CASE NO.:
Appeal (civil) 9258-9265 of 2003

PETITIONER:
Technip SA

RESPONDENT:
SMS Holding (Pvt.) Ltd. & Ors.

DATE OF JUDGMENT: 11/05/2005

BENCH:
Ruma Pal, Arijit Pasayat & C.K. Thakker

JUDGMENT:
J U D G M E N T

With
CA Nos.10092-10098/2003

RUMA PAL, J.

There are five main protagonists in these appeals, the appellant, Technip, a company incorporated in France, Coflexip, also incorporated in France, the Institut Francais du Petrol (referred to as IFP) which through its subsidiary ISIS, a company incorporated in France, was a shareholder in Technip and Coflexip, South East Asia Marine Engineering and Construction Ltd. (referred to as SEAMEC), a company incorporated and registered in India and finally the respondents who are the shareholders of SEAMEC. SEAMEC is a subsidiary of Coflexip in the sense that Coflexip through a chain of wholly owned subsidiaries controls the majority shareholding in SEAMEC.

The question which arises for consideration in these appeals is whether Technip acquired control of SEAMEC through Coflexip in April, 2000, or in July, 2001? There is no dispute that if Technip controls Coflexip then it also controls SEAMEC and if there has been a change of control of SEAMEC then Technip would be bound to offer to purchase the shares of the minority shareholders in SEAMEC in accordance with the provisions of the Securities And Exchange Board of India (Substantial Acquisition of Shares and Takeover)Regulations, 1997 (hereinafter referred to as the Regulations). The importance of the date of control/acquisition is because of the price of the shares payable on such public offer. In this case the price of SEAMEC shares in April 2000 was Rs.238 per share which was much higher than the price of Rs.43.12 per share in July, 2001. Technip had not made any public announcement at all, either in April 2000 or in July, 2001.

On the complaint of certain shareholders of SEAMEC before the Securities and Exchange Board of India (SEBI), proceedings were initiated against Technip under the Securities and Exchange Board of India Act, 1992 (referred as 'the Act'). SEBI held that French law applied to the takeover of Coflexip and consequently SEAMEC by Technip for the purpose of determining when such takeover was effected. It found that the Technip had obtained control of Coflexip in July 2001 and had violated Regulations 10 and 12 of the Regulations thereby acquiring 58.24% of the shares/voting rights and control in SEAMEC in July 2001 without making any public offer. Technip was accordingly directed by SEBI to make a public

announcement as required under the Regulations within 45 days of its order taking 3rd July, 2001 as the specified date for calculation of the offered price. Technip was also directed to pay interest at the rate of 15% per annum to the willing minority shareholders of SEAMEC, for the delayed public announcement.

The minority shareholders of SEAMEC preferred an appeal from SEBI's order before the Securities Appellate Tribunal (SAT) constituted under the Act. Their grievance was that the date of control of Coflexip by Technip was 12.4.2000 and not 3rd July, 2001 as held by SEBI. While the appeal was pending, pursuant to an interim order passed by the Tribunal, Technip implemented the order of SEBI by making a public announcement to acquire the shares of SEAMEC by taking 3rd July, 2001 as the specified date. Technip has also made payment of the share consideration together with the interest thereon to the shareholders of SEAMEC who accepted the public offer.

The Tribunal held that the applicable law to the question as to when control of SEAMEC had been taken over by Technip, was Indian Law. The Tribunal affirmed SEBI's conclusion that the Regulations had been violated by Technip by its failure to make a public announcement but decided that the relevant date on which the control of SEAMEC was taken over by Technip was April, 2000. The Tribunal accordingly directed Technip to treat the relevant date for calculating the offer price as 12th April, 2000 and to pay SEAMEC shareholders the difference between the price of the shares between 3.7.2001 and 12th April, 2000 together with the interest on such difference at the rate of 15%. One of the grounds on which the Tribunal came to the conclusion that Technip had taken over Coflexip in April, 2000 was based on the fact that both the companies had been promoted by IFP and that IFP through ISIS acting in concert with Technip had brought about the takeover of Coflexip by Technip.

According to Technip, since Technip and Coflexip are both registered in France and the takeover of Coflexip by Technip also took place in France, the applicable law is French. In terms of French Law, according to Technip, there was no control of Coflexip by Technip in April, 2000 and as such there was no change in control of SEAMEC on that date but in July 2001. It is further submitted that in any event Regulation 12 did not apply to the takeover because SEAMEC was not the target company and that while taking over Coflexip, Technip neither had the common objective nor was there any agreement between Technip and Coflexip with regard to SEAMEC. The rate of interest has also been challenged. It is said that although there was no challenge to the rate which was fixed by SEBI, if the Tribunal's order is upheld, then the impact of interest would be much greater. It is submitted that in any event, the dividend paid must be adjusted against the interest claimed. It is the final submission of Technip that if April 2000 is to be taken as the date of control, then only those shareholders who were shareholders of SEAMEC on the specified date and continued as such till the offer was made are entitled to the benefit of the Tribunal's order.

A separate appeal has been preferred by IFP from the decision of the Tribunal being CA No.10092/98. The grievance of IFP is that it is a professional body created by decree of the French Government and has been set up as a centre for research and industrial development, education, professional training and information for the oil and gas and automotive industries in France. IFP does not carry on any industry or commercial activities nor does it manage or control any listed company. It promotes companies to apply the results of its own

research. IFP says that an unnecessary stigma has been cast by the Tribunal's decision on a Government organization even though the show cause notice issued by SEBI did not make any allegation against IFP.

The respondents have on the other hand argued that the law applicable to SEAMEC was Indian Law and to determine if there was a change in the management and control of SEAMEC the provisions of the Regulations would apply. In terms of Regulations 10, 11 and 12 read with Regulation 2, any person, who acquires shares or voting rights in a registered company (described as a target company under the Regulations) above 15% or acquires control over the target company is required to make a public announcement offering to purchase the shares of the other shareholders in the target company. It is the submission of the respondents that according to Indian and French Law de facto control of Coflexip and therefore SEAMEC was taken over by Technip in April, 2000. The respondents also claim that Technip had in fact applied to SEBI to exempt them from the operation of the Regulations. The application had been rejected. This issue according to the respondent could not, therefore be reopened. It is said that SEAMEC was very much in the contemplation of Technip when it decided to take over Coflexip. It is asserted that therefore Regulations 10,11 and 12 applied in full measure. Technip had not only acted in concert with ISIS, another shareholder of Coflexip, but even by itself was in a position to exercise and in fact exercised control over Coflexip and therefore SEAMEC in April 2000.

The shareholders of SEAMEC may be classified into three groups;

a) Those, who were shareholders of SEAMEC in April, 2000 and continued as such;

b) Those, who were not shareholders in April, 2000 but were shareholders during the public offer having purchased the shares of SEAMEC before July, 2001.

c) Those shareholders, who were shareholders on the date of the public offer holding shares purchased in April 2000 and more shares after April, 2000 but before July, 2001.

The respondents who belong to group (b) have said that the public offer made by Technip after SEBI's order was unconditional. It was made to the shareholders who were shareholders as on the date of the public offer. On the question of interest it is said that it was not open to Technip to question either its liability to pay interest or the rate of interest and that Technip had already paid interest to the present shareholders without protest. Finally it is said that the finding of fact by the Tribunal should not be interfered with unless this Court came to the conclusion under Section 15Z of the Act that it was perverse.

We will start with this final submission. Section 15Z of the SEBI Act, 1992 allows any person aggrieved by the decision or the order of the Securities Appellate Tribunal to file an appeal to the Supreme Court on any question of law arising out of such order. Now the primary dispute in this appeal is whether the impugned transaction is to be judged according to French Law or Indian Law. That is a question of law. Furthermore, the determination as to what French Law is, is doubtless a question of fact but it is "a question of fact of a peculiar kind". As has been commented in Cheshire and North's Private International

Law (12th Edn.)
"To describe it (foreign law) as one of fact
is no doubt apposite, in the sense that the
applicable law must be ascertained
according to the evidence of witnesses, yet
there can be no doubt that what is involved
is at bottom a question of law. This has
been recognized by the courts".

Admittedly both Coflexip and Technip were incorporated according to and under the laws of France. They are therefore 'domiciled' in France. Normally, we would resolve any issue relating to their internal affairs by applying the law of their domicil, in this case French Law (See: Hazard Brothers & Co. v. Midland Bank Ltd. 1933 AC 289, 297; Metliss v. National Bank of Greece & Athens, SA: [1961] AC 255). But by that token it is equally true that SEAMEC which was incorporated in India would be governed by Indian law and that is what SAT held:

"SEBI has viewed (sic) that since Technip
and Coflexip are French companies,
matters relating to them should be decided
in accordance with French law. To the said
extent SEBI is correct. SEBI has no
jurisdiction to regulate takeovers and
acquisitions taking place outside India. But
certainly SEBI has jurisdiction to regulate
substantial acquisition and takeovers of
companies in India".

But then it came to the conclusion that even the question "whether Technip acquired control over Coflexip on 12.4.2000 and consequently over SEAMEC need be tested in the light of 2(c) definition". In other words Indian law would apply to determine whether the control of Coflexip was taken over by Technip. According to SAT any view to the contrary would "lead to absurd consequences even defeating the very objective of the Takeover Regulations".
SAT's conclusion as to the applicable law is questioned by the appellant and that cannot be considered as a question of fact. As held in Dalmia Dairy Industries Ltd. Vs. National Bank of Pakistan , the role of the appellate Court is such cases is:

"\005..to examine the evidence of foreign law
which was before the justices and to
decide for ourselves whether that evidence
justifies the conclusion to which they
came ".

The respondent's preliminary objection to the maintainability of the appeal is accordingly rejected.

The jurisdiction of SEBI or SAT or indeed this Court to apply foreign law has not been questioned at any stage. What is referred to as "private international law" by some authorities is referred to as conflict of laws by others . Whatever the nomenclature, it is based on the 'just disposal of proceedings having a foreign element'. To quote from Kuwait Airways Corp. v. Iraqi Airways Co. (2002) UKHL 19.

"The jurisprudence is founded on the
recognition that in proceedings having

connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court."

We have already said and it must be taken to be a generally accepted rule of private international law, that questions of status of a person's domicile ought in general to be recognized in other countries unless it is contrary to public policy. Questions of status of an individual would include matters such as legal competence, marriage and custody. (See in re Langley's Settlement Trusts (1962) Ch. 541); Russ v. Russ (1962) 3 All E.R.; Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu: AIR 1984 SC 1224; Oppenheimer v. Cattermole (1975) 1 All ER 538). Questions as to the status of a corporation are to be decided according to the laws of its domicil or incorporation subject to certain exceptions including the exception of domestic public policy. This is because "a corporation is a purely artificial body created by law. It can act only in accordance with the law of its creation". Therefore, if it is a corporation, it can be so only by virtue of the law by which it was incorporated and it is to this law alone that all questions concerning the creation and dissolution of the corporate status are referred unless it is contrary to public policy. [See: In the matter of American Fibre Chair Seat Corporation. William Daum et al. v. Arthur J Kinsman 265 N.Y.416; 193 N.E.253; McDermott Inc. v. Harry Lewis, 531 A.2d 206; Richard Reid Rogers v. Guaranty Trust Company of New York (288 US 123-151(S.C.(U.S.) Carl Zeiss Stiftung v. Rayner and Keller Ltd. (1966)2 ALL ER 536; Gaudiya Mission & Ors. v. Brahmachari & Ors. 1998 Ch. 341; Kuwait Airways Corp. V. Iraqi Airways Co. (No. 3) 2002 UKHL 19; Lazard Brothers & Co. v. Midland Bank Ltd. (1933) AC 289 at 297; Cheshire and North's Private International Law (12th Edn.) p.174].

This general rule regarding determination of status by the lex incorporationis will not apply when the issue relates to the discharge of obligations or assertion of rights by a corporation in another country whether such obligation is imposed by or right arises under statute or contract which is governed by the law of such other country.
The distinction is brought out in the case of National Bank of Greece and Athens S.A. and Metliss: 58 A.C. 509. A Greek Bank had issued mortgage bonds to persons in U.K. in pounds sterling. The bonds were guaranteed by another bank. Both the issuing bank and the guaranteeing bank were incorporated under Greek Law. The guaranteeing bank was subsequently amalgamated with a third Greek company and a new company was formed. A bond holder sued the new company seeking to enforce the guarantee. Under the Greek law there was a moratorium imposed on payments by the new bank. It was held by the House of Lords that the status of the new bank would be decided according to the law of the domicile of the original guarantor company and the new company which was Greek law. It was found that according to Greek law the new company succeeded to the assets and liabilities of the guarantor company. The question then was whether the English Courts would recognize the moratorium as debarring the bond holder from enforcing his rights under the bond. It was not in dispute that the bond was governed by English law. It was held that the evidence of the effect of the Greek moratorium in Greece was therefore irrelevant.
"This was an English debt and the obligation

to pay it, its quantum and the date of payment, are all governed by English law which will not give effect to the Greek Moratorium." (pg. 529)

The claim of the bond holder was accordingly allowed. Consequent upon the decision of the House of Lords a new Greek law was passed retrospectively modifying the terms of the amalgamation, so that the new bank was no longer required to discharge the original guarantor's dues to the bond holders. The House of Lords in Adams vs. National Bank of Greece S.A. 1961 A.C. 255, 282 again rejected the new bank's submission that it was not liable on the bonds. It was held that what was sought to be enforced was not "a Greek right, but a right arising under a contract under English law". It was held:

"It is well settled that English law cannot give effect to a foreign law which discharges an English liability to pay money in England and the appellants' contracts were English contracts under which they were to be paid in England".

Although the law of the Bank's domicile determined its status as a debtor, it could not determine the liability of the defendant on a contract subject expressly to English law. The relationship of Technip to Coflexip whether one of control or not is really a question of their status. The applicable law would therefore be the law of their domicil, namely, French law. Having determined their status according to French Law, the next question as to their obligation under the Indian Law vis a vis SEAMEC would have to be governed exclusively by Indian law (in this case the Act and the Regulations). SAT's error lay in not differentiating between the two issues of status and the obligation by reason of the status and in seeking to cover both under a single system of law.
But, contend the respondents, the French law even if applicable, was contrary to the Act and Regulations and is thereby contrary to the public policy underlying the Indian enactment. In our view, domestic public policy which can justify a disregard of the applicable foreign law must relate to basic principles of morality and justice and the foreign law amount to a flagrant or gross breach of such principles.

As far back as in 1918, Cardozo J, speaking for the Bench in Fannie F. Loucks et al., as Administrators of the Estate of Everett A. Loucks, Deceased, Appellants, V. Standard Oil Company of New York, Respondent. 224 N.Y.99; said:

"The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal".

Similarly the House of Lords in Kuwait Airways Corp. v. Iraqi Airways Co.(No.3): (2002) UKHL 19 said:

"\005\005Exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court".

In other words the power to disregard a provision in the foreign law must be exercised exceptionally and with the greatest circumspection "when to do otherwise would affront basic principles of justice and fairness which the courts seek to apply in the administration of justice in this country. Gross infringements of human rights are one instance, and an important instance, of such provision". (ibid)

The issue in the latter case arose out of an Iraqi law which confiscated Kuwaiti aeroplanes and vested them in the Iraqi Airlines Corporation. The Court refused to recognize the Iraqi law because:

"a legislative act by a foreign state which is an flagrant breach of clearly established rules of international law ought not to be recognized by the courts of this country as forming part of the lex situs of that state".

This Court in Renusagar Power Co. Ltd. Vs. General Electric Co. 1994 Supp.(1) SCC 644 while construing Section 7 (1) (b) of the Foreign Awards Act which allows Indian Courts the power to refuse to enforce foreign awards which are contrary to public policy, has held that:-

"\005.defence of public policy which is permissible under Section 7(1) (b) (ii) should be construed narrowly\005. It must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. (pg.682)

In that case it had been argued by the appellant that the expression "public policy" in Section 7(1) (b) (ii) of the Act has to be construed in a liberal sense and not narrowly and it would include within its ambit disregard of the provisions of the Foreign Exchange Regulations Act, 1973. This Court accepted the argument on the ground that the provisions contained in FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India as envisaged in Section 7(1)(b)(ii) of the Act. However on the facts it was held that the enforcement of the award would not involve violation of any of the provisions of FERA and for that reason it not would be contrary to public policy of India so as to render the award unenforceable in view of Section 7(1)(b)(ii) of that Act. In a sense all statutes enacted by Parliament or the States can be said to be part of Indian public policy. But to discard a foreign law only because it is contrary to an Indian statute would defeat the basis of private international law to which India undisputedly subscribes.[See: Surinder Kaur Sandhu v Harbax Singh Sandhu (supra)]. To quote again from the Kuwait Airways case (supra).

"The laws of the other country may have adopted solutions, or even basic principles, rejected by the law of the forum country. These differences do not in themselves furnish reasons why the forum court should decline to apply the foreign law. On the contrary, the existence of differences is the very reason why it may be appropriate for the forum court to have recourse to the foreign law. If the laws of all countries were uniform

there would be no 'conflict' of laws".

The Bhagwati Committee Report on Takeovers (1997) which was prepared after examining the principles and practices and the regulatory framework governing takeovers in as many as fourteen countries noted that while the practice and procedures vary from country to country, the principles and the concerns- cardinal among which are equality of opportunity to all shareholders, protection of minority interest, transparency and fairness-have remained more or less common. The aim of French Law like Indian Law is to ensure that all parties to a public tender offer respect the principles of shareholder equality, market transparency and integrity, fair trading and fair competition. All this is culled from the opinions of the experts relied upon by all the parties. Under Section 45 of the Evidence Act, 1972, the Court can take the admitted position into consideration in order to form an opinion as to the text of the relevant French law. [See: De Beeche and Ors. Vs. The South American Stores (Gath and Chaves Limited and the Chilian Stores Gath and Chaves Limited) 1934 LR A.C. 148]

Undisputedly, in April 2000, the relevant law in force in France was Article 355-1 of the French Companies Act 1966 (LOI No.66-537, du 24 Juillet 1966, Sur les Societas Commerciales). It read as follows:-

"I. A company shall be regarded as controlling another:

(1) When it directly or indirectly holds a percentage of the capital conferring on it the majority of the voting rights in the general meetings of this company;

(2) When it alone holds the majority of the voting rights in this company pursuant to an agreement concluded with other members or shareholders and which is not contrary to the interests of the company;

(3) When it actually makes, due to the voting rights which it holds, the decisions in the general meetings of this company.

"II. It shall be presumed to exercise this control when it directly or indirectly holds a percentage of the voting rights higher than 40% and when no other member or

shareholder directly or indirectly holds a percentage higher than its own."

Sub-clauses (1) and (2) of Clause (1) of Article 355-1, deal with de jure acquisition of control by one company of another. The third sub-clause deals with de facto control. All three sub-sections deal with the position of a company acting

on its own. Clause II of Article 355.1 provided for statutory presumption of control when the acquiring company directly or indirectly held more than 40% of the voting rights and was the largest shareholder.
In May, 2001, Article 355-1 of the 1996 Act was amended to include the following Sub-section:-

"III. In order to apply the same sections of this chapter, two or more persons acting in concert shall be regarded as jointly controlling another when they actually make, under an agreement to implement a common policy, the decisions taken in the general meetings of the latter."

Clause III provides for control being acquired by persons acting in concert under an agreement to implement a common policy if they actually take decisions in furtherance of such agreement at general meetings of the "controlled company". The entire Article was incorporated in the French Commercial Code as Article L 233-3 in 2002.
The second relevant Article is Article 356-1. Roughly translated it provided:-
"Any individual or legal entity, acting alone or in concert, that becomes the owner of a number of shares representing more than one twentieth, one tenth, one fifth, one third, one half or two thirds of the capital or the voting rights of a company having its registered office in France and whose shares are admitted for trading on a regulated market or are traded on the over-the- counter market as stated in article 34 of law no.96-597 dated July 2nd, 1996 relating to the modernization of financial activities, shall inform such company in a period of 15 days as of the crossing upwards of the threshold of the total number of shares that such person holds.

The owner also informs the Conceil de Marches Financiers (CMF) within a period of 5 trading days as of the day of crossing upwards of the threshold when the shares are listed on a regulated market. The CMF makes public such information.

The notifications referred to in the two proceeding paragraphs are also to be provided in the same period when the equity interest falls below the thresholds provided in the first paragraph.

The owner who is required to disclose the information in accordance with the first paragraph above specifies the number of securities that it possesses giving access to the capital of the company as well as the voting rights attached thereto.

The by-laws of the company can provide for additional disclosure obligations relating to holdings of fractions of the capital or voting rights that are less than the one-twentieth

mentioned in the preceding paragraph. The obligation relates to holding each such fraction, which cannot be less than 0.5% of the capital or voting rights.

In the event of a failure to satisfy the disclosure obligations mentioned in the preceding paragraph, the by-laws of the company may stipulate that the provisions of the first two paragraphs of article 356-4 shall apply only if requested and duly recorded in the minutes of the general meeting, by one or more shareholders holding a fraction of the capital or the voting rights of the issuing company at least equal to the smallest fraction of the capital held which must be declared. This percentage shall nevertheless not be greater than 5%.

The owner who is required to disclose according to the first paragraph must declare upon exceeding the thresholds of one tenth or one fifth of the capital or the voting rights the objectives that he intends to pursue over the coming twelve months. This declaration shall state whether the acquirer is acting alone or in concert, whether he intends to make further purchases, whether he intends to acquire control of the company, and whether he intends to seek his appointment or that of one or more other persons to the board of directors, management committee or surveillance committee. It is sent to the company whose shares have been acquired and to the CMF who publishes it, and to the Commission des Operations de Bourse (COB), within fifteen trading days of surpassing the threshold. Should those intentions change, and this is admissible only in the event of substantial changes in the environment, the financial situation or the shareholder base of the persons concerned, a new declaration must be made and published in the same way.

The last paragraph of Section 356-I provides that, upon crossing the thresholds of 10% of share capital or voting rights in the target company, and again of 20% of share capital or voting rights in the target company, the purchaser is required to file with the Stock Exchange Authorities, with copy to the target company, a Statement of Intent, specifying (i) whether the purchaser acts alone or in concert with third parties, (ii) whether the purchaser intends to continue acquiring shares in the target company, (iii) whether the purchaser intends to acquire control of the target company and (iv), whether the purchaser intends to seek representation on the Board of Directors of the target.
The Section has been re-enacted as L 233-7 of the 2002, French Commercial Code.
Therefore, French Law at the relevant time provided that a company holds control over another (the Target Company) in the following cases.
(i) the Company holds, directly or indirectly, title to a number of shares granting to such holder a majority of voting rights in the general meetings of

shareholders of the Target.

(ii) the Company holds the majority of voting rights in the Target pursuant to an agreement with a third party or as a result of acting in concert with such third party.

(iii) the Company in effect determines, through the votes it holds, the decisions taken in the general meetings of shareholders of the Target (what is known as 'de facto' control).

The Stock Exchange authorities in France are the Conceil des Marches Financiers or the French Financial Markets Authority (referred to as the 'CMF') and the Commission des Operations de Bourse viz. the French Stock Exchange Authority (referred to as the 'COB'). They are regulatory bodies with powers of inspection, supervision and disciplinary action. The supervisory role of CMF is itself subject to the Commission Bancaire or the French Banking Commission and the COB. Article 1 and Article 2 of Decree No. 96-869 dated October 3, 1996 also provide for appeals from the decisions taken by the CMF before the Paris Courts of Appeals. Article 33 of Chapter-I Title-II provides that the CMF shall set forth the Rules governing public offers including the conditions under which a natural or legal person, acting alone or in concert within the meaning of Article 356-1-3 of Law 66-37 dated July 24, 1966 aforesaid and who directly or indirectly comes to hold a certain percentage of the capital stock or voting rights in a company whose shares are traded on a regulated market to forthwith inform the CMF and file a proposed tender offer with a view to acquiring a specified quantity of the company's securities. If this filing is not made, the securities that the person holds in excess of the aforementioned percentage of the capital stock or voting rights shall be deprived of voting rights.

The provisions in French law relating to takeovers as we see them are, therefore, rigorous. The Indian law is no less rigorous and differs only marginally with the French law on the subject.

The three relevant Regulations which were alleged to have been violated by Technip are Regulations 10,11 and 12. Regulations 10,11 and 12 are contained in Chapter III of the Regulations which deals with substantial acquisition of shares or voting rights in and acquisition of control over a listed company:-

"10. No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights if any, held by him or by persons acting in concert with him), entitle such acquirer or exercise fifteen percent or more of the voting right in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations.

11(1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, not less than 15% not more than 75% of the shares or voting rights in a company, shall acquire either by himself or through or with persons acting in

concert with him, additional shares or voting rights entitling him to exercise more than 2% of the voting rights, in any period of 12 months, unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations.

(2) No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise more than 51% of the voting rights in a company, unless such acquirer makes a public announcement to acquire share of such company in accordance with the Regulations.

Explanation: For the purposes of Regulation 10 and Regulation 11, acquisition shall mean and include;

(b) direct acquisition in a listed company to which the Regulations apply;
(c) indirect acquisition by virtue of acquisition of holding companies, whether listed or unlisted, whether in India or abroad.

12. Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the Regulations.

Explanation.

Where any person or persons has given joint control, such control shall not be deemed to be a change in control so long as the control given is equal as the control given is equal to or less than the control exercises by person(s) presently having control over the company."

The difference between the French law and their regulations relates to the prescribed limits of share holding for control by one company over another. This cannot conceivably make the French law violative of any public policy underlying the Acts and Regulations so as to persuade us to disregard the French Law.

Thus it is the French law which we must apply to decide whether Technip took over the control of Coflexip in April 2000 or July 2001. Incidentally, the opinions of various persons claiming to be experts in French Commercial Law have expressed diametrically opposing views as to whether Technip could be said to have taken control of Coflexip applying the relevant French law, in April 2000. We do not propose to rely upon either of the views expressed as none of them was subjected to cross examination. According to Technip their expert affirmed an affidavit and was offered for cross examination by SEBI and that SEBI declined to do so. But the affidavit unlike the opinion expressed by the same firm earlier to Technip on 15th November 2001 did not express any opinion as

to whether Technip did or did not acquire control of Coflexip either in April or July 2001 but only gave evidence of the applicable French law and highlighted the consequences of failure to comply with the statement of intent which was required to be filed with CMF. Therefore, ultimately it is for this Court to resolve the conflict by looking at the admitted text of the French law and the material on record to decide the proper application of the provisions. According to the show cause notice issued by SEBI to Technip, Technip had acquired control of Coflexip by acting in concert with ISIS. Technip has said that in April, 2000 there was no concept of acting in concert under French Law since the extended meaning of 'controlled company' was introduced by amendment to Article 355-1 only in May, 2001. The submission ignores Article 356-1. The concept of a takeover by acting in concert was there in 2000. In fact Article 355-1 of the French Companies Act merely sets out factors determining when a company could be said to hold control over another. It does not, as Article 356.1 does, speak of the method for acquiring such control.

At this stage and before we apply the law to the facts we may note one aspect that has been lost sight of by SAT and that is that irrespective of the status of Coflexip and Technip to each other, in order to trigger Regulations 10 to 12, it would have to be established that the purchase of the 29.68% shares by Technip in Coflexip was with the object of taking control of SEAMEC. That is what the relevant Regulations provide and also what is alleged in the Show Cause Notice issued to Technip by SEBI. The allegation in the show cause notice was that Technip, the acquirer and ISIS as a shareholder of Coflexip acted in concert to acquire control over Coflexip and therefore SEAMEC treating SEAMEC as the target company. The emphasis is on the target company whether the case is of direct or indirect acquisition under the Regulations. Thus Regulation 2(b) of the Regulations defines 'acquirer' as meaning any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company and 'acquirer' also means a person who acquire or agrees to acquire control over the target company either by himself or with any person acting in concert with the acquirer.

The word 'control' has been defined in Regulation 2(c) in the following manner:

"control" shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner".

The other definition which is relevant is Regulation 2(e) defining the phrase 'person acting in concert'. We are concerned with sub section (i) which says that it comprises "persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company". Finally is the definition of the word 'target company' in Regulation 2(o) as meaning a listed company whose shares or voting rights or

control is directly or indirectly acquired or is being acquired. If the Indian Law were to be invoked in April 2000 it would have to be shown that Technip acquired or agreed to acquire the right to control SEAMEC (in this case the alleged target company) either by itself or acting in concert with any other shareholder or Coflexip.

According to the Bhagwati Committee Report to be acting in concert with an acquirer, persons must fulfill certain 'bright line' tests. They must have commonality of objectives and a community of interest and their act of acquiring the shares or voting rights in company must serve this common objective. The commonality of objective which should be established between the acquirer and a shareholder in order to trigger off Regulations 10,11 and 12 with respect to a subsidiary company is referred to as the "chain principle" in the Report which enunciates that an offer should be made to the shareholders of such a target company if

(a) the shareholding in the second company constitutes a substantial part of the assets of the first company; or

(b) one of the main purposes of acquiring control of the first company was to secure control of the second company.

This is evident also reading the definitions of 'acquirer' 'control' 'acting in concert' and 'target company' in Regulations 2 (b)(c) (e) and (o) together.

A similar position obtains in England where Note 7 to Rule 9.1 of the City Code on Takeovers and Mergers likewise provides:-

"Occasionally, a person or group of persons requiring statutory control of a company (which need not be a company to which the Code applies) will thereby acquire or consolidate control, as defined in the Code, of a second company because the first company itself holds a controlling block of shares in the second company, or holds shares which, when aggregated with those already held by the person or group, secure or consolidate control of the second company. The Panel will not normally require an offer to be made under this Rule in these circumstances unless either:

a) the shareholding in the second company constitutes a substantial part of the assets of the first company; or

b) one of the main purposes of acquiring control of the first company was to secure control of the second company".

The "second company" both under the 'chain principle' referred to in the Bhagwati Committee Report as well as in the City Code on Takeovers and Mergers is the target company and the first company is the medium or vessel or vehicle for attaining control on the target company. In the present case Coflexip would be the 'first company' and SEAMEC the actual target and the liability to make an exit offer to the shareholders

of SEAMEC would arise only if either one of the two conditions prescribed is fulfilled. It would therefore have to be proved by the shareholders of SEAMEC that Coflexip was taken over (if at all) in April 2000 by Technip with the assistance of ISIS so that control of SEAMEC could be obtained or that Coflexip's shareholding of SEAMEC constituted a substantial part of Coflexip's assets.

The standard of proof required to establish such concert is one of probability and may be established "if having regard to their relation etc., their conduct, and their common interest, that it may be inferred that they must be acting together: evidence of

actual concerted acting is normally difficult to obtain, and is not insisted upon" . While deciding whether a company was one in which the public were substantially interested within the meaning of Section 23A of the Income Tax Act, 1922 this Court said:-

"The test is not whether they have actually acted in concert but whether the circumstances are such that human experience tells us that it can safely be taken that they must be acting together. It is not necessary to state the kind of evidence that will prove such concerted actings. Each case must necessarily be decided on its own facts ".

In Guinness PLC and Distillers Company PLC the question before the Takeover Panel was whether Guinness had acted in concert with Pipetec when Pipetec purchased shares in Distillers Company PLC. Various factors were taken into consideration to conclude that Guinness had acted in concert with Pipetec to get control over Distillers Company. The Panel said :-

"The nature of acting in concert requires that the definition be drawn in deliberately wide terms. It covers an understanding as well as an agreement, and an informal as well as a formal arrangement, which leads to co-operation to purchase shares to acquire control of a company. This is necessary, as such arrangements are often informal, and the understanding may arise from a hint. The understanding may be tacit, and the definition covers situations where the parties act on the basis of a "nod or a wink"\005.. Unless persons declare this agreement or understanding, there is rarely direct evidence of action in concert, and the Panel must draw on its experience and commonsense to determine whether those involved in any dealings have some form of understanding and are acting in co-operation with each other ".

According to the Dictionaire Permanent du Droit des Affairs French law does not make proof of the concerted action dependant upon the existence of a written document. "However, given the serious consequences linked to the existence of a concerted action, only serious presumptions drawn from factual date can lead to a qualification of a concerted action. The mere observation of similarity of behaviours cannot constitute such a proof. Even the common

position of certain shareholders is not necessarily indicative of the existence of a concerted action. Such shareholders may have adopted legitimately a similar position, independently, because of their own strategic interest". (Extract from the 1989 French Securities and Exchange Commission Report).

In this background of the law we may consider briefly the relevant facts.

IFP had promoted Technip and Coflexip in 1958 and 1971 respectively. In 1975 IFP promoted ISIS as a wholly owned subsidiary to hold its investments. It is the admitted position that IFP retained majority control of ISIS until October,2001.

The main shareholders of Technip at all material times were ISIS, Gaz de France and Sogerap (which later came to be known as Fina Total Elf and is hereafter referred to as 'Elf'). They held 11.8%, 10.9% and 6.4% of the shareholding whereas 65.9% of the shareholding was held by the public. In 1994 ISIS, Gaz de France, Elf and Technip entered into an agreement inter alia granting a right of preemption to each other in respect of their respective shareholdings.

The shareholders of Coflexip till April 2000 were ISIS, Elf and Stena (incorporated in the Netherlands), apart from American investors who held 50% of the shareholding. The first three shareholders had entered into a similar shareholders agreement with a right of preemption.

Coflexip through a chain of subsidiaries purchased 49.85% of the shareholding in SEAMEC on 25th October, 1999.

In December, 1999, the Chairman CEO of Coflexip made a proposal to the Chairman/CEO of Technip to examine the merits of a merger between Coflexip and Technip. In January, 2000 Stena intimated that it would not support a merger of Coflexip and Technip as it was not part of Stena's strategy to hold an equity stake in an engineering and construction company.

On 31st March, 2000, Stena offered to sell its shares in Coflexip held by it and its associates J.P. Morgan, being 29.7% of the shareholding of Coflexip, to Technip.

ISIS had three representatives on Coflexip's Board of 11 Directors, who also had two Directors in Technip.

On 7th April, 2000, the Board of Technip approved the deal with Stena to purchase its 29.68% shares in Coflexip. ISIS and Elf abstained from voting as they were shareholders in both Coflexip and Technip.

On 11th April, 2000, several events took place. ISIS wrote a letter to Stena renouncing its preemptive rights under the shareholders agreement in favour of Technip. There is no binding that it would have been financially possible for ISIS to have exercised its preemptive rights given the financial implications particularly the necessity to make a further public offer to purchase the balance shares of Coflexip as it would have crossed the threshold as prescribed under French Law.

On the same date Elf also renounced its preemptive rights under the shareholders agreement in favour of Technip. An agreement was then entered into between Technip and Stena for the acquisition of Stena's 29.68% shares in Coflexip at the rate of Euros 119 per share. Statements of intent were filed by Technip with Stock Exchange Authorities and with Coflexip.

Coflexip in turn wrote a letter to Technip on the same date agreeing not to acquire equity shares in a competing company without prior written consent of Technip.

The declaration required by French law was made to the CMF by Technip on 28th April, 2000 that Technip.

a) did not directly or indirectly hold any other shares in Coflexip;

b) it was not acting in concert with any other and had no plans for any such action;

c) it had no intention to increase its equity stake within 12 months after acquisition;

d) undertaking not to acquire new equity shares in other companies involved in Coflexip's scope of activities except with the prior written approval of Coflexip;

e) agreeing that violation of any of the aforesaid stipulation would entitle Coflexip to claim damages.

This was published by CMF on 4th May, 2000. A similar declaration or statement of intent was given to COB. Both the authorities accepted the declaration and there was no protest to the publication by any member of Coflexip or anyone else for that matter. There is thus no dispute that Technip agreed to acquire 29.68% shares in Coflexip on 11.4.2000. Nor is it disputed that it complied with the requirements of Art 356-1.

Clearly a purchase of 29.68% shares in a company would not by itself give the purchase de jure control of the company under French Law. The acceptance of the statement of intent filed by Technip before the Stock Exchange Authorities would not however be conclusive of the matter. It may be that the Market Authorities agree to the publication of a statement or a notice or a financial publication. It may also be that those professional independent bodies have professionally verified the contents of such communications and have been satisfied with their accuracy. However, there is no adjudicatory process and there was no judicial decision of any authority which we could recognize as a foreign judgment on any principle of judicial comity or conflict of laws. To return to the narration of facts:-

On the same date i.e. 11th April 2000 three appointees of Technip were co-opted on the Board of Coflexip. According to Technip there was in fact no change in the daily management of Coflexip. Coflexip's Board of Directors consisted of eleven Directors, of which Technip's Directors were only three. The President of the Board and the Managing Director continued to be the same. The respondents have argued that there was in fact an effective change in the management. Of the 11 Directors of Coflexip, three belonged to ISIS. Therefore, ISIS and Technip together had a total of six out of the eleven Directors on Coflexip's Board. Additionally, Technip's Directors were appointed to the Strategic Committee as well as the Audit Committee of the Board. The respondents point out that all these appointments were made even before payment of the purchase price of the shares by Technip to Stena. The purchase of shares between Stena and Technip was completed on 19th April, 2000, on which date and Stena's 29.68% shares in Coflexip was registered in favour of Technip. Technip has argued that the effect of the purchase of the Stena's shares was merely a strategic alliance between Coflexip and Technip and Technip did not control Coflexip. On the other hand there was evidence of a possible acquisition of Technip by Coflexip. This position continued till January, 2001 when IFP agreed to sell its entire interest in ISIS to Technip. According to Technip and IFP this was the first time IFP had come into the picture.

In February, 2001 the Chairman of Coflexip expressed his reservation about the proposed sale of ISIS's shares in

Coflexip to Technip. Coflexip continued to act independently of Technip with regard to various policy decisions. Technip offered to purchase the balance shares of Coflexip at a premium of 25% on 3rd July, 2001. The price offered by Technip was not immediately acceptable to the Board of Coflexip. A Special Committee was set up to consider whether the price was adequate. ISIS voted in favour of setting up of the committee. As it happened, the Special Committee recommended a higher price, so that the Technip had to improve its offer to purchase Coflexip's share. These facts according to Technip showed that ISIS was not acting in concert with Technip.

Technip has said that the purchase of 100% shareholding was duly approved by Regulatory Authorities of USA, Finland and Netherlands and on 11th October, 2001 Technip acquired control of 99.04% of the share capital of ISIS and 98.36% of the share capital of Coflexip. Coflexip's shares were registered in the name of Technip on 19th October, 2001.

We are of the opinion that having regard to the balance of probabilities there was no evidence that Technip obtained de facto control of Coflexip in April 2000. The evidence would rather suggest that it was nothing more than a strategic alliance. The mere fact that in two Annual General Meetings of Coflexip Technip was in the majority cannot by itself establish its control over Coflexip. It may be that in a company with a large and dispersed membership, a comparatively small proportion of the total shares, if held in one hand, may enable actual control to be exercised. But the obtaining of a majority in a shareholders' meeting may have been the outcome of absenteeism or some other factor. It is not as if Technip exerted its influence over any policy matters of Coflexip. Besides this was not the case in the Show Cause Notice. The allegation was that ISIS and Technip acted in concert in the matter of purchase of Stena's shares in Coflexip by Technip. That has not been established.

Technip's explanation for ISIS not exercising its preemptive right under the shareholders agreement is plausible. The explanation was that ISIS was a subsidiary of IFP and it is not the policy of IFP to manage companies in which it invests. ISIS therefore was not interested in acquiring further shares in Coflexip nor did it have the financial means to do so. ISIS was a Government controlled company and was holding shares on behalf of IFP, a Government body, and its failure to exercise its rights of preemption could be a Government decision should IFP have caused ISIS to proceed with such a huge investment, it could have been in breach of the relevant EU regulations as intervention of the State in Private Industry.

In any event there is no evidence that Technip acquired Coflexip if it at all did so in April 2000, so as to gain control of SEAMEC. Yet that is the aspect with which we are concerned.

SEBI said that on the material before it, it was difficult to hold that IFP along with ISIS was acting in concert with Technip for the purpose of acquiring shares/voting rights/control of Coflexip so as to indirectly acquire control over SEAMEC in April 2000. But in view of the admitted takeover of Coflexip by Technip in July 2001 directed the publication of an offer to SEAMEC's taking that as the effective date.

In reversing this judgment, SAT held that ISIS and Technip had acted in concert to gain control over Coflexip in April, 2000. We are of the opinion that the approach of the SAT was entirely wrong. For the purposes of determining Technip's obligations under the Regulation it should have addressed itself as SEBI had done to the question whether ISIS and Technip were acting in concert to obtain control over the target company, namely, SEAMEC. In other words, did the shareholding of Coflexip in SEAMEC constitute a substantial

part of the assets of Coflexip, or was the main purpose of acquiring control of Coflexip the acquisition of control over SEAMEC?

According to the SAT, the reasons which established that ISIS and Technip were acting in concert in April 2000 were as follows:

(i) "\005 there was shareholders agreement dated 2.11.1994 between Stena group on one side and ISIS and others on the other to control Coflexip\005\005\005\005.It is also noted

that ISIS group had not exercised its preemptive right to block Technip's entry."

(ii)"\005\005(it was clear)from the shareholding pattern of Technip, Coflexip and ISIS that IFP was having common interest."

(iii)"Whether these companies belonged to one "group" or that they were companies under the same management" may be in dispute. But no one can dispute that they belonged to one family in the real sense\005\005..ISIS and IFP had one lineage - the common parenthood in IFP\005\005\005. \005\005\005.Gaz de France and Total Fina Elf- both associated with IFP family."

(iv)" Coflexip and Technip are having interest in the Petroleum sector, IPF could be interested in these 2 entities joining together and forming a combine and that having regard to their common interest, it may be inferred that they must be acting together."

(v)"Technip Chairman's letter that they were ultimately planning to take over Coflexip and they "were on this merger, passing through a number of necessary stages: which included "the acquisition of 30% of Coflexip in April 2000\005"

(vi) "ISIS has its nominees on the Board of Technip. ISIS has its nominees of Coflexip. \005\005\005.\005.Thus in a 11 member Board of Coflexip Technip ISIS combine had a majority."

(vii)"From the material available on record there is every justification to infer that the plan was to combine Technip and Coflexip and form a strong combined entity to be a business leader in the petroleum sector and that it was with this end in view Technip in which ISIS had interest acquired Coflexip in which also ISIS had interest."

(viii)"\005 total holding of these two companies were around 47% sufficient enough to control Coflexip in view of its 48% shares widely held by public. It is also noted that in fact in the annual general

meeting of Coflexip held in May 2000 and May 2001(before the merger effected on 3.7.2001) Technip had exercised 54% and 57% of the voting rights, that this itself is indicative of the fact that Technip had more than 50% voting rights at its command, even though on record it was holding only 29%."

(ix)"ISIS objecting to the setting up of a committee to revise the offer price, is but natural as an increase in offer price was to its advantage and by doing so it was not in any way acting against its objective of helping Technip to acquire control over Coflexip. Adding a little more financial burden on Technip by asking for higher offer price can not be viewed as a hostile action from ISIS or as evidence of non co-operation."

(x)"Technip possibly wanted to strengthen its position dejure as well with 99% and they acquired shares to that level through the public offer in July, 2001. In my view the acquisition raising the shareholding to

99% in Coflexip was the final act whereas the process started on 12.4.2000."

(xi)" \005in my view Technip had decided to take over control of Coflexip and to achieve the said objective, acquired 29.68% shares of Coflexip on 12.4.2000. the evidence before me leads to the conclusion that ISIS had acted in concert for the said purpose."

We need not go into the reasons separately although we must say that we disapprove of the introduction of the concept of a joint family into corporate law when the statutory provisions, particularly Regulation 2(e) exhaustively defines what would amount to 'acting in concert'. More particularly when Regulation 3(1)(e)(i) provides that:-

(1) "Nothing contained in Regulations 10,11 and 12 of Regulations 10,11 and 12 these Regulations shall apply to;

(e) Interse transfer of shares amongst:-

(i) group companies, coming within the definition of group as defined in the Monopolies and Restrictive Trade Practices Act, 1969 (25 of 1969)".

The 'IFP family' if any would be nothing more than such a group. Furthermore, it is abundantly clear that even the name of SEAMEC does not feature in any of the several reasons put forward by SAT whereas that, as we must emphasise, should have been the primary point of focus. The respondents have sought to adduce further evidence before us to the effect that SEAMEC was in the contemplation of Technip when it purchased Stena's shares in Coflexip. There is no question of allowing any fresh evidence to be adduced at this stage.

Besides we do not think that any evidence of mere contemplation of SEAMEC's assets would do. That should have been the principal objective in order to trigger the Regulations as it was not the respondent's case before SAT that the shareholding of Coflexip in SEAMEC constituted a substantial part of the assets of Coflexip nor has SAT so found. SEBI had noted that the takeover of SEAMEC was only an incidental fall out of the control of Coflexip and that SEAMEC formed a 'small and insignificant portion of the total business of Coflexip' contributing merely 2% of the total asset base of Coflexip as on December, 2000. The finding was not reversed by SAT.

We are thus of the opinion that SEBI's order must prevail and the order of SAT must be set aside. The other issues as to the rate of interest, the adjustment of dividend and the identification of the shareholders of SEAMEC would arise only if SAT's order had been upheld. As we are allowing the appeals of both Technip and IFP it is unnecessary to determine them.

Consequent upon our decision to allow the appeals the bank guarantees furnished by Technip to secure the difference in amounts between the share prices which would be payable by Technip had SAT's view prevailed must be and are hereby discharged.

The appeals are for these reasons allowed without costs.