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GOODBYE TO UNIFICATION ? THE INDIAN SUPREME COURT AND THE UNITED NATIONS ARBITRATION CONVENTION

*Upendra Baxi**

I. Introduction

INTERNATIONAL CONVENTIONS seeking to attain uniform legal and conflictual regime are invariably confronted with many characteristic problems. One of the most persistent problems arises from the fact that consensus around basic policies among states with differing legal cultures and systems is attainable only at the cost of reserving for the ratifying states some latitude for variation of obligations. Even when such privileges are ostensibly not provided at all, they lurk behind the verbal formulae which strive to embody the measure of consensus attained.[1]

Quite apart from the problems thus arising, the need of translating the authentic treaty text (or texts) into the national legal language proves often adequate to breed baffling problems concerning meaning and scope of internationally assumed obligations.[2] Moreover, the implementation of a treaty through the enabling legislation provides scope for manifold (intentional and unintentional) variations of the treaty text and phraseology. Typically, at least in the common law countries, the legislative draftsman is conditioned by domestic models of legislative drafting; and these naturally intrude on the task of preparing an international convention for legislation. Typically, the legislative draftsman, interacting uneasily between the national culture of drafting and the quite different traditions surrounding formulations of international convention, seeks to make best of the job by appending the text of the convention as a schedule to the Bill. Typically again, these kinds of Bills receive little or no legislative attention, being in some sense "non-political" matters. And the device of scheduling the text of an international treaty to the proposed law helps to quiet any doubts which may

*B.A., LL.M. (Bombay), LL.M., J.S.D. (Berkeley, California); Professor of Law, University of Delhi.

1. See, for a survey of some of these problems, U. Baxi, Unification of Private Maritime International Law Through Treaties—An Assessment 14 *Indian Yearbook of International Affairs* 72-161 esp. 72-83, 151-61 (1966) and the literature there cited. See also O.C. Giles, *Uniform Commercial Law* 51-68 (1970).

2. See, *e.g.*, *C.A. Corocraft* v. *Pan American Airways*, [1969] 1 All E.R. 80; see also *infra* note 34, for an illustration closer to the present study.

otherwise be raised concerning fidelity of the executive to internationally assumed obligations.

But when the scheduled convention varies in phraseology from the legislative text purporting to enact it, difficult problems of law and policy begin to arise for the national courts. The common law culture has developed rules of statutory construction to make the judicial task easier; but this culture is shaped by the historically established supremacy of the legislature in England over other branches of government, including courts. And this historical conditioning makes inevitable the search for "the legislative intention", when the statutory formulae are seen to be ambiguous. Although it is relatively easy to establish in most cases what the overall purpose of the legislature was in enacting a statute, it is difficult in most situations to the point of impossibility, to discover the *intention* behind specific legislative formulations.[3]

The judicial search for "the" legislative intention is usually conscientious. And the search is certainly commendable if undertaken as an historical excursion informing the present and future interpretative efforts. But in the final analysis judicial statements purporting to fix "the" legislative intention do no more than convey the simply ineluctable policy decisions of the judges. This low visibility of policy decisions thus arising is specially troublesome for the implementation of international conventions, as it often interposes yet another obstacle to the attainment of internationally formulated desirable and desired objectives.

And it is indeed ironical that, both at the judicial and legislative drafting levels, the "colonial" legal culture should persist in the intensely nationalistic ex-colonial countries, like India which by its constitutional structure has abandoned the English doctrine of parliamentary sovereignty. The present study of a recent—and a very retrograde—Indian Supreme Court decision analyzes in the main the viccissitudes of international legislative efforts in national courts from these general perspectives. The decision in *V/O Tractoro-export* v. *Tarapore & Co.*[4] illustrates how an unconscious parochial concern for the value of national sovereignty can periclitate the modest progress sought to be made in the miniscule, but still important, area of conflictual unification of laws relating to international arbitral process.

II. The problem

M/s Tarapore and Co. (an Indian company) entered into a contract in 1965 with M/s Tractoroexport (a Russian Company) for the supply of earth moving equipment for the value of rupees 6,609,372. Clause 13 of the contract provided for "amicable settlement" of disputes between

3. On the problematics of "intention-hunting" see *e.g.* G.C. MacCallum, Jr., "Legislative Intent", *Essays in Legal Philosophy* (Summer ed.) 237-73 (1968).

4. A.I.R. 1971 S.C. 1. Hereinafter referred to as *Tractoroexport*. A.V. Grover and J.C. Shah, JJ., constituted the majority, with V. Ramaswami, J., dissenting.

the parties, failing which all disputes were to be "submitted without application to the ordinary courts for settlement by Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce in Moscow".[5] The arbitration was to be governed by the rules of procedure of the above named commission. The contracting parties further agreed to treat arbitration awards under this clause to be "final and binding".[6]

Under the contract, the Indian company opened a letter of credit for the entire value of the equipment negotiable through the Bank of Foreign Trade of U.S.S.R. at Moscow. Twenty-five per cent of the total value was payable in the first instance, and the remainder seventy-five per cent was payable at the expiry of one year from the date of first payment.

The Indian company raised objections to certain machinery supplied by Tractoroexport as not conforming to the contractual specifications. Tractoroexport, on the other hand, demanded a modification of the letter of credit to the extent of about 250,000 rupees, owing to the devaluation of the Indian currency in June 1966 by 57.48%. The Indian company instituted a suit in the Madras High Court on the basis of its allegations of defective equipment in breach of contract and obtained an *ex-parte* injunction against Tractoroexport restraining them from negotiating further the original letter of credit. The suit was withdrawn by the Indian company subsequently in view of the mutual agreement to settle the dispute amicably in terms of clause 13 of the contract.[7]

Negotiations did not, however, prove productive when the time for the payment of the seventy-five per cent of the value of equipment approached. The Indian company instituted at this stage another suit for breach of contract and damages in the Madras High Court and once again obtained an *ex-parte* injunction, restraining Tractoroexport from negotiating the letter of credit. Tractoroexport, on the other hand, initiated arbitral proceedings before the stipulated commission in Moscow under proper notice to the Indian company. Tractoroexport applied to the Madras High Court for a stay of suit under section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961.[8] Not merely was Tractoroexport's application

5. *Tractoroexport* at 12-13.
6. *Ibid.*
7. *Id.* at 3-4, 12-13.
8. Section 3 of the Foreign Awards (Recognition and Enforcement) Act reads: Notwithstanding anything contained in the Arbitration Act, 1940 or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, 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.

denied, but also the court allowed the counter-application of the Indian company that the Soviet company be restrained by injunction from participating in arbitral proceedings in Moscow. From this ruling, the Soviet company appealed to the Indian Supreme Court.[9]

Article II of the convention, in effect, obligates the contracting states to recognize an agreement between parties "to submit to arbitration" all or any of the "differences" that may arise out of their legal relationship provided that the subject-matter is "capable of settlement by arbitration". Sub-clause (2) of article II defines the term "agreement" inclusively, as referring to an "arbitral clause in a contract or an arbitration agreement". Sub-clause (3) of article II directs the courts of the contracting states to grant stay of judicial proceedings and refer "the parties to abitration" unless the agreement to arbitrate was "null and void, inoperative or incapable of being performed".[10]

The Indian Foreign Awards (Recognition and Enforcement) Act, 1961, was enacted by the Parliament with a view to giving effect to the 1958 New York Convention.[11] The text of the convention is appended as a schedule to the Act. In enacting a provision concerning the "stay" of the judicial proceedings (corresponding to article II(3) of the convention) section 3 of the Indian Act requires Indian courts to grant stay of judicial proceedings upon request by any party which seeks arbitral settlement of the dispute in accordance with "a submission made in pursuance of an agreement to which the convention set forth in the Schedule applies."[12]

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9. The ruling of the single judge Ramamurthi, J., was questioned before the Division Bench of the Madras High Court which affirmed the ruling, allowing leave to appeal to the Supreme Court.

10. Art. II of the 1958 New York Convention formulated under the United Nations auspices reads :

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

11. For an account of this convention see M. Domke, United Nations Conference on International Commercial Arbitration 53 *Am. J. Int. L.* 414 (1959); P. Contini, "International Commercial Arbitration" 8 *Am. J. Comp. L.* 283 (1959); L. V. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 70 *Yale L.J.* 1049 (1961); E.J. Cohn, "The Fifth Report of the Private International Law Committee" 25 *Mod. L.R.* 449 (1962).

For studies of the Geneva Protocol and Convention, see E.G. Lorenzen, *Selected Articles on the Conflict of Laws* 506 (1947); and article cited *infra* note 34.

12. See *supra* note 8.

The dispute before the Supreme Court raised four principal issues of law and policy. The first question concerned the interpretation of the formula "submission made in pursuance of the agreement" in the context of the stay of judicial proceedings. What did the terms "submission" and "agreement" mean ? Did the term "agreement" refer to an agreement to arbitrate or to a contract, of which arbitral clause was merely one part ? Did "submission" mean merely an agreement to refer the disputes to arbitration without more or actual submission to arbitration, in the sense of accepting and nominating the arbitrators and participating in arbitral processes ? The second and related question concerned the approach the court should adopt towards interpretation of a statute which was enacted by the Parliament to implement an international convention. Should the court, in case of ambiguities in the statute, be decisively guided by the history of judicial interpretation of statutary formulas even when it thwarts the implementation of an eminently desirable international treaty ? Or should the court effectuate the treaty by resolving a statutory ambiguity by interpretation favouring implementation of its purposes and provisions ? Questions concerning the role of domestic courts in the promotion and strengthening of international law become deeply relevant.

And the third major question was whether it was proper, under more or less established standards of international behaviour, for the court to grant injunctive relief restraining the Russian company from taking proceedings authorized by the contract before the designated arbitral tribunal. Allied with this is of course the perennial conflicts question of the scope of judicial deference to party autonomy

Although we shall follow the court in its answer to some of these questions, including the principal question concerning the construction of the term "submission" in the statutory formula, the main submission of this paper is that the decision of the court can be seen to rest on narrower grounds than the range of the above issues canvassed in the judgment might suggest. And when the quite specific and narrow grounds of the decision are unearthed from the judicial verbiage on the meaning of and history of the statutory formula the decision can be regarded as reinforcing the letter and spirit of the 1958 New York Convention rather than frustrating it. [13]

III. Submission

The appellant Russian company contended that the term "submission" in the formula "submission made in pursuance of an agreement" meant a decision embodied in the contract to settle all disputes through arbitration, whereas the term "agreement" referred to the entire agreement, of which the arbitral clause (submission) was only a part. The respondent, Indian company, on the other hand, argued that in the context the word "submission" must mean only actual submission by parties to

13. See part VI of this paper.

arbitration and that the term "agreement" similarly denoted not the entire commercial contract but only that part of it which embodied an agreement to have recourse to arbitration for the settlement of contractual disputes. They further contended that if "submission" in the formula "submission made in pursuance of an agreement" indeed referred to an arbitral clause in the contract and nothing more, then the formula itself became "meaningless and unintelligible".[14] The majority of the Supreme Court agreed with the respondent's contentions.

Justice Grover (for the majority) finds thus because if "submission" merely refers to arbitral clause or agreement then it becomes "difficult to comprehend why the Legislature should have used the words which follow the term 'submission', namely 'made in pursuance of an agreement'."[15] One answer to this question can be that the expression "agreement to which the Convention set forth in the Schedule applies" refers *not* to arbitral agreement or clause but to the entire commercial contract of which such an agreement or clause is a part. But to accept this answer is, according to Justice Grover, merely to shift the problem of otioseness of the words used by the legislature to the phrase "made in pursuance of". These words "convey no sense"[16] if by agreement were construed to mean "commercial contract". Moreover, the term "agreement" cannot bear this wide meaning in the second part of section 3 of the Indian Act "even by stretching the language".[17] That part reads as follows :

> [T]he 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 parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

But at a purely analytical level at which they are made, these arguments are, with respect, scarcely conclusive. First, as to "submission", the 1958 New York Convention and the Indian Act contemplate a specific kind of submission. Such submission must be an *agreement in writing*. It must relate to any or all, past or future, differences arising between parties "in respect of defined legal relationships, whether contractual or not". And finally such agreement must pertain to a "subject-matter capable of settlement by arbitration". Only when such "submission" is evidenced, a court of the contracting state can grant a stay of legal proceedings, in the absence of other extenuating grounds. The statutory formula "submission made in pursuance of an agreement to which the Convention set forth in the Schedule applies" incorporates all the above mentioned components. But there might be many *other* kinds of "submissions " to arbitrate disputes, such as submission in *lite* or unwritten submission, or submission not so

14. *Tractoroexport* at 4.
15. *Id.* at 9.
16. *Ibid.*
17. *Ibid.*

much in respect of "a defined legal relationship" but rather as to the very "definition" of a legal relationship between the parties. These sorts of "submission" are *not* covered by the convention or the Indian Act implementing the convention. Accordingly, the words "made in pursuance of" after "submission" in the statutory formula are not necessarily otiose. They rather help us to fix the boundaries of submissions which fall within the convention and the Act.

This sort of reasoning leaves us with the two difficulties Justice Grover still has with construing "agreement" to mean "commercial agreement". The learned Justice feels (as already noted) that the words "made in pursuance of" will convey *no* sense if the term "agreement" were to be construed widely. For, then the statutory formula will read : "an agreement to refer the dispute to arbitration made in pursuance of a commercial contract". But if the commercial contract in fact contains an arbitration clause then section 3 of the Act must refer to submission in the narrower sense of some sort of participation in the arbitral proceedings. The courts, consequently, are not required to grant stay of legal proceedings unless submission in this sense has occurred.

This aspect of the judicial reasoning must indeed rest on the assumption that in all cases contracting parties would include arbitration clauses in their contracts. But this need not necessarily be so. It is perfectly conceivable that parties may provide for settlement of disputes through arbitration in a separate agreement made contemporaneously or subsequently to the commercial contract.[18] In this sort of situation, the formula "an agreement to refer the dispute to arbitration made in pursuance of an agreement" makes perfect sense.

Moreover, it is also possible to maintain that arbitration clauses in commercial contracts constitute "submission made in pursuance of an agreement" within the terms of the convention as well as those of the Indian statute. For, concern for settlement of disputes through arbitration must logically presuppose disputes which need such settlement. And in turn disputes cannot logically arise (in the present context) without an agreement concerning exchange of goods and services for a consideration. Therefore, there is no oddity in maintaining that the term "submission" may mean no more than an arbitration agreement, whether embodied in one contract as an arbitral clause or embodied in two or more contracts as a separate agreement to arbitrate disputes. Notionally, there is no inherent reason why the term "submission" should have the narrow meaning of "actual submission" and not the wider meaning of agreement to arbitrate disputes.

The second reason focussing on specific exceptions when a court is obliged to grant a stay of proceedings also fails to withstand close scrutiny. To be sure, consistency in interpretation of terms of a statute is an important desideratum. But duality of meaning of the term "agreement" is in fact

18. *Cf. Owners of Cargo on Board the Merak* v. *The Merak* (owners), (1965) 2 W.L.R. 250 at 262-63 (per Scarman, J.).

embedded in article II of the New York Convention to which section 3 of the Indian statute corresponds. Article II of the convention uses the term "agreement" inclusively as comprehending *both* an arbitral clause in a contract *and* a separate arbitration agreement.[19] The courts shall grant a stay of arbitral proceedings only if "the said agreement" (meaning as above) "is null and void, inoperative or incapable of being performed".[20]

No fateful consequences emerge, therefore, if "agreement" in article II is construed as meaning the commercial contract to which the arbitral clause belongs. For, surely if that contract is "null and void, inoperative or incapable of being performed", then little purpose is served by requiring parties to undergo arbitral settlement. To compel parties so to do by not granting a stay (on appropriate application by one of the contracting parties) is only to defer the stage when the domestic courts would need to pronounce on the futility of that exercise by a refusal to enforce the foreign arbitral award as being contrary to the public policy at the forum.[21]

Perhaps then the real reasons for the majority's refusal to accept the appellant's construction lie not so much in analytical difficulties which the judgment stresses but rather in statutory and judicial history. To this we now turn.

IV. Legislative and judicial history : the fallible guide

The landmark Geneva Protocol on Arbitration Clauses, 1923[22] and the Convention on the Execution of Foreign Arbitral Awards, 1927,[23] were not implemented in India till the enactment of the Arbitration (Protocol and Convention) Act of 1937. Prior to 1937, two separate regimes of statutory law governed arbitration. In what were called the Presidency towns the Indian Arbitration Act of 1889 applied. In other areas, the Indian Civil Procedure Code applied in relation to arbitration matters. The Indian Arbitration Act of 1940, established a uniform arbitration law for entire British India. The Indian arbitration law was naturally affected by the evolution of the English laws on the subject, notable among which were the Arbitration Act of 1889, the Arbitration Clauses (Protocol) Act of 1924, the Arbitration (Foreign Awards) Act of 1930, and the Arbitration Acts of 1934 and 1950.

The 1889 English and Indian Arbitration Acts defined the term "submission" widely as meaning "a written agreement to submit present or future disputes to arbitration, whether an arbitrator was named therein

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19. See *supra* note 10.

20. See *supra* notes 8, 10.

21. Art. V (2) (b) of the 1958 New York Convention provides that recognition and enforcement of an arbitral award "may also be refused" when the "competent authority in the country where enforcement is sought finds" that such measures will be "contrary to the public policy of that country".

22. For complete text see *International Commercial Arbitration* at 17-19 (Indian Society of International Law Publication 1964).

23. *Id.* at 22-27.

or not".[24] This meaning of "submission" was unaffected in 1924 when the Arbitration (Protocol) Act was legislated.[25]

The amending English Arbitration Act of 1934 defined an "arbitration agreement" in precisely the same words which were used to define "submission" in the 1889 Act;[26] and this additional definition did not affect the 1889 definition of "submission". It was only in 1950 that the English Arbitration Act altogether deleted the definition of "submission" which existed on the statute book from 1889 to that date. The 1950 Act, however, retained the definition of "arbitration agreement" as provided in the 1934 Act.[27] The Indian Arbitration Act of 1940 also followed the 1934 Act in so defining an "arbitration agreement".[28]

It is clear, and so acknowledged, by the majority of the Supreme Court, that at least until 1950 the term "submission" in the relevant English statutes had the inclusive meaning embracing both an agreement to refer to arbitration and actual submission.[29] The legislative formula in the 1924 English Arbitration (Protocol) Clauses Act referring to "submission made in pursuance of an agreement"[30] thus did not necessarily and exclusively import actual submission as distinct from an agreement to submit to arbitration.

The majority, however, argues that the British Parliament intended in 1950 to employ the term "submission" in a narrow meaning of actual submission to arbitral processes.[31] This argument is based on the reasons that the 1950 English Arbitration Act omits the definition of "submission" and makes a pointed reference to arbitration in section 4(2) formula "submission to arbitration made in pursuance of an agreement". If the legislature intended to refer to agreement to arbitrate (rather than only the actual submission to arbitration) then it could easily have used the term

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24. *Tractoroexport* at 6, 12-15.
25. *Ibid.*
26. The Arbitration Act, 1934, s. 21(2).
27. The Arbitration Act, 1950, s. 32.
28. The Arbitration Act, 1940, s. 2(*a*).
29. *Tractoroexport* at 5-7.
30. See s. 1 of that Act quoted in *Tractoroexport* at 14-15.
31. S. 4(2) reads :

Notwithstanding anything in this Part of this Act, if any party to a submission to arbitration made in pursuance of an agreement to which the protocol set out in the First Schedule to this Act applies, or any person claiming through or under him commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed 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.

"arbitration agreement" which was defined by the 1934 Act, and by the 1950 Act in the same wide terms as in the previous Act.[32] For this view, Justice Grover relies on the justly renowned *Russell on Arbitration*[33] and the views expressed by Professor Naussbaum in a landmark article on arbitration.[34] And not merely does Justice Grover differ from the contrary approach advocated by Dicey-Morris[35] but also his Honour feels that *Merak*[36] which adopted their views was wrongly decided.

Likewise, the Indian Parliament in enacting the 1961 Act, according to the court, must have intended to use the "submission" in a narrow sense as it was open to the Parliament to use the wider expression "arbitration agreement". The inference about this intention was reinforced by the fact that the Indian High Courts have "uniformly and in unequivocal terms" construed "submission" to mean actual submission to arbitration.[37]

But this sort of reasoning proves too much. By the same "logic" as the court adopts, it can be asserted that the British Parliament could not have been unaware of the fact that the term "submission" had the statutory meaning of arbitration agreement since 1889, unaffected by any later legislation. Accordingly, an intention not to transform the meaning

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32. *Tractoroexport* at 9, 10.

33. *Russell on the Law of Arbitration* 79 (11th ed., 1963; A. Walton ed.).

34. A. Naussbaum, Treaties on Commercial Arbitration : A Test of International Private-Law Legislation 56 *Harv. L.R.* 219-44 at 227-28 (1941). Naussbaum notes that while the protocol requires a stay of judicial proceedings in the case of "*arbitration agreements whether referring to present or future disputes*", the English Act of 1924 substitutes a less "liberal provision" by using the expression "*submission made in pursuance of an agreement to which the said Protocol applies*" (at 227 : emphasis in original). The acute criticism of the English draftsmanship is fully merited (and Indian draftsman, specially after independence, share this "guilt by association"). But as I maintain in the text it is possible to ameliorate the quirks of draftsmanship by taking a different approach to the word "agreement" in the protocol. An equally fruitful course is to interpret "submission" less restrictively, as suggested in the text and (for slightly different reasons) in *Dicey-Morris infra* note 35.

35. Dicey-Morris, *The Conflict of Laws* 1073-1077 (1967, 8th ed.).

36. See *Merak*, *supra* note 18.

37. *W. Wood & Son Ltd.* v. *Bengal Corporation*, A.I.R. 1959 Cal. 8; *Bajrang Electric Steel Co.* v. *Commrs. for Port of Calcutta*, A.I.R. 1957 Cal. 240; *K.E. Corporation* v. *S. De Traction*, A.I.R. 1965 Bom. 114 all adopting the meaning of submission as "actual submission" here favoured by the majority. Ramaswami, J., rightly rebuts the claim that these decisions constitute a "long course of practice or a series of decisions" of which the legislators at the time of enactment of 1961 Act must have due notice. He stresses that the decisions are not "numerours" (certainly we must exclude from the above list the 1965 Bombay decision which was delivered *after* the enactment of 1961) and it is "unsafe and unrealistic to draw the presumption that Parliament in reenacting s. 3 of the Act was aware of the intervening judicial interpretation and set its seal of approval upon it". (*Tractoroexport* at 20).

And courts are not estopped from reconsidering "precedents" merely because the legislature has in the meantime relied upon judicial interpretation of terms in enacting certain statutes. This is all the more so when such precedents are regarded by later courts as erroneous. Ramaswami, J., here invokes most cogently Lord Denning's observations in *Pa* v. *Bow Road Domestic Proceedings Court*, [1968] All E.R. 89 at 91.

of the expression "submission" into the narrow meaning can equally well be attributed to the Parliament. True, the separate definition of "submission" was dropped in the 1950 Act. But this might imply verbal parsimony on the part of legislative draftsmen. Quite clearly, if the definition of "submission" and "arbitration agreement" was precisely the same, it was pointless to maintain this duplication. And since till 1950, both "submission" and "arbitration agreement" had exactly the same meaning, it is not implausible to suggest that the draftsmen were somewhat indifferent on the question as to which term should be retained in the 1950 Act.

Moreover, and this is crucial, there can be no submission to arbitration in the narrow sense unless there is in the first place an agreement to arbitrate. To be sure, an agreement to arbitrate is not the same as actual submission to arbitration, just as a foundation of a house is not the house itself. But in the absence of legally recognized extenuating circumstances an agreement to submit disputes to arbitration in a specified manner imports a legal obligation of submission of disputes to arbitration. *This* obligation can scarcely be discharged by a refusal to perform it ! To refuse to grant a stay of legal proceedings on the ground that submission means actual participation is simply to nullify a contractual obligation, which in the absence of legally recognized extenuating circumstances it is the duty of the courts to protect and promote.[38] And surely this sort of judicial duty arises independently of any international conventions or any particular formulae used in such conventions and national statutes adopting them.[39]

Neither statutory and judicial history nor indeed rules of statutory construction (which ought never in any case be absolutized) compel or even

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38. See *infra* note 52.

39. Shah, J., who concurred with Grover, J., in this case, rightly observed in an earlier case that :

> Where a party to an arbitration agreement commences an action for determination of a matter agreed to be referred under an arbitration agreement the Court normally favours stay of the action leaving the plaintiff to resort to the tribunal chosen by the parties for adjudication. The Court in such a case is unwilling to countenance, unless there are sufficient reasons, breach of the solemn obligation to seek resort to the tribunal selected by him, if the other party thereto still remains ready and willing to do all things necessary for the proper conduct of arbitration. *This rule applies to arbitrations by tribunals, foreign as well as domestic*... the Court insists [by virtue of its inherent powers], unless sufficient reason to the contrary is made out, upon compelling the parties to abide by the entire bargain, for not to do so would be to allow a party to the contract to approbate and reprobate, and this *consideration may be stronger in cases where there is an agreement to submit the dispute arising under the contract to a foreign tribunal.*

Michael Golodetz v. *Serajuddin & Co.*, A.I.R. 1963 S.C. 1044 at 1045-46 (emphasis added). It is regrettable, with respect, that the same learned judge who so emphatically enunciated this fundamental principle should have allowed himself to associate with the result in this present case which so eminently frustrates that very principle.

justify the majority approach. Is the majority decision really grounded even in the somewhat parochial insistence on national sovereignty ? An answer to this question will require us to follow the last major aspect of the judgment, where for once issues are clearly joined between the majority and the dissenting opinions.

V. The role of domestic courts in the fulfilment of treaty obligations

In the *Merak*[40] issues similar to those confronting the Indian Supreme Court were raised before Justice Scarman in relation to stay of legal proceedings under section 4 (2) of the Arbitration Act, 1950. That section relates to duties and powers of English courts to stay a suit in the light of the 1923 Geneva Protocol (Britain has yet to accept and implement the successor 1958 Geneva Convention). Upon consideration of the foregoing types of arguments based on legislative and judicial history, Justice Scarman found no difficulty in construing the term "submission" in the notorious legislative formula "submission to arbitration made in pursuance of an agreement". The point of departure for the reasoning of the learned judge was that sub-section 4 (2) of the Act must be read together with the English translation of the protocol scheduled to the Act.[41] In his Honour's opinion, the protocol was concerned with two agreements : the commercial agreement and the arbitration agreement, a division which was embodied in section 4 (2) of the 1950 Act as well[42]. The phrase "submission to arbitrate" referred to the arbitration agreement or the arbitral clause; the term "agreement" in turn referred to the commercial contract as a whole.[43] To hold that the term "submission" meant an "actual submission of an existing dispute to a particular arbitrator" would be to make "nonsense" of the protocol.[44] The term "submission" no longer statutorily defined, must be interpreted in a way that was "appropriate to its context".[45]

Justice Grover criticizes, albeit indirectly, the *Merak* approach. His Honour recognizes that "statutes are to be interpreted provided their language permits, so as not to be inconsistent with the comity of nations or with established principles of international law".[46] But when the language of the statutes is clear, and not open to construction "in more than one way"[47] the statutes must be interpreted in accordance with their clear meanings, even if such construction results in a departure from, or a breach of, treaty obligations or international law. This is so, because in India,

40. See *Merak*, *supra* note 18 at 262.
41. *Id.* at 262.
42. See for the text of the relevant section, *supra* note 31.
43. See *Merak*, *supra* note 18 at 263.
44. *Ibid.*
45. *Ibid.*
46. *Tractoroexport* at 8, invoking 36 *Halsbury's Laws of England* (Simmonds *ed.*) 629 (1961, 3rd edition).
47. *Tractoroexport* at 8.

as in England, treaties become law of the land only when implemented by a legislative Act. Maximum deference is due in the first place to the text of the enabling statute which embodies "the" legislative intention. And in the absence of ambiguity, the courts ought not to resort at all to the convention, whether or not it is appended as a schedule to the Act. Only when the statutory formulae are equivocal, is such a resort proper and only then is the court free to prefer that construction which fulfills, rather than frustrates, the internationally assumed obligations. And even here the finding of ambiguity in the legislative formula must not precede an attempt to interpret the statutory words "in the well established sense which they had in municipal law".[48]

The *Merak* court was "dominated by the Protocol of 1923"[49] though in Justice Grover's opinion section 4(2) of the relevant 1950 Act did not suffer from any ambiguity. Like section 3 of the Indian Act, section 4(2) of the English Act, clearly meant by "submission" actual submission and not an agreement to arbitrate without more.

Given the premise that the term "submission" has one clear meaning and no other meaning at all, the majority's above conclusion inevitably follows. Given this premise, and shared common law heritage of the statutory construction "culture", the veiled reproach by the majority to Justice Scarman's approach in the *Merak* is also justified. The *Merak* did not proceed explicitly on the finding of any statutory ambiguity.[50] And in the majority's opinion finding of ambiguity was a pre-requisite for utilizing the convention as a further guide to the resolution of the statutory ambiguity.[51]

Furthermore, the Parliament was free to deviate from the protocol, and the convention. And "a clear deviation from the rigid and strict rule that the courts must stay suit whenever an international commercial arbitration as contemplated by the protocol and conventions was to take place, is to be found in section 3" of the Indian Act before the court.[52]

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48. *Ibid.*, citing as an authority for this proposition the decision in *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.*, (1933) A.C. 402.

49. *Tractoroexport* at 9.

50. Though Scarman, J., mentions the argument of the counsel in this respect, his Honour does so only hypothetically and in the operative part of the judgment does not make any finding of ambiguity or invoke any canon of construction related to its resolution. See *Merak, supra* note 18 at 261-64.

51. This certainly is an incorrect appreciation of the significance of scheduling an international treaty to an enabling Act. When it is thus scheduled, it is technically as much a part of the statute as the sections of the Act. This is even more so when the relevant sections of the statute (as s. 3 of the Indian Act) specifically refer to the provisions of the convention appended in the schedule.

52. *Tractoroexport* at 10. But the evidence is altogether too slender to warrant this assertion. No doubt, the majority is correct in pointing out that s. 3 of the Indian Act before it, and s. 4 (2) of the 1950 English Arbitration Act, *add* to the convention art. II requirements a further element. This is that "the application to the Court for a stay of suit must be made by a party before filing a written statement or taking any other step in the proceedings". It is also true that precisely the same requirement is embodied in

Unlike Justice Scarman in the *Merak*, Justice Ramaswami in the present case bases his dissenting opinion on a clear finding of ambiguity in the legislative formula.[53] Justice Ramaswami describes as fallacious the argument (adopted by the majority) that the wider meaning of the term "submission" will render the legislative formula "meaningless and unintelligible".[54] The "fallacy" lies in approaching a statute as if it were a "theorem of Euclid".[55] But the "doctrine of literal method is not always the best method for ascertaining the intention of Parliament".[56] The statute must be construed "with some imagination" of its underlying purpose.[57]

The majority does realize that its approach results in a frustration of the purpose of the New York Convention but maintains that "we are bound by the mandate of the legislature."[58]

Here then we are confronted with the perennial conflict between the textualist and contextualist approaches to the construction of statutes. Both approaches are tenable; both enable us, in their own ways, to perceive and highlight difficult problems of law and policy which might be otherwise overlooked. In given contexts, each of these approaches can yield results which are sometimes satisfactory or disappointing. All that legal scholars can ask of the judges is that they do not elevate either approach to the status of a holy dogma which inexorably leads to one consistent set of outcomes. All that we, as human beings, can ask of our judges, also as human beings, is that they approach their task conscientiously and rationally.

Any criticism of the majority opinion merely on the ground that it

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the domestic law of both countries : See s. 34, of the Indian Arbitration Act, 1940 and s. 4(1) of the Arbitration Act, 1950 (U.K.).

But from the mere addition of this requirement the inference concerning "the" legislative intention to deviate from the convention scarcely follows. Certainly, the protocol and the convention do *not* require stay of suit just because an arbitration between "parties" was to take place. It is only when one of the parties to the "agreement" requests the court to stay the suit that it is incumbent upon the court to do so in the absence of specified exceptional circumstances. And in terms both the relevant Indian and English sections begin with a *non-obstante* clause, ruling out altogether any legal relevance of domestic law to the stay proceedings. Art. II, para. 3, of the 1958 Convention does not purport to regulate the stage of legal proceedings at which one of the parties to an arbitration agreement can appropriately request a stay of suit. This area is obviously left to the sphere of national law, and additional national requirements in this respect cannot simply be regarded as evincing an intention to depart from the convention-obligations, unless these requirements are so formulated as to specifically limit the convention obligations. The latter is hardly the situation with regard to the requirement of s. 3. On the court's present approach one might as well argue that any change in the language of the convention in enacting it must imply an intention to deviate from it. This will render even those innocuous words in s. 3, "any party....or any person claiming through or under him" sinister enough to demonstrate a legislative intention to deviate from the convention.

53. *Tractoroexport* at 21.
54. *Ibid.*
55. *Ibid.*
56. *Ibid.*
57. *Ibid.*
58. *Id.* at 9.

ultimately adopted a literalist approach or any praise of the dissenting opinion because it adopted a contextualist approach will be misplaced. Since appellate judges do legislate constantly though intersticially within the common law culture, the real question and the cardinal ground for evaluation, lies not so much in what the legislator intended but what intention the judges ought to *impute* to legislators in a given litigious situation.

From this perspective, the majority's performance can be faulted for several reasons. For one thing, attribution of intention to the legislature to deviate from the text of a multilateral international convention, devised to attain a more satisfactory legal regime than previously possible through a multitude of national laws and policies, ought *not* to be lightly presumed. Indeed, it would be commendable to introduce the above proposition as a rule of construction. To be sure, it is rarely, if ever possible, *conclusively* to establish in cases of statutory ambiguity, what precisely the legislature intended. But it is possible to show that in enacting the convention the legislature did in certain matters indeed probably intend to depart from, or vary the scope of, internationally assumed obligations. For reasons canvassed in the preceedings sections III and IV of this paper, it does not seem probable that the legislature in the present case did in fact intend to vary the terms of the New York Convention. In other words, these counter-indications reinforce the above presumption of non-deviation. Correspondingly even heavier a burden of proof is entailed to establish the contrary proposition attributing to the legislature an intention to deviate from the convention.

The present Supreme Court decision can be viewed as an invitation to Parliament to test the hypothesis that it intended to deviate from the New York Convention. But an equally sound way in which to test the legislative intention with regard to the convention would have been to advance the hypothesis that Parliament did not intend to deviate from the convention. Both courses were analytically open to the court. Attribution of an intention to legislature is an important social decision involving basic policy considerations, the range of deference to be accorded by the judiciary to Parliament being only one of these.

The majority has oriented itself only to this last consideration of difference to a co-ordinate branch of the government. In so doing, the Indian Supreme Court has not taken account of the vital consideration of economic management of law-making resources within the community. The majority opinion recognizes that it was the overall purpose of the Parliament that the 1961 Act should effectuate the 1958 New York Convention.[59] It recognizes further that the convention would be better effectuated by adopting the second line of interpretation of the statutory formula—namely that Parliament did not intend deviation from the convention.[60] Having gone this far, it would have been better in the light

59. *Ibid.*
60. *Ibid.*

of considerations here advanced to ask the Parliament to verify the court's imputation of this intention (of non-deviation). This is so because Parliament will not need to take any action if it agreed with the judicial imputation of its intention whereas Parliament will have to amend the Act to negate the imputation of intention to deviate, as now is the case.

When uncertainty about the *overall* purpose of Parliament is so minimal as in this case, it is wasteful of the community resources to require the Parliament to clarify by fresh legislation an ambiguity that can be resolved in a manner conducive to the overall purpose. Indeed, where the overall legislative purpose is manifestly ambivalent the courts are certainly justified in putting the community to the expense—of money, time, talent, and other overheads—of the clarification of the law.[61] But this was not the situation here. And to impose upon Parliament the additional burden of enacting a clarifying statute is to add to the tasks of an already overworked institution. It is also not entirely fanciful to suggest that the judicially imputed intention may remain the law by default if Parliament is altogether unable to attend to this miniscule area in the midst of a multitude of conflicting and priority-demanding concerns.[62]

And the wisdom of the imputation of an intention of non-deviation stands reinforced in the present case by the value of the ever important role of domestic courts in the application, elaboration, and development of international law. This role is necessarily limited by the fact that the courts are national rather than international tribunals. It is also limited by the need to attain a "just" result in an instant case. But, these limitations do not affect substantially the range of contributions which domestic courts can make not only to the authority of international law in general but also in particular to the fulfillment of specific obligations assumed under international law.[63] And this role of the judiciary dovetails well with the other pivotal role—that of collaborating (at least at the appellate level but certainly not only there) with the legislature in the task of clarifying, elaborating and developing the law.

The answer to all this, in terms of the majority opinion, that the court has to implement the legislative mandate when the words of the statute are clear and unambiguous simply begs the question. In general, judgments about "clarity" or lack of it are the function of the perception of the addressee of a message or communication. In the relatively closed system of courts, judgments about the clarity or ambiguity of the statutory

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61. An almost paradigmatic illustration of such legislative ambivalence is well analysed by V. Aubert, Some Social Functions of Legislation 10 *Acta Sociologica* 99-110 (1966); reprinted in abridged form in *Sociology of Law* 116-26 (V. Aubert, ed., 1969) Penguin.

62. See for a detailed description of the "business of legislature", H.M. Hart, Jr., and A. M. Sacks, *The Legal Process* 717-726 (Tent. ed.; 1958). Also see p. 403 for a clear account of some problems surrounding legislative correction of judicial interpretation of the law.

63. *Cf. C.A. Corocraft* case, *supra* note 2 at 87 (per Lord Denning, M.R.).

formula arise out of a *decision* by the addressee (the judges) to regard them as such. The decisions of courts to regard certain statutory formula as clear or otherwise are naturally important decisions, having a wide range of social consequences. But even with the closed decisional system of courts, characterization of certain words of statute as "clear" or "ambiguous" is *intellectually* conclusive within the context of a particular litigation when that decision is unanimous. When the decision is divided (as in the instant case) reason demands intense interpretative effort on the part of both the majority and minority judges. And even though it is only the majority judgment about "clarity" or "ambiguity" which has authoritative legal consequences, the division among decision-makers highlights the fact that within the judicial universe at that point of time the statutory formula was not simply and clearly "clear". The deeper meaning of this point is simply that perceptions of clarity and ambiguity ultimately rest on policy desire to so characterize a cluster of legislative words.

VI. Conclusion

In fact, the court in this case had two perfect opportunities to hold that while section 3 of the Indian Act applied (because "submission" in the wider sense was made by parties) the request for stay of suit could not be granted because the present fact-situation fell within the exceptions specified by the 1958 New York Convention and the relevant Indian Act requiring the courts not to grant a stay of the suit. It was open at least on two grounds for the court to hold that a stay cannot be granted because the agreement was "null or void, inoperative or incapable of being performed". Despite the reluctance of the court to resort to these grounds It is submitted that they furnished the *real* reasons for the court's decision. For reasons later canvassed, It is further submitted that the decision in the case can be limited as resting on these grounds notwithstanding the elaborate discourses on the meaning of "submission".

First, as Justice Ramaswami pointed out in his dissent, the Madras High Court had already held that the arbitral clause in the principal contract of 1965 had "ceased to be effective" as a result of the subsequent 1966 agreement to settle the dispute amicably.[64] The Madras High Court also felt that the "alleged nullity of the contract on the basis of mutual mistake" was a matter that remained to be properly examined.[65] These two factors provided a sufficient ground for not granting stay of the suit.

And, secondly, though in the context of propriety of granting injunctive relief, the majority takes judicial notice of the fact that the Government of India had placed several restrictions on the availability of foreign exchange.[66] These restrictions made it "virtually impossible

64. *Tractoroexport* at 21.
65. *Ibid.*
66. *Id.* at 12.

for the Indian company to take its witnesses to Moscow and to otherwise properly conduct the proceedings there".[67]

This is so clear an acknowledgement by the court that the arbitral agreement was incapable of performance, that it is a matter of considerable surprise that the majority should not have relied on it as the real reason for holding that the stay of suit cannot be granted. Surely this was the very type of situation for which the New York Convention and the Indian Act provided by their exception clauses relieving the courts of the duty to grant the stay, and indeed requiring them not to grant it. Even if arbitration had proceeded *ex parte* in Moscow, the non-availability of foreign exchange and consequent non-participation by the respondents would have been a very strong ground of public policy militating against recognition and enforcement of the award.

It is possible to analyze and read this decision in the end as not really a decision on the meaning of "submission" at all but as a decision on the "exceptions" clause of section 3 of the Indian Act. It is analytically tenable to say that the true *ratio* of the decision only reinforces the Act's directive that stay of suit shall not be granted when the agreement (whether construed as the entire commercial agreement or an agreement to arbitrate) is "null or void, inoperative or incapable of being performed". All the elaboration on the construction of the term "submission", both in the majority and the minority opinions, was unnecessary and does not form a part of the reason for the decision, and thus constitutes *obiter dicta.*

To rationalize the case in this manner is to leave open for the future scope for recanvassing the issue of proper construction, hopefully by the Full Court of the legislative formula "submission made in pursuance of an agreement". It is also to relieve the Indian Parliament of the need to initiate and process an amending legislation. This approach to the judgment is warranted all the more by the multiple vulnerabilities of the court's attempted construction of the statutory formula. But, even more importantly, this sort of rationalization prevents the reluctant imputation of the intention to Parliament (to endow the word "submission" with the narrow meaning of actual submission) from becoming the law of the land by sheer default of legislative action.

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67. *Ibid.* Once again this doctrine of taking judicial notice of foreign exchange restrictions is a regressive step. The court did not allow a stay of foreign arbitral proceedings on this ground so recently as 1963 in the case cited in *supra* note 39. And in the same proceedings the Calcutta High Court made only this concession that the Indian party could seek a stay if it proved that it had met with "any difficulty, either, initiating