provided that in case of disputes arising from the agreement should be settled by the Rules of ICC.

Subsequently, after taking-over of the plant the plaintiff filed the suit, for the declaration interalia, that the taking-over was void/voidable and the same may be canceled. The appellants filed an application for stay of the proceedings under Section 3 of the Foreign Awards Act. By appear the case appeared before the Supreme Court.

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[34] It may be noted that the implementing legislations and the concerns of different contracting states differ with regard to the application of these criteria. Also see, Albert Jan van den Berg, 'New York Convention of 1958, consolidated commentary cases Reported in Volumes XV(1990) to XVI(1991)', Year Book of Commercial Arbitration, vol.XVI (1991), p.462.

[35] Supreme Court Cases, vol.II, 1994, pp.156-76.

The issues that had to be addressed by the Supreme Court was concerned with the validity, operativeness and capability of being performed by the arbitration agreement. (a) between the respondents (borrower) and one set of appellants (suppliers) and (b) between the respondents (borrower) and another set of appellants. (lenders). The Supreme Court did not agree with the findings of the High Court of Orissa that the arbitration agreements had become inoperative as the agreement with the lenders was before one set of arbitrators in proceedings to be held at Stockholm and the agreement with the suppliers was before another set of arbitrators in proceedings to be held at Paris, though the body which was to conduct the arbitration proceedings, was the same.[36] Neither it agreed with the finding that the plaint did not make severable allegations against different defendants who were parties to different contracts. The Supreme Court held that the reasoning of the High Court was strained and totally erroneous). It had satisfied that the appellants 1 to 3 had satisfied all the conditions of Section 3 of the Foreign Awards Act. It held:

The plaintiff by merely entering into other contracts with different parties cannot prejudice or defeat the rights of the different party under the different contracts with different parties cannot prejudice different contract, particularly when the right to foreign arbitration has been provided by Parliament as an indefeasible right in which the court, does not have any kind of discretion.[37]

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[36] Ibid., p.172.

[37] Ibid.

Referring to the question posed earlier the court said:

> The arbitration is contemplated as per Section 3 of the Foreign Awards Act. The plaintiff by filing a plaint, cannot make the arbitration clause invalid or inoperative.[38]

The above verdict is an authority for the proposition that the right to foreign arbitration is an indefeasible right in which court does not have any discretion and the plaintiff simply by filing a suit cannot make the arbitration clause invalid or inoperative. provided the requirements in Section 3 are satisfied. Moreover by holding that the action of the court under Section 3 of the Foreign Award Act as mandatory, the Supreme Court has curtailed the area where Courts would have exercised their discretion as to render the arbitration clause unenforceable under the above Section.

The mandatory nature of the court's power under Section 3 of the Foreign Awards Act had been categorically stated by the Supreme Court of India in Renu Sagar Power Company Ltd., (appellant) v. General Electric Company and Anr., (GEC - respondents).[39] The appellant and the respondent formed a contract where by the latter agreed to sell to the former necessary equipment for a thermal electric generating plant. Certain claims by GEC were resisted by Renu Sagar. Later the matter was referred to arbitration under the "ICC arbitration clause" in the contract. The reference to arbitration was disputed by the Renu Sagar on the ground that the claims were beyond the purview of the arbitration clause and a suit in this regard was field before.

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[38]Ibid.

[39] AIR SC, 1985.

The GEC had also filed an arbitration petition invoking section 3 of the Foreign Awards Act. The matter ultimately reached the Supreme Court of India. The Supreme Court had framed inter alia the issue whether the claims referred by the GEC to the Court of Arbitration of the ICC were beyond the scope of arbitration clause.

It was contended by the appellants that the stay if granted as sought by G.E.C. would render Renu Sagar's suit dead for all practical purpose. In other words, the contention was that the present petition could not be a proper stage to decide the issue of arbitrability of the claims. This contention was rejected by the Supreme Court. The Supreme Court was of the opinion that Section 3 of the Foreign Awards Act made it obligatory upon the Court to stay the legal proceedings if the conditions set forth were satisfied.[40] It was held that proper stage at which the court had to be fully satisfied about those conditions was before granting the relief of stay in Section 3.

With regard to the issue of "whether claims referred by the GEC to the Court of Arbitration of the ICC were beyond the scope of arbitration" the Supreme Court was confronted with the question whether Renu Sagar's suit could be said to be in respect of any matter agreed to be referred to arbitration? The submission that the arbitration clause in the contract did not include within its scope the issue of arbitrability of the alleged claims and the suit was not liable to be stayed was negatived by the Supreme Court. Renu Sagar again argued that the phrase "in respect of any matter agreed to be referred

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[40] Ibid., p.1190. Also see, Union of India v. Owners of Vessel Hoegh Orchid and their Agents, AIR Guj., 1983, p.43.

to the arbitration" occurring in Section 3 should be construed as covering only the disputes or claims on merits which have been referred to the arbitrators. Since Renu Sagar's suit, it was pleaded, merely raised the issue of arbitrability of those claims the suit could not be considered in respect of any matter agreed to be referred to arbitration. If this interpretation was accepted that would amount a narrow construction of Section 3. There Supreme Court rejected this interpretation. It stated:

> In the first place there is nothing in the section which warrants the placing of such narrow construction on the relevant issue. What matters are agreed to be referred to arbitration will depend upon what language is employed by the parties to arbitration agreement ... there is nothing in law or equity which prevents the party from referring even the existence, validity or effect (scope) of the arbitration agreement itself to the arbitrators.[41]

Thus the Supreme Court in the above case gave a liberal interpretation to Section 3 of the Foreign Awards Act. It would avoid the dilatory tactics on the part of any party to such agreement by merely raising a plea that arbitrability of the claims in the suit cannot be considered "in respect of any matter agreed to be referred to arbitration".

Meaning of after appearance and before filing a written statement or taking any other steps in the proceeding

The provisions in Article II of the New York Convention do not indicate any

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[41] See, AIR SC, 1985, p.1184.

information as to the issue when should the party apply to the court to stay the proceedings and refer the parties to arbitration. Section 3 of the Foreign Awards Act specifically provides when such request be made to the court before which legal proceedings are instituted. It uses the words "after appearance and before filing a written statement or taking any other steps in the proceeding". This forms one of the important condition to be satisfied before a party avails the assistance offered by Section 3. However, in applying this condition to a factual situation, problems may crop up. For example, regarding its interpretation, particularly when the counsel representing the defendant may have acted contrary to what the party has instructed him.

In Svenska's case the Supreme Court of India has spelt out the meaning of the above mentioned condition. The respondent (plaintiff in the original suit) had filed a suit against the appellants (defendant in the suit) inspite of an arbitration clause. There after respondents filed an application under Section 3. The Trial Court had held that appellant 4 had not satisfied condition IV in section 3. That condition is that where one of the parties to the arbitration agreement, inspite of it, commences any legal proceedings in any court against the other party, any party to such legal proceedings may, "at any time after appearance and before filing a written statement or taking any other step in the proceedings", apply to the court to stay the proceedings.[42] And the High Court of Orissa in the revision petition filed by appellant 4 affirmed the finding of the Trial Court that

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[42] This condition, among others, was listed by the Supreme Court of India.

the appellant had not satisfied the above condition in as much as before filing the application for stay the party has taken other steps in the legal proceedings.

The Supreme Court on appeal from the High Court of Orissa said that one of the important conditions for applicability of condition (iv) was that there must be appearance on its behalf before filing the written statement. Appellant 4 had limited the act of appearance merely to oppose the application for ad interim injunction operating against the above party. Power of attorney by appellant 4 to its counsel, was specifically limited to the miscellaneous case. The applications for seeking time were filed contrary to the express instructions not to put in appearance or take any step in the proceedings related to suit. The Supreme Court expressed the view that had the applications seeking time for filing written statement moved with either express or implied instructions of the appellant 4 there would have been no doubt in the proceedings relating to suit.[43] It was held that since the power of attorney being limited to the miscellaneous case coupled with the express instructions to the contrary, the filing of two applications seeking time for filing written statement was ultravires and had no effect on appellant.[44] Thus the Supreme Court held that the appellant 4 had fulfilled the condition iv in section 3 of the Foreign Awards Act. Thus it is evidenced from the above case that the Supreme Court has

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[43] Svenska Handelsbanken v. Indian Charge Chrome Ltd., SCC 2, 1994, p.168.

[44] ibid., p.170.

emphasised the necessity of the party putting in appearance in the suit. If it did not do so, then any so called step taken would not preclude it from pursuing its application for stay of the suit.[45]

Under Section 3 of the Foreign Awards a situation may so arise that a court may be requested not to stay the suit against a party defendant impleaded in the suit after the filing of an application by the other defendant impleaded originally. The situation arose in R.M.Investment & Trading Co. Pvt. Ltd., (appellant) v. Boeing Co. & Another respondents).[46] The contract was for consultancy services for promotion of sale of Boeing aircrafts in India. There was a purchase agreement for purchase of two aircrafts between Boeing Co., and the Air India. R.M.I. being the consultancy from Boeing later refused to pay the same. There upon R.M.I. filed a suit against Boeing before the Calcutta High Court. An application for stay was also filed under Section 3 of the Foreign Awards Act by the defendant 1, Boeing. R.M.I. sought to implead Air India as defendant 2, and it was allowed to do so. The matter dragged to the Supreme Court of India. The Court had to decide the issue if the suit was liable to be stayed against Boeing, could it also be stayed against Air India?

The appellant argued that even if the suit was liable to be stayed under Section 3, it could only be stayed as against Boeing and the appellant should be allowed to proceed

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[45] See, Nariman, n.25, p.37.

[46] AIR SC, 1994, pp.1140-41.

against Air India. The Court rejected this contention as wholly untenable. It said:

> Even after impleadment of Air India as defendant the main relief in the suit is claimed against Boeing and Air India has been impleaded ... only to obtain discovery and production of certain documents. If the suit against Boeing has to be stayed under Section 3 of the Act it is difficult to appreciate how it could proceed against Air India.[47]

Hence the court found no merit in the appeal and dismissed the same.

The above decision by the Supreme Court lays down the rule that in the circumstances that a suit against one defendant, against whom main relief is claimed, is stayed it should also be stayed against other defendant or defendants.

Who can apply for stay of proceedings?

The matter who can apply for stay of legal proceedings in a suit under Section 3 of the Foreign Awards Act was dealt with by the High Court of Gujarat in Union of India and Another, Plaintiffs v. Owners of Vessel Hoegh Orehid & Others, Defendants.[48] The Union of India entered into a charter party contract with the owners of the Vessel Hoegh Orchid, Norway, for the safe transport carriage and discharge of the bulk consignment of di-ammonium phosphate. The plaintiff, Union of India, filed a suit before the court

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[47] ibid., pp.1140-41.

[48] AIR Guj. 1983, pp.34-47.

for non delivery and/or conversion and/or for negligence by the defendants who were bound under the contract to supply, carry, and deliver the agreed quantity of the bulk consignment. After the appearance 1st and the 4th defendants sought stay of the suit under Section 3, on the ground that the suit was instituted despite an arbitration agreement. The matter reached the High Court of Gujarat.

The plaintiffs made an agreed that the court should not stay the suit since no application has been filed by the original defendants 1 to 3 and particularly when notice of motion has been taken out by defendants 4 who is not a party to the charter-party contract. The court rejected this argument. The court laid emphasis on the words used in Section 3. It use the words "any party to a legal proceeding commenced by a party to an agreement court against any other party to the agreement, or any person claiming under or through him, to apply to the court so stay the proceedings". Therefore, the court observed that in order to move the court for stay of the proceedings under section 3 of the Foreign Awards Act it is not necessary that the applicant must be a party to the arbitration agreement.[49]

A glance at the above decisions delivered by the courts reveals the fact that the courts have indeed made an attempt to spell out the meaning of certain words used in Section 3 of the Foreign Awards Act. For example the meaning of the words "any time after appearance ... or before ... taking any other steps in the proceedings". However it is also

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[49] Ibid.,p.47

revealed the fact that there is no clue as to what law should to be applied while deciding the "validity and capability of the arbitration agreement being performed".

Procedures for Enforcement of Awards

The party in whose favour an award is made in order to seek enforcement of such award is required to follow certain procedures. In India the provisions contained in Section 5, 6 & 8 of the Foreign Awards Act state the different procedural requirements to be fulfilled by the party in whose favour an award is made. The courts in India have examined various issues which have arisen under the above provisions. These issues are: (a) jurisdiction of the court to take award on file; (b) documents that have to be submitted; (c) foreign judgement in terms of award; (d) construing of an award. Each one of these issues will now be dealt with.

Jurisdiction of the Court to take award on file

The case on this point is Brace Transport Corp. of Monrovia, Bermuda, (appellant) v. Orient Middle East Lines Ltd., and Ors, respondents,[50] decided by the Supreme Court of India. The contract was concerned with an agreement to sell a vessel "Saudi Cloud", to the second respondent by the appellant. The nominee of the second respondent was the first respondent, Orient Middle East Lines Ltd., who purchased the said vessel from the

[50] AIR SC 1994,pp.1715-23.

second respondent. The contract also included an arbitration agreement. Disputes between the parties was referred to arbitration. That resulted in an award in favour of the appellant. The appellant set in motion the procedures for enforcement of award in India since the vessel, which was sold to the third and then to the fourth respondent, was beached at Alang in the State of Gujarat. The Civil Judge of the Bhavanagar court held that it had jurisdiction to entertain the appellants application and continued to pass the order. The High Court of Gujarat has reversed the order of the Civil Judge. Thereafterwards the appellants appealed to the Supreme Court.

The Supreme Court had to address the issue whether the Bhavanagar Court had jurisdiction to take the award on file, if so what was the subject matter for exercising its jurisdiction?

The appellant agrued that since the vessel was within the jurisdiction of the Bhavanagar Court it had jurisdiction to take the award on file. It was further contended that the appellants had a maritime lien on the said vessel. Both these contentions were rejected by the Supreme Court. It was then submitted that the subject-matter of the award was 'money' and 1st and 2nd respondents had money in the jurisdiction of Bhavanagar. The court agreed with this contention and found:

> This being an award for money its subject matter may be said to be money, just as the subject matter of a money-decree may be said to be money.[51]

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[51] Ibid., p.1721.

Thus the appeal was allowed. It may be noted that the court's decision to take award on file was not based on the fact that the vessel was in the jurisdiction of the Bhavanagar Court because the vessel was no more the property of the 1st and 2nd respondents. The reason was that the money payable to the 1st and 2nd respondents by the 3rd and 4th respondents was deposited in the Bhavanagar Court.[52] The court interpreted the relevant words "any court having jurisdiction over the subject matter of the awards" occurred in section 5 of the Foreign Awards Act in order to arrive at the above conclusion.[53]

Documents to be submitted with request for enforcement

At the time of applying for the enforcement of a foreign award a party must produce before the court the original award or a duly authenticated copy thereof, the original agreement for arbitration or a duly certified copy there of and such other evidence as may be necessary to prove that the award is a foreign award. A question which is asked is the question can a party be required to produce evidences other than those that are statutorily required?

This point was decided by the High Court of Delhi in Ludwig Wunsche & Co., Plaintiff v. Raunaq International Ltd., and Anr., Defendants.[54] Wunsche applied for the

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[52] Ibid.

[53] It says " Any person interested in a foreign award apply to any court having jurisdiction over the subject matter of the award that the award be filed in court".

[54] AIR Del, 1983, pp. 247-53.

enforcement of an award made in London against Raunaq at the High Court of Delhi. The request made was under the Foreign Awards Act. They supplied to the court an original award and a duly authenticated copy of it. The Registrar of the court directed that application be registered as a suit. The order of the Registrar also stated that the arbitrators be directed to file the award, award proceedings and documents ...) Wunsche then sought that the said order be "clarified and/or modified/amended by withdrawing the direction to the arbitrators because the award was already filed and award proceedings and documents were not statutorily required. Raunaq objected the application. The matter was referred to the court. Two issues framed in the case were: the question as to the correct and proper procedure to be followed when a party seeks enforcement of a foreign award in India; following from this the question as to the manner in which an apparent conflict between the Indian Arbitration Act, 1940 on the one hand and the Foreign Awards Act on the other was to be resolved.

As to the first issue under consideration the plaintiff submitted that the production of the arbitration proceedings were unnecessary for the purpose of enforcement of a foreign arbitral award under the provisions of Foreign Awards Act. On the contrary the defendants argued that the foreign award could be enforced in India only in accordance with the procedure required by the Indian Arbitration Act. Accordingly, along with the production of award notice to the arbitrator to produce the award proceedings and other documents was mandatory. By its terms section 8(1) provides:

> The party applying for the enforcement of a foreign award shall, at the time of the application, produce (a) the original award on a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; (b) the original agreement for arbitration or a duly certified copy thereof; and (c) such evidence as may be necessary to prove that the award is a foreign award.[55]

After perusal of the above provision the court said that it represented a departure from the procedure laid down in the Act of 1940, in that, in the first instance, an application for enforcement of an award has to be accompanied by the original award or a duly authenticated copy of it.[56] It observed:

> There is no provision for a notice to the arbitrator or of any direction to the arbitrator or of any direction to the arbitrator for the production of the award or arbitration proceedings. The only notice envisaged is a notice to the respondent to show cause why the award be not filed .... The only opportunity under this procedure that the respondent has it to oppose the filing of the award on the ground that the conditions of Section 7 for the enforcement of foreign awards are not satisfied.[57]

As regards to the second issue the court opined that the Foreign Awards Act was covered by the words "any law for the time being in force" occurring in Section 47 of the Indian Arbitration Act, 1940. Thus certain categories of arbitration agreement agreements, arbitrations, arbitration proceedings and awards are dealt with separately under special statute like the Foreign Awards Act. The court stating that the Foreign

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[55] Ibid.,p.250.

[56] Ibid.

[57] Ibid., p.251

Awards Act was a special statute, emphasised that special statute prevails over the general.[58] Having said that the court did not rule out completely of the applicability of the India Arbitration Act, 1940 with regard to foreign arbitral awards. The provisions of the Indian Arbitration Act, 1940 is made applicable even to the cases fulling under the Foreign Awards Act in cases where there is no provision in the latter Act to regulate some matters or there is a provision which is inconsistent with the general provisions contained in the former Act.

However, the court said, provisions of the Indian Arbitration Act, 1940 was not to be applicable to the case under discussion. It accordingly modified the order of the Registrar. Thus so far as enforcement procedure, especially the production of evidences of foreign arbitral awards are concerned the court above abided by Article III of the New York Convention which forbids the imposition of "substaintially more onerous" condition on the enforcement of foreign arbitral awards than those imposed for enforement of domestic awards.[59] But is does nor procedure a state from having" less onerous conditions for enforecement of foreign arbitral awards. The court's observation under Section 8 (1) of the Foreign Awards Act was neither substaintially more onerous" nor

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[58] Ibid.

[59] It says that "each contracting state shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the condition laid down in the following articles. There shall not be imposed substantially more onereres conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic awards'.

was "less onerous". To that extent the court was faithful to the provisions of Article III.

Foreign judgments in terms of awards

When in the country of origin, a leave for enforcement is issued by the court on the awards, the leave may constitute a court judgment in that country. The judgment may have the effect of absorbing the award into the judgment in that country. If in this case the enforecement is sought in another contracting state the question arises whether the award can be enforced as foreign award under the New York Convention or as a foreign judgment on another basis. This matter was brought to the notice of the High Court of Bombay in Northern Sales Co. Ltd., Petitioner V. Reliable Extraction Industries Pvt. Ltd., Respondent.[60] There was a dispute between the petitioner and the respondent to the amount payable by the respondent in respect of demurrage claim. The petioner resorted to Grain and Feed Trade Association (GAFTA) Rules of Arbitration in accordance with the contract. An arbitral award was accordingly made against the respondent. Since the respondent declined to pay the amount due, to the petitioner filed the petition under Section 5(1) of the Foreign Awards Act.

Before the court it was contended by the respondent that the petitioner could not seek relief in the present petition. Because in pursuance of the award the petitioner approached the English court for a judgment interms of the award and accordingly the

[60] AIR Bom, 1985, p. 332-36

English Court passed the judgment. And, therefore the award merges in the judgment. Thus the main issue for examination was whether as a result of that English judgment the award stands merged in the judgment? After making an elaborate examination of the order passed by the English Court the High Court of Bombay came to the conclusion that the said order was merely an enforcement order and not a judgment. The court reasoned that the leave granted was merely for enforcement of award in the same manner as the judgment. Moreover the court held that even assuming that the order of the English court was considered as a judgment, still it was not possible to hold that the award stands merged in the judgment. A foreign judgment was not accorded the power of merging and effecting the cause of action.[61] The High Court said :

> Therefore even assuming that the order passed by the Master in Chambers is a judgement, still it being a foreign judgment, as far as this Court is concerned, it will not have the effect of effacing the cause of action, that is the award secured by the petitioners in their favour.[62]

Thus the court decided that the petitioner was entitled to institute the proccedings in the court on the basis of the award. It ordered that the award or an action judgment be pronounced in accordance with the award. Thus it may be submitted that in India a foreign arbital award can be sought for enforcement under Section 5 and 6 of the Foreign

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[61] Ibid., p. 334.

[62] Ibid.

Awards Act although a foreign judgment was given in terms of award cannot erase the cause of action. Merger of the award into the judgment in the country of origin does not have extra-territorial effect and that therefore the award remains a cause of action for enforcement in other countries on the basis of the Convention.[63]

Construing the awards

With the subject "construing of the award" we have come to the last issue under this section. Proper construction of the foreign arbitral award is vital for the enforcement of the award under the New York Convention. Also it is in the interest of justice that the enforcing court should not unnecessarily interfere in amending the award under the pretext that the award is ambiguous without taking into consideration the purpose of the New York Convention and its implementing legislation. The case law on this point is M/s. Koch Navigation Inc., (appellant) V. M/s. Hindustan Petroleum Corporation Ltd., (respondent).[64]

In the above case the appellant and the respondent had agreed for a charter party agreement. Arbitration agreement provided that in the event of any dispute or difference a single arbitrator would be appointed to arbitrate according to the English Arbitration

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[63] See, van den Berg, n. 37, p. 530

[64] AIR SC, 1989, pp. 2198-2202.

Act. Dispute arose and matter was referred to the arbitrator. The arbitrator passed the award in favour of the appellant. Among other items, the award also included the cost of reference to arbitration to be taxed in the event of disagreement between the parties. The matter was first heard by the single Judge of the Bombay High Court. Against his judgment it came before the Division Bench. Appellants approached the Supreme Court of India. The issue before the Supreme Court was whether the cost of reference to arbitration was part of the arbitration awarded in question.

The main contention of the respondents was that the arbitrator had not awarded the cost of reference. Therefore, there was no scope for addition to the award. The Supreme Court was in agreement with the contention that the award must be executed as it was. However, the court asserted the fact-that the award to be executed must be properly interpreted and given effect t.[65] It expressed the view that the court ' award was ambiguous. Was the concerned award in the present case ambiguous in nature? In an answer the court observed:

> It had categorically provided that cost of reference is to be paid by the respondent. The award has stated that such cost should be agreed between the parties and in case there was no agreement, cost should be taxed. The award is clear and unambiguous and does not leave this question undecided.[66]

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[65] Ibid., p. 2201.

[66] Ibid.

Thus in the circumstances, there was no scope of remission of this award or not enforcing what the arbitrator had awarded. The court further stated:

> Under the Act, if an application is filed for decree interms of the award, the court in upholding the award ought to grant a decree interms of the award and not substract any portion there of.[67]

Accordingly the Supreme Court modified the order and judgment of the Bombay High Court. The above judgment of the Supreme Court signified the point that the meaning of a foreign award should be interpreted in the light of the New York Convention and its implementing legislation in India. The award must be executed as it is. The only ground which may compel the court to modify or substract the award is when the award is 'ambiguous' in nature.

The above decision that the award must be executed as far as possible as it is, further, supplemented by the Kerala High Court in Grand Cashew Corporation and Ors., Petitioners v. M/s Gibbs Nathaniel (Canada) Ltd., (respondent).[68] Here the award was against whom the respondent had obtained foreign award. The respondent filed application under Section 5(1) of the Foreign Awards Act before the Sub Court for filing the awards in the court. After getting the names of the partners, the respondents had filed an interlocutory application to implead the partners and to amend the applciation filed under

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[67] Ibid.

[68] AIR Ker, 1984, pp. 33-35

Section 5 (1) accordingly. The petitioners objected. The objections were over ruled by the court and all the partners of the petitioners firm were allowed to be impleaded. The petitioners henceforth challenged the orders of the sub Court before the High Court of Kerala. The only issue before the High Court was whether the parties of a firm could be impleaded in an application under Section 5 (1) of the Foreign Awards Act for filing the foreign award obtained against a firm and whether the application could be amended accordingly.

The petitioner contended that the awards were only against the firms and not against their individual partners. Section 6 of the Foreign Awards Act provides that a decree is to be passed only "interms of the award". They urgued if the partners were not parties to the award a decree could not be passed against them. The providions of the Civil Procedure Code of India, 1908 would only be applicable subject to the previsions of the Foreign Awards Act. Therefore partners of the firm, should not be impleaded. On the other hand, the respondents contention was that the decree was being against a firm and that the decree could be realised only if the partners were allowed to be impleaded and summons were served against them in accordance with Order XII, Rule 50, Civil Procedure Code of India, 1908.

The High Court treated the proceedings of the case as a miscellaneous proceedings and held that as per Section 141 of the Civil Procedure Code the procedure prescribed therein in regard to suits should apply. The relevant provision, O. XXI, R. 50 (4) says

that a decree against a firm will not relase, render liable or otherwise affect any partner unless be has been served with summons. The decree holder, the court said, with the leave of the court could execute a decree, obtained against a firm, against the partners of the firm.[69] Besides it observed:

> As the judgment that is to be pronounced and the decree that should follow under Section 6 of the Foreign Awards Act are against a firm and are to be in accordance with the procedure prescribed by the Civil P.C., a partner can not successfully resist his impleadment in the application filed under Section 5 for filing the award in Court. The petitioners can not take shelter under the words "pronounce judgment according to the award in Section 6".[70]

Hence the court decided by virture of the Foreign Awards Act and the Civil P.C., that the partners be impleaded in the suit. It gave a reasonable interpretation to the provisions of Section 5 and 6 of the Foreign Awards Act.

Refusal of Enforcement

In the previous section we have seen the significance of refusal of the recognition and enforcement of a foreign award. Article V of the New York Convention elaborates the general grounds for non-enforcement by the courts of forum state. In India, Section 7 of the Foreign Awards grounds lists act various grounds upon which a court may refuse to enforce an otherwise enforceable foreign arbitral award. Briefly stated, they are: (a)

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[69] Ibid., p. 34.

[70] Ibid.

invalidity of the arbitral agreement; (b) a violation of due process; (c) the arbitration exceeding his authority; (d) irregularity in the composition of the arbitral trabunal or the arbitral procedure; (e) failure of the award to become binding or set aside or suspended in the country in which, or under the law of which, that award was made; (f) non-arbitrability of the dispute; and (g) violation of public policy. The last two of the above seven grounds empower the court, on their own motion, not to enforce a foreign arbitral award.

Therefore, in proceedings for enforcement of a foreign arbitral award under the Foreign Awards Act the scope of enquiry is limited to grounds mentioned in section 7 of the said Act. It is impermissbile for a party to impeach the award on merits. So far three cases, in which Section 7 of the Foreign Award Act. It is impermissible for a panty to impugn the award on merits. So far three cases, in which Section - 7 of the Foreign Award Act was invoked have been decided by the courts. The alleged grounds in all those three cases were; due process of law [Section 7(1) (a) (ii)]; and the ground of public policy {Section 7(1) (b) (ii)]; Each one of these grounds will be discussed below in the light of hte court's observations.

The ground of due process of law

This ground of due process of law manifests in itself the notion of "natural justice". The case law on this point is the famous case of Renusagar Power Company

Ltd., appellant v. General Electric Company, respondent.[71] The case was decided by the Supreme Court of India in appeal. The contract was for supply and erection of the Thermal Power Plant for appellants. Since there arose a dispute the General Electric Co., made certain claims which were resisted by the appellants. There upon in accordance with the arbitration agreemnt the differences were referred to arbitration and an award was made accordingly. The enforcement of the award filed by the respondent was resisted by the appellant in the Bomaby High Court, on various legal grounds. All of them were rejected by the Bombay High Court. Then the case came before the Supreme Court.

Various grounds of defences for not enforcing the award against the applellant was raised even before the Supreme Court. The appellants objected, inter alia that it was "unable to present its case" becore the arbitral tribunal. The grievance was that the arbitral tribunal decided the preliminary objection raised by the appellants that the arbitrator had become functions 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 Co., without any further notice to the appellants. As a result the appellant was unable to present its case before the arbitral tribunal. Thus the Supreme Court was concerned with the question whether there was a bar to the enforcement of the award unde Section 7-(i) (a) (ii) of the Foreign Awards

[71] AIR SC, 1994, pp. 860-914.

Act?

The Supreme Court has disagreed with the above contention of the appellants. For such Stand taken by it it noted down several facts of the case. The first hearing before the aribitral tribunal was conducted on February 25, 1984. It was represented by both the parties. In that hearing the tribunal concluded hearing on issues 22(g) to (p) and the matter was thereafter was adjourned to June 10. But due to the illness of one of arbitrator the proceedings had to be adjourned to October 1, 1995. And a notice to this effect was sent to the parties. In the notice it was specifically stated that the main purpose of the hearing was to deal with the Renusagar's counter claims together with the climant's calim. Meanwhile application submitted by General Electric Co., under section 3 of the Foreign Awards Act had been rejected by the Mirzapur Civil Court. THe same order was not yet set aside or stayed by the Allahabad High Court in the revision pettiton filed by Genral Electric. Renusagar intimated the Secretary General of the ICC that the arbitrators had become functions officio and could not proceed in the matter. The Chairman of the tribunal intimated in return that the question as to the effect of thesuit filed in Mirzapur Court - would be considered as a preliminary issue of the scheduled meeting on October 1, 1995. Again Renusagar had sent a communication that their contention was totally different in that it could proceed in the arbitration proceedings. TIt was also urge the tribunal not to communicate with them any further regarding the

arbitration that had become infructuous. Therefore there was no question of Renusagar appearing before the tribunal on the dates fixed for hearing. In these circumstances the Supreme Court said:

> ...it is not open to Renusagar to say that the Arbitral Tribunal after having rejected, (by majority) the said objection raised by Renusgar 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...[72]

Therefore the court held that the enforcement of the arbitral award is not bas ed by Section t(i) (a) (ii) of the Foreign Award sACt on the ground that Renusagar was unable to present its case before the arbitral tribunal.

It appears from the above decision that the Supreme Court had given a narrow interpretation to Section 7(1) (a) (ii) of the Foreign Awards Act.[73] This provision incorporater the words "proper notice of the arbitral proceedings or unable to present his case". However the court is content with just concluding that under the cirumstances further notice to Renusagar was not necessary. Advertantly or inadvert antly the court skipped the questionunder what rule of law was if to be determined that further notice was present its case before the arbitral tribunal. Neither Section 7(1) (a) (ii) of the

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[72] Ibid., p. 82.

[73] This provision provides that the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

Foreign Awards Act nor Article V(1) (b) of the New York Convention[74] contains criteria upon which to gauge the "adequacy of the notice" or was otherwise unable to present his case". Some scholars hold the view that this defence essentially sanctions the application of the forum states standard of due process including "audi et alteram partem".[75] To remove the doubt as to the applicable law the Supreme Court ought to have addressed this issue. It was all the more necessary that there is a remote chance that a court may anallizise to the previous proivision of section 7(i) (a) (ii) Foreign Awards Act which States that the question of validity of the agreement is determined according to the law the parties have selected or failing any selection under the law of the place of arbitration.

Public Policy

Public policy is a well recognised concept under private international law. Public policy in international commercial is always used as a defence against the enforcement of contain foreign laws used legislatives dulared inconsistent with basic principle of the forum state. This defence is justified on guards of maintaining the sanctity minimum values like justice, morality or the cultural ethos in a given social economic context. Hence it is where that there is no and can be no uniform integration of public policy.

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[74] Article V(1)(b) of the New York Convention and Section 7(1)(a)(ii) of the Foreign Awards Act are similar in nature and content.

[75] See, van den Berg, n. 37, p. 494.

In the field of conflict of laws public policy is often given a narrow interpretation. As Justice Cardozo stated when applying a foreign law, the choice of law involving public policy "would violate some fundamental principle of justice, same prevalent conception of good morals, some deep rooted tradition of common Weal". [Laukcks v. Standard Oil Con, 224, New York 99, 111 (1918]. In contrast the public policy exception has a broader interpretation in the area of recognition and enforcement of foreign awards. Here apart from an alien law what is germain is the procedure adopted in deciding the foreign award.

The Supreme Court of India and the Bombay High Court have involved public policy to set aside a foreign award.

Section 7(1) (b) (ii) of the foreign Awards Act 1961, empowers a court not to enforce a foreign award if it finds that the enforcement of such award would be contrary to "public policy". Public policy, as essentially an escape route, denotes a justification or excuse for not enforcing an otherwise enforceable foreign award. Indian courts have been called on to interpret directly the extent and content of public policy defense in India. In C.O.S.I.D. Inc., V. Steel Authority of India (SAIL)[76] the government owned Indian Company SAIL had entered into a contract for supply of Hob Rolled Steel Sheet coils (H.R. Coils) with a foreign company (C.O.S.I.D.). It could not discharge its contractual obligations due to an order issued to it by the Iron and Steel Ministry, the

[76] AIR 1986, del, p. 8-23

Government of India. In the event an award was made in favour of the foreign company. To the query which 'public policy' national or international is permissible under the Foreign Awards Act, the Delhi High Court noted that the expression public policy in Section 7(1) (b) (ii) means public policy of India. Application of national law determining public policy is expressly sanctioned by Art V(2) (b) of the New York Convention. The court in that case found that the Act did not make any distinction between domestic and international public policy.

The content of "public policy" as used in the act as a legal standard is now set by the Indian Supreme Court in Renusagar Case, The expression 'public policy' in the relevant section denotes 'public policy of India' through the expression is not qualified by the world 'India'. Recognition and enforcement of a foreign award would not be questioned on the ground that it is the country whose law governs the contract nor on the ground that it is contrary to the law of the country of the place of arbitration. According to the Supreme Court of India's verdict in *Renusagar case*[77] there are three patterns of the operation of the doctrine of 'public policy' in the field of recognition and enforcement of foreign arbitral awards. First, an Indian Court will refuse on grounds of public policy to recognise and enforce a foreign arbitral award if such enforcement is contrary to "fundamental policy of Indian Law". That is to say, if the foreign award involves a violation of Indian statute law. For example, violation of the provisions of the Foreign

[77] AIR SC, 1994, p. 860-914.

Exchange Regulations Act (FERA), or non compliance of a courts' order's. However, more contravention of law would not attract bar of 'public policy. Thus a party sustaining a claim that an award would be time barred under Indian Limitation Act is not opposed to public policy.

There is a second pattern of public policy invocation. A court will refuse on grounds of public policy to recognise and enforce a foreign arbitral award if such enforcement is detrimental to the "interest of India". The words "interest of India: is of general import and the Court did not clearly spell it out. It may be public or national interests or image of India. Will the court refuse enforcement of a foreign award because it would tend to jeopardize at the international level the ood relations of India with another state ?

There are decided cases which address the "public policy" concept under the category of the interest of India. In C.O.S.I.D. v. Steel Authority of India, the court refused to enforce and award on the ground of public policy inter alia for the reasons that the Government of India's decision to ban the export shipments of coils with immediate effect in view of acute shortage of HR Coils existing in the country at the relevant times. The government action was intended for common good which involved national economic policy. From this it may be discerned that the main thrust of public policy here is not to achieve the rejection of an intrinsically repugnant foreign award, but rather to protect the national interest.

The third pattern of operation of public policy is that in which the enforcement of a foreign award would be contrary to justice or morality.

Apart from stating the above three patterns of "public policy" the Indian Supreme Court has pointed out two more notable points which are north mentioning. First, granting of compound interest would not involve, infringement of the public policy. But the question as to whether on award of damages on damages could be contrary to Indian public policy has been left open. Second, the objection as to the award on the ground of "unjust enrichment" would go to the merits of the award as such it could not be raised as being opposed to "public policy".

From the above it is evinced that the courts in India do not apply the restrictive criterion of international public policy. "Order Public International". Scholars have criticized the concept of 'public policy' as enunciated by the Supreme court of India as far too vague. The problem lies in the hybrid and ambiguous nature of a provision in the New York Convention which embraces both procedural and substantive aspects and that refers to "the fundamental economic, legal, moral, political, religious and social standards of very state or extra-national community, which are so sacrosanct as to require their maintenance at all costs and without exception. The resultant differing interpretations allows a state to gut the Convention.

Excessive Jurisdiction

The modern trend generally points out that it is in favour of territoriality principle regarding the subject of applicable arbitration procedure. It is the law of the place of arbitration that should govern arbitration procedures. Both recent legislation and case law goes to show that the application of the procedural law of the place of arbitration. They also confirm that the courts of the place of arbitration have jurisdiction to set aside an award. However, Indian Courts have over the years shown that such jurisdiction under the Foreign Awards Act is not exclusive. The courts based their judgment referring to section 9(b) of the Foreign Awards Act which provides: "Nothing in this Act shall ... apply to any award made on an arbitration agreement governed by the law of India".

The first case in this direction was reported from the Supreme Court of India. In Oil and Natural Gas commission, appellant v. Western Co., of North America respondent[78] the parties has entered into a drilling contract. The arbitration clause provided that the disputes would be settled by arbitration in London. An award passed in London was sought to be enforced in the United States under the New York Convention. Meanwhile the appellant sought to vacate the award before the Bombay High Court. The case came before the Supreme Court of India. The Supreme Court held that the award had not become final and binding under the Indian Arbitration Act, 1940. The Indian Act requires that a domestic award be made subject to judgment and decree before it is

[78] AIR SC, 1987, pp.674-89.

enforceable. The court's reasoning was based on the interpretation of Article V(1)(e) of the New York Convention. This provision stated that: "enforcement may be refused where the arbitral 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". Besides the court found that the law governing the arbitration procedure was the Indian law, since the parties have made this choice of law.

To the same conclusion is the decision of the Supreme Court in Singer case.[79] The facts of the case have already been mentioned. One may justify the Supreme Courts exercise of extraterritorial jurisdiction in the Natural Gas Commission Case, since the parties had been selected Indian law to govern the arbitration procedure. But in Singer case the Supreme Court showed a inclination to vacate an interim award rendered in London based only on contractual choice of Indian law as the law governing the agreement under which the dispute arose. There was no allegation that the parties had agreed to the application of Indian procedural law. The Supreme Court decided that the law governing the agreement to arbitrate was presumed to be the same as that governing the agreement in which the arbitration clause was provided. The court, on the one hand, advocated for a wide scope of application for the Indian law governing the arbitration agreement. It made use of this broad scope to justify broad jurisdiction to review foreign arbitral awards. On the other had it maintained the view that the courts at the seal of arbitration have only

[79] AIR SC, 1993, pp. 998-1014.

a limited scope of review particularly when the parties had agreed to the ICC rules of procedure.

The court relied on the provisions of section 9 of the Foreign Awards Act which permitted the court to find that the award rendered in London should be considered as a domestic award.

The above two cases, particularly the Singer case demonstrate the hostile position taken by the Indian courts. The Indian experience is an exception to the trend toward harmonisation of arbitration laws on the issue of the law applicable to the arbitration procedure and the courts competence to annul or vacate the award.

Public policy is eventually a link between an international arbitration and the given dome still legal system in the sense that irrespective of the place of arbitration or the law applied it has application to the merits. As domestic rules are the ultimate arbitrator for application of the law they in a sense are responsible for creating new deeds of international public policy. Though the terms to a contract may denationalised by clauses of good, equity and general principles of law, the courts as an essential wing of a government shall always interrupt the law in conductive fashion basing the needs and the recongnised values of the country.

The lack of a uniform rule governing application of public policy often gives rise

to accusing parochialism and narrow interest of country. This to a large extent and effective international transection. International conventions are nowadaysshowing a declinein applying public policy as a defence. The ICSID is a pointer in this direction.

CHAPTER IV

CHAPTER-IV

AN APPRAISAL OF THE ARBITRATION AND CONCILIATION BILL, 1995

The Indian approach to international commercial arbitration, particularly with regard to the recognition and enforcement of foreign arbitral awards has seen some changes in the past few years. However, there are some areas such as the provision contained in Section 9(b) of the Foreign Awards Act which authorises the courts in India not to apply the Foreign Awards Act to awards made on an arbitration agreement governed by the law of India, which have the potential to jeopardise the purpose of the New York Convention[80]. It amply suggests that the New York Convention is not fully implemented in India. The approach is still of a rigid nature. This is in direct contrast to what most of the contracting states to the New York Convention perceive and practice today. The common belief expressed by scholars and writers that arbitration improves the justice system, at least in the Indiancontext, has not become true.

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[80] Article I, Para III of the New York Convention provides: It may also declare that it will apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such a declaration.

There has been a general feeling of apathy about changing the obsolete provisions of the arbitration laws in India. That is why foreign investors are quite sceptical of investing in India.[81] It is now realised that our economic reforms may not become a reality if the law relating to the settlement of both domestic and international commercial disputes remains out of tune with such reforms. The "Law Commission of India",[82] "the Indian Council of Arbitration",[83] and several other representative bodies of trade and industry and experts in the field of arbitration have proposed amendments to the Indian Arbitration Act, 1940 to make it more responsive to contemporary requirements. The resulted in the holding of several draft conferences to bring about a new comprehensive arbitration legislation. Ultimately the "Arbitration and Conciliation Bill, 1995" (hereafter "the Bill") is now being tabled before the Rajya Sabha for the enactment.

From the reading of its preamble it is clear that the Bill aims to consolidate and amend the law relating *interalia*, to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The Bill is based on the Model

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[81] The Times of India (New Delhi), 4 April, 1976. Mr.Kathushiro Uhada had expressed the common apprehension among the Japanese investors investing in India. Having concerned about the general legal system he underscored the point that the Indian government would setup an internationally consistent arbitration system to settle commercial disputes.

[82] See the 'Statement of Objects and Reasons' of the Arbitration and Conciliation Bill, 1995, p.37.

[83] Business Standard (New Delhi), Saturday October 1, 1994.

Law on International Commercial Arbitration adopted in 1985 by the United Nations Commission on International Trade Law (hereafter the UNCITRAL). One objective of the Model law is to promote the goals of the New York Convention by applying the Convention's substantive provisions in a manner more conducive to the needs of international commercial arbitration. This entails a discussion of those needs of international commercial arbitration which were not addressed by the New York Convention? This aspect will be dealt with at first before discussing the important modifications made to the Foreign Awards Act in the Bill.

The Need for 'Model Law'

The New York Convention offers some clear advantages when compared to the situation before it had come into force. In the pre-New York Convention period one had to rely upon the Geneva Protocol and Geneva Convention for the recognition and enforcement of foreign arbitral awards. Now, the situation is vastly improved. The burden of proof lies on the defendant to prove the existence of one of the grounds for refusal of enforcement of an award enumerated in Article V of the New York Convention. The so-called "double exequatur" does not exist anymore. The commentators are unanimous in their opinion that the overall performance of the New York Convention is satisfactory.[84] However, they concede that there is ample scope for improvement. The

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[84] Peiter Sanders, "A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", International Lawyer, vol.13, 1979, p.269.

considerable success of the New York Convention should not lead us to be overoptimistic in our conclusions. Because the diversity remains great, atleast in the form and vocabulary of existing rules; the general picture often appears confused.

The New York Convention despite its advantages suffers from certain legal infirmities. Firstly, the facility of reservation offered by the New York Convention has been utilised by all most all the contracting states. The New York Convention declared that "arbitral awards not considered as domestic awards in the state where recognition and enforcement is sought" are considered as "foreign" for purposes of recognition and enforcement. The New York Convention defined a "domestic" award by omission. The danger of this reservation was amply demonstrated by the two cases discussed in the last chapter where the court investigating the matter sought to exercise excessive extra-territorial authority.[85] Moreover, experience has shown that the term "commercial" is susceptible to varying interpretations in different and even in the same legal system.[86] By excluding certain subjects from the realm of "commercial disputes" a contracting state may obstruct the enforcement of awards made by foreign arbitral tribunals.

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[85] The cases Oil & Natural Gas Commission v. Western Co., of Northern America, and National Thermal Power Corp., v. Singer Co., are pointers in this direction.

[86] In this connection Kamani Engineering case and Indian Organic Chemical case may be mentioned.

Secondly, under the New York Convention the setting aside can take place only in the state in which the award was made or in the state "under the law of which" the award was made. It may be recalled that the New York Convention accepts that a foreign award in its country of origin may have been set aside on other grounds than mentioned under Article V, paragraphs (a)-(d). If the awards in the country of origin be set aside on grounds other than those mentioned above, these grounds will be indirectly introduced as grounds for refusal in the country of enforcements.[87] National arbitration laws differ in their formulation of grounds to set aside and may not necessarily limit these grounds to the four grounds mentioned above.

The UNCITRAL, since its establishment in 1966, has been involved with the task of harmonising and unifying the law of international trade and also coordinating the work of organisations active in this field. In 1981 UNCITRAL had turned its attention to the creation of a model law to further unify national arbitration laws. It had first reviewed the report of the United Nations Secretary-General about the "Study on the Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[88] The key areas of problem which UNCITRAL had found was the

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87 See, Sanders, n.5, p.276.

88 Kenneth T.Ungar, "The Enforcement of Arbitral Awards Under UNCITRAL's Model Law on International Commercial Arbitration", Columbia Journal of Transnational Law, vol.25, p.727.

inability of the New York Convention to address the uncertainty as to which country's law would be applicable under an arbitration agreement. In addition to that it found that the disparity in national laws had led at times to different results in similar enforcement actions. It also took notice of the fact that considerable number of states, particularly Latin American States, were apprehensive of adhering to the New York Convention. Thus it was felt that these problems could be solved through a mechanism providing for uniform interpretation and application of the New York Convention's principles.[89]

At its Fourteenth Session in 1981 UNCITRAL established a Working Group on International Contract Practices (The Working Group) with the task of preparing a model law on international commercial arbitration. The Working Group had sought comments for the draft law from the member states of the United Nations and international arbitral organisations, such as African-Asian Legal Consultative Committee(AALCC) and the International Chamber of Commerce (ICC). After many deliberations the "Model Law" was finally adopted by the UNCITRAL on 21 June 1985. Subsequent to this the General Assembly of the United Nations has recommended that all countries give due consideration to the UNCITRAL Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international arbitration practice.

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89 Ibid.

However, it must be remembered that the "Model Law" is just a draft consisting of model rules and not a draft international convention. It was intended as a vehicle for furthering the aims of the New York Convention. The purpose is to promote the goals of the New York Convention by applying the treaty's substantive provisions in a manner more conducive to the needs of international commercial arbitration.[90] If the Model Law were a Convention it would have to be adopted verbatim or wholly rejected. This intention was deliberately excluded. The document provides just a basic model. These model law provisions can be adopted with or without adaptation. Within the framework it allows states to decide for itself to what extent the Model Law is adopted or adapted.[91]

Against this background we shall proceed to consider the important provisions of the Bill, particularly those which are related to the recognition and enforcement of foreign arbitral awards.

The Bill

The Arbitration and Conciliation Bill, 1995 is a comprehensive document, consisting of four parts. The Bill aims at consolidating and amending the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign

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90 Ibid., p.730.

91 Michael Kerr, "Arbitration And The Courts: The UNCITRAL Model Law", International and Comparative Law Quarterly, vol.34, January 1985, p.7.

arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.[92]

Scope and Object of the Bill

The Bill seeks to consolidate and amend the law relating to domestic and international arbitration, and to define the law relating to conciliation, bearing in mind the UNCITRAL Model Law. The main objectives of the proposed Bill are -

i. To comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;

ii. To make provisions for an arbitral procedure which is fast, efficient and capable of meeting the needs of specific arbitration;

iii. To provide that the arbitral tribunals gives the reasons for its arbitral awards;

iv. To ensure that the arbitral tribunal remains within the limits of its jurisdiction;

v. To minimise or reduce the supervisory role of courts in the arbitral process;

vi. To permit an arbitral tribunal to use mediation, conciliation, or other procedures during the arbitral proceedings to encourage settlement of disputes;

vii. To provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

viii. To provide that settlement agreement reached by the parties as a result of conciliation preceding will have the same status and effect as an arbitral

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92 The preamble of 'the Bill'.

award on agreed terms in the substance of the dispute rendered by the arbitral tribunal;

ix. To provide that for the purposes of enforcement of the foreign award every arbitral award made in a country to which one of the two international conventions relating to foreign arbitral award to which India is a party applies, will be treated as a foreign award.

The above objectives of the Bill point towards strengthening of the domestic law towards meeting the growing demands of opening up markets caused by globalisation. The Bill also provides that the procedure for arbitration should be increasingly made simple fair and devoid of the courts rigours. Tribunals are also required to pass reasoned decisions. Another objective of the Bill is to grant the court a limited jurisdiction in matters which come up before them. Their essential role would be that of an Ombudsman, i.e. to ensure that the requisite law and procedure is applied. The increasing trend towards mediation and conciliation as modes of settlement of disputes goes to show that the arbitral process requires assistance from experts in international trade and other commercial matters. One of the objective speaks of treating every final award as if it were a decree of a court. This again is a pointer towards the finality of the award. In a subtle way the Bill tries to limit the jurisdiction of courts. The objectives do not speak in any way of grounds on which awards can be set aside, say for example public policy. If one may call this as a lacunae it goes to show that the Bill is basically catering to the needs of the international business community wherein commercial transactions shall be carried on unhindered.

The Bill provides for the principle of reciprocity to be applied in case of enforcement of foreign arbitral awards. However the Bill does not indicate as to how the reciprocity requirements are to be applied by the courts in India. Considering that the reservation as a declaration of public policy of India, the courts may *suo moto*, or at the request of the other party to an arbitration agreement or award falling under New York Convention, refused to apply the New York Convention through the provisions of the Bill, on the ground that the courts in the other state party have interpreted public policy in a restrictive manner.

Since the Bill is an exhaustive and a single document on arbitration, domestic and international, and conciliation, a complete examination of the Bill is beyond the scope of this chapter. Therefore the discussion shall be confined to Chapter I of Part II, New York Convention Awards, of the Bill. However to elucidate the provisions contained therein relevant provisions in Part I and the UNCITRAL Model Law will be referred to.

Some Important Modifications to Foreign Awards Act

As has been mentioned earlier certain important changes have been sought in the Bill. They include charges to both the Foreing Awards Act and the general arbitration law. They are briefly mentioned below.

Definition of a Foreign Award

Under the Foreign Awards Act an award had to satisfy the requirements of commercial relationship and reciprocity reservation, as also the saving clause contained in Section 9 which ousted an award made in an arbitration agreement governed by the law of India from becoming a foreign award for purposes of the Act. In the Bill, however, a foreign award is defined as "an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India". The Bill has made use of the Model Law in retaining the commercial relationship and reciprocity reservation used in the Foreign Awards Act. Under Article 1(1) of the Model Law, a New York Convention state may, by virtue of its accession to the New York Convention, apply the terms of the Model Law on the basis of reciprocity.

Retaining of commercial relationship reservation seems to be logical since the said reservation in the New York Convention has crept into the Model Law as well. Section 2(f) of the Bill defines the term "international commercial arbitration" as an "arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law of India". But it is curious to note that the said provision fails to mention the important foot note to Article 1(1) of the Model Law which gives a non-exhaustive list of commercial relationships. The footnote was included in order to minimise the narrow interpretation of the word "commercial". At this juncture

one may refer to Article 1(5) of the Model Law which states:

> This law shall not affect any other law of this state by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this law.

The wordings used in Article (1)(5) represents a compromise between the goal of uniform treatment of awards and the desire to preserve the commercial relationship reservation for those nations using the mechanism under the New York Convention. The words used or retained in the amended version of Section 44 of the Bill is the result of the provision in Article 1(5) of the Model Law.[93] It is safe to assume that states formerly unwilling to enforce foreign arbitral awards in certain sensitive areas are not likely to adopt the Model Law without planning to use Article 1(5) to continue exempting these sensitive areas from the "commercial" category.

However, the Bill enhances the applicability of the New York Convention to those awards which hitherto attracted by the saving clause of Section 9(b) of the Foreign Awards Act which provided that nothing in the Act shall apply to any award on an

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[93] It says:

The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or service; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or ccession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

arbitration agreement governed by the law of India. To that extent Section 44 of the Bill sought to improve upon the Foreign Awards Act[94]. According to which provision an award has to fulfill the following conditions -

a that the award must be on differences between persons arising out of legal relationship;

b. that such legal relationship must be considered as commercial under the law in force in India;

c. that the award must be made on or after 11 October 1960;

d. that the award must be in writing; and

e. that the award must be made in a state which has made reciprocal provisions to the New York Convention.

If the above conditions are fulfilled an award is said to be a foreign award and hence would be recognised and enforced in accordance with the provisions of Chapter I Part II of the Bill. The Bill by repealing the saving clause as to awards not considered as commercial if they are made in an arbitration agreement governed by the law of India, attempts to improve upon the Foreign Awards Act.

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[94] Section 44 of the Bill provides:

In this chapter, unless the context otherwise requires,
'Foreign Award' means an arbitral award on differences between persons arising out of legal relationships, whether contracted or not, considered as commercial under the law in force in India, made on or after the eleventh day of October, 1960.

The power of judicial authority to refer the parties to arbitration is provided in Section 45 of the Bill. It reads:

> Notwithstanding anything contained in Part I or in the Code of Civil Procedure Code, 1908, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, in operative or incapable of being performed.

The wordings of this provision are slightly different from those contained in Section 3 of the Foreign Awards Act. The key words "at any time after appearance and before filing a written statement or taking any other step in the proceedings" in the latter do not find a place in Section 45 of the Bill. Presumably, any one of the party to the agreement or any person claiming through or under him may move the court to refer the dispute to arbitration even after filing return statement.

Section 47 lays down the rule that a party applying for the enforcement of a foreign award must produce before the court the original award or a copy thereof, duly authenticated in the manner prescribed by the law of the country where it was made, a original agreement for arbitration or a duly certified copy thereof, or such other evidence, if necessary, to prove that award is a foreign award. This provision is same as the one contained in the Foreign Awards Act and the New York Convention.

With regard to the procedure for enforcement of foreign award, Section 49 simplifies the required procedure[95]. It says that if the court is satisfied that the foreign award is enforceable under Chapter I Part II of the Bill (Sections 49-52) the award is deemed to be a decree of that court. Under the New York Covention the successful party is made to file an application for enforcement of the award. Thereafter, the court is to pass a judgement followed by the Court decree. Under Section 49 of the Bill, the court's satisfaction that the award is enforceable under Chapter I, Part II will suffice. The party need not wait for the final decree.

The Bill in Chapter I, Part II introduces a new provision which was not provided either under the New York Convention or the Foreign Awards Act. According to Section 50 an aggrieved party shall appeal from the order of a court refusing to refer the parties to arbitration under section 45 or refuse to enforce a foreign award under section 48[96].

So far as conditions for enforcement of foreign awards is concerned the amending provisions, Section 48, parallels the corresponding provisions of the Foreign Awards Act,

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[95] It says:
Where the court is satisfied that the foreign award is enforceable under this chapter, the award shall be deemed to be a decree of that Court.

[96] It provides:
(1) An appeal shall lie from the order refusing to -
(a) refer the parties to arbitration under section 45;
(b) enforce a foreign award under Section 48, to the Court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

except that of an explanation to Section 48(2)(b) of the Bill.[97] The explanation to the above provision supplements the words "public policy of India" by providing that an award which was induced by fraud or corruption would be against the "public policy of India".

The Bill as a comprehensive document about arbitration laws in India, is the result of a wide spread necessity felt by legal scholars, foreign investors and voluntary bodies alike. It can be considered as a decisive step taken by the Indian government to overhaul arbitration laws, national and international. The chief objectives of the Bill is to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. Though the Bill expresses the view that, it has incorporated the amendments to arbitration laws in India based on the UNCITRAL Model Law, no major changes have been brought about. The only change that can be attributed to the Bill is the omission of a saving clause which permits the court to assume unlimited power and an exercise jurisdiction over an award rendered abroad. Besides, a notable improvement by way of, right to appeal is provided. On the whole, the Bill is reflection of the liberalisation of the economic policy of India; a significant move to meet the present day needs.

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[97] Explanation to Section 48(2)(b) reads:

Without prejudice to the generality of clause (b), it is hereby declared for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

CHAPTER V

CHAPTER V

CONCLUSION

Today one can say with certain amount of certainty that international arbitration is most effective means of settling international trade disputes. Arbitration offers a fast,flexible and expeditious and often cheap mode of dispute settlement. Arbitrators are appointed by the parties or with their consent.They are usually men with special knowledge of international trade and business. The diversity of national legal systems, both in terms of substantive procedural rules often prevents a just solution. Consequently a strong need has long been felt to develop uniform rules and practices at the international and regional level for private dispute resolution.

The efforts of the International Chambers of Commerce and the League of Nations bore fruit when the Geneva Protocol, 1923 came into being. Though the Protocol met with some success in drawing up uniform rules and attracting some membership, it was not able to ensure that the resulting arbitral award be made enforceable; the principle problem in every international commercial dispute is the recognition and enforcement of foreign arbitral awards. The Geneva Convention, 1927 met with limited success because of double exequatur.

In the post Second World War period, the efforts of the United Nations met with a big success when the New York Convention was adopted in 1958. The major economic

powers and trading nations readily ratified it. The chief merits of the New York Convention lie in the fact that it recognises the arbitral agreement and limits the grounds on which an arbitral award can be challenged. Despite the fact the New York Convention is hailed as a major success, countries are wary that the Convention in many ways is inimical to their interests and often impinges upon their sovereignty. The Latin Americans have long refused to ratify the New York Convention. They fear that once they are bound by an international agreement they will have to alter their standards of public policy and conform to differing international norms.

In so far as India is concerned, the Indian Arbitration Act, 1940 and the Foreign Awards Act, though piecemeal in nature, have to a certain extent met the needs of the country, in particular it's business and trading community. The legislations would have served the 'national interest' better if the Indian courts, especially in the eighties, had not taken a narrow view of the provisions of the Foreign Awards Act. The courts have modified to accomodate the newly announced policies of liberalisation.

The power of judicial review in many a state is often limited under the arbitration law, the examples being the English and the Swiss arbitration laws. The same cannot be said in respect of the Indian law. Section 9(b) of the Foreign Awards Act gives unrestrained powers to the courts in India to exercise their jurisdiction extra territorially. In the Singer case the Supreme Court invoked jurisdiction on the basis of the fact that the contract was governed by Indian law. It conveniently overlooked the fact that the

parties had not agreed for the Indian law to govern their agreement to arbitrate and the fact that the award had become binding in the country where it was rendered. Such decisions can lead to a protracted litigation which is not in the interest of the growing focus on international trade and investment.

Most of the national legal systems have various heads of public policy on which a foreign arbitral award can be set aside. The New York Convention leaves it to the states as to define what is 'public policy'. State interpretation of public policy is often a direct reflection of the government's socio-economic policies. In *Renusagar's case* (1994) the Supreme Court categorised the heads of public policy under the 'the basic principles of the laws of India', 'India's interests' and 'the natural justice and morality'. Such broad categorisation gives the courts unhappily a blanket power to set aside a foreign arbitral award. At the same time, one does does not seek to deny that India as a sovereign state has a right to protect it's 'vital' interests.

To overcome the anomalies present in the Foreign Awards Act, the Ministry of Law, Justice and Company Affairs has introduced a Bill No.XXX, 1995 titled the Arbitration and Conciliation Bill, 1995, in the Rajya Sabha. This Bill is a comprehensive document which tries to bring together the Indian Arbitration Act and the Foreign Awards Act in a single text. The Bill has deleted Section 9(b) of the Foreign Awards Act, a major irritant for international commercial arbitration. Another novel change brought up in the Bill is that Section 48 has added two new heads of public policy.

namely, fraud and corruption.

The Bill is a reflection of the present government's attitude of openess to accommodate interests of foreign traders and investors. It is seemingly a genuine move to make the arbitration law uniform and properly codified. It remains to be seen if this Bill by bringing together a host of Acts will clear or further complicate the law of arbitration in India.

To sum up, one can say with a certain amount of surety that the New York Convention by and large is genuinely 'international' in character. The Foreign Awards Act incorporated many provisions of the New York Convention without taking provisions, *ad-verbatim* from the Convention. The *Renusagar case,* went a long way to lay down the grounds on which a foreign award can be set aside, on grounds of public policy. The interest of India, fundamental principles of law, justice and morality in themselves are comprehensive enough to encompass any award to be set aside. While being critical of the judgement, one cannot overlook the fact that, every sovereign state can protect and define what it's national interests are.

The *Singer case*, saw the Supreme Court invoking Section 9(b) of the Foreign Awards Act and set aside an award, under the reservation clause. In the *COSID case* the Supreme Court held that if a party failed to fulfil its obligations under an international contract, due to a governmental ordinance, such award passed against the party is against the public policy of India.

The Arbitration and Conciliation Bill, 1995 which seeks to replace the Foreign Awards Act and the domestic Indian Arbitration Act, is a novel move by the government. Yet, one can conjecture that, the Bill seeks to do away with the time tested jurisprudence created by various higher courts of this country. One can but, hope that this Bill shall be a corner stone comprising a single, uniform, codified text that will help the courts to understand and interpret cases regarding recognition and enforcement of foreign arbitral awards.

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