* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ OMP NO. 325/2005

Reserved on 17th September,2008
Pronounced on 27th January, 2009

M/s SARA INTERNATIONAL LTD. ..... Petitioner

Through : Mr. Siddharth Agarwal with
Mr. Simon Benjamin, Advocates.
versus

ARAB SHIPPING CO. (P) LTD ..... Respondent

Through : Mr. Prashant Pratap with
Mr. O.P.Gaggar, Advocates

CORAM:
Mr. Justice S. Ravindra Bhat

1. Whether reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

Mr. Justice S. Ravindra Bhat
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1. The present proceeding under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") questions the validity of an award, drawn by an arbitrator, and published on 9th June, 2005 (hereafter called "the impugned award").

2. The facts, in brief are that the respondent/claimant (referred to as "the claimant"), a company incorporated in Singapore, and disponent owner (a term which, according to the Maritime dictionary -www.m-i-link.com/dictionary/

means a person or company which has commercial control over a vessel's operation without owning the ship) of the vessel MV ASHA MANAN, entered into a Charter Party with the Petitioner (hereafter called "the Charterer") whereby 15000 MTs (5% more, or less) of bulk wheat were to be shipped from Kandla, for discharge, in the ports of Salalah and Sultan Qaboos, (the latter port hereafter referred to as "PSQ") in Oman. It is a matter of record that disputes arose between parties, over settlement of demurrage, dispatch, freight balance as well as damage to and shortage of cargo. The claimant sought recourse to arbitration. Clause 25 of the "Box Condition" in the Charter Party, dated 22.07.2003 embodying general conditions, stated "ARBITRATION IN MUMBAI, ENGLISH LAW TO APPLY". Clause 32 of the "GENCON" Charter, agreed to by the parties, read as follows:

> *"Any dispute arising under this Charter Party shall be referred to Arbitration in Mumbai, English law to apply, one arbitrator being appointed by each party. On the receipt by a party of the nomination in writing of the other party's arbitrator, that party shall appoint its arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall apply. If arbitrators properly appointed shall not agree they shall appoint an Umpire whose decision shall be final and binding. For disputes where the total amount claimed by either party does not exceed the amount of US $ 50000 the arbitrator shall be conducted in accordance with the small claim procedure on the London Maritime Arbitrators."*

3. The petitioner completed loading operations at Kandla on 16th August, 2003. The claimants demanded payment of US$ 63, 295.46 for load port demurrage @ US$ 5250 per day, and also recovery of US $4124.66 as demurrage at first discharge port, Salalah. The claimant further demanded US $ 9241.80

towards balance freight. This was disputed by the petitioner, who alleged short-landing of cargo, and claimed set off. This was referred to arbitration; the resultant impugned award is questioned by the petitioner.

4. On 20.12.2003, the claimant through counsel intimated about appointment of Shri R.S. Cooper as its nominee Arbitrator and called upon the petitioner to follow suit and nominate its Arbitrator. On 02.01.2004, the petitioner nominated one Mr. K.V. Ganesh as its nominee Arbitrator. However, on 02.02.2004, the said Shri Ganesh expressed his unwillingness to accept the assignment. The claimant, therefore, called upon the petitioner to appoint a fresh Arbitrator. The latter wrote back on 05.02.2004 expressing that it would nominate someone else within a few days. On 26.2.2004, the claimant wrote back to the petitioner calling upon the latter to appoint the Arbitrator within 7 days failing which its nominee Shri Cooper was to be treated as Sole Arbitrator. On 3.3.2004, the petitioner by its letter intimated the claimant that it had appointed one Captain Diwan as its nominee Arbitrator. Thereafter the claimant in its letter dated 16.3.2004 voiced its position that Mr. Cooper would be the Sole Arbitrator since the petitioner had not nominated any one. The petitioner, therefore, wrote to the claimant stating that it had already nominated Shri Diwan. On 31.3.2004 Captain Diwan issued a letter accepting his appointment. By letter dated 7.4.2004, counsel on behalf of claimant wrote to Mr. Devinder Diwan previously nominated by the petitioner as its Arbitrator, *inter alia*, stating as follows: -

"…….. as per the Arbitration Clause and applicable English Law, the Charterers were required to appoint an Arbitrator within 14 days. However, the Charterers failed to appointment an Arbitrator and in the circumstances Mr. Cooper, the Arbitrator appointed by the disponent owner stood appointed as Sole Arbitrator. The Charterers were notified accordingly by letter dated 16.3.2004. Accordingly, Mr. Cooper issued directions to the parties by letter dated 20.3.2004 for filing of pleadings and documents.

I refer to our telecon this morning when you confirmed that you have been appointed as Arbitrator by Sara International Limited, the respondent and that you have accepted the appointment. Whilst your appointment as Arbitrator by Sara International Limited is out of time, my clients had instructed me to accept your appointment so that the Arbitral Tribunal is duly constituted. I would be grateful for your formal written confirmation that you have accepted appointment as Arbitrator by Sara International Limited.

Clause 32 of the Charter Party provides that if the Arbitrator properly appointed do not agree, they shall appoint Umpire whose decision shall be final and binding. Thus, in accordance with the Arbitration Clause and English Law, the reference shall proceed before the two Arbitrators and in the event of any disagreement, the disputes shall be referred to the Umpire. In the circumstances, I would request you to appointment the Umpire in consultation with your Arbitrator Mr. R.S. Cooper……

…….The Arbitrators are also requested to issue directions for the purpose of filing the pleadings and documents by the parties so that the arbitration can be proceeded with expeditiously. These formal directions are necessary so that the time-table for the arbitration is fixed and the parties are thereafter aware of the time limits within which they have to submit their pleadings and documents."

5. The above letter dated 7.4.2004 was addressed to the petitioner; a copy of it was also marked to the claimant's nominee Arbitrator, Mr. Cooper. On 28.4.2004, the claimant's counsel wrote to the petitioner – with the copy marked

to Mr. Cooper stating that the latter would be functioning as the Sole Arbitrator. The relevant part of that letter dated 28.4.2004 reads as follows:-

> *"13. In view of your e-mail dated 24th March, 2004, I contacted Mr. Diwan on 25th March, 2004, who confirmed that he has not accepted the appointment although he had received some communication from your Madras agents appointing him as arbitrator which he would consider. I contracted Mr. Diwan again on 7th April, 2004 when he stated that he had accepted appointment. In the light of this, by my letter dated 7th April, 2004, I requested a formal communication from him that he had accepted appointment in the light of what had transpired on earlier occasions.*
>
> *14. As I did not hear from the two arbitrators, I contacted Mr. R.S. Cooper to ascertain the position when I was informed that he had contacted Mr. Diwan who had stated that he is not willing to act as an arbitrator unless he receives advance payment towards his fees from you. Subsequently I contacted Mr. Diwan today to ascertain from him whether he is willing to act as arbitrator. Mr. Diwan categorically informed me that he will not act as arbitrator, unless he receives advance towards his fees from you.*
>
> *In the light of this, the position today is that Mr. Devinder Diwan has not accepted appointment as arbitrator by you and consequently you are deemed to have failed to appoint an arbitrator as required by Clause 32 of the charter party and within the time limit provided therein. I do not wish to go into the propriety of the communications between you and Mr. Diwan, suffice it to say that in the light of what Mr. Diwan has stated, there is no question of his appointment as arbitrator. Mr. R.S. Cooper shall now proceed as the Sole Arbitrator and I am marking a copy of this letter to Mr. R.S. Cooper with a request that he would immediately proceed as Sole Arbitrator and issue revised direction on the lines of his earlier directions dated 20th March, 2004."*

6. Mr. R.S. Cooper, on 29.4.2004 wrote to the claimant's counsel and the petitioner fixing a schedule for filing pleadings and also confirming that he would

proceed with the matter as the Sole Arbitrator. On 1.5.2004, the petitioner appears to have addressed a fax message to Mr. Cooper protesting the claimant's position that they had not appointed Shri Diwan as an Arbitrator. On 6.5.2004, again the petitioner wrote to the claimant's counsel stating that Mr. Devinder Diwan was their nominee and that Mr. Cooper as well as Mr. Diwan would decide the time frame for appointment of 3rd Arbitrator and stating that further proceedings by Mr. Cooper as a Sole Arbitrator would be contrary to law. The claimant's counsel by his letter dated 10.5.2004 maintained the position that Mr. Cooper stood appointed as Sole Arbitrator in view of Clause 32 of the Charter Party and the English Arbitration Act, 1996. It is not in dispute that on 7.5.2004 Captain Devinder Diwan addressed a letter to the petitioner confirming acceptance of his appointment; a copy of the letter was sent to claimant's counsel as well as Mr. R.S. Cooper. The claimants, however, maintained their stated position that the arbitral proceedings had to be conducted only by Mr. R.S. Cooper acting as Sole Arbitrator. The petitioner, therefore, preferred an application under Section 11 (6) of the Act before the Supreme Court being Arbitration Petition No. 9 of 2004. During pendency of that proceeding, the petitioner moved applications under Section 16 and 17 before Mr. R.S. Cooper questioning his jurisdiction. Those applications were heard on 4th & 5.9.2004; the petitioner and the claimant also filed written submissions in support of their arguments. Mr. Cooper by his order dated 18.10.2004 rejected the applications and upheld the contentions of the claimants. The Arbitrator rejected the petitioner's contentions that proper law governing the arbitration agreement

was the Indian Arbitration Act. The Arbitral Tribunal also rejected the argument that appointment of a single Arbitrator was contrary to law. The application under Section 16 was rejected holding that appointment of Mr. Diwan put forth to have been made on 31.3.2004, was contrary to established facts. The application pending before the Supreme Court was disposed of on 14.12.2004 in view of the fact that the Arbitrator had ruled upon its jurisdiction. In the meanwhile, the petitioner's application under Section 9 preferred before this Court also was disposed of. The parties thereafter went ahead for the proceedings before the Arbitral Tribunal.

7. The petitioner did not dispute the claim for the sum of US $ 72798. The Arbitrator noted in the impugned Award that the petitioner's counsel had offered on 29.6.2004 to pay US $ 28165.79 without admitting liabilities to any extent whatsoever. The offer being conditional was not accepted by the claimant. Subsequently, during the course of arbitral proceedings, the petitioner paid US $ 38947.79 as undisputed dues of the claimant. The balance claim of US $ 38850.25 was, therefore, subject matter of arbitral proceedings. The petitioner sought to put forward two counter claims for US $ 12,500 and $ 21350.25, effectively pleading set off to the claimant's demands. The petitioner's demand for water damage due to cargo at Salalah to the extent of US $ 12,500 was held not to be substantiated. In returning the findings, the Arbitrator held that there was no evidence that damaged cargo was protested immediately on discharge; no notice of claim was given to the Vessel Masters or Agent on discharge; no price claim was ever preferred to the vessels', Agents at Salalah and importantly the

statement of facts jointly signed by the receivers and the vessels', agents did not mention about any water damage. As regards the second head of counter claim i.e. shortage of 158.766 MT at PSQ, the Arbitrator noted that this shortage could not be denied. However, the Arbitrator reasoned that having parted the bill of lading to the consignee (of the goods) for valuable consideration, the petitioner sought to put forward a claim without disclosing how it had a right to sue or how the cause of action had accrued. It was held that the petitioner had, under its purchase order (with the consignee) undertaken to reimburse the latter in the event of the quantity ascertained at the consignee's Silo being less than the bill of leading quantity. The purchase order was a contract between the seller i.e. the petitioner and its buyer, to which the claimant ship owner had no privity of contract. It was, therefore, held that loss did not arise under the Charter Party, which was a contract of carriage with the claimant.

8. The Arbitrator found against the petitioner, on the reasoning that a ship owner could not be exposed to concurrent liability from both the Charterer (in this case the petitioner) and the bill of lading holder (the consignee) under the contract. The Arbitrator, therefore, rejected the counter claims and held the petitioner liable to pay US $ 33850.25 with 6 % interest p.a. till payment; in addition the claimant was also held liable for interest @ 6 % p.a. on US $ 38947.79 for the period 7.9.1993 to 10.1.2005. The Arbitral Tribunal awarded cost to the claimant @ Rs.3,70,000/-.

9. The petitioner contends that the award is liable to be set aside for the reason that Indian Law has to compulsorily apply to the arbitral proceedings, since they were held at Mumbai. Reliance is placed upon the judgment reported as *Bhatia International v. Bulk Trading S.A.* 2002 (4) SCC 105 and *Venture Global Engineering v. Satyam Computers* 2008 (4) SCC 190. It is argued by Mr. Aggarwal on the strength of these decisions that the Petitioner contended about applicability of Indian Law at the earliest available opportunity and was ruled upon by the Arbitrator. Therefore, the ground is available for the proceeding whereby the jurisdiction of the Arbitral Tribunal itself has been questioned under consequent Award, was rendered contrary to the public policy.

10. It was next argued that the composition of the Arbitral Tribunal was not in accordance with the agreement, the arbitration agreement or Part-I of the Act. In support it is urged that Mr. Devinder Diwan who had been nominated by the petitioner to act as his Arbitrator accepted the appointment on 31.3.2004. The claimant's counsel expressly communicated waiver of all objections and confirmed having spoken to the Arbitrator. The formal written communication only was sought, which was neither mandated in the agreement or in any law. Yet, later on 28.4.2004, the claimant sought to resile from this position to say that its Arbitrator would function as the Sole Arbitrator. It is argued that although there was delay in terms of Clause-32 to appoint the Arbitrator within 14 days, the delay was waived by the claimant through his counsel letter dated 7.4.2004. It is argued that once the Arbitrator's acceptance was received and the delay in appointment (by the petitioner of his nominee Arbitrator) waived, there was no

method by which such nominee Arbitrator's appointment could be withdrawn. It is contended that the appointment of an Arbitrator is distinct from the acceptance by him. The appointment in this case was made upon the communication by the petitioner and had no co-relation with the claimant's allegation about Mr. Diwan not having accepted the appointment. Reliance is placed upon the decision reported as *Keshav Singh – vs-. Indian Engineering Company,* AIR 1969 BOM 227 and *Keshav Singh Dwarkadass Kapadia –vs-. Indian Engineering Company*, 1971 (2) SCC 706. It is argued in the alternative that even if acceptance were assumed to be mandatory, there was no compulsion that such acceptance of appointment had to be confirmed in writing. Thus, counsel contends that there was no defect in the appointment of Arbitrator and consequently Mr. Cooper could not have proceeded to act as Sole Arbitrator and made the Award. Urging the Court to apply the ratio in *Yashwith Constructions v. Simplex Concrete* AIR 2006 1798, counsel states that the mandatory nature of Section 15 left no choice with either party to substitute the Arbitrator without intervention of the Court. Therefore, the composition of the Arbitral Tribunal was contrary to law.

11. Mr. Aggarwal next argued that in any event, Clause-32 of the Charter Party provided for two Arbitrators which is contrary to Section 10 of the Act. The composition of the Tribunal was unworkable and did not constitute a valid arrangement for the purpose of Section 11 of the Act. Therefore, the only method of saving the arbitration agreement was to appoint three Arbitrators. Since this was not done, award is unsustainable in law.

12. On the merits of the award, the petitioner urges that after having noted that there was a shortage of 158.766 MT at PSQ and in view of the liability in relation to the shortage and an admission in relation to the shortage, the Tribunal could not have non-suited it on the ground that by its endorsement of the bill lading to the third party, it lost its rights to sue the shipper. Counsel relies upon the decision reported as *"The Dunelmia"* 1969 (2) Lloyds Rep 476. The learned counsel emphasized that Clause 10 of the Charter Party clearly provided that the bill of lading would be signed by the Master "without prejudice to the Charter Party". He, therefore, submitted that as per the applicable law, i.e., English Law, the relations between the party were governed by the Charter Party and, therefore, the petitioner had the right to sue and recover from the claimant the sum equivalent to the value of the shortfall of cargo 158.766 MT.

13. Mr. Prashant Pratap, learned counsel for the claimant argued that the impugned award is in consonance with law and cannot be interfered with. Disputing the petitioner's contention about composition of the Arbitral Tribunal, Mr. Pratap urged that according to the agreement of the parties, the proper law governing the contract as well as the proper law governing the arbitration agreement was English Law. Relying upon the decisions of the Supreme Court reported as *National Thermal Power Corporation v. Singer Company & Ors* 1992 (3) SCC 551 and *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc* 2003 (9) SCC 79, it was argued that the proper law of the arbitration agreement is normally the same as the proper law of the contract and that only in exceptional cases it is different, where the contract or agreement indicates to the contrary.

Counsel relied on the observations in the NTPC case that in the absence of an express choice, the law governing the contract is applicable for the arbitration agreement. Reliance was also placed on the decision reported as *Sumitomo Heavy Industries Ltd. v. ONGC* 1998 (1) SCC 305 to say that the proper law of the contract governs the substantive rights and obligations of the parties out of which disputes arise and further that the curial law is the one governing arbitral proceedings as well as the manner in which the reference can be conducted. It was, therefore, urged that the law governing the arbitration agreement is English Law and not the Indian Arbitration and Conciliation Act.

14. On the question of the number of Arbitrators, the claimants urged that the arbitration agreement cannot be invalidated as it provided for an even number of Arbitrators. Learned counsel relied upon the decision of the Supreme Court reported as *Minerals and Metals Trading Corporation v. Sterlite Industries (I) Ltd.* 1996 (6) SCC 716 to say that Section 7 of the Act enacts the necessary ingredients which go into the making of the arbitration agreement and that the number of Arbitrators is dealt with Section 10 which is part of the machinery provision. Therefore, providing for even number of Arbitrators would not by itself result in the arbitration agreement being rendered a nullity. It was urged that in any event, the Arbitral Tribunal did not comprise of two Arbitrators to fall foul of Section 10.

15. It was next argued that the composition of the arbitral tribunal was in consonance with the arbitration clause. The initial notice for arbitration by the

claimant required petitioner to nominate it's arbitrator; Sh. Ganesh, who was nominated, failed to enter upon reference. Thereupon Sh. Cooper stood automatically constituted as sole arbitrator in terms of Clause 32 and even issued directions on 20.03.2004. The question of the claimants having waived objections as to appointment of Sh. Diwan as nominee arbitrator by the petitioner would have arisen only if Sh. Diwan accepted the appointment within the time stipulated in the arbitration agreement. He failed to do so; he also confirmed his inability to act as arbitrator, as reflected in the letter on behalf of the claimant on 28.04.2004. Much later, on 07.05.2004, Sh. Diwan purported having accepted appointment. By that stage, Sh. Cooper, in view of the preceding events was deemed to be Sole Arbitrator. Learned counsel submitted that the petitioner's reliance on so-called letter dated 31.03.2004 was examined and rejected by the arbitrator in the order dated 18.10.2004 where it was reasoned that such a contention was a clear afterthought. Counsel contended that if Sh. Diwan's letter dated 31.03.2004 was genuine, nothing prevented the petitioner from furnishing it's copy to the claimant immediately on receipt.

16. Mr. Pratap submitted that in this case, since the law governing the arbitration agreement was English law, acceptance of appointment by the arbitrator had to be necessarily indicated. Learned counsel argued by placing reliance on *Russel on Arbitration (21st Edition 1997)* that the three requirements for completion of a valid appointment of an arbitrator are:

1. Informing the other party.

2. Informing the nominee.

3. Securing the nominee's agreement to act.

17. He relied on the judgment reported as *Tradax Export S.A. v. Volks Wagen Werk A.G.* 1970 (1) Lloyd's Law Rep. 62 in support of the submission. It was submitted that the decision of the Supreme Court relied upon by the petitioner, i.e. *Keshavsen Dwarkadas* case has no application. In its response, the contention made was that the judgment concerned itself with appointment of an umpire who, unlike an arbitrator, is to act immediately on being appointed and arms jurisdiction only in the event of disagreement by two arbitrators. It was, therefore, argued that Section 14 and 15 of the Arbitration Act, 1996 have no application in the facts of this case.

18. It was contended that the findings of the arbitrator on damage to cargo are based on evidence, such as statement of facts; no notice of damage being served on master or agents and no evidence of any survey of the so-called damaged cargo. Lastly, there was no quantified claim by the receivers on the vessel's agents. Learned counsel further urged that the arbitrator's finding regarding right, title and interest in the cargo vesting with the consignee and thus disentitling the petitioner, to put forward a claim, were justified and legal. It was contended that the Bill of Lading issued by the master were endorsed by the petitioner in favour of the consignee/receiver, i.e. Oman Flour Mills, who were the holders of the Bill of Lading. Thus, the title to and property in the case vested in favour of the consignee, who alone had the necessary standing to file a suit.

Reliance was also placed on *Indian Bills of Lading Act, 1856*, similar to Section 2(1) of *English Carriage of Goods by Sea Act, 1992* which replaced the earlier *Bills of Lading Act, 1855*. Learned counsel relied upon the judgment reported as *"Albazero 1976 2 Lloyd's LR 467"* where Court held that a ship owner can be sued for loss or damage to the goods by the person actually sustaining loss as owner of the goods, having privity with the carrier by whose breach the loss is caused. Learned counsel distinguished the decision in *"The Donelmia"* where the charterer was also the owner of bill of lading as the consignee. In such case, the Bill of Leading operated only as a receipt. The claimant contends that in this case, the petitioner was the charterer and the bill of lading, the latter was endorsed to the consignee.

19. The first question to be decided is the proper law applicable to the arbitration agreement and the validity of the arbitration agreement. In arbitrations concerning parties that involve international dimensions where the parties belong to different nationalities or where parties have agreed upon application of another law, i.e. other than the law applicable to the place of formation of contract, several possible situations arise. The first is what is characterized as *"the proper law of the contract",* which is the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen. In the present case, the law governing the contract or the proper law of the contract, unmistakably is English law. The second limb is what is called as *"proper law of the arbitration agreement",* which is the law governing the obligation of the parties to submit the disputes to arbitration and to honor an

award. The third dimension or point is the *"curial law",* which is the law governing the conduct of the individual or concerned reference. According to *Mustill & Boyd's Commercial Arbitration (Second Edition),* Page 62, when a Court is faced with the problem as to what is the proper law, the questions of classifications have to be considered. The learned authors indicate the classification on the following lines:

> *"1. The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the Tribunal; the question whether award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes".*
>
> *"2. The curial law governs: the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; classification of evidence; the determination of the proper law of the contract."*
>
> *"3. The proper law of the reference governs: the question whether the parties have been discharged from their obligation to continue with reference of the individual dispute."*

20. In this case, as pointed earlier, the agreement of the parties unequivocally points to the intention that the proper law of the contract would be English law. At the same time, the parties further agreed that the disputes would be resolved through arbitration in Mumbai. It is argued by the claimants that the choice of law governing the contract raises presumption that the proper law of the arbitration agreement would be the same as the proper law of the contract. For this, the reliance is placed on the judgment of the Supreme Court reported as *National Thermal Power Corporation (supra)* as well as *Shreejee Traco India Private Limited,* were cited. On the other hand, the petitioner relies upon the

subsequent three-judge decision in *Bhatia International (supra); Indtel Technical Services Private Limited 2008 (11) Scale 375* and *Venture Global Engineering v. Satyam Computers* 2008 (4) SCC 190. It is argued that the provisions of *The Arbitration and Conciliation Act, 1996* interpreted in these three decisions unambiguously point to the Parliamentary intention that the Part-I of the enactment would apply to all arbitral proceedings, if they are held in India and that the parties are free to depart only to the extent permitted by the derogable provisions of the Part-I. In *National Thermal Power Corporation (supra)*, the Court held as follows:-

> *"24. The validity, effect and interpretation of the arbitration agreement are governed by its proper law. Such law will decide whether the arbitration clause is wide enough to cover the dispute between the parties. Such law will also ordinarily decide whether the arbitration clause binds the parties even when one of them alleges that the contract is void, or voidable or illegal or that such contract has been discharged by breach or frustration. (See Heyman v. Darwins Ltd. ((1942) 1 All ER (HL)).) The proper law of arbitration will also decide whether the arbitration clause would equally apply to a different contract between the same parties or between one of those parties and a third party.*
>
> *25. The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Such choice is exercised either expressly or by implication. Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which,*

though collateral or ancillary to the main contract, is nevertheless a part of such contract.

26. Whereas, as stated above, the proper law of arbitration (i.e., the substantive law governing arbitration) determines the validity, effect and interpretation of the arbitration agreement, the arbitration proceedings are conducted, in the absence of any agreement, the arbitration proceedings are conducted, in the absence of any agreement to the contrary, in accordance with the law of the country in which the arbitration is held. On the other hand, if the parties have specifically chosen the law governing the conduct and procedure of arbitration, the arbitration proceedings will be conducted in accordance with that law so long as it is not contrary to the public policy or the mandatory requirements of the law of the country in which the arbitration is held. If no such choice has been made by the parties, expressly or by necessary implication, the procedural aspect of the conduct of arbitration (as distinguished from the substantive agreement to arbitrate) will be determined by the law of the place or seat of arbitration. Where, however, the parties have, as in the instant case, stipulated that the arbitration between them will be conducted in accordance with the ICC Rules, those rules, being in many respects self-contained or self-regulating and constituting a contractual code of procedure, will govern the conduct of the arbitration, except insofar as they conflict with the mandatory requirements of the proper law of arbitration, or of the procedural law of the seat of arbitration [See the observation of Kerr, LJ. in Bank Mellat v. Helliniki Techniki SA ((1983) 3 All ER 428 (CA)). See also Craig, Park and Paulsson, International Chamber of Commerce Arbitration, 2nd edn. (1990).] To such an extent the appropriate courts of the seat of arbitration, which in the present case are the competent English courts, will have jurisdiction in respect of procedural matters concerning the conduct of arbitration. But the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement. [See Mustil & Boyd, Commercial Arbitration, 2nd edn.; Allen Redfern and Martin Hunter, Law & Practice of international Commercial Arbitration, 1986; Russel on Arbitration, 20th edn, (1982); Cheshire & North's Private International Law, 11th edn (1987)]."

21. Later in *Shreejee Traco India Private Limited,* Lahoti. J exercising the powers of the Court under Section 11(6) held as follows:

> *"Though the case is pre-1996, certain observations made therein are apposite. In case of conflict of laws, the Supreme Court of India has opined that for arbitration, the selection of the place of arbitration may have little significance where it is chosen, as is often the case, without regard to any relevant or significant link with the place. This is particularly true when the place of arbitration is not chosen by the parties themselves, but by the arbitrators or by the outside body, and that too for reasons unconnected with the contract. It would be different if choice of place for submission for the arbitration is supported by the rest of the contract and surrounding circumstances which may be treated as stronger indication in regard to the intention of the parties. Dicey & Morris on The Conflict of Laws (11th Edn., Vol. II) was cited with approval wherein the learned authors state inter alia that the law governing arbitration proceedings is the law chosen by the parties, or, in the absence of agreement, the law of the country in which the arbitration is held. In the absence of express choice of the law governing the contract as a whole or the arbitration agreement as such having been exercised by the parties, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. The presumption is rebuttable. The parties have the freedom to choose the law governing an international commercial arbitration agreement. Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as law of the country in which the arbitration is agreed to be held."*

22. It would be immediately seen that in *National Thermal Power Corporation (supra)* itself, the Supreme Court noticed the distinction between the proper law governing the contract or the disputes arising out of the contract and the proper law of the arbitration. In para 26 of the judgment, the Court observed that where the proper law of the contract is expressly chosen by the party, such law, in the

absence of an unmistakable intention to the contrary governs the arbitration agreement which is a part of the contract. In para 26, the Court noticed that the proper law of arbitration determines the validity, effect and interpretation of the arbitration agreement that the arbitration proceedings are conducted in the absence of any agreement to the contract, in accordance with the law of the country in which the arbitration is held.

23. The factual narrative here would disclose that the contract which contains the arbitration agreement was drawn in India; the parties clearly intended that arbitration proceedings are also to be held in Mumbai. With its context, it would be necessary now to notice the law declared in *Bhatia International, Appellant V. Bulk Trading S. A.* 2002-(4)-SCC -105, where the Supreme Court held as follows:

> *"As is set out hereinabove the said Act applies to (a) arbitrations held in India between Indians, and (b) international commercial arbitrations. As set out hereinabove international commercial arbitrations may take place in India or outside India. Outside India, an international commercial arbitration may be held in a convention country or in a non-convention country. The said Act however only classifies awards as "domestic awards" or "foreign awards". Mr. Sen admits that provisions of Part II make it clear that "foreign awards" are only those where the arbitration takes place in a convention country. Awards in arbitration proceedings which take place in a non-convention country are not considered to be "foreign awards" under the said Act. They would thus not be covered by Part II. An award passed in an arbitration which takes place in India would be a "domestic award". There would thus be no need to define an award as a "domestic award" unless the intention was to cover awards which would otherwise not be covered by this definition. Strictly speaking, an award passed in an arbitration which takes place in a non-convention country would not be a "domestic award". Thus the necessity is to define a "domestic award" as including all awards made under Part I. The definition indicates that an award made in an international commercial arbitration held in a non-convention country is also considered to be a "domestic award".*

Section 5 provides that a judicial authority shall not intervene except where so provided in Part I. Section 8 of the said Act permits a judicial authority before whom an action is brought in a matter to refer parties to arbitration. If the matters were to be taken before a judicial authority in India it would be a court as defined in Section 2(1)(e). Thus if Part I was to only apply to arbitrations which take place in India the term "court" would have been used in Sections 5 and 8 of the said Act. The legislature was aware that, in international commercial arbitrations, a matter may be taken before a judicial authority outside India. As Part I was also to apply to international commercial arbitrations held outside India the term "judicial authority" has been used in Sections 5 and 8

... To conclude, we 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."

24. In *Venture Global Engineering (supra)*, the Supreme Court held:

> *"clear that the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part - I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part - I. It is also clear that even in the case 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. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such. The matter, therefore, is concluded by the three-Judge Bench decision in Bhatia International (supra)."*

In *INDTEL Technical Services Pvt. Ltd –vs- W.S. Atkins PLC (dated 25-8-2008)* 2008(3)ARBLR391(SC), JT2008(9)SC354, 2008(11)SCALE375- Kabir, J speaking for the Supreme Court, exercising power under Section 11(6) held as follows:

> *"What, however, distinguishes the various decisions and views of the authorities in this case is the fact that in the Bhatia International case (supra) this Court laid down the proposition that notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation `Act, 1996, indicating that Part-I of the said Act would apply where the place of arbitration is in India, even in respect of International Commercial agreements, which are to be governed by laws of another country, the parties would be entitled to invoke the provisions of Part-I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable.*
>
> *25. The decision in the Bhatia International case (supra) has been rendered by a Bench of Three Judges and governs the scope of the application under consideration, as it clearly lays down that the provisions of Part-I of the Arbitration and Conciliation Act, 1996, would be equally applicable to International Commercial arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by implication, which is not so in the instant case."*

25. As noticed in the discussion earlier, according to *Mustill & Boyd (supra)* the proper law of the arbitration agreement covers various issues such as the validity of the notice of arbitration; constitution of the tribunal; question whether an award lies within the jurisdiction of the arbitrator as well as formal validity of the award. It even includes questions where the parties stand discharged from any obligation to arbitrate future disputes. If these considerations are kept in mind, the advent of the 1996 Act and its subsequent interpretation in *Bhatia International (supra)* has resulted in a situation where it would be not possible for Courts to hold - in respect of non-derogable provisions of Part-I of the Act, that arbitrations held in India would not be governed by law of India and that

proper law of the arbitration agreement can be something different. All that the claimants are urging is that the reference to the proper law of the contract in this case is a strong pointer to the intention of the parties that the proper law of the arbitration agreement is also English law. However, in the opinion of the Court, the two factors mentioned before, i.e. the 1996 Act and the declaration of law in *Bhatia International* as applied in subsequent decisions, has altered that understanding; it is no longer possible for Courts to, in such cases, infer that the proper law of the arbitration agreement is also the proper law of the contract. The position proposed could arguably have been different if the arbitration clause itself expressly mentioned that the proper law of the arbitration agreement is not Indian law but something else.

26. The topic may be concluded with the English view, which favors the theory that the law of the seat (of arbitration) is necessarily the procedural law governing arbitration. This was so declared in *Channel Tunnel Group Limited v. Balfour Beatty Construction Limited* 1993 AC 334 where the Court of Appeal held that the presumption in favour of the law of the seat was irresistibly in the absence of an express choice of some other law. *The New York Convention*, by Article V.1(d) supports this position and provides that award may be set aside by Courts of the country where enforcement of an arbitral award, if:

> *"The arbitral procedure was not in accordance with the agreement of the law of the country where the arbitration took place."*

27. *Mustill & Boyd,* in their *Companion (Second Edition 2001)* state that with the enactment of the 1996 Arbitration Act in England, the prospect of an

arbitration conducted in England being governed by the procedural law of another state has been greatly diminished. The authors state:

> *"Given that the Act is the parliamentary expression of national policy concerning the arbitral process, it seems unlikely that even an express choice of foreign law in relation to an arbitration with a seat in England could have any impact on the mandatory provisions of the Act and equally that anything other than such an express choice in writing could enable the rules of foreign law of arbitration to take precedence over the non-mandatory provisions of the English Act."*

28. In view of the above discussion, the Court is of the opinion that the claimant's contention about applicability of English law as the proper or governing law for the arbitration agreement cannot be accepted. The discussion in *Bhatia International* and subsequent judgments and *Mustill & Boyd* clearly show that if the seat of the arbitration is in a different country than the laws of one, which govern the contract, the proper law of the arbitration agreement and the *curial law* would be that of the former.

29. The next question to be decided is whether a reference to two arbitrators in Clause 32 of the contract governing the parties vitiated the proceedings with the result such a condition is contrary to Section 10 of The Arbitration and Conciliation Act, 1996. This issue is no longer open to debate; the Supreme Court in its later decision in *Narayan Prasad Lohia v. Nikunj Kumar Lohia*,(2002) 3 SCC 572, held as follows:

> *"a conjoint reading of Sections 10 and 16 shows that an objection to the composition of the Arbitral Tribunal is a matter which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to so object*

there will be a deemed waiver under Section 4. Thus, we are unable to accept the submission that Section 10 is a non-derogable provision. In our view Section 10 has to be read along with Section 16 and is, therefore, a derogable provision.

17. *We are also unable to accept Mr Venugopal's argument that, as a matter of public policy, Section 10 should be held to be non-derogable. Even though the said Act is now an integrated law on the subject of arbitration, it cannot and does not provide for all contingencies. An arbitration being a creature of agreement between the parties, it would be impossible for the legislature to cover all aspects. Just by way of example Section 10 permits the parties to determine the number of arbitrators, provided that such number is not an even number. Section 11(2) permits parties to agree on a procedure for appointing the arbitrator or arbitrators. Section 11 then provides how arbitrators are to be appointed if the parties do not agree on a procedure or if there is failure of the agreed procedure. A reading of Section 11 would show that it only provides for appointments in cases where there is only one arbitrator or three arbitrators. By agreement parties may provide for appointment of 5 or 7 arbitrators. If they do not provide for a procedure for their appointment or there is failure of the agreed procedure, then Section 11 does not contain any provision for such a contingency. Can this be taken to mean that the agreement of the parties is invalid? The answer obviously has to be in the negative. Undoubtedly the procedure provided in Section 11 will mutatis mutandis apply for appointment of 5 or 7 or more arbitrators. Similarly, even if parties provide for appointment of only two arbitrators, that does not mean that the agreement becomes invalid. Under Section 11(3) the two arbitrators should then appoint a third arbitrator who shall act as the presiding arbitrator. Such an appointment should preferably be made at the beginning. However, we see no reason, why the two arbitrators cannot appoint a third arbitrator at a later stage i.e. if and when they differ. This would ensure that on a difference of opinion the arbitration proceedings are not frustrated. But if the two arbitrators agree and give a common award there is no frustration of the proceedings."*

Furthermore, the court is of opinion that the argument about the arbitration clause, in this case being contrary to public policy, as it provides for two arbitrators, cannot be pressed by the petitioner, whose primary grievance is that the arbitral tribunal was improperly constituted, since its nominee was not allowed to participate in the proceeding.

30. The court now has to consider the objection to the constitution of the arbitral tribunal, in view of the petitioner's contention that it had appointed Shri. Dewan, and the claimant waived its right to object to such appointment, by view of its counsel's letter dated 7.4.2004 and that consequently it could not have resiled from its position, resulting in Shri Cooper acting as a sole arbitrator.

31. In the decision reported as *Keshav Singh Dwarkadas Kapadia's case (supra)* the Supreme Court declared the law in the following terms:

> *"It is important to notice the distinction between appointment and acceptance of office. The present appeals concern the appointment of an umpire. The questions of effectiveness or perfection of appointment are by the nature of things subsequent to appointment unless the agreement or the statute provides otherwise. Arbitrators and umpire too are often appointed by the parties. Sometimes an umpire is appointed by arbitrators. The constitution of the arbitral body and the manner in which the appointments are made are primarily dealt with in the arbitration agreement or else the Arbitration Act will apply. In some cases, the appointment of arbitrator may require special consideration. If, for instance, two arbitrators are required to be appointed one by each party an appointment of arbitrator by a party is not complete without communication thereof to the other party. The reason in the words of Lord Denman is this: "Neither party can be said to have chosen an arbitrator until he lets the other party know the object of his choice" (See Thomas v. Fredrick, (1847) 10 Q.B. 775). Where each party was to appoint a valuer by May 31, 1847 and one of the parties nominated a referee late on May 31 and sent by that night's post a notice thereof to the defendant who received it on June 1, it was held that the plaintiff had not nominated a referee by May 31. (See Taw v. Harris, 1848) 11 Q.B. 7).*
>
> *….In the present appeals, the reference was to arbitrators and they were required to appoint an umpire. The appointment of an umpire by two arbitrators means that the arbitrators are to concur in appointing an umpire. There is no particular method of appointment of an umpire prescribed by the Act. The usual method of appointment of an umpire by the arbitrators is in writing. Arbitrators who are required to appoint an umpire are under no obligation to obtain the approval of the choice of the personnel by*

> *the parties who appointed the arbitrators. If any party is dissatisfied with the choice that will not affect the validity of the appointment…"*

The Supreme Court, in the above decision, was no doubt concerned with appointment of an umpire. The court also considered the judgment cited by the claimant, i.e *Tradax Export S.A.* as well as *Russel* on Arbitration. This court, however, sees no reason why an arbitrator's appointment has to be accepted by him. For the same reasons why acceptance is not required in the case of an umpire, the appointment, in the case of an arbitrator, also does not require his acceptance. The Act does not impose such a condition; in the event an arbitrator declines to take up the assignment, it is open to the parties to agree upon another name; in the event of disagreement, the court can be approached, under Section 14 or 15 as the case may be.

32. In this case, the claimant's counsel had, on 7.4.2008 written to the petitioner's nominee, Shri Diwan, that while his appointment as Arbitrator by Sara International Limited (ie. the petitioner) was "out of time," yet, his clients instructed him to accept his (Diwan's) appointment:

> *"… so that the Arbitral Tribunal is duly constituted. I would be grateful for your formal written confirmation that you have accepted appointment as Arbitrator by Sara International Limited."*

This communication reveals that after the period of seven days, initially given to the petitioner under the arbitration agreement to appoint an arbitrator, and the refusal by its first nominee, Shri Ganesh, on 07.04.2004, Shri Diwan confirmed his appointment as arbitrator. The claimant sought a written acceptance. However,

this further requirement has not been justified; nor did the claimant, in the hearing show whether there could be any time limit for communication of such written acceptance. This means that the arbitrator, Shri Dewan's appointment was known; the claimant's objections to this were waived, expressly by its counsel.

33. *B. S. N. L. & Ors., Petitioner V. M/s. Subash Chandra Kanchan & Anr.*, AIR 2006 SC 3335 was a case where, during the course of hearing, a concession about appointment of an arbitrator was recorded. The arbitration clause postulated that the power to appoint the arbitrator was with the appellant. The court held that this had been waived by the party (appellant before it) and that it could not resile from that situation. The court held as follows:

> *"a litigant is represented by an advocate. A concession made by such an advocate is binding on the party whom he represents. If it is binding on the parties, again subject to just exceptions, they cannot at a later stage resile therefrom. The matter may, however, be different if a concession is made on a question of law. A wrong concession on legal question may not be binding upon his client. Here, however, despite the stand taken by the Appellant in its written statement before the High Court the learned Advocate consented to appointment of a person as an arbitrator by the High Court in exercise of its jurisdiction under Section 11 of the 1996 Act, in our considered view, the same should not be permitted to be resiled from. A person may have a legal right but if the same is waived, enforcement thereof cannot be insisted.*
>
> *In Ramdev Food Products Pvt. Ltd. v. Arvindbhai Rambhai Patel and Ors. [2006 (8) SCALE 631], this Court observed :*
>
> > *"The matter may be considered from another angle. If the first respondent has expressly waived his right on the trade mark registered in the name of the appellant-Company, could he claim the said right indirectly ? The answer to the said question must be rendered in the negative. It is well-settled that what cannot be done directly cannot be done*

indirectly. The term `Waiver' has been described in the following words : "Waiver" is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted upon it is sufficient consideration It seems that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration."

Waiver may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel."

34. In terms of Section 34 (2) (a) (v) if the composition of the arbitral tribunal is not in accordance with agreement of parties, the award can be set aside by court. In *The Indian Iron And Steel Co. Ltd. V. Tiwari Road Lines*. 2007-(5)-SCC 677, the Supreme Court underlined the importance of the courts respecting the mandate of the parties, in the following terms:

"In the matter of settlement of dispute by arbitration, the agreement executed by the parties has to be given great importance and an agreed procedure for appointing the arbitrators has been placed on high pedestal and has to be given

preference to any other mode for securing appointment of an arbitrator."

This court is of opinion that having waived objections to appointment of Shri Dewan, the claimant could not have later unilaterally decided that he did not accept the appointment, merely because he did not comply with its direction to put down the acceptance in writing. No time limit can be discerned, even if such condition were sustainable in law, in the letter; no such time limit has been prescribed by law.

35. For the above reasons, the petition has to succeed; the impugned award is hereby set aside. The parties are at liberty to take steps to have the dispute resolved in accordance with the arbitration agreement. The petition is allowed. No costs.

DATED: 27th January, 2009

S. RAVINDRA BHAT
(Judge)