NOTES AND COMMENTS

ALLEPEY TURMERIC FINGERS AND ARBITRAL AWARDS : SPICES IN THE CONFLICT OF LAWS

I. INTRODUCTION

THE TRIUMPHANT VOYAGE of Vasco da Gama who left Lisbon on July 8, 1497, reaching the port of Calicut in South India on May 29, 1498, marked the beginning of the end of the Arab monopoly of the East Indian spice trade in the world market.[1] Since that historic date many intrepid Portuguese sailors crossed the Indian ocean and braved many a disaster to bring back the cargo of spices (and precious stones) to Lisbon.[2] Among these spices, one may surmise, was turmeric "a herbaceous perennial plant belonging to the family *Zinigiberaceae*" — a spice not merely used as a condiment or curry powder but also as a dyestuff and sometimes for medicinal purposes.[3] One may say that the native wealth of the East Indies, as the region was then called, then consisted mainly of spices which were in great demand in Europe. The spiceland of the world inevitably became the theatre of colonial exploits in subsequent Asiatic history.

And yet it is strange that the spices never significantly entered the already pungent stream of the law of the conflict of laws till an Indian exporting company failed to deliver more than thirty tons of Allepey turmeric fingers to a coporation in New York in the year 1954. The somewhat tragic tale of the undelivered spices ended in the court-room of the Highest Court in India in 1964 when the Supreme Court

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1. Calicut was a great emporium of Arab trade. It was the chief among the many ports of Malabar Coast, whence Europe drew its supplies of pepper and ginger. Here Mohemmadan merchants purchased cinamon brought from Ceylon and spices from Maldive Islands, which they carried to port of Jiddah in Arabia, and then to the port of Tor in the Sinaitic peninsula, whence they were carried overland to Cairo. Here they were shipped down Nile to Rossetta, and the last stage of the transaction was performed on camels to Alexandria, where they were purchased by European merchants. At all these places duties had to be paid, in consequence of which the cost of merchandise was quadrupled. ...

1 *The Cambridge Modern History* 25-26 (1904: Ward, *et. al.* eds.) For further account of the Portugese exploits on the Malbar Coast, See 1 *The New Cambridge Modern History* 425-27 (1959, Potter ed.)

2. Thus Vasco da Gama himself barely escaped an assasination attempt and Pedro Alvares Cabral who followed Gama underwent similar risk and many more naval and personal deprivations before actually accomplishing the triumphal feat of bringing back six (out of thirteen) ships fully loaded with spices whose cargo, we are assured, "fully repaid the cost of the whole expedition." See Potter, *supra* note 1.

3. See 22 *Encylopedeia Brittanica* 625 (1950).

decided that neither the *ex parte* arbitral awards made in New York nor a New York judgment confirming these can be enforced in India.[4] It is the purpose of this paper to trace the destiny of the Allepey turmeric fingers in terms of the comparative conflicts theory and to assess the significance of the Indian decision both in the context of the general state of conflict rules on the subject of enforcement of arbitral awards and of the emerging tradition of the private international law in India.[5]

Briefly, the leading facts of the case were as follows. The plaintiff, The East India Trading Co. Inc., incorporated under the laws of New York, entered into a contract, for the purchase of Allepey turmeric figures, with an Indian firm, M/s. Badat & Co., a firm at that time carrying on business in Bombay, India. The parties agreed to conduct their business according to the terms and conditions of the American Spice Trade Association. These provided *inter alia* that in event of a dispute arising under the contract all claims shall be settled by reference to arbitration under the rules of the said association, and the contract was deemed to have been "made as of in New York." On the failure of the Indian company to supply the turmeric fingers, as per the separate contractual requisitions by the New York corporation, the latter secured two *ex parte* arbitral awards for the sum of $ 18,748. Pursuing the procedure prescribed for the enforcement of such awards, the New York corporation secured the judgment of the New York Supreme Court confirming these awards. Proper notice of both the arbitration and the judicial proceedings was served on the Indian company but it preferred not to participate in either. The New York corporation subsequently sought recovery of the amount due both under the awards and the judgment by filing a suit in the High Court of Bombay under its "original jurisdiction."

In the first instance, Mr. Justice Mody, of the High Court of Bombay, dismissed the suit on the jurisdictional grounds as also on merits. The learned Judge held that the Court had no jurisdiction to try

4. *Badat & Co.* v. *East India Trading Co.*, A.I.R. 1964 S.C. 538.

5. Indian conflict decisions at the Supreme Court level are indeed few and in general most of the Indian conflicts decisions have passed unnoticed in comparative conflicts studies save for the notable efforts by Professor T. S. Rama Rao, of the University of Madras. Apart from his frequent valued contribution on conflicts to the *Indian Year Book of International Affairs* see, Rama Rao, "Conflict of Laws in India," 23 *Zeitschrift Für Auslandlaes Und Internationales Privatrecht* 259 (1958). See also Chittale "First Decision of Supreme Court Involving Conflict of Laws," 5 *Am. Jl. Comp. Law* 629 (1956). The decision under study has received some critical attention in India. See Raghavan, "Foreign Judgment and Foreign Arbitral Awards — Enforcement in India," *Supreme Court Journal* 37 (1965); and Govindraj "Foreign Arbitral Awards and Foreign Judgments Based on such Awards," 13 *I.C.L.Q.* 1465 (1964).

The present writer is engaged in a study of conflict of laws in India in comparative context as a part of his doctoral thesis for the University of California at Berkeley entitled *American-Indian Private International Law — A Bilateral Study* (forthcoming).

the suit, and that on the evidence before the Court it could not be held that the commercial agreement — the very foundation of the arbitral awards and the judgment — was entered into by the parties. The learned Judge further held that the awards here merged in the foreign judgment and, therefore, no suit was maintainable on the two awards. The net result was that neither the judgment nor the awards could be enforced against the Indian defendant.[6]

On appeal, the Division Bench of the High Court — consisting of Mr. Chief Justice Chagala and Mr. Justice S. T. Desai — disagreed with Mr. Justice Mody on almost all points.[7] They held that there was sufficient evidence to prove the existence of the commercial agreements; that the High Court had jurisdiction to try the suit as the original cause of action — at least a part of it — arose within the limits of the original jurtsdiction of the High Court of Bombay; and finally, that under the common law rules, which were applicable to this case, arbitral awards did not merge with foreign judgments confirming them. The Division Bench — hereafter called the Appeal Court — however certified an appeal against its judgment to the Supreme Court of India thus giving rise to the present decision. The majority of the Supreme Court, for the reasons discussed hereafter, allowed the appeal with one of the Justices, Mr. Subba Rao, dissenting.[8]

The Supreme Court of India, in its majority opinion, considered the two alternate pleas of the appellant; (i) the Bombay High Court had no jurisdiction to enforce the foreign arbitral judgment and (ii) that the awards not being "final" merged with the judgment and, therefore, could not be enforced.[9] While this broad dichotomy of issues somewhat oversimplifies the posture of the case; we will analyze the reasoning of the Court with its help.[10]

II. Enforcement of the New York Judgment: Spices Abroad and Spices at Home

(a) *The Judicial Reasoning*

In order to enforce a foreign judgment, the recognizing court should have some effective jurisdiction over the defendant. The legal

6. See the summation of this decision in A.I.R. 1959 Bom. 414. The judgment of Mody, J., seems not to have been reported.

7. See generally A.I.R. 1959 Bom. 414.

8. The majority of the Court consisted of Mr. Justice Raghubar Dayal and Mr. Justice Mudholkar who delivered the judgment. Most of Mr. Justice Subba Rao's dissent pertains to procedural (pleadings) and evidentiary aspects of the case, discussed by the trial and the appeal courts, but not taken into account by the majority of the Supreme Court. We will here refer only to the conflictual aspects of the dissent.

9. *Supra* note 4, at 551.

10. The other contentions of the appellants were: first, the Supreme Court of New York had no jurisdiction to give the judgment; second, the arbitrators likewise had no jurisdiction to make the awards and finally that they, at the time of the institution of the suit, did not reside within the limits of original jurisdiction of the High Court of state of Bombay. The Supreme Court in its majority opinion did not consider these issues as relevant (save the last and that too—perfunctorily) and consequently was not advertent to them. Nor did it consider non-conflictual aspects of the case, treated at length in the dissenting opinion of Mr. Justice Subba Rao.

sources of jurisdiction, of course, vary but broadly three types of jurisdictions have long been recognized: jurisdiction *in personam* jurisdiction *in rem*, and jurisdiction *quasi in rem*.[11]

The original jurisdiction of the High Court of Bombay is derived from the Letters Patent which first established the Court and still functions as the source of its authority.[12] Clause 12 of the Letters Patent provides that the Court in exercise of its original civil jurisdiction shall be empowered to "receive, try and determine suits of every description" if the Court has personal jurisdiction over the defendant or if it happens to be the situs court in cases involving land or other immovable property and

> in all other cases if the cause of action shall have arisen, either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the original jurisdiction of the said High Court.....

In the pleadings in the first instance the following averment was made by the plaintiffs :

> The defendants used to carry on business and reside in Bombay. Their present whereabouts are not known. But the terms of business were accepted by the defendants in Bombay and the proposal of acceptance of the said contracts by the defendants' refusal to pay the said sum also took place in Bombay. A material part of the cause of action took place in Bombay and with leave granted under clause 12 of the letters patent this Hon'ble Court has jurisdiction to try the suit.[14]

On this averment Mr. Justice Mody in the first instance, held that the Court lacked jurisdiction to try the suit insofar as it was based on a foreign judgment. The Appeal Court endorsed this opinion though it preferred not to "finally decide the matter." In a "dictum" the Appeal Court, however, observed :

> The only way that jurisdiction could possibly have been attracted was by an averment that there was an obligation under the judgment on the part of the

11. For an excellent and brief survey of principles and problems see Ehrenzweig and Louisell, *Jurisdiction in a Nutshell* 1-79 (2d. edn. 1968) ; Ehrenzweig, *A Treatise on the Conflict of Laws* 70-119 (1962) (hereafter cited simply as Ehrenzweig, *Treatise*.) *But see* von Mehren and Trautman, *The Law of Multistate Problems: Cases and Materials on Conflict af Laws* 587-811 *esp.* 554-56 (1956) ; and *Id.* "Jurisdiction to Adjudicate: A Suggested Analysis," 79 *Harv. L. R.* 1121, *esp.* 1135-36, and 1164-79 (1966). The learned authors feel that the traditional terms by which jurisdiction is characterized as being *in rem* or *personam* or on *quasi in rem* need to be abandoned as they obscure the policy considerations behind what they call "the jurisdiction to adjudicate." They would instead suggest the classification of jurisdiction into "general," "limited general" and "specific." We commend this impressive and original analysis as a much needed infusion of clarity in conflicts thinking in this area, though the prospects of its overall acceptance by the bench and the bar (at least in India) may at present seem doubtful.

12. See, for a brief historical background, Setalvad, *The Common Law in India* 1-62 (1960) ; and *Mulla on the Code of Civil Procedure* : *Act of 1908*, 1883-1929 (Aiyer ed., 13 edn. 1967) (Hereinafter referred to as *Mulla*).

13. See *Mulla* 1887.

14. See *supra* note 7 at 416.

> defendants to pay the amount in Bombay or that the defendants had undertaken the obligation to pay the judgment amount in Bombay.[15]

The Appeal Court held that the awards, despite their alleged lack of "finality," were enforceable and decided that the Court had jurisdiction to enforce the awards since the arbitration agreement was entered into in Bombay and that fact constituted "an important material and necessary part of the cause of action."[16]

The Supreme Court of India entertained "no doubt as to the correctness"[17] of the Appeal Court's view on the lack of jurisdiction to enforce the New York judgment but based its agreement with it on entirely different grounds. Strangely enough in deciding whether the Court had *jurisdiction* to try the suit and enforce the judgment, the majority found it necessary to examine in some detail the doctrinal and judicial basis for recognition and enforcement of foreign judgments, and to note at some length the great divergence of opinion among the commentators on the subject.[18] The Court held that the foreign judgment "furnishes an independent cause of action" and observed:

> The judgment was rendered in New York and, therefore, the cause of action furnished by it arose at that place and nowhere else. This cause of action is really independent of the action afforded by the contract and, therefore, if advantage was sought to be taken of it, the suit would not lie at Bombay.[19]

Further in the context of the doctrine of non-merger of the original cause of action with the foreign judgment the Court opined:

> But...if he (plaintiff) chooses to sue upon the judgment, he cannot find jurisdiction for the institution of suit on the basis of original cause of action because once he chooses to rest himself on the judgment obtained by him in a foreign court, *the original cause of action will have no relevance whatsoever even though it may not have merged in the judgment.*[20]

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15. *Ibid.* This observation, with respect, is difficult to comprehend, at least in terms of conflicts theory. Naturally, as in this case, a judgment confirming the liability to pay a specified amount, creates a legal obligation for the defendant to discharge the liability. A foreign judgment need not expressly prescribe such an obligation or the locale of its fulfilment. See, Cheshire, *Private International Law* 537 (7th edn. 1963) with the material there cited. *Cf.* Govindraj, with specific reference to section 13 of the Indian Civil Procedure Code 1905, *supra* note 5, at 1467.

16. See *supra* note 7 at 417.

17. A.I.R. 1964 S.C. 538 at 552.

18. *Id.* at 552-558.

19. *Id.* 554.

20. *Id.* at 555.

We may here note Mr. Raghavan's suggestion (made as he says with "diffidence") that in the situations like present the forum court may assume jurisdiction

> ..on the footing that the original submission agreement concluded within the jurisdictional limits of the Court of the forum implies a contract to given [*sic*] effect to the judgment.

Raghavan, *supra* note 5 at 41. But this suggestion simply revives the conception of the nature of a foreign judgment as a contractual debt. Procedural and historical reasons have necessitated such a view in the United Kingdom but, for many important constant criticism as "inconclusive" and unsatisfactory. See *Dicey on Conflict of Laws* 1058-59 (7th edn. 1958). See also the much firmer approach in Dicey-Morris, *The Conflict of Laws* 1048-49 (8th edn. 1967) and the authorities there cited.

The Supreme Court acknowledged that no judicial precedent dictated the reasoning it preferred in the present case. The only decision which the Court referred to in support of its notion of foreign judgment as a cause of action in itself was of Mr. Justice Sellers, in *East India Co.* v. *Carmell Exporters and Importers Ltd.*[21]

In that case, an award made in favour of the plaintiffs, on August 2, 1949, was confirmed on appeal on December 7, 1949. The award thus confirmed was made enforceable by the judgment of the New York Supreme Court on May 11, 1950. During the time the award was made and confirmed on appeal and the rendition of the final judgment of the New York Supreme Court, devaluation of sterling occurred and the question before the Court was the narrow one of the date which should be regarded as appropriate for conversion of the amount due in sterling. Mr. Justice Sellers, deciding the case in favour of the New York Corporation, held that the date of conversion should be computed on the basis of the date of the New York judgment. The Indian Supreme Court felt — quite incorrectly in our submission — that the only difference between this case and the one before it was that "while in our case the question is *where* it [*i.e.* the cause of action] arose, in the case cited the question was as to *when* it arose."[22]

It is true that Mr. Justice Sellers used language suggesting that foreign judgment was a cause of action.[23] But the sole question involved in that case was whether the date of the foreign judgment or that of the breach of contract should be regarded as relevant for conversion of the judgment amount into sterling. It was never contended that the foreign judgment itself was not enforceable. The question of recognizing court's *jurisdiction* was not an issue.[23a] In fact the decision in that case followed the traditional common law theory that foreign judgments which are conclusive and satisfy the conflicts requirements for their recognition create obligations which the English courts

Moreover, Mr. Raghavan somewhat overgeneralizes the holding of Slesser J. in *Bremer Oeltransport G.M.B.H.* v. *Drowry*, [1933] 1 K.B. 753. Certainly, the learned Lord Justice inclined to the view that an action on award is "really founded" on "the agreement to submit the difference of which the award is the result." (*Id.* at 764). But the authority of the previous precedent was not disturbed by this decision; and the learned Justice regarded his holding as "sufficient for the purpose of the plaintiffs" which was that the order for service outside the jurisdiction was properly made under the relevant rules. See also Dicey-Morris cited herein.

Mr. Raghavan is on a surer ground, to which in any case we give salience, when he highlights the discretionary nature of jurisdiction power under the relevant clauses of Letters Patent (Raghavan, *loc. cit.* 41n.)

21. (1952) 2 Q.B. 439.

22. See *supra* note 17 at 554, (emphasis added).

23. See *supra* note 21 at 442 and the conclusionary characterization of the New York Supreme Court Judgment (at 444) as "the immediate source from which the defendants' liability flows in the present action."

23a. *Cf.* Raghavan, *supra* note 5 at 40.

will recognize and enforce.[24] It is, therefore, difficult to agree with the majority of the Supreme Court that this decision dealt with a similar situation and that it can be regarded even as a persuasive authority.

(b) Cause of Action: A Familiar Recipe?

It is clear that central to the judicial reasoning in this case is the nebulous notion of cause of action. We have seen that the Court first characterized the foreign judgment as a cause of action and then insulated it totally from the original cause of action by a still confusing notion of "relevance" of one to the other. And yet in the context of enforcement of the awards the Court had no hesitation in regarding the awards as fresh causes of action. In so doing the Court was either advancing a novel thesis about the juridical character of foreign judgments in general or (as is more likely) falling prey to the difficult notion of the cause of action.

It seems that in most legal systems of the world[25] and at least in the common law systems,[26] one of the preliminary stages of presentation of a controversy for adjudication involves submission of a written statement of the facts on which it is based, Part of this statement contains a statement of what are traditionally called the "operative facts." The recital of operative facts performs an invocatory function. In other words a statement of these facts is used by the parties, especially the plaintiff, to urge the court to exercise its jurisdiction. The term 'cause of action' has thus been used to refer to the operative facts and in this sense it is one of the *jurisdiction-invoking devices.*

The other major aspect of the term 'cause of action' involves a reference to the very substance of litigation which may be traditionally said to consist either in violation of some right or breach of some duty for which the plaintiff is legally entitled to seek redress. This aspect of the meaning of the term 'cause of action' belongs to the sphere of actual litigation itself and not to the preliminary stage of setting the adjudicatory processes in motion. We thus arrive at a differentiation between two aspects of the term 'cause of action' namely, the *prima facie* or the procedural aspect and the substantive or the merits aspect.[27] In view of the general problematics of the substance-procedure dichotomy,[28] we will here characterize the present distinction of the

24. See *supra* note 15.

25. See, generally, 5 R. Pound, *Jurisprudence* 425-40 (1959) :

26. See Pound, *supra* note 25, and generally Fleming James Jr., *Civil Procedure* 65-66, 76-81 (1965). And see *infra* notes 27, 29.

27. This distinction is suggested by the classification adopted by J. Michael, *The Elements of Legal Controversy* 132-57 (1948).

28. See the classic analysis by W.W. Cook, *The Logical and Legal Bases of Conflict of Laws* 154-93 (1942).

notion of cause of action as involving its *jurisdiction-invoking* aspect and *litigationresolving* aspect.[29]

It is in this context of the *dèpeçage*[30] of the notion of cause of action that we may proceed to seek an answer to the analytically hazardous question: Is foreign judgment a cause of action? Presuming, as we ought to, that the foreign judgment is bona fide, the only sense in which a suitable response to the above question can be given is by reference to the jurisdiction-invoking aspect of the cause of action since the litigation has at the time when the judgment is sought to be enforced in a recognizing forum has been obviously resolved. No doubt, under the common law conflicts theory a foreign judgment *per se* does not extinguish what has been traditionally called "the original cause of action" and is considered at best a collateral, if not an inferior, modality of redress. But in absence of a separate proceeding at the time of the enforcement of a foreign judgment, and also in absence of impeachment of such a judgment on such grounds as may be permitted by the conflicts jurisprudence of the recognizing forum, the judgment as presented for recognition and enforcement should be considered as having resolved the existing controversy. In this context, we should further stress that in the common law tradition a foreign judgment has merely the status of a "fact" and in itself does not operate as a judgment on the subjects of the recognizing legal order. Hence, foreign judgment assumes the form of an "operative fact" in the recognizing forum. Though the suit may be primarily

29. We do not mean to suggest that this distinction exhausts all meaning of the chamaleon-like "cause of action." We feel it necessary to reiterate the various meanings of the term expressed in the following passage from a judgment of Mr. Justice Cardozo in the *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68 (1933);

> [I]t will confuse instead of helping, if we do not insist at the beginning upon a definition of our terms or at least a recognition of their shifting meanings. A "cause of action" may mean one thing for one purpose and something different for another. It may mean one thing when the question is whether it is good upon demurrer, and something different when there is question of the amendment of a pleading or of the application of the principle of res judicata ... At times and in certain contexts, it is identified with the infringement of a right or violation of a duty. At other times, and in other contexts, it is a concept of law of remedies, the identity of the cause being then dependent of that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, the group of operative facts out of which a grievance has developed. This Court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or of the relation to be governed.

See also for further discussion J. Michael, *supra* note 27. Even the American Law Institute's Restatement on Conflict of Laws, while dealing with this concept, does not find it either desirable or possible to offer a general formula and instead prefers frankly to rely on policy considerations. See the neat summation and analysis in von Mehren and Trautman, *Law of Multistate Problems: Cases and Materials on Conflict of Laws* 570-72 (1965; to be hereafter cited by authors).

30. The term *dèpecage* is here used non-technically; and figuratively at any rate. It does not refer to what is known as spiltting up of a cause of action.

one of enforcement of a foreign judgment, the pleadings will inevitably contain a statement of facts which furnish the original cause of action. In other words, no written statement aiming to invoke the jurisdiction of the recognizing court can merely state or solely rely on the fact that a foreign judgment has been delivered. The original cause of action (the basis of the controversy giving rise to the foreign judgment) has also to be set out.

Obviously, a foreign judgment *as an operative fact* can never occur within the territorial jurisdiction of the recognizing court. It also follows that when a foreign judgment is sought to be enforced, the action is primarily based on the original cause of action *plus* the fact of foreign adjudication over the substance of the litigation.[31] Analytically, then, when the occurrence of the operative facts is one of the sources of the recognizing court's jurisdiction (as in the present case) reference to the foreign judgment as a cause of action means only that it is now a part of the *assorted operative facts* on which the court, can, if it so desires, exercise its jurisdiction.

And yet it is asserted in *Halsbury's Laws of England*:

> The judgment *in personam* of a foreign court of competent jurisdiction condemning one of the parties to the payment of sum of money constitutes... a good cause of action in England.[32]

More recently, Graveson has observed:

> ... it is true to say that at common law a foreign judgment is not enforced as such; it constitutes merely a cause of action on which an English judgment may be given, and, it is, therefore, the English judgment which is enforced in England.[33]

This cleavage between the apparent procedural impossibility of enforcing the foreign judgment when considered as a sole operative fact and the diverse usages and fundamental ambiguities inherent in the notion of the cause of action itself. The writers quoted here seem concerned to emphasize the fact that the foreign judgment is *itself* never enforceable in the recognizing court and that it can be enforced only through a suit where the foreign judgment would furnish an actionable cause. In other words, (as noted earlier) a foreign judgment even when it satisfies all the conflictual requirements for its recognition and enforcement in relation to the recognizing legal order, has merely the status of an operative fact. It is not equable to the judgments of the domestic courts and requires an intrasystemic transformation through a domestic

31. See Cheshire, *supra* note 15, and more recently, Dicey And Morris, *The Conflict of Laws* 965-69 (1967: 8th edn.). See also Ehrenzweig, *Treatise* 161-62.

32. 7 *Halsbury's Laws of England* 140 (1954: 3d edn.).

33. Graveson, *Conflict of Laws* 543 (1965: 5th edn.).

34. See also a discussion of similar authorities in the Supreme Court judgment, *supra* note 17 at 553-54.

judgment to become enforceable. But even in this sense, the term 'cause of action,' in absence of other recognition-deterring factors, essentially performs a jurisdiction-invoking function. Inadvertence to this fundamental distinction, we submit, led the Supreme Court erroneously to the non-recognition of the New York judgment.

The Supreme Court's approach betrays another inconsistency as well. While the Court held, as we saw, that the foreign judgment as a cause of action cannot be enforced within the jurisdiction of the Bombay High Court, it considered the awards as fresh causes of action which could be enforced in that Court, provided they satisfied the 'finality' requirement.[35] It can be said that the awards, like the judgment, were made in New York and as such cannot be considered by themselves as causes of action which have occurred within the jurisdictional limits of the Bombay High Court. Once we adopt the basic premise of the Supreme Court's reasoning in the present case, it would be analytically incorrect to continue the traditional differentiation between foreign arbitral judgment and foreign arbitral awards. In other words, when we hold that the original cause of action has no "relevance" to the foreign judgment construed as a cause of action we have also to hold that the foreign arbitral awards equally suffer from similar lack of relevance as the original cause of action, traditional and rather obvious differences between the two notwithstanding.

We would also like to emphasize that the analysis of enforceability of foreign judgments in terms of cause of action obscures the policy choice that the Court is making both from the court itself and the commentators on the decision.[36] Under the relevant clause of the Letters Patent, the jurisdiction of the Court is discretionary.[37] In addition, the Supreme Court recognized that the present adjudication, not being controlled by any specific treaty or statute, had to be resolved "on the same grounds and circumstances" which prevail in the common law as well as on the "grounds of justice, equity, and good conscience."[38] Even a painstaking scrutiny of the majority opinion fails to disclose the principles or policy preferences which compelled the

35. The awards were held not to meet the finality requirement as we shall see shortly.

36. The type of considerations which ought to weigh with the courts in such a situation are well provided in the analysis by von Mehren and Trautmen, *infra* note 41. The critical *non*-use of the discretion in this case has passed largely unnoticed in the commentation on this case. See *supra* note 5. But see for an illustration of a casual notice *supra* note 20.

37. The Courts are not forbidden to take cognizance of any particular class of cases. On the contrary, when the cause of action has arisen either wholly or in part within the jurisdictional limits the court is entitled to exercise its discretionary power. See *Mulla*, *supra* note 13.

38. *Supra* note 17 at 552.

Court to prefer the present outcome.[39] The tendency of this decision, undoubtedly having great precedent-value, may be to restrict the exercise of discretionary jurisdiction of the High Court in similar future cases.

Finally, the most obvious practical result of this decision will be that foreign arbitral judgments will almost cease to be enforceable in India. In a judicial system, still very much under the yoke of *stare decisis*,[40] it will require a great deal of judicial ingenuity to find basis for departing from the judgment whose language is categorical and whose conclusions are not based on any well articulated considerations of law or policy.[41] Nor, it is apprehended, will it be easy to distinguish future cases from the present one for the reason that the present case is far from being atypical.

Jurisprudentially then we may say that the manipulation of the various meaning of the term cause of action as a decisional device, leading as it does to an obviously unprincipled decision, is at least by one criterion of justice quite unjust. Being policy-blind, it is also unenlightened in terms of rational and progressive administration of justice.[42]

III. Enforcement of the New York Arbitral Awards: The Conflicts Cuisine

Summing up the state of relationship between conflict of laws and the commercial arbitration, Professor David Stern observed that in this area "... either a studied neglect or calculated confusion remains."[42] This statement is as true today as it was in 1952.[43] Whatever be the reasons, it is clear that enforcement of arbitration awards is a much

39. All one finds instead is a dubious reliance on a lone precedent and the paralyzing fascination of the egnimatic notion of "cause of action."

40. The Constitution may itself seem to embody the norm of *stare decisis* in article 141 prescribing that "the law declared by the Supreme Court of India shall be binding on all court sin the territory of India." The seminal infusion by Subba Rao, C.J., of the technique of "prospective overruling" in *Golak Nath* v. *State of Punjab*, A.I.R., 1967 S.C. 1643, however, betokens important future changes. On this see generally, Hooker, "Prospective Overruling in India: *Golak Nath* and After," 9 *J.I.L.I.* 596 (1967).

41. For a most sensitive articulation in recent times of policies involved in recognition of foreign judgments see von Mehren and Trautman at 833-42. The reader is invited to assess the present judgment against the five major policy considerations (on p. 835) deemed relevant by the learned authors, and draw his own conclusions.

42. David Stern, "The Conflict of Laws in Commercial Arbitration," 17 *Law & Cont. Prob.* 567 (1952).

43. This notwithstanding the fact that reeditions of almost all the treaties mentioned by Professor Stern in footnote 2 of the above article have been issued. The only welcome exception in this area is provided by the bilateral studies in private international law published by the Parker School of Foreign and Comparative Law, where despite the brevity of the volumes the subject receives greater attention (in most volumes) than customarily devoted to it in the leading treatises on conflict of laws.

understudied field of conflict of laws.[44] It is in this context that we here emphasize the significance of the present decision as it adds to the corpus of common law cases on the subject and illustrates the difficulties which the Bench and the Bar face with — if indeed not as a result of the defaults of — the publicists in the area.

Had the Arbitration Protocol and Convention Act of 1937, applied to the present case, the New York awards could have been enforced in India as if they were made in India. But since the United States was not a party to the Convention the provisions of this Act designed primarily to give effect to it could not apply here.[45] It was also common ground that the arbitral awards involved here were "valid," the arbitration having been conducted in a fair manner and in accordance with the *lex loci arbitrationes*. The narrow but difficult issue was whether the awards were "final" under the New York law. It is here that doctrinal uncertainties and divisions in scholarly opinion proliferated in the judgments of the Appeal Court and the Supreme Court of India.

(a) Merger, Judgment and Enforcement Order: Conflicts Condiments

One of the main contentions of the appellants was that the awards under question were not "final" within the contemplation of the New York law until the New York Supreme Court so declared by a judgment. But very ingeniously they further proceeded to argue that if such a judgment, was delivered then the awards become merged with the judgment which of course they contended was unenforceable in India. They further relied on one of the conflict niceties and asserted that the New York judgment was different from an enforcement order, the difference being that an enforcement order will not merge, but rather rejuvenate, the awards.

In many interesting ways this last contention was uniformly, and happily, rejected at all levels of judicial opinion. The Appeal Court at Bombay adopted simple reasoning. The learned Justices there held that this distinction between enforcement orders and judgments cannot survive. They felt that if it be the case that a judgment makes

44. No doubt a prime reason is infrequency of litigation on the subject and the advent of many multilateral and bilateral treaties pertaining to the enforcement of awards. Nonetheless there does not appear to be any self-evident reason for the lack of systematic and rational study of such decisional law and methodologies as are available. Later in the note (§ IV, *infra*) we venture to consider some aspects of the bewildering decisional techniques generally employed by courts.

45. Unification of Law through multilateral treaties has progressed significantly in this area. The lack of adherence to these conventions, despite weighty considerations suggesting acceptance thereof by the United States, is partially mitigated by bilateral treaties between the United States and other countries. Studying closely the sections on arbitration in the Parker School Bilateral Studies on Private International Law, we find that the U.S. has entered into a large number of bilateral treaties, containing provisions regarding mutual recognition of arbitral awards. See also note 66 *infra*.

the award enforceable, then the judgment gives rise to the very enforceability of the award in question. Therefore it would not be correct to assert that the awards in such a case would merge with the judgment.[46] The majority of Supreme Court merely noted the inconclusive state of doctrinal and judicial authority in the field and held that this would be sufficient to dismiss this position of the appellants.[47] Mr. Justice Subba Rao adopted a more functional approach in his dissenting opinion and disregarding the observations in Dicey to the contrary as merely expressive of "the author's doubts,"[48] held that distinction between an enforcement order and a judgment was meaningless. He observed :

> If an award gets vitality by a mere enforcement order, it gets a higher sanctity by the court of its origin making a judgment on it. Both of them afford a guarantee of its vitality and enforceability in the country of its origin and, *therefore, a different country can safely act upon it.*[48]

Thus the learned Judge reasoned within the context of the present case without shadow-boxing with doctrines. The problem was not the distinction between enforcement orders and judgments in abstract, and its possible meanings also in abstract, but the meaning of the suggested distinction in the present case where the recognizing court is called upon to make a determination of the enforceability and finality of awards given abroad. In this context (as also generally) the learned Judge's above view is unimpeachable.

Surely there seems little reason in mechanically perpetuating a technical differentiation between a foreign judicial enforcement order

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46. See *supra* note 7 at 417 para 5. The Court here cited an interesting and most relevant Privy Council decision on the subject. In *Oppenheim and Co.* v. *Mohammed Hanef*, A.I.R. 1922 P.C. 120 the appellants sought to enforce a judgment of the High Court of Justice in London confirming on arbitral judgment or in the alternation the award itself. The trial Court in Madras decided the suit in favour of the plaintiffs on the basis of the award. This decision was reversed by an Appeal Court, and the appellants came before the Privy Council. The respondents did not participate in the proceedings but the Privy Council nonetheless uphled the decision of the trial court of Madras on the ground that the award was enforceable.

The Appeal Court citing the above case observed:

> The Privy Council had before it an award which [according to the Indian Corporation in the instant case] was merged in the foreign judgment and still the judgment was given on the award. The Privy Council had before it an award which was not enforceable as such because a decree on the award had been taken before the High Court of Justice in London. Both the features on which emphasis has been placed...were present in the case of the Privy Council. Notwithstanding these features the Privy Council gave the plaintiffs a decree on the award.

Supra note 7 at 417-18.

47. A.I.R. 1964 S.C. 538 at 558-59.

48. The learned Justice referred to *Dicey on Conflict of Laws* 1059 (Morris *et al* ed., 7th edn., 1958). The much more concise discussion in the eighth edition is also more guarded on this point. See Dicey-Morris, *The Conflict of Laws* 1055-56 (8th edn. 1967).

and a foreign judgment, the latter occasioning merger of the awards and the former retaining alive such awards. As Mr. Justice Subba Rao correctly pointed out both these provide the awards with some degree of judicial sanctity, in turn enabling the recognizing forum to act thereupon without apprehensions of causing injustice to parties involved. It also follows that any "merger" of the awards with the judgment occurs only within the rendering jurisdiction and does not apply to the recognizing jurisdiction. Thus, while in New York probably only the New York Supreme Courts' judgment would have been enforceable, and the awards would not have furnished a cause of action, in Bombay and New Delhi both the awards and the original foreign judgment could provide separate and alternate causes of action. Merger of causes of action need not traverse with the causes of action; they are not so inseparable, and therefore also less malefic, as the Witch and her broom-stick.

(b) *Finality*: *The Table d'hôte*

The majority of the Supreme Court, however, proceeded to judge the requirement for finality by a formal interpretation of the provisions of the New York law and sought support in a long English precedent. In a superficial deference to party autonomy, the Court recognized that the rules of the arbitration governing the present awards did provide for their finality but immediately proceeded to observe:

> ... that rule is no more than a term of the contract between the parties and must be subject to the laws of the State.[50]

By a citation of the relevant provisions of the New York arbitration law the Court seemed to be satisfied that the awards were not final under the law since a judgment was required and that the Court could vacate the award on the enumerated grounds.[51] The Court further felt that under the New York law "... the award as such can never be enforced. What is enforceable is the judgment."[52] A final award

49. *Supra* note 47 at 543. (Emphasis added).

50. The full statement of the Court is as follows:

> No doubt the American rule also says that the award shall become final and binding on the parties but whether it takes away the jurisdiction of the Court to go behind its finality will have to be ascertained by reference to the laws of New York State. For, that rule is no more than a term of contract between the parties and must be subject to the laws of the State.

Supra note 47 at 557.

51. The reference here was to the article 84 of the New York Civil Practice Act, and the sections specially cited were 1461, 1462, 1462-a, 1463 and 1466. These in general provide for elaborate judicial review of arbitral awards prior to their judicial confirmation.

The New York arbitration law has since undergone a revision, though the above provisions do not seem to have been materially altered. For the text of the amended law, see "The New York Arbitration Law: Article 75, Civil Practice Law and Rules; Commentary and Text," 18 *Arbitration Journal* 132 (1963).

52. See *supra* note 47 at 558.

according to the Court's analysis ceased to be an award and became a judgment. The surviving cause of action, held the Court would then be the foreign judgment and not the award. This neat semi-logic thus amounts to the following set of propositions:

(i) In order to be enforceable the award must be final.

(ii) Under the New York law the award becomes final only through a judgment of the Court.

(iii) But then what remains is the judgment and not the award.

In arriving at these conclusions, the Court sought to negate the relevance of the well-known *Union Nationale* case.[53] In that case the Court of Appeals in England held that a Danish award, made pursuant to an arbitration agreement entered into at Paris, was enforceable under the Arbitration Act, 1950, though that award in absence of a Danish judgment could not be enforced in Denmark. The Indian Supreme Court acknowledged that the Court of Appeals here made a distinction between 'finality' and 'enforceability' of awards, but immediately proceeded to draw a distinction between the Danish law (as it *thought* was interpreted before and by Lord Evershed) in that case and the New York law in the present case.[54]

That the Indian Supreme Court misconstrued this case is evidenced from the very manner in which the case was cited. We are assured that the "... facts of the case are succintly summarised in the head-note and we can do no better than reproduce its relevant portion."[55] Perhaps, nothing better could be done when we want to "succinctly summarise" a case than citing a head-note: but such a procedure is clearly not adequate when we want to derive an insight into the decision which is relevant to our own.

For example, the head-note cannot be expected to spell out fully, if at all, the significance of the fact that the enforcement of the Danish award was sought under the statutory framework which provided for a reciprocal enforcement of arbitral awards.[56] Nor of course can the

53. *Union Nationale des Cooperatives Agricoles De Cereales* v. *Robert Catterall & Co. Ltd.*, [1959] 2 Q.B. 44,

54. *Supra* note 47 at 556-57.

55. *Id.* at 556.

56. And this is indeed a crucial difference between the Indian and the English cases. In the latter, enforcement in England of a Danish award was resisted on the ground that it was not enforceable in Denmark. Lord Evershed, and Lord Pearce, both preferred to determine the "finality" requirement under section 37(1)(*d*) of the Arbitration Act, 1950. Section 37 of that Act lays down five conditions for enforcement of foreign awards. One of the conditions, relevant here, is expressed by sub-section (1)(*d*) which prescribes that a foreign award, in order be enforceable in England, must have "become final in the country where it was made." Section 39 of the Act also refers to finality.

> For the purpose of this part of this Act, an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made. (*Contd.*)

note tell us anything about the contextual significance of the distinction made in that judgment between the "finality" as against the "enforceability" of the awards.[57] Least of all can such a citation accomplish the necessary judicial feat of stating and weighing the significance of the similarities and differences in the situations presented by the Danish award and the New York awards. And yet all this is necessary even when the case is cited not as a "precedent" in the meaningless way some courts still do cite cases, but as a useful tool for the present decisional outcome.

Be that as it may, the distinction between finality and enforceability of foreign awards made in the *Union Nationale* case was not such an absolute one as held by the present judgment.

It is true that the arbitration rules of the Copenhagen Chamber contemplated a finality for the awards which were deemed, save for formal defects, to be immune from judicial review. But from this to infer that in a Danish Court the defendant can complain that the award "suffered from formal defects *and nothing else*"[58] is to overgeneralize the cautious approach of the Court of Appeals and to interpret the Danish law without the necessary guidance from experts on that law. This point is surely important because the judgment of

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Lord Evershed did not consider section 39 as being "a definition or as meaning that in the absence of proceedings for contesting the validity of an award, an award must be final..." and characterized a subsumption of this section in Russell's *Treatise on Arbitraiton* under the rubric "Meaning of 'final award'," as an overstatement. While noting this criticism, Walton, the editor of the seventeeth edition of *Russell*, still retains the same rubric, somewhat inconsistently. See *Russell on Arbitration* 394 (17th edn. 1963). The learned editor of *Russell* also fails too take into account that on p. 54 of the judgment Lord Evershed *did* recognize the other meaning of the finality *i.e.* no formal action had been instituted in Denmark to challenge the award.

In the Indian case of course this statutory background was absent. If however the Indian Supreme Court relied on the possibility (unarticulated) that article 37(1)(*d*) prescribing determination of finality requirement under *lex loci arbitrationes* as expressive of a common law principle, (which we think it is) it is all the more surprizing that the Court did not arrive at the same outcome as that of the British Court of Appeals.

57. Lord Evershed clearly stated

> It (*i.e.* award) is no doubt not enforceable directly in Denmark or anywhere else; but it is final...within the contemplation of this section

Supra note 53 at 55.

It is clear that finality was a matter to be judged by the Danish law; and enforceability by the English law.

Likewise, it is clear that for the *State of New York* finality of the awards was not complete till a judicial confirmation. But for a recognizing forum the award themselves became final by the very judgment confirming them. And of course it is meaningless to say that by the very reason that the award becomes final it ceases to be an award but becomes a judgment and the recognizing forum can then take into account only the judgment. Sheer confusion between the meaning of these terms irrespective their context can justify such a conclusion. See infra §IV of this paper.

58. See *supra* note 47 at 557.

finality was made by the Court of Appeals on the view (specifically stated by Lord Evershed) that:

> I agree...that the language...(of the Rules) is not limited to defects on the face of the award, mere matters of form; *it will extend to compliance with the rules under which the award was given.*[59]

The determining factors of the *Union Nationale* case would then seem to be these: (i) ascertainment of finality requirement under section 37(1)(*d*) of the (British) Arbitration Act, 1950; (ii) the conformity of the Danish award to the *lex loci arbitrationes*; (iii) the general equivalance of foreign (*i.e.* Convention countries) awards with the English awards under the structure of Arbitration Convention and (iv) lack of any challange — formal or otherwise — to the Danish award in Denmark.[60] Of these considerations (i) and (iii) did not apply in the present case as the United States was not a Convention country;[61] (iii) and (iv) which were both relevant were however divested of their relevance by the purely formal and mechanical reading of the finality requirement in the New York arbitration law.

IV. Validity, Finality and Enforceability of Awards: A Philosophical Dessert

The real perlexity arises in the present case, and generally in the field of enforcement of arbitral awards because of indiscriminate mingling of three distinct, though related, notions — validity, finality, and enforceability. Confusion is compounded when out of excessive respect to precedents, and literal fidelity to previous decisions, these essentially policy-orientating devices are mistaken for inflexible sets of legal rules.

The jurisprudential nightmare associated with the term "validity" haunts us as much in the general consideration of a "valid"

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59. *Supra* note 53 at 55. (Emphasis added).

The 15th paragraph of the rules of the Arbitration Chamber of Copehhagen categorically stated:

> By submitting to the judgment and award made by the committee, the parties have unconditionally subjected themselves to the committee's (including appeal court's) decision both in substance and in form, and this decision shall not in any way be overruled and set aside by the law courts...

Supra note 53 at 49.

To say the least it is doubtful if Danish courts will agree to such absolute prorogation. At any rate, the discussion of this aspect of the matter is far too sketchy in the English decision to warrant an inference that such prorogation will be tolerated by Danish Court. And yet this is exactly how the majority of the Indian Supreme Court chose to read that case.

60. The last consideration mentioned in the text had only a marginal relevance in the Court of Appeal's verdict. Nonetheless, it is intensely relevant to the Indian decision; for prescinding considerations as to the scope of judicial review of arbitral awards in Denmark, the stark fact remains that the Indian Corporation had not availed of the vast powers of judicial review of awards in New York at the time of the New York proceedings.

61. See *supra* note 45.

law as in the specific determination of the "valid" award. Just as a law according to some jurisprudents may be valid without being effective and both valid and effective without being necessarily just,[62] so also it seems that an award may be valid without being "final" and can be both "valid" and "final" without being "enforceable." Surely when Lord Evershed referring to only one aspect of this confusion said that these are "somewhat philosophical considerations" he was putting the matter in a masterpiece of judicial understatement.[63]

A conflicts scholar however is in a relatively comfortable position even with regard to these "philosophical considerations" because the problem like the entire subject of conflict of laws arises (and we may add can be met) because of multiplicity of adjudicatory forums. Accordingly what is needed is not metaphysics in the Grand Style but really a Wittgenstinian linguistic analysis. These terms, we may simply say, mean differently in different language games of law.[64] When the language game is that of a municipal legal order they mean something entirely different than when the language game is one of the law of conflicts of laws. To confuse the two is to create a problem where none ought to be and what Gilbert Ryle has called to so aptly a "category mistake."[65]

Thus, within the municipal law sphere, an arbitral award must be both valid and final to be enforceable. Validity would normally refer to the observance of rules of arbitration agreement and in general a compliance with the norms of natural justice or fairness in the conduct of arbitration proceedings. Finality of a valid arbitral award would normally depend on the judicial imprimatur being placed on the award either by way of simple registration or enforcement order or judgment. An arbitral award which can be thus baptised as both valid and final will be enforceable. In other words validity and finality standing alone are *necessary* but not *sufficient* conditions for enforceability of an award, but together are both necessary and sufficient conditions of enforceability.

Likewise, the municipal legal order may not see any rationale in keeping alive two distinct causes of action. Hence, when an award

62. See, Christie, "The Notion of Validity in Modern Jurisprudence," 48 *Minn. L. Rev.* 1049 (1964) and the material there cited.

63. *Supra* note 53 at 54-55.

He was here referring to a passage from a book by Bernt Hjejle, *Frivillig Voldgift* commencing with the sentence :

> An arbitral award need not be final because it is valid (but if it has become final it must of course be considered as valid).

63a. Dicey-Morris, for examples, confidently submit that these "familiar" difficulties are not "insuperable." See their *The Conflict of Laws* 1355 (8th edn. 1967).

64. See generally Wittgenstein, *Philosopical Investigations* (1593: Anscombe trs); Strawson, "Review of Wittegenstein's, *Philosophical Investigations*," LXIII *Mind* 70-99 (1954). Also see for a lucid exposition, Hartnack, *Wittgenstein and Modern Philosophy* (1965: Anchor Books)

65. See G. Ryle, *Concept of Mind* 16-23 (1949).

becomes enforceable (being valid and final) it is only the judgment (or order) which can be enforced within the legal order and not the awards or the cause of action giving rise to the awards. In technical terms, both the original cause of action and the awards based thereon merge with such judgment or order.

When however we approach the conflictual legal order, it becomes necessary to remind ourselves constantly that these terms are in their origin *non*-conflict terms.[65a] Thus, in conflictual order, while the criterion of validity remain the same as in municipal order, the character of validity (*i.e.*, its legal function) may assume a different form. It *may* become both a necessary and a sufficient condition for enforcement in the recognizing forum. A forum recognizing the doctrine of party autonomy as a sovereign principle may act on a valid arbitral award as binding on parties, irrespective of the fact that it has or has not been translated into finality (and thus enforceability) in the legal system of its rendition. This, we suggest, is the *raison de etre* of treating arbitral awards alive as causes of action as distinct from the judgments thereon or the "original" causes of actions giving rise to both awards and judgments. This position would also seem to be virtually the basis of the arbitral convention under which awards given within the legal regimes of the signatory countries are directly enforceable *inter se*.[66]

But even in conflictual systems, inspite of the due recognition to non-adhesion party autonomy situations,[67] the recognizing forum still

66. This is surely the position with regard to the Convention on the Recognition and Enforcement of Foresgn Arbitral Awards, adopted by the United Nations Conference on International Commercial Arbitration on June 10, 1958. See Article V(e) of the Convention. For the text and excellent critical appraisal see Domke, "The United Nations Conference on International Commercial Arbitration," 59 *Am. Jl. In'tl L.* 414 esp. at 416 and 420-25 (for the text).

The formulation of finality requirement by the U.N. convention, perhaps, raises as many problems, as it solves. Nonetheless, it decisively rejects the proposition that awards should be "final and operative" in the rendering state in order to be enforceable in other convention states. On this see, Quigley, "Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Arbitral Awards," 70 *Yale L. J.* 1049, at 1069-70 (1960-61). And see also for the summarized comments of various delegations on this provision, Contini, "International Commercial Arbitration..." 8 *Am. Jl. Comp. L.* 283, 303-04 (1959).

The position under article 1(e) of the Geneva Convention on the Execution of Foreign Arbitral Awards, adopted by India by the § 7(d) of the Arbitration (Protocol and Convention) Act (VI of 1937) and by Britain by § 37 of the Arbitration Act, 1950, appears to be in doubt. There appear to have been no decisions in India on this point; but we consider that the *Union Nationale* case does establish the proposition that in absence of contentious proceedings on the award in the country of rendition, such award will be considered final. See *supra* notes 53-60 *Contra*: *Russell, supra* note 56, and Dicey-Morris, *The Conflict of Laws* 1062-63 (1967).

67. See generally Ehrenzweig, *Treatise* 453-58; Baxi, "Validity of 'Professio Juris' Stipulations in Maritime Passage Contracts: A study in American Conflicts Law," 4 *Houston L. Rev.* 657 (1967).

want to ensure full protection of the defendant, particularly (as is often so) if the defendant belongs to the legal community of the recognizing forum. This is ensured, first and foremost by keeping the original cause of action alive notwithstanding the arbitral awards. But, second, and this is important from our point of view, by providing that the valid awards presented for recognition to the forum court should also be final. Finality in this sense means judicial approval by the forum where awards are first rendered in accordance with the arbitration agreement or contract.[68]

But such judicial approval may occur in different modalities. The Court may in some cases be required by domestic law only to enquire into the fairness of arbitral proceedings and not to reanalyze the awards on merits. When in such a situation the court passes either an enforcement order or a judgment, it may only express its views on the fairness of the proceedings. Of course, even such an approval may indirectly impinge on the outcome of the arbitral proceedings in that if certain norms of fairness or natural justice or certain rules of contract are not observed the awards can be set aside.

Even then this situation differs from one in which the court can pronounce directly on the merits of the awards. Where a particular legal system requires the courts to reascertain the validity of the awards on merits, the awards cannot be regarded as final in absence of a judicial concurrence therewith. It is even doubtful in a situation where this specificity of norms obtains whether the arbitral awards can at all be called valid prior to judicial review.[69]

Thus then "finality" may refer to any of the above situations and the recognizing forum has to take these differences into account. In any given situation, when finality of the awards is impugned the recognizing forum should first refer to the policies of the finality-bestowing foreign forum. If the policy of that forum is orientated

68. We doubt whether as a matter of general approach, this requirement should be considered merely as an "additional formality" as Mr. Govindraj has apparently done. He states :

> The additional formality of a further ratification or confirmation of the awards by a judgment as required by the law of New York could neither affect their validity nor make them any the less binding as between the parties. *Conclusiveness of the awards may be presumed irrerpective of the formality of a further ratification by lex fori*, provided the awards satisfy the conditions of submission to arbitration, conduct of arbitration in accordance with the submission, and, finally, validity by the law of the forum.

Govindraj, *supra* note 5, at 1467-68, (Emphasis added.)

But this formulation is circular. The last criterion validity by law of forum—may precisely be open to determination by judicial review and in that case validity is *judgment-dependent* and as such *not* a formality. Besides to take it for granted that such a requirement was a formality according to the New York law or (as the statement above seems to imply) should always be so presumptively regarded is erroneous.

69. Conversly, the recognizing forum may require that that not merely no proceedings are pending in the foreign court but also that none may be brought there. This is a prime requirement for recognttion of foreign awards in the Swedish law. See H. Nial *American-Swedih Private International Law* 73 (1965).

towards a substantive reexamination of the awards, the recognizing forum should not regard the awards as final till evidence of such reexamination is furnished. If however only judicial approval is required (and secured) the awards should be treated as final both in the national as well conflictual meanings, and this should be done even when the awards are rendered *ex parte* as in the case under analysis.

Weighty considerations of policy underlie this approach. There is no doubt that in arbitral conflicts situations a recognizing forum must be other-regarding and not just self-regarding. The entire rationale of arbitration in trade and commerce is one of providing the parties with both expert and expeditious modes of settling disputes arising out of business transactions. Recourse to arbitration also implies economy of the institutional judicial effort for the legal systems concerned. International trade and commerce between nations depend to a very large part on the expectation of judicial respect to arbitral actions and outcomes in crisis situations symbolized by litigation over arbitral awards.

And these considerations become all the more important in an *ex parte* situation where owing to the impregnable barriers of national jurisdictions, one of the parties may totally place itself beyond the reach of the other by availing of these barriers. Recognizing forums cannot and should not serve as immunizing agents for such behaviour on the part of the defaulting party. Thus, the requirement of finality is an important constituent of fairness to the parties involved.

Enforceability also acquires a different connotation when used in the conflict situations. Thus, as we have seen, in a municipal situation it would be unusual to find an arbitral award which is both valid and final but which cannot be enforced. But in conflict situations this would be most usual and common. More often than not the enforcement of an award occurs in the home country of the defendant, one of the parties to a contract. The enforceability requirement then carries a reference to the legal policies of the recognizing forum just as finality requirement demands obeisance to the rendering forum.

But to say that an award not enforceable in the rendering forum is equally uneforceable, *and only for that reason,* in the recognizing forum is to confuse the meaning of enforceability in the domestic situation and in the conflicts situation, these being radically different. For conflicts purposes, once the validity and the finality requirements are met enforceability or the lack of it in the rendering forum ceases to be a significant consideration.

When, however, courts insist on treating enforceability in the rendering forum as an equally important consideration as validity and finality of awards, a curious conflict between the rules and doctrines of conflict of laws arises, as in the present case. And whatever be the decisional outcome of this conflict, it is bound to be unsatisfactory, since the confiict is rather a pseudo-conflict arising from misunderstanding of the domestic and conflicts meanings of validity, finality, and enforceability. To examine enforceability of the awards

in the rendering forum in the *domestic* sense is of necessity to transpose the domestic conclusion of merger of enforceable awards with the domestic judgment to the international level. This in substance was what the Supreme Court of India did.

In fact, the Supreme Court did more and worse. It overlooked that the New York rules on the subject conferred a discretion on the New York Supreme Court to examine the New York arbitral awards on merits before pronouncing a judgment on their finality. The New York law also provided an opportunity to the Indian defendants to impeach the awards. And the New York Supreme Court confirmed the awards with the provisions of law in view. Just because there exist on the statute books of New York provisions signifying opportunities for impeachment of arbitral awards prior to their judicial approval, it cannot be said that all arbitral awards confirmed by the New York *ex parte* are therefore non-final until these rules are actually availed of according to the law of New York. Provisions of law in themselves facilitate decisional outcomes; they are *not* the outcomes. Pronouncement of finality in the teeth of provisions for judicial review can be taken to mean nothing less than the approval by the legal order of what has transpired during, and what has been accomplished by, the arbitral proceedings under its panoply.

The Indian Supreme Court also overlooked yet another important policy dimension of the case. An Indian petitioner arriving in the courtrooms of New York with an Indian arbitral award confirmed by an Indian court of law will, given jurisdiction by the New York courts, undoubtedly receive recognition of judgment and awards. In return, the legal community of New York state can expect similar treatment of the New York petitioners in the Indian courtrooms. This expectation they would consider all the more justified in view of the generally liberal policy of the New York courts extending recognition to foreign judgments regardless even of reciprocity.

Viewed in this policy context, a moment's reflection would show that the present decision may well bring about an unexpected and very regrettable chain reaction within the decisional law of the foreign countries leading to a situation where the foreign courts may be asked to withhold recognition and enforcement to Indian arbitral awards and judgments on the basis of total lack of reciprocity that this decision so clearly leads to.[70] The argument that India is in no danger — immediate or remote — of becoming a centre of commercial arbitration, and has consequently little to fear by way of reprisals, can only succeed if Indian courts are able to accomplish a perfect instilutionalization of mechanical jurisprudence. Happily enough, this prospect is remote and it is to the creative Indian conflicts jurisprudence of the future that this comment is dedicated.

*Upendra Baxi**

70. The fact that the Court has expressly reaffirmed the power of Indian Courts to enforce *final* awards (*supra* note 47 at 558) may appear to mitigate this dire prospect, at least partially. But with this affirmation is also bequeathed the rich, but scarcely enriching, confusion about the meaning of "finality."

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