Pasl Wind Solutions Private Limited vs Ge Power Conversion India Private ... on 20 April, 2021

Equivalent citations: AIR 2021 SUPREME COURT 2517, AIRONLINE 2021 SC 213

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Bench: Hrishikesh Roy, B.R. Gavai, Rohinton Fali Nariman

REPORTABLE

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

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

JUDGMENT

R.F. Nariman, J.

1. Leave granted.

2. The present appeal raises an interesting question – as to whether two companies incorporated in India can choose a forum for arbitration outside India – and whether an award made at such forum outside India, to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [“New York Convention”] applies, can be said to be a “foreign award” under Part II of the Arbitration and Conciliation Act, 1996 [“Arbitration Act”] and be enforceable as such. Factual Background 3.1. The appellant is a company incorporated under the Companies Act, 1956 with its registered office at Ahmedabad, Gujarat. The respondent is a company incorporated under the Companies Act, 1956 with its registered office at Chennai, Tamil Nadu, and is a 99% subsidiary of General Electric Conversion International SAS, France, which in turn is a subsidiary of the General Electric Company, United States.

3.2. In 2010, the appellant issued three purchase orders to the respondent for supply of certain converters. Pursuant to these purchase orders, the respondent supplied six converters to the appellant. Disputes arose between the parties in relation to the expiry of the warranty of the said converters. In order to resolve these disputes, the parties entered into a settlement agreement dated 23.12.2014. Under clauses 5.1 and 5.2 of the settlement agreement, the respondent agreed to provide

certain delta modules along with warranties on these modules for the working of the converter panel. Clause 6 of the settlement agreement contained the dispute resolution clause which reads as follows:

> "6. Governing Law and Settlement of Dispute 6.1 Any dispute or difference arising out of or relating to this agreement shall be resolved by the Parties in an amicable way.

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

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

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

> "The Tribunal finds that two Indian parties can arbitrate outside India. The Tribunal is persuaded that the Supreme Court of India's decision in Reliance Industries Ltd v. Union of India (2014) 7 SCC 603 (Exhibit CLM-3) is a leading authority. This has been confirmed by the Supreme Court of India in Sasan Power Limited v. North American Coal Corporation India Private Limited (2016) 10 SCC 813 (RL-6), which at an earlier instance before the High Court of Madhya Pradesh 2016 (2) ARBLR 179 (MP), rendered on 11.09.2015, held that two Indian companies can arbitrate outside of India.
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> Furthermore, the earlier case of Atlas Export Industries v. Kotak & Company (1999) 7 SCC 61, which was applied in Sasan, found that a contract which is unlawful under

section 23 of the Indian Contract Act 1872, because it breaches Indian public policy, would be void but that "merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement" (p.65, para f of judgment). Such is the case here where the parties freely agreed on Zurich as the seat of the arbitration. This position has been followed in a recent decision of the Delhi High Court in GMR Energy Ltd. v. Doosan Power Systems India Pvt. Ltd. on 14 November 2017 CS (Comm) 447/2017 (RL-7) applying Atlas in allowing two Indian parties to arbitrate outside India. The Tribunal notes the Respondent's contention that this case is "expected to be appealed" (Respondent's Preliminary Application dated 9 December 2017, para 23) but the Tribunal must deal with the law as it finds it at present and no doubt the Final Award in the present case will precede any exhaustive appeal in India in GMR. Respondent's pleadings in reliance, inter alia, on TDM Infrastructure Private Limited v. UE Development India Private Limited (2008) 14 SCC 271 are, in the Tribunal's finding, misplaced because although it is accepted that two Indian nationals should, as a matter of Indian law, not be permitted to derogate from Indian substantive law, this being part of the public policy of the country, this fails to distinguish between the lex arbitri and the lex causae. In the present case, the parties have not chosen a foreign substantive law, only a foreign seat. The Respondent also relied on M/s Addhar Mercantile Private Limited v. Shree Jagadamba Agrico Exports Pvt. Ltd. (2015) SCC Online Bom 7752, which the Respondent submitted followed TDM (RL-4). However, although the Tribunal is aware that this decision has been criticised because although the court did not expressly find that two parties could not opt for arbitration outside India, the court's finding that Indian parties cannot derogate from Indian law because that would violate Indian public policy has led to the judgment being interpreted wrongly to imply that Indian parties cannot choose a foreign seat. That said, Addhar is in any event a first instance decision and the higher authorities of the Indian Supreme Court prevail.

Finally, the cases of Enercon (India) Limited v. Enercon GMBH (2014) 5 SCC 1 and Bharat Aluminium Co. v. Kaiser Aluminium Inc. (2012) 9 SCC 552 relied on by the Respondent in relation to its submissions that the closest and most real connection test under Indian law do not assist the Respondent because that test is only relevant where the seat is unclear. Moreover, Bharat clearly held that the applicability of section 28 of the Indian Act is restricted to the substantive law of the contract and does not apply to the seat of the arbitration. Conclusion For the reasons set out above, the Tribunal therefore finds that the arbitration clause in the Settlement Agreement is valid and will proceed to apply the Swiss Act because the seat of the arbitration is Zurich, Switzerland." 3.5. This procedural order was not challenged by either of the parties. Vide the said procedural order, the seat of the arbitration was stated to be Zurich, Switzerland. The respondent suggested Mumbai, India as a convenient venue in which to hold arbitration proceedings as costs would be reduced thereby. The appellant objected to this suggestion. At the Case Management Conference dated 28.06.2018, the learned arbitrator decided that though the seat is in Zurich, all hearings will be held in Mumbai, acceding to the application made by the respondent. Since the mountain did not come to

Muhammad, Muhammad, in the form of the learned arbitrator, went to the mountain and held all sittings at the convenient venue in Mumbai.

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

> "Operative Part
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> 227. Based on the foregoing, the Arbitral Tribunal hereby finds, holds and orders:
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> Preliminary Issues A. The seat of the arbitration is Zurich, Switzerland. On the Merits B. The Claimant's claims for breach of contract, damages and interest thereon are rejected.
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> C. The Claimant shall pay to the Respondent INR 25,976,330.00 and US$40,000.00 in legal costs and expenses with accumulated interest, if any, in accordance with the Indian Interest Act, 1978.
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> D. All other claims of either party, to the extent that they exist, are dismissed.
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> Made in Zurich, this 18th day of April 2019" 3.7. After the passing of the final award, the respondent called upon the appellant to pay the amounts granted vide the said award. As the appellant failed to oblige, the respondent initiated enforcement proceedings under sections 47 and 49 of the Arbitration Act before the High Court of Gujarat, within whose jurisdiction the assets of the appellant were located. At this stage, the appellant did a complete volte-face and asserted that the seat of arbitration was really Mumbai, where all the hearings of the arbitral proceedings took place. So asserting, the appellant filed proceedings challenging the said final award under section 34 of the Arbitration Act, being CMA No.18 of 2019 before the Small Causes Court, Ahmedabad which was then transferred to the Commercial Court, Ahmedabad and renumbered as CMA No.76 of 2020. An application filed under Order 7 Rule 11 of the Code of Civil Procedure, 1908 ["CPC"] by the respondent was rejected by the Commercial Court, Ahmedabad. At present, the proceedings under section 34 of the Arbitration Act and the respondent's application under Order 21 of the CPC for execution of the final award are at a standstill in view of the appeal before us.

The Appellant's Case:

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

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

4.2. He then argued that foreign awards contemplated under Part II of the Arbitration Act arise only from international commercial arbitrations. "International commercial arbitration", as has been defined in section 2(1)(f) of the Arbitration Act, would make it clear that there has to be a foreign element when parties arbitrate outside India, the foreign element being that at least one of the parties is, inter alia, a national of a country other than India, or habitually resident in a country other than India, or a body corporate incorporated outside India. For this reason, the award passed in the present case cannot be designated as a foreign award under Part II of the Arbitration Act. To buttress this submission, he relied heavily upon the judgment of a learned Single Judge of this Court in TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd., (2008) 14 SCC 271 ["TDM"] and two judgments of the Bombay High Court.

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

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

4.5. Going to the language of section 44 of the Arbitration Act, Mr. Himani stressed upon the expression "unless the context otherwise requires" and cited several judgments to show that the context of section 44 is that of an international commercial arbitration and cannot, therefore, apply to a foreign award between two Indian parties without the involvement of a foreign element. He also relied heavily upon the 246 th Report of the Law Commission of India of August 2014 which recommended amendments to the Arbitration Act, and particularly, the substitution of section 2(1)(e) and the explanation to section 47. He stressed the fact that both these amendments were necessary to ensure that it is the High Court that exercises jurisdiction in all cases of international commercial arbitration. For this purpose, he relied upon the domestic arbitration law of the United States ["U.S."] to show that even under the said law, it is only when an agreement or award between two U.S. citizens involves some foreign element that such arbitration can take place abroad. He buttressed these submissions by referring to the proviso to section 2(2) of the Arbitration Act which, according to him, furnished a bridge that joined Part II to Part I, as a result of which it became clear that section 44 refers only to international commercial arbitrations, as is stated in the proviso to section 2(2). 4.6. He then went on to argue that the Arbitration Act is a self-contained code, as has been held by several judgments of this Court, and that when there is no foreign element involved in an award made in Zurich between two Indian companies, such award cannot be the subject matter of challenge or enforcement either under Part I or Part II of the Arbitration Act. 4.7. Mr. Himani

then relied heavily upon section 10 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ["Commercial Courts Act"] which also recognises only two categories of arbitrations – international commercial arbitration and other than international commercial arbitration. He argued that there is a head-on conflict between section 10(3) of the Commercial Courts Act and section 47 of the Arbitration Act, as a result of which the former must prevail. For this purpose, he relied upon the non-obstante clause in section 21 of the Commercial Courts Act. This being the case, in any case, the impugned judgment made by the Gujarat High Court has to be set aside as it was made without jurisdiction because even as per the impugned judgment, the present is not a case of an international commercial arbitration but instead falls under the second category of "other than international commercial arbitration", as a result of which only the district court would have jurisdiction.

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

The Respondent's Case:

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

5.2. Mr. Dewan then argued that Part I and Part II of the Arbitration Act have been held to be mutually exclusive and pointed out the fundamental fallacy contained in the argument of Mr. Himani to try and import the definition of international commercial arbitration from Part I of the Arbitration Act into section 44 via the expression "unless the context otherwise requires" contained in section 44, and the so-called bridge between Parts I and II contained in the proviso to section 2(2). According to him, section 44 is modelled on the New York Convention which only requires "persons", both of whom can be Indian, having disputes arising out of commercial legal relationships, which are to be decided in the territory of a State outside India, which State is a signatory to the New York Convention. He then argued that any attempt to breach the wall created between Part I and Part II, which have been held to be mutually exclusive in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 ["BALCO"], cannot be countenanced by this Court. 5.3. He further argued that unlike the definition of "international commercial arbitration" contained in section 2(1)(f) in Part I, nationality, domicile or residence of parties is

irrelevant for the purpose of applicability of section 44 of the Arbitration Act. As a matter of fact, according to the learned Senior Advocate, this is no longer res integra as it has been expressly decided under the pari materia provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961 ["Foreign Awards Act"] in Atlas (supra) that two Indian parties can enter into an arbitration agreement with a seat outside India, which would result in an award that would then have to be enforced as a foreign award.

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

5.5. He then went on to argue that neither section 23 nor section 28 of the Contract Act proscribe the choice of a foreign seat in arbitration. As a matter of fact, the exception to section 28 of the Contract Act expressly excepts arbitration from the clutches of section 28, which is an express approval to party autonomy which is the very basis of the Arbitration Act. He also argued that section 23 of the Contract Act, when it speaks of "public policy", must be confined to clear and incontestable cases of harm to the public and cited several cases to buttress this proposition. 5.6. In any case, he combated Mr. Himani's argument by referring to paragraph 118 of BALCO (supra) to argue that section 28(1) of the Arbitration Act would apply only when the arbitration takes place in India and not when the seat is outside India. Equally, grounds available for challenge, which would no longer be available as a result of two parties going abroad to resolve their differences, are waivable, and both parties have, in this case, substituted the challenge to be made to an award under section 34 of the Arbitration Act with two bites at the cherry – first, by a challenge under Swiss law to the award in Zurich, and second, by resisting enforcement under the grounds contained in section 48 of the Arbitration Act.

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

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

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

The Arbitration and Conciliation Act, 1996

6. Having heard learned counsel for both parties, it is first necessary to set out the relevant provisions of Part I and Part II of the Arbitration Act. "2. Definitions.—(1) In this Part, unless the context otherwise requires,— ***

(e) "Court" means—

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

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

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

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

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

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

(iv) the Government of a foreign country;

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

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

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

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

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

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

> "28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India,—
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> (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
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> (b) in international commercial arbitration,—
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> (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
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> (ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
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> (iii) failing any designation of the law under sub-

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

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

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

> "34. Application for setting aside arbitral award.— *** (2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:
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> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence." Part II of the Arbitration Act deals with enforcement of foreign awards in India, and contains two chapters, Chapter I of which deals with the enforcements of awards to which the New York Convention applies.
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> Sections 44, 46, 47, and 49, contained in Chapter I of Part II of the Arbitration Act, are extracted as follows:
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> "44. Definition.—In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11 th day of October, 1960—
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> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
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> (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies." "46. When foreign award binding.—Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award." "47. Evidence.—(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the Court—
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> (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
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> (b) the original agreement for arbitration or a duly certified copy thereof; and
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> (c) such evidence as may be necessary to prove that the award is a foreign award.

> (2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

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

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

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

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

> "3. The venue of the hearing shall be Mumbai, India. The seat of the arbitration of course remains Zurich, Switzerland. I am grateful to the Respondent for offering to assist with the organisation of the hearing in India. The consequence of holding the hearing in Mumbai will of course be dealt with in the Award on costs, depending on

> the outcome. The Tribunal is of the view that it is cost efficient to hold the hearing in India where the parties are based, the Respondent's five witnesses are based, where Respondent's legal team are based and Claimant's co-counsel is based. This means that the Claimant's lead counsel, the Claimant's sole witness and the sole arbitrator must travel to India. ..." This arrangement has been accepted by both parties. Even in the final award dated 18.04.2019, the learned arbitrator held:
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> "82. For the reasons set out above, the Tribunal therefore has held in Procedural Order No.3 and hereby finds that the arbitration clause in the Settlement Agreement is valid and proceeds to apply the Swiss Act because the seat of the Arbitration is Zurich, Switzerland."

9. The closest connection test strongly relied upon by Mr. Himani would only apply if it is unclear that a seat has been designated either by the parties or by the tribunal. In this case, the seat has clearly been designated both by the parties and by the tribunal, and has been accepted by both the parties. The judgment in Enercon (supra), relied upon by Mr. Himani, applied the aforesaid test only because the arbitration clause therein provided that London was the "venue" and not the seat. It was, therefore, pointed out by this Court that given the various factors connecting the dispute to India and the absence of any factors connecting it to England, on the facts of that case, there was no necessity to regard London as the seat when it was, in fact, only the venue (see paragraphs 98-103, 114-116, and

128).

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

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

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

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

> "2. Definition.—In this Act, unless the context otherwise requires, "foreign award" means an award on differences between persons arising out of legal relationships,

whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies; and

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

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

"2. (7) An arbitral award made under this Part shall be considered as a domestic award." In our opinion, the aforesaid provision does not, in any manner, relax the territorial principle adopted by the Arbitration Act, 1996. It certainly does not

introduce the concept of a delocalised arbitration into the Arbitration Act, 1996. It must be remembered that Part I of the Arbitration Act, 1996 applies not only to purely domestic arbitrations i.e. where none of the parties are in any way "foreign" but also to "international commercial arbitrations" covered within Section 2(1)(f) held in India. The term "domestic award" can be used in two senses: one to distinguish it from "international award", and the other to distinguish it from a "foreign award". It must also be remembered that "foreign award" may well be a domestic award in the country in which it is rendered. As the whole of the Arbitration Act, 1996 is designed to give different treatments to the awards made in India and those made outside India, the distinction is necessarily to be made between the terms "domestic awards" and "foreign awards". The scheme of the Arbitration Act, 1996 provides that Part I shall apply to both "international arbitrations" which take place in India as well as "domestic arbitrations" which would normally take place in India.

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

89. That Part I and Part II are exclusive of each other is evident also from the definitions section in Part I and Part II. The definitions contained in Sections 2(1)(a) to (h) are limited to Part I. The opening line which provides "In this Part, unless the context otherwise requires....", makes this perfectly clear.

Similarly, Section 44 gives the definition of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter I (New York Convention Awards). Further, Section 53 gives the interpretation of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter II (Geneva Convention Awards). From the aforesaid, the intention of Parliament is clear that there shall be no overlapping between Part I and Part II of the Arbitration Act, 1996. The two parts are mutually exclusive of each other. To accept the submissions made by the learned counsel for the appellants would be to convert the "foreign award" which falls within Section 44, into a domestic award by virtue of the provisions contained under Section 2(7) even if the

arbitration takes place outside India or is a foreign seated arbitration, if the law governing the arbitration agreement is by choice of the parties stated to be the Arbitration Act, 1996. This, in our opinion, was not the intention of Parliament. The territoriality principle of the Arbitration Act, 1996, precludes Part I from being applicable to a foreign seated arbitration, even if the agreement purports to provide that the arbitration proceedings will be governed by the Arbitration Act, 1996." *** "120. We are unable to agree with the submission of the learned Senior Counsel that there is any overlapping of the provisions in Part I and Part II; nor are the provisions in Part II supplementary to Part I. Rather there is complete segregation between the two parts.

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

(a) the commencement of arbitration;

(b) the conduct of arbitration;

(c) the challenge to the award; and

(d) the recognition or enforcement of the award.

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

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

14. As a matter of fact, the reason for the insertion of the proviso to section 2(2) by the Arbitration and Conciliation (Amendment) Act, 2015 was because the judgment in Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105 ["Bhatia"] had muddied the waters by holding that section 9 would apply to arbitrations which take place outside India without any express provision to that effect. The

judgment in Bhatia (supra) has been expressly overruled a five-Judge Bench in BALCO (supra). Pursuant thereto, a proviso has now been inserted to section 2(2) which only makes it clear that where, in an arbitration which takes place outside India, assets of one of the parties are situated in India and interim orders are required qua such assets, including preservation thereof, the courts in India may pass such orders. It is important to note that the expression "international commercial arbitration" is specifically spoken of in the context of a place of arbitration being outside India, the consequence of which is an arbitral award to be made in such place, but which is enforced and recognised under the provisions of Part II of the Arbitration Act. The context of this expression is, therefore, different from the context of the definition of "international commercial arbitration" contained in Section 2(1)(f), which is in the context of such arbitration taking place in India, which only applies "unless the context otherwise requires". The four sub-clauses contained in section 2(1)(f) would make it clear that the definition of the expression "international commercial arbitration" contained therein is party-centric in the sense that at least one of the parties to the arbitration agreement should, inter alia, be a person who is a national of or habitually resident in any country other than India. On the other hand, when "international commercial arbitration" is spoken of in the context of taking place outside India, it is place-centric as is provided by section 44 of the Arbitration Act. This expression, therefore, only means that it is an arbitration which takes place between two parties in a territory outside India, the New York Convention applying to such territory, thus making it an "international" commercial arbitration.

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

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

> "Article I
>
> 1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." *** "Article II
>
> 1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

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

> "53. Interpretation.—In this Chapter "foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924,—
>
> (a) in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and
>
> (b) between persons of whom one is subject to the jurisdiction of some one of such powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the powers aforesaid, and
>
> (c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made." It will be seen that the requirement of section 53(b) is conspicuous by its absence in section 44 when it comes to an award to which the New York Convention applies.

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

> "China The first part of article I, paragraph 2, provides: 'Any Contracting State may, upon signing, ratifying or acceding to this Convention, declare that it will apply the Convention only to the recognition and enforcement of arbitral awards made in the territory of another Contracting State.' It follows from this provision that any person receiving an arbitral award in a Contracting State may request recognition and enforcement, and this right is not limited to the nationals of a Contracting State. The Chinese Government considers this provision as too liberal, and is of the opinion that, on the basis of the principle of international reciprocity, such a right should be restricted in accordance with the spirit of article I of the 1927 Convention on the Execution of Foreign Arbitral Awards, which provides: 'An arbitral award ... shall be recognised as binding and shall be enforced ... provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies, and between persons who are subject to the jurisdiction of one of the High Contracting Parties.'" Likewise, Mexico also objected, stating:

> "The Mexican Government further considers that it would be advisable to include in the draft Convention the stipulation contained in the Geneva Convention that the arbitral award must have been made in a dispute between persons who are subject to the jurisdiction of one of the Contracting States. The Mexican Government takes this view because Mexican law regards arbitral awards as acts which in themselves are private, since they are made pursuant to compromise concluded between private persons, and which become enforceable only when the logic of the award is, in addition supported by the authority of a judicial decision." Hungary followed suit, also stating:
>
> "For this reason, and contrary to the statement contained in point 23 of the Committee's report, the point should be reconsidered whether, in compliance with the provisions of the Geneva Convention of 1927, the validity of the Convention should be restricted to arbitral awards on differences between persons coming under the jurisdiction of one or the other of the Contracting States, or whether at least the Contracting States should be accorded the right under the Convention to apply the provisions of the same only to arbitral awards of such a nature. If the present meaning of the word 'jurisdiction' – as stated in the Committee's report - is rather vague and ambiguous, there is no reason why it should not be defined more precisely." As did Norway:
>
> "As far as the definition of the scope of the convention is concerned, the Norwegian Government agrees with the Special Committee (see paragraph 23 of the Report) that the requirement of the Geneva Convention of 1927 (article I, first paragraph), to the effect that the arbitral award must have been made "between persons who are subject to the jurisdiction of one of the High Contracting Parties", is too vague and ambiguous. The scope of the present draft seems on the other hand to be unreasonably comprehensive. As now formulated, the convention would apply even if both the parties to the arbitral award are nationals of the State where enforcement is sought as well as in cases where none of them is a national of a Contracting State."

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

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

is the result of a compromise reached within the working group. The first sentence of this paragraph is based upon a territorial criterion:

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

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

Let me illustrate this by an example. Germany regards an arbitral award rendered in France under German procedural law as a German arbitral award and an arbitral award rendered in Germany under French procedural law as a non-domestic, French award. Germany applies the criterion of the applicable procedural law and therefore will also apply the Convention when enforcement is sought in Germany of an award rendered in Germany under French procedural law.

The scope of the new Convention is wider than that of the Geneva Convention which applies to awards that have been "made in a territory of one of the High Contracting Parties to which the Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties". Here we only find the territorial principle and in addition to this the restriction that the award must be made between persons, subject to the jurisdiction of the High Contracting Parties."

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

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

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

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

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

> (i) the dispute must be considered to be a commercial dispute under the law in force in India,
>
> (ii) it must be made in pursuance of an agreement in writing for arbitration,
>
> (iii) it must be disputes that arise between "persons" (without regard to their nationality, residence, or domicile), and
>
> (iv) the arbitration must be conducted in a country which is a signatory to the New York Convention.

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

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

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

> "1.4.1 Foreign arbitration and international arbitration are not the same An arbitration that takes place in State A is a foreign arbitration in State B. It does not matter whether the arbitration is commercial or non-commercial or whether the parties are from the same country, from different countries or that one or all are from

> State A. Since even a domestic arbitration in State A is a foreign arbitration in State B, the courts of State B would be called upon to apply the New York Convention to enforcement of a clause calling for arbitration in State A and to the enforcement of any award that would result.
>
> Aiding foreign arbitration In some legal systems the courts will not come to the aid of a "foreign" arbitration by way of aiding in the procurement of evidence, granting interim orders of protection or the like. However, many modern arbitration laws provide that the courts will aid arbitrations taking place in a foreign State.
>
> 1.4.3 Definition of an international arbitration *** Model Law In the Model Law an arbitration is international if any one of four different situations is present:
>
> ***
>
> 2) The place of arbitration, if determined in or pursuant to, the arbitration agreement, is situated outside the State in which the parties have their places of business."

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

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

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

> (i) Vanguard Fire and General Insurance Co. Ltd. v. Fraser and Ross, (1960) 3 SCR 857 "The main basis of this contention is the definition of the word "insurer" in Section 2(9) of the Act. It is pointed out that that definition begins with the words

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

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

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

(d) of sub-section (1) a case of payment of gratuity to the nominee or the family of a working journalist who dies while he is in the service of a newspaper establishment. Section 17(1) provides that where any amount is due under the Act to a newspaper employee from an employer, such an employee himself or a person authorised by him or, in case of his death, any member of his family can apply to the State Government or other specified authority for the recovery thereof. Similar provisions are also to be found in Section 33-C(1) of the Industrial Disputes Act. Claims under that

section include those for compensation in cases of retrenchment, transfer of an undertaking and closure under Chapter V-A of that Act, all of which would necessarily be claims arising after termination of service and the claimant would obviously be one in all those cases who would not be presently employed in the establishment of the employer against whom such claims are made. Likewise, the claim for gratuity under Section 17, read with Section 5 of the Act, would itself be one which accrues after the termination of employment. These provisions, therefore, clearly indicate that it is not only a newspaper employee presently employed in a particular newspaper establishment who can maintain an application for gratuity. The scheme of all these acts dealing with industrial questions is to permit an ex-employee to avail of the benefits of their provisions, the only requirement being that the claim in dispute must be one which has arisen or accrued whilst the claimant was in the employment of the person against whom it is made. There can, therefore, be no doubt that the definitions of a "newspaper employee" and "working journalist" being subject to a context to the contrary, the benefit of Sections 5 and 17 is available to an ex-employee though he has ceased to be in the employment of that particular newspaper establishment at the time of his application for gratuity. The contention that the respondent was not entitled to maintain his application as he was not in the service of the appellant company on the date of his claim before the Labour Court cannot be sustained."

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

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

25. We have already seen that the context of section 44 is party-neutral, having reference to the place at which the award is made. For this reason, it is not possible to accede to the argument that the very basis of section 44 should be altered when two Indian nationals have their disputes resolved in a country outside India. On the other hand, the judgment in S.K. Gupta v. K.P. Jain, (1979) 3 SCC 54 is apposite, and states as follows:

> "24. The noticeable feature of this definition is that it is an inclusive definition and, where in a definition clause, the word "include" is used, it is so done in order to enlarge the meaning of the words or phrases occurring in the body of the statute and when it is so used, these words or phrases must be construed as comprehending not only such things which they signify according to their natural import, but also those

> things which the interpretation clause declares that they shall include (see Dilworth v. Commissioner of Stamps [(1899) AC 99, 105 : 79 LT 473]). Where in a definition section of a statute a word is defined to mean a certain thing, wherever that word is used in that statute, it shall mean what is stated in the definitions unless the context otherwise requires. But where the definition is an inclusive definition, the word not only bears its ordinary, popular and natural sense whenever that would be applicable but it also bears its extended statutory meaning. At any rate, such expansive definition should be so construed as not cutting down the enacting provisions of an Act unless the phrase is absolutely clear in having opposite effect (see Jobbins v. Middlesex County Council [(1949) 1 KB 142 : (1948) 2 All ER 610]). Where the definition of an expression in a definition clause is preceded by the words "unless the context otherwise requires", normally the definition given in the section should be applied and given effect to but this normal rule may, however, be departed from if there be something in the context to show that the definition should not be applied (see Khanna, J., in Indira Nehru Gandhi v. Raj Narain [(1975) Supp SCC 1, 97]). It would thus appear that ordinarily one has to adhere to the definition and if it is an expansive definition the same should be adhered to. The frame of any definition more often than not is capable of being made flexible but the precision and certainty in law requires that it should not be made loose and kept tight as far as possible (see Kalya Singh v. Genda Lal [(1976) 1 SCC 304, 309 : (1975) 3 SCR 783])."

26. For this reason, it is not possible to accede to the argument that the expression "unless the context otherwise requires" can be held to undo the very basis of section 44 by converting it from a seat-oriented provision in countries that are signatories to the New York Convention to a person-oriented provision in which one of the parties to the arbitration agreement has to be a foreign national or habitually resident outside India. In any case, the context of section 44 is very far removed from the context of an international commercial arbitration in Part I which is defined for the purposes of section 11, section 28, section 29A(1), section 34(2A), and section 43I, all of which occur in Part I and deal with arbitrations which take place in India. Also, the argument of Mr. Himani would involve bodily importing the expression "international commercial arbitration" into section 44, which cannot be done because of the opening words of section 44, "In this Chapter" which is Chapter I of Part II, and then applying the definition contained in section 2(1)(f) of the Arbitration Act which, being restricted to Part I, must now be applied to Part II. No canon of interpretation would permit acceptance of such an argument.

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

> "2. The contract dated 3-6-1980 incorporated an arbitration clause which is extracted and reproduced hereunder:

"This contract is made under the terms and conditions effective at date of Grain and Food Trade Association Ltd., London, Contract 15 which is hereby made a part of this contract ... both buyers and sellers hereby acknowledge familiarity with the text of the GAFTA contract and agree to be bound by its terms and conditions."

3. "GAFTA" stands for Grain and Food Trade Association Ltd., London. Clause 27 of Standard Contract 15 of GAFTA provides as under:

"27. Arbitration.—(a) Any dispute arising out of or under this contract shall be settled by arbitration in London in accordance with the arbitration rules of Grain and Food Trade Association Limited, No. 125 such rules forming part of this contract and of which both parties hereto shall be deemed to be cognisant.

(b) Neither party hereto, nor any persons claiming under either of them, shall bring any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal, as the case may be, in accordance with the arbitration rules and it is expressly agreed and declared that the obtaining of the award from the arbitration, umpire or Board of Appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute." A foreign award was delivered on 22.06.1987 as per the Rules of GAFTA, London. Kotak & Co. moved an application under sections 5 and 6 of the Foreign Awards Act before the High Court, seeking enforcement of the award by filing the same and praying for pronouncement of judgment according to the award. The award was made a rule of the court, followed by a decree, by a learned Single Judge of the Bombay High Court. A Letters Patent Appeal preferred by Atlas Exports Pvt. Ltd. was dismissed. A specific contention was raised that since both Atlas Exports Pvt. Ltd. and Kotak & Co. were Indian parties, the award could not be enforced, being contrary to sections 23 and 28 of the Contract Act. This was repelled by this Court as follows:

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

> "28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.
>
> Exception 1.—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred."
>
> 11. The case at hand is clearly covered by Exception 1 to Section 28. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute/s adjudicated by having the same referred to arbitration. Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement. Moreover, in the case at hand the parties have willingly initiated the arbitration proceedings on the disputes having arisen between them. They have appointed arbitrators, participated in arbitration proceedings and suffered an award. The plea raised before us was not raised either before or during the arbitration proceedings, nor before the learned Single Judge of the High Court in the objections filed before him, nor in the letters patent appeal filed before the Division Bench. Such a plea is not available to be raised by the appellant Atlas before this Court for the first time."
>
> 28. It is clear that this Court categorically held that a foreign award cannot be refused to be enforced merely because it was made between two Indian parties, under pari materia provisions of the Foreign Awards Act.

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

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

> "... However, this may be, there is, in my opinion, no justification for regarding as obiter dictum a reason given by a Judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing. A good illustration will be found in London Jewellers Ltd. v. Attenborough, (1934) 2 KB 206 (CA). In that case the determination of one of the issues depended on how far the Court of Appeal was bound by its previous decision in Folkes v. R., (1923) 1 KB 282 (CA), [in which] the court had given two grounds for its decision, the second of which [as stated by Greer,

L.J., in Attenborough case, (1934) 2 KB 206] was that: (KB p. 222):

> '... where a man obtains possession with authority to sell, or to become the owner himself, and then sells, he cannot be treated as having obtained the goods by larceny by a trick.'" In Attenborough case, (1934) 2 KB 206 it was contended that, since there was another reason given for the decision in Folkes case, (1923) 1 KB 282, the second reason was obiter, but Greer, L.J., said in reference to the argument of counsel: (Attenborough case, KB p. 222) "I cannot help feeling that if we were unhampered by authority there is much to be said for this proposition which commended itself to Swift, J., and which commended itself to me in Folkes v. R., (1923) 1 KB 282, but that view is not open to us in view of the decision of the Court of Appeal in Folkes v. R., (1923) 1 KB 282. In that case two reasons were given by all the members of the Court of Appeal for their decision and we are not entitled to pick out the first reason as the ratio decidendi and neglect the second, or to pick out the second reason as the ratio decidendi and neglect the first;

we must take both as forming the ground of the judgment." So, also, in Cheater v. Cater, (1918) 1 KB 247 (CA) Pickford, L.J., after citing a passage from the judgment of Mellish, L.J., in Erskine v. Adeane, (1873) LR 8 Ch App 756, said: (Cheater case, KB p. 252) "... That is a distinct statement of the law and not a dictum. It is the second ground given by the Lord Justice for his judgment. If a Judge states two grounds for his judgment and bases his decision upon both, neither of those grounds is a dictum." (at page 741) The said judgment has been followed in State of Gujarat v. Manoharsinhji Pradyumansinhji Jadeja, (2013) 2 SCC 300 (at paragraphs 78 and 79) and in Shayara Bano v. Union of India, (2017) 9 SCC 1 (at footnote 65).

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

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

> "Section 202. Agreement or award falling under the Convention—An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An

> agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States."

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

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

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

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

tribunal.' Sub-clause (d) of this Article deals with payments to be made by the parties for the purpose of Arbitration.

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

> "46. Finally, in paragraph 118 [Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552], the crucial part heavily relied upon by Shri. V.K. Tankha, learned Senior Advocate, reference is made to section 28, and it is held as under:
>
> '118. It was submitted by the learned counsel for the appellants that Section 28 is another indication of the intention of Parliament that Part I of the Arbitration Act, 1996 was not confined to arbitrations which take place in India. We are unable to accept the submissions made by the learned counsel for the parties. As the heading of Section 28 indicates, its only purpose is to identify the rules that would be applicable to 'substance of dispute'. In other words, it deals with the applicable conflict of law rules. This section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide 'the dispute' by applying the Indian 'substantive law applicable to the contract'. This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations. The provision would have an overriding effect over any other contrary provision in such contract. On the other hand, where an arbitration under Part I is an international commercial arbitration within Section 2(1)
>
> (f), the parties would be free to agree to any other 'substantive law' and if not so agreed, the 'substantive law' applicable would be as determined by the Tribunal. The section merely shows that the legislature has segregated the domestic and international arbitration. Therefore, to suit India, conflict of law rules have been suitably modified, where the arbitration is in India. This will not apply where the seat is outside India. In that event, the conflict of law rules of the country in which the arbitration takes place would have to be applied. Therefore, in our opinion, the emphasis placed on the express 'where the place of arbitration is situated in India', by the learned Senior Counsel for the appellants, is not indicative of the fact that the intention of Parliament was to give an extra-territorial operation to Part I of the

Arbitration Act, 1996.' (emphasis in original)

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

48. However, if we further read the findings recorded by the Supreme Court in the same paragraph 118, as reproduced hereinabove, it is held by the Supreme Court that when the seat is outside India, the conflict of law rule of the country in which the arbitration takes place would have to be applied, and thereafter it is held that the expression 'whether the place of arbitration is situated in India' does not indicate the intention of the Parliament to give extra territorial operation to Part I, of the Arbitration Act of 1996. In paragraph 123 also, the matter has been considered in the backdrop of the provisions contemplated under section 28, this also makes us to come to the inevitable conclusion that the provisions of Part I will not apply where the seat of arbitration is outside India.

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

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

'23. Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excluded the same from those provisions which parties derogate from (if so provided by the Act). The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian Law. This is part of

the public policy of the country.

36. It is, however, made clear that any findings/observations made hereinbefore were only for the purpose of determining the jurisdiction of this Court as envisaged under Section 11 of the 1996 Act and not for any other purpose.' (emphasis in original)

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

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

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

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

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

proceedings and suffered an award. The plea raised before us was not raised either before or during the arbitration proceedings, nor before the learned Single Judge of the High Court in the objections filed before him, nor in the letters patent appeal filed before the Division Bench. Such a plea is not available to be raised by the appellant Atlas before this Court for the first time.' (emphasis in original)

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

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

54. We cannot accept the aforesaid proposition. Shri Anirudh Krishnan, learned counsel, had taken us through the provisions of both the Act of 1940 and the Act of 1996, and thereafter he had referred to the judgment of the Supreme Court in the case of Fuerst Day Lawson Limited (supra), where after a detailed comparison of various sections of both the Acts, from paragraphs 65 onwards, Hon'ble Supreme Court discussed the provisions of both Acts, and finally has observed that there is not much of a difference between them. If the aforesaid judgment in the case of Fuerst Day Lawson Limited (supra) is considered, the same holds that both, the Act of 1980 [sic 1940] and 1996 are identical and the Hon'ble Court has also indicated the similarity in both the Acts. That being so, we see no reason as to why the principle laid down of Atlas Exports (supra), which is by a Larger Bench i.e.. Division Bench, should not be applied particularly in the light of the law of precedent as laid down in the case of A.R. Antulay (supra). The contention of Shri. V.K. Tankha, learned Senior Advocate, that the learned District Judge relied upon the judgment in the case of Atlas Exports (supra) and refused to rely upon the case of TDM Infrastructure (supra) only because it is by a Single Bench is not convincing or acceptable, as the Division Bench Judgment in the case of Atlas Exports (supra) is a binding precedent and once it is held in the aforesaid case that two Indian companies can agree to arbitrate in a foreign country and the same is not hit by public policy, we see no error

in the order passed by the learned District Judge.

55. That apart, we also find that in the case of TDM Infrastructure (supra), a note of caution is indicated in paragraph 36, which was added by a corrigendum subsequent to pronouncement of judgment, this clearly indicates the principle laid down by the Supreme Court was only for determining the jurisdiction under section 11 and nothing more.

We need not go into the questions any further now, as we find that the judgment in the case of Atlas Exports (supra) is a binding precedent.

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

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

58. In the First Schedule to the Act of 1996, convention on the recognition and enforcement of foreign award popularly known as New York Convention has been laid down and admittedly in this case the parties have agreed to have an arbitration with its seat outside India i.e.. London. If that be the position then the provisions of section 45 would be attracted until and unless it is established that the agreement is null and void, inoperative or incapable of being performed. If we analyse the scheme of the Arbitration and Conciliation Act, 1996, we find that there is a distinction between 'International Commercial Arbitration' and a 'Foreign Award'. It is the case of the appellant that in a dispute between two Indian Parties, which is a domestic arbitration, Part II and Section 45 of the Act of 1996 will not apply. However, when we consider the distinction between 'International Commercial Arbitration' and 'Foreign Award', we find that there is a difference between an International Commercial Arbitration and an Arbitration which is not an International Commercial Arbitration. The same is based on the nationality of the parties and this distinction is only relevant for the purpose of following the appointment procedure as contemplated under section 11. As far as nationality of the parties are concerned, the same has no applicability for considering the applicability of Part II, of the Act of 1996. Applicability of Part II is determined solely based on what

is the seat of arbitration, whether it is in a country which is signatory to the New York Convention. If this requirement is fulfilled, Part II will apply and in the present case as this requirement is fulfilled, we have no hesitation in holding that the dispute in question is covered by Part II of the Act of 1996." *** "72. Finally, we may observe that once it is found by us that parties by mutual agreement have decided to resolve their dispute by arbitration and when they, on their own, chose to have the seat of arbitration in a foreign country, then in view of the provisions of Section 2(2) of the Act of 1996, Part I of the Act, will not apply in a case where the place of arbitration is not India and if Part I does not apply and if the agreement in question fulfils the requirement of Section 44 then Part II will apply and when Part II applies and it is found that agreement is not null or void or inoperative, the bar created under Section 45 would come into play and if bar created under Section 45 comes into play then it is a case where the Court below had no option but to refer the parties for arbitration as the bar under Section 45 would also apply and the suit itself was not maintainable." This statement of the law has our approval. It may only be mentioned that the judgment in Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 SCC 333 ["Fuerst Day Lawson"], referred to the provisions of the Foreign Awards Act, 1961 and Part II of the Arbitration Act of 1996 and not the Arbitration Act, 1940, as has been incorrectly held in paragraphs 53 and 54 of the aforesaid judgment. In addition, it may only be mentioned that the judgment of this Court by a learned Single Judge, under section 11 of the Arbitration Act, in TDM (supra) cannot, in any case, be regarded as a binding precedent, having been delivered by a Single Judge appointing an arbitrator under section 11 – see State of West Bengal v. Associated Contractors, (2015) 1 SCC 32 (at paragraph 17).

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

> "13. Mandate of section 45 to refer a dispute to the Arbitrator is also on a condition that the said agreement has to be a legal agreement. When the Apex Court, in unequivocal terms has held that when both the Companies are incorporated in India an agreement cannot be termed as an "International Arbitration Agreement", I am of the view that since both the plaintiff and the defendants are companies incorporated in India even for the sake of argument, there is an arbitration agreement, it cannot be an "International Arbitration Agreement" and as such not valid in law. However, I may clarify that I have not gone through the question whether in fact there is an arbitration agreement between the parties or not."

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

> "8. It is not in dispute that both parties are from India. A perusal of clause 23 clearly indicates that intention of both parties is clear that the arbitration shall be either in India or in Singapore. If the seat of the arbitration would have be at Singapore, certainly English law will have to be applied. Supreme Court in case of TDM

> Infrastructure Private Limited (supra) has held that the intention of the legislature would be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.
>
> 9. Insofar as submission of the learned counsel for the respondent that if such provision is interpreted in the manner in which it is canvassed by the learned counsel for the applicant, it would be in violation of section 28(1)(a) is concerned, since I am of the view that the arbitration has to be conducted in India, under section 28(1)(a), the arbitral tribunal will have to decide the disputes in accordance with the substantive law for the time being in force in India. In my view the said agreement which provides for arbitration in India thus does not violate section 28(1)(a) as canvassed by the learned counsel for the respondent."

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

> "33. However, in para-36 of TDM Infrastructure (supra) Supreme Court clarified that any findings/observations made hereinabove were only for the purpose of determining the jurisdiction of the Court as envisaged under Section 11 of the 1996 Act and not for any other purpose and is also evident from the conclusions noted in para 20 and 22 of the report. Thus GMR Energy cannot rely upon the decision in TDM Infrastructure (supra) to contend that in the present case Part-I of the Arbitration Act would apply and not Part-II." The learned Single Judge of the Delhi High Court then relied upon this Court's judgment in Atlas (supra) in paragraph 41. In paragraph 43, the learned Single Judge then referred to the table that is set out in Fuerst Day Lawson (supra) as follows:
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> "43. Contention of learned counsel for GMR Energy that the judgment in Atlas (supra) was given prior to Arbitration and Conciliation Act, 1996, and therefore not applicable to the present case, also deserves to be rejected in view of the decision of the Supreme Court reported as (2011) 8 SCC 333 Fuerst Day Lawson v. Jindal Exports Ltd. wherein comparing the pre amendment and post amendment Arbitration Act it was observed that the new Act is more favourable to international arbitration than its previous incarnation. The report comparing the provisions of the two Acts noted:
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> 64. The provisions of Chapter I of Part II of the 1996 Act along with the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961, insofar as relevant for the present are placed below in a tabular form:

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

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

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

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

3. Stay of proceedings in 45. Power of judicial authority respect of matters to be to refer parties to arbitration. referred to arbitration.— — Notwithstanding anything Notwithstanding anything contained in Part I or in the contained in the Arbitration Code of Civil Procedure, 1908 Act, 1940 (10 of 1940), or in (5 of 1908), a judicial authority, the Code of Civil Procedure, when seized of an action in a 1908 (5 of 1908), if any party matter in respect of which the to an agreement to which parties have made an Article II of the Convention set agreement referred to in Section forth in the Schedule applies, 44, shall, at the request of one or any person claiming of the parties or any person through or under him claiming through or under him, commences any legal refer the parties to arbitration, proceedings in any court unless it finds that the said against any other party to the agreement is null and void, agreement or any person inoperative or incapable of claiming through or under him being performed. in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the court to stay the proceedings and the court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

4. Effect of foreign awards. 46. When foreign award —(1) A foreign award shall, binding.—Any foreign award subject to the provisions of which would be enforceable this Act, be enforceable in

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

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

5. Filing of foreign awards in court.—(1) Any person interested in a foreign award may apply to any court having jurisdiction over the subject-

matter of the award that the award be filed in court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified why the award should not be filed.

6. Enforcement of foreign 49. Enforcement of foreign award.— awards.—Where the court is (1) Where the court is satisfied satisfied that the foreign award that the foreign award is is enforceable under this enforceable under this Act, the Chapter, the award shall be court shall order the award to deemed to be a decree of that be filed and shall proceed to court.

pronounce judgment Appealable orders.—(1) An according to the award. appeal shall lie from the order (2) Upon the judgment so refusing to— pronounced a decree shall refer the parties to arbitration follow, and no appeal shall lie under Section 45;

from such decree except insofar as the decree is in excess of or not in accordance with the award.	enforce a foreign award under Section 48, to the court authorised by law to hear appeals from such order. (2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.
7. Conditions for enforcement of foreign awards.—(1) A foreign award	48. Conditions for enforcement of foreign awards.—(1) Enforcement of a

may not be enforced under this Act—
if the party against whom it is sought to enforce the award proves to the court dealing with the case that— the parties to the agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made; or the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(iii) the award deals with questions not referred or contains decisions on matters beyond the scope of the agreement:
Provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(v) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of

foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that— the parties to the agreement referred to in Section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent

which, that award was made;	authority of the country in which,
or	or under the law of which, that

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

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

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

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

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

8. Evidence.—(1) The party 47. Evidence.—(1) The party applying for the enforcement applying for the enforcement of of a foreign award shall, at the a foreign award shall, at the time of the application, time of the application, produce produce— before the court— the original award or a copy the original award or a copy thereof, duly authenticated in thereof, duly authenticated in the manner required by the the manner required by the law law of the country in which it of the country in which it was was made; made;

the original agreement for arbitration or a duly certified copy thereof; and	the original agreement for arbitration or a duly certified copy thereof; and such
such evidence as may be necessary to prove that the award is a foreign award.	evidence as may be necessary to prove that the award is a foreign award.
(2) If the award or agreement requiring to be produced	(2) If the award or agreement to be produced under sub-section
under subsection (1) is in a foreign language, the party	(1) is in a foreign language, the party seeking to enforce the
seeking to enforce the award	award shall produce a

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

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

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

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

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

10. Repeal.—The Arbitration 52. Chapter II not to apply.— (Protocol and Convention) Act, Chapter II of this Part shall not 1937 (6 of 1937), shall cease apply in relation to foreign to have effect in relation to awards to which this Chapter foreign awards to which this applies.

Act applies.

11. Rule-making power of the High Court.—The High Court may make rules consistent with this Act as to— the filing of foreign awards and all proceedings consequent thereon or incidental thereto;

the evidence which must be furnished by a party seeking to enforce a foreign award under this Act; and

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

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

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

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

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

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

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

> "43. Learned counsel for the plaintiff has heavily relied upon Section 23 of the Contract Act which provides for considerations and object which are lawful and which are not, thus emphasizing that two Indian parties contracting out of Indian law would defeat the provisions of the law and would be opposed to public policy. Learned counsel for the plaintiff seeks either declaration of Clause 6 of the agreement between the parties as null and void or by applying the Blue Pencil Test give meaningful interpretation to clause-6 whereby the parties can then subject themselves to the jurisdiction of Indian Cotton Association. Three Judge Bench of the Hon'ble Supreme Court in (2017) 2 SCC 228 Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd. emphasized the principle of party autonomy in arbitration and held that the same is virtually the backbone which permit parties to adopt the foreign law as the proper law of arbitration. In (2005) 5 SCC 465 Technip SA v. SMS Holding Pvt. Limited, a three Judge Bench of the Hon'ble Supreme Court dealing with the conflicts of law held that disregard of applicability of foreign law must relate to basic principles of morality and justice and only when the foreign law amounts to a flagrant or gross breach of such principle that power should be exercised to hold inapplicability of foreign law that too, exceptionally and with great circumspection. It was held that in a sense all statutes enacted by Parliament or the States can be said to be part of Indian public policy, but to discard a foreign law only because it is contrary to an Indian statute would defeat the basis of private international law to which India undisputedly subscribes.
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47. Therefore, an arbitration agreement between the parties being an agreement independent of the substantive contract and the parties can choose a different governing law for the arbitration, two Indian parties can choose a foreign law as the law governing arbitration. Further there being clearly a foreign element to the agreement between the parties, the two Indian parties, that is the plaintiff and defendant could have agreed to an international commercial arbitration governed by the laws of England. Hence Clause 6 of the contract dated 30 th May, 2019 between the parties is not null or void." The argument of the appellant based on sections 23 and 28 of the Contract Act

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

"23. What considerations and objects are lawful, and what not.—The consideration or object of an agreement is lawful, unless— it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void."
"28. Agreements in restraint of legal proceedings void.— Every agreement,—

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

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

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

> "Rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification. Circumstances may change and make a commercial practice expedient which formerly was mischievous to commerce. But it is one thing to say that an occasion has arisen upon which to adhere to the letter of the rule would be to neglect its spirit, and another to deny that the rule still exists. The dicta which Lord Justice Fry cites from Hitchcock v. Coker [142. 6 A. & E. 348], from Tallis v. Tallis [1 E. & B. 391], and from Mallan v. May [11 M. & W. 653], are all dicta in cases of partial restraint, where the reasonableness of the particular contract necessarily came under consideration. The necessary protection of the individual may in such cases be the proper measure of the reasonableness of the bargain. When Lord Justice Fry passes on [14 Ch. D. 366] to examine the question of the existence of the common law rule, he assumes, as it appears to me, without sufficient justification, that complete protection of the individual is the only reason which ought to lie at the root of the doctrine. But the reasonableness of the legal principle which forbids general restraint altogether is not the same thing as the reasonableness (as between the parties) of the bargain in any particular case. With regard to the argument that the rule, if it existed, would be an artificial one, and would therefore admit of no exceptions, the judgments of the Judges and of the House of Lords in the case of Egerton v. Earl Brownlow [4 H. L. C. 1], illustrate, I submit, the distinction between a fixed rule of customary law and a rule based on reason and policy. The latter may admit of exceptions, although the former may not." (at pages 661-662) *** "The result seems to me to be as follows: General restraints, or, in other words, restraints wholly unlimited in area, are not, as a rule, permitted by the law, although the rule admits of exceptions. Partial restraints, or, in other words, restraints which involve only a limit of places at which, of persons with whom, or of modes in which, the trade is to be carried on, are valid when made for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenantee. A limit in time does not, by itself, convert a general restraint into a partial one. "That which the law does not allow is not to be tolerated because it is to last for a short time only." In considering, however, the reasonableness of a partial restraint, the time for which it is to be imposed may be a material element to consider." (at pages 662-663)

40. The classic judgment of this Court in Gherulal Parakh v. Mahadeodas Maiya, 1959 Supp (2) SCR 406 ["Gherulal"] states as follows:

> "... Cheshire and Fifoot in their book on Law of Contract 3rd Edn., observe at p. 280 thus:
>
> "The public interests which it is designed to protect are so comprehensive and heterogeneous, and opinions as to what is injurious must of necessity vary so greatly with the social and moral convictions, and at times even with the political views, of different judges, that it forms a treacherous and unstable ground for legal decision. ... These questions have agitated the Courts in the past, but the present state of the law

would appear to be reasonably clear. Two observations may be made with some degree of assurance.

First, although the rules already established by precedent must be moulded to fit the new conditions of a changing world, it is no longer legitimate for the Courts to invent a new head of public policy. A judge is not free to speculate upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions. He must expound, not expand, this particular branch of the law.

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

"Jessel, M.R., in 1875, stated a principle which is still valid for the Courts, when he said: 'You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract '; and it is in reconciling freedom of contract with other public interests which are regarded as of not less importance that the difficulty in these cases arises .... We may say, however, that the policy of the law has, on certain subjects, been worked into a set of tolerably definite rules. The application of these to particular instances necessarily varies with the conditions of the times and the progressive development of public opinion and morality, but, as Lord Wright has said, 'public policy, like any other branch of the Common Law, ought to be, and I think is, governed by the judicial use of precedents. If it is said that rules of public policy have to be moulded to suit new conditions of a changing world, that is true; but the same is true of the principles of the Common Law generally." In Halsbury's Laws of England, 3rd Edn., Vol. 8, the doctrine is stated at p. 130 thus:

"Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy.... It seems, however, that this branch of the law will not be extended. The determination of what is contrary to the so-called policy of the law necessarily varies from time to time. Many transactions are upheld now which in a former generation would have been avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion." ..." (at pages 432-434) *** "... The doctrine of public policy may be summarized thus: Public policy or the policy of the law is an illusive (sic elusive) concept; it has been described as "untrustworthy guide", "variable quality", "uncertain one", "unruly horse", etc; the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve

> them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days." (at pages 439-440)

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

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

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

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

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

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

43. This Court's judgment in Central Inland Water Transport Corpn. v. Brojo Nath Ganguly, (1986) 3 SCC 156, after referring to the case law on the subject, then held:

"92. The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought— "the narrow view" school and "the broad view" school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in Janson v. Driefontein Consolidated Gold Mines Ltd. [(1902) AC 484, 500]: "Public policy is always an unsafe and treacherous ground for legal decision". That was in the year 1902. Seventy-eight years earlier, Burrough, J., in Richardson v. Mellish [(1824) 2 Bing 229, 252 : 130 ER 294, 303 and (1824-

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

"In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them." It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution."

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

"17. I am in respectful agreement with the conclusion arrived at by the High Court. It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury to public interests or welfare would depend upon the times and climes. The social milieu in which the contract is sought to be enforced would decide the factum, the nature and the degree of the injury. It is contrary to the concept of public policy to contend that it is immutable, since it must vary with the varying needs of the society. What those needs are would depend upon the consensus value judgments of the enlightened section of the society. These values may sometimes get incorporated in the legislation, but sometimes they may not. The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to

promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society. So long as the courts keep themselves tethered to the ethos of the society and do not travel off its course, so long as they attempt to furnish the felt necessities of the time and do not refurbish them, their role in this respect has to be welcomed."

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

> "48. Since the doctrine of public policy is somewhat open- textured and flexible, Judges in England have shown certain degree of reluctance to invoke it in domestic law. There are two conflicting positions which are referred as the 'narrow view' and the 'broad view'. According to the narrow view courts cannot create new heads of public policy whereas the broad view countenances judicial law making in this areas. (See : Chitty on Contracts, 26th Edn., Vol. I, para 1133, pp. 685-686). Similar is the trend of the decision in India. In Gherulal Parakh v. Mahadeodas Maiya [1959 Supp 2 SCR 406 : AIR 1959 SC 781] this Court favoured the narrow view when it said:
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> "... though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these days" (p. 440)
>
> 49. In later decisions this Court has, however, leaned towards the broad view. [See : Murlidhar Agarwal v. State of U.P. [(1974) 2 SCC 472, 482 : (1975) 1 SCR 575, 584]; Central Inland Water Transport Corpn. v. Brojo Nath Ganguly [(1986) 3 SCC 156, 217]; Rattan Chand Hira Chand v. Askar Nawaz Jung [(1991) 3 SCC 67, 76-77].]"

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

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

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

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

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

> "263. This Court in Gherulal Parakh v. Mahadeodas Maiya [AIR 1959 SC 781 : 1959 Supp (2) SCR 406] held that freedom of contract can be restricted by law only in cases where it is for some good of the community. The Companies Act, 1956 or the FERA, 1973, RBI Regulation or the IT Act do not explicitly or impliedly forbid shareholders of a company to enter into agreements as to how they should exercise voting rights attached to their shares."

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

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

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

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

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

54. Even otherwise, BALCO (supra), which has been referred to by the Madhya Pradesh High Court in Sasan I (supra), in paragraph 118 thereof specifically indicated that section 28(1)(a) of the Arbitration Act will not apply where the seat is outside India as, in that event, the conflict of law rules of the country in which the arbitration takes place would have to be applied.

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

> "Rule 224 – (1)(a) Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not be prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement." *** "The principle in Ralli Bros.: It has already been seen that at common law there was thought to be a principle that a contract (whether lawful by its governing law or not) was, in general, invlaid in so far as the performance of it was unlawful by the law of the country where the contract was to be performed (lex loci solutionis). This principle as formulated in the second edition of this work, was adopted by the Court of Appeal in the Ralli Bros case. There remains a question, however, whether it is a rule of the conflict of laws (as its formulation would suggest) or is, on the contrary, a principle of the domestic law of contract relating to supervening illegality. The answer affects the question whether the principle has any application since the incorporation of the Rome Convention and the enactment of the Rome I Regulation. It is clear that if an English contract was to be performed abroad, the English court would refuse to enforce it if its performance would directly or indirectly violate the

law of the place of performance. Hence an agreement governed by English law for the payment in Spain of chartered freight beyond the maximum permitted by Spanish law did not support an action in England. Where such a contract was illegal ab initio according to the foreign law and was made by the parties with the object of defying the foreign law, its invalidity would often follow from a general principle of public policy stated below in connection with Rule 229. We are here mainly concerned with contracts which are not against the public policy of this country by reason of their interference with the friendly relations towards a foreign government, but which nevertheless involve the doing of something unlawful according to the law of the country in which the contractual obligation is to be performed, e.g. because performance was rendered illegal by the lex loci solutionis after the making of the contract. If English law is the governing law of the contract, the consequences of illegality, whether initial or supervening, according to the law of the place of performance will be identical with those which arise from the initial or supervening illegality according to English domestic law of a contract to be performed in England.

For the principle in Ralli Bros, as so understood, to be applicable it is necessary that "performance includes the doing in a foreign country of something which the laws of that country make it illegal to do. What this means is not that performance is excused whenever it includes an act in a country whose law makes this act illegal. It is not enough that performance is excused, or that the act is unlawful by the law of the country in which it happens to be done, or that the contract is contrary to public policy according to the law of the place of performance. It must be "unlawful by the law of the country in which the act has to be done," i.e. by the law of the country in which, according to its express or implied terms, the contract is to be performed. It would not matter whether the person liable to perform would, by doing so, infringe the laws of the foreign country in which he is resident or carries on business, or of which he is a national, if the law of that country is neither the governing law of the contract nor the lex loci solutionis. Up to this point the question of the consequences of illegality according to the lex loci solutionis is covered by authority. It was, however, doubtful and highly controversial whether, according to the English rules of the conflict of laws, illegality according to the lex loci solutionis as such had any effect on the validity or operation of a contract governed by foreign law and to be performed in a third country, i.e. in a foreign country other than that of the governing law. Would an English court enforce a French contract for the payment in Spain of chartered freight beyond the maximum permitted by Spanish law? Would it hold that the consequences of such illegality were governed by Spanish law, the lex loci solutionis, or would it leave it to French law, the governing law of the contract, to determine whether illegality according to the lex loci solutionis had any, and if so what, effect upon the validity and operation of the contract? The prevailing academic view was that supervening illegality according to the law of the place of performance did not as such prevent an English court from enforcing the contract, unless it were governed by English law. The principle in Ralli Bros, on this view, was not a principle of the conflict of laws at all, but merely an application of the English domestic rules

> with regard to the discharge or suspension of contractual obligations by supervening illegality, and the illegality of performance under the lex loci solutionis was no more than a fact to be taken into account by an English court in judging whether performance had become impossible. Whether an English court would enforce a French contract for the doing in Spain of something which Spanish law had forbidden after the making of the contract would depend on French law, and, in particular, on the French law of suspension or discharge of contracts. There was no direct authority on the point. In Kahler v. Midland Bank Ltd. Lord Reid said that "the law of England will not require an act to be done in performance of an English contract if such act....would be unlawful by the law of the country in which the act has to be done." In Zivnostenska Banka v. Frankman, however, he regarded it as "settled law that, whatever be the proper law of the contract, an English court will not require a party to do an act in performance of a contract which would be an offence under the law in force at the place where the act is to be done."

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

> "The question then arises — and it is, as I say, the only question for your Lordships' consideration — whether the respondents were justified in repudiating the contract. They claim to be justified on the ground that I have already stated. Their broad proposition is that whether or not the proper law of the contract is English law, an English court will not enforce a contract, or award damages for its breach, if its performance will involve the doing of an act in a foreign and friendly State which violates the law of that State. For this they cite the authority of the well-known case of Foster v. Driscoll, [1929] 1 K.B. 470 and much of the debate in this House has been whether that case was rightly decided, and if so, whether it is distinguishable from the present case. The appellant contends that it was not rightly decided, and further invokes a familiar principle which he states in these wide but questionable terms, "An English court will not have regard to a foreign law of a penal, revenue, or political character," and claims that the Indian law here in question is of such a character." (at pages 317-318) *** "Here, my Lords, was a formidable line of authority when in 1920 Ralli Brothers v. Compañia Naviera Sota y Aznar, [1920] 2 K.B. 287 came before the Court of Appeal. In that case the contract in suit was governed by English law but it required the performance in Spain of an act illegal by Spanish law, and it was held that for that reason it could not be enforced. I will cite one passage only from the judgment of Scrutton L.J. "Where," he said, [1920] 2 K.B. 287, 304: "a contract requires an act to be done in a foreign country, it is, in the absence of very special

circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent States." In the Ralli Brothers case, [1920] 2 K.B. 287, the relevant law was not a revenue law, and I am content to assume that Scrutton L.J. might have qualified his statement if he had had such a law in mind. But I venture to return to what I said earlier in this opinion. It does not follow from the fact that today the court will not enforce a revenue law at the suit of a foreign State that today it will enforce a contract which requires the doing of an act in a foreign country which violates the revenue law of that country. The two things are not complementary or co-extensive. This may be seen if for revenue law penal law is substituted. For an English court will not enforce a penal law at the suit of a foreign State, yet it would be surprising if it would enforce a contract which required the commission of a crime in that State. It is sufficient, however, for the purposes of the present appeal to say that, whether or not an exception must still be made in regard to the breach of a revenue law in deference to old authority, there is no ground for making an exception in regard to any other law. I should myself have said — and this is, I think, the only point upon which I do not agree with the Court of Appeal — that the present case was precisely covered by the decision in Ralli Brothers, [1920] 2 K.B. 287. For when the fact is found that the very thing which the parties intended to do was to export the jute bags from India in order that they might go via Genoa to the Union of South Africa, it appears to me irrelevant that upon the face of the documents that wrongful intention was not disclosed. But, whether this is so or not, it is clearly covered by Foster v. Driscoll, [1929] 1 K.B. 470, a decision the correctness of which is not to be doubted. The distinctive feature of the case was that Scrutton L.J. thought that the contract there in question could be carried out legally, and for that reason, differing from Lawrence and Sankey L.JJ., held that it was not invalid. The principle of the decision in Ralli Brothers, [1920] 2 K.B. 287 was emphatically reasserted and the apparent innocence of the documents was disregarded, the guilty intention being proved ab extra. So, here, it has been conclusively found that the common intention of the parties was to violate the law of India, and it is of no consequence that the documents did not disclose their intention. I ought not to part from the case without noting that Sankey L.J. observed that the cases relating to the breach of a revenue law were not germane to the issue. Nor are they germane to this appeal. Whether they are still to be regarded as a binding authority is a question that must await determination." (at pages 321-323) Lord Reid, concurring, held:

"The only recent authority which is directly in point is Foster v. Driscoll, [1929] 1 K.B. 470. There Scrutton L.J. dissented because he took a different view of the facts: if he had held that performance of the contract necessarily involved a breach of American law, I think that he would have agreed with the majority. He said, [1929] 1 K.B. 470, 496: "I have no doubt that if seller and buyer agreed to ship the whisky into the United States contrary to the laws of that country the contract would not be enforced here: Ralli's case, [1920] 2 K.B. 287, not because it was illegal here but as a matter of

public policy based on international comity." He then cited with approval, [1929] 1 K.B. 470, 497, Dicey's Conflict of Laws, 4th ed., p. 620: "'It must, however, be noted that if a contract is an English contract, it will only be held invalid on account of illegality if it actually necessitates the performance in a foreign and friendly country of some act which is illegal by the law of such country.'" And he also quoted with approval a passage from the judgment of Blackburn J. in Waugh v. Morris, (1873) L.R. 8 Q.B. 202, 208: "We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance." By "a thing which cannot be performed without a violation of the law," I think that Blackburn J. meant a thing which the contract expressly or by clear implication requires to be done. This contract does not require the seller to obtain the goods from India: it is only after investigation of the facts that it appears that he could not have got them anywhere else. And this contract does not disclose the buyer's intention to send the goods to South Africa. On the face of it this contract could be performed without a breach of the laws of any country. I shall also quote from what Lawrence L.J. said in Foster's case, [1929] 1 K.B. 470, 510:"On principle, however, I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed; and none the less so because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would instigate or aid and abet some other person to commit it." These passages cover the present case, and I agree with them.

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

My Lords, it is quite impossible for a court in this country to set itself up as a judge of the rights and wrongs of a controversy between two friendly countries, we cannot judge the motives or the justifications of governments of other countries in these matters and, if we tried to do so, the consequences might seriously prejudice international relations. By recognizing this Indian law so that an agreement which

> involves a breach of that law within Indian territory is unenforceable we express no opinion whatever, either favourable or adverse, as to the policy which caused its enactment. In my judgment this appeal should be dismissed." (at pages 324-326)

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

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

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

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

> "5. Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract — (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper

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

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

"Party autonomy

38. Party autonomy is virtually the backbone of arbitrations.

This Court has expressed this view in quite a few decisions. In two significant passages in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. [Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126 :

(2016) 2 SCC (Civ) 580, Hon'ble Judges/Coram: Anil R. Dave, Kurian Joseph and Amitava Roy, JJ.] this Court dealt with party autonomy from the point of view of the

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

39. In Union of India v. U.P. State Bridge Corpn. Ltd. [Union of India v. U.P. State Bridge Corpn. Ltd., (2015) 2 SCC 52 : (2015) 1 SCC (Civ) 732] this Court accepted the view [O.P. Malhotra on the Law and Practice of Arbitration and Conciliation (3rd Edn. revised by Ms Indu Malhotra, Senior Advocate)] that the A&C Act has four foundational pillars and then observed in para 16 of the Report that: (SCC p. 64) "16. First and paramount principle of the first pillar is 'fair, speedy and inexpensive trial by an Arbitral Tribunal'. Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed

to, that has to be generally resorted to." (emphasis in original)

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

353-414, Para 6.07] wherein it is said:

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

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

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

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

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

"Public policy and two-tier arbitrations

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

contrary to public policy.

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

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

Section 10 of the Commercial Courts Act.

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

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

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

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

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

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

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

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

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

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

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

> "13. As already noted, there should be a clear inconsistency between the two enactments before giving an overriding effect to the non-obstante clause but when the scope of the provisions of an earlier enactment is clear the same cannot be cut down by resort to non-obstante clause. In the instant case we have noticed that even the General Rules of which Rule 3(2) forms a part provide for promotion by selection. As a matter of fact Rules 1(3)(a) and 3(1) and 4 also provide for the enforceability of the Special Rules. The very Rule 3 of the General Rules which provides for recruitment also provides for promotion by selection and further lays down that the methods of recruitment shall be as specified in the Special Rules, if any.
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> In this background if we examine the General Rules it becomes clear that the object of these Rules only is to provide broadly for recruitment to services of all the departments and they are framed generally to cover situations that are not covered by the Special Rules of any particular department. In such a situation both the Rules including Rules 1(3)(a), 3(1) and 4 of General Rules should be read together. If so read it becomes plain that there is no inconsistency and that amendment by inserting

> Rule 3(2) is only an amendment to the General Rules and it cannot be interpreted as to supersede the Special Rules. The amendment also must be read as being subject to Rules 1(3)
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> (a), 3(1) and 4(2) of the General Rules themselves. The amendment cannot be read as abrogating all other Special Rules in respect of all departments. In a given case where there are no Special Rules then naturally the General Rules would be applicable. Just because there is a non-obstante clause, in Rule 3(2) it cannot be interpreted that the said amendment to the General Rules though later in point of time would abrogate the special rule the scope of which is very clear and which co-

exists particularly when no patent conflict or inconsistency can be spelt out. As already noted Rules 1(3)(a), 3(1) and 4 of the General Rules themselves provide for promotion by selection and for enforceability of the Special Rules in that regard. Therefore there is no patent conflict or inconsistency at all between the General and the Special Rules."

69. Consequently, this argument of the appellant also fails. Whether an application under section 9 of the Arbitration Act would lie

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

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

.....J. [ROHINTON FALI NARIMAN] .....J. [B.R. GAVAI] .....J. [HRISHIKESH ROY] New Delhi;

April 20, 2021.