INDIA AND INTERNATIONAL ARBITRATION

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My wife Bapsi and I are delighted to be here at the commemorative launch of the India Studies Center.[1] Congratulations to Dean Frederick Lawrence, Associate Dean Susan Karamanian, and to the indefatigable Ms. Gauri Rasgotra for institutionalizing legal learning. For lawyers, learning is a life-long experience.

I have listened all day to varied aspects of "Emerging India" with a range of formidable speakers who were both informative and entertaining.

But the important thing to remember in a one-day conference like this is whether it passes the Franklin Delano Roosevelt test. Long before he became president, FDR had attended hundreds of speakers' forums, and he had a theory: that members of the select audience present do not listen to those who speak at functions, like ours, for two reasons: (1) because they are either themselves listed as subsequent speakers and are therefore too busy thinking of what they themselves are going to say; or (2) if they are not speakers, they are too absorbed framing the clever question they would like to ask in the limited time set aside for discussion from the floor.

So to test his theory, young FDR invariably slipped into his own otherwise clear and coherent presentation, the following words: "By the way, I murdered my grandmother this morning." If there was no reaction from the audience, it proved that his theory was valid.

But, he played his "grandmother card" too often. At one session, upon hearing FDR's outrageous remark, one of the more attentive members of the audience quickly responded: "I am sure she had it coming to her."

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1. Dean Frederick Lawrence invited me to speak at a conference held on Friday, March 13, 2009 "to mark the opening of the India Studies Center at the George Washington University Law School." Letter from Dean Frederick Lawrence to author (November 19, 2008) (on file with author).

At the conference today, no one slipped in the news of the unfortunate assassination of an older relative. But, if any speaker, just venturing to test the waters, had made such a remark, he or she would have been met by a hundred voices saying in unison: "We are sure she had it coming to her." In other words, the listeners were keyed-up and attentive, which is always a good start to a conference.

And now—on to the topic: "India and International Arbitration." Last year, Mr. Jan Paulsson, President of the London Court of International Arbitration (LCIA), addressed students of McGill University in Montreal. His lecture was titled "International Arbitration is not Arbitration."[2] He said that "International Arbitration is no more a 'type' of arbitration than a sea elephant is a type of elephant. True, one reminds us of the other. Yet the essential difference of their nature is so great that their similarities are largely illusory." Arbitration (he said) is an alternative to courts but there is no supra-national court and so, in a national environment, "international arbitration is the only game."[3] My task today is to explain how "the only game" was regarded in India in the past and how the "game" is now being played.

In 1983, at the sixtieth anniversary of the Court of International Arbitration of the International Chamber of Commerce (ICC), U.S. Judge Howard Holtzmann stressed the idea of judge and arbitrator being "associates in a system of international justice,"[4] but Keba Mbaye of Senegal promptly contradicted him. Keba Mbaye was then a Judge of the International Court of Justice (ICJ), and its former president. Politely, but firmly, he said that the notion that there was a system of international justice was not shared by countries in Africa, Asia, and Latin America, which still saw arbitration as a foreign judicial institution imposed upon them. Developing

2. Jan Paulsson, *International Arbitration Is Not Arbitration*, STOCKHOLM INT'L ARBITRATION REV., no. 2, 2008, at 1.

3. *Id.* at 1-2. Paulsson also stated:

> The fact that international arbitration is, practically speaking, a monopoly is no reason to celebrate. It is simply a fact. It is unlikely, in our lifetimes, that we will see the emergence of Global Commercial Courts having compulsory jurisdiction. . . . So the reason I insist that international arbitration is not arbitration is that we can live without arbitration. Countries A, B, and C may take different views—encourage, discourage, or even outlaw arbitration—but if *international* arbitration goes, international economic exchanges will suffer immensely. Nothing will take its place.

Id. at 2-3.

4. Berthold Goldman, *The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective*, *in* 60 YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE 257, 258-59 (1984).

countries were rarely the venue of international arbitration, (he said) and even more rarely produced arbitrators. Judge Mbaye also spoke of African courts' hostility to arbitrations conducted by foreign tribunals: "[A]s everybody knows, in fact arbitration is seldom freely agreed to by developing countries. It is often included in contracts of adhesion the signature of which is essential to the survival of these countries."[5]

Until the early 1980s, conditions in the Indian Subcontinent (in India, Pakistan, and Bangladesh) were somewhat similar to those described by Judge Mbaye. International arbitration was unpopular not only for the reasons he had articulated, but also because in transnational disputes in the 1960s, 1970s, and even in the 1980s, Indian parties were not able to effectively defend claims brought against them in arbitral tribunals abroad because of India's low reserves of foreign exchange.[6]

There was also an indigenous problem. In India, courts' traditional attitude towards arbitration had been indulgent and paternalistic—an approach fostered by India's earlier law of arbitration enacted at the beginning of World War II.[7] As for international arbitration, there was the lurking suspicion (in many Indian minds) of a revival of foreign dominance. Over the years, however, things have changed.

At the Centennial Conference of the LCIA in September 1993, Jean-Louis Delvolve (a Court member) presented a stirring piece titled "The Fundamental Right to Arbitration."[8] The theme of Delvolve's presentation was that the time had come to proclaim arbitral freedom as a fundamental principle, to be constitutionally guaranteed by every state. He gave a homely example to illustrate his point:

> In the same way as no-one is obliged to travel by train in a country where the State provides a public railway service if one has the benefit of a means of transport which is better adapted to one's needs (and even if the trains run on time!); so no-one should be obliged to submit himself to even the most diligent of state courts, should he and his adversary both consider that a

5. Keba Mbaye, Commentary, *The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective*, *in* 60 YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE 293, 293-95 (1984).

6. India did not go global until the 1980s, when its foreign exchange reserves reached $1 billion.

7. *See generally* The Arbitration Act, No. 10 of 1940, INDIA CODE (2000).

8. Jean-Louis Delvolve, *The Fundamental Right to Arbitration*, *in* THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE 141 (Martin Hunter et al. eds., 1995).

> private judge would be more appropriate to decide their dispute.[9]

But modern states, both in the West and in the East, have shown a marked reluctance to universalize the concept of absolute arbitral freedom. Even a state that is a party to The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[10] is permitted to exclude arbitral freedom in relation to legal relationships that its laws consider to be "non-commercial."[11] And a New York Convention state may also refuse to recognize or enforce arbitral awards if, according to its own national law, the subject matter of the dispute is not capable of settlement by arbitration, or where such recognition or enforcement is contrary to the individual state's notions of public policy.[12]

Within the constraints imposed by the New York Convention, the United Nations Commission on International Trade Law (UNCITRAL) Model Law of 1985 (the Model Law)[13] has shown the way towards greater arbitral freedom, outside the established national court systems. India was a party to the New York Convention, and first gave effect to it by enacting the Foreign Awards (Recognition and Enforcement) Act of 1961 (the 1961 Act). It was only later that India adopted the Model Law when India's Parliament (repealing the provisions of the Arbitration Act of 1940) enacted the Arbitration and Conciliation Act of 1996: which also repealed, (and re-enacted), the provisions of the 1961 Act. Out of twelve states in Asia that have adopted the Model Law, five (including India) have expressly incorporated in their local laws provisions similar to Article 5 of the Model Law.[14] This provision limits court intervention in domestic and international arbitration only to matters for which the Model Law has made express provision. This was

9. *Id.* at 145.

10. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

11. *Id.* art. I, § 3.

12. *Id.* art. V, § 2.

13. UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

14. The Indian provision that is almost identical to Article 5 of the Model Law is Section 5 of The Arbitration and Conciliation Act of 1996. Section 5 of the Act reads as follows:

> Extent of judicial intervention—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

The Arbitration and Conciliation Act, No. 26 of 1996, § 5, INDIA CODE (2000).

not so during the regime of the Arbitration Act of 1940 (the 1940 Act) when Indian Courts could interfere (and frequently did) with arbitral proceedings and arbitral awards—both domestic and foreign—on the judge-based notion that it was the duty of courts to keep arbitrators within the law.

The 1996 Act has almost entirely followed the Model Law; and where it departed from the Model Law's provisions, users of arbitration almost came to grief: Section 10(1) of the 1996 Act (which follows the language of Article 10(1) of the Model Law) leaves it to the parties to determine the number of arbitrators. But departing from the text of Article 10(1) of the Model Law, Section 10(1) of the 1996 Act went on to add: "provided that the number shall not be an even number." This proviso to Section 10(1) was added only in order to emphasize that the arbitral regime that prevailed under the 1940 Act—a panel of two arbitrators and an Umpire appointed by them[15]—no longer prevailed. The proviso to Section 10(1), however, did not reckon with arbitral proceedings that were already pending on the date when the 1996 Act came into force (for instance, January 25, 1996); disputes under which would have to be adjudicated after that date. One of India's public sector enterprises—the Mines and Minerals Trading Corporation (MMTC)—contended before the Supreme Court of India (in *MMTC v. Sterlite Industries*[16]) that since the proviso to Section 10(1) expressly prohibited reference to an "even number" of arbitrators, an arbitration agreement for appointment of only two arbitrators (as envisaged in the 1940 Act), was no longer valid post-January 1996 and such arbitration agreements under the 1940 Act were no longer enforceable under the 1996 Act. Fortunately, for the growth of arbitration law in India, the Supreme Court rejected this textual interpretation. The court held that an arbitration agreement entered into before January 25, 1996, and providing for an arbitral tribunal of two arbitrators (with an Umpire stepping in when the arbitrators disagreed) had to be read (after the 1996 Act came into force) as effectively providing for a panel of *three* arbitrators (two arbitrators and a Chairman), which, not being an "even number," was not prohibited under Section 10(1). Section 10(1) therefore, continued to apply to pre-1996 arbitration agreements as well. This purposive interpretation of the section saved from

15. Under the 1940 Act, the Umpire would enter on the arbitral reference if and when the two arbitrators disagreed and would then render an award. *See* The Arbitration Act, No. 10 of 1940, § 8, INDIA CODE (2000).

16. *See* MMTC Ltd. v. Sterlite Indus. (India) Ltd., (1996) Supp. 8 S.C.R. 676, 679, 683.

nullification thousands of arbitration agreements that had been entered into before January 25, 1996; this enabled parties to such arbitration agreements to sail safely into the harbor of alternative dispute resolution as provided for in India's 1996 Act. *MMTC* is an example for states that adopt the Model Law not to needlessly tinker with language in the articles.

For more than twelve years, India has had a new arbitration law in place, known as the Arbitration and Conciliation Act of 1996. It is in two parts: Part I of the 1996 Act governs both domestic and international commercial arbitration[17] and is applicable to arbitral proceedings and arbitral awards rendered in such proceedings *where the place of arbitration is in India*; Part II of the 1996 Act governs foreign arbitration agreements (where the place of arbitration is outside India) and also applies to the enforcement in India of New York Convention awards. The reason why (sometimes) the 1996 Act has not worked well in India is because although Indian law favors dispute resolution by arbitration, Indian sentiment (encouraged by the fraternity of lawyers) simply abhors the finality attaching to arbitral awards! A substantial volume of case law in India bears testimony to the long and arduous struggle to be freed from binding arbitral decisions. The aim of almost every Indian party to an arbitration agreement, domestic or foreign, is: "Try to win if you can; if you cannot, do your best to see that the other side cannot enforce the domestic or foreign award in India for as long as possible."

I am often asked whether a foreigner can rely upon the arbitral process when dealing with India, and my answer is "*yes—if the foreigner has the tenacity and endurance to last out.*" In the Indian legal system, there is ample—sometimes excessive—due process; and one has to be patient and persevering. If the foreigner can resist possible attempts by the Indian party to derail the arbitral process whilst it is in progress, and, after the arbitral process ends, successfully resist attempts to set aside (or not to enforce) the arbitral award, then a foreigner can justifiably rely upon the arbitral process when dealing with India: as was evidenced in the leading case of *Renusager Power Co. v. General Electric Co.* (1993).

17. "International Commercial Arbitration" is defined in the 1996 Act as an arbitration relating to disputes arising out of legal relationships, considered as commercial under the law in force in India and where at least one of the parties is (1) an individual who is a national of a country other than India, (2) a corporate body incorporated in any country other than India, or (3) a company or association of individuals whose central management and control is exercised in any country other than India. The Arbitration and Conciliation Act, No. 26 of 1996, § 2(f).

General Electric Company (GEC), the foreign company, had initiated ICC arbitration proceedings in Paris (in March 1982) against Renusagar, the Indian company, for non-payment to it for services rendered in the construction of Renusagar's thermal power plant at Renukoot, District Mirzapur in the State of Uttar Pradesh. Having refused to pay, Renusagar filed suit in the Bombay High Court for a declaration that the claim referred to ICC Arbitration was beyond the scope of the arbitration clause (in the contract). GEC in turn requested the Bombay High Court to stay proceedings pending the ICC Arbitration (which was granted)—and this order was eventually upheld by the Supreme Court of India in August 1984.[18] In August 1982, GEC filed a suit in the Calcutta High Court to enforce bank guarantees given under the contract, and Renusagar countered by applying to the District Court at Mirzapur to issue a declaration that the bank guarantees were unenforceable. Ultimately, in view of the arbitration clause, the proceedings in the Mirzapur Court were stayed by the Supreme Court at the instance of GEC.[19] The arbitrators appointed under the ICC clause then proceeded with the arbitration and made an award (in Paris) on September 16, 1986 in favor of GEC for a sum of over $12 million. Enforcement of this award (under the 1961 Act) was at first resisted in India by Renusagar on various grounds but the foreign award was decreed by a single judge of the Bombay High Court in 1988, and the decree was affirmed the following year by a Division Bench of the same High Court. The Supreme Court ultimately affirmed the Bombay High Court decision—but not until October 7, 1993![20] The champion litigator GEC ultimately triumphed, because it had lasted out!

Setting a new and healthy trend, the decision of October 1993 authoritatively laid down that the 1961 Act, enacted to implement India's accession to the New York Convention 1958, had to be interpreted as far as practicable, to uphold a "foreign award" governed by its provisions. This decision—*Renusagar III*—has been followed in India, and many foreign awards have been consistently

18. *See* Renusagar Power Co. Ltd. v. Gen. Elec. Co., (1985) 1 S.C.R. 432, 510.
19. *See* General Elec. Co. v. Renusagar Power Co., (1987) 3 S.C.R. 858, 865, 883-84.
20. *See* Renusagar Power Co. v. Gen. Elec. Co., (1994) Supp. 1 S.C.C. 644, 713.

enforced both under the 1961 Act,[21] and thereafter under Part II of the Arbitration and Conciliation Act of 1996.[22]

There are, however, two decisions of the Supreme Court of India that urgently need correction—by larger benches (since Indian Courts are precedent-bound). The first is the judgment of a bench of three judges in *Bhatia International v. Bulk Trading S.A.*, 2002 (4) S.C.C. 105: Bhatia International, an Indian company, entered into a contract with Bulk Trading S.A. (a foreign company); the contract contained an ICC Arbitration clause with the stipulated place of arbitration being Paris. The ICC Court proceeded to appoint a sole arbitrator. In aid of this pending foreign arbitration, Bulk Trading S.A., the foreign company, applied in an Indian Court against Bhatia International, the Indian Company, for an injunction under Section 9 of the Arbitration and Conciliation Act of 1996 (Interim Measure of Protection)—in Part I of the Act—to restrain the Indian party from alienating, transferring, or creating third-party rights over its business assets and properties in India pending a decision in the foreign arbitration. On the maintainability of such an application being raised, the Supreme Court of India, in overruling the decision of the High Court (which had opined that Section 9 of Part I did not and could not apply to foreign arbitral proceedings), held "that the provisions of Part-I would

21. *See, e.g.*, Smita Conductors Ltd. v. Euro Alloys Ltd., A.I.R. 2001 S.C. 3730, 3736 (a London Award recognized and enforced by the Supreme Court of India); Mehta v. Mehta, (1999) 3 S.C.R. 562, 571, 582, 593 (a New York Award recognized and enforced by the Supreme Court of India); Sumitomo Heavy Indus. Ltd. v. ONGC Ltd., A.I.R. 1998 S.C. 825, 831 (a London Award recognized and enforced by the Supreme Court of India); Transocean Shipping Agency Private Ltd. v. Black Sea Shipping, (1998) 1 S.C.R. 130, 136-37, 142 (a Ukraine Award recognized and enforced by the Supreme Court of India); Brace Transp. Corp. of Monroria Bermuda v. Orient Middle E. Lines Ltd., (1995) Supp. 2 S.C.C. 280, 286-89 (a London Award recognized and enforced in India by the Supreme Court of India); Koch Navigation, Inc. v. Hindustan Petroleum Corp., (1989) 4 S.C.C. 259, 261-64 (a London Award recognized and enforced in India by the Supreme Court of India). *But see* C.O.S.I.D. Inc. v. Steel Authority of India, 1986 A.I.R. 73 (Del.) 8, 22 (High Court of Delhi decision which is the only reported instance where a foreign award was not recognized or enforced in India under the 1961 Act).

22. *See, e.g.*, Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., (2006) 11 S.C.C. 245 (a London Award recognized and enforced by the Supreme Court of India); Fargo Freight Ltd. v. Commodities Exch. Corp., (2004) 7 S.C.C. 203, 213 (a London Award recognized and enforced by the Supreme Court of India); Austbulk Shipping SDN BHD v. P.E.C. Ltd., http://indiankanoon.org/doc/1831920 (a London Award recognized and enforced by the Delhi High Court in 2005); Force Shipping Ltd. v. Ashapura Minechem Ltd., 2003 (3) Arb. L. Rep. 432 (a London Award recognized and enforced by the Bombay High Court in 2003); Tropic Shipping Co. Ltd. v. Kothari Global Ltd., http://indiankanoon.org/doc/971128 (a London Award recognized and enforced by the Bombay High Court in 2001); Toepfer Int'l Asia Private Ltd. v. Thapar Ispat Ltd., A.I.R. 1999 Bom. 86 417, 422 (a London Award recognized and enforced by the Bombay High Court in 1999).

apply to all arbitrations and to all proceedings relating thereto . . . . In cases of international commercial arbitrations held out of India provisions of Part-I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions." It is submitted that this decision is in the teeth of the statutory provisions and is manifestly erroneous. The message to judges in the 1996 Act is that they must construe India's Act as enacted. In *Bhatia International*, this message was ignored. Part I of the 1996 Act, which applies to disputes where the place of arbitration is India, must be read separately from Part II, which deals with foreign arbitrations (which take place outside India). Judges must stick to the letter of the law and not bother too much about its so-called "spirit." In *Bhatia International*, the bench of three judges relied on what they described as the "spirit" of the 1996 Act when granting an interim measure of protection to the foreign party, invoking Section 9 in Part I (interim measures of protection by the court in pending arbitrations)—even though Part I did not apply, and was not intended to apply to foreign arbitrations. The judgment in *Bhatia International*, though well intentioned, is seriously flawed. If it had stood alone, it might not have mattered. But in January 2008, a bench of two judges in *Venture Global Engineering Company U.S.A. v. Satyam Computer Services*—following the three-judge bench decision in *Bhatia International*—went way beyond the limits of judicial lawmaking.[23] After an arbitration in London between the Indian party (Satyam Computers Services Ltd.) and the U.S. company (Venture Global Engineering) had concluded by an award (London Award) against the U.S. company, the U.S. company attempted to resist execution of the award in the United States—the attempt failed. The U.S. company (Venture Global) then filed suit in an Indian court challenging the foreign award, (a procedure not permitted or envisaged by the 1996 Act) and both the trial court and the High Court on appeal rightly held that the U.S. company was not entitled to challenge a foreign award in India—and certainly not by filing a separate suit. But a bench of two judges of the Supreme Court of India (in a further appeal) felt bound by the decision in *Bhatia International* (of a bench of three judges), and permitted the suit to proceed, even though Part I of India's 1996 Act applied only to arbitral awards made in India, not made abroad and even though foreign awards brought to India had to be decreed and enforced unless such enforcement was pre-

23. *See generally* Venture Global Eng'g Co. U.S.A. v. Satyam Computer Servs., (2008) 4 S.C.C. 190.

cluded on one or more of the restricted grounds set out in the New York Convention.[24] The decision in *Venture Global* is not just erroneous—it is quite inexplicable and cannot be defended.[25] Hopefully, it will be corrected by a larger bench, because just a few days after the decision in *Venture Global*, it was cited before another bench (of two judges) in *BALCO Industries v. Kaiser-I-Hind*.[26] At the hearing, one of the judges said quite emphatically that the decision in *Bhatia International* was incorrect (and so was the decision in *Venture Global*), but the other judge demurred. In view of the disagreement, this case will now be posted before a different bench.

I have said some uncomplimentary things about two decisions of our courts (in *Bhatia International* and in *Venture Global*) but I must stress that there is no foreigner bias in India's legal system, nor amongst its judges. The foreign party loses or wins as often as the local. In fact, statistics show that in the last fifty-five years, amongst the important arbitration cases that ultimately reached the Supreme Court of India, foreign parties have succeeded over Indian parties in a preponderating majority of cases.

So, what is the way forward?

It was envisaged in a bill—the Arbitration and Conciliation (Amendment) Bill of 2003 introduced in Parliament in December 2003, for bifurcation of the provisions relating to domestic and international commercial arbitration on the one hand, and foreign arbitration on the other—separate additional grounds of challenge

24. Section 48 of the 1996 Act sets out the New York Convention's grounds for not enforcing foreign awards in India. The Arbitration and Conciliation Act, No. 26 of 1996, § 48, INDIA CODE (2000).

25. One has to be respectful about decisions of a country's highest court. There is a charming story as to how lawyers, reared in the Anglo-Saxon system of jurisprudence, may legitimately criticize decisions of their highest courts. Professor Arthur Goodhart, editor of the prestigious *Law Quarterly Review* for fifty years, has shown the way with his critical comments of the judgments of the House of Lords. Because Goodhart always prefaced his comments with placatory words, they were not badly received. Upon retiring as editor of the *Law Quarterly Review*, he said:

> [I]f you are doubtful whether the judicial reasoning is wholly unassailable you preface your comment on the judgment with the words: "with respect." If the judgment is obviously wrong you substitute "with great respect." And if it is one of those judgments that have to be seen to be believed, the [introductory] formula is "but with the greatest respect!"

Fali S. Nariman, *Courts and Arbitrators: Paradigms of Arbitral Autonomy*, 15 B.U. INT'L L.J. 185, 186 (1997). Applying the "Goodhart formula," the decision in *Bhatia International* deserves the prefatory remark "but with respect." The decision in *Venture Global*, however, warrants the prefatory remark "but with the greatest respect."

26. Bharat Aluminium Co. v. Kaiser Aluminium Technical Serv. Inc., Civ. App. No. 7019 of 2005 (India Jan. 16, 2008).

being added in the case of domestic awards. The official bill sponsored by the government of the day stated in its objects and reasons:

> Ever since the commencement of this Act, requests have been voiced for its amendment. The main problem with the existing Act was that UNCITRAL Model law which was meant as a Model for International Arbitration was adopted also for domestic arbitration between Indian parties in India. In several countries the laws of arbitration for international and domestic arbitration are governed by different statutes.[27]

The bill went on to provide for inserting a new Section 34A in Part-I of the Act, (after Section 34—Applications for setting aside arbitral awards): which provided for an additional ground of challenge in the case of domestic awards "where there [was] an error which is apparent on the face of the arbitral award giving rise to a substantial question of law . . . ."[28]

By introducing in Part I Section 34A, (Additional ground of challenge in case of certain (domestic) awards) and deliberately omitting any such ground with reference to the non-enforcement of foreign awards (Section 48 in Part-II)—the framers of the bill made clear their intention that the dicta of the bench of two judges in *ONGC v. Saw Pipes*[29] would no longer apply when a foreign

27. The Arbitration and Conciliation (Amendment) Bill, 2003, *available at* http://lawmin.nic.in/legislative/arbc1.pdf (Statement of Objects and Reasons).

28. *Id.* § 27. The bill also provided for a specialized bench in every High Court, known as the Arbitration Division of the High Court, which would deal expeditiously with challenges to awards. The bill also imposed time limits for disposal of applications for enforcement of foreign awards. *See id.* §§ 30, 44.

29. Oil & Natural Gas Corp. (ONGC) v. Saw Pipes Ltd., (2003) 5 S.C.C. 705, 743-45. The Supreme Court held in *ONGC v. Saw Pipes* that an award contrary to substantive provisions of Indian Law or against the terms of the contract (as construed by the Court) is "patently illegal" and eligible to be set aside under Section 34 as violating "the public policy of India". *Id.* The case dealt with a domestic award where the Court equated (erroneously, in my opinion) a mere "error of law apparent on the face of the award" with "public policy." *Id.* We have to live with this regrettable decision. Being a decision of the highest court, it has been dutifully followed by the High Courts. *See, e.g.*, Sterlite Indus. Ltd. v. Dept. of Telecomm., (Delhi H.C. 2006), http://indiankanoon.org/doc/129870; Jagmohan Singh v. Satish Ashok, 2004 (1) Arb. L. Rep. 212 (Bombay); State of Jharkhand v. Bharat Drilling & Foundation Treatment Pvbt. Ltd., 2004 (1) Arb. L. Rep. 127 (Jharkhand); State of Andhra Pradesh v. K. Krishnan Raju, 2004 (1) Arb. L. Rep. 566 (Andhra Pradesh); Kishan v. Freeway Mktg., (Delhi H.C. 2003), http://indiankanoon.org/doc/1806032.

The Supreme Court in *Renusagar Power Co.* had addressed the "public policy" issue and had correctly stressed the limited grounds for setting aside domestic awards as well as the limited grounds for non-enforcement of foreign awards. In proceedings for recognition and enforcement of a foreign award, the Court said the parties are not entitled to impeach the award on the merits. Because the expression "public policy of India" both in Section 34(2)(b)(ii) (application for setting aside arbitral award) and Section 48(2)(b) (condi-

award was being enforced in India; and that even in the case of domestic awards, the words "public policy of India" in Section 34(2)(b)(ii) would not include errors of law apparent on the face of the award (since that contingency was separately provided for in the proposed new Section 34A).

This bill—if enacted into law—would have taken care of many perceived shortcomings in the working of the 1996 Act. The bill was referred to a Select Committee (of both Houses of Parliament); but in view of the committee's opposition to the provisions of the bill, the same was later withdrawn. So we are left with the anomalies of some erroneous judicial dicta about some provisions of the 1996 Act.

The basic objective of the Model Law was to provide a specific regime for international commercial arbitration; and individual legal systems were encouraged to adopt it irrespective of the way in which they might regulate domestic arbitration. But some countries, like India, were so enthused by the Model Law that they adopted it for all types of arbitrations. The 1996 Act has experimented with a fused regime adopting the Model Law for both domestic (including international commercial) arbitrations and awards, and foreign arbitrations and awards. The experiment has not been successful. Applying the Model Law to both domestic and international arbitrations has created confusion and disorder. Domestic awards in each country have peculiar features and the peculiar feature of a domestic award in India is that its finality is not respected by the parties nor looked upon too seriously by courts: for over fifty years (from 1940 to 1996) courts in India had become accustomed to supervising arbitral awards, and setting them aside for errors apparent on their face (a jurisdiction done away with only under the 1996 Act). Old habits die hard.

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tions for enforcement of foreign awards) must necessarily be construed as that term is interpreted in private international law, a foreign award will be recognized and enforced unless it is contrary to (1) the fundamental policy of Indian law, (2) the interests of India, or (3) justice and morality. *See* Renusagar Power Co. v. Gen. Elec. Co., (1994) Supp. 1 S.C.C. 644, 682. *Renusagar Power Co.* was decided under the (now repealed) Foreign Awards (Recognition and Enforcement) Act of 1961 but is still good law and has been followed on this point in a series of subsequent decisions. *See, e.g.*, Smita Conductors Ltd. v. Euro Alloys Ltd., A.I.R. 2001 S.C. 3730, 3736 (a London Award under the new repealed Act of 1961); Austbulk Shipping SDN BHD v. P.E.C. Ltd., http://indiankanoon.org/doc/1831920 (2005 decision of the Delhi High Court under the 1996 Act); Force Shipping Ltd., v. Ashapura Minechem Ltd., 2003 (3) Arb. L. Rep. 432 (2003 decision of the Bombay High Court under the 1996 Act); Tropic Shipping Co. Ltd. v. Kothari Global Ltd., http://indiankanoon.org/doc/971128 (2001 decision of the Bombay High Court under the 1996 Act).

Arbitration is not a subject of high priority with the Law Ministry of the Government of India, and it has been recently proposed that a fresh bill will be introduced in Parliament to make arbitration—especially international commercial arbitration—more workable, in conformity with the provisions of the New York Convention. Until then, India's Arbitration and Conciliation Act of 1996 will remain—like the proverbial curate's egg[30]—good, only in parts!

30. The phrase originates from a *Punch* cartoon of November 1895 drawn by George du Maurier entitled *True Humility*, which pictured a timid–looking curate taking breakfast in his Reverend's house. The Reverend says, "I'm afraid you've got a bad egg, Mr. Jones!" The curate replies, "Oh, no, my Lord, I assure you! Parts of it are excellent!" George du Maurier, *True Humility*, PUNCH, Nov. 9, 1895, at 222.