SUPREME COURT OF INDIA

TDM Infrastructure Private Limited

Vs.

UE Development India Private Limited

Arbitration Application No. 2 of 2008

(S.B. Sinha J.)

14/05/2008

ORDER

1. The parties hereto are companies registered and incorporated under the *Companies Act, 1956* (for short "the Act"). Directors and shareholders of the petitioner - company, however, are said to be residents of Malaysia. The Board of Directors of the petitioner also sits at Malaysia.

2. A contract for rehabilitation and upgrading was awarded to the respondent by the National Highway Authority of India. Respondent subcontracted a portion thereof to the petitioner by three letters of awards dated 12.04.2002, 24.05.2002 and 29.08.2002.

> However, for the purpose of present petition, we are concerned with the second and third letters of award. The parties entered into those contracts containing an arbitration clause, which read as under:
>
> "If the parties fail to settle the question, dispute or difference through negotiations, the same shall be referred to Arbitration as per the provisions of the Indian Arbitration Act, 1940 and the rules made thereunder and any statutory modifications or re-enactment thereof that may be made from time to time and actually in force at the time of reference. The cost of arbitration shall be borne by the parties in the ratio to be agreed upon by the parties. The venue of the Arbitration shall be New Delhi. The language to be used in the arbitration proceedings shall be English."

3. Disputes and differences having arisen between the parties, the said arbitration agreement was resorted to, wherefor a notice dated 22.03.2007 was served by the petitioner through its solicitors M/s. Shook Lin & Bok. A nominee was proposed. In response thereto, the respondent herein through its solicitors M/s. Shearn Delamore & Co. also proposed its nominee by a letter dated 18.04.2007. Respondent, however, proposed amendments to the original dispute resolution and arbitration clause by suggesting change of venue of the arbitration to Kuala Lumpur, Malaysia in stead and place of New Delhi and that the disputes be arbitrated in terms of the *Malaysian Law and the Malaysian Arbitration Act, 2005*. The

said proposal of the respondent was rejected by the petitioner. Petitioner thereafter proposed alternative nominee which was also rejected by the respondent and in turn suggested itsown nominee which was not acceptable to the petitioner.

4. By reason of this application under Section 11(5) and 11(6) of the *Arbitration and Conciliation Act, 1996* (for short "the 1996 Act"), a prayer has been made for appointment of a sole arbitrator to adjudicate upon the disputes and differences between the parties arising out of or in relation to the aforementioned second and third letters of award.

5. One of the contentions raised by the respondent is that the petitioner - company being registered in India, this Court has no jurisdiction to pass an order for appointing an arbitrator. It was urged that the Company in law must be held to be situate in India notwithstanding that the directors are foreign nationals as for all intent and purport, the Company incorporated in India would always be controlled in India.

6. Mr. Sumeet Kachwah, learned counsel appearing on behalf of the petitioner, would submit that in view of the provisions contained in Section 2(1)(f) read with Section 11(6) of the 1996 Act, this Court alone has the jurisdiction to appoint an arbitrator as the central management and control of the petitioner company is exercised in Malaysia inasmuch as the term "central management" would mean that its day to day management does not take place in India.

7. Drawing our attention to the fact that the *Indian Income Tax Act, 1961* contains a similar provision, it was urged that the test which should be applied in a case of this nature is the real business test as propounded by the House of Lords in *De Beers Consolidated Mines Limited v. Howe (Surveyor of Taxes)*[1] which has been approved by this Court in *V.V.R.N.M. Subbayya Chettiar v. Commissioner of Income Tax, Madras*[2] *and McLeod and Company Ltd. v. State of Orissa and Others*[3].

8. The terms "nationality", "domicile" or "residents" must be interpreted, Mr. Kachwah would submit, having regard to the text and context in which they are used. Our attention in this behalf has been drawn to the provisions of Section 1(4) of the English Arbitration Act, 1975 and Section 85 occurring in Part II of *English Arbitration Act, 1996*, which, however, has not come into force.

9. Mr. Dhyan Chinappa, learned counsel appearing on behalf of the respondent, on the other hand, would submit that the interpretative tools for interpretation of the provisions of the 1996 Act and taxing statute are different.

> "It was urged that the jurisdiction of this court must be determined having regard to the provisions contained in Sections 2(6), 11(9) and 28 of the 1996 Act.
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> It was furthermore submitted that the English Courts, even in respect of a taxing statute, have deviated from its earlier stand as would appear from a decision in *Unit Construction Co. Ltd. v. Bullock*[4]."

10. The 1996 Act was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

> "The preamble of the 1996 Act shows that the Parliament of India intended to give effect to the rules framed by the United Nations Commission on International Trade Law (UNCITRAL) known as UNCITRAL Model Law on *International Commercial Arbitration in 1985*."

11. Before embarking on the questions adverted to heretobefore, we may notice some provisions of the 1996 Act.

> Sections 2(1)(a), 2(1)(b), 2(1)(f), 2(6), 2(7) and 2(8) of the 1996 Act read as under:
>
> "2(1) In this Part, unless the context otherwise requires,--
>
> (a) "arbitration" means any arbitration whether or not administered by permanent arbitral institution;
>
> (b) "arbitration agreement" means an agreement referred to in section 7;
>
> (f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is--
>
> (i) an individual who is a national of, or habitually resident in, any country other than India; or
>
> (ii) a body corporate which is incorporated in any country other than India; or
>
> (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
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> (iv) the Government of a foreign country;
>
> (6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.
>
> (7) An arbitral award made under this Part shall be considered domestic award.
>
> (8) Where this Part.--

(a) refers to the fact that the parties have agreed or that they may agree, or

(b) in any other way refers to an agreement of the parties, that agreement shall include any arbitration rules referred to in that agreement." Sections 11(1), 11(5) and 11(9) read as under:

"11 - Appointment of arbitrators (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities."

Section 28 of the 1996 Act reads as under:

"28 - Rules applicable to substance of dispute (1) Where the place of arbitration is situate in India,--

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration--

(i) the arbitral tribunal shall decided the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

12. Whereas Part I of the 1996 Act deals with domestic arbitration, Part II thereof deals with the Foreign Award.

> "The term "International Commercial Arbitration" has a definite connotation. It inter alia means a body corporate which is incorporated in any country other than India. However, according to the petitioner, it is a company whose central management and control is exercised in any country other than India and, thus, despite the fact that the company is incorporated and registered in India, its central management and control being exercised in Malaysia, it will come within the purview of Clause
>
> (iii) of Section 2(1)(f) of the 1996 Act."

13. Whenever in an interpretation clause, the word "means" is used the same must be given a restrictive meaning.

> "International Commercial Arbitration" and "Domestic Arbitration" connote two different things. The 1996 Act excludes domestic arbitration from the purview of International Commercial Arbitration. The Company which is incorporated in a country other than India is excluded from the said definition. The same cannot be included again on the premise that its central management and control is exercised in any country other than India. Although clause (iii) of Section 2(1)(f) of the 1996 Act talks of a company which would ordinarily include a company registered and incorporated under the Companies Act but the same also includes an association or a body of individuals which may also be a foreign company. Sub-section (6) of Section 2 of the 1996 Act leaves the parties free to determine certain issues. That freedom shall include the right of the parties to authorize any person including an institution, to determine the same. Thus, in a case of this nature, the court shall not interpret the words in such a manner which would be opposed to the intention of the parties. A statute which provides for an arbitration between the parties and a taxing statute must be interpreted differently. The term "International Commercial Arbitration" even does not find place in the UNCITRAL Model Law. It finds place only in the English Arbitration Act which has also not been given effect to.

14. Part II of the 1996 Act deals with enforcement of foreign awards. The 1996 Act keeping in view the scheme of the statute must be read in its entirety. It takes into consideration various situations. Power of this Court to appoint an arbitrator would arise in view of Sub-section (12) of Section 11 of the 1996 Act only if it is to be held that the dispute has arisen in relation to an international commercial arbitration.

> "Whether, thus, an agreement falls within the purview of Section 2 (1)(f) of the 1996 Act is the core question. Section 2(1)(f) speaks of legal relationship whether

> commercial or otherwise under the law in force in India. The relationship has to be between an individual who is a national of or habitually resident in any country other than India as specified in Clause (i) of Section 2(1)(f). `Nationality' or being `habitually resident' in respect of a body corporate in any country other than India should, in my view, receive a similar construction."

15. Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration.

16. The learned counsel contends that the word "or" being disjunctive, clause (iii) of Section 2(1)(f) of the 1996 Act shall apply in a case where clause (ii) shall not apply. We do not agree. The question of taking recourse to clause (iii) would come into play only in a case where clause (ii) otherwise does not apply in its entirety and not where by reason of an exclusion clause, consideration for construing an agreement to be an international commercial arbitration agreement goes outside the purview of its definition. Once it is held that both the companies are incorporated in India, and, thus, they have been domiciled in India, the arbitration agreement entered into by and between them would not be an international commercial arbitration agreement and, thus, the question of applicability of clause (iii) of Section 2(1)(f) would not arise.

> "The Chief Justice of India or his designate, furthermore, having regard to Sub-section (9) of Section 11 of the 1996 Act must bear in mind the nationality of an arbitrator. The nationality of the arbitrator may have to be kept in mind having regard to the nationality of the respective parties."

17. Only in a case where, however, a body corporate which need not necessarily be a company registered and incorporated under the Companies Act, as for example, an association or a body of individuals, the exercise of central management and control in any country other than India may have to be taken into consideration.

18. Chapter VI of the 1996 Act dealing with making of an arbitral award and termination of proceedings in this behalf plays an important role. In respect of `international commercial arbitration', clause (b) of Sub-section (1) of Section 28 of the 1996 Act would apply, whereas in respect of any other dispute where the place of arbitration is situated in India, clause (a) of Sub-section (1) thereof shall apply.

19. When, thus, both the companies are incorporated in India, in my opinion, clause (ii) of Section 2(1)(f) will apply and not the clause (iii) thereof.

20. Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excludes the same from those provisions which parties derogate from (if so provided

by the Act). The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.

21. Russell on Arbitration, 23rd edition, page 357, in his commentary on English Arbitration Act, 1996, shows that although a distinction has been made between a domestic and non-domestic arbitration but the provisions relating to domestic arbitration had not been brought into force.

22. Section 85 of the *English Arbitration Act, 1996* which provides for a modification of Part I in relation to domestic arbitration agreement reads, thus:

> "85. - Modification of Part I in relation to domestic arbitration agreement.
>
> (1) In the case of a domestic arbitration agreement the provisions of Part I are modified in accordance with the following sections.
>
> (2) For this purpose a "domestic arbitration agreement" means an arbitration agreement to which none of the parties is -
>
> (a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or
>
> (b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom, and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom.
>
> (3) In subsection (2)"arbitration agreement" and "seat of the arbitration" have the same meaning as in Part I (see sections 3, 5(1) and 6)."
>
> Sub-section (4) of Section 1 of the *English Arbitration Act, 1975* is also to the same effect.

23. It is of some significance to notice that whereas the 1996 Act lays emphasis on one of the parties being outside India; the English Arbitration Act for the purpose of domestic arbitration agreement excludes a body corporate which is incorporated and whose central control or management is exercised in a State other than United Kingdom.

24. Thus, under the English Arbitration Act, what is being considered is domestic arbitration agreement where a body corporate is incorporated in a State other than United Kingdom; whereas under the 1996 Act only a body corporate which is only incorporated in a State outside India shall be included within the meaning of the international commercial arbitration.

25. Reference to the provisions of Indian Income Tax Act, 1961, in my opinion, is not apposite. Taxing statutes are enacted for a different purpose. They provide for compulsory exaction. Section 6 of the Income Tax Act clearly states the situation contemplated under Clause (ii) of Sub-section (3) of Section 6 is only for the purpose of the said Act.

> "It speaks about two contingencies, viz., where the company is an Indian Company and control and management of whose affairs may be situated wholly in India. The provision of the 1996 Act, therefore, in my opinion, is not in pari materia with the provisions of the Indian Income Tax Act."

26. Even in a case where taxing statute applies, nationality or domicile of the assessee may have to be taken into consideration.

27. The decisions which, thus, have been relied upon by Mr. Kachwah are not applicable to the facts of the present case.

28. An interpretation should ensure certainty in determination of jurisdiction as to which court should a disputant approach for appointment of an arbitrator under Section 11 of the Act. Else, the question is always mooted as to whether a company is controlled outside India or not and accordingly would have to be determined in each and every case, if an objection is raised. The interpretation of the Act, as suggested hereinbefore, would lead to determination of jurisdiction of either the High Court or this Court with certainty.

> "In *Subbayya Chettiar v. IT Commissioner, Madras*[5], this Court, while dealing with the issue of Hindu Undivided Family and the residence of the family endorsed the definition of Patanjali Sastri J. (in the same case before the Madras High Court) as follows:
>
> "`Control and management' signifies, in the present context, the controlling and directive power, `the head and brain' as it is sometimes called, and `situated' implies the functioning of such power at a particular place with some degree of permanence, while `wholly' would seem to recognize the possibility of the seat of such power being divided between two distinct and separated places."
>
> In that case, this Court, while dealing with the definition contained in Section 4 of the Income Tax Act was mainly concerned with a Hindu Undivided Family and not a Company. Furthermore, in the findings of Patanjali Sastri, J., there is a direct reference to "some degree of permanence".
>
> A difficulty in having a clear definition of domicile has been noticed by this Court (albeit in a different context) in *Central Bank of India Ltd. v. Ram Narain*[6] stating:
>
> "Writers on Private International Law are agreed that it is impossible to lay down an absolute definition of "domicile". The simplest definition of this expression has been given by Chitty, J. in Craignish v. Craignish wherein the learned Judge said: "That

place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom."

But even this definition is not an absolute one. The truth is that the term "domicil" lends itself to illustrations but not to definition. Be that as it may, two constituent elements that are necessary by English law for the existence of domicil are: (1) a residence of a particular kind, and (2) an intention of a particular kind. There must be the factum and there must be the animus. The residence need not be continuous but it must be indefinite, not purely fleeting. The intention must be a present intention to reside for ever in the country where the residence has been taken up. It is also a well established proposition that a person may have no home but he cannot be without a domicil and the law may attribute to him a domicil in a country where in reality he has not. A person may be a vagrant as when he lives in a yacht or wanderer from one European hotel to another, but nevertheless the law will arbitrarily ascribe to him a domicil in one particular territory. In order to make the rule that nobody can be without a domicil effective, the law assigns what is called a domicil of origin to every person at his birth. This prevails until a new domicil has been acquired, so that if a person leaves the country of his origin with an undoubted intention of never returning to it again, nevertheless his domicil of origin adheres to him until he actually settles with the requisite intention in some other country."

In Unit Construction Co. Ltd. (supra) on a question as to whether subsidiary companies of a holding company based in South Africa would be deemed to be domiciled in England, it was held:

"My Lords, I do not read the reference to the ordinary constitution of a limited liability company as evidencing an intention to make any addition to the test indicated by Lord Loreburn in the De Beers case. I think that all Sir Raymond Evershed was saying was that, in almost every case, the articles of association of a limited company vest the control of the company in the board of directors and that accordingly, if you found out that the board of a company habitually met in a particular country, you would thus settle the residence of that company. He plainly had not in mind a case such as the present, where it would appear that the board of directors appointed under the articles did not meet at all during the period relevant to the assessments now in question, nor was he expressing any opinion as to what the right conclusion would be, if, for instance, the control was vested not in the board but in managing agents. It seems to me that, in the circumstances disclosed in the Case Stated, the commissioners, if the Court of Appeal were right as to the law, might, but for the admission made by the appellant company, have been compelled to find that the African subsidiaries had no residence anywhere. Moreover, it may well be asked what the position would have been had the business of each of the African companies been conducted by their duly appointed boards but, in disregard of the articles, all the board meetings had been held in London and all instructions had been issued from London. Logically, if the Court of Appeal were right, these meetings should be disregarded and the African subsidiaries could not be held to be resident in England, but counsel

for the Crown shrank from carrying his argument to this logical conclusion. Counsel for the Crown suggested that, unless the application of Lord Loreburns principle was made in accordance with the Court of Appeals interpretation of it in the present case, the consequences would be disastrous and companies could vary their liability by moving control to and fro. My Lords, so they could, even on the Court of Appeals view, if they amended the relevant articles (not a very difficult process in the case of a hundred per cent subsidiary). Moreover the adoption of the interpretation of the law laid down by the Court of Appeal could lead to the strange consequences which I have already indicated. My Lords, I do not think that adherence to the test laid down by Lord Loreburn and to the application thereof which, as I think, has hitherto been adopted namely, that the question where the central control actually abides is a question of fact for the decision of the commissioners will lead to any disastrous consequences. The facts of the case before your Lordships are most unusual. It is surely exceptional for a parent company to usurp the control; it usually operates through the boards of the subsidiary companies, and had the commissioners found in the present case that that was what had in substance happened, it may well be that your Lordships could not have disturbed that finding. But they have found to the contrary, and, as I have already said, it seems to me that there was evidence justifying their conclusion."

The domicile of a company being an artificial person would depend upon the nature and purport of the statute. [See McLeod and Company Ltd. (supra)].

In the said decision itself, however, it is noticed that the nationality of a company is determined by the law of the country in which it is incorporated and from which it derives its personality. However, for the purpose of taxation, test of residence may not be registration but where the company does its real business and where the central management and control exists. A distinction, thus, exists in law between a nationality and the residence. Furthermore, there exists a dispute that all the Board meetings take place only in Malaysia. In a matter involving determination of jurisdiction of a court, certainty must prevail which cannot be determined by entering into a dispute question of fact."

29. For the reasons aforementioned, I am of the opinion that this Court has no jurisdiction to nominate an arbitrator. The application is dismissed with costs. Counsel's fee assessed at Rs. 50,000/-.

ORDER

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2. A contract for rehabilitation and upgrading was awarded to the respondent by the National Highway Authority of India. Respondent subcontracted a portion thereof to the petitioner by three letters of awards dated 12.04.2002, 24.05.2002 and 29.08.2002.

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(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

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(a) refers to the fact that the parties have agreed or that they may agree, or

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Sections 11(1), 11(5) and 11(9) read as under:

"11 - Appointment of arbitrators (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

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(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

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The term "International Commercial Arbitration" has a definite connotation. It inter alia means a body corporate which is incorporated in any country other than India. However, according to the petitioner, it is a company whose central management and control is exercised in any country other than India and, thus, despite the fact that the company is incorporated and registered in India, its central management and control being exercised in Malaysia, it will come within the purview of Clause (iii) of Section 2(1)(f) of the 1996 Act.

13. Whenever in an interpretation clause, the word "means" is used the same must be given a restrictive meaning.

> "International Commercial Arbitration" and "Domestic Arbitration" connote two different things. The 1996 Act excludes domestic arbitration from the purview of International Commercial Arbitration. The Company which is incorporated in a country other than India is excluded from the said definition. The same cannot be included again on the premise that its central management and control is exercised in any country other than India. Although clause (iii) of Section 2(1)(f) of the 1996 Act talks of a company which would ordinarily include a company registered and incorporated under the Companies Act but the same also includes an association or a body of individuals which may also be a foreign company. Sub-section (6) of Section 2 of the 1996 Act leaves the parties free to determine certain issues. That freedom shall include the right of the parties to authorize any person including an institution, to determine the same. Thus, in a case of this nature, the court shall not interpret the words in such a manner which would be opposed to the intention of the parties.
>
> A statute which provides for an arbitration between the parties and a taxing statute must be interpreted differently. The term "International Commercial Arbitration" even does not find place in the UNCITRAL Model Law. It finds place only in the English Arbitration Act which has also not been given effect to."

14. Part II of the 1996 Act deals with enforcement of foreign awards. The 1996 Act keeping in view the scheme of the statute must be read in its entirety. It takes into consideration various situations. Power of this Court to appoint an arbitrator would arise in view of Sub-section (12) of Section 11 of the 1996 Act only if it is to be held that the dispute has arisen in relation to an international commercial arbitration.

> "Whether, thus, an agreement falls within the purview of Section 2 (1)(f) of the 1996 Act is the core question. Section 2(1)(f) speaks of legal relationship whether commercial or otherwise under the law in force in India. The relationship has to be between an individual who is a national of or habitually resident in any country other than India as specified in Clause (i) of Section 2(1)(f). `Nationality' or being `habitually resident' in respect of a body corporate in any country other than India should, in my view, receive a similar construction."

15. Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration.

16. The learned counsel contends that the word "or" being disjunctive, clause (iii) of Section 2(1)(f) of the 1996 Act shall apply in a case where clause (ii) shall not apply. We do not

agree. The question of taking recourse to clause (iii) would come into play only in a case where clause (ii) otherwise does not apply in its entirety and not where by reason of an exclusion clause, consideration for construing an agreement to be an international commercial arbitration agreement goes outside the purview of its definition. Once it is held that both the companies are incorporated in India, and, thus, they have been domiciled in India, the arbitration agreement entered into by and between them would not be an international commercial arbitration agreement and, thus, the question of applicability of clause (iii) of Section 2(1)(f) would not arise.

> "The Chief Justice of India or his designate, furthermore, having regard to Sub-section (9) of Section 11 of the 1996 Act must bear in mind the nationality of an arbitrator. The nationality of the arbitrator may have to be kept in mind having regard to the nationality of the respective parties."

17. Only in a case where, however, a body corporate which need not necessarily be a company registered and incorporated under the Companies Act, as for example, an association or a body of individuals, the exercise of central management and control in any country other than India may have to be taken into consideration.

18. Chapter VI of the 1996 Act dealing with making of an arbitral award and termination of proceedings in this behalf plays an important role. In respect of `international commercial arbitration', clause (b) of Sub-section (1) of Section 28 of the 1996 Act would apply, whereas in respect of any other dispute where the place of arbitration is situated in India, clause (a) of Sub-section (1) thereof shall apply.

19. When, thus, both the companies are incorporated in India, in my opinion, clause (ii) of Section 2(1)(f) will apply and not the clause (iii) thereof.

20. Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excludes the same from those provisions which parties derogate from (if so provided by the Act). The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.

21. Russell on Arbitration, 23rd edition, page 357, in his commentary on English Arbitration Act, 1996, shows that although a distinction has been made between a domestic and non-domestic arbitration but the provisions relating to domestic arbitration had not been brought into force.

22. Section 85 of the English Arbitration Act, 1996 which provides for a modification of Part I in relation to domestic arbitration agreement reads, thus:

> "85. - Modification of Part I in relation to domestic arbitration agreement.
>
> (1) In the case of a domestic arbitration agreement the provisions of Part I are modified in accordance with the following sections.

(2) For this purpose a "domestic arbitration agreement" means an arbitration agreement to which none of the parties is -

(a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or

(b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom, and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom.

(3) In subsection (2)"arbitration agreement" and "seat of the arbitration" have the same meaning as in Part I (see sections 3, 5(1) and 6)." Sub-section (4) of Section 1 of the English Arbitration Act, 1975 is also to the same effect."

23. It is of some significance to notice that whereas the 1996 Act lays emphasis on one of the parties being outside India; the English Arbitration Act for the purpose of domestic arbitration agreement excludes a body corporate which is incorporated and whose central control or management is exercised in a State other than United Kingdom.

24. Thus, under the English Arbitration Act, what is being considered is domestic arbitration agreement where a body corporate is incorporated in a State other than United Kingdom; whereas under the 1996 Act only a body corporate which is only incorporated in a State outside India shall be included within the meaning of the international commercial arbitration.

25. Reference to the provisions of Indian Income Tax Act, 1961, in my opinion, is not apposite. Taxing statutes are enacted for a different purpose. They provide for compulsory exaction. Section 6 of the Income Tax Act clearly states the situation contemplated under Clause (ii) of Sub-section (3) of Section 6 is only for the purpose of the said Act. It speaks about two contingencies, viz., where the company is an Indian Company and control and management of whose affairs may be situated wholly in India. The provision of the 1996 Act, therefore, in my opinion, is not in pari materia with the provisions of the Indian Income Tax Act.

26. Even in a case where taxing statute applies, nationality or domicile of the assessee may have to be taken into consideration.

27. The decisions which, thus, have been relied upon by Mr. Kachwah are not applicable to the facts of the present case.

28. An interpretation should ensure certainty in determination of jurisdiction as to which court should a disputant approach for appointment of an arbitrator under Section 11 of the Act. Else, the question is always mooted as to whether a company is controlled outside India

or not and accordingly would have to be determined in each and every case, if an objection is raised. The interpretation of the Act, as suggested hereinbefore, would lead to determination of jurisdiction of either the High Court or this Court with certainty.

> "In *Subbayya Chettiar v. IT Commissioner, Madras*[11], this Court, while dealing with the issue of Hindu Undivided Family and the residence of the family endorsed the definition of Patanjali Sastri J. (in the same case before the Madras High Court) as follows:
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> "`Control and management' signifies, in the present context, the controlling and directive power, `the head and brain' as it is sometimes called, and `situated' implies the functioning of such power at a particular place with some degree of permanence, while `wholly' would seem to recognize the possibility of the seat of such power being divided between two distinct and separated places."
>
> In that case, this Court, while dealing with the definition contained in Section 4 of the Income Tax Act was mainly concerned with a Hindu Undivided Family and not a Company. Furthermore, in the findings of Patanjali Sastri, J., there is a direct reference to "some degree of permanence".
>
> A difficulty in having a clear definition of domicile has been noticed by this Court (albeit in a different context) in *Central Bank of India Ltd. v. Ram Narain*[12] stating:
>
> "Writers on Private International Law are agreed that it is impossible to lay down an absolute definition of "domicile". The simplest definition of this expression has been given by Chitty, J. in Craignish v. Craignish wherein the learned Judge said: "That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom." But even this definition is not an absolute one. The truth is that the term "domicil" lends itself to illustrations but not to definition. Be that as it may, two constituent elements that are necessary by English law for the existence of domicil are: (1) a residence of a particular kind, and (2) an intention of a particular kind. There must be the factum and there must be the animus. The residence need not be continuous but it must be indefinite, not purely fleeting. The intention must be a present intention to reside for ever in the country where the residence has been taken up. It is also a well established proposition that a person may have no home but he cannot be without a domicil and the law may attribute to him a domicil in a country where in reality he has not. A person may be a vagrant as when he lives in a yacht or wanderer from one European hotel to another, but nevertheless the law will arbitrarily ascribe to him a domicil in one particular territory. In order to make the rule that nobody can be without a domicil effective, the law assigns what is called a domicil of origin to every person at his birth. This prevails until a new domicil has been acquired, so that if a person leaves the country of his origin with an undoubted intention of never returning to it again, nevertheless his domicil of origin adheres to him until he actually settles with the requisite intention in some other country."

In Unit Construction Co. Ltd. (supra) on a question as to whether subsidiary companies of a holding company based in South Africa would be deemed to be domiciled in England, it was held:

"My Lords, I do not read the reference to the ordinary constitution of a limited liability company as evidencing an intention to make any addition to the test indicated by Lord Loreburn in the De Beers case. I think that all Sir Raymond Evershed was saying was that, in almost every case, the articles of association of a limited company vest the control of the company in the board of directors and that accordingly, if you found out that the board of a company habitually met in a particular country, you would thus settle the residence of that company. He plainly had not in mind a case such as the present, where it would appear that the board of directors appointed under the articles did not meet at all during the period relevant to the assessments now in question, nor was he expressing any opinion as to what the right conclusion would be, if, for instance, the control was vested not in the board but in managing agents. It seems to me that, in the circumstances disclosed in the Case Stated, the commissioners, if the Court of Appeal were right as to the law, might, but for the admission made by the appellant company, have been compelled to find that the African subsidiaries had no residence anywhere. Moreover, it may well be asked what the position would have been had the business of each of the African companies been conducted by their duly appointed boards but, in disregard of the articles, all the board meetings had been held in London and all instructions had been issued from London. Logically, if the Court of Appeal were right, these meetings should be disregarded and the African subsidiaries could not be held to be resident in England, but counsel for the Crown shrank from carrying his argument to this logical conclusion. Counsel for the Crown suggested that, unless the application of Lord Loreburns principle was made in accordance with the Court of Appeals interpretation of it in the present case, the consequences would be disastrous and companies could vary their liability by moving control to and fro. My Lords, so they could, even on the Court of Appeals view, if they amended the relevant articles (not a very difficult process in the case of a hundred per cent subsidiary). Moreover the adoption of the interpretation of the law laid down by the Court of Appeal could lead to the strange consequences which I have already indicated.

My Lords, I do not think that adherence to the test laid down by Lord Loreburn and to the application thereof which, as I think, has hitherto been adopted namely, that the question where the central control actually abides is a question of fact for the decision of the commissioners will lead to any disastrous consequences. The facts of the case before your Lordships are most unusual. It is surely exceptional for a parent company to usurp the control; it usually operates through the boards of the subsidiary companies, and had the commissioners found in the present case that that was what had in substance happened, it may well be that your Lordships could not have disturbed that finding. But they have found to the contrary, and, as I have already said, it seems to me that there was evidence justifying their conclusion."

The domicile of a company being an artificial person would depend upon the nature and purport of the statute. [See McLeod and Company Ltd. (supra)].

In the said decision itself, however, it is noticed that the nationality of a company is determined by the law of the country in which it is incorporated and from which it derives its personality. However, for the purpose of taxation, test of residence may not be registration but where the company does its real business and where the central management and control exists. A distinction, thus, exists in law between a nationality and the residence. Furthermore, there exists a dispute that all the Board meetings take place only in Malaysia. In a matter involving determination of jurisdiction of a court, certainty must prevail which cannot be determined by entering into a dispute question of fact.

29. For the reasons aforementioned, I am of the opinion that this Court has no jurisdiction to nominate an arbitrator. The application is dismissed with costs. Counsel's fee assessed at Rs. 50,000/-.

[1]*[(1906) AC 455]* [2]*[1950 SCR 961]* [3]*[(1984) 1 SCC 434]* [4]*[1960 AC 351]*
[5]*[AIR 1951 SC 101]* [6]*[AIR 1955 SC 36]* [7]*[(1906) AC 455]* [8]*[1950 SCR 961]*
[9]*[(1984) 1 SCC 434]* [10]*[1960 AC 351]* [11]*[AIR 1951 SC 101]* [12]*[AIR 1955 SC 36]*