JUDGMENT SHEET

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

C.O No.649 of 2013

Louis Dreyfus Commodities Suisse S.A.

Versus

Acro Textile Mills Ltd.

J U D G M E N T

Date of Hearing.	18-04-2018
PETITIONERS BY:	M/s Syed Hassan Ali Raza and Asad Javed, Advocates.
RESPONDENTS BY:	Mr. Waleed Khalid, Advocate.

Shahid Karim, J:- This judgment will decide an application under Section 6 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (**Act, 2011**). It requests this Court:

i. *"to order that the Appeal Award dated 30.09.2011 be filed in this Hon'ble Court;*
ii. *to pronounce Judgment and Decree in favour of the Plaintiff and against the Defendant in terms of the Appeal Award;*
iii. *to award the costs of this Suit to the Plaintiff; and*
iv. *to grant any other relief as this Hon'ble Court may deem fit in the circumstances of this case."*

2. A summation of essential facts which form the historical background of the instant application is given below. The facts have been culled out from the factual brief given by the applicant and have not been contradicted in material particulars by the

respondent. Any fact to the contrary shall be dealt with as a matter of defence by the respondent:

Background:

1. *Acro Textile Mills Limited ("Acro") was desirous to sell a quantity of raw cotton to Louis Dreyfus Commodities Suisse S.A., ("Applicant").*

2. *In this transaction, the parties followed the standard procedure applicable to international sale of goods and each party shared their version of the contracts proposing terms and conditions.*

3. *To this end, the Respondent, provided (6) Sellers Contracts on its letterhead identifying the terms and conditions of the said contracts, which are identical. The particulars of the contracts are as follows:*

Sellers Contract No.	**Annex**	**Page No.**	**Date of Contract**	**Price (US cents/lbs)**	**Date of Shipment**
Acro/Ctn/001-10	A	21	3 September 2010	92	October – first half of November 2010
Acro/Ctn/002-10	A1	23	8 September 2010	93	October – 21 November 2010
Acro/Ctn/003-10	A2	25	14 September 2010	95.90	October – 21 November 2010
Acro/Ctn/004-10	A3	27	22 September 2010	103.75	October – 21 November 2010
Acro/Ctn/005-10	A4	29	8 October 2010	110	Nov/Dec – 2010
Acro/Ctn/006-10	A5	31	15 October 2010	117	Nov – 2010

4. *On the other hand, the Applicant also provided six (6) Purchase Contracts on its letterhead identifying its version of the terms and conditions of the said contracts (all Purchase Contracts have identical terms), which are as follows:*

Purchase Contract No.	**Page No. in C.M. for Additional Documents**	**Date of Contract**	**Price (US cent/lbs.)**	**Date of Shipment**
P00040 and Amendment	8 to 10A	3 September 2010	91 **Note**: Price amended to 92 through amendment	October – first half of November 2010
P00041 and Amendment	11 to 13A	7 September 2010	92 **Note**: Price amended to 93 through amendment	October through to latest 21 November 2010
P00047	14 to 15A	14 September 2010	95.90	October through to latest 21 November 2010
P00058	16 to 17A	22 September 2010	103.75	October through to latest 21 November 2010

P00084	18 to 19A	8 October 2010	110	November – December – 2010
P00089	20 to 21A	14 October 2010	117.50	November 2010

The Rules and Bylaws of International Cotton Association (ICA) were made applicable to the contracts. As regards dispute resolution, it was agreed that the disputes relating to the contract will be resolved through arbitration in accordance with the bylaws of ICA and the seat of arbitration shall be Liverpool, England.

5. *On 27 October 2010, the terms of the contracts were finalized by the parties and the Applicant vide its email dated 28 October 2010 (**Attached as Annex B at Page No. 33**) sent the scanned copy of the bilaterally executed Sellers' Contracts to Acro. In the same email, the Applicant requested Acro to start all operations immediately.*

6. *Acro failed to perform the contracts and the Applicant vide its email dated 15 November 2010 (to Mr. Sheikh Rehman Anwar, CEO Acro Textile Mills Limited) (**Attached as Annex C at Page No. 34**) held Acro in breach of the contract and claimed US$ 4,435,104.05. Moreover, the Applicant informed the Respondent of its intention to refer the matter to International Cotton Association ("ICA") for arbitration, in case Acro failed to pay the said amount.*

7. *On 8 December 2010, one of the officials of the Applicant emailed to Acro (**Attached as Annex D at Page No. 36**) offered to convince the management to accept "in addition to the 848,771 usd a cash settlement of 3,150,000.00 usd paid within this week".*

8. *On 10 December 2010, Mr. Rehman Anwar, CEO of Acro, emailed to the Applicant proposing a settlement at US$ 836,441.00 (**Attached as Annex E at Page No. 39**).*

   *In reply to the same, the Applicant vide its email dated 14 December 2010 (**also attached as Annex E at Page No. 38**), rejected Acro's proposal and informed Acro that "this is our final notice on this matter. LDC will proceed with ICA technical arbitration. LDC have appointed Mr. Arthur Aldcroft as our arbitrator on 14 December 2010. According to ICA Bylaws and Rules, we invite Acro to appoint their arbitrator on or before 28 December 2011. On commencement of arbitration, LDC shall not negotiate this matter any further."*

9. *Accordingly, the Applicant submitted a request for arbitration under Bylaw 302 of the Bylaws and Rules of the ICA (**Attached as Annex F at Page No. 40**).*

10. *The ICA emailed ICA's Reference No. A01/2010/67 dated 15 December 2010 (**Attached as Annex F/1 at Page No. 42**) to Acro vide ICA's email (**Attached as Annex F/2 at Page No. 43**). Through this Reference, the ICA requested Acro to appoint its arbitrator within the stipulated period in Bylaw 303. Annex F/1 and F/2 were also couriered via FedEx to Acro, receipt of which is attached as **Annex F/3 (at Page No. 47**).*

11. ***On 27 December 2010, Mr. Rehman Anwar, CEO of Acro, vide his email (Attached as Annex H/1 at Page No. 49) to the ICA, appointed Mr. C. J. Harman as arbitrator.***

12. *On 30 December 2010, the ICA through its email (**Attached as Annex H/2 at Page No. 50**) to Acro, sent the ICA's letter (**Attached as Annex H/3 at Page No. 51**) confirming the appointment of C. J. Harman and, further informed them of its intention to inform Acro of the appointment of the third arbitrator who shall serve as Chairman of the Tribunal. A copy of the said letter was also sent to the Applicant (**Attached as Annex H/4 at Page No. 52**).*

13. *On 10 January 2011, the ICA sent its letter (**Attached as Annex I/1 at Page No. 53**) to Acro through ICA email (**Attached as Annex I/3 at Page No. 55**) confirming the appointment of I. J. Magrane as the Chairman of the Arbitral Tribunal.*

14. *On 12 January 2011, ICA vide its email (**Attached as Annex J/1 at Page No. 51**) sent ICA's letter (**Attached as Annex J/2 at Page No. 57**) to Acro along with copy of the details of the claims received from the Applicant. ICA also requested Acro to submit a reply to the claim within 14 days of the receipt of the documents together with a deposit of £3,000*[1].

15. *On 3 February 2011, the ICA sent its ICA's letter (**Attached as Annex K/1 at Page No. 63**) to Acro through ICA's email (**Attached as Annex K/2 at Page No. 64**) informing Acro that the deadline for receipt of its documents had passed / expired but, the Chairman of the Tribunal had extended the deadline by seven (7) days so that Acro could submit a reply. Acro was also informed that in case it failed to submit any documents within the extended period, the Tribunal would proceed with the arbitration and would make an Award as permitted Bylaw 306(5).*

16. *As Acro did not submit a reply (or any documents), **the Arbitral Tribunal after proper application of mind and following due process of law issued an Arbitral Award dated 18 March 2011 (Attached as Annex L at Page No. 67) in favor of the Applicant.***

*Acro had been pre-empted by ICA in its letter dated 16 March 2011 (**Attached as Annex M/1 at Page No. 111**) that the Award will be published on 18 March 2011. The letter was emailed by the ICA to Acro on 16 March 2011 (**Attached as Annex M/2 at Page No. 113**).*

17. *On 21 March 2011, the ICA sent its letter (**Attached as Annex N/1 at Page No. 115**) to Acro through ICA's email (**Attached as Annex N/2 at Page No. 116**) informing that the Arbitral Award was stamped and made effective on 18 March 2011 by the ICA. The ICA further informed Acro that any notice of appeal against this Award should reach the ICA on or before 15 April 2011 in accordance with ICA Bylaw 311.*

18. *On 1 April 2011, the ICA sent its letter (**Attached as Annex P/1 at Page No. 118**) to Acro through ICA's email (**Attached as Annex P/2 at Page No.119**) informed that a notice of appeal has been received by the Applicant who shall submit the reasons for appeal by 29 April 2011.*

19. *On 5 May 2011, the ICA sent its letter (**Attached as Annex Q/1 at Page No. 120**) to Acro through ICA's email (**Attached as Annex Q/2 at Page No. 121**) confirming to have received the Applicant's reasons for appeal within the time allowed and enclosed a copy of the same to Acro. Further, the ICA requested Acro to submit its comments to the Appeal Committee within a period of twenty-eight (28) days (under Bylaw 313).*

20. *On 25 May 2011, the ICA sent its letter (**Attached as Annex T/2 at Page No. 132**) to Acro through ICA's email (**Attached as Annex T/3 at Page No. 133**) confirming the appointment of the members of the Technical Appeal Committee. Furthermore, under Bylaw 312.7, ICA gave Acro seven (7) days to object to any member of the Technical Appeal Committee.*

21. *On 8 June 2011, ICA sent its letter (**Attached as Annex R/1 at Page No. 125**) to Acro through ICA's email (**Attached as Annex R/2 at Page No. 126**) along with a copy of the documents that were due to be put before the Appeal Committee.*

22. *On 30 September 2011, the Technical Appeal Committee issued the Appeal Award dated 30 September 2011 after application of mind and following due process of law (**Attached as Annex O at Page No. 99**).*

Respondent's defence:

3. The respondent, Acro Textile Mills Limited (**"Acro"**) filed its reply to the application. However, in terms of section 7 of the Act, 2011 read with Article V of the Convention on the Recognition and

Enforcement of Foreign Arbitral Awards (New York Convention) Acro was obliged to furnish objections on the grounds which have been delineated in Article V along with proof that the grounds which are being invoked by the respondent are sufficient for the refusal of recognition and enforcement of the award. The reply filed by Acro shall be treated as objections in terms of Article V of the New York Convention read with Section 7 of the Act, 2011. It may be stated that in terms of section 2(a) of the Act, 2011, a reference to the Article in the Act shall mean an Article of convention which has been made part of the Act, 2011 and the two must be read together for the purpose of a decision by this Court on an application under Section 6 of the Act, 2011 seeking the recognition and enforcement of foreign arbitral award. The portions of the objections put forth by Acro and relevant for our purposes are being reproduced as under:

> *"That at the outset, it is submitted that the alleged Contracts that have been made the basis of the titled Application as well as the alleged Award are false and fabricated and the same are denied. It is denied that any such Contracts were executed between the parties. Based on the above, it is submitted that there was neither any Contract between the parties as alleged by the Plaintiff nor any agreement to refer any dispute to arbitration before any forum, including the International Cotton Association (ICA). Therefore, it is submitted that the alleged Award as well as any and all proceedings in connection therewith are invalid, unlawful and illegal. The same cannot be recognized and therefore, the titled Application is liable to be dismissed.*

> *"(ii) Any purported award issued pursuant to the alleged arbitration agreement cannot be construed as a 'foreign award' in terms of the Act. Hence, the same would not fall within the purview of the Act. Consequently, any such Award would be a local award and would have to be dealt with under the provisions of Arbitration Act, 1940. In view of the above, it is submitted that any alleged award or its recognition or enforcement falls outside the jurisdiction of this Honourable Court."*
>
> *D) That it is submitted that the alleged Award and any and all proceedings connected therewith are illegal and unenforceable on account of the fact that the Defendant received no notice whatsoever, as required in terms of applicable laws, regarding the appointment of the arbitrators or of the arbitral proceedings. The alleged proceedings were admittedly ex-parte and conducted behind the back of the Defendant and are thus of no value in the eyes of law as the Defendant was not able to present his case…"*
>
> *"3….It is specifically denied that the alleged Contracts were entered into between the parties or that the same were executed by the Defendant. On the contrary, at or around that time, there were some discussions for the sale of different kinds of cotton. Such discussions were don with various brokers and intermediaries. One of the important aspects of such discussions was the payment mechanism for any such goods as it was a business norm that any payment would be through an acceptable Letter of Credit. The acceptable terms of a Letter of Credit for such purpose included an irrevocable and confirmed letter of credit that could be negotiated with any local bank in Pakistan and that any charges outside Pakistan would be the buyer's responsibility. However, the Defendant was made to understand that the Plaintiff was unwilling or unable to meet such terms and hence, there was no finalization of any contract between the parties. Accordingly, there was no transaction that took place in that context."*

4. The primary objection which has been raised by Acro is that the agreements relied upon by the applicant are unenforceable since neither Acro nor any of its representatives executed the said agreements so as to form binding obligations to be performed by Acro. Thus, the execution of the agreement has been denied. The signatures affixed

on the agreements on behalf of Acro have also been denied and this aspect forms the main plank of the defence of Acro on the basis of which Acro contends that the application be dismissed. Since the award (which purports to be a foreign arbitral award) is based on an invalid agreement and hence not liable to be recognized and enforced by this Court.

Act, 2011, its Purpose & Policy:

5. The Act, 2011 repeals the Arbitration (Protocol and Convention) Act, 1937 and is conspicuous for its brevity and shortness. It makes the New York Convention a part of the Act and also makes the recognition and enforcement of the foreign arbitral award to be dependent upon the Articles of the New York Convention. Foreign arbitral award has been defined as:

> *"(e) "foreign arbitral award" means a foreign arbitral award made in a Contracting State and such other State as may be notified by the Federal Government in the official Gazette."*

6. It is not the case of Acro that the award sought to be enforced is not a foreign arbitral award, for it has been made in a contracting state and according to the applicant, between Acro and the applicant by arbitrators appointed in terms of the agreement between the parties and under the Bylaws and Rules of the International Cotton Association Limited. Section 6 of the Act, 2011 reads as under:

> *"6. Enforcement of foreign arbitral award.-(!) Unless the Court. pursuant to section 7, refuses the application seeking recognition and enforcement of a foreign arbitral award, the Court shall recognise and enforce the award in the same manner as a judgment or order of a court in Pakistan.*
>
> *(2) A foreign arbitral award which is enforceable under this Act, shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Pakistan.*

7. Therefore, the court can refuse the enforcement and recognition of the award only in terms of section 7, which too is relevant and provides that:

> *"7. Unenforceable foreign arbitral awards.- The recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the Convention."*

8. It is clear upon a reading of section 7 above that the recognition and enforcement of a foreign arbitral award shall not be refused except in terms of Article V of the Convention. It follows ineluctably that ordinarily the court will grant recognition and enforcement to a foreign arbitral award and any refusal is hedged in by the mandate of Article V of the Convention which forms part of the Act, 2011. This is the intention of the legislature and encapsulates what has been described as the underlying theme of the Convention which "can be said to have a pro-enforcement bias and a strong case can be made out that the grounds under Article V are to be applied restrictively and construed narrowly". *(Redfern & Hunter, et. Al., Law and Practice of International Commercial Arbitration, 4th ed. 2004).*

9. Sections 6 and 7 of the Act, 2011 are the pivot around which the entire Act, 2011 revolves. These provisions direct themselves to the recognition and enforcement of the award and not the arbitration agreement. This is the crucial aspect which needs to be hammered in. The enumeration made in section 7 captures the entire intention of the legislature. This enumeration will be kept in view by the court and take precedence over any other construction sought to be put on the scheme of the Act, 2011 or on the basis of the New York Convention which is appended as a schedule. The schedule will have relevance so far as it is referred to in the primary enactment itself. The ineluctable inference upon reading of section 7 is that the only grounds of refusal for recognition and enforcement of the award shall be those given in Article V of the Convention and no other. By necessary corollary, therefore, any challenge premised on Article II read with Article IV stand ousted. Sections 6 and 7 of the Act, 2011, when read in combination, oblige the court to recognize and enforce an award unless it finds the award to run foul of Article V of the Convention.

10. Article V exercises a gravitational pull on the decision to be rendered on an application of this nature and must be reproduced in order to understand its precise scope and sweep:

Recognition and enforcement of the award may be refused, at the request of the party against 1vhom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:-

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

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration, can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

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

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

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:-

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

11. However, three other Articles will also be engaged in the discussion that follows and which are Articles II, III and IV. They may also be brought

forth in order to complete the narration of the structure of the Act, 2011:

"ARTICLE II

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

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

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

ARTICL.E Ill

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

ARTICLE IV

I. · To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the. application, supply:-
(a) The duly authenticated original award or a duly certified copy thereof;
(b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

12. Therefore, these provisions will have to be read cumulatively and holistically in order to understand the policy of the law. There is no doubt that the purpose of the law is to give recognition and enforcement to a foreign arbitral award expeditiously and with all deliberate speed. In short, the Act, 2011 has been enacted to give effect to the New York Convention which is a binding agreement between the Contracting States and the underlying purpose being that any awards issued by international arbitral forums ought to be enforced and recognized so as to curtail the time of the contracting parties in the enforcement of their financial obligations. Article V, it may be seen upon its perusal, places the burden of proof upon the party against which the recognition and enforcement of the award has been invoked. That party is required to furnish to the Court where the recognition and enforcement is sought of the necessary proof so as to establish one or more of the grounds given in Article V which may be taken as a defence against the enforcement of the award. Article IV prescribes the documents which are required to be supplied to the court and which will trigger the jurisdiction of the court to proceed to recognize and enforce the foreign arbitral award.

13. The concept relating to the policy of the Act is of paramount importance and all interpretation must

be done in accordance with the policy and the intention of the legislature found therein. From time to time public authorities have set their face against the policy of an Act, and either declined to implement it or else attempted to frustrate it. Needless to say, this is an unlawful motive. This has been dealt with in *Administrative Law, H.W.R. Wade & C.f. Forsyth (Eleventh Edition)* in the following manner:

> *"In two strong and almost simultaneous decisions of 1968 the House of Lords and the Court of Appeal boldly applied the law as so often laid down. In one, the House of Lords asserted legal control over the allegedly absolute discretion of the Minister of Agriculture and held that he had acted unlawfully…"*
> *"In Padfield v. Minister of Agriculture, Fisheries and Food the House of Lords had to consider a dispute under the milk marketing scheme established under the Agricultural Marketing Act 1958. The Act provided for a committee of investigation which was to consider and report on certain kinds of complaint 'if the Minister in any case so directs…"*
>
> *Lord Reid expressly rejected 'the unreasonable proposition that it must be all or nothing—either no discretion at all or an unfettered discretion'. He said:*
>
> *Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.*
>
> *Lord Upjohn said that the minister's stated reasons showed a complete misapprehension of his duties, and were all bad in law. The scarcely veiled allusion to fear of parliamentary trouble was, in*

particular, a political reason which was quite extraneous and inadmissible. One of the fundamental matters confounding the minister's attitude was his claim to 'unfettered' discretion:

First, the adjective nowhere appears in section 19 and is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives."

"Yet as we have seen it is commonplace for the judges to impose limits on apparently unqualified discretions derived from 'the policy and objects of the Act'. And in both the recent cases mentioned the judges, in fact, recognized that such limitations might be imposed and required that the discretion of the Secretary of State, although wide, be exercised in accordance with the rule of reason. Thus the incautious use of the word 'unfettered' to describe a broad statutory discretion does not adumbrate the rejection of the foundational principle of administrative law just described."

The importance of the Padfield decision was underlined by Lord Denning MR in Breen v Amalgamated Engineering Union [1971] 2 Q B 175 at 190:

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by Padfield v. Minister of Agriculture, Fisheries and Food which is a landmark in modern administrative law."

Wade further elaborated the rule as:

> *"The Padfield case, already discussed, shows the 'statutory policy' doctrine as applied to a minister of the Crown. The House of Lords held that in refusing to refer the milk producers' complaint to the statutory committee the minister had acted so as to frustrate the policy of the Act, despite the fact that its words were merely permissive; and that the political and other reasons given were irrelevant and indicative of unlawful motives…"*
>
> *The House of Lords also rejected the Crown's argument that the minister need have given no reasons and that therefore such reasons as he volunteered to give could not be criticized. Going still further, the House declared that if in such a case he refused to give any reasons, the court might have to assume that he had no good reasons and was acting arbitrarily. In other words, the minister may not be able to disarm the court by taking refuge in silence…"*

14. In England, the enforcement and recognition of foreign arbitral awards under the New York Convention are governed under the Arbitration Act, 1996, Ss. 100-103. In *Russell on Arbitration, 24th edition*, the concept of refusal of recognition and enforcement, in the paradigm of the policy of the Convention, has been stated thus:

> *"Refusal of recognition and enforcement. The grounds on which recognition of New York Convention awards will be refused under ss. 101-103 of the 1996 Act are very limited. Section 103 accordingly embodies a pro-enforcement approach. So unless the ground for refusal falls within the terms of s.103, the court must recognize and enforce a New York Convention award. The court also apparently has a very limited discretion to enforce the award even where one or more of the grounds are made out."*

15. In *China Minmetals Materials Import & Export Co. V Chi Mei Corp., Court of Appeal, Third Circuit, United States of America, 26 June 2003, 02-2897 and 02-3542*, the purpose of the Convention has been alluded to in the following words:

"The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n. 15, 94 S. Ct. 2449, 2457 n. 15, 41 L. Ed. 2d 270 (1974). In an oft-cited opinion concerning enforcement of a foreign arbitration award, the Court of Appeals for the Second Circuit noted the "general pro-enforcement bias informing the Convention," explaining that the Convention's "basic thrust was to liberalize procedures for enforcing foreign arbitral awards." Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 973 (2d Cir. 1974).

As the Court of Appeals for the Second Circuit has noted, " [t]here is now considerable caselaw holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award." Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys `R' Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997) (emphasis added) (citing M & C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 851 (6th Cir. 1996); Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial Y Comercial, 745 F. Supp. 172, 181-82 (S.D.N.Y. 1990); Brandeis Intsel Ltd. v. Calabrian Chems. Corp., 656 F. Supp. 160, 167 (S.D.N.Y. 1987).

*Assuming that this case had come to the district court and the IAAF had sought to compel Slaney to arbitrate her claims, a determination as to whether there had been a writing might pose a barrier to the IAAF's position. However, that is not the case. Here, an arbitration has already taken place in which, as we have determined, Slaney freely participated. Thus, the fact that Slaney suggests there is no written agreement to arbitrate, as mandated by Article II of the New York Convention is irrelevant. See, e.g., Coutinho Caro & Co., U.S.A., Inc. v. Marcus Trading Inc., 2000 WL 435566 at *5 n. 4 (D. Conn. March 14, 2000) (recognizing a difference between the situation where a party seeks to compel arbitration and a situation in which one attempts to set aside an arbitral award that has already been issued). What is highlighted here is the difference between Article II of the Convention, which dictates when a court should compel parties to an arbitration, and Article V, which lists the narrow circumstances in which an*

arbitration decision between signatories to the Convention should not be enforced.

16. Thus the general pro-enforcement bias which permeates the Act, 2011 is the policy of the law and must be the underlying thrust to liberalise procedures for enforcing foreign arbitral awards. The courts, on a proper objective analysis must give effect to the intention of the legislature and the purpose of the New York Convention, in the enforcement of foreign arbitral awards. The centrality of the statutory enterprise consists in shunning a tendency to view the application with scepticism and to consider the arbitral award as having a sound legal and foundational element. This presumption is for the respondent to rebut upon proof being furnished. More importantly, the policy of the Act, 2011 requires this Court to dispose of issues by the usual test for summary judgment, and not by a regular trial.

Threshold objection of Articles II and IV:

17. Acro contended that the applicant has failed to fulfill the requirements of Article IV and, therefore, the application ought to be dismissed on the threshold. Acro argues that the original agreement referred in Article II has not been produced and which makes the application deficient and hence not maintainable. This has been urged on the basis of the defence taken by Acro as regards the lack of execution of the agreement relied upon by the

applicant. In this regard, Acro has placed reliance on a number of judgments from the foreign jurisdiction under similar circumstances in which the issue regarding the supply of documents in terms of Article IV has been found to be a baseline question and has been required to be determined ahead of the objections under Article V. I shall deal with the case law cited by the respondent in the first instance before proceeding ahead:

18. Two of these cases would require mention and a detailed scrutiny. Reliance was placed on the holding of the Court of Appeal of Germany in *Case No.8 Sch 11-2, 4 September 2003, Oberlandesgericht [OLG] Celley*. Clause 19 of the contract provided for arbitration at the China International Economic and Trade Arbitration Commission. The respondent argued that the parties did not validly enter into a contract as its representatives did not have the power of attorney to sign that contract on behalf of the respondents. The Court of Appeal noted that (and this is crucial) "the original arbitration agreement supplied by the claimant together with its request for enforcement was **illegible** and the **readable copy also supplied by the claimant was unsigned**." The court held that the formal requirements of Article IV were left unanswered as the preliminary requirement that there is a valid arbitration agreement between

the parties was not met in the present case. With regard to the claimant's argument that the issue of the respondent's representation had already been settled in the arbitral award it was held that:

> *"The Court also noted that, although in principle the party opposing enforcement has the burden to prove the grounds for refusal of enforcement in Art. V convention, the party seeking enforcement has the burden to prove the "pre-condition for the existence of such grounds for refusal", that is, that "the parties have concluded an arbitration agreement pursuant to Art. II Convention". The court dismissed the claimant's argument that the issue of the defendant's representation had already been discussed and settled in the arbitral award, holding that the arbitral tribunal's findings as to its own jurisdiction are not binding on the enforcement court, which reviews them independently…"*

19. It further held that:

> *"The claimant supplied the original arbitral award…pursuant to Art. IV(1)(a) Convention, as well as translation thereof as requested by Art. V [rectius, [IV](2) Convention. However, it failed to supply the original arbitration agreement pursuant to Art. IV(1)(b) together with Art. II(1) Convention. The claimant did supply (the alleged original printout of) a fax that it received from the defendant. According to Art. II(2) Convention, 'agreement in writing' in Art. II(1) means an arbitration clause in a contract or an arbitration agreement, if the contract or the arbitration agreement is signed by the parties or contained in an exchange of letters or telegrams between them. Modern forms of communication, such as the telefax, may be deemed to fall within the scope of this provision. [In the present case,] it is decisive that the original of the fax is illegible to a large extent, whereas the 'readable copy' thereof, which the claimant also supplied, is not signed."*

20. The decision went on to conclude as follows:

> *"Ultimately, this question may remain open, as there is no valid arbitration clause pursuant to*

Art. V(1)(a) together with Art. II(1) Convention. According to Art. II(1) Convention, each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, as long as the subject matter is capable of settlement by arbitration. In the present case, the claimant did not meet its burden to prove that it validly concluded a contract with the defendant on 25 [rectius, 29] April 2000, so that also the arbitration clause contained in that contract (clause 19) is valid."

[8] "Contrary to the claimant's opinion, the defendant does not have the burden to prove that Mr. U did not have the power of attorney to conclude the arbitration agreement under Chinese law. Admittedly, according to Art. V(1) Convention, the burden to prove the existence of the grounds on which recognition and enforcement of a foreign arbitral award can be refused under that article is on the party against which enforcement is sought: hence, thus, the defendant. However, a pre-condition for the existence of such grounds for refusal is that the parties have concluded an arbitration agreement pursuant to Art.II Convention. Only when this fundamental condition of the existence of an arbitration agreement is met can there be grounds for refusal of the recognition and enforcement of an arbitral award."

21. The German Court of Appeal held that although according to Article V of the New York Convention, the burden to prove the existence of the grounds on which recognition and enforcement of foreign arbitral award can be refused was on the party against which enforcement was sought, a pre-condition for the existence of said grounds for refusal was that the parties had concluded an arbitration agreement pursuant to Article II of the Convention. Thus, the German Court of Appeal by bifurcating the determination to a two-tier procedure, held it as a pre

condition for enforcement that the existence of a valid arbitration agreement pursuant to Article II of the Convention must be proved and the burden of which was on the claimant. It is reiterated that on the facts of the case before the German Court of Appeal there was no legible copy of the agreement before the court and which was also unsigned. Therefore, the findings of the German Court of Appeal turn on the peculiar facts before that Court and upon which the decision ultimately hinged. However, the German Court of Appeal did not advert to the aspect of severability under which the courts have generally dismissed this argument to hold that an arbitration agreement is legally independent from the underlying contract which contains it and that the nullity of a contract does not imply that the arbitration agreement therein is invalid. This doctrine has been recognized in a number of other cases from the German Court of Appeal and which have been referred to in the Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards issued by the UNCITRAL Secretariat (**The Guide**). At the same time the precedent cited by the counsel for the respondent does not take into account contrary view of the German Courts as to the form requirements of Article II such as *Oberlandesgericht [OLG] Celley, Germany, 14 December 06, 8 Sch 14/05* and

Oberlandesgericht [OLG] Celley, Germany, 18 September 2003 8 Sch 12/02. In a series of decisions German Courts have applied the more favourable provisions of the German Code of Civil Procedure at the award enforcement stage to assess the validity of an arbitration agreement under Article V(1)(a).

22. A decision by the Supreme Court of Italy was also referred which reinforces the principle that the original arbitration agreement or a certified copy be supplied at the time of filing the request for enforcement and this is an aspect which concerns the admissibility of the enforcement proceedings. In *Italy No.182, Microware s.r.l. in liquidation (Italy) v. Indicia Diagnostics S.A., Corte di Cassazione [Supreme Court], First Civil Chamber, 17291, 23 July 2009* it was held that:

> *The Supreme Court annulled the lower court's decision and denied enforcement, confirming its consistent jurisprudence that the requirement in Art. IV of the 1958 New York Convention (mirrored in Art. 839(2) of the Italian Code of Civil Procedure) that the original arbitration agreement or a certified copy thereof be supplied at the time of filing the request for enforcement concerns the admissibility of the enforcement proceedings rather than the evidence-collecting phase. As a consequence, it is not a mere condition for the action whose lack can be cured in the course of the proceeding."*

23. Therefore, the supply of the original arbitration agreement was held to concern the admissibility of enforcement proceedings which really seems to echo the enumerations of Article IV of the Convention and one cannot doubt the requirement to be essential to set

in motion the proceedings for enforcement. However, Acro on the contrary, invites this Court to blur the line between the Article IV requirement and Article V defence of validity of agreement. The term "agreement in writing" has to be seen in the context of Article II and which specifies that the arbitral clause in a contract or an arbitration agreement may be either signed by the parties or alternately may be teased out of an exchange of letters or telegrams. By the passage of time and with the onset of far more innovate technology, emails and other forms of modern information systems can justifiably be included in the term "exchange of letters or telegrams" so as to enlarge and broaden the scope and to give effect to the Convention in present times. Otherwise the Convention will be rendered unworkable and pedantic and thus unsuitable for changing times. In essence, therefore, the claimant has merely to supply a copy of the agreement, whether signed or unsigned, or based on "exchange of letters or telegrams" and that is sufficient compliance of Article IV. All other questions are in the realm of validity or otherwise of the agreement, including the question of its proper execution as raised by Acro herein, and thus to be dealt with as a defence under Article V. In *Smita Conductors Ltd. v Euro Alloys Ltd., Appeal (civil) 12930 of 1996*, the Indian Supreme Court held that:

> *"What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by para 2 of Article II. If we break down para 2 into elementary parts, it consists of four aspects. It includes an arbitral clause (1) in a contract containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract contained in exchange of letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing."*
>
> *"If the two contracts stood affirmed by reason of their conduct as indicated in the letters exchanged, it must be held that there is an agreement in writing between the parties in this regard."*

24. Similarly in *Russell on Arbitration, 24th edition*, the following statement reiterates the rule:

> *"**Procedure for summary enforcement of a New York Convention award**. Section 102 specifies the procedure for recognizing or enforcing a New York Convention award as follows:*
> *"102.(1) A party seeking the recognition or enforcement of a New York Convention award must produce:*
> *a) the duly authenticated original award or a duly certified copy of it, and*
> *b) the original arbitration agreement or a duly certified copy of it.*
> *(2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent."*
> *Production of these documents suffices for the purpose of recognition of the award by the court. The court is likely to take a liberal and pragmatic approach to the satisfaction of these formal requirements. The Court of Appeal took such an approach to certification under s.102(1) in Lombard knight v Rainstorm Pictures Inc, where although the certification of the arbitration agreements did not expressly refer to the accuracy of the copy, it was sufficient for the purposes of s.102(1). There was no requirement for independent certification of the arbitration agreement. Certification also does not go to validity of the arbitration agreement, which is dealt with at the next stage under s. 103(2)(a), (b). Equally, the party seeking recognition does not have to show at that stage that the award was binding upon the party against whom recognition is sought. Any such question is for the latter to raise at the next stage under s. 103(2)."*

25. *China Minmetals Materials Import and Export Col. Ltd v. Chi Mei Corporation, Court of Appeals Third Circuit United States, 26 June, 2003* is a case which has been relied upon by the learned counsel for the respondent. However, in the *Guide*, *China Minmetals* has been relied upon as authority for the proposition that various articles of the New York Convention contemplate as a whole that an enforcing court should enforce valid agreements to arbitrate and only awards base on those agreements.

26. The primary issue before the Court of Appeal was stated thus:

> *"The primary issue in this case is whether the district court properly enforced the foreign arbitration panel's award where that panel, in finding that it had jurisdiction, rejected Chi Mei's argument that the documents providing for arbitration were forged so that there was not any valid writing exhibiting an intent to arbitrate. This issue actually involves two distinct questions. First, we must consider whether a foreign arbitration award might be enforceable regardless of the validity of the arbitration clause on which the foreign body rested its jurisdiction."*

27. In its holding, the Court of Appeal referred to a number of precedents which established a strong federal policy in favour of arbitration and that the presumptions in favour of the arbitration carries special force when international commerce was involved. Secondly, the Court of Appeal distinguished two contrary judgments of the Courts of Appeal and held them to be authorities for their own facts. However, the fact remains that in those precedents the

Courts of Appeal had held that once an arbitration had already taken place, Article V will be triggered which lists the narrow circumstances in which an arbitration decision between signatories to the Convention should not be enforced. Also that the New York Convention maintains very different regimes for the review of arbitral awards and that the Convention was very clear that when an action for enforcement was brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention. In my opinion the contrary view referred to in *China Minmetals* of a co-ordinate Court of Appeal has a better reading of the New York Convention and its representations. However, the crux of the holding in *China Minmetals* is the following:

> *"We therefore find that the absence of any reference to a valid written agreement to arbitrate in Article V does not foreclose a defense to enforcement on the grounds that there never was a valid agreement to arbitrate. Minmetals cannot point to any case interpreting Article V of the Convention so narrowly as to preclude that defense and we are aware of none.*[12] *Nor do the text and structure of the Convention compel such an interpretation. Indeed, although only Article II contains an "agreement in writing" requirement, Article IV requires a party seeking to enforce an award under Article V to supply " [t]he original agreement referred to in article II" along with its application for enforcement. Furthermore, Article V expressly provides that the party opposing enforcement may furnish "to the competent authority where the recognition and enforcement is sought proof that ... the said agreement is not valid...." Read as a whole, therefore, the Convention contemplates that a court should enforce only valid agreements to arbitrate and only awards based on those agreements. Thus, the concern we expressed in our decisions in Article II cases like Sandvik and Deutz — that parties only be required to arbitrate those disputes they intended to*

> *arbitrate — is likewise present in this case. We therefore hold that a district court should refuse to enforce an arbitration award under the Convention where the parties did not reach a valid agreement to arbitrate, at least in the absence of a waiver of the objection to arbitration by the party opposing enforcement.*[13]

28. It can be seen from the above that the Court of Appeal in *China Minmetals* read the Convention as a whole and found that the defence on the basis of the validity or invalidity of an agreement could be culled out from a reading of Article V itself and, therefore, reading it cumulatively the Convention contemplated that court will enforce only valid agreements to arbitrate and awards based on those agreements. This conclusion in *China Minmetals* generally agrees with the construction that ought to be put upon a holistic reading of the New York Convention. In my opinion, the only requirement of Article II read with Article IV of the Convention is that an original copy of the agreement or its certified copy was produced by the claimant at the time of making the request for the recognition and enforcement of the award. This requirement cannot be considered within the narrow confines of a strict agreement in writing but has to be seen in the context of the concept of an agreement in writing given in Article II of the Convention. Also, it would be reasonable basis for the Court to proceed under the Act, 2011 read with the New York Convention if the Arbitral Tribunal has rendered an award on the basis of an arbitration agreement and

by considering the defence regarding the validity or otherwise of that agreement. In the present case, the original copies of the agreements have been produced which are all signed. Therefore, the requirements of Article II read with Article IV stand fulfilled and therefore this court is only obliged to consider the objections and defences raised on the basis of Article V regarding the validity of the agreement. The ground of defence taken by the respondent herein viz. that the respondent had not signed the arbitration agreement is one of the grounds which concerned the validity of an arbitration agreement pursuant to Article V(1)(a) and thus, will be amenable to the jurisdiction of this Court under Article V and for which the burden of proof is squarely on Acro. Thus, it is clear that the requirements of Article II have been fulfilled by the claimant whereas the onus of Article V has not been discharged by Acro and has gone abegging. Doubtless, section 5 read with Article IV of the convention places a prior duty on the claimant to supply the duly authenticated original award or a duly certified copy thereof and the original agreement or a duly certified copy to the court to trigger the process. But this, at best, is a procedural formality and if an agreement in any form has been produced, the duty stands discharged and any

objection to the agreement may only be raised within the periphery of Article V and not under Article II of the Convention. For, all such objections will be covered within the broad contours of the defence of incapacity or invalidity under the law. The Act, 2011 and the Convention do not countenance a two-tier adjudicative process. The policy and purpose of law will suffer grievously if such an interpretation was allowed to be weighed with the Courts. I have no doubt in my mind that in all such maters the jurisdiction of the court is hedged in by the provisions of sections 6 and 7 which require a court to consider and dilate upon Article V defences only. This will include all defences regarding nullity of a contract or that one of the parties had not signed the arbitration agreement. This view is reinforced in a case if the Arbitral Tribunal has already considered this objection and determined it in favour of the claimant. A *fortiori*, in such a case if the same original agreement is produced, it will be considered as sufficient compliance of Article IV and the court will proceed to decide the Article V defences set up by the respondent for which the proof requires to be furnished. This is also the consistent view of the U.S Court of Appeals for the Second Circuit as noted in *China Minmetals* (which was a slightly divergent view from earlier cases). Article II of the

Convention has been reproduced above. It requires each Contracting State to recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen between. Clause 2 of Article II gives an inkling of the scope of the term "agreement in writing". It has been defined to include an arbitral clause in a contract or arbitration agreement, *signed by the parties or contained in an exchange of letters or telegrams*. Modern forms of communication, such as email, telefax etc. fall within the scope of this provision. Thus a claimant may produce and rely upon an agreement in writing which may either be signed by the parties or is contained in an exchange of emails etc. meaning thereby that this other form of agreement is writing need not be signed. In other words, if a set of emails or other correspondence by any modern means of communication is supplied (as in the present case) by the claimant, he will be deemed to have crossed the threshold of section 5 of the Act, 2011, read with Article IV of the Convention and any objection to their validity can only be dealt with as Article V(1)(a) defence to be treated as such.

UNCITRAL Guide and its relevance:

29. Article IV is preceded by Article III and which enjoins a Contracting State to recognize arbitral

awards as binding and to enforce them in accordance with rules of procedure of the territory where the award is relied upon. Thus, Article III places a primary obligation on a Contracting State to recognize arbitral awards. It must be emphasized that what is sought to be recognized is the arbitral awards and not the agreement referred to in Article IV. Article IV begins with the words "to obtain the recognition and enforcement mentioned in the preceding Article". Therefore, Article IV refers to the preceding Article in order to obtain the recognition and enforcement and the preceding Article III refers to the recognition and enforcement of arbitral awards. What follows thereafter is merely a ministerial act of supplying to the court the duly authenticated original award or a duly certified copy of the original agreement referred to in Article II. It does not matter whether the original agreement is invalid under the law to which the parties have subjected it or its execution has been denied. These are questions which will be determined in the ambit of Article V objections for which the proof lies upon the objector. Article II merely reinforces the concept that every Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration or of any differences which have arisen or which may arise

between them in respect of defined legal relationship whether contractual or not. The words "whether contractual or not" are significant and have a close nexus with the byelaw 201 of the Byelaws of ICA. Byelaw 201 says that:

> *"**Bylaw 201***
> *1 Subject to Bylaws 302 and 318, the following clauses will apply to every contract made under our Bylaws and Rules, or containing words to similar effect:*
> - *The contract will incorporate the Bylaws and Rules of the International Cotton Association Limited as they were when the contract was agreed.*
> - *If any contract has not been, or will not be performed, it will not be treated as cancelled. It will be closed by being invoiced back to the seller under our Rules in force at the date of the contract.*
> - *All disputes relating to the contract will be resolved through arbitration in accordance with the Bylaws of the International Cotton Association Limited. This agreement incorporates the Bylaws which set out the Association's arbitration procedure.*
> - *Neither party will take legal action over a dispute suitable for arbitration, other than to obtain security for any claim, unless they have first obtained an arbitration award from the International Cotton Association Limited and exhausted all means of appeal allowed by the Association's Bylaws.*
>
> *The words 'all disputes' can be changed to read 'quality disputes' or 'technical disputes'. But if nothing else is agreed, the words 'all disputes' will apply.*
> *2 Attention is drawn to Bylaws 302 and 318 which allow the Directors to deny arbitration, if, on the day before the date of the contract giving rise to the dispute, either party has its name circulated on the ICA List of Unfulfilled Awards in accordance with Bylaws 315 and 354.*
> *3 This Bylaw will apply even if:*
> - *the contract is held to be invalid or ineffective, or was not concluded; or*
> - *the recommended form of contract set out in Appendix A has not been used."*

30. From the bylaw 201, reproduced above, it is clear that the bylaw will apply even if the contract is

held to be invalid or ineffective or was not concluded as is the stance taken by Acro. To reiterate, Acro asserts that certain negotiations did take place between the parties but no agreement was concluded. In such a case as well, the disputes relating to the contract will be resolved through arbitration in accordance with the Bylaws of ICA. Be that as it may I do not agree with the threshold objection taken by Acro with regard to the filing of the original agreement which in this case has been done along with an authenticated copy of the original award and hence the requirements of Article IV of the New York Convention have indeed been fulfilled. It is a different matter that Acro has chosen to deny the execution of the agreement but that aspect will be covered under Article V and must be taken as an objection under that Article for which the proof lies upon Acro. The flip side is that in case the reply filed by Acro is not taken as objections under Article V then for all intents and purposes there are no objections under Article V and this Court will proceed to enforce and recognize Foreign Arbitral Award, for this is the mandate of section 7 of the Act, 2011.

31. The learned counsel for the applicant also referred to the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958) (2016 Edition). The Guide is a product of the work of the

Secretariat based on expert input and is a United Nations publication. An extensive summary of the grounds of Article V has been brought forth based on the publication of the experts as well as case law which has developed in different jurisdictions. The purpose of the New York Convention has been delineated in the following words:

> *"2. The drafters of the New York Convention sought to overcome the hurdles that an applicant had to meet under the previous regime and enforcement of foreign arbitral awards. The 1927 Geneva Convention placed the burden on the party relying on an arbitral award to prove five cumulative conditions in order to obtain recognition and enforcement, including that the award was "final", which in practice required the party to effectively obtain two decisions of exequatur, one at the country where the award was issued, and one at the place of enforcement. As a further obstacle, under the 1927 Geneva Convention a court was required to refuse recognition and enforcement if the award had been annulled in its country of origin, if the respondent had not been given proper notice or was under a legal incapacity, or if the award dealt with differences not contemplated in the parties' arbitration agreement. The 1927 Geneva Convention also allowed a party opposing recognition and enforcement to raise any additional grounds for refusal available under the law governing the arbitration.*
>
> *3. While the first draft of article V of the New York Convention closely followed the wording of the 1927 Geneva Convention, significant changes wee introduced during the drafting process. The final text of article V reflects the recommendation of the Dutch delegation to eliminate the requirement of double exequatur, to restrict the grounds for refusal of recognition and enforcement as much as possible and to place the burden of proving such grounds on the party opposing recognition and enforcement. Furthermore while the 1927 Geneva Convention provided that recognition and enforcement shall be refused if one of the grounds for non-enforcement in its article II were present, the final text of article V omits any language that makes refusal to recognize and enforce mandatory."*

32. With regard to the construction which has generally been put by the courts in the Contracting States, it is said that:

> *"4. As discussed in the following chapters on article V of the guide, courts in the Contracting States have generally construed the grounds for refusal under the Convention narrowly, and have exercised their discretion to refuse recognition and enforcement of Foreign Arbitral Awards under the New York Convention in exceptional cases only."*

33. As regards the exhaustive nature of the ground under Article V, the Guide has this to say:

> *"9. The grounds for refusal under article V do not include an erroneous decision in law or in fact by the arbitral tribunal. A court seized with an application for recognition and enforcement under the Convention may not review the merits of the arbitral tribunal's decision. This principle is unanimously confirmed in the case law and commentary on the New York Convention."*

34. The above statement is based on the case law and the commentary on the New York Convention which unanimously holds that the courts seized with an application for recognition and enforcement may not review the merits of the arbitral tribunal's decisions. As regards the burden of proof it was provided that:

> *"15. The introductory sentence of article V (1) provides that recognition and enforcement may only be refused "at the request of the party against whom the award is invoked", and if that party "furnishes proof" of the grounds listed in that paragraph. In accordance with this wording, courts in the Contracting States have consistently recognized that the party opposing recognition and enforcement has the burden of raising and proving the grounds for non-enforcement under article V(1)."*

35. The interpretation of Article V(1)(a) was also the subject of discussion in the Guide and which was

based on a summation of the discussions and reports of the committees which preceded the drafting of the New York Convention as well as the case law which developed over time in different jurisdictions of the Contracting States. Here we are not concerned with the first part of the objection embodied in Article V with regard to the lack of capacity of the parties. We are, however, concerned with invalidity of an arbitration agreement. As to the meaning of invalidity based on reported case law, the following discussion is relevant for our purposes:

> *"36. Reported case law shows that parties have seldom been successful in opposing recognition and enforcement of an arbitral award pursuant to article V (1) (a) on the ground that the arbitration agreement was invalid.*
> *37. In a number of cases, the party opposing recognition and enforcement argued that a defect in the main agreement rendered the arbitration agreement invalid. Courts have generally dismissed this argument pursuant to the principle of severability, which holds that an arbitration agreement is legally independent from the underlying contract which contains it, and the nullity of a contract does not imply that the arbitration agreement therein is invalid.*
> *38. in some cases, parties have argued that the arbitration agreement was invalid pursuant to article V (1)(a) on the ground that one of the parties had not signed the arbitration agreement. For instance, in Dallah, the Supreme Court of the United Kingdom denied enforcement of an award on the ground that one party to the award was not validly bound by the arbitration agreement. Conversely, the supreme Court of Victoria in IMC Mining Solutions, in assessing a challenge based on Section 8(5)(a) of the Australian International Arbitration Act of 1974 (implementing article V (1)(a) of the Convention), held that the party which had allegedly not signed the arbitration agreement was validly bound by it in accordance with the law applicable to the arbitration agreement, which was different from the law applicable to the main agreement. Similarly, a Swiss court enforced an arbitral award rendered on the basis of an arbitration agreement by reference despite it not*

being signed by one of the parties. In some jurisdictions, courts have ruled that, despite not having signed the arbitration agreement, a party's behavior in the arbitral proceedings, including its participation therein, could constitute a valid arbitration agreement within the meaning of article V (1)(a)."

41. In a number of reported cases, however, courts have assessed the validity of the arbitration agreement pursuant to the form requirements of article II. As explained by a United States appeals court in China Minmetals, articles II, IV(1)(b) and V (1)(a) of the Convention contemplate as a whole that an enforcing court should enforce only valid agreements to arbitrate and only awards based on those agreements."

36. Further that:

"44. With respect to article V(1)(a), courts have typically rules that it is for the party opposing recognition and enforcement to prove either that one of the parties was under some legal incapacity at the time of the conclusion of the arbitration agreement or that the arbitration agreement was invalid under the applicable law. The party seeking recognition and enforcement only bears the burden of supplying documentary evidence of the arbitration agreement pursuant to article IV (1)(b), which provides that the party applying for recognition and enforcement shall supply the original arbitration agreement or a copy thereof."

37. In conclusion, the Guide found that:

"7. The text and the drafting history of the Convention suggest that the applicant should only prove prima facie the existence of the arbitration agreement while the party opposing recognition and enforcement has the onus of proving its invalidity. Commentators have generally favoured this approach."

38. Thus, upon a consideration of case law as well as commentaries and other material on Article V (1)(a), it was concluded that the applicant merely has to prove *prima facie* existence of the arbitration agreement while the party opposing the recognition and enforcement has the onus to prove its invalidity. Not only that this takes care of the threshold objection

taken by Acro but also places the onus on it of proving that any of the objections taken by Acro are sustainable. It is in this context and background that the application shall be determined and correspondingly the objections taken by Acro inviting this Court to refuse to recognize and enforce the Foreign Arbitral Award.

Article V determination:

39. To reiterate, the policy and the purpose of the law has been adumbrated and which require this Court to recognize and enforce Foreign Arbitral Award expeditiously and with all deliberate speed. The statement in this regard made in *Russel* and the approach to be taken by courts is relevant for any such discussion. It says that:

> *"**Opposing enforcement of a New York Convention Award**. As stated above, subject to production of the required documents the court has no discretion but to recognize and enforce a New York Convention award unless the party opposing enforcement proves one or more of the grounds specified in s. 103 of the Arbitration Act 1996. These grounds of refusal are exhaustive, and if none of the grounds is present the award will be enforced. Much has been written about these grounds and a detailed analysis of their international application is beyond the scope of this book but they will be treated summarily in this chapter. The onus of proving the existence of a ground rests upon the party opposing enforcement, but that may not be the end of the matter. There is an important public policy in the enforcement of awards and the courts should only refuse to enforce an award under s. 103 in a clear case.*
> ***Approach of the Court**. On an application under s. 103 issues may arise in respect of which disclosure and cross examination is required. However, the court should be cautious about taking that approach and should usually be able to dispose of issues by applying the usual test for summary judgment, namely whether there is a real prospect of establishing a ground under s. 103 or whether*

there is some other compelling reason why the court should order a full trial."

40. The above statement embodies the holding of the English courts which have taken it as a matter of public policy to adopt a pro-enforcement approach. The learned counsel for the respondents does not seriously contest the award to be a Foreign Arbitral Award within the meaning of the provisions of the Act, 2011. The primary defence set up by the respondent is with regard to the validity of the agreement and denial of its execution by the respondent or any of its representatives or agents. To this end, the learned counsel invites this Court to frame issues and to hold a regular trial by taking down evidence, *pro and contra*. This, in my opinion, cannot be resorted to in a case automatically and as a matter of course. This procedure has to be adopted as an exception and not as a rule. The primary purpose of the law is to compel this Court to proceed to enforce and recognize the Foreign Arbitral Award without adverting to a regular trial and on the basis of documents produced by the parties. For, if the applicant complies with the provisions of sections 6 and 7 of the Act, 2011 read with Article IV of the New York Convention, the burden shifts to the respondent to set up any of the defences contemplated by Article V and in respect of which the proof has to be furnished by the respondent especially the grounds on which the

recognition and enforcement of the Foreign Arbitral Award may be refused.

41. No proof was furnished by Acro in support of the ground that the agreement was not valid under the law. However, the parties were required by this Court to file their affidavit and counter affidavit so that the determination of the objections raised by the respondent may very well be made on the basis of the affidavit and counter affidavit submitted by the parties. Mr. Rehman Anwar son of Sheikh Muhammad Anwar filed an affidavit on behalf of Acro and the contents of the affidavit may be reproduced for ready reference:

> *"Affidavit of Mr. Rehman Anwar son of Sheikh Muhammad Anwar resident of 104-B, DHA Phase-V, Lahore.*
> *I, the above named deponent, do hereby solemnly declare and affirm as under:-*
>
> 1. *The alleged contracts (the "Alleged Contracts"), appended with Application under Section 6 of the recognition and enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, filed by Louis Dreyfus Commodities Suisse S.A. as Plaintiff against Acro Textile Mills Limited as Defendant were, to the best of my recollection, not finalized or signed. Around that time, there were some discussions for the sale of different kinds of cotton. Such discussions/negotiations were done with various brokers and intermediaries. However, on account of failure to agree on the terms, the agreements were not concluded.*
> 2. *For present purpose, I examined the available record in the Defendants' office; however, I did not come across any record of any of the Alleged Contracts with my signatures.*
> 3. *The only available record of the Alleged Contracts found in the Defendant's office is with respect to the documents filed with the Application in the titled proceedings. During the course of these proceedings, as a matter of caution, a handwriting expert was requested to examine and confirm whether*

the alleged signatures on the Alleged Contracts matched with the signatures of the undersigned. The handwriting expert confirmed that the signatures did not match.

4. *The email address 'rehman@acrotextile.com' was/ is under my use; however, I do not recollect either receiving or sending any of the emails that have been appended with the Application under Section 6 and allegedly sent to or received from the said e-mail address. The email record for the relevant period is not available due to passage of time and therefore, the same could not be examined.*

42. Counter affidavit was filed by Muhammad Sohail on behalf of the applicant in order to rebut the contents of the affidavit filed by Rehman Anwar. The relevant portion of counter affidavit reads as under:

> *"It is further submitted that Mr. Rehman Anwar had executed the Contracts, which are enclosed with the Petitioner / Applicant's Application under Section 6 ("Petitioner's Application") of the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Act, 2011 ("2011 Act") and the signature of Mr. Rehman Anwar on his Affidavit (i.e. under reply) is identical to his signature on the Contracts."*
>
> *"4. The contents of Paragraph No.4 are correct to the extent that the email address used by Mr. Rehman Anwar is rehman@acrotextile.com, which has now been clearly admitted by Mr. Rehman Anwar in the Affidavit under reply, since the inception of the Petitioner's Application. The remaining contents of the paragraph-under reply are denied. It is submitted that this email address was used by Mr. Rehman Anwar to send the email dated 10 December 2010 (Annexure E at Page 39 to the Petitioner's Application) in which Mr. Rehman Anwar acknowledged (1) the existence of the contracts; (2) the existence of the ICA arbitration; and (3) offered a settlement amount to the Petitioner of USD 836,441. Likewise, this email address was also used by Mr. Rehman Anwar on 27 December 2010 (Annexure H/1 at Page 49 of the Petitioner's Application) to appoint Mr. C.J. Harman as his arbitrator for the arbitration in the International Cotton Association. Finally, as is evident from the documents enclosed in the Petitioner's Application, the entire correspondence of the ICA with Mr. Rehman Anwar was sent on this admitted email address. The statement of Mr. Rehman Anwar that "I do not recollect either*

> *receiving or sending any of the emails that have been appended with the Application under Section 6 and allegedly sent to or received from the said email address" is patently false and vehemently denied. Likewise, Mr. Rehman Anwar's statement that "the email record for the relevant period is not available due to passage of time and therefore, the same could not be examined" is also false and inadmissible in terms of Section 3 and 4 of the Electronic Transaction Ordinance, 2002 read with Article 2(e) of the Qanun-e-Shahadat, 1984."*

43. It may be stated that Rehman Anwar was the representative of Acro (its Chief Executive Officer) and allegedly has also executed the contracts which form the basis of the claim of the applicant. It can be seen upon a reading of affidavit of Rehman Anwar that he does not deny clearly and expressly the execution of the agreements but merely gives an evasive statement on the basis of his recollection that the agreements sought to be enforced **were not finalized and signed**. He however admits that there was some discussion for the sale of different kinds of cotton and on account of failure to agree on the terms, the agreements were not concluded. Thus, the negotiations are admitted but the execution of the agreements is denied. As submitted above, and by reference to bylaw 201 of the Bylaws of ICA, this too gives rise to a cause for referring the matter to arbitration. More importantly the email address rehman@acrotextile.com has been admitted to be under the use of the deponent. However, he very conveniently denies recollection of either receiving or sending any of the emails which have been attributed to have been sent or received by the deponent with the

applicant during the time when the negotiations were being held as also while proceedings for arbitration were being commenced. He also states that "*the email record for the relevant period is not available due to passage of time and therefore the same could not be examined*". This statement too does not have a factual basis as the email record can very well be recovered and recouped by a person who maintains an email address and therefore it belies logic as to why deponent did not make any effort to retrieve that record or to make a categoric statement with regard to the acceptance or denial of the emails exchanged with the applicant. Moreover, if on the one hand the deponent admits to discussions and negotiations to have taken place during that time it would lead to the inference that these emails must have been exchanged between the applicant and Rehman Anwar on behalf of Acro and this Court can validly and lawfully draw an inference that the deponent has deliberately withheld information regarding the said exchange of emails to have taken place between the applicant and Acro. Yet, from the contents of the affidavit it seems that Acro labours under the impression that a simple denial will suffice and the onus will then shift to the applicant to prove the execution and hence validity of the contacts. This is utterly misplaced and runs counter to the mandate of Article V. It is emphasised once again that

it is upon Acro to furnish proof and not otherwise. Thus Acro ought to have brought material on record to rebut the execution of contracts as well as the exchange of emails.

44. The substantive part of the evidence set up by the applicant consists of the emails exchanged between the applicant and Rehman Anwar on behalf of Acro. But prior to that an issue, raised peripherally, is necessary to be dealt with. The counsel for the respondent took exception to the following statement in the award in respect of the contracts sought to be enforced.

> *"6(2)….four of the contracts were reduced to writing on the sellers' contract form and all six contracts on the buyers' form of contract and were agreed by both the seller and the buyers".*

45. The nature of the transaction which is sought to be enforced was such that it involved "battle of forms". This mean that there was an exchange of contracts between Acro as the seller and the applicant as the buyer. These contracts were similar in content and language and which were exchanged by both the parties and copies of which were retained by them. These contracts and their contents have been reproduced in the award. They have also been attached with the application as well as through CM filed by Diary No.68243 of 2015. Both the sets of contracts have been brought forth however the case of the applicant is based on the sellers' contracts which

have all been attached with the main application. It will be noticed that the contents of these agreements and the dates correspond with each other and they were exchanged simultaneously. The sellers' contracts have been sent by Rehman Anwar on behalf of Acro and the basis of the award are both the sets of contracts exchanged by the parties. It will be noticed that the award refers to the corresponding numbers of the contracts of both the sellers as well as the purchaser. This is the practice followed internationally in all such transactions and is a standard procedure. These numbers of the contracts find mention in the emails exchanged between the parties.

46. I will now revert to the veracity and probative value of the documents relied upon by the applicant in order to establish its claim. However, as explicated the burden of proof lay squarely on the respondent to allege that the agreement was not valid under the law to which the parties had subjected it. It will be seen at the end of the conclusion of an appraisal of these documents and the defence set up by Acro that Acro has failed to discharge the burden cast upon it by Article V of the New York Convention. This is being said in the context of the objection taken by the respondent on the basis of Article II read with Article IV of the New York Convention and as discussed above that burden has been discharged by the applicant

by the production of the signed agreement between the parties.

47. The first document relied upon by the applicant is an email dated 28.10.2010 (Annexure 'B) by which the applicant sent the scanned copy of the bilaterally executed Sellers' contracts to the respondent. In the said email the applicant also requested the respondent to start all operations to shipout the first 500 MT of P00040. This email also makes a reference to the meeting with Acro on the previous day as well as the scanned copy of the papers send by Rehman Anwar, CEO of Acro. The applicant alleges that the respondent failed to perform the contracts and the applicant sent an email dated 15.11.2010 to Rehman Anwar, CEO Acro and held the respondent in breach of the contract while claiming US Dollars 4,435,104.05. The relevant portion is reproduced below:

> *"We really are at the end of out patience, no signs are there that you intend to ship the 500 ts of P-00040 which was already in your warehouse and you promised to have docs at our bank latest 15 nov which is today. Also, as far as we know and understand from the market, not any of our purchases through Acro have even been registered yet, it is not even under process.*
> *We are therefore obliged to hold you in breach of contract and claim you the market difference as it is today.*
> *If payment is not received by 19 nov 2010 we will refer this matter to ICA arbitration."*

48. On 8.12.2010 one of the officials of the applicant emailed to Rehman Anwar and offered to

convince the management to accept certain proposals made by Acro. The email stated that:

> *"Let me first clarify that I don't reply to all since I would like to receive some more details/replies to following questions so I can eventually approach my management and try to convince them to solve once and for all these matters. This message is not in name of LDCommodities."*
>
> *"The 125.00 usc/lb value you refer to is just not realistic to where the market was trading and we/management is basing itself on our 160.00 usc/lb value and the 4,435,104.05 usd is what management is aiming for as it is fair and reasonable (see values above).*
> *I do understand from your message here under that Acro would pay us 125.00-103.16 (our average purchase price), or thus 21.84 usc/lb on 3500mt (lump sum 1,685,196.24 usd) and we keep the 848,771.00 usd. This thus equals to a total of 2,533,967.24 usd.*
> *There is thus a difference of 1,901,136.81 usd. Honestly, I have no chance to go to the management with your proposal. But I think I can defend/convince management to accept in addition to the 848,771 usd- a cash settlement of 3,150,000.00 usd payed within this week*
> *In no circumstances this is a firm offer nor a firm proposal. This is without prejudice to any arbitration proceedings. Pls revert asap as the dead line that was given to Acro is this Friday 10th December."*

49. From a reading of the email above, it can be seen that the said email was in response to an offer made by Rehman Anwar for payment of a **certain sum of money as the average purchase price.** On 10.12.2010 Rehman Anwar emailed back and made the following proposal:

"From: Rehman Anwar rehman@acrotextile.com
To: Pierre.desomer@ldcom.com
Date: 10.12.2010 07:24
Subject: Re: invoice back P00040, P00041, P00047, P00058, P00084, P00089

Dear Mr. Pierce,

> *I have taken legal opinion on our case regarding ICA arbitration. According to my understanding the breach of contract did not occur on the 15th of November 2010 as LDC is claiming. Therefore, the price which the invoice back*

> *option is being exercised is not valid. However, I have been trying to resolve this situation since day one and therefore, would like to propose the following:*
> *Invoice back price @ USC 125*
> *Our average price @ USC 103.16*
> *Difference = USC 21.84*
> *Difference In USD= USD 1,685,212*
> *Credit with LDC = USD 848,771*
> *Amount payable by Acro to LDC= USD 836,441*
> *Validity 10-Dec-2010 for the Invoice back price.*
> *I appreciate your efforts but this is the best proposal I can come up with."*

50. The above email contains a proposal which was agreed to be paid by Acro to the applicant as cash settlement of the claim being made by the applicant. Two things are at once evident from the reproduction of the email above. Firstly, it has been sent from the email address of rehman@acrotextile.com which is the email address confirmed by Rehman Anwar in his affidavit to have been under his use and admitted to belong to him. Secondly, in the column of 'Subject' the reference of the contract numbers is the same which is on buyers' form and which has now been relied upon by the applicant for their recognition and enforcement. This email was replied to on 14.12.2010 in the following words:

> *"We have provided you with evidence as to the market on 15 November 2010 and we stand by our market value of 160.00 cents/lb.*
> *We acknowledge that you have a credit balance with LDC of USD 848,771 which we agree to apply against the invoice back amount calculated at USD 4,435,104.50.*
> *Accordingly, LDC demanded payment of USD 3,586,333.50 by last Friday but Acro Textiles failed to pay.*
> *This is our final notice on this matter. LDC will proceed with ICA technical arbitration. LDC have appointed mr Arthur Aldcroft as our arbitrator on 14th December 2010. According to ICA Bylaws and Rules, we invite ACRO to appoint their arbitrator on or before 28th December 2011, Upon commencement of arbitration LDC shall not negotiate this matter any further."*

51. Acro's proposal was rejected by the applicant and the email certified as a final notice on the matter. Simultaneously it was informed that the applicant had appointed an Arbitrator on 14.12.2010 according to ICA Bylaws and rules. Acro was invited to appoint its arbitrator on or before 28.12.2011. Accordingly, the applicant submitted a request for arbitration under bylaw 302 of ICA Bylaws attached as Annexure 'F' with the application. ICA emailed ICA's reference number dated 15.12.2010 to the respondent through an email and was sent to the email address of Rehman Anwar. Through this reference, ICA required the respondent to appoint its arbitrator within the stipulated time period mentioned in bylaw 303. At the same time, the reference was couriered via FedEx to the respondent and the receipt of which has also been attached as Annexure 'F/3'.

52. On 27.12.2010, Rehman Anwar sent the following email to ICA:

> *"Dear Mrs. Simons,*
> *We have appointed Mr. C.J. Harman as our arbitrator for the arbitration in ICA. Reference: A01/2010/67 C.J. HARMAN*
> *Plexus Cotton Ltd. Birkenhead, UK*
> *Tel: +44 151 650 8888*
> *Email: chris@ @plexus-cotton.com."*

53. By this email, Acro appointed its own Arbitrator for the arbitration in the ICA reference sent to Acro. This was confirmed on 30.12.2010 by ICA through its email to the respondent confirming the appointment of Acro's Arbitrator and further

informing Acro of the confirmation of the name of a third arbitrator who will serve as the Chairman of the Tribunal which was done vide email dated 10.01.2011 and a Chairman of the Tribunal was duly appointed. It is pertinent to mention that in respect of each email, the scanned copies of the documents and letters received from the applicant were being couriered to Acro by ICA. On 12.1.2011 ICA enclosed a copy of the details of claim received from the applicant and requested Acro to reply to the claim within fourteen days of the receipt of the documents. This was not done by Acro and ICA was constrained to send an email on 3.2.2011 to the respondent (Annexure 'K/2) informing the respondent that the deadline for receipt of its documents had passed but the Chairman of the Tribunal had extended the deadline by seven days so that the respondent could file its reply. It was further informed that failure to do so would compel the Tribunal to proceed with the arbitration and to make an award. Needless to say that Acro did not submit a reply nor any documents and the Arbitration Tribunal rendered its Award which is now sought to be recognized and enforced. Prior to that, ICA had invited the respondent in its letter dated 16.3.2011 (Annexure 'N/1') that the Award will be published on 18.3.2011. On 21.3.2011, ICA sent a letter once again to the respondent through ICA's email (Annexure

'N/2') informing that the Arbitral Award was stamped and made effective on 18.3.2011 by ICA and a notice of appeal against the Award was also given thereby. On 05.05.2011, ICA sent a letter to the respondent confirming to have received the applicant's reasons for appeal within the time allowed and enclosed a copy of the same to the respondent. ICA further requested the respondent to submit its comments to the Appeal Committee within a period of twenty eight days. On 25.05.2011, ICA confirmed the appointment of the members of the Technical Appeal Committee and gave the respondent seven days' time to object to any member of the Committee. On 30.09.2011, the Technical Appeal Committee issued the Appeal Award dated 30.09.2011. It may be noticed that Acro did not participate in the proceedings in arbitration being conducted by ICA after the initial appointment of its arbitrator referred to above.

54. The documents relied upon by the applicant and referred to above are the documents which have been described as electronic documents having been sent by an automated information system within the meaning of the terms defined in the Electronic Transactions Ordinance, 2002 (**Ordinance, 2002**). An electronic document has been defined as:

> *"electronic document" includes documents, records, information, communications or transactions in electronic form."*

55. Similarly, the term 'automated' has been defined to mean that:

> *"automated" means without active human intervention".*

56. As also the term 'information system', which has been defined as:

> *"information system" means an electronic system for creating, generating, sending, receiving, storing, reproducing, displaying, recording or processing information."*

57. This will have to be read with explanation 3 of Article 73 of the Qanun-e-Shahadat Order, 1984. Explanation 3 has been added to Article 73 by section 29 of the Ordinance, 2002 read with the schedule to the said Ordinance. For facility, section 29 of the Ordinance, 2002 says that:

> *"**29. Amendment of Presidential Order No. X of 1984.—**For the purposes of this Ordinance, the Qanun-e-Shahadat Order, 1984 (P.O. No.10 of 1984) shall be read subject to the amendments specified in the Schedule to this Ordinance."*

58. Therefore, to the extent that the amendments have been specified in the Schedule to the Ordinance, 2002, the provisions of the Order, 1984 shall be read subject to those amendments. Article 73 of the Order, 1984 and the Explanation 3 may also be reproduced for facility:

> *"**73. Primary evidence**. Primary evidence means the document itself produced for the inspection of the Court.*
> *Explanation 3.A printout or other form of output of an automated information system shall not be denied the status of primary evidence solely for the reason that it was generated, sent, received or stored in electronic form if the automated information system was in working order at all material times and, for the purposes hereof, in the*

> *absence of evidence to the contrary, it shall be presumed that the automated information system was in working order at all material times."*

59. Thus, by the enumeration of Article 73, primary evidence would mean the document which is produced for the inspection of the Court. In order to extend the operation of Article 73 to electronic documents, the legislature added Explanation 3 which too has been brought forth above and according to which a printout or other form of output of an automated information system shall not be denied the status of primary evidence solely for the reason that it was generated, sent etc. in electronic form if the automated information system was in working order at all material times. Explanation 3 raises the presumption that the automated information system is in working order at all material times. This is only subject to the evidence to the contrary. No evidence has been brought forth by the respondent in order to establish that automated information system (emails and the system through which they were exchanged) were not in working order at all material time. Therefore, the emails which have been relied upon by the applicant would be deemed to be primary evidence entitled to be treated as such by this Court. A reference to some of the other provisions of Ordinance, 2002 would also lend actuality to entire analysis. Sections 3 and 4 are relevant and read as under:

> *"**3. Legal recognition of electronic forms**.—No document, record, information, communication or transaction shall be denied legal recognition, admissibility, effect, validity, proof or enforceability on the ground that it is in electronic form and has not been attested by any witness.*
> ***4. Requirement for writing**.—The requirement under any law for any document, record, information, communication or transaction to be in written form shall be deemed satisfied where the document, record, information, communication or transaction is in electronic form, if the same is assessable so as to be usable for subsequent reference".*

60. Likewise section 13 relates to the subject of attribution of communications and provides:

> *"**13. Attribution of communications**.—(1) Unless otherwise agreed as between an originator and the addressee, an electronic communication shall be deemed to be that of the originator if it was sent: (a) by the originator himself; (b) by a person who had the authority to act for and on behalf of the originator in respect of that electronic communication ; or*
> *(c) by an automated information system programmed by, or on behalf of the originator.*
> *(2) Unless otherwise agreed as between the originator and the addressee, the addressee is to regard an electronic communication as being that of the originator, and is entitled to act on that assumption if:*
> *(a) the addressee has no reason to suspect the authenticity of the electronic communication; or*
> *(b) there do not exist any circumstances where the addressee knows, or ought to have known by exercising reasonable care, that the electronic communication was not authentic."*

61. Section 13 is a crucial provision and says that an electronic communication shall be deemed to be that of the originator if it is sent by the originator himself and by an automated information system programmed by or on behalf of the originator. There is no doubt that the emails relied upon by the applicant

are all within the ambit of the term 'electronic communication' as the term 'electronic' has been defined in the Ordinance, 2002 and includes electrical, digital, magnetic, optical, biometric, electrochemical, wireless or electromagnetic technology. Also the addressee is entitled to act on the assumption that the electronic communication is that of the originator if the addressee has no reason to suspect the authenticity of the electronic communication. This is also not the case since neither the applicant nor ICA ever suspected the authenticity of the emails sent by the respondent and considered those emails as being that of Rehman Anwar, CEO Acro. Reading this provision and the assumption of the applicant with the contents of the affidavit filed by Rehman Anwar, it is an ineluctable conclusion that the emails were sent by Rehman Anwar to both the applicant as well as ICA from an automated information system programmed by Rehman Anwar himself. It is also apparent from a consideration of the entire set of emails, referred to above, and upon reading them holistically that Rehman Anwar never ever doubted the authenticity of the agreements which were being relied upon by the applicant and in respect of which the arbitration was invoked. In fact, Rehman Anwar referred to the same number of those contracts in his exchanges with both the applicant as well as ICA. Ironically in the reply

filed on behalf of Acro, the execution of the agreements has been denied categorically and without equivocation. Interestingly Acro has not filed any documents with the reply and, therefore, Acro has made a bald denial of the execution of the agreements without any proof as required by Article V of the New York Convention. In contrast, the affidavit filed by Rehman Anwar does not categorically deny the execution of the agreements. In paragraph 2, he deposes that *"For present purposes, I examined the available record in the Defendant's office; however, I did not come across any record of any of the Alleged Contracts with my signatures."*

62. The above does not constitute a clear denial of the execution of the contracts and thus the stance of Rehman Anwar, CEO Acro does not accord with the stance taken in the reply filed by the respondent.

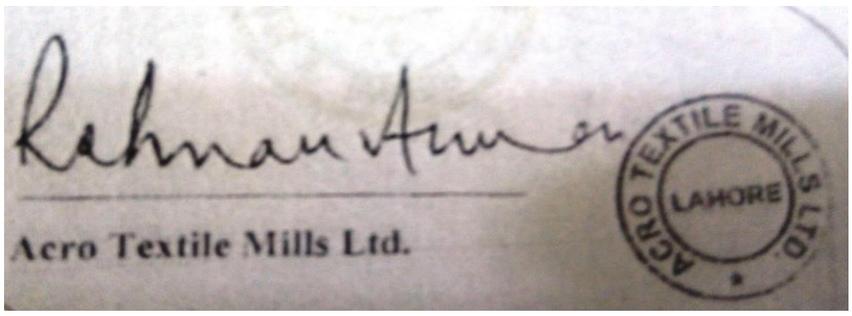
63. Comparison of signatures is a permissible course and Article 84 of the Qanun-e-Shahadat Order, 1984 allows a Court to make that choice by adopting a method given therein. Since this court proposes to give a summary judgment, resort to Article 84 is, in my opinion, a preferred course in the instant matter. Article 84 of the Order, 1984 provides that:

> ***84. Comparison of signature, writing or seal with others admitted or proved:*** *(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made any signature writing or seal admitted or proved to the satisfaction of*

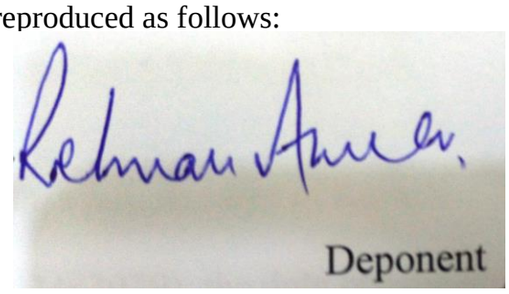
> *the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.*
>
> *(2) The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.*
>
> *(3) This Article applies also, with any necessary modifications, to finger-impressions.*

64. The provisions of Article 84 above empower a court to ascertain the veracity of a signature, writing or seal to determine that such signature, writing or seal is that of a person by whom it purports to have been written or made and a comparison may be made by the court with the admitted or proved signature, writing or seal to the satisfaction of the court. Thus, for the purposes of comparison of signature, writing or seal, a Court has been given the power to ascertain the fact. Although, the provisions of Order, 1984 do not apply to the proceedings before this Court under the Act, 2011, this Court has chosen to resort to a comparison of the signatures which have been denied by Rehman Anwar, CEO, Acro on the contracts which are the basis of the claim. These signatures on the contracts are being compared with the signatures of Rehman Anwar on the affidavit, filed by him and which are admitted to have been made by Rehman Anwar. The

signatures on the contract allegedly executed by Rehman Anwar are as under:



65. The admitted signatures made by Rehman Anwar on the affidavit filed by him in comparison are being reproduced as follows:



66. The parties were informed of the scrutiny of both the signatures by this Court. It can be seen from a comparison of the two signatures that there is no material difference in the formation, curves, semi-circles, loops, smoothness, angles and style of writing. The two signatures are substantially identical in formation of corresponding letters, including their size and gaps. It is a forgone conclusion that no person can write his own signatures twice with precision and pinpoint accuracy so as to be identical in almost all respects. Both the signatures reflect swift and carefree

movement of pen and there is no hesitation which is discernible from a comparison of both the signatures. This Court, therefore, finds the two signatures to be similar and having been made by the same person.

67. This course of action has been approved by the superior courts in *Rehmat Ali Ismaila v. Khalid Mehmood* (**2004 SCMR 361**), *Mst. Fatima v. Abdul Razzak* (**1988 SCMR 1449**), *Ghulam Rasool and others v. Sardar ul Hassan and another* (**1997 SCMR 976**) and *Messrs Waqas Enterprises and others v. Allied Bank of Pakistan and 2 others* (**1999 SCMR 85**). In the present proceedings, this procedure is also in consonance with the spirit and policy of the Act, 2011 which requires this Court to dispose of issues by the usual test for summary judgment.

68. Accordingly, I find that all requirements for the enforcement of the Appeal award have been satisfied. This application is, therefore, allowed. Accordingly, there will be an order as follows:

1) *The Appeal award made on 30.09.2011 is hereby recognized as a binding and enforceable award and enforced through this order.*

2) *Applicant is granted judgment in the amount represented in the Appeal award, which shall be executed as a decree of this Court.*

3) *The applicant shall have costs of this application.*

69. To come up for further proceedings on **25.06.2018**.

(SHAHID KARIM)
JUDGE

Announced in open Court on 08.05.2018

Approved for reporting.

JUDGE

✯

Rafaqat Ali`