Delhi High Court
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Gas Authority Of India Ltd. vs Spie Capag, S.A. And Others on 15 October, 1993
Equivalent citations: AIR 1994 Delhi 75, 1993 (27) DRJ 562, ILR 1994 Delhi 131
Author: A D Singh
Bench: A D Singh
JUDGMENT

Anil Dev Singh, J.

1. The foremost question in issue in this case is whether or not Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (for short 'FARE Act') is applicable to the arbitration agreement contained in the underlying contract executed by and between Gas Authority of India (for short 'GAIL') on the one hand and SPIE CAPAG, S.A., NKK Corporation and Toyo Engineering Corporation (for short 'Consortium') on the other. The second question which arises is : If Section 3 of the FARE Act is applicable then whether or not proceedings before the International Court of Arbitration of the International Chamber of Commerce (respondent No. 4), initiated by the Consortium for appointment of three member Arbitral Tribunal for adjudication of the claims raised by it against GAIL, should be permitted to continue.

2. The facts of the case may be stated as under :

GAIL is a company incorporated under the Companies Act, 1956 having its registered office at Hotel Samrat, Chanakyapuri. New Delhi. GAIL floated world wide tenders for execution of Welled Steel Gas Pipe Line Project for transportation of sweetened South Bassein Gas from Hazira in the State of Gujarat to Jagdishpur in the State of Uttar Pradesh via Bijaypur in the State of Madhya Pradesh for being utilised in the fertilizer/power plants and by other users. Pursuant to this invitation the Consortium submitted its bid in respect of the said work. On April 7, 1986 GAIL accepted the bid of the Consortium and in this regard also issued a letter of acceptance dated April 9, 1986. The parties finally entered into two agreements being agreements, Nos. I & II on May 10, 1986, one relating, inter alia, to design engineering manufacture, construction and commissioning of all equipments, pipe lines and plants etc. and the other, inter alia, concerning supply of imported materials and equipments etc. for the total contract price of U.S. 584 million dollars equivalent to Rs. 772 crores (approximately), calculated on the basis of exchange rate prevalent at the time of the execution of the agreement. Both the agreements contain identical terms.

3. The project was to be completed in accordance with the time frame specified in Section 3 of "Completion Schedule" and all tasks were to be executed by July 31, 1988. There has been a delay in the completion of the work for which each party is lying blame at the door of the other. It is not however, disputed by the parties that some portion of the work still remains incomplete and that the Consortium has already been paid a sum of Rs. 765 crores. For delay in execution of the work GAIL has already taken proceedings for enforcing the performance guarantee furnished at the instance of the Consortium to recover liquidated damages.

4. On or about April 9th/10th, 1990 GAIL received a communication dated April 3rd, 1990 from Secretary General, Court of Arbitration, International Chamber of Commerce (for short 'ICC') forwarding a copy of the Consortium's request dated March 30th, 1990 for arbitration in request of its claim against GAIL for a further payment of U.S. dollars 450 million (equivalent to Rs. 775 crores approximately). In the request for arbitration the Consortium, inter alia, also seeks a declaration that GAIL does not have any right to levy liquidated damages, Pursuant to this communication, GAIL filed an application under Section 33 of the Arbitration Act, 1940 (for short 'Arbitration Act') (being Suit No. 1440/90) for (a) declaring the request dated March 30, 1990 as invalid, illegal and violative of the contract between the parties, (b) determining the existence, validity and the effect of the arbitration agreement embodied in the contract between the parties dated May 10, 1986, and (c) declaring that the matter was not referrable to arbitration.

5. On May 5, 1990 D. P. Wadhwa, J. before whom the matter came up, while directing notice to Consortium (respondents 1 to 3) and ICC (respondents No. 4), stayed further proceedings before the respondent No. 4. The Consortium appeared in the matter and filed its reply and also an application, being I.A. No. 5206 of 1990, under Section 3 of the FARE Act for stay of the proceedings in the suit.

6. The main thrust of the argument of the Consortium was that there is a valid arbitration agreement between the parties, which is subject to New York Convention of 1958 and is covered by the FARE Act, including Section 3 of the FARE Act read with Art. II(3) of the Schedule thereto and this court being a court of the contracting State was obliged to stay the suit.

7. In order to appreciate the main issue between the parties it is necessary to notice the background to the New York Convention, 1958 and its two precursors namely, Geneva Protocol on Arbitration Clauses of 1923 and International Convention on the execution of Foreign Arbitral Awards of 1927.

8. After the First World War, commensurate with the importance of international trade and the increased use of international commercial arbitration, a need was felt for providing proper arbitral machinery for the resolution of disputes between the contracting parties subject to the jurisdiction of different States. In this regard ICC promoted an international convention for removal of impediments to the enforceability of the arbitral clause. The first serious effort in this direction, was made under the auspices of The League of Nations, which fructified in the conclusion of a treaty on September 24, 1923 called Protocol on Arbitration Clauses (for short 'Protocol') which was ratified by 30 States The Protocol though baptised as "Protocol on Arbitration Clauses" also catered for arbitral procedure and execution of arbitral awards. Protocol comprised of 8 Articles of which Articles 1 to 3 need to be noticed, for the rest are not relevant to the issues in question. Article 1 of the Protocol, inter alia, provided that each of the contracting States recognise that validity of an agreement, whether relating to existing or future differences, between parties subject respectively to the jurisdiction of different contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with the contract relating to commercial matter or to any other matter capable of settlement by arbitration, whether or not the parties are subject to the jurisdiction of a country in which arbitration was to take place. Each contracting States, however, was given a right to limit the aforesaid obligations to contracts relating to commercial matters. This Articles established the international validity and enforceability of the arbitration agreements contained in the international commercial agreements.

9. Article 2 dealt with the arbitral procedure and so far as it is relevant read as follows :

"2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place ....."

10. Article 3, which secured the enforcement of the award, read as under :

"Each contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the proceeding articles".

11. According to above Article, two conditions were required to be fulfillled before the contracting State could be saddled with the responsibility to ensure the execution of the award :

(1) The arbitral award should have been rendered in accordance with the provisions of the national laws of the executing State; and

(2) The arbitral award should have been rendered in the territory of the executing State.

12. Thus under the Protocol only domestic awards could be enforced by the courts of the member States. This was one of the glaring shortcoming of the Protocol.

13. In order to overcome the deficiencies exhibited by the Protocol, the League of Nations was instrumental in the conclusion of another treaty for securing the recognition and enforcement of the international arbitral awards arising out of the arbitration agreements falling under the Geneva Protocol. This treaty called International Convention on the Execution of Foreign Arbitral Awards (for short 'Geneva Convention') was concluded on September 26, 1927 at Geneva. This was ratified by 24 States. Undoubtedly Geneva Convention supplemented the protocol by making it possible to enforce an award in a contracting State other than where the award was rendered. As per the Geneva Convention each high contracting State was required to recognise as binding and to enforce, in accordance with the rules of the procedure of its territory, arbitration award made in another contracting State pursuant to an agreement covered by the Protocol. India was a signatory to both the Protocol and the Geneva Convention subject to the reservation of limiting India's obligations in respect there of to contracts which were considered as commercial under the laws of India. For implementing and giving effect tothe Protocol and the Geneva Convention, the Arbitration (Protocol and Convention) Act, 1937 was enacted. The objects and reasons of the Act were as follows :

"The Government of India have had for sometime under consideration the question of India's adherence to the Geneva Protocol on Arbitration Clauses (1923) and the International Convention on the Execution of Foreign Arbitral Awards (1927). The object of these instruments is to meet the widely expressed desire of the commercial world that arbitration agreements should be ensured of effective recognition and protection. A large number of countries including many of first class commercial and industrial importance, e.g., the United Kingdom, France, Germany, the Netherlands have adhered to these instruments.

After consulting local Governments, High Courts and commercial bodies, a majority of whom were found to be in favor of India's accession to these instruments the case was placed before the Commerce Department. Standing Advisory Committee of the Legislature who recommended that India should adhere to the instruments. These have accordingly been signed at Geneva on behalf of India, subject to reservations limiting India's obligations under the instruments to commercial contracts and excluding the Indian States from the scope of the instruments".

14. Notwithstanding the laudable object of the Geneva Convention, subsequent experience showed that the instrument was not conducive to the speedy enforcement of foreign arbitral awards and requirement of international trade. The most important reason for this was that the beneficiary of the award was required to show to the court, before which the matter came for enforcement, that the award had become final in the country in which it was made. Thus, the party opposing the enforcement of the award could effectively prevent its execution on the ground that the award was subject matter of litigation in the country where it was rendered. The Geneva Convention also laid too much emphasis on the remedies that were open to the parties to invoke the law of the country where award was made for the purposes of setting aside the same.

15. Realizing that in the interest of international developing trade it was important to further the means of obtaining the enforcement in one country of international arbitral awards rendered in another country, relating to commercial disputes, the International Chamber of Commerce issue a draft convention in 1953 on International Arbitral Awards which, inter alia targeted essentially to achieving an international commercial arbitration which was to be free of a national law. The United Nations Economic and Social Council (ECOSOC) to whom ICC draft was presented prepared another draft in 1955. The making of the draft has a small history which may be of academic interest.

16. ECOSOC by its resolution No. 520 (XVII) dated May 6, 1954 established an ad hoc committee of eight Member States to study the matter raised by the International Chamber of Commerce in the light of all the relevant consideration and to report its conclusions to the former submitting such proposal at latter deemed appropriate, including a draft convention. The Committee held 13 public meetings from March 1 to 15, 1955

at New York and on the last day viz., March 15, 1955 adopted a draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards along with its recommendations and submitted the same to the ECOSOC. Thereupon ECOSOC at its 853rd meeting vide its Resolution 570 (XIX) dated May 20, 1955 requested the Secretary General to transmit the Draft Convention and the report of the Committee to the Governments of States, Members and Non-Members of the United Nations, for their consideration and comments and the desirability of convening a conference of conclude a convention.

17. Upon receipt of the comments of number of Government and inter and non-governmental organisations. ECOSOC at its 923rd plenary meeting dated May 3, 1956 decided to convene a "Conference to conclude a convention on the recognition and enforcement of foreign arbitral awards". Consequently the conference was held at New York from May 20 to June 10, 1958 and the new international convention on the Recognition and Enforcement of Arbitral Awards was adopted by the conference on the last day viz., June 10, 1985, which came to be known as New York Convention. The New York Convention makes provision for the recognition and enforcement of an arbitral agreement subject to certain conditions being satisfied. Besides it also provides for the recognition and enforcement of an award resulting from an arbitration agreement to which the convention applies.

18. In order to give legislative effect to the New York Convention. Parliament enacted the Foreign Awards (Recognition and Enforcement) Act, 1961 (for short 'FARE Act'). By virtue of the provisions of Section 10 of the FARE Act the Arbitration, Protocol and Convention Act, 1937 stand repeated in relation to foreign awards to which this Act applies.

19. The FARE Act aims at providing a mechanism for speedy referral of disputes to arbitration between the contracting parties and for speedy enforcement of resultant foreign arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards is sought. It does not apply to domestic arbitral awards, that is to say, awards shaped on the basis of arbitration agreements governed by the internal system of laws of the State in which recognition and enforcement is sought. At this stage it will be advantageous to refer to various provisions of the FARE Act.

20. Section 1 of the FARE Act lays down the territorial extent of the Act by providing that it extends to the whole of India.

21. Section 2 defines "Foreign Awards". It reads as under :

"In this Act, unless the context otherwise requires, "foreign award" means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 -

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies, and

(b) in one of such territories as the Central Government being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

22. Section 3 makes provision for mandatory stay of legal proceedings in respect of matters to be referred to arbitration under the agreement between the parties to which Article II of the Convention applies subject to and on fulfillment of certain conditions. Section 3 provides as under :

"3. Stay of proceedings in respect of matters to be referred to arbitration - notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908, if any party to an agreement to which Article II of the Convention set forth in the Schedule applies, or any person claiming through or under him

commences any legal proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings apply to the court to stay the proceedings and the court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings".

23-24. Section 4 makes provision for giving effect to the foreign awards. It makes an award enforceable in India subject to other provisions of the Act as if it were an award made on a matter referred to arbitration in India. Sub-section (2) of Section 4 treats a foreign award, which would be enforceable under the Act, binding on persons between whom it was made. Such an award can be relied upon by the said persons by way of defense, set off or otherwise in any legal proceedings in India.

25. Section 5 deals with the procedure for filing of foreign awards in court.

26. Section 6 which provides for enforcement of foreign award reads as under :

"Enforcement of foreign award - (1) Where the court is satisfied that the foreign award is enforceable under this Act, the court shall order the award to be filed and shall proceed to pronounce judgment according to award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award".

27. Section 7 lays down the conditions for enforcement of foreign awards. This section reads as under :

"7. Conditions for enforcement of foreign awards : (1) A foreign award may not be enforced under this Act :

(a) If the party against whom it is sought to enforce the award proves to the court dealing with the case that :

(i) the parties to the agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made; or

(ii) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(iii) the award deals with questions not referred or contains decisions on matters beyond the scope of the agreement; Provided that if the decisions on matters submitted to arbitration can be separate from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made, or

(b) if the court dealing with the case is satisfied that :

(i) the subject matter of the difference is not capable of settlement by arbitration under the law of India; or

(ii) the enforcement of the award will be contrary to public policy;

(2) If the court before which a foreign award is sought to be relied upon is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority referred to in sub-clause (v) of clause (a) of sub-section (1), the court may, if it deems proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to furnish suitable security".

28. Section 8 lays down the manner and method of giving evidence of the award for purposes of proving the same.

29. Section 9 is a saving provision and is as follows :

"9. Saving - Nothing in this Act shall :

(a) prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Act had not been passed; or

(b) apply to any award made on an arbitration agreement governed by the law of India".

30. Section 10 as already noticed is a repealing section.

31. Lastly, Section 11 confers power on the High Court to make rules consistent with the Act for effectuating the purpose of the same.

32. Like Arbitration Protocol and Convention Act, 1937, which incorporated the Geneva Protocol and Geneva Convention as first and second schedules thereto, the FARE Act makes New York Convention a part and parcel of itself by embodying the same as a schedule thereto, consisting of XVI Articles.

33. Article 1 defines the scope of the convention is relation to the recognition and enforcement of arbitral awards. The said Article reads as under :

"(1) This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where there recognition and enforcement are sought.

(2) The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by the permanent arbitral bodies to which the parties have submitted.

(3) When signing, ratifying or acceding to this convention, or notifying extension under Article X thereof, any State may on the basis of reciprocity declare that it will apply for Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

34. The aforesaid Article provides for the recognition and enforcement of foreign arbitral awards whether or not they were made in the territory of a contracting State. At the same by implication it excludes domestic award from its purview.

35. From a bare reading of Article 1(1), it is clear that it deals with awards made in any State other than the State where their recognition and enforcement is sought; it does not require that parties be subject to jurisdiction of different contracting States. New York Convention marks a clear departure from the Geneva Convention as the letter was based strictly upon the principles of reciprocity and it applied to arbitral awards made in the territory of contracting States and between the persons subject to the jurisdiction of one of the contracting States. Therefore the area of operation of the New York Convention is wider than that of Geneva treaties. Article 1(3) of the New York Convention, however, permits any contracting State of limit the filed of application of the said convention by declaring that it would apply the convention to arbitral awards rendered in the territory of other contracting States only. In other words, though the said para does not establish strict requirement of reciprocity, at the same time it allows any contracting State to declare that it would limit the applicability of the convention only to arbitral awards made in the territories of the other contracting States. Negatively a contracting State not making such a declaration would be bound to apply the convention to arbitral awards rendered in any other country, whether or not such a country, where the award has been rendered, is a party to the convention or not.

36. According to the said para, the Convention enables the contracting States also to declare that they would apply the convention to disputes arising out of legal relationships whether stricto sensu contractual or not provided they are considered as commercial under the domestic law of the State making such a declaration.

37. New York Convention depicts an equilibrium in spite of assimilating two different concepts. This was achieved by widening its field of application, embodying the principle of universality by refraining from the principles of strict reciprocity embodied in the Geneva Convention and at the same time enabling a State to make a reservation in respect of reciprocity, making the applicability of the convention to awards rendered in the territory of another contracting State which might otherwise be discouraged from ratifying it.

38. Article 1(2) gives in inclusive definition to the expression "arbitral awards". It includes arbitral awards either made by appointed arbitrators for each case or arbitral bodies to which the parties have submitted.

39. Article II deals with the question of recognition and enforcement of an agreement to submit to arbitration differences which have arisen or may arise between the contracting parties. The Convention Article 11 provides that :

"1. Each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

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

40. If paragraph 1 of Article II is read in isolation it would appear to apply to all arbitration agreements. But having regard to the international origin of the convention, purpose and object thereof and the spirit behind the FARE Act this Article must be construed as applying to arbitration agreements between the parties, one of whom must be a foreigner, engaged in international trade with each other. The mechanism is meant for the resolution of disputes/differences in the Context of International Commercial Arbitration Agreements under the aforesaid provision. Each contracting State is under an obligation to recognise and enforce an arbitration agreement having a foreign element.

41. According to para 2 of Article II such an agreement, whether in the form of an arbitral clause or arbitration agreement, should be in writing signed by the parties. The agreement envisaged may not necessarily be contained in one comprehensive document but may be found in several documents. It can also be spelt out from exchange of letters or telegrams.

42. Para 3 of Article II specifies the effect of an arbitration agreement on court proceedings. A court of the contracting State dealing with a matter in respect of which the parties have entered into an arbitration agreement of the kind covered by paras 1 and 2 of Article II, is mandatorily, required to refer the matter to arbitration at the request of one of the parties to the agreement unless the court finds the agreement to be null and void, inoperative or incapable of being performed. Except in the contingency mentioned in this para the parties must abide by the chosen method of resolution of disputes by arbitral mechanism in the manner laid down in the arbitration agreement or arbitral clause."

43. Article II deals with the recognition and enforcement of arbitral awards and reads as under :

"Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

44. Article IV lays down the procedure for applying to the court for recognition and enforcement of the award.

45. Article V provides for the contingencies in which the court of a Contracting State may refuse recognition and enforcement of the award at the instance of an aggrieved party against whom the award is invoked.

46. According to Article VI a party, who has applied for setting aside for suspension of the award to a Competent Authority, before whom the award is relied upon by the other party claiming enforcement of the same, the former party may be required by the authority to give suitable security, if it feels inclined, to accede to his request for adjourning the decision on the question of enforcement of the award.

47. Article VII (1) declares that the provisions of the Convention shall not affect the validity of multilateral or bilateral agreements confirming the recognition and enforcement of arbitral award entered into by the Contracting States nor deprive any interested party of any right it may have under an arbitral award in the manner and to the extent allowed by the law or treaties of the country where such an award is sought to the relied upon.

48. Para 2 of Art. VII repeals the Geneva Protocol and the Geneva Convention and while so doing provides as follows :

"2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall ease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention."

49. According to Article VIII (1) the Convention was kept open up to December 31, 1958 for signature on behalf of the members of the United Nations and also on behalf of any other State which became member of any specialised agency of the United Nations or became a party to the Statute of the International Court of Justice, or any other State to which an invitation was addressed by the General Assembly of the United Nations. According to para 11 of Article VIII the instrument of ratification was required to be deposited with the Secretary General of the United Nations.

50. Article IX has two paragraph. While para 1 kept the Convention open for accession to all states referred to in Article VIII, Para 2 laid down the procedure for accession by States to this Convention.

51. Article X makes provision for the application of the Convention by a State in the territories for the intentional (international ?) relations of which it is responsible.

52. Article XI makes special provisions for application to a federal on a non-unitary State.

53. Article XII provides for the date of coming into force of the convention. It reads as follows :

"This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession."

54. Article XIII permits a Contracting State to denounce the Convention and prescribes a procedure therefore.

55. Article XIV does not permits a Contracting State to avail itself of the present convention against other contracting States except to the extent that it has bound itself to apply the convention.

56. Article XV makes it incumbent on the Secretary General of the United Nationals to notify the States contemplated in Article VIII of the following :

(a) Signatures and ratifications in accordance with Article VIII :

(b) Accessions in accordance with Article IX;

(c) Declarations and notifications under Articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with Article XII;

(e) Denunciations and notifications in accordance with Article XIII."

57. The last Article, being Article XVI, confers equal authenticity to the Chinese, English, French, Russian and Spanish texts of the Convention and these texts are to be deposited in the archives of the United Nations. The Secretary General of the United Nations is also required to transmit a certified copy of the Convention to the States contemplated in Article XIII.

58. It was argued by the learned counsel for GAIL that the proper law governing the contract in question is the law of this country and the same law will govern the arbitration agreement as well. As a sequester it was contended that any award arising from the instant arbitration agreement would be governed by the law of India and would be outside the purview of the FARE Act. He further submitted that since the end product would not be covered by the FARE Act, it would also not apply to the arbitration agreement. On the other hand, learned counsel for the Consortium, submitted that recognition and enforcement of the arbitration agreement is not dependent on the condition that the resultant award arising there from must be a foreign award.

59. In view of the line of reasoning adopted by learned counsel for the parties, it will be essential to determine the proper law governing the underlying contract and the arbitration agreement.

60. Proper law of the contract is the law which the court is required to apply for determining the inter se obligations of the parties under the same. Proper law is an expression used to describe the law that governs the contract. It provide a primary system of law under which the right and obligations of the parties have to be worked out. In other words, the proper law governs the matters flowing from the contract executed by and between the parties.

61. It has long been recognised that the parties have a free choice to select the proper law applicable to the contract. Lord Atkin in R. v. International Trustee for the Protection of Bondholders Akt. ((1937) 2 All ER 164), observed that the intention will be ascertained by the intention expressed in the contract. Choice though conclusive is subject to the choice being not contrary to public policy. Where there is an express choice made by the parties regarding the application of the proper law, the agreement will be governed by that law. This is also indicated by Article V(1)(a) of the New York Convention (corresponding to Section 7(1)(a) of the FARE Act), which provides, inter alia, that a foreign award may not be enforced if the arbitration agreement from which it stems is not valid, under the law to which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made. Though the said provision relates to the conditions for the enforcement of the arbitral award, at the same time it gives the cue for determining the law applicable to an arbitration agreement.

62. Where, however, choice is not expressly stated in the agreement, the intention of the parties for determining as to what law governs the transaction must still be gathered from the agreement itself. In ascertaining the proper law of the contract the court must have regard to features of the contract which serve as links between the contract and the country with which it is most closely and vitally connected, for example, the place where the agreement has been entered into by the parties, where the same is required to be performed, the seat of the forum where the disputes inter se between the parties have to be resolved etc. These connecting ties are the pointers which indicate the country which is most closely associated and connected with the contract and in which lies the centre of gravity of the contract.

63. For ascertaining the proper law of the contract, it will be relevant to refer to Article 5(1) and 5(2) of the Special Conditions of Contract. The said Articles run thus :

"5.1. This agreement shall be construed and interpreted in accordance with and governed by the laws of the Union of India. 5.2. In respect of all matters or actions arising out of this contract and which may arise at any time the courts at Delhi alone shall have exclusive jurisdiction".

64. Thus while Article 5(1) declares that the agreement shall be governed by, and be construed and interpreted in accordance with the laws of India, Article 5(2) states that courts at Delhi alone shall have exclusive jurisdiction in respect of all matters and actions arising under the contract. According to the aforesaid Article it is manifest that the parties have expressly selected the law of India as the proper law for determining the obligations under the contract. Thus there is no need to draw any inference about the intention of the parties in this regard. The agreement categorically and clearly postulates that the contract is to be governed by the laws of India.

65. It may, however, be pointed out the different and distinct laws may govern the contract, the arbitration agreement and arbitration proceedings according to the will of the parties. Normally unless there is a contrary indication in the agreement, the same law will govern the contract, the arbitration agreement and the arbitration proceedings. The Court will not readily and without good reason split a contract in this respect and usually proper law of the contract governs all matters arising out of the same specially where the parties stipulate that the agreement shall be governed by a particular system of law without laying down any exceptions what so ever. In such a contingency the entire contract will be governed by one primary system of law.

66. At this stage examination of Articles 9.1 and 9.2 of General Conditions of Contract will also be essential for the purpose of resolution of the point in issue. The Articles read as under :

"9.1. Unless otherwise specified all disputes arising in connection with the present contract which cannot be settled by mutual negotiations shall be finally settled under the Rules of conciliation and arbitration of the International Chambers of Commerce Paris by one or more Arbitrators appointed in accordance with the said Rules. The venue of any arbitration proceedings shall be at New Delhi - India.

9.2. The Laws of India shall apply to and govern any such proceedings".

67. Thus from reading of Article 9.2 of General Conditions of Contract it is manifest that arbitration proceedings will also be governed by the Law of India. The combined effect of both Article 5(1) of the Special Conditions of the Contract and Article 9(2) of the General Conditions of the Contract is that the agreement and the arbitration proceedings will be governed by the laws of India.

68. Though in the aforesaid Articles 5.1 and 9.2, the parties have expressly stated that the agreement and the arbitration proceedings are to be ruled by laws of India, Article 9.1 however, stipulates that disputes in connection with the contract, which include solution by mutual negotiations are required to be settled under the I.C.C. Rules by one or more arbitrations appointed under the said Rules while holding setting at New Delhi. In this regard, therefore, Article 9 necessitates reference to the relevant provision of the I.C.C. Rules, which happens to be Article 13(3) of the I.C.C. Rules of Arbitration. The said Rule reads as under :

"The parties shall be free to determine the law to be applied by the Arbitrator to the merits of the dispute. In absence of any indication by the parties to the applicable law, the Arbitrator shall apply the law designated as a proper law by the Rule of conflict which he deems appropriate."

69. According to this Article the choice of the proper law is left exclusively to the parties and in absence of any indication of such a choice in the agreement, the Arbitrator decides the question as to which law is applicable to the merits of the dispute. As already seen, the parties speaking through the medium of Art. 5.1 of the special conditions of Contract have unequivocally declared that the agreement is to be construed and interpreted in accordance with laws of India. This Article covers the entire gamut of the agreement, whether it be the arbitration clause or other provisions of the agreement or the merits of the pending disputes between the parties which flow from the contract.

70. In any event, if the parties had not expressly stated their choice of the laws ruling the contract, still the laws of India would govern the contract and substance of the disputes as the most appropriate set of laws of the following factors :

(1) The venue of arbitration has been fixed at New Delhi;

(2) The courts at New Delhi have been given exclusive jurisdiction in all matters arising out of the contract;

(3) The agreement was signed by the parties in India;

(4) The agreement was to be performed in India.

71. The above are the links binding the contract with India. They show close association and connection with this country. The contract has chartered the Indian course and remains in its orbit. Therefore, law of India would be the proper law being.

(a) the law of the forum or lex fori;

(b) the law of the place where contract is made or lex loci contracts; and

(c) the law of the place where contract is to be performed lex loci solutions.

72. Viewing from any angle the substantive law governing the contract including the arbitration agreement as well as the procedural law governing the conduct of arbitration proceedings is the same viz. law of India. In nutshell the position boils down to this.

73. Words of Article 5.1 of the Special Conditions of Contract, by virtue of which the agreement is to be interpreted and construed are wide and comprehensive enough to cover the whole of the contract including the clause containing the arbitration agreement. Normally the law governing the contract governs the arbitration agreement and the merits of the disputes between the parties as well unless the parties have intended otherwise to the contrary. In the instant case there is no indication in the agreement to the contrary.

74. In National Thermal Power Corporation v. The Singer Company , the Supreme Court while determining the proper law of the arbitration agreement between the parties to the cause observed as under :

"21. As regards the governing law of arbitration. Dicey says :

"Rule 50(1) The validity, effect and inter-pretation of an arbitration agreement are governed by its proper law.

(2) 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 (Vol. 1 pages 534-535).

22. The principle in Rule 58, as formulated by Dicey, has two aspects (a) the law governing the arbitration agreement, namely, its proper law; and (b) the law governing the conduct of the arbitration namely, its procedural law.

23. The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as whole, or the arbitration and agreement as such, a presumption may arts the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption. See dicey Vol. 1, p. 539 : See the observation in Whitworth Street Estates (Manchester) Ltd. v. James Miller and partners Ltd. ((1970) AC 583, 607, 612 & 616)".

75. Having regard to the foregoing, I have no hesitation in holding that the law of India, being the proper law of the contract would govern all the matters under the contract in question including the arbitration agreement, arbitration proceedings arising there from the question of the existence, validity, effect (scope) and interpretation of the arbitration clause. (See : Nova (Jersey) Knit Ltd. v. Dallal v. Bank Melle ((1986) QBD 441).

76. Having held so I will now examine the argument of the learned counsel for GAIL the since the laws of India are to govern the arbitration agreement the resultant award, if any arising there from would be a domestic award falling outside the purview of the FARE Act and since the ultimate award cannot be enforced under the provisions thereof, the arbitration agreement too is capable of recognition and enforcement under the same. This plea of the learned counsel necessitates a reading of Section 9.2 of the FARE Act, which is reproduced in the earlier part of the judgment. A perusal of the provision shows that it expressly excludes an award arising out of an arbitration agreement governed by the law of India from the operation of the FARE Act.

77. In this regard the law has been settled by the Supreme Court in National Thermal Power Corporation v. The Singer Company (supra) and is no longer res integra. That was a case where the question for determination was whether or not an interim award made in London which arose out of an arbitration agreement governed by the laws of India fell within the purview of the FARE Act. The apex Court held that since the proper law applicable to the contract including the arbitration agreement was the law in force in India, the resultant award was a domestic award within the meaning of Section 9.2 of the Act. In this regard the Supreme Court observed as follows :

"42. The Foreign Award Act contains a specific provision to exclude its operation to what may be regarded as a domestic award in the sense of the award having been made on the arbitration agreement governed by the law of India, although the dispute was with a foreigner and the arbitrator was held and the award was made in a foreign State.

43. Section 9 of this Act says :

"Nothing in this Act shall :

(a) .....

(b) apply to any award made on an arbitration agreement governed by the law of India".

Such an award necessarily falls under the Arbitration Act 1940, and is amendable to the jurisdiction of the Indian Courts and controlled by the Indian system of law just as in the case of any other domestic award, except that the proceedings held abroad and leading to the award were in certain respects amenable to be controlled by the public policy and the mandatory requirements of the law of the place of arbitration and the competent courts of that place".

78. In view of Article 5 and 9 of the Special Conditions of the Contract and the General Conditions of the contract respectively, by virtue of which law of India are to govern the arbitration agreement and having regard to the decision of the Supreme Court, it is apparent that the award to be made by the arbitrator would be domestic award which would not be governed by the FARE Act. Accordingly I hold that the resultant award, if any, arising out of the arbitration agreement would be a domestic award not governed by the FARE Act.

79. Notwithstanding the above position, the learned counsel for the Consortium submitted that the contention of GAIL that arbitration agreement not resulting in a foreign award would not be enforceable under the FARE Act was not correct. They argued that the arbitral clause contained in the underlying agreement between the parties would still fall within the purview of Section 3 of the FARE Act and Article II of the New York Convention and is required to be enforced in accordance with the said provisions. This plea will require close examination of the purpose and object of the New York Convention and the FARE Act. This will also require examination of Section 3 of the FARE Act and Art. II of New York Convention, in the light of other provisions as well to determine the field of their application.

80. To trace the spirit behind the New York Convention and the FARE Act a reference to the object and purpose of the Arbitration (Protocol and Convention) Act, 1937, which was a precursor to the FARE Act, is necessary. A perusal of the objects and reasons of that Act, which are reproduced above, show that the Act gave legislative recognition to the Geneva Protocol and Geneva Convention as the purpose of these instruments, inter alia, was "to meet the widely expressed desire of the commercial world that arbitration agreement should be ensured of effective recognition and protection". It is significant to note that the various State Governments, High Courts and Commercial bodies were found to be in favor of India's accession to these instrument.

81. At this stage it will be appropriate to examine the statement of objects and reasons of the FARE Act itself, which read as follows :

"1. The procedure for settlement, through arbitration of disputes arising from international trade was first regulated by the Geneva Protocol of Arbitration Clauses, 1923, and the Geneva Convention of 1927 to which India was a party and which were given effect to in India by the Arbitration (Protocol and Convention) Act, 1937. This Act was, therefore, enacted to adopt the then prevailing practices of arbitration in India to the regulations of the Geneva Protocol on Arbitration Clauses of 1923 and Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

2. It was, however, felt that the Geneva Convention hampered the speedy settlement of disputes through arbitration and hence no longer met the requirements of the international trade due to the following principal defects :

(a) it placed an undue emphasis on the law of the land, the selection of arbitrators, the procedure to be followed by these tribunals etc. and

(b) it laid too much emphasis on the remedies that were open to parties to invoke the law of the country for the purposes of setting aside the awards.

Therefore, in order to remedy, inter alia, the above mentioned defects, a draft convention was prepared by the International Chambers of Commerce, which was considered by the United Nations Economics and Social Council in consultation with the Government of various countries and non-Government organisation and finally a new International Convention on the Recognition and Enforcement of Arbitral Awards was adopted New York on the 10th June, 1958. This Convention was duly ratified by the Government of India and was deposited with the Secretary General of the United Nation on the 13th July, 1960.

3. The Geneva Convention shall cease to have effect between the contracting States on their becoming bound by the New York desirable to replace Act VI of 1937 by a new piece of legislation. This Bill provides for the filing and enforcement of foreign awards in courts in accordance with New York Convention.

4. The new Bill, when brought into operation, will apply only to foreign awards made on or after the 11th day of October, 1960, and the foreign awards made before that date will continue to be governed by the 1937 Act."

82. Thus, the object of the FARE Act was to give legislative recognition to the New York Convention. As a successor to the Geneva Convention the New York Convention was aimed to energize and strengthen the machinery for settlement of the disputes emanating from agreements having transnational character. It was meant to remove the existing deficiencies in the previous treaties and not to demolish the mechanism for referral of disputes to arbitration arising out of such transactions.

83. Again the objects and reasons of the Act 47 of 1973, which was enacted to amend the provisions of Section 3 of the FARE Act in order to remove the lacuna pointed out by the Supreme Court in M/s. V/o Tractor-export Moscow v. Tarapore and Co. Madras , also give insight to the purpose of the FARE Act. The statement of objects and reasons of the Amending Act are as under :

"(II) The Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted to give effect to the International Convention on Recognition and Enforcement of Foreign Arbitral Awards done at New York on the 10th day of June, 1958. Article II of this Convention provides for recognition by Contracting States of agreements including arbitral clauses in writing by which the parties to the agreement undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not concerning a subject matter capable of settlement by arbitration.

The article also provides that when the court of a contracting States is seized of a matter in respect of which the parties have made an agreement to which the article applies, the court shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void inoperative or incapable of being, performed. In such cases, according to the article, the mere existence of a valid arbitration agreement which render it mandatory for the court to refer the parties to arbitration and stay the proceedings before it. In a V/o Tractors-export Moscow v. Tarapore and Co. (supra) the Supreme Court has, however, held by a majority of 2 : 1, that Section 3 of the Act does not give full effect to Article II of the Convention. According to the court, the section is applicable only in case where not only is there an arbitration agreement in force between the parties, but there has also been an actual reference to arbitration. It is, therefore, proposed to amend the section suitably to bring out the intention clearly.

The Bill seeks to achieve the above object."

84. The Supreme Court in Renusagar Power Co. Ltd. v. General Electric Company Ltd. , commenting upon the purpose of the FARE Act observed that the Act was enacted to give effect to the New York International Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which India was a party and was calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration.

85. The principal purpose of the New York Convention and the Act as stated in the decision of the US Supreme Court in Fritz Scherk v. Alberto-Culver Co. ((1974) 417 US 506), is this :

"The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries".

86. Therefore, the prime object of the New York Convention was to ensure the recognition and enforcement of the commercial arbitration agreements having international features and the resultant foreign awards arising there from. For this purpose, the New York Convention lays down one uniform code. It provides a common yard stick on the touchstone of which these agreements and awards are recognised and enforced in the countries which have acceded to the same. Thus generating confidence in the parties, who may be unfamiliar with the diverse laws prevailing in different countries with which they are trading, that the arbitral agreements and awards flowing there from will be respected and enforced by the courts of the states where enforcement is sought, provided the conditions laid down in Arts. I and II of the New York Convention are satisfied for such enforcement.

87. By looking at the convention, it is clear that it mandates by focal action :

(1) Recognition and enforcement of commercial arbitration agreements contained in international contracts. (See Article II of the New York Convention);

(2) Enforcement of foreign arbitral awards (See Article I of New York Convention).

88. From a reading of Article II of the Convention it does not appear that there is any express or implied limitation or fetter which calls for recognition and enforcement of only those arbitration agreements which will result in foreign awards. Such a construction cannot be placed upon the said article as this would go against the spirit and grain of the convention.

89. Under Article II of the New York Convention (corresponding to Section 3 of the FARE Act) the court of a contracting State will refuse to entertain an action in a matter in respect of which the parties have made an agreement in writing to refer disputes which may arise between them. There are, however, four exceptions

which can be spelt out from Article II, one in para 1 and three in para 3 thereof on the basis of which a court can refuse enforcement of an arbitration agreement and these are :

(1) the subject matter of the dispute is not capable of settlement by arbitration;

(2) the agreement is null and void;

(3) the agreement is inoperative; and

(4) the agreement is incapable for being performed.

90. There is no other exception which can be culled out from Article II, in pursuance of which the court can decline to recognise and enforce the arbitration agreement. Therefore, according to the above provision the courts power is limited to enforcing an arbitration agreement except in the aforesaid cases.

91. Again though Section 7(1) of the FARE Act, which mirrors Article V of the New York Convention, deals with the subject to enforcement of awards, a close reading thereof also leads to the discovery of three exceptions to the rule requiring enforcement of arbitration agreements. Clause (a) of sub-section (1) of Section 7 of the FARE Act (Article V(i)(a) of the New York Convention) inter alia, lays down that a foreign award may not be enforced in case the parties to the agreement were under the law applicable to them suffering from some incapacity or the said agreement is not valid under the law to which the parties have subjected it, or failing any, indication thereon, under the law of the country where the award was made. Clause (b) sub-section (1) of Section 7 of the FARE Act (equivalent to Article V(2)(a) of the New York Convention inter alia, provides that a foreign award may not be enforced if the subject matter of the difference is not capable of settlement by arbitration under the law of India. Here the unenforceability of the award is attributable to the snags in the arbitration agreement. Exceptions embodied in Section 7(1)(a)(i) and (i)(b) of the FARE Act/Article V(1)(a) & (2)(b) of the New York Convention can be deemed to be incorporated in Section 3 of the FARE Act/Article II of the New York Convention in addition to the exceptions/limitations which have already been culled out from Section 3 of the FARE Act and Article II of Convention.

92. India acceded to the New York Convention on July 13, 1960 subject to the reservation that the convention would only be applicable to the recognition and enforcement of awards made in the territory of another contracting state and to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the law of India. The first and the second reservation were only the permissible reservations which, like other contracting states, India could make under Article I of the New York Convention. But this limitation did not bind the Parliament. How the Parliament acted while according legislative recognition to the New York Convention gives key to the problem. As already seens, in order to give legislative recognition to the New York Convention the Parliament by Act No. 45 of 1961 enacted the FARE Act and also by an amending Act 47 of 1993 removed the lacuna pointed out by Supreme Court to give full effect thereto. If the Parliament was so inclined it could have provided exceptions to the application of the convention but instead it incorporated the same in the FARE Act with the intention of giving complete legislative recognition to it.

93. According to Section 3 of the FARE Act, the court in India are under an obligation to stay the legal proceedings in respect of the matters arising out of the arbitration agreements of the kind covered by Art. II of the New York Convention subject of course to the exemption mentioned therein. Neither Section 3 nor any other provision of the Act alludes to any limitation or exceptions calling for recognition and enforcement of only those transnational arbitration agreements which are capable of resulting in a foreign award. Refusal to enforce the arbitration agreement on the ground that it will not result in a foreign award cannot be sustained in view of Art. II of the New York Convention and Section 3 of the FARE Act. In case such a limitation was intended, there was no reason why the convention or the FARE Act could not specifically cater for it.

94. As already seen the convention does not apply to an award made in the country where the enforcement is sought. It also does not apply to an award considered as domestic award in the country in which enforcement of such award is sought. The field of application of Art. 1 is expressly restricted by the convention itself. If the field of application of Art. II of the Convention was to be confined to only those agreements which would result in Foreign Award, then one would have expected an express provision to that effect either in the Article itself or in any other provision of the convention. Since there is to such limitation imposed in the convention or the FARE Act restrictive construction cannot be placed upon S. 3 of the FARE Act or Art. II of the convention.

95. The FARE Act was enacted for giving legislative recognition to the convention which in turn was meant to accord respect and encouragement to the arbitration agreements made in the field of international trade and commerce and non domestic awards arising there from.

96. If the international trade has to be strengthened and given a boost then it is absolutely essential to respect the agreements of the nature covered by Article II of the New York Convention subject to the conditions specified therein. The concerns of international community require that there should be uniformity of treatment with regard to the interpretation of the Now York Convention.

97. In the United Kingdom by the enactment of the Arbitration Act, 1975 (1975 c. 3) the New York Convention has been given effect to Section 1 of the British Act provides for the stay of the proceedings in an action where a party can prove a valid agreement which is not a domestic arbitration agreement as defined in Section 1(4) thereof, which reads is under :

"(4) In this section 'domestic arbitration agreement' means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and to which neither :

(a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom; nor

(b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom;

is a party at the time the proceedings are commenced."

98. According to the above a domestic agreement is the one where the following two ingredients are present.

(1) Both the parties to the arbitration agreement are the nationals or residents of the United Kingdom; and

(2) The agreement provides for arbitration in the United Kingdom.

99. In other words, where one of the parties is a foreigner the arbitration agreement will be considered as International arbitration agreement notwithstanding the fact that the arbitration is to take place in the United Kingdom.

100. In the USA the relevant United States Code was amended by Public Law No. 91-368 by adding Chapter 2 for implementing the New York Convention. Section 202 fixes, inter alia, the criteria on the basis of which an arbitration agreement or an award can be called as covenant award and covenant arbitration agreement. It reads as under :

"202. Agreement or award falling under the Convention : "An arbitration agreement or arbitral award arising out of legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in Section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between the citizens of the United

State shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal of business in the United States."

101. The clear import of Section 202 is that the convention applies to an arbitration agreement between parties out of which at least one of them is not a citizen of the United States, irrespective of the fact whether the place of arbitration is within or outside the United States.

102. These legislative enactments also help in the understanding of Art. II of the Convention.

103. Having regard to the above discussion, I am of the view that the New York Convention will apply to an arbitration agreement if it has a foreign element or flavour involving international trade and commerce even though such an agreement does not lead to a foreign award but the enforcement and recognition of the agreement will of course be subject to the limitations already spelt out.

104. Applying this criterion, the agreement in question attracts Art. II(3) of the New York Convention and cannot be termed as a domestic arbitration agreement inasmuch as the parties constituting the Consortium and their business are located outside India. The following are the details of their location as given in the agreement :

(1) SPIE-CAPAG S.A., organized and existing under the laws of France with its principal Office at Tour Anjoy, 33 Quai De Dion Bouton 92806 Puteaux France.

(2) NIPPON KOKAN K.K., organized and existing under the Laws of Japan with its Principal Office at 102, 1-Chome Marunouchi Chiyoda Ku Tokyo 100 Japan.

(3) TOYO ENGINEERING CORPORATION, organized and existing under the Laws of Japan with its Principal Offices at 2-5 Kasumigaseki 3-Chome Chiyoda Ku, Tokyo 100 Japan.

105. Therefore, undoubtedly the FARE Act and New York Convention will apply to the arbitration agreement in the present case.

106. Under Section 3 of the FARE Act and Art. II(3) of the New York Convention referral to arbitration is mandatory as these provisions do not leave any discretion in the court, once all the conditions for referral are fulfillled, i.e. the court does not find the arbitration agreement to be null and void, inoperative and incapable of being performed. The effect of Section 3 of the FARE Act and Art. II(3) of the Convention is to deprive the court of any discretion in the matter when the aforesaid limitation are not present. This mandatory character of the referral is uniformly applicable to the convention states.

107. Some light, though in an indirect way, is also thrown by Art. VII(1) of the New York Convention to the vexed question. The first paragraph of this Article, inter alia, contains a provision which leaves the parties free to enforce an arbitration award, covered by a convention agreement on the basis of the internal law of the enforcing state i.e. the law applicable to even a purely domestic award. The relevant portion/part of the Article reads as :

"The provisions of the present convention shall not affect the validity of multilateral or bilateral agreements ..... nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon .....

108. This shows that the parties to an international commercial arbitration agreement can agree to seek enforcement of an arbitral award on the basis of the domestic law instead of the New York Convention

notwithstanding the fact that they may have agreed to enforce arbitration agreement under Art. II of the Convention.

109. In case the resultant award falls within the provisions of S. 9(b) of the Act then surely it is not possible to enforce the same under the New York Convention and the FARE Act but a party can fall back upon the Arbitration Act to enforce the same. Neither the Arbitration Act, 1940 nor the FARE Act excludes its enforcement under the former Act. Thus even when the arbitration agreement does not result in an arbitral award capable of enforcement under the convention it can still be enforced under the parallel domestic law of India, the Indian Arbitration Act, 1940. In this view of the matter it is not necessary that for the application of Art. II(3) of the convention the arbitration agreement should lead to an arbitral award capable of recognition and enforcement under the New York Convention and the FARE Act. This type of nexus between the arbitration agreement and the arbitral award it not contemplated under the convention as otherwise requirement of such a linkage would have been provided by specific words to that effect in the New York Convention itself. To shackle the arbitration agreements, having foreign element, by reading into the FARE Act and the New York Convention limitations not provided for expressly-therein, would rob the agreements of their effectiveness and enforceability. The theory of linkage relating the arbitral agreements to arbitral awards for former's enforcement under the convention is not borne out even from the history of the aforesaid treaties including the New York Convention. Moreover Travois Preparatories of the New York Convention shows that the proposal of certain countries at the convention for relating the arbitration agreement to the arbitral award capable of enforcement fell through and the final draft did not have such a clause.

110. Again going to the history of the treaties. It is significant to note that the Geneva Protocol dealt with recognition and enforcement of foreign commercial arbitration agreements and with those awards which were of domestic character. Thus domestic awards arising out of international arbitration agreements under the Protocol were being enforced. By virtue of the next treaty, namely, the Geneva Convention, foreign arbitral awards were made enforceable while at the same time the mechanism of referral to arbitration contained in the Geneva Protocol was preserved and kept intact. Therefore while the Geneva Protocol governed the arbitration agreements and referral of disputes to arbitration, the Geneva Convention regulated the recognition and enforcement of the foreign arbitral awards made in pursuance of an arbitration agreement falling under the Geneva Protocol. The Indian Legislation namely, Arbitration (Protocol and Convention Act, 1937) was enacted for giving legislative recognition to the said treaties including the provisions contained in the Geneva Protocol relating to the recognition and enforcement of commercial arbitration agreements having foreign flavour which were blended in the said Act without any material change and without making its application dependent upon the recognition and enforcement of a resultant Arbitration Award under the Geneva Convention. The position with the advent of New York Convention, in so far as the recognition and enforcement of arbitration agreements is concerned, remains unaltered.

111. In nutshell, the Arbitration agreements which qualify for recognition and enforcement under Article II of the New York Convention and Section of the FARE Act should have a foreign element and relate to international commercial transactions. What is an international transaction is not capable of a precise definition and its meaning cannot be put in a strait-jacket. An international commercial transaction may take myriad forms. A commercial arbitration agreement will be international in character in the following situations.

(1) If one of the parties has business located aborad; or

(2) The agreement has to be performed abroad; or

(3) The subject matter of the transactions is located abroad; or

(4) One of the parties to the transactions is a foreigner etc.

112. The Parliament will do well to clarify the position by properly defining the field of application of Article II of the Convention. Certainty in law will add to acceptability of India as the venue for holding International arbitration. In case India becomes the hub of international commercial arbitrations it will reduce arbitration costs of parties, who presently sustain heavy expenditure on accounts of arbitrations conducted abroad. If an arbitration agreement is to be classified as a domestic agreement only one the basis of the arbitration taking place in India to which laws of India apply, many foreign parties would hesitate in selecting India as the venue for holding arbitrations and in choosing laws of India to apply to the agreements.

113. Learned counsel for GAIL submitted that the FARE Act and the Arbitration Act, 1940 differ in material aspects. He contended that in case the FARE Act and Article II of the New York Convention is made applicable to the agreements which do not result in foreign arbitral awards then the petition would be that while arbitration agreement will be governed by the FARE Act, the resultant award would be enforced under the Arbitration Act. According to the learned counsel this would result in a hybrid procedure, which cannot be countenanced. Having regard to the nature of the International Commercial Arbitration, I am of the opinion that the contention of the learned counsel is not well founded. An international commercial arbitration, as already seen may involve the application of different provisions of law at different stages. Different and distinct laws may govern the contract, the arbitration agreement and the arbitration proceedings. Therefore, an International Commercial Arbitration can be described as a hybrid. There is also no doubt that Arbitration Act, 1940 and FARE Act differ in certain aspects. This difference was brought out in Renusagar Power Ltd. v. General Electric Company Ltd. (supra). Even though the two acts may differ on certain aspects but the fact remains that there is no bar in enforcing an award resulting from a Convention arbitration agreement, which is covered by the FARE Act, under the Arbitration Act, 1940. If an award does not fall within the purview of the FARE Act it may yet fall within the purview of the Arbitration Act.

114. Learned counsel for Gail then submitted that according to the decision of the Supreme Court in National Thermal Power Corporation (supra) the arbitration agreement contained in the underlying contract is governed by law of India so as to save it from the ambit of the Foreign Awards Act. The Supreme Court in that case was considering the question of the recognition and the enforceability of the award resulting from an arbitration agreement to which Laws of India applied. In that context it held that the award was not enforceable under the FARE Act as Section 9(b) thereof applied to the award and the award would be regulated by the provisions of the Arbitration Act. The question whether or not the arbitration agreement which would result in a domestic aword is covered under the FARE Act was nor before the Supreme Court. Therefore, with respect, the decision of the Supreme Court in the NTPC case is not applicable to this aspect of the matter.

115. Having regard to the above discussion, I am of the opinion that Section 3 of the FARE Act and Article II of the Convention (Schedule thereto) would be attracted subject to the conditions prescribed therein being satisfied.

116. Now what needs to be determined is whether the conditions specified in Section 3 of the FARE Act and Article II of the Convention stand satisfied for a referral of the alleged disputes raised by the Consortium to arbitration.

117. In order to examine the question Section 3 of the FARE Act needs to be examined closely. This section reads as under :

"3. Stay of proceedings in respect of matters to be referred to arbitration - Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Proceduee, 1908, if any party to an agreement to which Article II of the Convention set forth to the Schedule applies, or any person claiming through or under him commences any legal proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the court to stay the proceedings, and the court, unless

satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings".

118. It must be noted that Section 3 of the FARE Act starts with a non-obstante clause. This gives it an overriding effect over anything contrary thereto contained in the Arbitration Act. 1940 or the Code of Civil Procedure, 1908. Another striking feature of the said provision is that unlike Section 34 of the Arbitration Act which by the use of the word 'may' confers discretion on the courts. Section 3 of the FARE Act by the use of the word "shall" makes it obligatory on the court to stay the legal proceedings initiated by a party to the arbitration agreement provided conditions specified therein are fulfillled. These conditions as culled out by the Supreme Court in Renusagar Power Limited (supra) are as follows :

"(i) there must be an agreement to which Article II of the Convention set forth in the Schedule applies.

(ii) a party to that agreement must commence legal proceedings against another party thereto.

(iii) the legal proceedings must be in respect of any matter agreed to be referred to arbitration in such agreement.

(iv) the application for stay must be made before filing the written statement or taking any other steps in the legal proceedings.

(v) the court has to be satisfied that the agreement is valid, operative and capable of being performed; (this relates to the satisfaction about the existence and validity of the arbitration agreement).

(vi) the court has to be satisfied that there are disputes between the parties with regard to the matters agreed to be referred; (this relates to scope of the arbitration agreement touching the issue of habitability of the claims.)

119. Learned counsel appearing for the Consortium contended that in the present case all the above conditions stand satisfied for invoking Section 3 of the FARE Act. On the other hand, learned counsel for GAIL submitted that only two conditions, namely conditions II and IV have been fulfillled and the rest of the conditions are not satisfied. In so far as condition I is concerned, I have already held that the agreement is one to which Article II of the Convention set forth in the Schedule to the FARE Act applies. A regards conditions II & IV no discussion is required as there is no dispute that the same stand satisfied. As far as conditions III and VI, which overlap and are inter-related, and condition IV are concerned. Mr. Desai, learned counsel for GAIL contended that before any stage can be granted under Section 3 of the FARE Act the court has to be satisfied about :

(a) the existence and validity of the arbitration agreement; and

(b) the existence of disputes between the parties with regard to the matters agreed to be referred for arbitration.

Learned counsel submitted that the court should also determine the effect (scope) of the arbitration agreement and the question of habitability of the claim. From the side of the Consortium, Mr. Sen followed by Mr. Kapur, learned counsel, submitted that the arbitration clause is wide enough to cover these questions and it is for the arbitrator to determine the same, subject to the final decision of the court after the award, if any, is filed. In support of their contentions, both the sides relied on the decision of the Supreme Court rendered in the Renusagar Power Co. Ltd. (supra);

In order to appreciate, the rival contentions of the learned counsel for the parties it would be necessary to refer to the relevant observations of the Supreme Court in the said decision, which are as under :

"Before dealing with the question whether conditions (iii) and (iv) are satisfied in this case or not we would briefly indicate how the schemes of the two Acts (Foreign Award Act and Arbitration Act) materially differ on several aspects having a bearing on the points at issue. An examination of Sections 3, 4 and 7 of the Foreign Awards Act in juxtaposition with Sections 32, 33 and 34 of the Arbitration Act brings out these differences. Under Section 32 of the Arbitration Act suits to challenge the existence or validity of an arbitration agreement or award as also suits to have the effect (scope) of an arbitration agreement determined are barred and such questions can be raised only by an application under Section 33 of the Act whereas under the Foreign Awards Act there is no provision similar or akin to Sections 32 and 33 (and that is why a suit of the nature filed by Renusagar qua the arbitration agreement covered by the convention is maintainable) but by virtue of Sections 3 and 7 the same purpose is served though by a different procedure. Sections 3 and 7 read together disclose a scheme that so far as questions of existence, validity and effect (scope) of the arbitration agreement are concerned, the determination thereof by the arbitrators is also subject to the decision of the court and this decision of the court can be had either before the arbitration proceedings commence or during their pendency, if the matter is decided by the court in a Section 3 petition, as in the present case, or can be had under Section 7 after the award is filed in the court and is sought to be enforced under Section 6. True Section 4(2) declares that a foreign award shall be treated as binding for all purposes on persons as between whom it is made but that is subject to Section 7 where under enforceability thereof is made dependent upon satisfaction of certain conditions specified therein, for example, under Section 7(1)(a)(iii) one of such conditions for enforceability is that the award should not deal with questions on referred nor should it contain decisions on matters beyond the scope of the agreement. In effect, Section 3 of the Foreign Awards Act so to say combines in its own ambit both Sections 33 and 34 of the Arbitration Act; in other words, questions regarding the existence, validity or effect (scope) of the arbitration agreement which can be decided under Section 33 of the Arbitration Act are required to be decided under Section 3 of the Foreign Awards Act before a stay of legal proceedings contemplated therein could be granted and the right to have legal proceedings stayed contained in Section 34 of the Arbitration Act is also to be found in the same Section 3. Further the Foreign Awards Act has also taken cognizance of the possibility that there may not be a Section 3 petition at all the matter being directly proceeded before the arbitrators and the possibility of the arbitrators giving a decision on an issue not within their competence or jurisdiction and in such cases Section 7 contains a safeguard which prevents any such award from being made enforceable. Such being the scheme under the Foreign Award Act we would reiterate our view that decisions of our courts on similar or analogous provisions contained in the Arbitration Act would not be of any help to decide questions arising under the Foreign Awards Act. For instance, the view taken by the Calcutta High Court in Balabux Agarwall's case (supra) and by this court in Gaya Electric Supply Co.'s case (supra) that a court acting under Section 34 of the Arbitration Act is a court of limited jurisdiction performing a limited function and that a petition under Section 33 cannot be stayed by invoking Section 34 of that Act will be of no avail whatever in face of the express provisions contained under Section 3 of the Foreign Awards Act, which section, as indicated earlier, combines within its own ambit both Sections 33 and 34 of the Arbitration Act and those questions have to be decided by the court before granting stay. Similarly, the broad principle that an arbitrator has no power to determine questions of his own jurisdiction (which include questions regarding the existence, validity and effect i.e. scope of the arbitration agreement) and that neither English Law allows these questions to rest with the arbitrator (for which counsel for Renusagar have been contending and we shall deal with it later) would be hardly applicable to any foreign award made under the Act, if the Scheme of the Act emerging from a combined reading of Sections 3 and 7 clearly shows that so far as the questions of existence, validity and effect (scope) of the arbitration agreement are concerned, the determination thereof by the arbitrators is subject to the decision of the court and that this decision of the court can be had under Section 7 even after the award is made and filed in the court but before it is made enforceable; Section 7(1)(a)(i) and (iii) show that the award can be challenged on these grounds which implies that the arbitrators have decided those questions while making their award."

"..... Obviously if the occasion to decide the question of arbitrator's jurisdiction arises at an earlier stage namely in a Section 3 petition the court has to decide it before granting stay of the legal proceedings and such a decision of the court on that question will be conclusive and binding on the arbitrator and the question

before him will then become academic. It is thus clear that under the scheme questions of existence, validity or effect (scope) of the arbitration agreement itself, in cases where the arbitration clause embraces within its scope and such question, (unless decided by the court in a Section 3 petition) could be initially determined by the arbitrators, which would be subject to the final decision of the court".

120. Thus according to the above decision to existence, validity and effect (scope) of an arbitration agreement can be determined by the court at any of the following three stages :

(1) Before the arbitration proceedings commence;

(2) During the pendency of the arbitration proceedings; and

(3) After the award is filed in the court.

121. At the first and second stage a party can ask the court to determine the question in a petition under Section 3 of the FARE Act as was the case before the Supreme Court in Renusagar Power Co. Ltd. (supra), and at the third stage he can avail of the grounds mentioned in Section 7 of the FARE Act. GAIL therefore is justified in approaching the court at the first stage with the request to determine the existence, validity and effect (scope) of the arbitration agreement.

122. Moreover in the present case, the award would be domestic award and it will not be possible to invoke Section 7 of the FARE Act to question the award on the grounds relating to the existence, validity and effects (scope) of the arbitration agreement. Therefore this is the only appropriate stage to ask the court to determine the existence, validity and scope of the arbitration agreement.

123. In order to further examine the said question, it will be necessary to refer to a few clauses of the Agreement.

124. As per clause (B) of the contract the parties proceeded on the footing that the Contractor (Consortium) has seen the site where the work was to be carried out and had considered the nature and extent of all possible and probable delays, hindrances or interferences to or with the execution and completion of the work. Clause (B) (at page 2 of the agreement) reads as under :

"(B) CONTRACtor has inspected SITE and surroundings of WORK specified in the Bid Document and satisfied himself by careful examination before submitting his BID as to the various aspects of bidding and obtained complete information as to the matters and things referred to/or implied in the Bid Document or having any connection therewith, and has considered the nature and extent of all probable and possible situations, delays, hindrances or interferences to or with the execution and complete of WORK to be carried out under CONTRACT, and has examined and considered all other matters, conditions and things probable and possible contingencies, and generally all matters incidental thereto and ancilliary thereof affecting the execution and completion of WORK and which might have influenced it in making his BID."

125. Articles 1.7 and 1.11 of the General Conditions of Contract (for short "GCC") are also worthy of being taken note of. These articles read as follows :

"1.7. The "WORK" shall mean and include all works to be executed, all items and things to be supplied/done and services and activities to be performed by the CONTRACtor in persuant to and in accordance with the CONTRACT.

1.11. "SPECIFICATIONS" shall mean all directions, various technical specifications, provisions and requirements attached to the CONTRACT, which pertain to the method and manner of performing the WORK to the quantities and qualities of the WORK as may be amplified or modified by GAIL. Drawings for the

performance of the CONTRACT in order to provide for unforeseen conditions or in the best interests of the WORK. It shall also include the latest edition including all addenda/corrigenda of applicable standard specifications and other relevant Codes."

126. There is no manner of doubt that the Article 1.7 and 1.11 of the GCC cover a very wide ground as the definitions of the words 'WORK' and 'Specifications' take into their sweep all kinds of services and activities relating to the contract in question.

127. Article 1.23 of the GCC deals with the 'Contract Price' which means price as defined in Article 5 of the GCC. Articles 5.1.1 to 5.1.3 are also relevant and read as under :

"5.1.1. The total price of the WORK to be carried out is accordance with all terms and conditions stipulations, SPECIFICATIONS, requirements and other contents of CONTRACT as incorporated into the CONTRACT DOCUMENT, shall be treated as the CONTRACT PRICE.

5.1.2. The CONTRACT PRICE shall remain firm and fixed till the issue of FINAL CERTIFICATE and shall not be subject to escalation and shall be deemed to include and cover all costs, expenses and liabilities of every kind to be taken in execution, completing and handing over WORK to owner by CONTRACtor.

128. According to the above the 'Contract Price' is to remain firm and fixed, and is not subject to escalation. It includes and covers all costs, expenses and liabilities of every kind undertaken in execution completion and handing over of the WORK to GAIL by the Consortium.

129. Article 5.1.3 deals with factors which constitute the contract price. Clause 5.1.3 is as under :

5.1.3. The CONTRACT PRICE shall be demand inter alia to include and cover the cost of all CONSTRUCTIONAL PLANT, TEMPORARY WORK, SUPPLY OF MATERIALS, LABOUR, INSURANCE, FUEL, StorES and APPLIANCES to be supplied by CONTRACtor and all other matters in connection with each GROUP/SECTION/SUB-SECTION.

130. It is apparent from the reading of the Article that the Contract Price covers inter alia, price of all matters in connection with each Group/Section/Sub-section of work as per contract.

131. Article 5.1.4 is also pertinent and reads as follows :

"5.1.4. The CONTRACT PRICE shall include and cover the cost of all royalties and fee for all articles, and processes, protected by letters patent or otherwise incorporated in or used in connection with WORK, also all royalties, rents and other payments in connection with obtaining MATERIALS of what so ever kind for WORK, and shall indemnify the owner which INDEMNITY, the CONTRACtor hereby gives against all actions, proceedings, claims, damages, costs and expenses arising from the incorporation in or use on WORK of any such articles, processes or MATERIALS. Octroi or other Municipal or Local Board Charges if levied on MATERIALS, EQUIPMENT or MACHINERIES to be brought to SITE for use on WORK shall be borne by CONTRACtor".

132. The overall picture presented by various clauses of Article 5 leave no manner of doubt that the contract price is unalterable and the Consortium was required to perform its obligations on the footing that it had to complete the project including every detail thereof without expecting anything beyond what was payable in terms of the said Article, except where additional payment was specifically provided in certain contingencies in the agreement itself. For the sake of illustration such payments have been provided in Article 4.12.1 of the GCC and Article 13.1 of the SCC but the Consortium is not staking its claim under them.

133. The method and manner for claiming addition/extra payment, beyond the contract price is given in Article 5.7.1 and 5.7.2. Article 5.7.1 and 5.7.2 provide as under :

"5.7.1. Should CONTRACtor consider that he is entitled to any extra payment for any extra/additional WORK or MATERIAL change in original SPECIFICATIONS carried out by him in respect of WORK he shall forthwith give notice in writing to the ENGINEER that he claims extra payment. Such notice shall be given to the ENGINEER upon which CONTRACtor bases such claims and such notice shall contain, full particulars of the nature of such claim with full details and amount claimed. Irrespective of any provision in the CONTRACT to the contrary, the CONTRACtor must intimate his intention to lodge claim on the owner within 10 (ten) days of the commencement of happening of the event and quantify the claim within 30 (thirty) days, failing which the CONTRACtor will lose his right to claim any compensation/reimbursement/damages etc. or refer the matter to arbitration.

Failure on the part of CONTRACtor to put forward any claim without the necessary particulars as above within the time above specified shall be an absolute waiver thereof. No omission by owner to reject any such claims and no delay in dealing therewith shall be waiver by owner of any of his rights in respect thereof.

5.7.2. owner shall review such claims within a reasonable period of time and cause to discharge these in a manner considered appropriate after due deliberations thereon. However, CONTRACtor shall be obliged to carry on with the work during the period in which his claims are under consideration by the owner, irrespective of the outcome of such claims, where additional payments for works considered extra are justifiable in accordance with the CONTRACT provisions, owner shall arrange to release the same in the same manner as for normal WORK payment. Such of the Extra WORKS so admitted by owner, shall be governed by all the terms, conditions stipulations and SPECIFICATIONS as are applicable for the CONTRACT. The rates for extra works shall generally, be the Unit rates provided for in the CONTRACT. In the event unit rates for extra WORKS so executed are not available as per CONTRACT, payments may either be released on day work basis for which daily/hourly rates for workmen and hourly rates for equipment rental shall apply or on the unit rate for WORK executed shall be derived by interpolation/extrapolation of unit rates already existing in the CONTRACT. In all the matters pertaining to applicability or rate and admittance or otherwise of any extra WORK claim of CONTRACtor the decision of ENGINEER shall be final and binding".

134. The words of clause 5.7.1 are imperative and decisive and explicitly provide that in case the Consortium considers itself entitled to any extra payment for any extra/additional work or material change in original specifications carried out, it shall forthwith give notice in writing to the ENGINEER claiming extra payment giving full particulars and details of the nature of such claims and amount. Beside the Consortium is required to notify in writing its intention of longing a claim on GAIL within ten days of the commencement of happening of the event for which payment is claimed, containing full particulars of the nature of the claim with complete details of the amount claimed, and quantify the claim within thirty days failing which the Consortium loses its right to claim any

compensation/reimpurement/damages OR to refer the matter to arbitration, failure on the part of the Consortium to notify the intention of lodging claim in the manner prescribed in the said Article will amount to an absolute waiver thereof. These stipulations have been made operative "irrespective of any provision to the contrary in the contract". Any cause of action for payment for extra/additional work or material change in the original specifications would arise under this Article and will be subject to the compelling time limit laid down therein. The clause combines twin time barring stipulations : first lays down a time limit of ten days within which the contractor (Consortium) is required to give notice of its intention to lodge a claim on GAIL and the second lays down a time limit of thirty days within which the Consortium must quantify its claim. Crossing of the time limits bars the arbitration and the claim. Therefore, this specific, sufficiently clear and unambigous provision destroys the claim as well as the party's right to seek arbitration with regard to the extra/additional payment over and above the contract price, if the fundamental requirements of the said Article

are not fulfillled. Where the right to claim and to refer the matter to arbitration has been lost, the net effect would be that the party will not be able to claim arbitration. This is so because the jurisdiction of the arbitrators is only that which is conferred on them by the consent of the parties as represented in the agreement.

135. A distinction, however, needs to be drawn with regard to a case, where a clause of the contract simply extinguishes the claim on the ground of it having been made beyond the prescribed time limit but not the right to refer the claim to arbitration. The consequence would be that in such a case the matter would require reference to arbitration though the arbitrator may reject the claim on the ground that the claim does not survive as having been made beyond the stipulated period. In the instant case breach of the aforesaid time limits defeats both the claim as well as the habitability thereof and renders the provision for arbitration in regard thereto interest and lifeless.

136. If a claim for extra/additional payment is not raised in accordance with the provisions of Article 5.7.1, the party will not have access to the arbitral mechanism. In other words, until a claim is made in conformity therewith, there would be no arbitration agreement between the parties. Violation of the prescribed time limit cannot be ignorned as the consequence for such a failure has been stated clearly and precisely and does not leave the court or the parties guessing. These provisions have to be given the efficacy otherwise one would be doing violence to the express language of the said clause. Lord Denning MR in Agro Company of Canada v. Richmond Shipping Ltd. ((1973) 1 Lloyds' Rep. 392), observed that the courts regard a contractual time limit time limit as a positively beneficial feature of a commercial contract, the object of which is :

(1) To provide some limit to the uncertainties and expense of arbitration and litigation;

(2) To facilitate the obtaining of material evidence;

(3) To facilitate the settling of accounts for each transactions as and when they fall due.

136A. In M/s. Uttam Singh Duggal & Co. (P) Ltd. v. Indian Oil Corporation Ltd. (2nd (1985) 2 Delhi 131), the court was faced with some what similar problem. Clause 6.6.1.0 of the agreement in that case was as follows :

"6.6.1.0. Should the contractor consider that he is entitled to any extra payment or compensation in respect of the works over and above the amounts due in terms of the contract as specified in Clause 6.3.1.0 hereof or should the contractor dispute the validity of any deductions made or threatened by the Corporation from any Running Account Bills or any payments due to him in terms of the Contract, the Contractor shall forthwith give notice in writing of his claim in this behalf to the Engineer-in-Charge and the State Engineer within 10 (ten) days from the date of the issue of orders or instructions relative to any works for which the Contractor claims such additional payment or compensation, or on the happening of other event upon which the Contractor bases such claim, and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed. The Contractor shall not be entitled to raise any claim, nor shall the Corporation anywise be liable in respect of any claim by the Contractor unless notice of such claim shall have been given by the Contractor to the Engineer-in-Charge and the Site Engineer in the manner and within the time aforesaid, and the Contractor shall be deemed to have waived any or all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid."

137. Clause 9.0.0.0 of the agreement dealt with the appointment of an arbitrator. The court analysing Clause 6.6.1.0 observed that disputes had to be raised in accordance with the provisions of the agreement to attract the applicability of the arbitration clause and until a claim is made in accordance therewith, there could be no dispute which could be referred to arbitration under Clause 9.0.0.0. At this stage it will be advantageous to quote the analysis made by the court regarding the provisions of Clause 6.6.1.0 and allied provisions.

"That dispute has to be raised in accordance with the provision of the agreement to attract the applicability of the arbitration clause. If no such dispute exists, the arbitration clause is not applicable and in fact there would be no arbitration agreement. In fact, if reference is made to the arbitration clause in the present case, no time limit as such is prescribed for the appointment of the arbitrator. As I see Clause 6.6.1.0 exists independently of Clause 9.0.0.0. Under Clause 6.6.1.0, (i) the contractor shall forthwith give notice in writing of his claim to the Engineer-in-Charge and the Site Engineer within ten days from the date of issue of order of instructions relative to any works for which the contractor claims such additional payment or compensation, or on the happening of other event upon which the contractor bases such claim; (ii) such notice shall give full particulars of the nature of such claims; (iii) grounds on which it is based; and (iv) the amount claimed. The contractor is debarred from raising any claim unless notice of such claim has been given in the manner and within the time prescribed, otherwise the contractor "shall be deemed to have waived any or all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and Site Engineer in writing in the manner and within the time aforesaid". Under Clause 6.6.3.0, if any of the claims which has been notified in accordance with Clause 6.6.1.0 still remains/persists at the time of preparation of final bill, the contractor is to specify the same in the form of a statement of claim attached to the final bill, again giving the particulars of the nature of the claims, grounds on which the claims are based and the amount claimed and this again is to be supported by copy of the notice sent in respect thereof to the Engineer-in-Charge and Site Engineer. It is specifically mentioned in Clause 6.6.3.0, that if the claim attached with the final bill be at variance with the claim notified under the provisions of clause 6.6.1.0, it shall be deemed to be a claim different from the notified claim with consequences that it shall stand waived as given in clause 6.6.1.0. However, under clause 6.6.3.1 any claim notified under clause 6.6.1.0 which is not calculated in the final bill stands waived. Thus, the parties agreed that before any claim dispute could be subject matter of arbitration, certain formalities had to be gone into."

138. However learned counsel appearing for the Consortium referred to the decision of this court in Jai Chand Bhasin v. Union of India , and contended on the strength of this authority that the question whether or not the claim was barred under clause 5.7.1 is not to be decided by the Court but by the arbitrators to be appointed in accordance with clause 9.1. In Jai Chand Bhasin's case it was a term of the contract that if the contractors do not make any demand for arbitration in respect of any claim within 90 days of the receipt of the intimation from the Government that the bill is ready for payment, the claim of the contractors will be deemed to have been waived and absolutely barred and the Government will stand relieved of all liabilities under the contract in respect of the claim. As would be seen this clause did not touch the arbitration agreement and it was still the arbitrator who had the final say in the matter inasmuch as it was the arbitrator alone which could reject the claim of the contractor on the ground that the arbitration was not claimed within the stipulated period. It was not a case of clause containing two different types of time barring provisions; one dealing with the claim itself and the other dealing with the arbitrator's right to adjudicate upon it. In the present case we are confronted with a clause which not only bars the claim but also arbitrator's right to adjudicate upon the same on the expiry of aforesaid time limits.

139. In the Union of India v. E. B. Aabys Rederi A/S ((1974) 2 All ER 874), the House of Lords was dealing with a Centrocon arbitration clause which was to the following effect :

"All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London, who shall be Members of The Baltic and engaged in the Shipping and/or Grain trades, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire. Any claim must be made in writing and Claimant's Arbitrator appointed with twelve (12) months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred".

140. Commenting on the aforesaid clause their Lordships observed that the clause was imperative and decisive as it specifically provided that unless the provision was complied with any claim shall be deemed to be waived and absolutely barred.

141. A similar question seems to arisen before the King's Bench Division in Williams & Mordey v. W. H. Muller & Co. (London) Ltd. ((1924) 18 Lloyd's LR 50). Here also the court was faced with a clause in the charter party fixing a time limit within which the arbitrators were to be appointed. The relevant portion of the clause was : "Any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge, and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred". Considering the effect of the peremptory of time limit, the court held as follows :

"It does not seem to me to matter whether it is a question of the Statute of Limitations or a contract limiting the time in which the claims are to be made. Each one of them is equally binding on both parties to the contract. This is a case in which the arbitration clause applies; and, as it applies, I have very reluctantly come to the conclusion that the defendants' point is rights, and that, inasmuch as the plaintiffs failed to appoint their arbitrator at the end of three months, the claims is barred."

142. Again in H. Ford & Co. Ltd. v. Compagnie Furness (France) ((1992) 2 KB 797), the arbitration clause with which the court was concerned also provided for appointment of the claimants' arbitrator within three months of the final discharge of cargo and it was also provided that the claim must be made in writing and if the provision is not complied with the claim shall be deemed to be waived and absolutely barred. The claimants were the charterers of a steamship of which the respondents were the agents for the owners. Loss to cargo was suffered by the claimants due to ship's unseaworthiness. The owners of the cargo claimed arbitration for preferring a claim for damages but failed to appoint their arbitrator within the stipulated time frame. In the arbitration however, the cargo owners succeeded and the award was made in their favor. On the ship owners move to have the award set aside on the ground that the arbitrator had no jurisdiction to make the award as the claim should be deemed to have been waived and absolutely barred for the cargo owners' failure to appoint the arbitrator within the stipulated period of time, the King's Bench Division held as follows :

"This provision dealing with the appointment of an arbitrator is a matter of procedure, and applies in this case. Therefore as the jurisdiction of the arbitrator was only that given to him by the consent of the parties, and as the parties agreed that the arbitrator, if appointed at all, should be appointed within a certain time, it seems to me to follow that as that time had elapsed neither party had power to appoint an arbitrator unless the other party consented. Therefore the arbitrator had no power to make the award. I express no opinion on the point whether the applicants contracted as principals or agents. In the result the applicants, the Campagnine Furness (France), succeed, and this award must be set aside".

143. Where the arbitration clause provides for compelling time limit for notifying and lodging a claim and also provides for the consequence of the failure to do so, the clause must be held to be of a mandatory character. Since in the present case the parties bargained on the footing that the claim shall be notified and quantified within a specified period of time they must abide by the same and cannot be allowed to charter a course of action which is contrary to the agreement. As is evident from the preponderance of judicial authority the claim for arbitration must be made in accordance with the provisions of the agreement and within the time limit prescribed therein and unless that is done, the arbitrator will have no jurisdiction in the matter as he derives authority only from the agreement of the parties.

144. It is not claimed either in the application under Section 3 of the FARE Act or in the letter dated March 30, 1990 of the Consortium addressed to the International Court of Arbitration of International Chamber of Commerce, that the procedure prescribed under Article 5.7.1 of the GCC for preferring extra/additional claim had been complied by it. The claim of the Consortium to the tune of US $ forty five hundred million is in addition to the fixed contract price of US $ five hundred eighty four million. Consortium's claim for extra payment should be made in accordance with Article 5.7.1 of the GCC. As already seen Article 1.7, dealing with the work, Article 1.11, relating to 'Specifications', and Articles 5.1.1 to 5.1.4, dealing with the contract price, cover all kinds of activities relating to the work in question and price of all groups, sections and sub-sections thereof. As is apparent from clause B of the agreement, the Consortium is deemed to have foreseen the nature and extent of delays in the execution of the work. Even according to Article 4.18.2 of the

GCC delay in execution of the work on account of its suspension/stoppage/hindrance does not entitle the Consortium to claim compensation as such contingencies were deemed to have been duly considered in the contract price. This Article reads as under :

"4.18.2. It is also possible that work may be required to be temporarily suspended/stopped/hindered for short duration(s) due to various reasons/constraints. As such contingencies are foreseen and are likely to occur on various workfronts, locations and occasions, these, are deemed to have been duly considered in the contract price, contractor may be given extension of time provided such reasons/constraints are not attributable to contractor. No compensation what so ever is payable to contractor and no adjustment in contractor price is envisaged on this account".

145. Therefore it is to be assumed that the Consortium quoted the price for the work in question after taking into consideration the nature and the extent of the likely delays in the execution of the work. In face of the stipulations made in the aforesaid article, it was for the Consortium to show as to how the claim was arbitrable. In this case the question is not merely of determining the scope of the arbitration clause but the question is of the existence of the arbitration agreement qua the claim of the Consortium for US $ 450 million, which is not in conformity with Article 5.7.1. Once the bar of Article 5.7.1 comes into operation, the arbitration agreement disappears and no longer exists in regard to the claim for extra or additional payment as consent of the parties for referring the matter to arbitration stands withdrawn.

146. In may opinion in principle no distinction can be drawn between a case where time limit for survival of the claim and its referability to arbitration is over and a case where a certain matter is excepted from the operation of the arbitration clause. Once the time limit as laid down in clause 5.7.1 is over, the matter for all intents and purposes is rendered as an 'Excepted Matter' since the same no longer remains within the purview of the arbitration clause and is excluded from its operation. There is a long string of authorities which hold that it is for the court to determine whether the matter is an 'Excepted Matter' or not. (See : Prabartak Commercial Corporation Ltd. v. Chief Administrator, Dandakaranya Project , Sarvesh Chopra v. General Manager, Northern Railway ((1989) 1 Arb LR 224 (Delhi)), C. T. Chacko v. Kerala State Electricity Board ((1990) 1 Arb LR 43 (Ker)), and Y. M. Reddy v. Rashtriya Ispat Nigam Ltd. ((1992) 1 Arb LR 460 (Andh. Pra.)).

147. At this stage it will be apposite to refer to Article 9.1 of the GCC which reads as under :

"9.1. Unless otherwise specified all disputes arising in connection with the present CONTRACT which cannot be settled by mutual negotiations shall be finally settled under the Rules of Conciliation and arbitration of the International Chambers of Commerce/Paris by one or more arbitrators appointed in accordance with the said Rules. The venue of any arbitration proceedings shall be at New Delhi, India.

148. Article 9.1 of the GCC dealing with the appointment of arbitrators has to be read subject to clause 5.7.1. This follows from the opening words of the former article, namely, "unless otherwise specified", which limit and restrict its operation. These words cut the amplitude and width of the arbitration clause and the same is rendered dependent upon and subservient to other clauses of the agreement like Article 5.7.1 of the GCC. If the formalities laid down in Article 5.7.1 are not fulfillled by the party it will lose its right to claim adjudication of its claim by arbitration. Besides Article 5.7.1 prevails over Article 9.1 and other provisions because it also contains a non-obstante clause which uses the following expression;

"Irrespective of any provision in the contract to the contrary".

149. A conjoint reading of Articles 5.7.1 and 9.1 of the GCC leave no manner of doubt that the letter provision is not widely worded so as to fetter the jurisdiction of the court to determine the questions of existence, validity and effect of the arbitration agreement.

150. It was further submitted on behalf of the Consortium that one should simply consider whether in fact there are any disputes between the parties with regard to the matters agreed to be referred to arbitration without interpreting the contract. It was also submitted that the words such as "unless otherwise specified" in an arbitration clause contained in an underlying building contract are not to be given a restrictive meaning.

151. These submissions of the learned counsel lose sight of the fact that Article 5.7.1 of the GCC contains a non obstante clause which restricts the application of Article 9.1 of the GCC.

152. It must be clarified that the basic question involved is whether or not the arbitration agreement exists qua the claims of the Consortium. This aspect of the matter does not require any further elaboration as the same has already been dealt with except that the non obstante clause embodied in Article 5.7.1 seems to be an exceptional one as none of the cases cited by the learned counsel for the Consortium contained a clause of this nature and since the question relates to the existence of the arbitration agreement the same has to be decided by referring to the relevant clauses of the agreement which would also involve interpretation of the same. Therefore none of the authorities cited by the learned counsel are applicable to the facts of the present case.

153. While entering into the agreement the parties proceeded on the basis that the claim, if any, for extra and additional payment must be preferred in conformity with Article 5.7.1 of the GCC. This agreement has to be respected. It needs to be mentioned that this provision read with Article 9.1 of the GCC will also have sway over Article 8.3 of the ICC Rules on which reliance has been placed by the Consortium.

154. Learned counsel for the Consortium submitted that Article 5.7.1 of the GCC cannot be enforced as it is unconscionable and was incorporated because of Consortium's lack of bargaining power as compared to GAIL. It was also submitted that the parties were not ad idem in so far as this clause is concerned.

155. As already seen the purpose of incorporating a clause like Article 5.7.1 is to remove uncertainties and save expense of arbitration and litigation. It also facilitate the preservation of the material evidence and settling of the accounts for each transactions as and when they fall due. This clause is positively beneficial and cannot be said to be unconscionable. In any event I do not consider that the Consortium's bargaining power did not match with the bargaining power of GAIL. There is nothing to show that the parties while entering into the agreement were not ad idem in so far as Article 5.7.1 was concerned.

156. Another stand of the Consortium is that no Engineer capable of performing quasi-judicial functions was ever appointed by GAIL, thus preventing the Consortium from complying with Article 5.7.1.

157. A reference to Article 5.7.1 does not indicate that Engineer having judicial back-ground had to be appointed. It contemplates an Engineer as defined in Article 1.5 of the GCC. It is not the case that GAIL had not appointed an Engineer in accordance with Article 1.5 of the GCC. In any event nothing prevented the Consortium from giving the requisite notices contemplated under Article 5.7.1 directly to GAIL.

158. There is another infirmity in the case of the Consortium which is reflected in para 6 of its application under Section 3 of the FARE Act. The relevant portion of para 6 reads as under :

"..... In addition the plea regarding clause 5.7.1 would apply only to some among the claims made by the applicants in the request for arbitration and not to all of them. In the premises the applicants submit that the petition under Section 33 of the Arbitration Act, 1940 is not maintainable."

159. From the above it is apparent that the Consortium does not dispute the position that some of the claims made by it fall within the purview of Article 5.7.1. If that is the position then the requirements of Article 5.7.1 should have been satisfied before a request for appointment of an arbitral tribunal could be made. It is also not specified by the Consortium as to which of the claims fall within or outside the purview of Article 5.7.1.

160. Having regard to the above discussion I am of the view that the conditions III, V and VI laid down by the Supreme Court in Renusagar Power Co. Ltd. (supra) have not been satisfied in the present case. Therefore, in so far as the claim of the Consortium amounting to US $ forty five hundred million are concerned, no case has been made out for its reference to arbitration. This issue will not arise before the court of Arbitration of International Chamber of Commerce.

161. However, there is one more aspect of the matter which has to be gone into and that is GAIL had levied liquidated damages against the Consortium and for this purpose it had invoked the bank guarantee. This matter has also been raised in the letter of the Consortium dated March 30, 1990. In so far as that question, is concerned, the same is covered by the arbitration clause. This being the position, the matter in regard to the said dispute can proceed before the Arbitral Tribunal which may be constituted by the International Chamber of Commerce for this purpose.

162. Accordingly, the fourth respondent is restrained from referring claim No. 1 of the Consortium contained in its letter of request for arbitration dated March 30, 1990, amounting to US $ Forty five hundred million to the Arbitral Tribunal and at the same time the order of May 5, 1990, staying the proceedings before the fourth respondent, is made absolute to the extent indicated above.

163. In the result both the suit and the IA are disposed of in the light of the above observations and directions.

164. Order accordingly.