CHAPTER VI

CONCLUSION

International trade and commerce, which obviously has transnational effects, is one of the remarkable phenomenon of contemporary world. With the internationalisation of the market, international transactions have not only grown in number but have also generated greater possibilities for international trade disputes. Such disputes, like others, need prompt settlement. Conflict resolution devices available to international business community are conciliation, negotiation, litigation and arbitration. However, when negotiations and conciliation fail intervention of an impartial third party in dispute resolution becomes inevitable. In such a situation, the parties, as a practical matter, have two alternatives: litigation or arbitration.

Adjudication of an international trade dispute in national courts may be resorted to by the parties because of that courts' power to compel witnesses and production of documents; certainty in procedural rules and authority to render a binding decision. However the presence of a foreign element, involvement of parties belonging to different states with varied and often conflicting systems of law, generally deter the parties to approach a national court for judicial settlement. An
international commercial contract poses two additional basic problems, namely, plea of sovereign immunity and the act of state doctrine, affecting the efficacy of the judicial settlement of international trade disputes.

It is, therefore, natural for the parties to an international contract to prefer settlement of disputes through arbitration. Arbitration offers the parties the opportunity to choose their own judges, (arbitrators), who are expert and skilled in the subject-matter of the dispute and are well conversant with the law to be applied to settle the lis and to empower the arbitrators to adopt the required procedure to settle the dispute.

Arbitration compared to litigation in a court of law, in ultimate analysis, provides not only cheaper and quicker resolution of international trade disputes but also provides an informal, and more flexible and adaptable conflict resolution device.

It also minimises the possibility of some of the more prevalent procedural maneuvering found in judicial settlement of international trade disputes. An international arbitral tribunal, which is constituted by consensus of the parties generally bases its decision on equitable principles (rather than on legal, procedural and substantive, constraints) and avoids nationalistic favouritism. Need for a neutral adjudicator is particularly acute when a State is a party to an
international trade dispute. Private persons, fearing either that the national courts may favour their own sovereign or that the sovereign may change the law to suit its purposes, may avoid being tried in the courts of their sovereign opponents and foreign states. On the other hand, a state, believing in the maxim *par in parem non habet imperium*, may be reluctant to allow courts of another foreign state to sit on judgment of its conduct.

International Commercial Arbitration, which has been accepted by the international business community as an effective conflict resolution mechanism, however, cannot function effectively without assistance of national courts and municipal laws. Judicial and legislative approaches at the national level to international commercial arbitration and matters related thereto, which are far from uniform in present certain difficult issues, viz., stay of concurrent judicial proceedings; jurisdiction of arbitral tribunals; impartiality and independence of international arbitration from the law of *situs*; arbitrability of subject-matter of arbitration; law applicable to arbitration (*lex loci situs* or *lex loci solutionis* or *lex loci arbitrii* or rules of conflict of laws or *lex loci mercatoria* or *ex acquo et bono*); rules governing presentation and reception of evidence; extent of supervisory jurisdiction of courts over international
commercial arbitration; feasibility of interim or provisional measures; relevance of the plea of sovereign immunity in international arbitral process and in enforcement of the resultant award.

The doctrine of sovereign immunity, premised on the principle of the independence, the equality and dignity of states and the consequential maxim *pars in pares non habet imperium*, precludes national courts from asserting jurisdiction over foreign governments without their consent. Most of the states, national immunity Acts and international, as well as regional, instruments dealing with sovereign immunity, doubting propriety of the maxim *pars in pares non habet imperium* in the contemporary extended activities of a State and reposing faith in the rule of law and ideals of justice, have accepted the restrictive theory of sovereign immunity. This theory is basically based on the distinction between acts ‘public’ or ‘governmental’ or *acta jure imperii* and ‘private’ or ‘commercial’ or *acta jure gestionis*. It accords immunity only to ‘governmental’ activities of a State. However, the theory in operation demonstrates two crucial problems, namely, identification of a ‘State’ for the purpose of immunity and criteria to be applied for categorization of state activities into *acta jure imperii* and *acta jure gestionis*. 

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A careful study of the sovereign immunity Acts of different states, regional and international instruments on sovereign immunity reveals two conflicting approaches to the identification of a State or its entities, for purposes of immunity. A system of law may specify the ‘form’ of a state, its agency or instrumentality, in words of specific import or of wide amplitude, to qualify them for immunity or it may employ ‘functional’ criterion for conferring the status of a state on an entity irrespective of its technical or legal form.

The former approach necessarily insists on legal status and form of state entity rather than the juristic nature of the activity for which immunity is claimed. The latter approach, on the other hand, emphasises the nature of the act in question rather than status of the state entity as a criterion for identification of a state party. Either of the approaches, in the absence of international guidance and extended and varied activities of a State, can be subjected to equally convincing arguments for its rejection.

As for differentiation of *acta jure imperii* from *acta jure gestionis*, some insist upon ‘purpose’ while others prescribe ‘nature’, while still others advocate ‘nature and purpose’ of the state activity, as a decisive criterion for determining *acta jure gestionis* or ‘private’ activity of a State. If ‘purpose’ of an act is employed as the decisive criterion for
determination of 'governmental' or 'commercial' characteristic of a state activity, almost every act of a contemporary welfare State, which undertakes every act for public purpose, could justifiably be labeled as acta jure imperii entitled immunity. Such an approach ostensibly not only seems odd with the raison d'être of the restrictive theory of sovereign immunity but also defeats the genesis of the restrictive sovereign immunity. The same act may be characterised as acta jure gestionis in a system of law which takes nature of an activity as a determinative factor for attributing 'public' or 'private' character to a state activity. The 'nature and purpose' approach, on the other hand, neither satisfactorily solves the problems arising out of application of either 'purpose' or 'nature' theories nor furnishes precise criteria for determination of character of a state activity, but only restates the problem. A comparative evaluation of the strength and weaknesses of these attempted tests for distinguishing acta jure imperii from acta jure gestionis unmistakably favours the 'nature', test. It is significant to note that preference is given to 'nature, in the Asian-African region, American hemisphere and European countries. However, it got a setback when the International Law Commission, in its Draft Articles on Jurisdictional Immunities of States and their property, with a view to compromise between the 'purpose' and
‘nature’ theories suggested that nature of an activity be taken as a primary criterion for the determination of ‘governmental’ or ‘commercial’ character of a state activity and purpose of the act be also taken into consideration if practice of that state makes it relevant in the determination of non-commercial character of an activity. Reference to and reliance on, nature of an activity alone would frustrate the determination and application of the restrictive theory of immunity and furnish an additional ground to thwart the international commercial arbitration. But such a hybrid test, in the present submission, in a welfare State era wherein every activity of a State can justifiably be linked to public purpose would, in effect, come to favour the absolute theory of immunity.

Inspite of varied criteria for determination of acta jure imperii and acta jure gestionis and attributes of commercial activity of a State, however, almost all the national Acts, regional and international instruments dealing with sovereign immunity have recognised commercial activity as an exception to the doctrine of sovereign immunity.

Similarly, most of the national immunity Acts, regional and international instruments on sovereign immunity and opinio juris unmistakably buttress the approach that when a foreign State enters into a valid arbitration agreement with a private party, it cannot
raise the plea of sovereign immunity in arbitral process and even if it raises the plea of sovereign immunity, the arbitral tribunal is not bound to apply the prevailing rules of immunity, national or international, in deciding the immunity claim. The refusal by the arbitral tribunal of the sovereign immunity claim alone does not furnish an additional ground to assail the resultant award. The underlying reasoning, it seems, is that an agreement to arbitrate tantamounts to implied waiver of immunity; and submission to an agreed arbitral tribunal does not contravene the maxim *par in parem non habet imperium* as it neither violates the principles of independence and equality of a State nor does it offend its dignity. Accordingly, responses to a few related questions such as, does an arbitration clause irrevocably waive immunity? can a foreign State be held to have waived its immunity when an incompetent and unauthorised person has consented for arbitration?; can a foreign State be allowed to invoke its constitutional and internal law to repudiate its consent to arbitration and can it be held to have waived its immunity even when its constitutional law prohibits such a waiver?, are given in the negative. The approach, if examined in the background of the *raison détrire* of the doctrine of restrictive theory of sovereign immunity, the genesis of consensual contractual commitment and arbitral process, and the rule of law doctrine, seems appropriate.
But the prevailing diversity and uncertainty in identification of a State party for the purpose of immunity, diverse criteria to be employed for distinguishing *acta iure imperii* from *acta iure gestionis* and varied definitional contours of commercial activity of a State, which constitute the central focus of the restrictive theory of immunity, need immediate attention and satisfactory solution, if the international commercial arbitration has to be really effective. It is a high time to harmonize national laws, regional arrangements and international instruments to promote and strengthen international commercial arbitration in general and to give up the invocation of sovereign immunity.

However, unlike other Commonwealth countries and the American hemisphere, India does not have a comprehensive immunity Act. Section 86 of the Code of Civil Procedure of 1908 (C.P.C.), which stipulates that *inter alia* a foreign state cannot be sued in India except with the consent of the Central Government, as interpreted by the Supreme Court, constitutes a complete code on immunity of a foreign State in India and it is applicable to the exclusion of the principles of international law relating to sovereign immunity. Examined against the background and contents of the prevailing statutory enactments and state practices in the UK, USA and other common law countries and the
principles of contemporary international law, the provisions of section 86 of the C.P.C. authorising the Central Government, to accord its consent to sue a foreign state, rather than judicial one, do not seem in tune with the spirit and scheme of the overseas immunity Acts and the prevalent international immunity rules. It is also not clear from section 86, C.P.C. whether the Indian law embraces the restrictive theory of immunity based on the distinction between *acta jure imperii* and *acta jure gestionis*. However, one of the situations enumerated as guiding principles to help the Central Government to accord its consent to sue a foreign State in India is that the foreign state 'trades' within the jurisdiction of the court or it has, expressly or impliedly, waived its privileges accorded to it by virtue of section 86(1) of the Civil Procedure Code. But phraseology of section 86(2) of the C.P.C. makes it clear that consent of the central Government is still required to sue a foreign State in India even when it 'trades' or 'expressly or impliedly waives' its privilege. Such a commercial exception to state immunity, compared to the British SIA, American FSIA and immunity statutes prevailing in other national and international instruments, not only seems vague and imprecise but also goes against the well accepted restrictive theory of sovereign immunity. It is, therefore, high time that comprehensive immunity Act in

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India is enacted, preferably on the lines of British SIA and the American FSIA, to do away with the decisional authority vested in the Central Government rather than the judiciary and the ambiguities and uncertainties associated with the vague guiding principles enumerated in clause 2 of section 86 of the Code of Civil Procedure. Suitable suggestions have been made in this dissertation in this regard.

Variance in the national laws pertaining to enforcement of arbitral awards rendered in international commercial arbitration and divergence in judicial approaches under domestic laws for the enforcement of such awards have prompted people to think of alternative mechanisms to ensure smooth and effective enforcement of arbitral awards. They have taken a few concrete steps to harmonize the rules of recognition and enforcement of commercial arbitral awards.


The Geneva Protocol sought to make an international arbitral agreement binding on the
Contracting States and to remove disputes covered by such agreements from the jurisdiction of their courts, while the Geneva Convention, which supplemented the Geneva Protocol, ensured recognition and enforcement of arbitral awards rendered in pursuance of an arbitration agreements encompassed by the Geneva Protocol. The Geneva Convention, however, suffered from some in-built weaknesses minimising arbitration as a settlement machinery. It, *inter alia*, not only tilted the scales heavily against the party seeking enforcement and enabled the obstructionists to challenge and attack the award on a number of grounds but also placed upon the party seeking recognition and enforcement, the heavy burden of proving the conditions necessary for such enforcement.

The New York Convention has greatly improved and simplified the law and procedure relating to recognition and enforcement of foreign arbitral awards. It, *inter alia*, stipulates procedure for seeking enforcement; enumerates restrictive and exclusive grounds for such enforcement and refusal; shifts the *onus probandi* from the party seeking enforcement to the party resisting the enforcement and avoids *double exequator*, which was one of the prominent characteristics of the Geneva Scheme of enforcement of arbitral awards. It has not only acquired the status of a principal international instrument in the field of recognition and enforcement of foreign
arbitral awards but has also greatly influenced regional conventions and national laws. Almost all the states adhering to the Convention have implemented it by enacting specific legislations, more or less, modeled on, and identical to, the provisions of the Convention.

It, however, exhibits certain practical weaknesses. The convention, which endeavours to ensure 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 'arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought', unfortunately neither offers much guidance in interpreting the phrase 'foreign arbitral award' nor does it provide any clue as to which award will be considered a 'domestic award'. No restriction is introduced in the Convention to the 'domestic' or 'international' character of the dispute brought to arbitration either from the point of view of the subject matter of the dispute or of nationality, residence or domicile of the parties involved. It, therefore, may be doubted whether a 'stateless award' qualifies for recognition and enforcement under the Convention, or is considered as 'non-domestic' by the law of the requested state, or whether the term 'foreign' must be understood as implying a special connection with a foreign municipal law. Further, the
Convention recognises two reservations namely, reciprocity and commercial reservations. The latter one, as demonstrated in the preceding paras, gives way to a certain degree of latitude to national laws by allowing them to restrict the application of the Convention to awards made in a 'contracting state' and to a difference which is considered 'commercial' under their lex fori. The commercial reservation, which is interpreted differently by the national courts, has unfortunately not only surrendered the Convention to the national laws but also, to some extent, diluted efficacy of the Convention as an international instrument in the field of recognition and enforcement of foreign arbitral awards. Similarly, a set of pertinent problems/questions adversely affecting efficacy of the Convention have emerged as a result of interpretation of the some of the enumerated grounds for refusal of the enforcement of an arbitral award. They are: improper composition or irregularity in the arbitral procedure; determination of the binding character of an arbitral award and, non-arbitrability of the subject matter and violation of public policy. The New York Convention leaves doubts as to the extent of parties' autonomy in selecting any rules of arbitral procedure and the role of lex loci arbitrii in determining arbitral procedural irregularity. It also enables the national courts to take different approaches to the question as to the moment at which an award can
be considered to have become 'binding' for enforcement purposes. A few courts take the position that 'binding force' is to be determined under the law applicable to the award while others feel that it should be determined in an autonomous manner independent of the applicable law. Both the approaches can be justified on equally forceful grounds. The absence of grounds for setting aside of an award in the Convention, in ultimate analysis, not only led to its surrender to the diverse national laws but also to indirect inclusion in the Convention of domestic grounds for setting aside of an award. Lastly, suo motu or suo sponte refusal of recognition and enforcement of a foreign award by an enforcing court on unspecified and uncertain grounds of non-arbitrability of subject matter of the difference and violation of public policy of the forum has also created some noticeable problems. However, national courts have made the distinction between ordre public interne and ordre public extreme to apply different standards of public policy to the purely domestic cases and to the cases involving 'foreign element' or 'transnational effects' and to adopt a somewhat liberal approach in the international context of the cases involving the conflict of laws.

The AALCC, with a view to clarify some of the problems arising out of the interpretation and application of the provisions of the New York
Convention and to minimise disparity of national laws, suggested a Protocol to be annexed to the Convention. However, the UNCITRAL was not impressed by the idea of a Protocol and felt that the problems identified by the AALCC were not adequate to justify such a Protocol. However, the UNCITRAL, with a view to reduce difficulties and divergences in interpretation and application of the New York Convention, adopted the Model Law on International Commercial Arbitration in 1985.

The Model Law on International Commercial Arbitration attempts to ameliorate some of these weaknesses. It, unlike the New York Convention, makes distinction between 'international' and 'non-international' awards and provides for recognition and enforcement of all awards emanating from international commercial arbitration irrespective of their country of origin. It not only recognises autonomy of parties in determination of the arbitral procedure but also allows arbitral tribunals, in the absence of stipulation of arbitral procedure, to establish an appropriate procedure ensuring 'equal treatment' to the parties and allowing every party a 'full opportunity' of presenting his case. It, in addition to the exclusion of the grounds for refusal of the recognition and enforcement of an arbitral award, also enumerates exclusive grounds for setting aside of an arbitral
award. It is nevertheless important to note that the Model Law on Arbitration becomes applicable and operative only when a State adopts it as its law governing arbitration. The efficacy and fairness of international arbitration, obviously, depends upon how national legal systems respond to the UNCITRAL Model Law and deal with arbitral agreements, proceedings and awards.

However, till such a positive response to the Model Law is there, the New York Convention can be made to have wider and effective application if the problems which are affecting uniform interpretation and application of the New York Convention are identified and clarified. A few prominent among them are: the classes of awards to which the Convention should apply; autonomy of parties in determination of the arbitral procedural and role of the lex loci arbitrii in arbitral procedure; determination of 'binding' character of an arbitral award and at least, some indications as to what would be properly included within the expressions: 'non-arbitrability' of a subject matter and 'public policy'.

India has given effect to international arbitral rules relating to recognition and enforcement of arbitral awards of the Geneva Protocol of 1923; the Geneva Convention of 1927 and the New York Convention of 1958 by enacting the Arbitration (Protocol and

The 1961 Act, which exclusively provides for the filing and enforcement of foreign awards in India in accordance with the New York Convention, does not make the 1937 Act totally ineffective and inapplicable. It is not applicable to the foreign awards governed by the 1937 Act. Therefore, recognition and enforcement of a foreign arbitral award in India is still enforceable under the 1937 Act if the foreign country is a party to the Geneva Convention and not to the New York Convention. Such an award is enforceable in India if the award: (a) has been made in pursuance of an arbitration agreement which was valid under the law by which it was governed; (b) became "final" in the foreign country, (c) has not been annulled in the foreign country, and (d) relates to a matter which may be lawfully referred to arbitration under Indian law and its enforcement must not be contrary to public policy in India. The 1937 Act imposes on the party seeking enforcement of a foreign award the duty to establish the validity of the award, its finality etc. As the Geneva Convention, due to its inherent weaknesses could not cope with the increasing expectations of the international trade community, the 1937 Act, therefore, became less effective. The 1961 Act provides for speedy settlement of disputes through arbitration removing the
constraints impeding settlement of disputes by arbitration. It, inter alia, deals with laws and procedure for filing of foreign awards in the Indian courts, documents to be supplied and conditions to be fulfilled for enforcement of foreign awards and objections to the enforcement of foreign awards in India.

A comparative study of these two statutes reveals a set of fundamental differences relating to enforcement of foreign awards in India. Under the 1937 Act the petitioner is charged with the duty of establishing the finality of an award in the country of its origin compelling the petitioner to obtain judicial order testifying the finality of the award in its country of origin ultimately leading to the requirement of double exequatur for recognition and enforcement of the award. The 1961 Act, on the other hand, deems an award prima facie enforceable in the country in which it is relied upon. A petitioner, accordingly, is required to produce in the enforcing forum no more than the arbitral submission and the award. Recognition and enforcement of an award may be dismissed on any of the enumerated grounds, which are identical to that of the New York Convention. However, the burden of proof is shifted to the defendant in order to ensure, as far as possible, that these defences would not be employed to delay or frustrate the enforcement proceedings. The
1961 Act also empowers an enforcing authority to decline enforcement of an award if subject-matter of the dispute is not capable of settlement by arbitration under the Indian law or that enforcement of the award is opposed to public policy of the forum. The expression "public policy" as a defence to enforcement of a foreign arbitral award in India has been perceived differently by a few High Courts. The judicial perception reveals two conflicting approaches. First, unlike the courts of other nations, it refuses to recognise distinction between domestic public policy and international public policy; Second, acknowledging the distinction made in other states and approving it as a correct judicial approach, distinguishes domestic public policy from international public policy, to restrict the scope of public policy as a ground to deny enforcement of a foreign arbitral award in India. The latter approach not only seems more convincing but also is in tune with the judicial approach reflected in other counterparts of the world.

Judicial approach to these two statutes, which have been enacted by the Indian Parliament with a view to enjoining parties to arbitration to abide by their undertaking relating to arbitration and to ensuring enforcement of foreign arbitral awards in India, have been in consonance with the legislative intentions reflected in these statutes.
International commercial arbitration, despite the problems associated with it, sovereign immunity and difficulties in enforcement of foreign arbitral awards, over the years, has become an increasingly more popular method of dealing with disputes arising out of, or in connection with, or between parties to, transnational commercial agreements. International business community is almost unanimously in favour of arbitration which has proved itself better suited to the resolution of these disputes than national courts. National Immunity Acts and domestic courts are playing a supportive role to enhance the efficacy of international commercial arbitration.

Though the current developments to the law of sovereign immunity at national as well as international level demonstrates adequate effectiveness of the international arbitration process, many immunity rules which are of recent vintage or are still in the process of evolution, are far from uniform and are bridled with certain uncertainties hampering efficacy of international commercial arbitration as a conflict resolution mechanism. Immunity Acts of different states, therefore, need harmonization. The Draft Articles on Jurisdictional Immunities recently adopted by the United Nations, subject to the defects identified and discussed in the dissertation, could be a good model to achieve greater uniformity in the prevailing
national immunity rules. Till such an exercise is undertaken, it is suggested that parties to a state contract should remove the issue of sovereign immunity by means of appropriate contractual stipulation in the form of waiver of immunity to avoid unexpected difficulties in the arbitral process and the enforcement of the resultant award. The Indian Law of immunity, which, compared to overseas statutes, demonstrates fragmentary approach and exhibits outdated principles, need an urgent overhauling on the lines of the American FSIA; the British SIA and immunity Acts operative in other states.

Application and interpretation of the New York Convention and national statutes of different states modeled on it, which intend to ensure smooth and effective enforcement of arbitral awards, give rise to a few prominent issues, which require immediate attention to make the New York Convention a true international instrument on recognition and enforcement of foreign arbitral awards. The issues identified and solutions suggested to do away with them in the dissertation could, in the present submission, act as sufficient pointers in this regard. The UNCITRAL Model Law, if adopted by states in updating or enacting their arbitration laws, would certainly bring harmonization in national laws on arbitration. Its impact on individual states is yet to be realized but enactment of domestic
arbitral laws on the UNCITRAL Model Law would certainly prove to be of great benefit in the harmonization of international arbitral process. Till that time, national legislatures should make every possible effort to clarify the issues pertaining to 'bindingness' of an arbitral award, the ground of public policy for denying enforcement of a foreign award, and to make the enforcement more simple and smooth. Foreign arbitral awards, like national judgments need to be made self-executory or self-enforcing.