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CONFLICT OF LAWS

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I INTRODUCTION

GEOFFREY CHESHIRE wrote, "Private International Law, in fact, presents a golden opportunity perhaps the last opportunity for the judiciary to show that a homogeneous and scientifically constructed body of law, suitable to the changing needs of the society, can be evolved without the aid of legislature and though the task must necessarily be performed by the judges…"[1] It is a common knowledge that major part of substantive private international law (conflict of laws) is almost entirely found in judicial decision of domestic courts in a country. Private international law as practiced in India is no exception. This is indeed the current situation despite the harmonization and codification of this law both at international and domestic level, including the course of bilateral agreements. A study of case law periodically carried out ensures the progressive development of the subject such as the present survey.

II FAMILY LAW CHILD CUSTODY AND CHILD ABDUCTION

In *Arathi Bandi* v. *Bandi Jagdrakshara Rao*[2] the apex court is concerned with the issue of parental removal of the child where one parent has been given the legal custody and the other left behind parent is awarded the visitation rights. This case related to the traumatic situation of the parents relating to the custody of the child. Child was born to the appellant and respondent in America. Custody granted to mother by court in divorce proceedings with limited visitation rights to respondent husband. The child was removed to India, by wife despite the US court's restraining her from leaving the state of Washington. Since the wife did not return to US with the child, the US court changes the parenting plan. In the modified plan the husband was made the custodial parent and the wife granted the visitation rights. As the wife did not return to US with the child, the husband filed

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1 G.C. Cheshire, *Private International Law*, (Oxford University Press, Oxford, 1st edn., 1935).

2 AIR 2014 SC 918.

a *habeas corpus* petition in the High Court of Andhra Pradesh. Since there was no representation from the wife the writ petition resulted in an *ex parte* judgment. As against this, the wife preferred a review petition (later withdrawn) followed by the current appeal before the Supreme Court. It was averred by the wife before the apex court that the court's below have not considered the welfare of the child and has totally ignored relevant facts for determining what would be the best interest of the child. The wife submitted that both the mother and the child have been in India since 2008. The mother has been looking after the child single handedly without any help from the father. She has got a well paid job with IBH at Bangalore. The child lives in a joint family and is happy. He is now eight years of age and has developed roots in India. In her support she relied on the Supreme Court's decision in *Smt. Surinder Kaur Sandhu* v. *Harbax Singh Sindhu*[3] and the conclusion in the Parenting Evaluation Report which *inter alia* observed: In my opinion Anand should reside primarily with Ms. Bandi. He should have regular limited visitation with Mr. Rao increasing at regular intervals. These intervals should be based on Mr. Rao completing and changing certain criteria as well as on (Anand's) child's development needs. Mr. Rao should engage in specific services including alcohol treatment and a parenting class and both parents should participate in co-parent counseling.[4] It was further argued as regards the application of the principle of comity of courts as applicable in private international law matters as laid down in private international law matters as laid down in *Ravichandran* v. *Union of India*[5] by this court. According to wife's counsel the judgment of the apex court in *Dhanwanti Joshi* v. *Madhav Unde* [6] squarely covers the matter in the present case. In addition, the counsel for the wife relied also on the apex court's judgments in, *Sarita Sharma* v. *Sushil Sharma*[7] and *Ruchi Majoo* v. *Sanjeev Majoo.*[8]

The counsel appearing for the husband, on the other argued on the basis of the Hague Convention of 1980 on "Civil Aspects of International Child Abduction. According to him the convention fully recognizes the concept of doctrine of comity of courts in private international law. The counsel even pointed out the fact that India is not a signatory to this Hague Convention. In his view India should become a signatory to the Hague convention of 1980 which will in turn bring the prospect of achieving the return to India of children who have their homes in India. Further the counsel relied on the same judgments which were cited by counsel appearing for wife. The Supreme Court expressed its opinion as regards the abduction of children in international situations. It observed, "The court has specifically approved the modern theory of conflict of laws which prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case.

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3 AIR 1984 SC1224.

4 AIR 2014 SC 918 at 923.

5 AIR 2010 SC (Supp) 257.

6 (1993) 1 SCC 112.

7 AIR 2000 SC1019.

8 AIR 2011 SC 1952.

The court also holds that jurisdiction is not attracted by the operation or creation of fortuitous circumstances to allow the assumption of jurisdiction by another state in such circumstances will only result in encouraging forum-shopping".[9] Further the apex court following its opinion in *Ravichandran* case and quoting an excerpt therein carved out the role of a court dealing with a case of custody of a child removed by a parent from one country to another, the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody and all aspects relating to the child's welfare. The Supreme Court emphasized "should the court take a view that an elaborate enquiry is necessary, obviously the court is bound the 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 child's character, personality and talents and while doing so, the order of a foreign court as to his custody may be given due weight. The weight and persuasive effect of a foreign judgment must depend on the circumstances of each case".[10] On facts and circumstances of the case, the Supreme Court upheld the order of High Court of Andhra Pradesh which directed the appellant to return the child to the USA.

Amrik Singh v. *Sarabjit Kaur*[11] case displays a peaceful exercise of child custody on the basis of a compromise deed entered into between the parties. Sarabjit Kaur, the wife under Hindu Marriage Act, 1955 has agreed to the custody of their two children, a boy and a girl to remain with their father, Amrik Singh. In an affidavit, the respondent wife has resolved for the better future of the minors, to not create any hindrance whatsoever and that she will have no objection in case the children are taken with him abroad. In this case the father, was taking the children to Germany. In this petition, the petitioner husband was seeking custody of his two children under section 25 of the Guardians and Wards Act, 1890. The court, in view of the wife's affidavit granted the full and sole custody of the minors to the appellant, Amrik Singh so as to enable him to obtain visa for his children from the Germany embassy.

Family law-Inter-Country adoption

The case, *Kyle Spencer Allen* v. *Soban Singh*[12] involves an issue relating to 'Inter-Country adoption. Adoption is of a minor child, by foreign parents, living with his biological parents. An order by a District Judge, Tehri Garhwal directed for the issuance of a public notice through a daily news paper circulating in India, to the effect : 'Whether any national mission or any Indian wants to adopt the child', because the applicant is a foreigner. The petitioner in this case has sought a writ to quash the impugned judgments and orders concerning the issue before

9 *Supra* note 4 at 927.

10 *Id.* at 928.

11 Judgment delivered on 13-1-2014 by the High Court of Punjab and Haryana at Chandigarh.

12 2014(3)UC 2335.

the court. It is the contention of the petitioner that the impugned judgments and orders have failed to consider the relevant ruling of the apex court in *Lakshmi Kant Pandey* v. *Union of India*[13] *and Anokha* v. *State of Rajasthan*[14]

The Uttaranchal High Court in the present case explaining the background of the legal position of inter country adoption in India, explained taking into consideration of the two decisions of the Supreme Court, as under " the background in which the Guidelines were issued was a number of decisions of this court , the first of which is *Laxmikant Pandey* case. This is borne out from the stated object of the Guidelines as set out in para 1.1 thereof which " is to provide the sound basis for adoption within the framework of the norms and principles laid down by the Supreme Court of India in a series of judgments delivered in *Laxmikant Pandey* case between, 1984 and 1991.

The original decision of the court was taken on the basis of a letter written by one Laxmi Kant Pandey complaining of malpractices indulged in by social organizations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The judgment has considered the problem at great length after affidavits were filed not only by the Indian Council of Social Welfare but also by foreign organizations and Indian organizations. The decision has referred to three classes to children:

(i) Children who are orphaned and destitute or whose biological parents cannot be traced;

(ii) Children whose biological parents are traceable but have relinquished or surrendered them for adoption; and

(iii) Children living with their biological parents.

The third category has been expressly excluded from consideration as far as the decision was concerned 'for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents'. The reason is obvious. Normally no parents with whom the child is living would agree to give a child in adoption unless he or she is satisfied that it would be in the best interest of the child that is the greatest safeguard".[15] On the facts and circumstances of the case the court ruled "In the case in hand, the child is living with his biological parents; therefore, impugned notice is not necessary to be published. It is only biological parents who may file objections, if any. Therefore, orders impugned are set aside".

Family Law – Inter-personal conflict

The issue in *Butaki Bai* v. *Sukhbati*[16] deals with inter-personal conflicts in matters of inheritance of properties. To be precise, the conflict is as regards the

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13 AIR 1984 SC 469.

14 AIR 2004 SC 2829.

15 *Supra* note 12.

16 AIR 2014 Chh 110.

governing law – *i.e.,* the tribal law of succession or the Hindu Law of Succession, 1956. As per the customs of Halba Scheduled Tribes daughters are not entitled to get any share in the ancestral property of their father. It is the case of the appellants/ defendants that the parties belong to the Halba Scheduled Tribes and hence are governed by the customs of the tribe and not by the provisions of the Hindu Succession Act, 1956. They relied on section 2 of the Act.[17]

Factually speaking the appellant/defendant are the descendants of the father, through his son while the respondent /plaintiff are descendants through daughter. It is an admitted fact that the parties belong to Halba Scheduled Tribes of Bastar. The Tribe- Halba has been mentioned in entry seventeen in relation to Chattisgarh, in the Constitution of India scheduled tribe order which contains a list of scheduled tribes. The court observed in this context:[18]

> The provisions of Hindu Succession Act, 1956 do not *pro-tanto* apply to the members of schedule tribe as per section 2(2) of the Act of 1956, because of non-obstante clause in section 2(2) of the Act of 1956, as the customary law of the scheduled tribe has been preserved by the Legislature.

Following the apex court in *Madhu Kishwar* v. *State of Bihar*[19] the court further held that the provisions of Hindu Succession Act, 1956 will not apply to the parties, as they are Halba Scheduled Tribes, which is scheduled tribe within the meaning of article 366(25) of the Constitution of India and Central Government has not issued any notification directing otherwise and applying the provisions of Hindu Succession Act, 1956 to them.[20]

Having ascertained the legal position as regards inheritance of ancestral property in terms of tribal customs as well as Hindu Law, the court observed as under: [21]

> Thus in view of the foregoing discussion , this Court is of the considered opinion that the plaintiff has failed to establish that members of the Halba Scheduled Tribe, have given up her customary succession and have become " Hindus out and out" or "sufficiently Hinduised" and in the matter of succession , they are governed by any particular school of Hindu Law, consequently the legislative bar enacted under sub-section (2) of Section 2 of the Act of 1956 will apply in full force and provision of the Hindu Succession Act, 1956 will not apply to parties to suit *i.e.,* Halba scheduled tribes in absence of notification by Central Government applying the provision of Act of 1956 to them.

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17 Hindu Succession Act, 1956, s.2.

18 *Supra* note 16.

19 AIR 1996 SC 1864.

20 *Supra* note 16.

21 *Id*. at 117.

The court upheld the trial court's verdict on the facts and circumstances of the case. It may be pointed out that all matters of inheritance pertaining to inheritance to landed property are always governed by *lex situs.* In the present case the conflict arose between the tribal customary law and the statutory law as practiced in Chhattisgarh.

Family law – Harmonisation of personal laws

Shabnam Hashmi v. *Union of India*[22] is a writ petition, moved by a public spirited person under article 32 of the Constitution of India requesting the court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed *etc*. The apex court considering the Juvenile Justice Act, 2000, as amended along with the procedure prescribed by the Act, Rules and the Central Adoption Resource Authority (CARA) guidelines, observed:[23]

> To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition, we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a Uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date

Harmonization of personal laws in India, is needed to prevent inter personal conflicts of laws (due to the presence of multiple personal laws having allegiance to religions).

Sandip Shankerlal Kedia v. *Pooja Kedia*,[24] concerns with many issues of private international law. The couple in this case is Indian nationals. The main litigation between the parties is in respect of judicial separation sought by the wife in Mumbai and divorce and child custody claimed by the husband in Dubai. The wife has the custody of their child. Initially she took the child to Dubai and constrained the husband to sue upto the Supreme Court to obtain access to the child. The husband sought a travel ban order from court in Dubai. The travel ban order made the child to remain in Dubai for the husband to claim access to the child in Dubai.

The High Court of Bombay pointed out that "it is one of the principles of jurisdiction of courts in India to sue where the party resides and carries on business to confer jurisdiction upon that court".[25] Wife has shifted to Dubai, the country of

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22 AIR 2014 SC1281.

23 *Id.* at 1284-85.

24 2013 (4) Mh Lj 673.

25 *Id.* at para 16

her choice for her residence (though not of her domicile and nationality). When the husband filed divorce petition in Mumbai where she chose to reside, the wife did not submit to the jurisdiction of court in Dubai. It is common knowledge that the system of governance of laws in Dubai is not based on the common law system and is governed by the Sharia law. The court found that the matters such as the present case involved are governed by the personal status law, which is the substantive personal law governing the courts and the Civil Transactions Law in Dubai.

Chronologically, the husband has filed the divorce petition in Dubai, after wife has filed the petition for judicial separation in Mumbai. Thereafter wife petitioned the court for anti-suit injunction restraining her husband from pursuing his case in Dubai, which was allowed. In the present case the husband is challenging the order allowing the said wife's application for anti-suit injunction, restraining him from pursuing his case filed in Dubai for Divorce and child custody.

The court found that the husband had followed the procedures to file a divorce petition under Dubai law. The husband had filed the petition for divorce in Dubai, first before the family guidance committee, in accordance with the law prevailing in Dubai. The Dubai court follows the rules relating to conflict of laws in matters of procedure. According to state practice of Dubai, "the Rules of jurisdiction and all procedural matters shall be subject to the law of the state in which the legal action is filed or proceedings are initiated".[26]

The High Court of Bombay addressed in this case many questions of private international law. Issues dealing with procedure – *lex fori*, anti-suit injunctions in private international law, Family law issues concerning applicable law to divorce, jurisdiction, child custody, guardianship in Dubai including legal co-operation in cross country litigation through bilateral treaty. The issues in this case revolve around laws in India and Dubai. The court in its wisdom and facts and circumstances of the case has brought in a comparative account of both the laws in the context of private international law. The Dubai law, namely, the Civil Transactions Law (Federal Law no.5 of 1985) is the Civil Code. Under UAE law, the non-citizens of UAE, as also the non-Muslims amongst the citizens of UAE are entitled to be governed by their personal laws which are the most beneficent provision.

According to the law in Dubai, the civil status of persons and their competence shall be governed by the law of the state to which they belong by their nationality. In this context the High Court of Bombay pointed out that under the provisions of the personal status law, the substantive law applicable to the parties as non-citizen of the UAE would be the law which they ask to apply.

Addressing initially the wife's plea of anti–suit injunction against her husband's petition for divorce in Dubai, the court observed the law and practice of anti-suit injunction in India as under:[27]

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26 Art. 21 of Civil Transactions Law (Federal Law No. 5 of 1985) of UAE , *Id.*, para 23.

27 *Ibid.*

> …[I]t is settled law that injunction is a discretionary remedy. It is granted protection for of the rights of parties in personam as also against their properties. Such injunction cannot be granted specifically under the circumstances set out in Section 41 of the Specific Relief Act, 1963, the first of which is to prevent parties from suing in other forums except when it would result in multiplicity of proceedings as to be counter productive to both the parties entailing needless costs, expenses and time. It is also established that courts would act in exercising their inherent powers in the interest of justice to grant injunctions. An anti-suit injunction application would fall only under the inherent power of the court and is consequently covered by precedent law.

When parties have been in different jurisdictions, more specially in different international forums, courts have refrained themselves from exercising the jurisdiction to restrain parties from proceeding in another forum as such an injunction would be not only against the party in person, but against another court which may otherwise be a competent court to exercise jurisdiction upon the party himself /herself or the properties of the parties. The courts have also restrained themselves from exercising such jurisdiction in what are essentially known as "reciprocal territories", in which the laws governing parties are consistent with the laws in India, more specifically common law jurisdictions, since the Indian jurisdiction is essentially based upon common law. The constitutional framework of India enshrining an egalitarian society maintaining the rights and dignity of all human beings equally would be consistent with those jurisdictions. Further the principles of private international laws settling the law with regard to the proper law governing those parties are always adhered to and respected. It may at once be mentioned that those jurisdictions are also the ones internationally following the common law principles and the doctrines of equality of all human beings.

Conversely, therefore those countries and territories which do not follow the principles of equality, egalitarianism and dignity of all human beings are not taken to be "reciprocal territories".

We may refer to and be guided by the latest decision in the case of *Modi Entertainment Network* v. *W.S.G. Cricket PTE Ltd*.[28] in which the Supreme Court has set out the above principles:[29]

> i. in exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects : -
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> a. the defendant , against whom injunction is sought, is amenable to the personal jurisdiction of the court :
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> b. if the injunction is declined the ends of justice will be defeated and injustice will be perpetuated ; and

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28 AIR 2003 SC 1177.

29 *Id*., para 28.

c. the principle of comity – respect of the court in which the commencement or continuance of action/proceeding is sought to be restrained – must be borne in mind ;

ii. in a case where more forums than one are available , the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexations or in a forum non-conveniens;

iii…

iv a court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court…

v…..

vi……

vii the burden of establishing that the forum of the choice is a forum non-conveniens or the proceedings therein are oppressive or vexacious would be on the party so contending to aver and prove the same.

Consequently in that case where the jurisdiction of English courts was invoked which was held to be the forum of choice of the parties, the court refrained from passing any injunction restraining the respondent from proceeding in such court. The Supreme Court held that such a power should be exercised sparingly because the injunction though directed against a person, would in effect cause interference in the exercise of jurisdiction by another court having regard to the rule of comity/respect in the court in which the proceedings were commenced.

The court considered the law laid down in the case of *Oil and Natural Gas Commission* v. *Western Company of North America*[30] in which the parameters were specifically laid down. Only when it was necessary or expedient, when the ends of justice required and when the action in a foreign court would be oppressive, the court would sparingly and in rare cases exercise its jurisdiction to grant the order of injunction. In that case when Indian courts had exclusive jurisdiction upon parties being governed by the Indian law, Indian

30 (1987) I SCR 1024.

> Arbitration Act and the American Court had no jurisdiction, holding that it would cause serious prejudice to allow a party to violate the very arbitration clauses on the basis of which an award came to be passed which was sought to be enforced, an anti-suit injunction came to be granted.
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> In the same judgment the court also considered the view taken by the House of Lords in England upon similar principles laid down by English courts in the case of *Airbus Industries GIE* v. *Patel* [31] wherein it was observed that proceedings in a foreign jurisdiction could be allowed to proceed upon principles of comity and not where the conduct of the foreign state in exercising jurisdiction was such as to deprive it of the respect normally required by comity. Similarly it was observed that this jurisdiction would be exercised and injunction would be granted upon seeing lack of comity only when the English forum would have sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which such injunction entailed. Hence the further principle judicially set out is the principle of seeing the interest and connection of the parties and the subject matter of the suit by the court granting the injunction.
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> It is based upon these settled principles with which this court is governed that the case of the parties upon a case aforestated must be considered to grant or refuse the injunction. The judge in the impugned order having done so, interference, if any, required to be granted would be upon revisiting the above principles as applied to the facts of this case.[32]

Turning to substantive issues relating to matrimonial matters and child custody, the court pointed out, referring to the law in Dubai, "the domestic provisions, which is the substantive law governing the parties, would be applied when a foreign law such as the HMA is required to be applied".[33]

The court's attention was drawn to bilateral treaty between India and UAE of 1999[34] dealing with civil and commercial matters. This treaty provides for assistance of both countries for service of summons, taking evidence and execution of decrees, settlements and awards. It has been pointed out, that under article XX of this treaty "a decree of either of the countries would be recognized if it is in consonance with the principles under Section 13 of the CPC which deals with acceptance of foreign judgments".[35] The UAE Law will not apply to foreign law if

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31 (1998) 2 All ER 257.

32 *Supra* note 24 at paras 9- 14.

33 Art.26 of Civil Transactions Law of UAE, para 23.

34 *Available at*: http://www.mea.gov.in/Portal/ForeignRelation/uae-august-2012.pdf (last visited on Feb. 10, 2015).

35 *Ibid.*

it is in violation of Islamic Sharia, public order or morals prevailing in the UAE. After a thorough interaction of principles of Private International Law with the facts and circumstances of the case, the court observed as under:[36]

> she has chosen the country. She must accept her choice. She, therefore, comes within the jurisdiction of that country. She must respect the jurisdiction of those courts. The petition has been filed where she resides. The costs of obtaining affirmations and translations is petty given her status and position as also the choice of her residence. The wife is seen to have no cause to complaint. She has brought upon herself the jurisdiction of the Dubai Courts. This court must respect that jurisdiction on the principle of comity seeing nothing amiss.
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> The principles of comity /respect for all courts are enjoined to be borne in mind. The aforesaid law of personal status of 2005 in Dubai deserves the respect/comity as a sound law of any equitable justice system.
>
> The jurisdiction to which the wife would submit is, therefore neither inconvenient nor oppressive, but deserving the comity and respect as equitable and convenient in view of her own residence there. The court would be lothe to exercise the jurisdiction which would interfere not only with the husband's petition but the jurisdiction of that court.

The court ruled: [37]

> The husband's application is not seen to be only to spite the wife as is contended. The husband is entitled to sue for divorce upon what transpired between the parties leading the wife to leave the country of her nationality as well as domicile. Even if he was not constrained to apply in Dubai, having applied in the Courts in Mumbai, it would have been a herculean task for him to obtain her presence for conducting the proceedings. He must, therefore, submit himself to the place where the wife resides and carries on her business which he has done and which act cannot be faulted…

The application of the wife for anti-suit injunction deserves to be and is dismissed

Family law – Maintenance and Foreign Marriages Act 1969

In *Subhasis Gupta* v. *Dr Sritamakar,*[38] parties were initially married under US laws of New Jersey, in USA. They repeated the solemnization of their marriage

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36 *Supra* note 24 at para 43-45.

37 *Id*., paras 46 and 48.

38 2014 (2) CWN(CAL) 449.

in India in accordance with Hindu rites. Among the parties, the husband is an American citizen while the wife is an Indian citizen. Subsequently their marriage was dissolved in US and the wife returned to India to her parents. The wife filed a maintenance petition in India under section125 of the Code of Criminal Procedure (CrPC), in which the judicial magistrate granted an interim maintenance to the tune of Rs 20,000 per month to the wife.

In the present case, the petitioner/husband (American citizen) filed a written objection to the maintainability of the application for maintenance. His grounds of objections are:

a. marriage having taken place in US

b. the marriage, in which one party is an American citizen and another an Indian citizen and that the marriage itself is not registered under the Foreign Marriage Act, 1969

c. a decree of divorce has been obtained from the US Court in New Jersey wherein the wife has given up her claim of alimony

On these facts and circumstances the High Court of Calcutta observed: [39]

> as relief of maintenance has been claimed by wife under Section125 of the Code of Criminal Procedure, 1973 and not under the provisions of the Act of 1969, the bar of Section 18(4) of the Act of 1969 would not disentitle her from pursuing such claim in respect of a foreign marriage unregistered under the Act of 1969, if she is otherwise entitled to do so under the Code. That apart, in the instant case, it has been claimed that the marriage, in fact, was solemnized under the provisions of the Hindu Marriage Act in India also and the parties even cohabited in the country. For these reasons, I am of the view, which the statutory bar under Section 18(4) of the Foreign Marriage Act, 1969 cannot operate as bar for instituting a proceeding under Section125 of the Code of Criminal Procedure against the petitioner/husband in the facts of this case.

On merits the court ruled that the petitioner/husband has liberty to file further written objection for interim maintenance before the magistrate, and that in the meantime the petitioner shall continue to pay the interim maintenance to the tune of Rs.20, 000 per month to the wife.

III INTERNATIONAL CONTRACT

Metro Exporters Pvt.Ltd. v. *State Bank of India*[40] case concerns with international fund transfer which occurs with the payer's or the payee's bank or at

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39 *Id*. at 450.

40 AIR 2014 SC 3206.

times both banks. The banks may be located in a country other than that of the currency of the transfer. An international funds transfer may be subject to more than one law. The applicable law to the transaction of money transfer in each case between the payer and his own bank and between the payee's bank and the payee may be different based on the underlying obligation between the payer and the payee.

The facts of the dispute involved the appellant who used to export goods to Abdul Zafar Ghulam (importer) and the State Bank of India's overseas branch with whom the appellant used to bank. The appellant raised an invoice and shipped the goods directly to the importer at Mozambique, Nigeria and subsequently lodged the documents with the State Bank of India, overseas branch, Mumbai. In the course of the banking transactions handling the international fund transfers, through various banks a mistake had occurred because of which the amount got credited in "Bank of India A/c Metro Exporters Pvt. Ltd." and not in the credit of State Bank of India, FD(Foreign Department) Kolkata or Mumbai.

In this case the appellant has challenged the action of the State Bank of India in debiting from the appellant's EEFC account Euro 1.36 lakhs to realize Rs 94 lakhs on the ground that it was wrongly deposited in the appellant's account and that the appellant could recover the amount by way of civil proceedings. The appellant's petition was dismissed by the high court on the ground that it is a dispute which arose out of a contractual relationship between the parties and hence the appellant should find a remedy by way of a civil suit. Aggrieved by the high court's dismissal the appellant preferred the present case before the apex court. Further, the money sent by the importer to the appellant had never reached the SBI account either at Mumbai or at Kolkata, but went into the account of 'Bank of India' by mistake in the course of banking transactions that took place between Bank of America, City Bank of New York, United National Bank London, Al Zaroone Exchange or at level of importer.

In the context of the abovementioned factual details, the apex court studied the entire gamut of banking transactions relating to international transfer of funds and the manner of operation including as to what constitutes SWIFT (Society for Worldwide Interbank Financial Telecommunication). The court also considered the role of principles of international banking such as "NOSTRO and VOSTRO" accounts in the international transfer of funds that takes place in the course of imports and exports of goods from country to country.

In the facts and circumstances of the case, the court observed : " we are of the view, even if the amount was credited by the bank to the appellants' account by mistake, the question is whether,…the bank is justified in marking a lien on the appellant's EEFC account , thereby realizing the amount paid".[41] For record, since the bank had credited the amount in the appellant's EEFC account, their claim as against the imposter stood satisfied. The court stating its view made it clear that the appellant should not suffer for the mistake committed by the bank and observed

41 *Id*. at 3217.

"we make it clear that it is open to the SBI to use their good offices to follow up the matter with the Bank of America or any other entity, which is in receipt of control of subject money and recover the amount".[42]

Cross-country business transactions (involving whether institutions or individuals) such as those in the instant case concern international trade and commerce governed by rules of private international law. Classifying these judicial decisions as belonging to a particular topic will go a long way in developing the subject – conflict of laws. The instant case raises a very significant question as to " what law governs international fund transfer through banking institutions in cross country transactions ?" one answer is, if these transactions are contractual, they are governed by their contractual terms.

IV FOREIGN TORT IPR – INFRINGEMENT

A British company has brought an issue relating to infringement of its registered trademark before the High Court of Delhi against an Indian firm in *Easy Group IP Licensing Limited* v. *Easy Jet Aviation Services Pvt. Ltd*.[43] The plaintiffs (owners and licensed user), a company incorporated under the laws of England, filed a suit against the defendant, a company incorporated under the Companies Act, 1956 alleging infringement and passing off registered trademark, "easy Jet". The defendant company having its principal place of business in Mumbai, having name and style of Easy Jet Aviation Services Limited is engaged in facilitating air charters, aircraft management including buying and selling of aircrafts, as middlemen. After initial appearance, the defendant remained *ex parte* throughout the proceedings resulting in an *ex parte* order. The suit was filed under the Indian enactment, section 29 of the Trademarks Act, 1999. It is the case of the plaintiff that the defendant is using the impugned trademark in relation to the same services as offered by the plaintiffs under the suit trademark. Further, the plaintiff submitted that the mark of the defendant's "easy Jet" is a blatant copy of the plaintiff's mark "easy Jet" and that the defendants are passing off their services as those of the plaintiff and the same will cause a three fold injury to the plaintiffs:

i. confusion in public

ii adverse effect to the plaintiffs reputation and;

iii dilution – of goodwill and profits of the plaintiff.

It was contended by the plaintiffs that on account of defendant's infringement and passing of the suit trademark, the plaintiffs are seeking damages in their prayer.

On the aforesaid facts and circumstances of the case, the court noted that the "suit trademark" is a coined word. No explanation has been offered by the defendants as to why they chose the trademark. The defendant's have chosen not to contest the proceedings and therefore the only valid inference that can be drawn

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42 *Id*. at 3218.

43 Judgment delivered on 19-08-2013 by the High Court of Delhi.

is that the defendants adopted the impugned trademark to ride on the plaintiffs goodwill and popularity. The plaintiffs and the defendants are operating in the same sphere of activity. The services provided by the plaintiffs and the defendants are identical in nature. Therefore, the likelihood of confusion and deception is strong on account of the public at large associating the defendant's services to be those offered by the plaintiff. The acts of the defendants in using the impugned trademark coupled with a lack of plausible explanation offered by the defendants for the same, leads to the conclusion that the defendants are in fact passing off their services as those of the plaintiffs in an attempt to cash in on the plaintiff's reputation worldwide as well as in India.[44]

The court also found that the plaintiffs intellectual property rights have been protected by the international dispute resolution bodies such as WIPO and that in an action WIPO Administrative Panel had ordered the defendants herein to transfer the domain name easyjets.com to the plaintiff on the grounds similar to the present suit. The High Court of Delhi, under these circumstances held that the plaintiffs had successfully established the prior use of the trademark for which they hold a valid and subsisting registration and that for these reasons the defendants must be permanently restrained from using the plaintiff's trademark or any other deceptively similar mark. The court accordingly decreed the suit in favour of the plaintiffs which included payment of damages as well.

This is a clear case of foreign torts in the realm of conflicts of laws where the court applied the rule of *lex loci delicti commissi* – the law of the place where the actionable tort was committed, namely, Indian law. The court and the counsel appearing for the parties , could have identified the rule of foreign tort in conflict of laws and have not done so perhaps for reasons of lack of knowledge of conflict of laws.

V ADMIRALITY JURISDICTION

In *Porto Maina Maritime SA* v. *Owners and Parties Interested in the Vessel M.V. Gati Majestic*,[45] the plaintiffs, owners of a Greek ship claimed a cause of action against the defendant vessel, M.V. Gati Majestic arising out of damages of collision which took place at Haldia docks, between the plaintiffs vessel and the defendant vessel. Plaintiff had submitted an admiralty suit against the Indian vessel. The court *suo motu* raised a preliminary issue with regard to its exercise of 'Admiralty Jurisdiction' against the defendant vessel which carried an Indian flag and registered under the Indian laws. By rejecting the plaintiff's claim the court following the law laid down in *M.V. Elizabeth* [46] the Supreme Court observed:

> "the Admiralty Jurisdiction of the High Court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship". (Emphasis supplied by this Court).

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44 *Id*. at paras 31 and 34.

45 AIR 2014 Cal.47.

46 AIR 1993 SC 1014.

The above observation of the Supreme Court makes it categorically clear that it is only the presence of a "foreign ship" in Indian waters, which determines the attraction of admirality jurisdiction of the High Court.

In view of the enunciation of the principle for attracting admirality jurisdiction of the high court, as observed by the Supreme Court in paragraph 83 of its judgment rendered in *M.V. Elizabeth* there remains no manner of doubt, whatsoever, that it was not open to the plaintiff to invoke the admirality jurisdiction of this court in respect of an action against M.V. Gati Majestic, being an Indian flag flying vessel registered under Indian laws.[47]

VI CIVIL LIABILITY

M/s MRF Ltd. Chennai v. *M/s Singapore Airlines, Singapore*[48] concerns with civil liability *viz.*, (claim for damages). The appellant company, owner of the goods, entrusted to the respondent air carrier, who undertook to carry the cargo. The appellant found the cargo in a damaged condition upon arrival. The case concerns with two issues, namely on question of payment of damages the substantive and on the question of procedure. The first issue is covered by the provisions of the Carriage by Air Act, 1972 and the second issue on the computing the period of limitation to stake claim from the courts.

Both the issues fall under the purview of conflict of laws/private international law. The first issue illustrates the unification of private international law while the second explains rules pertaining to law governing procedure in conflict of laws. Accordingly, the court observed:[49]

> The Carriage by Air Act itself is to give effect to the Convention for the unification of certain rules relating to international carriage by air signed at Warsaw on 12.10.1929 and to the said Convention as amended by the Hague Protocol on 28.9.1955 and to make provision in its original form and in the amended form subject to exceptions, adaptations and modifications to non international carriage by air and for matters connected herewith.

Rules 30 (1) and (2) of the II schedule to the Carriage by Air Act, 1972 read as follows:

> 30(1) – The right to damage shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
>
> (2) – the method of calculating the period of limitation shall be determined by the law of the court seized of the case.

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47 AIR 2014 Cal 47 at 52.

48 AIR 2014 Mad 90.

49 *Id.* at 92. See also, in this context Cheshire, North & Fawcett, Private International Law 10 (14th edn., Oxford University Press, Oxford, 2008).

Mohan Murti v. *Deutsche Ranco GMBH* [50] involves issues relating to the validation of foreign documents.The power of attorney executed before and authenticated by Assistant Consular Officer of High Commission of India in UK and, the issue of notarization of merger documents formed the subject matter in this case. Briefly, the facts are, the respondent German company had approached this court by an application seeking restoration of an execution petition that was dismissed in default. It was contented by the respondent applicant a German company that "as per the German law the applicant company is to be treated as a successor-in-interest of the original decree holder company and the merger contract filed with the application is a duly notarized document, valid in law and is rendered valid through registration in the commercial register. The court noted on the issue of power of attorney, filed on behalf of the applicant in support of restoration of the execution petition, that technical objections should not be allowed to result in dismissal of substantive rights, following ratio laid down by the apex court[51]. Affirming this the court observed in the instant case " to dismiss the Execution Petition on hyper technical grounds where huge amounts of money are to be recovered (in the instant case amounting to Rs.10,42,73,564.75 which increases per month by Rs.2,27,250 being the interest accruing on the decreed amount of Rs.1,51,50,000) would be both unjust and unacceptable. Further we find that the power of attorney in the instant case is executed before and authenticated by the Assistant Consular Officer of the High Commission of India in the UK and we therefore are bound to presume the validity thereof under Sections 85 and 57 of the Evidence Act, 1872".[52]

The objections raised by the appellant in this case pertain to authentication of documents concerning merger of companies (of decree holder and the respondent German company) and Power of Attorney (filed by the applicant respondent) were rejected by the court and the appeal was dismissed.

The subject matter in the present case concerns issues relating to legal co-operation in transnational situations. There is, however no reference to the Hague convention on the validation of public documents, as now, India has ratified the same. Neither the contentions of the parties before the court nor the judiciary seem to be aware of these developments in conflicts of laws. The concerned Hague Convention is the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961.

VII INTERNATIONAL COMMERCIAL ARBITRATION

International commercial arbitration has its base rooted on the principles of conflicts of laws. The Indian enactment, *i.e.,* Arbitration and Conciliation Act of 1996 comprises of both rules for domestic as well as the foreign arbitrations as stipulated in part I and part II. This survey has come across four cases involving

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50 2014 AIR CC 8 (Del).

51 In *United Bank of India* v. *Naresh Kumar* AIR 1997 SC 3.

52 2014 AIR CC 8 (Del)11.

various issues on International Commercial Arbitration decided by the apex court. They are, *Reliance Industries Limited* v. *Union of India*,[53] *Reliance Industries Limited* v. *Union of India*,[54] *World Sport Group (Mauritius) Ltd.* v.*MSM Satellite (Singapore) Pte.Ltd*[55] *and Enercon India Ltd.* v. *Enercon GMBH*.[56]

Reliance Industries Limited v. *Union of India*[57] raises the issue whether part I of the Indian enactment which concerns with domestic arbitrations is applicable to an arbitration clause governed by English law and has the seat of the arbitration outside India. In this case the parties had entered into two Production Sharing Contracts (PSCs) in 1994. These contracts provide for the exploration and production of petroleum. The two parties who had into the PSCs consisted of the The Reliance Industries Limited (RIL) established under the laws of India, an Indian multinational , private sector company and the other (PSC) was entered into with BG Exploration and Production India Limited, forming part of BG Group, headquartered in the UK with worldwide business operations . At the outset, the PSCs provided for detailed procedure for ADR mechanisms. *Inter alia*, the PSC also in addition consisted of the following terms, which included arbitration: [58]

> Article 32 – Applicable Law and Language of the Contract –
>
> 32.1 Subject to the provisions of Article 33.12 , this Contract shall be governed and interpreted in accordance with the laws of India.
>
> 32.2 Nothing in this Contract shall entitle the Government or the Contractor to exercise the rights , privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India.

Parties agreed to associate the Secretary General of the Permanent Court of Arbitration at the Hague as third arbitrator. PSCs, agreed to the conducting of arbitration proceedings in accordance with the arbitration Rules of the UNCITRAL of 1985. According to the PSC terms, arbitral proceedings were to be held in London and the applicable law to be English Law. Disputes having arisen, the appellants issued a notice of arbitration after their attempts to resolve the disputes with the respondent amicably, have failed. The tribunal made a "Final Partial Consent Award". The tribunal declared in their award that the claimants' claims in respect of loyalties, cess, service tax and CAG audit are arbitrable. Union of India (the respondent) challenged the award before the High Court of Delhi under section 34 of the 1996 Act on grounds: [59]

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53 AIR 2014 SC 3218.

54 AIR 2014 SC 2342.

55 AIR 2014 SC 968.

56 AIR 2014 SC 3152.

57 AIR 2014 SC 3218.

58 *Id.* at 3220.

59 *Id*. at 3226-27.

(1) the terms of the PSCs entered would manifest an unmistakable intention of the parties to be governed by the laws of India and more particularly the Arbitration Act,1996.;

(2) the contract were signed and executed in India;

(3) the subject matter of the contracts , namely , the Panna Mukta and the Tapti Fields are situated within India

(4) the obligations under the contracts have been for the past more than 15 years performed within India

(5) the contracts stipulate that they "shall be governed and interpreted in accordance with the laws of India

(6) they also provided that "nothing in this contract" shall entitle either of the parties to exercise the rights , privileges and powers conferred upon them by the contract " in a manner which will contravene the laws of India" (Article 32.2); and

(7) the contracts further stipulate that "the companies and the operations under this Contract shall be subject to all fiscal legislation of India(Article 15.1)"[60].

(8) The appellants on the other argued that by choosing the English Law to govern their arbitration agreement and expressly agreeing to London seated arbitration the parties have excluded the application of Part I of the Arbitration Act, 1996. They also contended that the High Court of Delhi had no jurisdiction to entertain the objection filed by the Union of India under Section 34 of the 1996 Act as the courts in England and Wales have exclusive jurisdiction to challenge the award. Further it was also pointed out by the appellants that the arbitration was to be conducted under UNCITRAL Rules , 1985. Under these circumstances, the High Court held that the governing law of the contract ie. The proper law of contract is the law of India.

the parties never intended to all together exclude the laws of India, so far as contractual rights are concerned. The Laws of England are limited in their applicability in relation to arbitration agreement. The English Law would be applicable only with regard to the curial law matters ie. conduct of the arbitral proceedings. For all other matters, proper law of the contract would be applicable. Relying on Article 15 (1), it has been held that the fiscal laws of India cannot be derogated from . Therefore the exclusion of Indian public policy

60 *Id.* at 3225.

> was not envisaged by the parties at the time when they entered into the contract... the question of arbitrability of the claim or dispute cannot be examined solely on the touchstone of the applicability of the law relating to arbitration of any country but applying the public policy under the laws of the country to which the parties have subjected the contract to be governed. Therefore , according to the High Court the question of arbitrability of the dispute is not a pure question of applicable law of arbitration or *lex arbitri* but a larger one governing the public policy. The High Court then concluded that public policy of India cannot be adjudged under the laws of England… Since the question of arbitrability of the claim is a larger question effecting public policy of State it should be determined by applying laws of India… according to the High Court , the conclusion is that the intention of the parties under the agreement was always to remain subject to Indian laws and not to contravene them… and conducting the arbitration in accordance with the laws of England and not for all other purposes. Relying on the judgment of this court in *Bhatia International* v. *Bulk Trading S.A.*[61] it had been held that Part I of the Arbitration Act,1996 would be applicable as there is no clear express or implied intention of the parties to exclude the applicability of the Arbitration Act,1996.

Accordingly the high court ruled that petition under section 34 of the 1996 Act is maintainable. It further ruled that on disputes involved rights in *rem,* due regard has to be given to Indian laws, particularly when an award is challenged as being against public policy of India , even though the seat of arbitration is outside India. The reasoning of the high court took support of the doctrine of the public trust with regard to natural resources in India. The high court pointed out that since the appellants sought refund of amount of cess, royalties, service tax – all matters of public money, in India the jurisdiction of the Indian courts cannot be excluded. Finally the high court did not consider the *BALCO* case[62] as the Constitution bench of the apex court made the operation of the judgment prospective. It is this ruling of the High Court of Delhi which is the subject matter before the Supreme Court in this case. Parties contended in terms of proper law of contract and proper law of arbitration before the apex court. The essential dispute between the parties is as to whether part I of the Arbitration Act, 1996, would be applicable to the arbitration agreement irrespective of the seat of the arbitration. According to the apex court the intention of the parties would provide conclusive answer to the issue. For reasons stated earlier, the court relied on *Bhatia International* judgment and not the *BALCO* case. The court observed: "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 of any of its

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61 (2002) 4 SCC 105.

62 2012 (8) SCALE 333.

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"[63].

It may be pointed out here, that the Supreme Court in fact had followed the basic rule of conflict of laws concerning choice of law in terms of 'party autonomy' to choose the governing law of the contracts. The apex court in this case was looking for 'real intention of the parties as to whether the provisions of Arbitration Act, 1996 have been excluded by analyzing the terms stipulated in the PSC. After a thorough analysis of the PSC terms the Supreme Court concluded "we are of the opinion upon a meaningful reading of the articles of the PSC that the proper law of the contract is the Indian law; proper law of the arbitration agreement is the law of England".[64] The Supreme Court observed further, "Laws of India have been made applicable to the substantive contract. Law of England governs the Dispute Resolution Mechanism. Provision for Arbitration is a deliberate election of remedy other than usual remedy of a civil suit. The ADR mechanism under the Arbitral Laws of different nations is legally and jurisprudentially accepted, sanctified by the Highest Law Making Bodies of the member States, signatories to the New York Convention. India is not only a signatory to the New York Convention, but it has taken into account the UNCITRAL Model Laws and the UNCITRAL Rules, whilst enacting the Arbitration Act, 1996".[65]

Relying on its views on numerous judgments in this context, in particular the *Videocon Industries Ltd.*[66] case, the court opined, "once the parties had consciously agreed that the juridical seat of the arbitration would be London and that the arbitration agreement will be governed by the Laws of England it was no longer open to them to contend that the provisions of Part I of the Arbitration Act,1996 would also be applicable to the arbitration agreement".[67]

On facts and circumstances the Supreme Court opined: "The provisions of Part 1 of the Arbitration Act, 1996 (Indian) are necessarily excluded; being wholly inconsistent with the arbitration agreement which provides "that arbitration agreement shall be governed by English Law"….the remedy of the respondent to challenge any award rendered in the arbitration proceedings would lie under the relevant provisions contained in Arbitration Act,1996 of England and Wales".[68]

The next issue the apex court addressed is related to the principle of separability of law applicable to the proper law of contract and proper law of the arbitration agreement. The court pointed out that the arbitration agreement is independent of the other terms of the contract explaining the distinction between both the Supreme Court said, "the agreement to arbitrate is a separate contract

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63 *Id*. at 3230.

64 *Id*. at 3231.

65 *Id*., para 41.

66 AIR 2011 SC 2040

67 AIR 2014 SC 3218 at 3231-32

68 *Id*. at 3235.

distinct from the substantive contract which contains the arbitration agreement. This principle of severability of the arbitration agreement from the substantive contract is indeed statutorily recognized by section 16 of the Arbitration Act, 1996. Section 16(1) specifically provides as under: [69]

Competence of arbitral tribunal to rule on its jurisdiction 1.The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose –

a. an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and

b. a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause".

This principle of separability permits the parties to agree : that law of one country would govern to the substantive contract and laws of another country would apply to the arbitration agreement. The parties can also agree that even the conduct of the reference would be governed by the law of another country. This would be rare as it would lead to extremely complex problems. It is expected that reasonable businessman do not intend absurd results. In the present case, the parties had by agreement provided that the substantive contract (PSC) will be governed by the laws of India. In contradistinction, it was provided that the arbitration agreement will be governed by Laws of England. Therefore there was no scope for any confusion of the law governing the PSC with the law governing the arbitration agreement. This principle of severability is also accepted specifically under Article 33.10 of the PSC, which is, under –

"The right to arbitrate disputes and claims under this Contract shall survive the termination of this Contract".

The above discussed principle of separability which establishes the fact that the arbitration agreement is independent of the other terms of the contract has been discussed by the apex court in *Enercon(India) Ltd.* v. *Enercon GMBH* [70] and also in *World Sport Group (Mauritius)Ltd.,* v.*MSM Satellite (Singapore) Pte.Ltd,*[71] the apex court discussed in detail the three operative laws namely the law governing the substantive contract ; the law governing the agreement to arbitrate and the performance of that agreement and the law governing the conduct of the arbitration. It pointed out that it was open to the parties to agree that the law governing the substantive contract (PSC) would be different from the law governing the arbitration

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69 *Id.,* at 3237.

70 AIR 2014 SC 3152 . See also, Lakshmi Jambholkar, "Conflict Of Laws" XLIX *ASIL* 201-240 (2013).

71 AIR 2014 SC 968.

agreement – which is precisely the situation in the present case. Referring to the facts of the case on hand the apex court said that the performance of the contractual obligations under the PSC would be governed and interpreted under the laws of India and the alternative dispute redressal agreement ie. Arbitration agreement is concerned, by laws of England in terms of PSC. The court pointed out that the law governing the conduct of the arbitration is interchangeably referred to as the curial law or procedural law or *lex fori* . In its view: "the law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement".[72]

In coming to the aforesaid conclusion, the apex court relied on the learned commentators on International Commercial Arbitration, in particular on a passage from " Law and Practice of Commercial Arbitration in England" , by Mustill and Boyd(2nd edn.) in addition to a host of cases decided by the Supreme Court itself.

The term 'juridical seat' is not defined in the Indian Act of 1996 but the same has been specifically defined section 3 of the English Arbitration Act. This situation , according to the court would indicate that the arbitration law of England would be applicable to arbitration agreement . The court therefore held that the "remedy against the award will have to be sought in England, where the juridical seat is located …since the substantive law governing the contract is Indian Law, even the courts in England, in case the arbitrability is challenged, will have to decide the issue by applying Indian Law *viz.*, the principle of public policy *etc.*, as it prevails in Indian law".[73]

Appointment of a foreign arbitrator under section 11(9) of the Arbitration and Conciliation Act 1996, is one of the issues before the Supreme Court in *Reliance Industries Ltd.* v. *Union of India.*[74] In this case, Union of India entered into a production sharing agreement with one Indian company and two foreign companies. All the three companies are petitioners. The respondent is the Union of India. Petitioner no.1 is the Indian company *Reliance Industries Ltd.*, registered under the Companies Act, 1956. Petitioner no.2 is a company incorporated in Cayman Islands, British Virgin Islands; and the petitioner no.3 is a company incorporated under the laws of England and Wales (Canada). The subject matter of the agreement concerns with work of exploration, development and production of hydrocarbon reserves. Investment was funded by all companies and all were entitled to costs recovery and profit earned. The Indian company was made operator and was to act on behalf of all the three companies. Award when passed, to be binding on all the parties. Upon the disputes arising, the petitioners called upon the respondent to appoint an arbitrator. The pertinent issue in this case is as regards the appointment of the third arbitrator with a close link as to whether the arbitration is international or domestic. The petitioners maintain that the situation conforms to the international arbitration .They contend that the jurisdiction of the Supreme Court flows from

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72 AIR 2014 SC 348 at 3239.

73 *Id*. at 3241.

74 AIR 2014 SC 2342.

the fact that there is an international arbitration. The respondent Union of India on the other averred that the Supreme Court has no jurisdiction to entertain the petition for appointment of arbitrator. Union of India had argued that the dispute raised by petitioner no. 1 alone who is an Indian party is not an international arbitration as it is between two Indian parties and that for this reason only an Indian not a foreign national to be appointed as a third arbitrator. The judge observed in this context that "in my opinion… RIL, Niko and BP are all parties to the PSC. They are all contractors under the PSC. The PSC recognizes that the operator would act on the behalf of the contractor. All investments are funded by not just the petitioner no.1, but also by the other parties, and they are equally entitled to the costs recovered and the profits earned. For the sake of operational efficiency the operator acts for and behalf of the other parties.... the disputes have been raised in the correspondence addressed by petitioner no.1 not just on its own behalf but on behalf of all the parties

A perusal of some of the provisions of PSC would make it clear that all three entities are parties to the PSC. All three entities have rights and obligations under the PSC (see article 28.1(a)), including with respect to the Cost Petroleum, Profit Petroleum and Contract Costs (see article 2.2), all of which are fundamental issues in the underlying dispute . Where RIL acts under the PSC, including by commencing arbitration , it does so not only on behalf of itself, but also "on behalf of all constituents of the contractors" including Niko and BP".[75]

Continuing his opinion the judge pointed out further: "In my opinion, Article 33.6 virtually leaves it to the Chief Justice of India to appoint the third arbitrator who would be neutral, impartial and independent from anywhere in the world including India. Just as India cannot be excluded, similarly the countries where British Petroleum and Niko are domiciled, as an option from where the third arbitrator could be appointed, cannot be ruled out. Having said this, it must be pointed out that this is the purely legal position. This would be a very pedantic view to take whereas international arbitration problems necessarily have to be viewed pragmatically. Fortunately Arbitration Act, 1996 has made express provision for adopting a pragmatic approach. When the Chief Justice of India exercises his jurisdiction under section 11(6) he is to be guided by the provisions contained in the Arbitration Act, 1996 and generally accepted practices in the other international jurisdictions. Chief Justice of India would also be anxious to ensure that no doubts are cast on the neutrality, impartiality and independence of the Arbitral Tribunal. In international arbitration, the surest method of ensuring at least the appearance of neutrality would to be to appoint the sole or the third arbitrator from nationality other than the parties to the arbitration. This view of mine will find support from numerous internationally renowned commentators on the practice of international arbitration as well as judicial precedents"[76]. Further in this context the court stated that section 11(9) of the 1996 Act specifically

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75 *Id*. at 2354.

76 *Id*. at 2355-56.

empowers the Chief Justice of India to appoint an arbitrator from a nationality other than the nationality of the parties involved in the dispute. According to the court, even in the absence of a specific provision, the appointment of the third arbitrator would have to be guided by the provisions of the section 11(9) of the 1996 Arbitration and Conciliation Act, in terms of PSC. Keeping in view of the facts and circumstances of the case and also bearing scheme the 1996 Act and the underlying principles in the appointment of third arbitrator. The court undertook the task of appointing the third arbitrator in the present case.

Section 45 of the Arbitration and Conciliation Act, 1996

In *World Sport Group (Mauritus) Ltd.* v. *MSM Satellite (Singapore) Pte. Ltd*.,[77]the Board of Control for Cricket in India (BCCI) invited tenders for Indian Premier League (IPL) media rights for a period of 10 years from 2008 to 2017 on a worldwide basis. Amongst many tenders, the bid of World Sports Group India (WSG, India) was accepted by BCCI. A Media Rights License Agreement for the period 2008-2012 was entered into between BCCI and the respondent as a pre-bid arrangement, which was subsequently terminated, after the first IPL season. In 2009, the appellant and the respondent executed the Deed for Provision of Facilitation Services (the Facilitation Deed) and clause 9 of this deed was titled as "Governing Law".[78] Upon failure to pay the agreed facilitation fees of Rs.425 crores in full, disputes arose between the parties. Respondent also filed a suit against the appellant for a declaration that the facilitation deed was void. The appellant acting under clause 9 of the deed sent a request for arbitration to ICC Singapore. The ICC issued a notice to the respondent to file its answer, to the request for arbitration. The respondent in addition to the suit filed, also filed an application for injunction so as to restrain the appellant from continuing with arbitration proceedings. The Division Bench of High Court of Bombay allowed the application for injunction on appeal. Aggrieved by this ruling the appellant has filed the appeal before the Supreme Court.

The main issue before the apex court concerned with the power to the court to restrain parties from proceeding with arbitration in foreign countries. Any civil court in India which entertains a suit with the abovementioned issue has to follow the mandate of the legislature, namely sections 44 and 45 of the part – II of the 1996 Act. Under section 45 of the Act, in the case of arbitration agreement covered by the New York Convention, the court which is seized of the matter will refer the parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed. Accordingly, the court opined that "in view of the provisions of section 45 of the Act, the Division Bench of the High Court was required to only consider in this case whether Clause 9 of the Facilitation Deed which contained the arbitration agreement was null and void, inoperative or incapable of being performed".[79]

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77 AIR 2014 SC 968.

78 *Id.* at 970.

79 *Id*. at 981.

In the context of the facts and circumstances of the case the court held that "Clause 9 of the Facilitation Deed states *inter alia* that all actions or proceedings arising in connection with, touching upon or relating to the Facilitation Deed, the breach thereof and/or the scope of the provisions of the section shall be submitted to the ICC for final and binding arbitration under its Rules of Arbitration. This arbitration agreement in Clause 9 is wide enough to bring this dispute within the scope of arbitration".[80] The court relied on Redfern and Hunter on[81] for its conclusions. The court also referred to other commentators in this context.[82]

In *Enercon (India) Ltd.* v. *Enercon GMBH*[83] parties entered into share holding agreement (SHA) and Technical Know How agreement (TKHA). Both the agreements contained identically worded arbitration clause. This case concerns with mainly two issues – one as regards the separability of the arbitration clause/ agreement from underlying contract and second as regards initiating action for anti-suit injunction. The appellant and the respondent entered into a joint venture agreement. In furtherance of their business venture, the parties entered into various agreements based on 'Agreed Principles'. Immediately following incorporation of the 'Agreed Principles' in all their agreements, parties executed "Intellectual Property License Agreement (IPLA)". According to IPLA, the venue of arbitration proceedings shall be in London. The case of the appellant is that the IPLA draft was not a concluded contract. Respondent on the other contends that IPLA is a concluded contract and hence binding on the parties. The arbitration clause was invoked to resolve the dispute and the parties nominated their arbitrators. However the appellants filed a suit seeking a declaration that the draft IPLA was not a concluded contract and correspondingly there was no arbitration agreement between the parties. The respondents filed, on their part an application under section 45 of the Indian Arbitration and Conciliation Act, 1996. After a series of litigations by both the parties, the matter has reached the Supreme Court. The primary submission of the appellants is that IPLA is not a concluded contract. On the other hand, respondents contend that the court has to concern itself with the arbitration clause and not the main contract which the appellants attack.

This case established certain basic pointers in matters of dispute resolution through arbitration such as, parties cannot be permitted to avoid arbitration, without satisfying the court that it would be just and in the interest of all the parties not to proceed with arbitration. When the parties have irrevocably agreed to resolve all the disputes through arbitration an inconclusive substantive agreement between the parties has no effect on the existing binding arbitration agreement, in arbitration proceedings, courts are required to aid and support the arbitral process, the

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80 *Id*. at 982.

81 *International Arbitration*, 134 (5th edn., 2009).

82 Albert Jan Van Den Berg , " The New York Convention , 1958 – An overview". Published in the website of ICCA. Kronke, Nacimiento, et al (ed.) , Recognition and conferment of Foreign Arbitral Awards – A Global commentary on the New York Convention.

83 AIR 2014 SC 3152.

arbitration clause is independent of the underlying contract; the concept of separability of the arbitration clause /agreement from the underlying contract is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not evaporate into thin air with every challenge to its validity, finality, or breach of the underlying contract.

Relying on *Naviera Amazonica Peruana S.A.* v. *Compania International De Seguros Del Peru*[84] the apex court observed:[85]

> Applying the closest and the intimate connection to arbitration, it would be seen that the parties had agreed that the provisions of Indian Arbitration Act, 1996 would apply to the arbitration proceedings. By making such a choice , the parties have made the curial law provisions contained in Chapters III,IV,V and VI of the Indian Arbitration Act, 1996 applicable….By choosing that Part I of the Indian Arbitration Act, 1996 would apply, the parties have made a choice that the seat of arbitration would be in India. Section 2 of the Indian Arbitration Act, 1996 provides that Part I "shall apply where the place of arbitration is in India….

Further the Supreme Court referring to the *Naviera's case*, quoted the summarized state of the jurisprudence of the topic as under: " All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law :

1. the law governing the substantive contract
2. the law governing the agreement to arbitrate and the performance of that agreement
3. the law governing the conduct of the arbitration

In the majority of cases all three will be the same. But 1 will often be different from 2 and 3 and occasionally, but rarely, 2 may also differ from 3.[86] The court after a thorough analysis of the case pointed out that parties having chosen all the three applicable laws to be Indian laws, would not have intended to have created an "exceptionally difficult situation , of extreme complexities , by fixing the seat of Arbitration in London".

VIII FOREIGN JUDGMENT

An execution application for enforcement of foreign judgment under section 44-A was filed by the judgment-creditors in *Janardhan Mohandas Rajan Pillai* v. *Madhubhai Z. Patel* [87] in the High Court of Bombay. The concerned foreign

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84 1988 (1) Lloyd's Rep.116.

85 AIR 2014 SC 3177.

86 *Id*. at 3178.

87 2014 (2) ABR 162 ; 2014 (3) ALLMR 153.

judgments are the costs certificates issued by taxing master of the English court in favour of judgment creditors. This case concerns with procedure for enforcement of foreign judgment as laid down under section 44A and Order 21, Rule 21 of Code of Civil Procedure (1908), as well as the date of conversion of currency. Explaining the procedure, the court observed:[88]

In view of applicability of section 44-A of the Code of Civil Procedure,1908 for execution of decree passed by foreign court, judgment-creditors filed execution application in this court for enforcement of costs certificates issued by Taxing Master in their favour against the judgment-debtors. Order 21 Rule 22 which is relevant for the purpose of deciding the issue raised in this proceedings would be relevant.

The court thereafter considered the issue relating to the date of conversion of foreign currency into Indian currency in cases where execution application is made for enforcement and awarding payment in foreign currency. Following the apex court's ruling in *Forasol* v. *Giland Natural Gas Commission*[89] the court ruled that the date of conversion of sterling pounds into Indian rupees would be the date of judgment by the division bench of the court in the case for the purpose of making payment in execution of the decree in favour of the judgment-creditor.

IX CONCLUSION

A systematic survey of judicial decisions depict a homogenous and scientifically constructed body of law indicating the changing trends of the society and at the same time recording the changes in the society and forming the source of law – known as "Judge made law". Judicial decisions constitute the major source for Private International Law. Each year the survey of case law from various courts of India concerning issues relating to conflict of laws indicate not only the areas of current relevance but the progressive development of the subject as well.

The principal areas such as Family Law, contracts, intellectual property rights violations, international commercial arbitration, legal cooperation and enforcement of foreign judgments, figure in this year's survey.

In the field of Family Law, divorce and maintenance issues along with child custody and inter country adoption have been included. Referring to earlier landmark decisions and leading commentators, in the area of international commercial arbitration based on conflicts principles, indicate the importance of the law and its role in the development of dispute settlement systems.

The conflict of laws is ever expanding in its application to international trade transactions. Even so, the law pertaining to this sphere still has not entered the culminations of judicial exercise in the court rooms involving both, the bench and the bar. The striking example of this situation is evidenced in at least a couple of cases in the present survey. A transaction that involves international money transfers when subjected to more than one law, the question of applicable law as

88 *Id.*, paras 25-26.

89 AIR 1984 SC 241.

the basis of choice of law arise. The case on the point is *Metro Exporters* v. *State Bank of India*[90] which raises a very significant question: what law governs international fund transfer from one bank to another situated in different countries? Again, infringement of IPRs by private firms trading in different countries, is a common occurrence, and is an actionable wrong which results in payment of compensation for damages when proved which is identified in conflict of laws as "foreign torts". In *Easy Group Ip Licensing Limited* v. *Easy jet Aviation Services Pvt. Ltd*.[91] the infringement that took place in India was established and the court awarded the compensation to the foreign firm – that has got presence in 80 countries – under the Indian enactment. The court was in fact applying the conflicts principle '*lex loci delicti commissi*' but without identifying as such.

The survey proves the fact that conflict of laws is yet to make its meaningful presence in the court's deliberations in India.

90 AIR 2014 SC 3206.

91 2013 (55) PTC 485 (Del).