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CONFLICT OF LAWS

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I INTRODUCTION

THIS SURVEY forms the major source for private international law as practiced in India. The basic reason for this being case law as the primary source for private international law including its progressive development, in a country. This year's coverage includes issues concerning, domicile, family law matters dealing with child custody including conflict of laws issues in international commercial arbitration such as proper law of arbitration, party autonomy – intention of the party , and enforcement of foreign arbitral awards and recognition and enforcement of foreign judgment.

II DOMICILE / RESIDENTIAL CERTIFICATE

In *Hare Krishna* v. *State of Uttar Pradesh,*[1] the issue raised was, is the voter identity card – authentic proof of a person's present domicile. The petitioner was issued a domicile certificate (residential certificate). This domicile certificate was cancelled by an order of sub divisional magistrate. The petitioner in this case is challenging the cancellation order on the ground that the order mentions his earlier residence as his domicile whereas he has since abandoned that place and is now residing at a different place after purchasing his own house, in the new place. On the facts and circumstances of the case the court observed, " Domicile or residence more or less carry the same meaning, inasmuch as both refer to the permanent home of the person concerned. Domicile is at the international level and the residence is somewhat at a local level. A person is (has?) the domicile in the country in which he is considered to have his permanent home. No one can be without a domicile and no one can have two domiciles. The same principle applies at a lower level to the place of residence of a person. Domiciles are broadly domicile of origin and domicile of choice. Domicile

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1 2016 (117) ALR 741 decided on May 19, 2016 by High Court of Allahabad.

of origin prevails until a person acquires a domicile of another place. Domicile means a place of permanent home, a place which a person fixes as his habitation for himself and his family with the intention to live there permanently. The place where a person has his home in its ordinary acceptation or a place where he lives is regarded as his place of domicile.[2]"

Relating above observation to the facts of the case the court said, "A reading of the impugned orders reveal that the domicile of origin of the petitioner is villager Taiyapur Kamalapur, district Kasganj but he had voluntarily started living in Mohalla Mohan Chitragupt Colony in Kasganj. In 2006 he had purchased his own house in Mohalla Lavkush Nagar in Kasganj where he is living since then continuously. He is having his driving license and LPG connection from his address at the city of Kasgan".[3] In conclusion the court ruled, The aforesaid facts clearly established beyond doubt that the petitioner has abandoned domicile of origin and has voluntarily adopted Kasganj as the domicile of his choice where he is having his permanent abode and lives with his family. The voter identity card of the petitioner, which entitles him to vote in the village cannot be regarded as an authentic proof of his present domicile."[4]

III STATUS OF FOREIGN LAW

Status of foreign law in municipal courts became an issue before the apex court in *Al Ismail Haj Tour* v. *Union of India.*[5] This case concerns with private tour operators (PTO) registration and production of proof documents. The documents had to prove a fact that a PTO had infact conducted a Haj programme in a particular year, and that the PTO has necessary information and contacts in Saudi Arabia to organize an appropriate accommodation both at Mecca/Madinah. The Government of Saudi Arabia would not permit any pilgrim for Umrah through a PTO unless such PTO has a contract with one of the agencies authorised by the Government of Saudi Arabia for the purpose.

The present litigation arose when the Ministry of External Affairs issued a clarification by which a PTO seeking registration for consideration of quota for Haj programme is required to furnish documents. The PTOs challenged the said document on the ground that such clarification was unwarranted. It is the contention of the respondent that the prime consideration in the matter is to secure the safety and comfort of the Haj pilgrims. It was also pointed out in the contention that under laws of Saudi Arabia PTOs are not permitted to conduct Umrah operations unless they have a clear contract with one of the agencies duly authorized by Government of Saudi Arabia and some of the PTOs did not have any such contract. In conclusion the court ruled that it is open for the respondent to de-registrer such PTOs after giving reasonable opportunity to them. But until such deregistration takes place their cases must be

2 *Ibid.*
3 *Ibid.*
4 *Ibid.*
5 AIR 2016 SC 3863.

considered for allotment of quota for Haj 2016 if they are otherwise eligible. In this context the Supreme Court observed. " It is a settled principle of international law that a law of a foreign country is a pure question of fact insofar as municipal courts are concerned."[6]

IV FAMILY LAW

Child custody – Parental abduction

Marriage between the parties in this case *i.e., Maninder Kaur Atwal* v. *Barinder Singh Pannu*[7] was dissolved by US court. Their two children are citizens of US by birth. Their custody was given to father with visitation rights to mother in vacations. An application was filed by the petitioner mother to take the children to US for vacation. The lower court declined the application on the ground that US has no bilateral agreement with India to enforce the return of children to India and that India is not a signatory to the Hague Convention. Further there is no international agreement between US and India in this regard. Other factors being that the children being in higher classes in Ludhiana, their education will be affected adversely. Under the facts and circumstances of the case, the high court found above mentioned reasons as unfounded and ruled the rejection by the lower court as improper. The court observed, "The children are US citizens by birth. Therefore, for their mental and emotional developments, it is required that they should visit their motherland and be acquainted with its environment and also meet their mother. So far as apprehension….that the Court will not be able to enforce the return of the children as there is no bilateral agreement between USA and India and that India is not a party to the Hague Convention, I am of the considered view that law enforcement is much effective in US and the rights of the children are duly protected….Moreover, the decree incorporating the settled conditions was passed by the US court and in case of violation, the same can always be enforced by US Court or the Police Department of the US."[8]

P.K. Srikumar v. *Harshita Gopinathan*[9] concerns with custody of minor child between the spouses. Though the marriage took place in India, the parties were living in US, as the husband is a permanent resident of US and the wife had a valid H1B visa and employed in California. This is a simple case of custody based on the principle of welfare of the child as well as the provisions of section 13 of the Code of Civil Procedure, 1908 (CPC) concerning the conclusiveness of a foreign judgment in India. The minor child is a US citizen by birth. He came to India with his parents and returned to US with his father as agreed by his mother. When again the child was brought to India, the child was snatched from the appellant father by the mother (respondent) with the help of the police.

6 *Id.* at 3874.
7 AIR 2016 P& H 18.
8 *Id.* at 19.
9 AIR 2016 Mad 187.

After the forcible grabbing of the child by the respondent mother the appellant father approached the Superior Court of California for the custody of the child (as the child being the citizen of US by birth). The Superior Court of California rendered its judgment, after recording the service and participation of the respondent in the proceedings. The US court gave a finding that the respondent has appeared and she has subjected to jurisdiction of the court. The US court passed orders granting sole legal and physical custody of the minor child to the appellant father.

The current litigation before the High Court of Madras is by the appellant father seeking permanent custody of the minor child and seeking the declaration that the judgment /order passed by the Superior Court of California is conclusive and binding and enforceable within the jurisdiction of Indian courts and declare that the appellant father as the natural guardian and the legal custodian of his minor son. On the facts and averments the High Court of Madras ruled on two aspects-on welfare of the child and binding effect of foreign judgment. Referring to the welfare of the child, the court observed, "the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full development of the childs character, personality and talents."[10]

Referring to binding effect of foreign judgment in the instant case, the court said, "The child, being citizen of US, the Superior Court of California is having most intimating contact and the closest concern. Even as per the principle of Comity of Courts, the order of the Superior Court of California is to be respected…Even while considering the interest of the minor child, this court is of the view that due respect is to be given to the order of the US Court, as the USA Court has the most intimate contact with the issue involving the custody of the minor child, who is a citizen of USA…. Therefore, as per Section 13 of the Code of Civil Procedure, the order of the Superior Court of California is to be construed as conclusive between the appellant and the respondent as to the custody of the minor child and binding upon the parties."[11] In the course of the judgment the court referred to a catena of judgments that are leading authorities and it must be pointed out that all these cases are mainly of international child abductions which are mainly based on paramountcy of principle of welfare of child in the context of "Foreign Custody and Return Orders". [12]

In v. *State of Gujarat*[13] petitioner father, seeks custody of his minor children from his wife, the respondent. A US court (Illinois) has awarded the children's sole custody to the petitioner. Both petitioner

10 *Id*. at 195.

11 *Ibid*.

12 *Mckee* v. *Mckee* [1951] AC 352 ; L (Minors), In re [1974] 1 WLR 250 ; *Dhanwanti Joshi* v. *Madhav Unde* (1998) 1 SCC 112; H. (Infacts), In re (1966)1 WLR 381; *Elizabeth Dinshaw* v. *Aravind Dinshaw* , AIR 1987 SC 3); *V. Ravi Chandran* v. *Union of India*, AIR 2010 SC (Supp) 257; *Arathi Bandi* v. *Bandi Jagadrakshaka Rao,* AIR 2014 SC 918; *Surya Vadanan* v. *State of Tamil Nadu*, AIR 2015 SC 2243.

13 AIR 2016 Guj 134.

and the respondent are naturalized citizens of US, and so also their minor sons, having their permanent residence in US. Due to matrimonial disputes the respondent came to India alongwith children. Equipped with the US court interim custody orde, the petitioner has approached the High Court of Gujarat by a writ of *habeas corpus*. Respondent mother relied on domestic violence and section 13 of CPC (foreign judgment) and the best interests and the welfare of the minor children. It was further averred on behalf of the respondent mother that even though father may be a natural guardian of minor sons it cannot supercede the paramount consideration as to what is conducive to the welfare of the minor. The orders of the US court have been passed without hearing the respondent mother. On the basis of the aforementioned facts and circumstances and in the light of the series of cases in particular following the legal position as emerged in the case of *Surya Vadanan* v. *The State of Tamil Nadu*[14] observed," Considering the twin principles of comity of courts and the principle of the best interests and welfare of the child and keeping in view the "most intimate contact" doctrine it may be appropriate that the foreign court having the most intimate contact and the closest concern with the child is better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court. The Supreme Court further observed that the principle of "comity of courts" should not be jettisoned except for special and compelling reasons. This is more so in a case where only an interim order or an interlocutory order has been passed by a foreign court. The principle of "comity of courts" enjoins upon domestic courts to give due respect to such orders of foreign courts and in absence of special reasons an interim order of the foreign court ought not to be disregarded. On the face of a pre existing order of a foreign court the domestic court should desist from conducting an elaborate enquiry as a matter of course and in absence of special reasons."[15]

Interpersonal conflict of laws

Issue in *Robin* v. *Jasbir Kaur*[16] concerns with the validity of marriage. The wife filed a petition seeking an interim maintenance. It is the case of the husband that no marriage was solemnized as he is a Christian and the petitioner a Hindu-Sikh. According to him the petitioner, a divorcee and had taken divorce earlier from different persons and had extracted huge amounts. He pleaded that since there was no legal or valid marriage, the petitioner wife did not have the status of a wife. The trial court allowed the petition and granted Rs.2500/ as maintenance. In the revision petition, the court observed in the context of the facts and on the issues, "It is necessary to notice that neither Section 11 nor Section 12 of the Hindu Marriage Act renders a marriage between a Hindu and a Christian void or voidable on the ground that the parties belong to two different religions.

14 AIR 2015 SC 2243.

15 *Supra* note 14 at 144.

16 2016 (4) RCR (Civil) 805.

The rigour of voidness covered by Section 4 of the Indian Christian Marriage Act is stressed and attached more to the persons that officiate in the solemnization of the marriages, and it does not envisage as regards the validity or otherwise of a marriage simpliciter that took place between a Hindu and a Christian. This view is again fortified by Section 4 of the Special Marriage Act which permits a marriage between two persons of different faiths. Therefore, a Hindu can marry a Christian under the Special Marriage Act. Such a marriage cannot be held to be void on the ground that it was not performed according to the provisions of Section 6 of the Indian Christian Marriage Act. Similarly, Section 4 of the Foreign Marriage Act permits a marriage between parties, one of whom at least, is an Indian citizen residing outside India. On a similar analogy as noted supra, even a marriage under this Act, if performed between a Hindu and a Christian both or one of whom is an Indian citizen, cannot be held to be void on the ground that it is not performed in accordance with the provisions of Section 5 of the Indian Christian Marriage Act."[17]

Based on the above reasoning the court ruled that the marriage between the husband and the wife, who are Hindu and Christian cannot be held as invalid. This judgment calls for comments in view of the interfaith marriage which raised issue of validity of marriage. Being a case of inter-religious marriage the situation directly falls into the category of interpersonal conflicts. Under conflict of laws principles, the validity of marriage is tested in terms of formal and essential validity of marriage. The formal validity is governed by either the Hindu or the Christian form and the essential validity (capacity to marry) as prescribed under Hindu law and Christian law. Despite the factual situation providing the conflicts of laws issues, the judgments do not reflect them although they form primary source for conflict of law.

Conversion and conflict of laws

Change of religion from one to another results in interpersonal conflict of laws. Effects of conversion when not considered in terms of appropriate applicable laws would likely to result in injustice to parties concerned. *Krishna Dash Choudhary* v. *Parbin Rahman Hazarika*[18] is one such case where a Muslim man commits apostasy and gets excluded from the Islamic Commonwealth due to which all his rights, interests, status and relations get automatically extinguished. In this case, the Muslim husband became a Hindu and thereafter he married a Hindu woman. He got two daughters from the second marriage and died without returning to Islam. Dissolution of his first marriage with Muslim wife became final and not revoked. Under Muslim law his Muslim wife cannot be his widow and also cannot be his legal heir and so also children from his Muslim wife cannot inherit his property – not entitled to succession certificate as well.

The present case concerns with effects of conversion. The consequences of conversion results in change of personal law governing the personal matters leading

17 *Ibid.*

18 AIR 2016 Gau 19.

to inter-personal conflicts which often affect the rights of inheritance. The facts of the case narrated above concerns with conversion from Islam, the court was reviewing the entire field of law relating to conversions. The court was considering in this case, whether Muslim marriage subsists after a Muslim becomes an apostate? and whether offsprings, born out of a Mohammedan marriage would inherit property of their father on death if he became a Hindu before death?

In the context of the effects of conversion in marital unions the court observed, it is generally recognized that when the husband renounces Islam but his wife continues to remain a Muslim, their connection becomes unlawful….This is only an indication to the fact that an apostasy his marital tie with his Mohameddan wife gets automatically snapped without pronouncement of talaq."[19]

The court also observed, taking support from the report of the Law Commission of India,[20] "that upon conversion from Islam to some other faith, the effect under Muslim law, is that the marriage stands automatically dissolved. The court came to the conclusion that, "the moment a Muslim commits apostasy, he gets excluded from the Islamic commonwealth and all his rights, interests; status and relations get automatically extinguished. His marital tie with his Mohameddan wife automatically gets snapped and his Mohammedan wife becomes free to remarry".[21] Consequently his Mohammedan wife cannot be widow and she cannot be his legal heir under the law after his conversion to Hinduism.

On the question of inheritance, the court pointed out that after embracing Hinduism the husband was being governed by the tenets of Hindu law at the time of his death. It is clear from this case that though conversion plays a vital role in creating inter-personal conflict of laws, the principles governing this aspect are yet to emerge even in a country which has a 'composite system of personal laws' having allegiance to various religions. This is a case of inter personal conflicts. Inheritance to properties is based on personal laws. In the case of movables the governing law is the personal law at the time of death and the immovable is always governed by "*lex situs*". In the instant case the husband died as a Hindu and thus devolution to his property is governed by Hindu law.

V FOREIGN TORTS

Rajasthan State Road Transport Corpn. v. *Alexix Sonier*[22] is a case concerning a "Foreign Tort" whose facts occurred in India wherein a foreign citizen (USA) sustained irreparable injuries in a road accident in India. He was claiming compensation, in India, in this case.

19 *Id.* at 37.

20 Law Commission of India 18th Report, "Report on the Dissolution of Converts Marriage", 1886

21 *Supra* note 19 at 39.

22 2016 (4) SCJ 294.

The underlying principle of foreign torts for the governing law is the law of the place where the fortious act has occurred, and this is the current legal status as practiced in England after 1995/6 Private International Law (Miscellaneous, Provisions) Act, 1995. Earlier foreign torts was governed by Double actionability rule which was being followed by India (Rajasthan Kota case).[23] It is not clear whether the courts in India now are following the earlier double actionability rule which is being retained in England for defamation/slander/libel cases even after the 1995 Act which follows law of the place where the civil wrong has occurred in all the other cases. Currently, all the cases concerning torts – involving foreign elements are being decided on the basis of factual situations, and national statutes. This appears to be the position in *Rajasthan State Road Transport Corpn*.[24] The claimant who suffered injuries in the motor accident has remained unconscious in US, has claimed certain categories (cost of attendant for entire life) which the apex court allowed. If only the court identifies the legal issues in the case as concerning of "foreign torts" and identify also the rule (conflict of laws) as a principle of private international law, there is scope for the progressive development of law and state practice. The reason for this comment is Private International law originates and grows only through judicial decisions. Conventions and statutes record the rules laid down by courts and tribunals.

It is unfortunate, nowhere in the judgment there is mention of the foreign torts – neither from the Bench nor the Bar.

VI INTERNATIONAL COMMERCIAL ARBITRATION

Performance of international contract as per agreed terms of arbitration clause

In *Etoile Creations* v. *Sarl Danset Deco,*[25] disputes arose between the parties in relation to "Buyers Agreement" executed between them. The buyer agreement provides for resolution of disputes by way of arbitration. Briefly the facts are, the petitioner is a firm registered in Delhi. The respondent (Sarl Donset Deco) is a concern having its office in France. The petitioner manufactures products relating to home furnishing and upholstery exclusively for the respondent concern since 2000. The respondent firm is the buyer of the products manufactured by the petitioner for sale in France. The "Buyers Agreement" was executed between the parties on October 18, 2012 at New Delhi. The respondent did not release the outstanding amount of Euro 367,814.80 as per the terms and conditions of the buyer's agreement, even after numerous reminders of the dues. Subsequently legal notices were also sent to the respondent. As the respondent did not make the payment, the petitioner invoked the arbitration clause of the buyer's agreement and named also his arbitrator. The petitioner filed a petition before the Commercial Court in Lille, France to seize all the bank accounts of the respondent. The court's bailiff seized a total amount in HSBC Bank. The

23 *Kotah Transport Ltd., Kotah* v. *Jhalawar Transport Services Ltd.*, AIR 1960 Raj 224.

24 *Supra* note 23.

25 (2016) 8 SCC 263.

petitioner filed a claim before the Tribunal – De – Commercial De Lille Metropolis, France for recovery of debt which was dismissed. Petitioner's appeal also got dismissed. The appellate court declared the appeal inadmissible on the issue of jurisdiction in view of the arbitration clause in the buyer's agreement. In the present petition before the apex court, the petitioner is seeking the appointment of arbitrator as the disputes that have arisen between the parties in relation to the performance of their contract can only be examined by the arbitrator. The petition was therefore allowed.

Proper law of arbitration

Reliance Industries Limited v. *Union of India,*[26] involves issues concerning proper law of contract and the proper law of arbitration. However in this case the parties have approached the apex court as regards the proper law of arbitration. The facts were, the parties had entered into two Production Sharing Contracts (PSCs) which provide for the exploration and production of petroleum. The appellant is a largest private sector multinational company in India. The other company in the PSC is BG Exploration and Production India Limited (BG), a body corporate established under the laws of the Cayman Islands, part of BG Group, an international energy group headquartered in the United Kingdom (UK). The third, ONGC is a state owned oil and gas company in India. There three companies together defined as "contractor" in the PSC clause.

Certain differences and disputes have arisen between the parties in connection with the PSCs. Consequently the appellant issued a notice of arbitration. A tribunal was constituted for holding arbitration. The appellants claimed Royalties, Cess, Service Tax and CAG Audit. The respondent raised objection on the ground that these are not arbitrable. The respondent, Union of India challenged the award before the High Court of Delhi, invoking the jurisdiction of high court under section 34 of the Arbitration Act, 1996. The high court has held that the award can be permitted to be challenged in India even though the seat of arbitration is outside India.

It is this judgment of the high court which is the subject matter before the apex court. Briefly put the arguments revolved around the basic issues concerning proper law of contract and proper law of arbitration as applied to the international commercial transactions in the facts of the case. The apex court went into discovering the intention of the parties. The court began its inquiry by referring to parties' intention to choose (or exclude) the applicable law following the ratio in *Bhatia International*.[27] The court said, "In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties, by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part – I which is contrary to or excluded by that law or rules will not apply."[28]

26 2016 (1) SCJ 240.

27 (2002) 4 SCC 105.

28 *Id*., para 32.

In order to find the intention of the parties as regards exclusion of the provisions of the Arbitration Act, 1996 the court undertook to analyze the relevant articles of the PSC. In this context articles 32.1 and 32.2 are referred to. While article 32.1 provides the proper law of contract (ie., the laws of India), article 32.2 makes declaration that none of the provisions contained in the contract would entitle either the government or the contractor to exercise the rights , privileges and powers conferred upon it by the contract in a manner which would contravene the laws of India. The court observed the sequence of efforts made by the parties in this context. First, the parties to settle the disputes among themselves. Initially by conciliation, followed by arbitration thereafter. In case the procedure fails parties can approach the Permanent Court of Arbitration at Hague. Thus according to the apex court , provision in the PSC for approaching the PCA at Hague in case of default of by any of the parties is a strong indication for the exclusion applicability of Arbitration Act 1996 by the parties by consensus. Besides, parties have chosen UNCITRAL Rules, 1976 for conducting arbitration proceedings. The Court also found from the provisions of the PSC that the right to arbitrate disputes and claims under the contract shall survive the termination of the contract. The PSC also provided that the venue of arbitration to be in London and that the arbitration agreement shall be governed by the Laws of England. The apex court, accordingly observed, "we are of opinion , upon a meaningful reading of the Articles of the PSC, that the proper law of the contract is Indian law ; proper law of the arbitration agreement is the law of England…The conclusion is inescapable that applicability of Arbitration Act 1996 has been ruled out by a conscious decision and agreement of the parties.[29]" Continuing its observation, the Court said, "the high court has failed to distinguish the law applicable to the proper law of the contract and proper law of the arbitration agreement…[N]ow it is settled, in almost all international jurisdictions, the agreement to arbitrate is a separate contract distinct from the substantive contract which contains the arbitration agreement…."[30] In conclusion the Supreme Court allowed the appeal setting aside the high court judgment.

Party autonomy

The Supreme Court considered in *Centrotrade Minerals & Metals Inc*. v *Hindustan Copper Ltd.,*[31] the scope of party autonomy in an arbitration agreement. Briefly the facts are, the parties had entered into a contract. The contract contained an arbitration clause in two parts. The centrograde invoked it pursuant to arising of disputes. The indian council of Arbitration appointed an arbitrator who gave a NIL award. The centrotrade invoked the second part and the arbitrator in London gave an award in accordance with the rules of conciliation and Arbitration of international chamber of commerce. The London arbitration award was sought to be enforced by

29 2016 (1) SCJ 240 at 128.

30 *Id*. at 135.

31 (2006) 11 SCC 245; 2016 (12) SCALE 1015.

Centrotrade under section 48 of the Arbitration and Conciliation Act of 1996, which was challenged by the respondent. The crucial part of the arbitration clause in the instant case read as follows: [32]

> if either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in effect on the date hereof and the result of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any Court in jurisdiction.

Further clause 16 of the contract reads, "Construction – The contract is to be constructed and to take effect as a contract made in accordance with the laws of India." The decision in this case considers very important conflict of laws principles, namely, Party autonomy which is a basic rule of conflict of laws and according to the court 'is virtually the backbone of arbitrations.[33] The court observed in terms of legal position, the parties to an arbitration agreement have the autonomy to decide not only on the procedural to be followed but also the substantive law. The choice of jurisdiction is left to the contracting parties. On the facts of the instant case, the court pointed out that the parties have voluntarily agreed on a two tier arbitration system through clause 14 of the agreement and clause 16 of the agreement which provides the construction of the contract in accordance with the laws of India. It was found that the two clauses are mutually agreed upon by the parties.[34] It was observed that the "parties did and are bound by the agreement entered into by them. HCL cannot wriggle out of a solemn commitment made by it voluntarily, deliberately and with eyes wide open."[35]

Referring to the intention of the parties, the court opined that it is necessary to appreciate the parties intention when they agreed upon the arbitration clause in the contract….The contracting parties intended Clause 14 of the contract to provide two opportunities at resolving their disputes or differences."[36] After a deliberation through leading authors and case law on the subject the court negatived the challenge of the award by the respondent .

Party autonomy – choice of governing law

In *Sasan Power Ltd.* v. *North American Coal Corporation (India) P.Ltd*.[37] the apex court was addressing the issue, "whether two Indian parties can choose a foreign

32 *Id* .at 297.
33 *Id*. at 289.
34 *Id.* at 294.
35 *Id*. at para 44.
36 *Id*. at para 6 at 1021.
37 (2016) 10 SCC 813.

seat for arbitration or agree to a foreign governing law in arbitration. This issue is not answered in this case, as one of the parties was in fact not Indian. The appellant an Indian company and the American company executed between the appellant, respondent (NACC–an Indian company) and an American company. Agreement I is a bipartite agreement whereas Agreement II is a tripartite agreement. Agreement II is essentially in the nature of amendment to Agreement –I . Inasmuch as NAC is an American company and being a party to Agreement I as also to Agreement II, Agreement I and Agreement II become International Commercial Agreement within the meaning of Section 2(f) of the 1996 Act, which in clear terms, provides that if one of the parties to the agreement is a foreign company then such agreement would be regarded as " international commercial arbitration. According to the terms of the Agreement I laws of UK will be the governing law and all the disputes shall be resolved by ICC as per ICC rules; the place of arbitration shall be London, and provisions of part I of the 1996 Act will not apply to the arbitration in question.

Disputes arose between the appellant and respondent. The appellant filed a suit in Madhya Pradesh against the request for arbitration as being contrary to Indian law. In the suit an *ex parte* decree came to be passed injuncting ICC from proceeding with the arbitration. Aggrieved by the developments appellants carried the matter to the High Court of Madhya Pradesh, where the appeal was dismissed. In the present appeal before the apex court, it was found that the rights and obligations flowing out of the Agreement between the three parties are interdependent. In the facts and circumstances of the case, it was established that there was no discharge of the American company's obligations. The court clearly observed in the context of the facts, "Adjudication of the dispute raised by the respondent in the arbitration would necessarily involve examination of the rights and obligations of the American Company under Agreement I and Agreement II. Therefore, it is a dispute between three parties (of which one is an American company) with a foreign element *i.e.,* Rights and obligations of the American company. Hence, the stipulation regarding the governing law cannot be said to be an agreement between only two Indian companies".[38]

Continuing on facts and circumstances, the court observed, "So long as the obligations arising under Agreement I subsist and the American company is not discharged of its obligations under Agreement I , there is a "foreign element" therein and the dispute arising therefrom. The autonomy of the parties in such a case to choose the governing law is well recognized in law. In fact, section 28(1)(b) of the 1996 Act expressly recognizes such autonomy".[39]

Further, the court quoted its ruling on the scope of party autonomy stating that it not only includes to choose the governing law but also to exclude – expressly or impliedly a law. It relied on its ruling in *Bhatia International*[40] where it ruled, "we

38 *Id*. at 834.

39 *Id*. at 836.

40 (2001) 4 SCC 105.

hold that the provisions of part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of part I. In cases of international commercial arbitrations held out of India provisions of part I would apply unless the parties by agreement express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in part I, which is contrary to or excluded by that law or rules will not apply."[41]

Finally, the apex court stressed the relevance of choice of governing law thus: "The stipulation regarding the governing law contained in Article XII Section 12.1 is an independent stipulation applicable to both the substantive agreement and the arbitration agreement. Either of the agreements can survive in an appropriate case without the other. For example, if in a given case, (of a cross-border contract) parties can agree upon for the governing law but do not have any agreement for settlement of dispute through arbitration, it would not make any legal difference to the governing law clause (if otherwise valid) and bind the parties. The judicial forum before which the dispute (if any arises) falls for adjudication is normally obliged to apply such chosen governing law – a principle of international law recognized by this court. Similarly, it is possible in a given case, parties to a substantive contract in a cross-border transaction agree for the resolution of the disputes, if any, to arise out of such contract through arbitration without specifying the governing law. In such case, it would be the duty of the arbitrator to ascertain the "proper law" applicable to the case in terms of the established principles of international law. It is also possible that in a given case parties agree that the governing law of the substantive contract be that of one country and the governing law of the arbitration agreement be of another country. The principles of law in this regard are well settled. In all of the cases, the validity of either of the clauses/agreements does not depend upon the existence of the other."[42]

Applicable law – Party intention

In *Eitzen Bulk A/S*. v. *Ashapura Minechem Ltd.,*[43] the moot question is whether part I of the Arbitration and Conciliation Act, 1996 has any application to the foreign award where the proceedings were held in London and the arbitration was governed by English law. Eitzen Bulk A/S of Denmark entered into contract with Ashapura Minechem Ltd. of Mumbai as charterers for shipment of bauxite from India to China. This contract of Affreightment contained an arbitration clause which stated *inter alia*, "Any dispute arising under this COA is to be settled and referred to arbitration in London….English law is to apply."

Disputes having arisen between the parties, the matter was referred to arbitration. The arbitration resulted in award which went in favour of Eitzen Bulk and accordingly

41 *Id*. at 123.

42 (2016)10 SCC 844.

43 (2016) 11 SCC 508.

Eitzen applied for enforcement of the award in the countries of Netherlands, US, Belgium and UK. The courts in these jurisdictions have held the award to be enforceable as a judgment of the court. In India also the appellant filed the present proceedings under sections 27 to 49 of part II of the Arbitration Act, 1996 for enforcing the award, on the ground that the respondent was carrying on business within the jurisdiction of this court and has its registered and corporate office and assets within the territorial jurisdiction of this court. The question before the apex court is: "whether the stipulation show the intention of the parties to expressly or impliedly exclude the provisions of Part I to the arbitration , which was to be held outside India *i.e.,* in London.[44]" Stressing upon the role of intention of the parties the court pointed out: "We think that the clause evinces such an intention by providing that the English law will apply to the arbitration. The clause expressly provides that Indian law or any other law will not apply by positing that English law will apply. The intention is that English law will apply to the resolution of any dispute arising under the law. This means that English law will apply to the conduct of the arbitration. It must also follow that any objection to the conduct of the arbitration or the award will also be governed by English law. Clearly, this implies that the challenge to the award must be in accordance with English law. There is thus an express exclusion of the applicability of part I to the instant arbitration by clause 28. In fact, clause 28 deals with not only the seat of arbitration but also provides that there shall be two arbitrators, one appointed by the charterers and one by the owners and they shall appoint an umpire, in case there is no agreement. In this context, it may be noted that the Indian Arbitration and Conciliation Act, 1996 makes no provision for umpires and the intention is clearly to refer to an umpire contemplated by section 21 of the English Arbitration Act, 1996. It is thus clear that the intention is that the arbitration should be conducted under the English law i.e., the English Arbitration Act, 1996. It may also be noted that sections 67, 68 and 69 of the English Arbitration Act, provide for challenge to an award on grounds stated therein. The intention is thus clearly to exclude the applicability of part I to the instant arbitration proceedings. This is a case where two factors exclude the operation of part I of the Arbitration Act. Firstly, the seat of arbitration which is in London and secondly the clause that English law will apply."[45]

The court said that this position is now settled by a series of decisions of the apex court. On the facts and circumstances of the case the court observed, "we are thus of the view that by Clause 28, the parties chose to exclude the application of Part I to the arbitration proceedings between them by choosing London as the venue for arbitration and by making English law applicable to arbitration …the civil appeals of Eitzen are liable to succeed and are therefore allowed. The judgment of the Bombay High Court dated 3-12-2015 enforcing the foreign award under Part II of the Arbitration Act is correct and liable to be upheld."[46]

44 *Id*. at 517.

45 *Id*. at 517.

46 *Id.* at 520 and 521.

Enforcement of foreign award

The apex court was concerned with a License Agreement between the parties – appellant and respondent in *M/S Shinhan Apex Corporation* v. *M/S Euro Apex B.V.*,[47] which provided for settlement of disputes by way of arbitration in accordance with the Rules of the Dutch Arbitration Institute. The arbitral tribunal which heard the dispute passed a partial Final award (PFA). An application was filed by the respondent before the high court for enforcement of PFA which was duly carried out by the appellant following the directions of the Tribunal. The subject matter concerns with transfer of patents. Discussions were held between the parties to finalise the draft deed of transfer. Post – discussions, the redraft of deed of transfer carried some changes. The reference to PFA – which was mentioned in the earlier draft –transfer deed, was omitted. Factually speaking the respondent had failed to bring to the notice of the court, the re-draft with variations including the arbitration clause and the governing law. It was found that the learned single judge had completely omitted to take note of relevant factors and held that the final deed was at the instance of the appellant a fact which led to the passing of the impugned order. On the other hand, the appellant had duly executed the modified deed. In the circumstances the impugned order is set aside and the appeal allowed.

In *Arun Dev Upadhya* v. *Integrated Sales Service Ltd*.,[48] award was passed in favour of the respondent, Integrated Sales Service Ltd. by the International Arbitration Tribunal, making the appellant to pay USD 6,948,100. It is the case of the respondent that inasmuch as the appellant had not challenged the award under the Delaware Law which is the applicable law, the award has attained the finality. The respondent accordingly filed an application under the 1996 Act for enforcement of the award. The learned single judge opined that the award was not enforceable. The respondent preferred an appeal under the 1996 Act, to a division bench. The pivotal question in this case is, "whether an appeal against the judgment of single Judge in an international arbitration matter is appealable to the Division Bench or to put it otherwise, whether the intra-court appeal would lie."[49] The Supreme Court answered the query in the affirmative and dismissed the appeal.

VII FOREIGN JUDGMENT

In *Alcon Electronics Pvt.Ltd*. v. *Celem S.A. of FOS 34320*[50] the Supreme Court was concerned with execution of a foreign judgment passed by the High Court of Justice, Chancery Division, Patents Court, England. Briefly the facts are that, the respondent had filed a suit against the appellant before the English court for

47 2016 (4) SCALE 253.

48 AIR 2016 SC 4899.

49 *Id*. at 4903.

50 2016 (12) SCALE 645 ; (2017) 2 SCC 253.

infringement of patent vested in the respondents. In the litigation in England, the English Court dismissed the claims in its order and further directed the appellant to pay the costs to the respondents who are the original claimants, an amount set at £12,229.75. Respondents filed a petition for execution in India. The present appeal before the apex court is the consequence of dismissal of the executing court. The Supreme Court had carried out a thorough analysis of execution of the foreign judgment under Indian law namely, section 13 and 44-A of the CPC. The Supreme Court thus on the facts and circumstances of the case and in light of the analysis of the relevant provisions of the CPC, held that the execution petition filed by respondents is maintainable.

The apex court observed in this contex: [51]

> …to be conclusive an order or decree must have been obtained after following the due judicial process by giving reasonable notice and opportunity to all the proper and necessary parties to put forth their case. When once these requirements are fulfilled, the executing Court cannot enquire into the validity , legality or otherwise of the judgment..
> xxx
> A glance on the enforcement of the foreign judgment, the position at common law is very clear that a foreign judgment which has become final and conclusive between the parties is not impeachable either on facts or law except on limited grounds enunciated under section 13, CPC. In construing section 13, CPC we have to look at the plain meaning of the words and expressions used therein and need not look at any other factors. Further, under Section 14, CPC there is a presumption that the foreign court which passed the order is a court of competent jurisdiction which of course is a rebuttable presumption.
> xxx
> A judgment can be considered as a judgment passed on merits when the Court deciding the case gives opportunity to the parties to the case to put forth their case and after considering the rival submissions, gives its decision in the form of an order or judgment, it is certainly an order on merits of the case in the context of interpretation of section 13 C of the CPC.
> xxx
> Applying the same analogy to the facts of the case on hand, we have no hesitation to hold that the order passed by the English court is an order on merits.
> The principles of comity of nation demand us to respect the order of English Court. Even in regard to an interlocutory order Indian Courts have to give due weight to such order unless it falls under any of the

51 *Id*. at 261-263.

> exceptions under Section 13 of the CPC. Hence we feel that the order in the present case passed by the English Court does not fall under any of the exceptions to Section 13 of the CPC and it is a conclusive one.
> xxx
> Section 44 A of CPC indicates an independent right conferred on a foreign decree holder for enforcement of a decree/order in India. Section 44A was inserted by section 2 of the Civil Procedure Code (Amendment) Act, 1937(Act no.8 of 1937). This section is meant to give effect to the policy contained in the Foreign Judgments (Reciprocal Enforcement) Act, 1933. It is a part of the arrangement under which on one part decrees of Indian courts are made executable in UK and on the other part, decrees of court in the United Kingdom and other notified parts of Her Majesty's dominions are made executable in India. It is to be seen that as UK is a reciprocating territory and the High Court of Justice, Chancery Division, England being a recognized superior Court in England. Therefore, the order passed by that Court is executable in India under Section 44A of the CPC. The court in conclusion ruled that the order passed by the foreign court is conclusive and executable.

VIII CONCLUSION

The topics covered in this years survey include though few in number have indeed made a mark on the Indian state practice. It is essential to keep up the pace with rest of the world in an era of fast growing globalisation.