2024 INSC 850

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 31 OF 2023

M/S ARIF AZIM CO. LTD. **...PETITIONER(S)**

VERSUS

M/S MICROMAX INFORMATICS FZE **...RESPONDENT(S)**

J U D G M E N T

Signature Not Verified
Digitally signed by SANJAY KUMAR
Date: 2024.11.07 16:54:38 IST
Reason:

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts: -

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1. The present petition has been filed under Section 11 sub-section (6)(a) read with Section 11 sub-section (12)(a) of the Arbitration and Conciliation Act, 1996 (for short, the "**Act, 1996**") seeking a referral of the disputes that have arisen between the parties to arbitration and consequent appointment of an arbitrator by this Court in terms of clauses 26 and 27 of the Consumer Distributorship Agreement respectively dated 09.11.2010 (hereinafter referred to as the "**Agreement**") entered into between the petitioner and the respondent herein.

2. The petitioner, 'M/s Arif Azim Co. Ltd.', is a company based in Afghanistan, having its registered office at 1st Floor, Zarnigar Hotel, Mohammed Jan Khan Watt, Kabul, Afghanistan and is *inter-alia* engaged in the business of distribution of handsets which are manufactured by the respondent no. 1 in the territory of Kabul, Afghanistan. The respondent no. 1, 'M/s Micromax Informatics FZE' is a Free Zone Establishment company incorporated under the laws of United Arab Emirates having its office at 28, Shed No. 18, Technology Park, Free Trade Zone, Ras-Al-Khaimah, UAE. Whereas, the respondent no. 2, 'M/s Micromax India' is a public limited company incorporated in India having its registered office at Block A, Plot No. 21/14, Naraina Industrial Area, Phase-II New Delhi. The respondent no. 1 company is a wholly owned subsidiary of the respondent no. 2 company with the same Board Members in both the companies, and together they are engaged in the

business of manufacturing, importing and supplying various mobile handsets under its brand name 'Micromax' worldwide. We may clarify at the outset, that the respondent no. 2 company herein is a non-signatory to the arbitration agreement in respect of which the present Section 11 petition has been filed.

A. FACTUAL MATRIX

3. The petitioner herein and the respondent no. 1 company entered into a Consumer Distributorship Agreement dated 09.11.2010 (for short, the "**Distributorship Agreement**") *inter-alia* for the distribution of handsets which are manufactured by the respondent no. 1 and the same was executed by the parties in Kabul, Afghanistan. As per the terms of the aforesaid agreement, the petitioner herein became the authorized distributor of the respondent's products including mobile handsets and was granted a non-exclusive right to market and distribute the same under its own account in the territory of Afghanistan as allotted and delineated under the said agreement.

4. Before proceeding further, it would be apposite to first highlight some of the salient features of the aforesaid Distributorship Agreement which are relevant to the case at hand. Under the terms of the aforesaid Distributorship Agreement, it is stipulated that all payments shall be made by the distributor

in full before the physical delivery of the products, and it further specifies that the mode of such payment shall be through a letter of credit (L/C). The Distributorship Agreement further provides that no additions or modifications made to the aforesaid agreement shall be binding unless it is in writing and is duly signed by the authorized representatives of the parties. Additionally, the said Distributorship Agreement defines a 'supplementary agreement' to mean and include any further agreement or agreements that may be executed by the parties including such other terms and conditions that are not incorporated in the main agreement. The relevant clauses read as under: -

> ***"1. DEFINITIONS***
> *In this agreement, unless the context otherwise requires, the following expressions have the following meanings:*
>
> *xxx* *xxx* *xxx*
>
> ***Supplementary Agreement:*** *means the further agreement(s) as may be executed between the parties including such other commercial terms and conditions which are not incorporated in this Agreement.*
>
> *xxx* *xxx* *xxx*
>
> ***5. DISTRIBUTOR'S OBLIGATIONS***
> *xxx* *xxx* *xxx*
> ***5.4 Payment***
> *5.4.1 Invoice and Payment Terms. Unless credit terms have been expressly agreed by Micromax, payment for the Products shall be made through irrevocable and confirmed letter of credit (L/C) in full before physical delivery of the Products to Distributor (or Distributor's customer). Time for payment is of the essence and Micromax reserves the right to charge interest on sums overdue,*

on a day to day basis at the rate of 24% per annum. Such interest shall be payable on demand.

5.4.2. Payments not received by Micromax as per the payment terms shall constitute a default by the Distributor. Micromax shall have the right to invoke the bank guarantee furnished by the Distributor for securing payments in case of default. Distributor agrees not to seek any adjustments, set-off of any other amounts outstanding to Micromax in respect of the bank guarantee nor counter claim from Micromax.

xxx xxx xxx

23. ENTIRE AGREEMENT

23.1 This Agreement together with the Conditions of Sale, supersedes all prior agreements, arrangements, understandings and undertakings between the parties and constitutes the entire agreement between the parties relating to the subject matter hereof.

23.2 No addition to or modification of any provision of this Agreement shall be binding upon the parties unless made by a written instrument signed by a duly authorized representative of each of the parties.

23.3 Distributor hereby warrants to Micromax that it has not been induced to enter into the Agreement by any prior oral or written representations (whether innocently or negligently made) except as specifically contained in the Agreement."

5. Furthermore, the aforesaid Distributorship Agreement *inter-alia* stipulates that the said agreement will be governed by the laws of UAE and subject to the non-exclusive jurisdiction of the Dubai Courts. The said Distributorship Agreement also contains an arbitration clause which states that any dispute or difference pertaining to the said agreement or arising therefrom shall be resolved through arbitration alone, the venue of the arbitration shall be

Dubai, UAE and that the arbitration shall be subject to the UAE Arbitration & Conciliation rules. The relevant clauses are reproduced hereunder: -

> *"**26. DISPUTE RESOLUTION***
> *In the event of any dispute or difference arising out of the Agreement, its validity, applicability, then the same shall be referred to the arbitration. The arbitration shall be subject to UAE Arbitration and Conciliation rules made there under. The venue of arbitration shall be Dubai, UAE.*
>
> ***27. LAW AND JURISDICTION***
> *This Agreement shall be governed by and construed in accordance with the laws of UAE and shall be subject to the non-exclusive jurisdiction of the Dubai Courts."*

6. Pursuant to the aforesaid Distributorship Agreement several transactions took place between the petitioner and the respondents for the purchase and distribution of mobile handsets. It is the case of the petitioner that the business practice mutually followed by the parties for undertaking these transactions involved the petitioner first placing a purchase order, after which the respondents would raise an invoice, and the requisite payment would then be made either to the respondent no. 1 or the respondent no. 2 as per the instructions of the respondents.

7. Around March, 2012 the petitioner herein placed an order for purchase of 8000 (approx..) mobile handsets from the respondent no. 1. Against this purchase the respondent no. 1 raised a proforma invoice to the tune of $109,500/- (USD One hundred nine thousand five hundred) and as per the

invoice the said amount was payable by the petitioner to the respondent no. 1 company.

8. According to the petitioner, although the terms of the Distributorship Agreement mandated that both the delivery of handsets and the payments thereof be processed through the respondent no. 1 yet, interestingly, this time the handsets and the corresponding invoices for the same were issued by the respondent no. 2 instead. The respondent no. 2 supplied only 7300 handsets to the petitioner and issued a new invoice for the same amount i.e., $109,500/- (USD One hundred nine thousand five hundred), which was now payable directly to the respondent no. 2 instead.

9. It is the case of the petitioner herein that as on 12.05.2012, the petitioner company had a credit balance of $190,625/- (USD One hundred ninety six hundred twenty-five) with the respondent no. 1 company i.e., the running account of the respondent no. 1 reflected a sum of $190,625/- (USD One hundred ninety six hundred twenty-five) in favour of the petitioner company as outstanding credit. However, the respondent no. 2 whilst raising the invoice for supply of the aforesaid 7300 handsets, ignored the abovementioned credit balance of the petitioner and demanded payment, to be made directly to the respondent no. 2 in India.

10. Thereafter some email correspondences were exchanged between the petitioner company and one Shri Vikas Jain, the executive director of the respondent no. 1 and the business director of the respondent no. 2 company for the adjustment of the abovementioned credit balance lying in favour of the petitioner against the outstanding invoices. On 23.10.2012, the respondents *vide* an email informed the petitioner company that since the accounts of Micromax Informatics FZE & M/s Micromax India are separate, the credit balance lying in its favour in the respondent no. 1's account cannot be directly adjusted for the invoices raised by the respondent no. 2. It further stated that, the petitioner company should first make payment to the respondent no. 2 towards the invoices that have been raised, and thereafter, the respondent no. 1 company would remit the outstanding credit balance to the petitioner. The relevant portion of the respondent's email dated 23.10.2012 is reproduced below: -

> *"Dt. 23.10.2012*
> *Subject: Account Statement*
>
> *Dear Sir,*
> *Kindly note that from Arif Azim we need to receive USD 109500 for sales made in MMX India and Need to pay USD 190625 in respect of advance received respect of sale to be made in FZE. Both these accounts are of separate Cos.*
>
> *Hence we should first receive payment of MMX India account; then let Micromax FZE pay to Arif.*
>
> *Regards, Anita"*

11. On 15.01.2013, the petitioner made the requisite payment of $109,500/- (USD One hundred nine thousand five hundred), which was now payable directly to the respondent no. 2 towards the aforesaid invoices raised by it. Thereafter, it appears from the materials on record, that over a period of time many more transactions took place between the petitioner company and respondent no. 1 *inter-alia* for purchase and supply of various products whereby the credit balance lying in the respondent no.1's account in favour of the petitioner company now came out to be $88,425/- (USD Eighty-Eight Thousand Four Hundred Twenty-Five).

12. On 09.09.2019, the petitioner *vide* an email again requested Shri Vikas Jain to confirm the credit balance lying in its favour with the respondent no. 1 and to undertake steps to transfer the same to the petitioner's account. In response, Shri Vikas Jain directed the finance department of respondent no. 1 to confirm the credit balance lying with it in favour of the petitioner and further requested the petitioner to furnish its statement of account so that the two books of account may be reconciled for making the requisite payment.

13. Thereafter, several more correspondences took place between the petitioner and Shri Vikas Jain on behalf of the respondents through emails and texts *inter-alia* requesting for various documents and statements for the purpose of ascertaining the outstanding credit balance in favour of the petitioner. On

06.05.2022, the petitioner furnished the necessary statement of accounts to the respondents and requested for an update on the payment.

14. It appears from the material on record, that over the next 2-months several requests were made by the petitioner to the respondents for furnishing the outstanding credit balance in its favour and to make the requisite payment; however, the same were to no avail. Shri Vikas Jain, on behalf of the respondents' time to time expressed his difficulty in ascertaining the exact figure for the outstanding credit balance, *inter-alia* citing that it was a very old running account and that the accountants responsible for maintaining the records had left the company, and thus requested for more time to do the needful.

15. On 14.09.2022, the petitioner sent a notice for invocation of arbitration under Section 21 of the Act, 1996, in terms of Clause 26 of the Distributorship Agreement to the respondent nos. 1 & 2. Vide the notice, the petitioner raised a claim of $88,425/- (USD Eighty-Eight Thousand Four Hundred Twenty-Five) with interest @24% p.a. as per the terms agreed in the Distributorship Agreement and nominated Shri. V. Giri and Shri. R. Basant, Senior Advocate as its nominee arbitrators and called upon the respondents to accordingly appoint an arbitrator either from the above suggested panel or any other suitable name within 28-days from receipt of the said notice.

16. It is material to note that in the aforesaid notice of invocation dated 14.09.2022, the petitioner further alluded that in the Distributorship Agreement more particularly Clause 27 the parties had not designated a specific court to the exclusion of all other courts to adjudicate the dispute, thus no exclusive jurisdiction had been conferred by the parties upon any particular court. It further stated that, as the cause of action had concurrently both in Afghanistan and India, the petitioner expressed its preference to resolve the dispute through arbitration administered under the jurisdiction of the courts in India.

17. Since no reply to the aforesaid notice of invocation of arbitration was elicited from either of the respondents, the present petition came to be filed by the petitioner on 19.04.2023 before this Court for seeking appointment of an arbitrator under Section 11(6) of the Act, 1996 in other words due to the failure on part of the respondents in nominating an arbitrator as per the mutually agreed upon terms and procedure under the aforesaid Distributorship Agreement.

B. SUBMISSIONS OF THE PARTIES

i. <u>Submissions on behalf of the Petitioner</u>.

18. Mr. R. Sathish the learned counsel appearing for the petitioner in his written submissions has stated thus: -

"WRITTEN SUBMISSIONS MADE BY R. SATHISH, ADVOCATE ON BEHALF OF THE PETITIONER

1. The Dispute Resolution clause defined the venue of arbitration as Dubai and the curial law as UAE Arbitration and Conciliation Rules and the jurisdiction clause, suggestive of control, does not confer jurisdiction to Dubai courts to the exclusion of all other courts.

2. For international arbitrations, the concept of seat assumes greater significance as it acts as the indicator for both curial law as well as supervisory jurisdiction whereas venue is not associated with the jurisdiction.

3. The agreement, in so far the identity of Dubai courts, for jurisdiction, suffers from vagueness in that, it doesn't specify which of the courts of Dubai and the laws governing thereunder, shall have jurisdiction to hear the disputes among three different courts constituted, namely
(i) The UAE Courts (the language is not English)
(ii) Dubai International Financial Court (DIFC-Common law)
(iii) Abu Dhabi Global court (ADGM-common law).
Therefore, at the threshold, it is submitted that the 2nd part of clause 27 dealing with jurisdiction that "…….and shall be subject to the non-exclusive jurisdiction of the Dubai courts" is a valid opting out of the exclusive jurisdiction of Dubai courts, as the parties have intended to avoid impracticable and inconvenient process and procedures as a result of subsequent amendments and modifications to the agreement involving 3countries, Afghanistan, India and UAE. This submission is discernible from a plain reading of various clauses in the subject of the agreement as well as the conduct of the parties including a non -signatory to the agreement.

4. As held in Bharat Aluminium vs Kaiser Aluminium Technical Services Inc. 2012 (9)SCC 522, at para 99, that, it would be a matter of construction of the individual agreement to decide, whether the designated foreign "seat" would be read as in fact only providing a "venue"/"place" where the hearings would be held; and in the present case on hand, given the choice of UAE Arbitration and Conciliation Rules as being the curial law and the venue at Dubai, will not dictate what the governing or controlling law would be when the 2nd part of clause 27

reiterates the parties' autonomy in deciding/choosing the seat by expressly stating its intention that "This agreement shall be subject to the non-exclusive jurisdiction of the Dubai Courts". Regard being to other clauses in the agreement, this clause has been incorporated to avoid conflicts related to the jurisdictions of courts and confer jurisdiction on other courts too, it is submitted. (Emphasis supplied).

5. At the outset, be it kindly noted that, the relied upon decision by the respondent to oust the jurisdiction of Indian courts in Mankatsu Impex Private Limited vs Airvisual Limited 2010 (5) SCC 399 is misplaced as it was a case of exclusive jurisdiction in terms conferred by the agreement. A clause therein like Cl.17.2 which provides "the place of arbitration shall be Hong Kong", in addition to, also providing that "all disputes arising out of the MoU shall be referred to and finally resolved and administered in Hong Kong"...is conspicuously absent in the subject agreement. Still on a matter of law, emphasising the Party's autonomy, Mankatsu Impex held;

Quote "20. It is well-settled that "seat of arbitration" and "venue of arbitration" cannot be used interchangeably. It has also been established that mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties." Unquote

*5**. Proposition***

(i) Where in substance, the parties agreed that the local laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing law or controlling law will be. (Bharath Aluminium vs Kaiser Aluminium Technical services 2012 (9) SCC552 at page 613 Para 107.

(ii) When an agreement expressly designates the venue without any express reference to seat, given the various factors connecting the dispute to India in a contract executed in Kabul and wholly to be performed in India and Afghanistan and the absence of any foreign factors connecting the dispute to Dubai with its vagueness and uncertainty of what the parties had intended by their reference to the "Dubai courts", the burden is

on the respondents to establish that its terms constituted Dubai as the seat of arbitration.

SUBMISSIONS ON BEHALF OF THE PETITIONER

6. The petitioner submits that the laws of the country with which the subject agreement was most closely connected are India and Afghanistan. The recitals in Sub- Cl. 22.4 (Interpretation Clause) of the Distribution agreement and the conduct of the parties reveal that the parties had attached very little importance to its local subsidiary FZE within the "Micromax Group" of companies that ultimately signed the Distributor agreement. It was formed to take advantage of concessional benefits in a free economic zone. The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties.

7. A plain conjoint reading of the following 6 clauses in the agreement with a supplementary agreement executed by Micromax Inc. (Non-signatory parent Co.) in the form of two emails forming its integral part (Pages 37 to 54) would negate the contra plea of the respondents as to the jurisdiction of Indian courts.

(i) Clause 26 Clause 27 deals with Dispute Resolution; law and jurisdiction.

Quote.."Cl. 26. Dispute Resolution In the event of any dispute or difference arising out of the agreement, its validity, applicability, then the same shall be referred to arbitration. The arbitration shall be subject to UAE Arbitration and conciliation rules made there under. The venue of arbitration shall be Dubai, UAE.

Cl. 27. Law and jurisdiction

This shall be governed by and construed in accordance with the laws of UAE and shall be subject to the non-exclusive jurisdiction of the Dubai Courts." ....Unquote

8. Petitioner submits that Clause 27 preserved the party's autonomy in allowing the concerned parties to choose their seat/jurisdiction. The second part of jurisdictional Cl. 27 discloses the intention - an agreement by itself- to opt out of Dubai court's jurisdiction and this is what the parties had intended by their reference to "the non-exclusive jurisdiction of the Dubai Courts. Since the parties had agreed not to confer exclusive jurisdiction to courts in Dubai, neither of the parties

to the agreement construed the arbitration clause as designating courts in Dubai as the seat of arbitration.
Vide PASL vs GE 2021 SCC online 226.

9. DETERMINATION OF THE SEAT BASED ON THE CLOSEST CONNECTION TEST IF IT IS UNCLEAR THAT THE SEAT HAS BEEN DESIGNATED EITHER BY THE PARTIES.
The petitioner submits that the laws of the country with which the subject agreement was most closely connected is India. However, there is no stipulation whatsoever in the subject agreement about the supervisory power over the arbitration proceedings. In Enercon (India) Limited and others v. Enercon GMBH and another (2014) 5 SCC 1, the arbitration clause provided London as the venue and not the seat. The Court pointed out various factors connecting the dispute to India and the absence of any foreign factors connecting the dispute to England. Supreme Court held that "the location of the Seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. It was further held that the Seat normally carries with it the choice of that country's arbitration/curial law". In the present case, the parties have only agreed on Dubai as a "Venue" of arbitration and not the juridical seat of the arbitration. If Dubai is treated as seat of the arbitration, ipso jure, local laws will be applied. So much so, the stipulation regarding the governing law of the agreement -Laws of UAE - contained in the first part of Cl. 27 will not dictate, what the governing or controlling law would be, whereas the second part applies to both the substantive law and curial law, did not concede an exclusive jurisdiction to Dubai courts. Therefore on a matter of construction, Dubai cannot be the seat of Arbitration.

10. In Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd. and Ors., (2017) 7 SCC 678 followed by M/s Emkay Global Financial Services Ltd. v. Girdhar Sondhi reiterated that "seat" in the context of arbitration proceedings is akin to an exclusive jurisdiction clause and would not vest the courts with seat if exclusive jurisdiction is not conceded.

11. Submission is that "supervisory control over the arbitral proceedings" is not exclusively given to Dubai courts by the 2nd part of Clause 27 and the party's autonomy is thus preserved.

*12. **2nd submission**. The Bi-party Agreement executed between the petitioner and a foreign company in Kabul was altered by invoking the Group of Companies doctrine by a non-signatory to the agreement. In terms, the agreement has become a tri-partite agreement where a non-signatory to the original agreement directed the petitioner to make a direct payment of $109500 to India by changing the original invoice raised by a party to the agreement. Submission is, 2nd part of Cl.27 envisages a jurisdictional situation as had happened subsequently by the conduct of parties.*

12.1 A jurisdiction clause is suggestive of control. In the context of this particular case, the Dubai Courts would have no real control or supervisory jurisdiction over the arbitral process, in as much as, this supplementary agreement further reiterates the party's autonomy of choosing the juridical seat of Arbitration in consonance with 2nd part of Cl.27 in which case, a reference to the "venue" cannot be treated as the "seat" of the arbitration.

12.2 Micromax Inc.'s insistence on payment in India by altering the original terms is a <u>non-contest/in terrorem clause or a condition precedent</u> which again substantiates the Party's autonomy lest the respondents would have terminated the subsisting distribution agreement for violating the supplementary agreement by giving written notice under clause 15. Equally, clause 16.7 (Effect of termination), obliges respondents to pay forthwith any amount standing to the credit of distributor, should they choose to terminate the agreement. Respondents have perpetrated a continuous wrong.

12.3. The petitioner's submission in this regard are fortified by a plain reading of the following clauses r/w the supplementary agreement, in the form of emails forming an integral part of the Agreement u/s 7 (4) (b) and <u>Mc. Dermott International vs Burn Standard</u> (2006 (11) SCC 181)

Clause 1. Definitions.

Quote "Products: means goods but not spare or replacement parts supplied by Micromax (but not necessarily manufactured, assembled or, in the case of software, owned by Micromax Inc. or any of its subsidiary companies or affiliates) to the Distributor. ..Unquote (emphasis supplied)

Quote "Supplementary agreements: means further agreement(s) as may be executed between the parties including such other

commercial terms and conditions which are not incorporated in this agreement".

Cl. 5.4 Payment

……..

Cl. 5.4.3 *"Micromax shall be entitled to deduct from any monies due to the Distributor any sums owed by Distributor to Micromax……"Unquote*

Cl. 22 Interpretation

……

"22.4. *references to Micromax shall be deemed to include reference to affiliates of Micromax where the context so requires".*

24. Assignment *- Micromax may assign or otherwise transfer this Agreement or any of its rights and obligations hereunder whether in whole or in part" ……..Unquote.*

12.5 Acting upon the supplementary terms, the petitioner made a payment of $109500 by SWIFT to Micromax Inc. in Bombay. (page 64 Annexure P7). In juxtaposition, curated details of the two emails originating from Sh. Vikash Jain (deponent in the counter) who is the Executive Director of Micromax FZE (at page 62 Annex P-4) and an authorised representative of Micromax Inc. is given below:

Date: 11 December, 2012

Dear Ali Bhai,

Please find attached your debit balance to Micromax, India. Also sending a credit balance statement from FZE, Would appreciate if you can make the mentioned payment to India and we remit credit balance to you back from FZE.

Thanks

Vikas" *(Page 52 of the Paper book)*

"Date 11 December, 2012

Dear Ali Bhai,

This is about $190K that we owe back to your firm from FZE. Would appreciate if we can resolve the accounts at the fastest.

Thanks

Vikas" *(Page 54 of the Paper book)*

Final submission- Mere expression of venue of arbitration will not entail that the parties intended it to be the seat. The intention of the parties- keeping intact Party autonomy - has to be determined from other clauses of the Agreement and the conduct of the parties."

ii. <u>Submissions on behalf of the Respondent</u>.

19. Mr. Mudit Sharma the learned counsel appearing for the petitioner in his written submissions has stated thus: -

<u>"WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENTS "M/S MICROMAX FZE (UAE)"</u>

I. PETITION NOT MAINTAINABLE AND THIS HON'BLE COURT LACKS JURISDICTION:

1. It is humbly submitted that this Hon'ble Court does not have the jurisdiction to either entertain the Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the Act") and / or appoint an Arbitrator in terms of the Arbitration Agreement between the Petitioner and the Respondent i.e. M/s. Micromax Informatics FZE(UAE) for neither the arbitration seat is India nor the parties ever envisaged the redressal of disputes through arbitration in terms of Indian laws and in India as per the Distributor Agreement dated 09.11.2010 between the ***Parties (Ann. P-1 @ Pg. 37 (PDF Pg. 66 of Petition)*** *(hereinafter referred to as "**Distributor Agreement**")*

*2. Moreover, admittedly, both the Petitioner (an entity of Afghanistan) and the Respondent, M/s. Micromax Informatics FZE(UAE) (an entity of UAE) are body corporates incorporated, registered and situated outside India (**Please see description of Parties, Ann. P-1 @Pg.37 (PDF Pg. 66) & 50 (PDF Pg. 79) of Petition**) and the Distributor Agreement admittedly was entered and executed between the parties outside India.*

*3. The Territory defined under the Distributor Agreement is Afghanistan (**Please see Ann. P1 Clause 1 -Territory @Pg.50 (PDF Pg. 66) read with the Schedule @ PDF Pg. 79 of Petition**). All business transactions are outside India.*

*4. Clause 26 (**Distributor Agreement, Ann. P-1 @ Pg. 49 (Pdf Pg. 78 of Petition**) of the Distributor Agreement provides for dispute resolution at Dubai, UAE under UAE Arbitration and Conciliation rules.*
*5. Clause 27 of the **Distributor Agreement (Ann. P-1, @Pg. 49 (Pdf Pg. 78 of Petition**) specifically provides that governing law to be exclusively of UAE.*

6. There is clear intent between the parties that Dubai shall be the seat of Arbitration and the venue in the present case has to be construed as seat of arbitration.

7. Section 2 (2) of the Act with respect to the applicability of Part-1 stipulate that Section 11 of the Act has no application to arbitrations seated outside India. Thus, this a an arbitration seated outside India and Part-1 of the Act would have no applicability.

8. An "International Commercial Arbitration" in terms of Section 2(f) to attract the applicability of Section 11 for exercise of power of appointment of Arbitrator by this Hon'ble Court mandates that at least one party should be an individual or a body corporate in India and the arbitration agreement should compulsorily provide for seat of Arbitration in India. Admittedly neither of the Parties are individuals or body corporates in India nor the Distributor Agreement provides for arbitration seat in India.

9. Reliance is placed on the two Judgements of this Hon'ble Court:
*i. **"Mankatsu Impex Private Limited Vs. Airvisual Ltd., (2020) 5 SCC 399"**; relevant Paras being Para 20 at Page 406; Para 25 at Page 408 and Para 26 and Para 27 at Page 409 and*
*ii. "**BGS SGS Soma JV Vs. NHPC Limited, (2020) 4 SCC 234**"; relevant Paras being Paras 61, 62 and 67 at are Page 242).*

10. It is further submitted that the use of "non-exclusive jurisdiction of Dubai Courts" in Distributor Agreement did not ever envisage jurisdiction of Courts outside UAE and in no manner whatsoever the "Courts of India". The word "non-exclusive: has been used in the context that jurisdiction of other Courts in UAE may not be restricted.

11. Invoking of the provisions under section 11 of the Act; would tantamount to re-writing the terms of the Distributor Agreement and taking away parties' autonomy which is the sole principle on which arbitration is based. As such; this Hon'ble Court cannot exercise its powers of appointment of Arbitrator to the present alleged dispute between the Parties.

12. Given that the Governing law and jurisdiction is of Courts in UAE and Arbitration is stipulated to be under UAE Arbitration and Conciliation rules ; this Hon'ble Court has no jurisdiction to either entertain the present Petition and apply any provisions of the Arbitration Act or any other Indian law.

II. NO PRIVITY OF CONTRACT BETWEEN PETITIONER AND MICROMAX INFORMATICS LTD. (INDIA):

*13. Admittedly the Distributor Agreement dated 09.11.2010 containing the Arbitration Clause provides for dispute resolution between the Petitioner and Respondent, M/s. Micromax Informatics FZE **(UAE)**, an entity of UAE. Admittedly, Micromax Informatics Ltd. (India) is neither a party nor a signatory to the Distributor Agreement. Micromax Informatics Ltd. **(India)** is not even a Respondent to the present proceedings but has been sought to be impleaded by an Interim Application No.110064/2023. Thus, there exists no privity of contract between the Petitioner and the Indian Entity, Micromax Informatics Ltd. **(India)**.*

*14. Further, the Petitioner has sought to rely on communications between the Parties to establish privity of contract and assert Micromax Informatics Ltd. **(India)** as party to dispute. But in an email dated 23.12.2012 **(Ann. P-2 @Pg.52 (PDF Pg. 81) of Petition**); Micromax Informatics Ltd. (India) while making reference to M/s. Micromax Informatics FZE **(UAE)** and Micromax Informatics Ltd. **(India)** has explicitly and categorically stated that the accounts of both companies are separate and there are sums receivable in Micromax Informatics Ltd. (India).*

15. Even assuming though not admitting that the transactions with Micromax India were under the Distributor Agreement then too, the terms of the Distributor Agreement with respect to

territory, rules of arbitration, governing law, jurisdiction and other terms of agreement would remain same and cannot be considered to be varied. The Distributor Agreement in Clause 23.2 ***(Ann. P-1 at Pg. 48) (PDF Pg 77)*** *stipulates that no addition to or modification of any provision of this agreement shall be binding unless made by a written instrument signed by duly authorized representative of each of the parties.*

In view of the above, it is most respectfully prayed that the present Petition may kindly be dismissed."

C. ISSUES FOR DETERMINATION

20. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions of law fall for our consideration: -

I. Whether, the present petition under Section 11 of the Act, 1996 is maintainable?

II. Whether, Part I of the Act, 1996 is applicable to the arbitration clause contained in the Distributorship Agreement dated 09.11.2010?

III. What is the seat of the arbitration in terms of the Distributorship Agreement dated 09.11.2010?

D. ANALYSIS

21. It is necessary to delve into the history of the law of arbitration in India. Prior to the 1996 Act, three Acts governed the law of Arbitration in India — the Arbitration (Protocol and Convention) Act, 1937, which gave effect to the Geneva Convention, the Arbitration Act, 1940 (for short, the "**Act, 1940**"),

which dealt with domestic awards, and the Foreign Awards (Recognition and Enforcement) Act, 1961 (for short, the "**Act, 1961**") which gave effect to the New York Convention of 1958 and which dealt with challenges to awards made which were foreign awards. Thereafter, in order to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules, the Act, 1996 was enacted.

22. The Act, 1996 is divided into four parts. Part I which is headed "Arbitration"; Part II which is headed "Enforcement of Certain Foreign Awards"; Part III which is headed "Conciliation" and Part IV being "Supplementary Provisions".

23. There was no concept of "juridical seat" or "situs of arbitration" under the Act, 1940, rather the jurisdiction of courts was determined on the basis of the definition of "court" under Section 2(c) of the Act, 1940 which was defined as any civil court having jurisdiction to decide questions forming the subject-matter of the reference to arbitration if the same had been the subject-matter of a suit.

24. Under the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21-6-1985) which forms the basis of the Act, 1996, the concept of 'place of arbitration' or 'seat of arbitration' was encompassed in Article 20 which reads as under: -

> ***"20. Place of arbitration***.—
>
> *(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties.*
>
> *(2) Notwithstanding the provisions of paragraph (1) of this article, the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents."*

25. When the Act, 1996 was enacted replacing the earlier Act, 1940, a new provision of Section 20 was inserted by the legislature which was absent in the earlier Act, 1940. The said provision reads as under: -

> *"**20. Place of arbitration***.—
>
> *(1) The parties are free to agree on the place of arbitration.*
>
> *(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties.*
>
> *(3) Notwithstanding sub-section (1) or sub-section (2), the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any*

place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

26. A cursory reading of the aforesaid provision would reveal that it is a replication of Article 20 of the UNCITRAL Model Law whereunder, the place or seat of arbitration has been given pride and primacy. However, despite the aforesaid inclusion, the legislature retained the definition of "court" from the Act, 1940 in Section 2(e) of the Act, 1996 with a minor tweak that instead of any civil court of the lowest grade competent to entertain the subject-matter, now only the principal civil court or the High Court of original jurisdiction which is competent to entertain the subject-matter shall have jurisdiction. Due to this, the concept of juridical seat of the arbitral proceedings and its interrelationship with the jurisdiction of courts in respect of arbitral proceedings the Doctrine of Concurrent Jurisdiction emerged in the Indian Arbitration Regime.

i. <u>The Notional Doctrine of Concurrent Jurisdiction and Applicability of Part I of the Arbitration & Conciliation Act, 1996</u>.

27. It can thus be seen from the discussion in the preceding paragraphs of this judgment that the scheme of the Act, 1996 is bifurcated into distinct parts being Part I, II, III & IV. Each of these parts delineates a unique scheme that

deals with different aspects of arbitration or conciliation as the case may be. Section 11 of the Act, 1996 which *inter-alia* empowers this Court to appoint an arbitrator in case of an international commercial arbitration is contained in Part I of the said Act. Section 2(2) in Part I of the Act, 1996 expressly provides that this part (sic Part I and by extension the provisions thereunder) shall apply where the place of arbitration is in India. The said provision is reproduced hereunder: -

> *"**2. Definitions.***
>
> *xxx xxx xxx*
>
> *(2) This Part shall apply where the place of arbitration is in India.*
>
> *Provided that subject to an agreement to the contrary the provisions of section 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act."*

28. Thus, a cursory reading of the aforesaid provision makes it clear that the exercise of power to appoint an arbitrator under Section 11 of the Act, 1996 is dependent upon whether the said Part is applicable in the first place or not. As such it would be apposite to first understand the scope of Part I of the Act, 1996, more particularly the import of the expression "*where the place of arbitration is in India*" occurring in Section 2(2) of the Act and in which

situations is the said Part applicable in order to enable this Court to exercise its powers under Section 11 to appoint an arbitrator.

a. Pre-BALCO Regime.

29. In **National Thermal Power Corporation v. Singer Company & Ors.** reported in **(1992) 3 SCC 551**, although the award which was the subject-matter of the said case had been challenged under the then Act, 1940 yet the observations made therein by this Court in regards the applicability of the Act, 1940 are significant insofar as the Act, 1996 is concerned. In the aforesaid case, the question before this Court was whether the Act, 1940 was applicable to the arbitration agreement between the parties therein. This Court held as follows: -

(i) **First,** it held that the choice of law governing the arbitration agreement i.e., the *lex arbitri* would determine which system of law would be applicable. It observed that since the arbitration agreement therein was to be governed by Indian laws, the Act, 1940 would be applicable to such arbitration proceedings. The relevant observations read as under: -

> *"2. The National Thermal Power Corporation (the 'NTPC') appeals from the judgment of the Delhi High Court in FAO (OS) No. 102 of 1990 dismissing the NTPC's application filed under Sections 14, 30 and 33 of the Arbitration Act, 1940 (No. X of 1940) to set aside an*

interim award made at London by a tribunal constituted by the International Court of Arbitration of the International Chamber of Commerce (the "ICC Court") in terms of the contract made at New Delhi between the NTPC and the respondent — the Singer Company (the 'singer') for the supply of equipment, erection and commissioning of certain works in India. The High Court held that the award was not governed by the Arbitration Act, 1940; the arbitration agreement on which the award was made was not governed by the law of India; the award fell within the ambit of the Foreign Awards (Recognition and Enforcement) Act, 1961 (Act 45 of 1961) (the 'Foreign Awards Act'); London being the seat of arbitration, English courts alone had jurisdiction to set aside the award; and, the Delhi High Court had no jurisdiction to entertain the application filed under the Arbitration Act, 1940.

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47. The decisions relied on by counsel for the Singer do not support his contention that the mere fact of London being the place of arbitration excluded the operation of the Arbitration Act, 1940 and the jurisdiction of the courts in India. In Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd. the parties had not expressly stated which law was to govern their contract. On an analysis of the various factors, the House of Lords held that in the absence of any choice of the law governing arbitration proceedings, those proceedings were to be considered to be governed by the law of the place in which the arbitration was held, namely, Scotland because it was that system of law which was most closely connected with the proceedings. Various links with Scotland, which was the place of performance of the contract, unmistakably showed that the arbitral proceedings were to be governed by the law of Scotland, although the majority of the learned Law Lords (Lords Reid and Wilberforce dissenting on the point) held that, taking into account certain other factors, the contract was governed by English law. That case is no authority for the proposition that, even where the proper law of the contract is expressly stated by the parties, and in the absence of any contrary indication, a different law governed arbitration. The observations contained in that judgment do not

support the contention urged on behalf of the Singer that merely because London was designated to be the place of arbitration, the law which governed arbitration was different from the law expressly chosen by the parties as the proper law of the contract.

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51. In sum, it may be stated that the law expressly chosen by the parties in respect of all matters arising under their contract, which must necessarily include the agreement contained in the arbitration clause, being Indian law and the exclusive jurisdiction of the courts in Delhi having been expressly recognised by the parties to the contract in all matters arising under it, and the contract being most intimately associated with India, the proper law of arbitration and the competent courts are both exclusively Indian [...]

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54. The Delhi High Court was wrong in treating the award in question as a foreign award. The Foreign Awards Act has no application to the award by reason of the specific exclusion contained in Section 9 of that Act. The award is governed by the laws in force in India, including the Arbitration Act, 1940. Accordingly, we set aside the impugned judgment of the Delhi High Court and direct that Court to consider the appellant's application on the merits in regard to which we express no views whatsoever. The appeal is allowed in the above terms. We do not, however, make any order as to costs."

(Emphasis supplied)

(ii) **Secondly,** the Court held that where the parties have agreed to two distinct choices of law, one governing the arbitration agreement and the other governing the arbitration proceedings i.e., both *lex arbitri* and *lex curiae*, then the appropriate courts under both the laws will have concurrent jurisdiction in respect of the matters governed by

their respective system of law. Thus, where the parties have agreed that the arbitration agreement would be governed by the Indian Laws whereas the arbitration proceedings would be conducted in accordance with the English Laws, then in such cases two different courts will have concurrent jurisdiction in respect of matters as agreed upon by the parties i.e., the competent English Courts will have jurisdiction in respect of procedural matters concerning the conduct of arbitration while the competent courts in India will have jurisdiction over all matters pertaining to and arising out of the arbitration agreement. The relevant observations read as under: -

> *"26. Whereas, as stated above, the proper law of arbitration (i.e., the substantive law governing arbitration) determines the validity, effect and interpretation of the arbitration agreement, the arbitration proceedings are conducted, in the absence of any agreement to the contrary, in accordance with the law of the country in which the arbitration is held. On the other hand, if the parties have specifically chosen the law governing the conduct and procedure of arbitration, the arbitration proceedings will be conducted in accordance with that law so long as it is not contrary to the public policy or the mandatory requirements of the law of the country in which the arbitration is held. If no such choice has been made by the parties, expressly or by necessary implication, the procedural aspect of the conduct of arbitration (as distinguished from the substantive agreement to arbitrate) will be determined by the law of the place or seat of arbitration. Where, however, the parties have, as in the instant case, stipulated that the arbitration between them will be conducted in accordance with the ICC Rules, those rules, being in many respects self-contained or self-regulating and constituting a contractual code of procedure, will govern the conduct of*

> *the arbitration, except insofar as they conflict with the mandatory requirements of the proper law of arbitration, or of the procedural law of the seat of arbitration. [See the observation of Kerr, LJ. In Bank Mellat v. Helliniki Techniki SA. See also Craig, Park and Paulsson, International Chamber of Commerce Arbitration, 2nd edn. (1990).] To such an extent the appropriate courts of the seat of arbitration, which in the present case are the competent English courts, will have jurisdiction in respect of procedural matters concerning the conduct of arbitration. But the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement. [See Mustil & Boyd, Commercial Arbitration, 2nd edn.; Allen Redfern and Martin Hunter, Law & Practice of International Commercial Arbitration, 1986; Russel on Arbitration, 20th edn. (1982); Cheshire & North's Private International Law, 11th edn. (1987).]"*
>
> (Emphasis supplied)

30. Thus, this Court for the first time in **NTPC** (supra) laid down the Doctrine of Concurrent jurisdiction in arbitration albeit in a limited sense inasmuch as the exercise of concurrent jurisdiction by two different but competent courts was limited only to matters of procedure and conduct of arbitration, and that the exercise of jurisdiction by courts at the seat or situs of arbitration over the arbitration agreement and its ancillaries was still regarded to be an exclusive jurisdiction.

31. The applicability of the Act, 1940 was again looked into by this Court in ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd. & Ors.*** reported in **(1998) 1 SCC 305.** The said decision is in three-parts: -

(i) ***First,*** it was held that as per Section 47 of the Act, 1940 the provisions of the said Act applies to all arbitrations and to all proceedings thereunder, and as such where the agreement to arbitrate is governed by the laws of India, then the said Act would be applicable. The relevant observations read as under: -

> *"16. The law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement. Having regard to the clear terms of clause 17 of the contract between the appellant and the first respondent, we are in no doubt that the law governing the contract and the law governing the rights and obligations of the parties arising from their agreement to arbitrate, and, in particular, their obligation to submit disputes to arbitration and to honour the award, are governed by the law of India; nor is there any dispute in this behalf. Section 47 of the Indian Arbitration Act, 1940, reads thus:*
>
> > *"47. Act to apply to all arbitrations.— Subject to the provisions of Section 46, and save insofar as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:*
> >
> > *Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any court before which the suit is pending."*

> *17. [...] By reason of Section 9(b), the 1961 Act does not apply to any award made on an arbitration agreement governed by the law of India. The 1961 Act, therefore, does not apply to the arbitration agreement between the appellant and the first respondent. The 1940 Act applies to it and, by reason of Section 14(2) thereof, the courts in India are entitled to receive the award made by the second respondent. We must add in the interests of completeness that it is not the case of the appellant that the High Court at Bombay lacked the territorial jurisdiction to do so."*
>
> (Emphasis supplied)

(ii) ***Secondly,*** it reiterated that, where the parties have chosen both the law governing the arbitration agreement i.e., *lex arbitri* and the law governing the arbitrator's procedure and conduct thereof i.e., the curial law, it would confer concurrent jurisdiction whereby the competent courts under the curial law will have jurisdiction to administer the procedure of arbitration and the competent courts under the law governing the arbitration agreement will have jurisdiction to administer the performance of such agreement and the arbitrability of the dispute including the enforcement or setting aside of an award pursuant to such agreement. It further observed that the court administering the curial law will only have the jurisdiction to administer the conduct of such arbitration or reference. As soon as the arbitration concludes the curial law ceases and with it the jurisdiction of the courts to administer it ceases as well. The relevant observations read as under: -

> *"11. The conclusion that we reach is that the curial law operates during the continuance of the proceedings before the arbitrator to govern the procedure and conduct thereof. The courts administering the curial law have the authority to entertain applications by parties to arbitrations being conducted within their jurisdiction for the purpose of ensuring that the procedure that is adopted in the proceedings before the arbitrator conforms to the requirements of the curial law and for reliefs incidental thereto. Such authority of the courts administering the curial law ceases when the proceedings before the arbitrator are concluded."*
>
> (Emphasis supplied)

(iii) ***Lastly,*** this court added that, when it comes to the courts administering the law governing the arbitration agreement / the reference to arbitration, they will continue to exercise concurrent jurisdiction when it comes to the performance of the arbitration agreement even if the arbitration has concluded inasmuch as it is competent to first apply the *lex arbitri* to see if the dispute is arbitrable and then to apply the curial law to see how the reference ought to be conducted in order to give effect to the award. The relevant observations read as under: -

> *"12. The proceedings before the arbitrator commence when he enters upon the reference and conclude with the making of the award. As the work by Mustill and Boyd aforementioned puts it, with the making of a valid award the arbitrator's authority, powers and duties in the reference come to an end and he is "functus officio" (p. 404). The arbitrator is not obliged by law to file his award in court but he may be asked by the party seeking to enforce the award to do so. The need to file an award in court arises only if it is required to be enforced, and the need to challenge it arises if it is being enforced. The enforcement process is subsequent to and independent*

> *of the proceedings before the arbitrator. It is not governed by the curial or procedural law that governed the procedure that the arbitrator followed in the conduct of the arbitration.*
>
> *xxx*
>
> *15. We think that our conclusion that the curial law does not apply to the filing of an award in court must, accordingly, hold good. We find support for the conclusion in the extracts from Mustill and Boyd which we have quoted earlier. Where the law governing the conduct of the reference is different from the law governing the underlying arbitration agreement, the court looks to the arbitration agreement to see if the dispute is arbitrable, then to the curial law to see how the reference should be conducted, "and then returns to the first law in order to give effect to the resulting award".*
>
> (Emphasis supplied)

32. The aforesaid Doctrine of Concurrent Jurisdiction in Arbitration was further expanded by this Court in ***Bhatia International v. Bulk Trading S.A.*** reported in **(2002) 4 SCC 105**, wherein this Court examined the scope of Section 2(2) *viz-a-viz* Section 2(1)(e) & (f) of the Act, 1996 and held that Part I of the said Act applies to both (i) domestic arbitrations that take place in India and (ii) international commercial arbitrations that take place outside India. It held that unless the arbitration agreement states to the contrary, even if the seat or place of arbitration is outside India, the national courts in India will have concurrent jurisdiction in terms of Section 2(1)(e) along with the courts situated in the seat jurisdiction in terms of the arbitration agreement. The aforesaid decision is in two-parts: -

(i) ***First,*** it held that although Section 2 sub-section (2) of the Act, 1996 says that Part I will apply where the place of arbitration is in India, yet the Act more particularly Section 2(1)(f) makes no distinction between international commercial arbitrations held in India or outside India, thus the courts in India will have jurisdiction in terms of Section 2(1)(e) even in respect of international commercial arbitrations. The relevant observations read as under: -

> *"14. At first blush the arguments of Mr Sen appear very attractive. Undoubtedly sub-section (2) of Section 2 states that Part I is to apply where the place of arbitration is in India. [...]*
>
> *xxx*
>
> *16. A reading of the provisions shows that the said Act applies to arbitrations which are held in India between Indian nationals and to international commercial arbitrations whether held in India or out of India. Section 2(1)(f) defines an international commercial arbitration. The definition makes no distinction between international commercial arbitrations held in India or outside India. An international commercial arbitration may be held in a country which is a signatory to either the New York Convention or the Geneva Convention (hereinafter called "the convention country"). An international commercial arbitration may be held in a non-convention country. The said Act nowhere provides that its provisions are not to apply to international commercial arbitrations which take place in a non-convention country. Admittedly, Part II only applies to arbitrations which take place in a convention country. Mr Sen fairly admitted that Part II would not apply to an international commercial arbitration which takes place in a non-convention country. He also fairly admitted that there would be countries which are not signatories either to the New York Convention or to the Geneva Convention. It is not possible to accept the submission that the said Act makes no provision for international*

commercial arbitrations which take place in a non-convention country.

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20. Section 2(1)(e) defines "court" [...] A court is one which would otherwise have jurisdiction in respect of the subject-matter. The definition does not provide that the courts in India will not have jurisdiction if an international commercial arbitration takes place outside India. Courts in India would have jurisdiction even in respect of an international commercial arbitration. As stated above, an ouster of jurisdiction cannot be implied. An ouster of jurisdiction has to be express."

(Emphasis supplied)

(ii) ***Secondly,*** this Court observed that Section 2 sub-section (2) of the Act, 1996 nowhere specifies that Part I will "only" apply where the place of arbitration is in India, nor does it provide that Part I shall not apply where the place of arbitration is not in India. Thus, by not specifically providing in black and white, whether Part I of the Act, 1996 would apply to international commercial arbitrations held outside India, the legislature's intention appears to be to allow the parties the freedom to choose whether Part I or any of its provisions therein would apply or not by an express or implied agreement. The relevant observations read as under: -

"21. Now let us look at sub-sections (2), (3), (4) and (5) of Section 2. Sub-section (2) of Section 2 provides that Part I would apply where the place of arbitration is in India. To be immediately noted, that it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that Part I will "only" apply where the place of arbitration is in India

(emphasis supplied). Thus the legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The legislature is emphasising that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of sub-section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied.

22. If read in this manner there would be no conflict between Section 1 and Section 2(2). The words "every arbitration" in sub-section (4) of Section 2 and the words "all arbitrations and to all proceedings relating thereto" in sub-section (5) of Section 2 are wide. Sub-sections (4) and (5) of Section 2 are not made subject to sub-section (2) of Section 2. It is significant that sub-section (5) is made subject to sub-section (4) but not to sub-section (2). To accept Mr Sen's submission would necessitate adding words in sub-sections (4) and (5) of Section 2, which the legislature has purposely omitted to add viz. "subject to provision of sub-section (2)". However read in the manner set out hereinabove there would also be no conflict between sub-section (2) of Section 2 and sub-sections (4) and/or (5) of Section 2."

(Emphasis supplied)

Thus, this Court held that Part I of the Act, 1996 would apply to all arbitrations. Where such arbitration is held in India, the provisions of Part I would be compulsorily applicable, and parties may deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India the provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules agreed upon by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply. The operative portion reads as under: -

> *"32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.*
>
> *xxx*
>
> *35. Lastly, it must be stated that the said Act does not appear to be a well-drafted legislation. Therefore the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta cannot be faulted for interpreting it in the manner indicated above. <u>However, in our view a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless</u>*

the parties by agreement, express or implied, exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act. On this interpretation there are no lacunae in the said Act. This interpretation also does not leave a party remediless. Thus such an interpretation has to be preferred to the one adopted by the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta. It will therefore have to be held that the contrary view taken by these High Courts is not good law."

(Emphasis supplied)

33. In yet another decision of this Court in ***Venture Global Engineering v. Satyam Computer Services Ltd.*** reported in **(2008) 4 SCC 190** it was held that Part I of the Act, 1996 and the provisions thereunder would apply to all arbitrations including international commercial arbitrations. It further clarified that although Part II of the Act, 1996 provides a special set of provisions that are applicable only to "foreign awards" passed pursuant to international commercial arbitrations held outside yet this in no manner means that by virtue of the same the Part I would be inapplicable. Part I of the Act, 1996 would apply to all arbitrations outside India including "foreign awards" passed pursuant thereto unless its application has been specifically excluded by the parties. The relevant observations read as under: -

"*19. Mr Nariman heavily relied on para 26 of Bhatia International which we have extracted supra. According to him, the said paragraph contains not only the submissions of Mr Sen, who appeared for Bhatia International therein but also the ultimate conclusion of the Bench. He reiterated that the Court concluded:*

26. … Thus Section 44 (in Chapter I) and Section 53 (in Chapter II) define foreign awards, as being awards covered by arbitrations under the New York

Convention and the Geneva Convention respectively. Part II then contains provisions for enforcement of 'foreign awards' which necessarily would be different. For that reason special provisions for enforcement of foreign awards are made in Part II. To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to 'foreign awards'. The opening words of Sections 45 and 54, which are in Part II, read 'notwithstanding anything contained in Part I'. Such a non obstante clause had to be put in because the provisions of Part I apply to Part II."

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31. On close scrutiny of the materials and the dictum laid down in the three-Judge Bench decision in Bhatia International[20] we agree with the contention of Mr K.K. Venugopal and hold that paras 32 and 35 of Bhatia International[1] make it clear that the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part I. It is also clear that even in the case of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such. The matter, therefore, is concluded by the three-Judge Bench decision in Bhatia International.

32. The learned Senior Counsel for the respondent based on para 26 submitted that in the case of foreign award which was

> *passed outside India is not enforceable in India by invoking the provisions of the Act or CPC. However, after critical analysis of para 26, we are unable to accept the argument of the learned Senior Counsel for the respondent. Paras 26 and 27 start by dealing with the arguments of Mr Sen who argued that Part I is not applicable to foreign awards. It is only in the sentence starting at the bottom of para 26 that the phrase "it must immediately be clarified" that the finding of the Court is rendered. That finding is to the effect that an express or implied agreement of parties can exclude the applicability of Part I. The finding specifically states: "But if not so excluded, the provisions of Part I will also apply to all 'foreign awards'. ..."*
>
> (Emphasis supplied)

34. Thus, the concept of "concurrent jurisdiction" in arbitration in India was further expanded in ***Venture Global*** (supra) inasmuch as by holding Part I of the Act, 1996 to be applicable to foreign awards as-well, this Court clarified that even after the arbitration has concluded and the award has been passed, the courts in India will continue to have jurisdiction in terms of Section 2(e) of the said Act.

35. Similarly, in ***Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd.***, reported in **(2008) 10 SCC 308**, this Court reiterated that Part I of the Act, 1996 applies to both domestic and international arbitrations, notwithstanding the provisions of Section 2(2) of the said Act and irrespective of whether the seat of arbitration is in India or not. It further observed that the courts of the country, whose substantive laws govern the arbitration agreement, are competent courts in respect of all matters arising under the arbitration

agreement, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to the matter of procedure. Thus, an application under Section 11 for appointment of arbitrator in India was held to be maintainable though the seat of arbitration was in England. The relevant observations read as under: -

> *"16. The submissions made on behalf of Bhatia International were accepted by this Court upon a finding that, although, Section 2(2) of the Arbitration and Conciliation Act, 1996, provides that Part I of the Act would apply where the place of arbitration is in India, it did not provide that Part I would not apply where the place of arbitration is not in India. It was also held that it was nowhere provided that Part I of the aforesaid Act would not apply to arbitrations taking place outside India. ...*
>
> *xxx*
>
> ***26.** Referring to the decision in NTPC case [(1992) 3 SCC 551] which had also been referred to by Mr Gupta, Mr Tripathi submitted that in the said decision the views of jurists such as Dicey, Mustill and Boyd and Russell had been reiterated in support of the contention that the overriding principle is that the courts of the country, whose substantive laws govern the arbitration agreement, are competent courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to the matter of procedure. Mr Tripathi submitted that the decision in the aforesaid case supports the proposition that when the parties to the contract, do not express any choice with regard to the law governing the contract or the arbitration agreement in particular, a presumption has to be drawn that the parties intended that the proper law of the contract as well as the law governing the arbitration agreement would be the same as the law of the country which is the seat of arbitration. But when the parties expressly choose the proper law of the contract, as in the instant case, in the absence of a clear intention such law must govern the arbitration agreement also though it is collateral and ancillary to the main contract.*

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36. *Although the matter has been argued at great length and Mr Tripathi has tried to establish that the decision of this Court in Bhatia International case [(2002) 4 SCC 105] is not relevant for a decision in this case, I am unable to accept such contention in the facts and circumstances of the present case. It is no doubt true that it is fairly well settled that when an arbitration agreement is silent as to the law and procedure to be followed in implementing the arbitration agreement, the law governing the said agreement would ordinarily be the same as the law governing the contract itself. The decisions cited by Mr Tripathi and the views of the jurists referred to in NTPC case [(1992) 3 SCC 551] support such a proposition. What, however, distinguishes the various decisions and views of the authorities in this case is the fact that in Bhatia International [(2002) 4 SCC 105] this Court laid down the proposition that notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996, indicating that Part I of the said Act would apply where the place of arbitration is in India, even in respect of international commercial agreements, which are to be governed by the laws of another country, the parties would be entitled to invoke the provisions of Part I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable.*

37. The decision in Bhatia International case [(2002) 4 SCC 105 has been rendered by a Bench of three Judges and governs the scope of the application under consideration, as it clearly lays down that the provisions of Part I of the Arbitration and Conciliation Act, 1996, would be equally applicable to international commercial arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by implication, which is not so in the instant case."

(Emphasis supplied)

b. Post BALCO Regime.

36. The correctness of the decision in ***Bhatia International*** (supra) came under cloud, and the same was ultimately referred to a larger bench, which then culminated into the landmark decision of a 5-Judge Constitution Bench of this Court in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc*** reported in **(2012) 9 SCC 552**.

37. This Court in ***BALCO*** (supra) after a thorough examination of the scheme of the Act, 1996 held that the conclusions reached by this Court in ***Bhatia International*** (supra) are neither supported by the text nor the context of the provisions of Section 1(2) and the proviso thereto or Section 2(2) of the said Act. It held that the applicability of Part I of the Act, 1996 is limited only to arbitrations that take place in India. The said decision is in two-parts: -

(i) **First,** it held that a plain reading of Section 2(2) makes it clear that Part I of the Act, 1996 is limited in its application to arbitrations which take place in India. It observed that although the UNCITRAL Model Law which was the basis for the Act, 1996 has not been boldly adopted, yet it does not mean that the territorial principle envisaged under the Model Law has not been accepted. It held that the Parliament through Section(s) 1(2) and 2(2) of the Act, 1996 has clearly given recognition to the territorial principle that Part I of the said Act will only apply to arbitrations having their place / seat in India. The relevant observations read as under: -

"64. *[...]Thereafter, this Court has given further instances of provisions of the Arbitration Act, 1996, not being in conformity with the Model Law and concluded that "... The Model Law and judgments and literature thereon are, therefore, not a guide to the interpretation of the Act and, especially of Section 11 thereof". The aforesaid position, according to Mr Sorabjee has not been disagreed with by this Court in SBP & Co. We agree with the submission of Mr Sorabjee that the omission of the word "only" in Section 2(2) is not an instance of "casus omissus". It clearly indicates that the Model Law has not been bodily adopted by the Arbitration Act, 1996. But that cannot mean that the territorial principle has not been accepted. We would also agree with Mr Sorabjee that it is not the function of the court to supply the supposed omission, which can only be done by Parliament. In our opinion, legislative surgery is not a judicial option, nor a compulsion, whilst interpreting an Act or a provision in the Act.*

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67. We are unable to accept the submission of the learned counsel for the appellants that the omission of the word "only" from Section 2(2) indicates that applicability of Part I of the Arbitration Act, 1996 is not limited to the arbitrations that take place in India. We are also unable to accept that Section 2(2) would make Part I applicable even to arbitrations which take place outside India. In our opinion, a plain reading of Section 2(2) makes it clear that Part I is limited in its application to arbitrations which take place in India. We are in agreement with the submissions made by the learned counsel for the respondents, and the interveners in support of the respondents, that Parliament by limiting the applicability of Part I to arbitrations which take place in India has expressed a legislative declaration. It has clearly given recognition to the territorial principle. Necessarily therefore, it has enacted that Part I of the Arbitration Act, 1996 applies to arbitrations having their place/seat in India.

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70. [...] Therefore, the Arbitration Act, 1996 consolidates the law on domestic arbitrations by incorporating the provisions to expressly deal with the domestic as well as

international commercial arbitration by taking into account the 1985 Uncitral Model Laws. It is not confined to the New York Convention, which is concerned only with enforcement of certain foreign awards. It is also necessary to appreciate that the Arbitration Act, 1996 seeks to remove the anomalies that existed in the Arbitration Act, 1940 by introducing provisions based on the Uncitral Model Laws, which deals with international commercial arbitrations and also extends it to commercial domestic arbitrations. Uncitral Model Law has unequivocally accepted the territorial principle. Similarly, the Arbitration Act, 1996 has also adopted the territorial principle, thereby limiting the applicability of Part I to arbitrations, which take place in India.

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77. We are of the opinion that the omission of the word "only" in Section 2(2) of the Arbitration Act, 1996 does not detract from the territorial scope of its application as embodied in Article 1(2) of the Model Law. The article merely states that the arbitration law as enacted in a given State shall apply if the arbitration is in the territory of that State. The absence of the word "only" which is found in Article 1(2) of the Model Law, from Section 2(2) of the Arbitration Act, 1996 does not change the content/import of Section 2(2) as limiting the application of Part I of the Arbitration Act, 1996 to arbitrations where the place/seat is in India.

78. For the reasons stated above, we are unable to support the conclusion reached in Bhatia International and Venture Global Engg., that Part I would also apply to arbitrations that do not take place in India.

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81. We quote the above in extenso only to demonstrate that Section 2(2) is not merely stating the obvious. It would not be a repetition of what is already stated in Section 1(2) of the Arbitration Act, 1996 which provides that "it extends to the whole of India". Since the consolidated Arbitration Act, 1996 deals with domestic, commercial and international commercial arbitrators, it was necessary to remove the uncertainty that the Arbitration Act, 1996 could also apply to arbitrations

which do not take place in India. Therefore, Section 2(2) merely reinforces the limits of operation of the Arbitration Act, 1996 to India."

(Emphasis supplied)

(ii) **Secondly,** this court rejected the contention that the Act, 1996 is 'subject-matter centric' and not exclusively 'seat centric'. It observed that the words "subject-matter of the arbitration" and "subject-matter of the suit" occurring in Section 2(1)(e) should not be conflated as the former confers jurisdiction on the basis of cause of action while the latter confers jurisdiction on the basis of "place of arbitration", thus, the Act, 1996 is not merely 'subject-matter centric'. It observed that although the legislature by use of the words "subject-matter of arbitration" in addition to "subject-matter of the suit" under Section 2(1)(e) has conferred jurisdiction to two-courts i.e., the court of jurisdiction over the cause of action and the court of the seat of the arbitration process, yet the expression "subject-matter of suit" occurring in Section 2(1)(e) is confined only to Part I of the Act, 1996, and thus, wherever it is found that the seat or place of arbitration is outside India, Part I would be inapplicable and the jurisdiction then will be "exclusively seat centric". In other words, where the seat of arbitration is outside India, only those courts situated where the 'subject-matter of arbitration' lies i.e., at the place of arbitration will be competent to exercise supervisory jurisdiction over arbitration in

terms of Section 2(1)(e) of the Act, 1996. The relevant observations read as under: -

> *"95. The learned counsel for the appellants have submitted that Section 2(1)(e), Section 20 and Section 28 read with Section 45 and Section 48(1)(e) make it clear that Part I is not limited only to arbitrations which take place in India. That these provisions indicate that the Arbitration Act, 1996 is subject-matter centric and not exclusively seat-centric. That therefore, "seat" is not the "centre of gravity" so far as the Arbitration Act, 1996 is concerned. We are of the considered opinion that the aforesaid provisions have to be interpreted by keeping the principle of territoriality at the forefront. We have earlier observed that Section 2(2) does not make Part I applicable to arbitrations seated or held outside India. In view of the expression used in Section 2(2), the maxim expressum facit cessare tacitum, would not permit by interpretation to hold that Part I would also apply to arbitrations held outside the territory of India. The expression "this Part shall apply where the place of arbitration is in India" necessarily excludes application of Part I to arbitration seated or held outside India. It appears to us that neither of the provisions relied upon by the learned counsel for the appellants would make any section of Part I applicable to arbitration seated outside India. It will be apposite now to consider each of the aforesaid provisions in turn.*
>
> *96. [...] We are of the opinion, the term "subject-matter of the arbitration" cannot be confused with "subject-matter of the suit". The term "subject-matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render*

Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.

97. The definition of Section 2(1)(e) includes "subject-matter of the arbitration" to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist. On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term "court" as a court having jurisdiction over the subject-matter of the award. This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India.

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> ***Only*** *if the agreement of the parties is construed to provide for the "seat"/"place" of arbitration being in India — would Part I of the Arbitration Act, 1996 be applicable. If the agreement is held to provide for a "seat"/"place" outside India, Part I would be inapplicable to the extent inconsistent with the arbitration law of the seat, even if the agreement purports to provide that the Arbitration Act, 1996 shall govern the arbitration proceedings.*
>
> *xxx*
>
> *117. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat/place of arbitration outside India, then the provision that the Arbitration Act, 1996 would govern the arbitration proceedings, would not make Part I of the Arbitration Act, 1996 applicable or enable the Indian courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the English procedural law/curial law. This necessarily follows from the fact that Part I applies only to arbitrations having their seat/place in India."*
>
> (Emphasis supplied)

Thus, this Court held that Part I of the Act, 1996 is only applicable to arbitrations that take place in India and as such the decision of this Court in ***Bhatia International*** (supra) and ***Venture Global*** (supra) are no longer a good law. However, to avoid the chaos that might ensue upon arbitrations agreements and proceedings thereto which are already underway pursuant to the ratio of ***Bhatia International*** (supra) and ***Venture Global*** (supra), this Court held that the law declared by it will only apply prospectively to all arbitration agreements that have been executed on or after 06.09.2012 i.e.,

the date of pronouncement. This Court ultimately summed up its findings with the following conclusions reproduced below: -

> ***"Conclusion***
> *194. In view of the above discussion, we are of the considered opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted the Uncitral Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to international commercial arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in the Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.*
>
> *195. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International and Venture Global Engg. In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign-seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.*
>
> *196. We conclude that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which take place within the territory of India.*
>
> *197. The judgment in Bhatia International was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on*

numerous occasions. In fact, the judgment in Venture Global Engg. has been rendered on 10-1-2008 in terms of the ratio of the decision in Bhatia International. Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter."

(Emphasis supplied)

38. This Court in ***Union of India v. Reliance Industries Ltd. & Ors.*** reported in **(2015) 10 SCC 213** clarified the true import and effect of the decision in ***BALCO*** (supra). It held that although the doctrine of concurrent jurisdiction had been prospectively overruled in ***BALCO*** (supra) yet it would not mean or understood that all arbitration agreements prior to the date of pronouncement of BALCO (supra) will continue to be governed by ***Bhatia International*** (supra). It observed that ***Bhatia International*** (supra) itself had held that Part I of the Act, 1996 will not apply if it has been excluded expressly or by necessary implication. It said that the position of law that emerges from a conjoint reading of ***BALCO*** (supra) and ***Bhatia International*** (supra) is that where the court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, Part I of the Arbitration Act, 1996 would be excluded by necessary implication and the doctrine of concurrent jurisdiction will not apply irrespective of whether the arbitration agreement pre-dates ***BALCO*** (supra) or not. The relevant observations read as under: -

"13. It can be seen that this Court in Singer case did not give effect to the difference between the substantive law of the

contract and the law that governed the arbitration. Therefore, since a construction of Section 9(b) of the Foreign Awards Act led to the aforesaid situation and led to the doctrine of concurrent jurisdiction, the 1996 Act, while enacting Section 9(a) of the repealed Foreign Awards Act, 1961, in Section 51 thereof, was careful enough to omit Section 9(b) of the 1961 Act which, as stated hereinabove, excluded the Foreign Awards Act from applying to any award made on arbitration agreements governed by the law of India.

14. This being the case, the theory of concurrent jurisdiction was expressly given a go-by with the dropping of Section 9(b) of the Foreign Awards Act, while enacting Part II of the Arbitration Act, 1996, which repealed all the three earlier laws and put the law of arbitration into one statute, albeit in four different parts.

15. However, this Court in Bhatia International v. Bulk Trading S.A., resurrected this doctrine of concurrent jurisdiction by holding, in para 32, that even where arbitrations are held outside India, unless the parties agree to exclude the application of Part I of the Arbitration Act, 1996, either expressly or by necessary implication, the courts in India will exercise concurrent jurisdiction with the court in the country in which the foreign award was made. Bhatia International was in the context of a Section 9 application made under Part I of the 1996 Act by the respondent in that case for interim orders to safeguard the assets of the Indian company in case a foreign award was to be executed in India against it. The reductio ad absurdum of this doctrine of concurrent jurisdiction came to be felt in a most poignant form in the judgment of Venture Global Engg. v. Satyam Computer Services Ltd., by which this Court held that a foreign award would also be considered as a domestic award and the challenge procedure provided in Section 34 of Part I of the 1996 Act would therefore apply. This led to a situation where the foreign award could be challenged in the country in which it is made; it could also be challenged under Part I of the 1996 Act in India; and could be refused to be recognised and enforced under Section 48 contained in Part II of the 1996 Act.

16. Given this state of the law, a five-Judge Bench of this Court in BALCO v. Kaiser Aluminium Technical Services Inc.,

overruled both Bhatia International and Venture Global Engg. [...]

17. It will thus be seen that facts like the present case attract the Bhatia International[3] principle of concurrent jurisdiction inasmuch as all arbitration agreements entered into before 12-9-2012, that is, the date of pronouncement of BALCO judgment, will be governed by Bhatia International.

18. It is important to note that in para 32 of Bhatia International itself this Court has held that Part I of the Arbitration Act, 1996 will not apply if it has been excluded either expressly or by necessary implication. Several judgments of this Court have held that Part I is excluded by necessary implication if it is found that on the facts of a case either the juridical seat of the arbitration is outside India or the law governing the arbitration agreement is a law other than Indian law. ...

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21. The last paragraph of BALCO judgment has now to be read with two caveats, both emanating from para 32 of Bhatia International itself — that where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, Part I of the Arbitration Act, 1996 would be excluded by necessary implication. Therefore, even in the cases governed by the Bhatia principle, it is only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India that would continue to be governed by the Bhatia principle. Also, it is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the Bhatia rule."

(Emphasis supplied)

39. Thus, the legal position that emerges from a conspectus of all the decisions referred to above is that Part I of the Act and the provisions thereunder only applies where the arbitration takes place in India i.e., where either **(I)** the seat of arbitration is in India **OR (II)** the law governing the arbitration

agreement is Indian law. As a natural corollary to the above, the position of law may be summarized as under: -

(i) Arbitration agreements executed after 06.09.2012 where the seat of arbitration is outside India, Part I of the Act, 1996 and the provisions thereunder will not be applicable and would fall beyond the jurisdiction of Indian courts by virtue of the decision of this Court in **BALCO** (supra).

(ii) Even those arbitration agreements that have been executed prior to 06.09.2012 and thus, governed by ***Bhatia International*** (supra), Part I of the Act, 1996 may not necessarily be applicable, if its application has been excluded by the parties in the arbitration agreement either explicitly by designating the seat of arbitration outside India or implicitly by choosing the law governing the agreement to be any other law other than Indian law, by virtue of ***Reliance Industries*** (supra).

(iii) Thus, irrespective of the date of execution of arbitration agreement, Part I of the Act, 1996 will be applicable only to those arbitration agreements where the seat or place of arbitration is in India **OR** in the absence of any categorical finding as to the place or seat of arbitration, where such agreement stipulates or can be read to stipulate that the law governing the arbitration agreement would be Indian law.

40. The petitioner contended that since the aforesaid Distributorship Agreement that contains the arbitration agreement was executed on 09.11.2010 i.e., prior to the decision of ***BALCO*** (supra), Part I of the Act, 1996 would be applicable. However, as discussed in the foregoing paragraphs, Part I of the Act, 1996 is applicable to arbitration agreements prior to ***BALCO*** (supra) if the seat of arbitration is in India or where the arbitration agreement is found to be governed by Indian laws. Thus, now the only question that remains to be answered in the present case is whether the seat of arbitration designated under the aforesaid Distributorship Agreement is in India, if not, whether the arbitration agreement could be said to be governed by the Indian laws?

ii. Criterion or Test for Determination of Seat of Arbitration: Conflict of 'Venue' versus 'Seat' of Arbitration.

41. Before proceeding further with the analysis, it would be apposite to first understand what is the criterion or test for determining the 'seat' or place of arbitration.

a. Closest Connection Test – Place of Arbitration to be ascertained by the Law governing the Arbitration Agreement and not the Place of Arbitration.

42. The "closest connection test" is a legal principle used to determine which law governs an arbitration agreement when the parties have not expressly chosen a governing law or where there is a conflict between the choice of law by the parties. This test seeks to identify the jurisdiction that has the closest relationship with the subject-matter in question or *simplicter* the dispute between the parties by identifying which system of law has the closest and most real connection with the transaction or dispute between the parties.

43. The 'Closest Connection Test' was first applied by this Court in its decision in ***NTPC*** (supra). In the aforesaid case, the main substantive contract therein had been executed in India, the general terms and conditions appended to the main contract stipulated that the said contract shall be construed and governed according to Indian laws. It further stipulated that the courts of Delhi were conferred exclusive jurisdiction in all matters arising under the said contract. It also contained an arbitration clause which *inter-alia* stipulated that where the dispute concerns a foreign contractor, then it will be resolved through arbitration and that the rules of conciliation and arbitration of the International Chamber of Commerce shall apply to such arbitrations. Pursuant to the above, arbitration was conducted between the parties therein by a tribunal constituted by the International Chamber of Commerce and an interim award was made at London. The appellant therein

approached the Delhi High Court for setting aside the said interim award, however the High Court held that the award was not governed by the Act, 1940 and could only be set-aside at London being the designated seat of arbitration. Aggrieved by it, the appellant therein approached this Court by way of an appeal.

44. This Court in ***NTPC*** (supra) held that the law governing the contract will be the proper law governing the arbitration agreement and by it the place of arbitration itself. Where the parties have expressly chosen the proper law of the contract, the courts of that system of law will have jurisdiction. Where however, the parties have not expressly chosen the substantive law governing the contract, there the intention has to be discovered by applying the 'Closest Connection Test' to determine which place or system of law has its closest and most real connection with the transaction or dispute. It further, cautioned that mere selection of place of arbitration will not be sufficient to draw an inference as to the intention of parties as regards the seat of arbitration, unless there is a significant link with such place. The aforesaid decision may be better understood in three-parts: -

(i) **First,** it observed that the proper law of the arbitration agreement is normally the same as the proper law of the contract or the substantive law governing the contract. Where the proper law of the contract is expressly chosen by the parties then such law must, in the absence of

an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract. In other words, if the proper law of the contract is expressly chosen and the arbitration agreement forms part and parcel of such contract, then the substantive law of such contract will govern the arbitration agreement, and by its extension the place of arbitration. The relevant observations read as under: -

> *"24. The validity, effect and interpretation of the arbitration agreement are governed by its proper law. Such law will decide whether the arbitration clause is wide enough to cover the dispute between the parties. Such law will also ordinarily decide whether the arbitration clause binds the parties even when one of them alleges that the contract is void, or voidable or illegal or that such contract has been discharged by breach or frustration. (See Heyman v. Darwins Ltd.) The proper law of arbitration will also decide whether the arbitration clause would equally apply to a different contract between the same parties or between one of those parties and a third party.*
>
> *25. The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Such choice is exercised either expressly or by implication. Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen by the parties, as in the*

> *present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract."*
>
> (Emphasis supplied)

(ii) **Secondly,** if there is no express statement about the governing law, then the true intention of parties as to the place or seat of arbitration has to be discovered by applying sound ideas of business, convenience and sense to the language of the contract itself in order to determine the proper law of the contract. This may be done by applying the 'Closest Connection Test' whereby the courts impute an intention by applying the objective test to determine what the parties would have as just and reasonable persons intended as regards the applicable law had they applied their minds to the question. For this purpose, the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the courts having jurisdiction and such other links are to be examined to determine the system of law with which the transaction has its closest and most real connection. The relevant observations read as under: -

> "*13. [...] Where, however, the intention of the parties is not expressly stated and no inference about it can be drawn, their intention as such has no relevance. In that event, the courts endeavour to impute an intention by*

identifying the legal system with which the transaction has its closest and most real connection.

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16. Where the parties have not expressly or impliedly selected the proper law, the courts impute an intention by applying the objective test to determine what the parties would have as just and reasonable persons intended as regards the applicable law had they applied their minds to the question.[7] The Judge has to determine the proper law for the parties in such circumstances by putting himself in the place of a "reasonable man". He has to determine the intention of the parties by asking himself how a just and reasonable person would have regarded the problem" [...]

17. For this purpose the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the courts having jurisdiction and such other links are examined by the courts to determine the system of law with which the transaction has its closest and most real connection."

(Emphasis supplied)

(iii) **Lastly**, the choice of place of arbitration or selection of courts of particular country for submission to its jurisdiction, will have little relevance in determining the system of law to govern the arbitration agreement and may not be sufficient to draw an inference as to the intention of parties to regard the chosen place as the proper law of arbitration unless it is supported by the law governing the contract or in its absence if there is a significant link with such place that gives a strong indication that the law governing the arbitration agreement is

the law of the place chosen for arbitration. The relevant observations read as under: -

> *"15. In the absence of an express statement about the governing law, the inferred intention of the parties determines that law. The true intention of the parties, in the absence of an express selection, has to be discovered by applying "sound ideas of business, convenience and sense to the language of the contract itself". In such a case, selection of courts of a particular country as having jurisdiction in matters arising under the contract is usually, but not invariably, an indication of the intention of the parties that the system of law followed by those courts is the proper law by which they intend their contract to be governed. However, the mere selection of a particular place for submission to the jurisdiction of the courts or for the conduct of arbitration will not, in the absence of any other relevant connecting factor with that place, be sufficient to draw an inference as to the intention of the parties to be governed by the system of law prevalent in that place. This is specially so in the case of arbitration, for the selection of the place of arbitration may have little significance where it is chosen, as is often the case, without regard to any relevant or significant link with the place. This is particularly true when the place of arbitration is not chosen by the parties themselves, but by the arbitrators or by an outside body, and that too for reasons unconnected with the contract. Choice of place for submission to jurisdiction of courts or for arbitration may thus prove to have little relevance for drawing an inference as to the governing law of the contract, unless supported in that respect by the rest of the contract and the surrounding circumstances. Any such clause must necessarily give way to stronger indications in regard to the intention of the parties."*
>
> (Emphasis supplied)

45. Accordingly, this Court in ***NTPC*** (supra) held that since the proper law governing the contract was expressly stipulated to be the laws in force in

India and because the parties had specifically accepted the exclusive jurisdiction of the courts in Delhi in all matters arising under the contract it meant that the law governing the arbitration agreement would be same as the proper law governing the contract which contained the relevant arbitration clause. It further observed that since London had no significant connection with the contract or the parties except being a neutral place that had been chosen only because of the rules of the International Chamber of Commerce, it held that, the stipulation of such rules merely governed the procedure and conduct of the arbitration and could not in any manner supersede the overriding jurisdiction and control of the Indian law and the Indian courts that governed the main contract including the arbitration clause that formed part and parcel of the main contract. The aforesaid relevant observations read as under: -

> *"26. [...]Where, however, the parties have, as in the instant case, stipulated that the arbitration between them will be conducted in accordance with the ICC Rules, those rules, being in many respects self-contained or self-regulating and constituting a contractual code of procedure, will govern the conduct of the arbitration, except insofar as they conflict with the mandatory requirements of the proper law of arbitration, or of the procedural law of the seat of arbitration.*
>
> *27. The proper law of the contract in the present case being expressly stipulated to be the laws in force in India and the exclusive jurisdiction of the courts in Delhi in all matters arising under the contract having been specifically accepted, and the parties not having chosen expressly or by implication a law different from the Indian law in regard to the agreement contained in the arbitration clause, the proper law governing the arbitration agreement is indeed the law in force in India, and the*

competent courts of this country must necessarily have jurisdiction over all matters concerning arbitration. Neither the rules of procedure for the conduct of arbitration contractually chosen by the parties (the ICC Rules) nor the mandatory requirements of the procedure followed in the courts of the country in which the arbitration is held can in any manner supersede the overriding jurisdiction and control of the Indian law and the Indian courts.

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50. The arbitration clause must be considered together with the rest of the contract and the relevant surrounding circumstances. In the present case, as seen above, the choice of the place of arbitration was, as far as the parties are concerned, merely accidental insofar as they had not expressed any intention in regard to it and the choice was made by the ICC Court for reasons totally unconnected with either party to the contract. On the other hand, apart from the expressly stated intention of the parties, the contract itself, including the arbitration agreement contained in one of its clauses, is redolent of India and matters Indian. The disputes between the parties under the contract have no connection with anything English, and they have the closest connection with Indian laws, rules and regulations. In the circumstances, the mere fact that the venue chosen by the ICC Court for the conduct of arbitration is London does not support the case of the Singer on the point. Any attempt to exclude the jurisdiction of the competent courts and the laws in force in India is totally inconsistent with the agreement between the parties.

51. In sum, it may be stated that the law expressly chosen by the parties in respect of all matters arising under their contract, which must necessarily include the agreement contained in the arbitration clause, being Indian law and the exclusive jurisdiction of the courts in Delhi having been expressly recognised by the parties to the contract in all matters arising under it, and the contract being most intimately associated with India, the proper law of arbitration and the competent courts are both exclusively Indian, while matters of procedure connected with the conduct of arbitration are left to be regulated by the contractually chosen rules of the ICC to the extent that such rules are not in conflict with the public policy and the mandatory requirements of the proper law and of the law of the place of arbitration. The Foreign Awards Act, 1961 has no application

to the award in question which has been made on an arbitration agreement governed by the law of India.

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53. All substantive rights arising under the agreement including that which is contained in the arbitration clause are, in our view, governed by the laws of India. In respect of the actual conduct of arbitration, the procedural law of England may be applicable to the extent that the ICC Rules are insufficient or repugnant to the public policy or other mandatory provisions of the laws in force in England. Nevertheless, the jurisdiction exercisable by the English courts and the applicability of the laws of that country in procedural matters must be viewed as concurrent and consistent with the jurisdiction of the competent Indian courts and the operation of Indian laws in all matters concerning arbitration insofar as the main contract as well as that which is contained in the arbitration clause are governed by the laws of India."

(Emphasis supplied)

46. What has been conveyed in so many words by this Court in ***NTPC*** (supra) is that the law which governs the contract including the arbitration agreement, the courts of that system of law will have the supervisory jurisdiction over the arbitration. Where however the parties have expressly chosen a place of arbitration or selected a court of particular country for submission to the jurisdiction or selected the law for conduct of arbitration i.e., curial law, such place will only be regarded as venue, unless such factor is supported by relevant connecting factor sufficient to draw an inference as to what the parties would have intended as regards the applicable law. Thus, a mere place chosen by the parties will only be regarded as a venue and will not be construed as seat unless there is a significant link with such place to

be ascertained by applying the 'Closest Connection Test' to determine which place or system of law has the most real with the transaction or dispute.

47. Similarly, in ***Enercon (India) Ltd. & Ors. v. Enercon GMBH & Anr.*** reported in **(2014) 5 SCC 1** this Court, held that where the parties have expressly agreed that the law governing the contract, the law governing the arbitration agreement and the law of arbitration / curial law would be Indian laws, then the seat or place of arbitration would be India. It further observed that mere mentioning of London as the place of arbitration will not designate it as the seat of arbitration, in the absence of anything to connect it to the arbitration agreement. This Court applying the closest connection test, held that the place with the closest and most real connection with the arbitration agreement and the law of arbitration was India and not London. The relevant observations read as under: -

> *"98. We find much substance in the submissions of Mr Nariman that there are very strong indicators to suggest that the parties always understood that the seat of arbitration would be in India and London would only be the "venue" to hold the proceedings of arbitration. We find force in the submission made by the learned Senior Counsel for the appellants that the facts of the present case would make the ratio of law laid down in Naviera Amazonica Peruana S.A. applicable in the present case. Applying the closest and the intimate connection to arbitration, it would be seen that the parties had agreed that the provisions of the Indian Arbitration Act, 1996 would apply to the arbitration proceedings. By making such a choice, the parties have made the curial law provisions contained in Chapters III, IV, V and VI of the Indian Arbitration Act, 1996 applicable. Even Dr Singhvi had submitted that Chapters III, IV, V and VI would*

apply if the seat of arbitration is in India. By choosing that Part I of the Indian Arbitration Act, 1996 would apply, the parties have made a choice that the seat of arbitration would be in India. Section 2(2) of the Indian Arbitration Act, 1996 provides that Part I "shall apply where the place of arbitration is in India". In Balco, it has been categorically held that Part I of the Indian Arbitration Act, 1996, will have no application, if the seat of arbitration is not in India. In the present case, London is mentioned only as a "venue" of arbitration which, in our opinion, in the facts of this case cannot be read as the "seat" of arbitration.

99. We are fortified in taking the aforesaid view since all the three laws applicable in arbitration proceedings are Indian laws. The law governing the contract, the law governing the arbitration agreement and the law of arbitration/curial law are all stated to be Indian. In such circumstances, the observation in Naviera Amazonica Peruana S.A. would become fully applicable. In that case, the Court of Appeal in England considered the agreement which contained a clause providing for the jurisdiction of the courts in Lima, Peru in the event of judicial dispute; and at the same time contained a clause providing that the arbitration would be governed by the English law and the procedural law of arbitration shall be the English law. The Court of Appeal summarised the state of the jurisprudence on this topic. [...]

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116. The submission made by Dr Singhvi would only be worthy of acceptance on the assumption that London is the seat. That would be to put the cart before the horse. Surely, jurisdiction of the courts cannot be rested upon unsure or insecure foundations. If so, it will flounder with every gust of wind from different directions. Given the connection to India of the entire dispute between the parties, it is difficult to accept that parties have agreed that the seat would be London and that venue is only a misnomer. The parties having chosen the Indian Arbitration Act, 1996 as the law governing the substantive contract, the agreement to arbitrate and the performance of the agreement and the law governing the conduct of the arbitration; it would, therefore, in our opinion, be vexatious and oppressive if Enercon GmbH is permitted to compel EIL to litigate in England. ...

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123. The cases relied upon by Dr Singhvi relate to the phrase "arbitration in London" or expressions similar thereto. The same cannot be equated with the term "venue of arbitration proceedings shall be in London". Arbitration in London can be understood to include venue as well as seat; but it would be rather stretching the imagination if "venue of arbitration shall be in London" could be understood as "seat of arbitration shall be London", in the absence of any other factor connecting the arbitration to London. In spite of Dr Singhvi's seemingly attractive submission to convince us, we decline to entertain the notion that India would not be the natural forum for all remedies in relation to the disputes, having such a close and intimate connection with India. In contrast, London is described only as a venue which Dr Singhvi says would be the natural forum.

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135. In the present case, even though the venue of arbitration proceedings has been fixed in London, it cannot be presumed that the parties have intended the seat to be also in London. In an international commercial arbitration, venue can often be different from the seat of arbitration. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but this would not bring about a change in the seat of the arbitration. [...]"

(Emphasis supplied)

48. What can be discerned from the above decision of this Court in ***Enercon*** (supra) is that for determining the seat of arbitration the closest connection test involves identifying the law with which the agreement to arbitrate has its closest and most real connection. Where the parties have expressly or impliedly provided the law governing the substantive contract, the arbitration agreement and the curial law, the law with which the agreement to arbitrate has its closest and most real connection would be the law of

the *seat* of arbitration. Where the question before the courts involves ascertaining whether a particular place is the seat or venue of arbitration, the place with the closest connection with the law governing the arbitration agreement would be the seat of arbitration. Interestingly, although this Court deliberately did not address whether seat is to be determined based on the closest connection with the law governing the arbitration agreement or the curial law since in the facts of the said case both the law governing the contract and the curial law were the same, yet this Court approvingly referred to two other decisions in ***Roger Shashoua (1) v. Sharma*, [2009] EWHC 957 (Comm)** and ***Sulame´rica Cia Nacional de Seguros SA* v. *Enesa Engelharia SA*, (2013) 1 WLR 102 (CA)** wherein the seat of arbitration was construed on the basis of the curial law. The relevant observations read as under: -

> *"105. We are also unable to accept the submission made by Dr Singhvi that in this case the venue should be understood as reference to place in the manner it finds mention in Section 20(1), as opposed to the manner it appears in Section 20(3) of the Indian Arbitration Act, 1996. Such a submission cannot be accepted since the parties have agreed that curial law would be the Indian Arbitration Act, 1996.*
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> *xxx*
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> *124. In Shashoua, such an expression was understood as seat instead of venue, as the parties had agreed that the ICC Rules would apply to the arbitration proceedings. In Shashoua, the ratio in Naviera and Braes of Doune has been followed. In that case, the Court was concerned with the construction of the shareholders' agreement between the parties, which provided that "the venue of the arbitration shall be London, United*

Kingdom". It provided that the arbitration proceedings should be conducted in English in accordance with the ICC Rules and that the governing law of the shareholders' agreement itself would be the law of India. The claimants made an application to the High Court in New Delhi seeking interim measures of protection under Section 9 of the Indian Arbitration Act, 1996, prior to the institution of arbitration proceedings. Following the commencement of the arbitration, the defendant and the joint venture company raised a challenge to the jurisdiction of the Arbitral Tribunal, which the panel heard as a preliminary issue. The Tribunal rejected the jurisdictional objection.

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131. Upon consideration of the entire matter, it was observed in Sulamérica that "In these circumstances it is clear to me that the law with which the agreement to arbitrate has its closest and most real connection is the law of the seat of arbitration, namely, the law of England". It was thereafter concluded by the High Court that the English law is the proper law of the agreement to arbitrate.

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133. We also do not find any merit in the submission of Dr Singhvi that the close and the most intimate connection test is wholly irrelevant in this case. It is true that the parties have specified all the three laws. But the Court in these proceedings is required to determine the seat of the arbitration, as the respondents have taken the plea that the term "venue" in the arbitration clause actually makes a reference to the "seat" of the arbitration."

(Emphasis supplied)

49. Thus, with the decision of ***Enercon*** (supra), the stage is now set to examine the decision of ***Roger Shashoua*** **(1)** (supra) to trace the evolution of the Shashoua Principle.

b. The Shashoua Principle – 'Venue' to be construed as 'Seat'

50. In ***Roger Shashoua*** **(1)** a Queen's Bench Division (Commercial Court) of the England & Wales High Court held that when there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion would be that such venue in-fact is the juridical seat. It observed that often in arbitration agreements it is much more likely that the law of the arbitration agreement will coincide with the curial law, and thus any express stipulation of the curial law would aid in determination of the juridical seat. The relevant observations read as under: -

> *"26. The Shareholders Agreement provided that "the venue of arbitration shall be London, United Kingdom" whilst providing that the arbitration proceedings should be conducted in English in accordance with ICC Rules and that the governing law of the Shareholders Agreement itself would be the laws of India. It is accepted by both parties that the concept of the seat is one which is fundamental to the operation of the Arbitration Act and that the seat can be different from the venue in which arbitration hearings take place. It is certainly not unknown for hearings to take place in an arbitration in more than one jurisdiction for reasons of convenience of the parties or witnesses. The claimants submitted that in the ordinary way, however, if the arbitration agreement provided for a venue, that would constitute the seat. If a venue was named but there was to be a different juridical seat, it would be expected that the seat would also be specifically named. Notwithstanding the authorities cited by the defendant,*

I consider that there is great force in this. The defendant submits however that as "venue" is not synonymous with "seat", there is no designation of the seat of the arbitration by clause 14.4 and, in the absence of any designation, when regard is had to the parties' agreement and all the relevant circumstances, the juridical seat must be in India and the curial law must be Indian law.

27. In my judgment, in an arbitration clause which provides for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that the venue of the arbitration shall be London, United Kingdom does amount to the designation of a juridical seat. The parties have not simply provided for the location of hearings to be in London for the sake of convenience and there is indeed no suggestion that London would be convenient in itself, in the light of the governing law of the Shareholders Agreement, the nature and terms of that agreement and the nature of the disputes which were likely to arise and which did in fact arise (although the first claimant is resident in the UK).

28. The defendant relies upon the nature of the Shareholders Agreement, the provision for the proper law of the agreement to be that of India, the application of the ICC Rules and the Interim Measures Application made by the claimants in India as pointing to Indian law as, not only the curial law, but also that of the agreement to arbitrate. Furthermore reliance is placed on clause 14.5 of the Shareholders Agreement which provides that each party is to bear its own costs of the arbitration, which, on its face, is inconsistent with section 60 of the Arbitration Act. It is said that this conflict, when seen objectively, must militate against the application of English law to the arbitration and to the seat being London. In my judgment none of these matters will bear the weight which the defendant seeks to put upon them.

29. The defendant contends that the law of the agreement to arbitrate is Indian law, essentially

because the proper law of the Shareholders Agreement is Indian law. As appears from the decided authorities however, although there have been dicta to this effect, recent decisions, where the focus has been on the seat of the arbitration and the agreement to arbitrate, establish that it is much more likely that the law of the arbitration agreement will coincide with the curial law. This does not therefore much assist the defendant and the argument that the nature of the Shareholders Agreement points to Indian law as the curial law is in reality no more than an argument that its nature points to Indian law as the substantive law of the Shareholders Agreement, which is in any event expressly provided. [...]

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34. "London arbitration" is a well known phenomenon which is often chosen by foreign nationals with a different law, such as the law of New York, governing the substantive rights of the parties. This is because of the legislative framework and supervisory powers of the courts here which many parties are keen to adopt. When therefore there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is, to my mind, that London is the juridical seat and English law the curial law. In my judgment it is clear that either London has been designated by the parties to the arbitration agreement as the seat of the arbitration or, having regard to the parties' agreement and all the relevant circumstances, it is the seat to be determined in accordance with the final fall back provision of section 3 of the Arbitration Act."

(Emphasis supplied)

51. In ***Roger Shashoua (2) v. Mukesh Sharma*** reported in **(2017) 14 SCC 722** this Court held that the test that was applied in ***NTPC*** (supra) was no longer

a good law in view of the repeal of Section 9(b) of the Act, 1961. It further, held that the principle enunciated in ***Roger Shashoua* (1)** had been expressly approved by the 5-Judge Bench decision of this Court in ***BALCO*** (supra). Accordingly, this Court applying the Shashoua Principle held that the mention of London in the arbitration agreement was not merely as a location but as a juridical seat. The relevant observations read as under: -

> *"46. As stated earlier, in Shashoua Cooke, J., in the course of analysis, held that "London arbitration" is a well-known phenomenon which is often chosen by foreign nationals with a different law, such as the law of New York, governing the substantive rights of the parties and it is because of the legislative framework and supervisory powers of the courts here which many parties are keen to adopt. The learned Judge has further held that when there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is that London is the juridical seat and English law the curial law.*
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> *xxx*
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> ***54.*** *We had earlier extracted extensively from the said judgment, as we find, the Court after adverting to various aspects, has categorically held that the High Court had not followed the Shashoua principle. The various decisions referred to in Enercon (India) Ltd., the analysis made and the propositions deduced leads to an indubitable conclusion that Shashoua principle has been accepted by Enercon (India) Ltd. It is also to be noted that in Balco, the Constitution Bench has not merely reproduced few paragraphs from Shashoua but has also referred to other decisions on which Shashoua has placed reliance upon. As we notice, there is analysis of earlier judgments, though it does not specifically state that "propositions laid down in Shashoua are accepted".*

On a clear reading, the ratio of the decision in Balco, in the ultimate eventuate, reflects that the Shashoua principle has been accepted and the two-Judge Bench in Enercon (India) Ltd., after succinctly analysing it, has stated that the said principles have been accepted by the Constitution Bench. Therefore, we are unable to accept the submission of Mr Chidambaram that the finding recorded in Enercon (India) Ltd. that Shashoua principle has been accepted in Balco should be declared as per incuriam.

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60. Tested on the aforesaid principle, we find that the question that arose in Balco and the discussion that has been made by the larger Bench relating to Shashoua and C v. D are squarely in the context of applicability of Part I or Part II of the Act. It will not be erroneous to say that the Constitution Bench has built the propositional pyramid on the basis or foundation of certain judgments and Shashoua and C v. D are two of them. It will be inappropriate to say that in Enercon (India) Ltd. the Court has cryptically observed that observations made in Shashoua have been approvingly quoted by the Court in Balco in para 110. We are inclined to think, as we are obliged to, that the Shashoua principle has been accepted in Balco as well as Enercon (India) Ltd. on proper ratiocination and, therefore, the submission advanced on this score by Mr Chidambaram, learned Senior Counsel for the respondent, is repelled.

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72. It is worthy to note that the arbitration agreement is not silent as to what law and procedure is to be followed. On the contrary, Clause 14.1. lays down that the arbitration proceedings shall be in accordance with the Rules of Conciliation and Arbitration of ICC. In Enercon (India) Ltd., the two-Judge Bench referring to Shashoua case accepted the view of Cooke, J. that the phrase "venue of arbitration shall be in London, UK" was accompanied by the provision in the arbitration clause or arbitration to be conducted in accordance with the Rules of ICC in

Paris. The two-Judge Bench accepted the Rules of ICC, Paris which is supranational body of Rules as has been noted by Cooke, J. and that is how it has accepted that the parties have not simply provided for the location of hearings to be in London. To elaborate, the distinction between the venue and the seat remains. But when a court finds that there is prescription for venue and something else, it has to be adjudged on the facts of each case to determine the juridical seat. As in the instant case, the agreement in question has been interpreted and it has been held that London is not mentioned as the mere location but the courts in London will have the jurisdiction, another interpretative perception as projected by the learned Senior Counsel is unacceptable.

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74. It is apposite to note that the said decision has been discussed at length in Union of India v. Reliance Industries Ltd. The Court, in fact, reproduced the arbitration clause in Singer Co. and referred to the analysis made in the judgment and noted that notwithstanding the award, it was a foreign award, since the substantive law of the contract was Indian law and the arbitration law was part of the contract, the arbitration clause would be governed by Indian law and not by the Rules of International Chamber of Commerce. On that basis the Court held in Singer Co. that the mere fact that the venue chosen by the ICC Court or conduct of the arbitration proceeding was London, does not exclude the operation of the Act which dealt with the domestic awards under the 1940 Act. and thereafter opined:

> *"13. It can be seen that this Court in Singer case[9] did not give effect to the difference between the substantive law of the contract and the law that governed the arbitration. Therefore, since a construction of Section 9(b) of the Foreign Awards Act led to the aforesaid situation and led to the doctrine of concurrent jurisdiction, the 1996 Act, while enacting Section 9(a) of the*

> *repealed Foreign Awards Act, 1961, in Section 51 thereof, was careful enough to omit Section 9(b) of the 1961 Act which, as stated hereinabove, excluded the Foreign Awards Act from applying to any award made on arbitration agreements governed by the law of India.*
>
> *14. This being the case, the theory of concurrent jurisdiction was expressly given a go-by with the dropping of Section 9(b) of the Foreign Awards Act, while enacting Part II of the Arbitration Act, 1996, which repealed all the three earlier laws and put the law of arbitration into one statute, albeit in four different parts."*

> *75. We respectfully concur with the said view, for there is no reason to differ. Apart from that, we have already held that the agreement in question having been interpreted in a particular manner by the English courts and the said interpretation having gained acceptation by this Court, the inescapable conclusion is that the courts in India have no jurisdiction."*
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> (Emphasis supplied)

52. This Court in its decision in ***BGS SGS SOMA JV*** *v.* ***NHPC LTD.***, reported in **(2020) 4 SCC 234** held that wherever in the arbitration agreement there is designation of a place of arbitration as 'venue' of the 'arbitral proceedings', then such place effectively is the 'seat' of arbitration. This is because, the expression 'arbitral proceedings' does not refer to individual hearings but rather the whole arbitration process including the making of the award. It further held that where the parties have anchored the arbitral proceedings to

one fixed location or place, it would indicate that the parties intended such place to be the seat of arbitration. It held that where the place designated as venue in the arbitration agreement is coupled with there being no other significant contrary indicia that such place is merely a venue, then such place would be construed as the 'seat' of the arbitral proceedings. This Court also added that the international context where a supranational body of rules is to govern the arbitration in or in the national context the laws of a particular country then this would further be an indicia that the 'venue' designated in the arbitration agreement is really the seat of arbitration. The relevant observations read as under: -

> *"82. On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue*

> *is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a clause designates a "seat" of the arbitral proceedings. In an international context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration."*
>
> (Emphasis supplied)

53. Thus, this Court in ***BGS SGS SOMA*** (supra) laid down a three-condition test as to when 'venue' can be construed as 'seat' of arbitration. The conditions that are required to be fulfilled are as under: -

i. The arbitration agreement or clause in question should designate or mention only one place;

ii. Such place must have anchored the arbitral proceedings i.e., the arbitral proceedings must have been fixed to that place alone without any scope of change;

iii. There must be no other significant contrary indicia to show that the place designated is merely the venue and not the seat.

Where the aforesaid conditions are fulfilled, then the place that has been designated as 'venue' can be construed as the 'seat' of arbitration. It is clarified that, while applying the aforesaid test, it must be borne in mind that where a supranational body of rules has been stipulated in an

arbitration agreement or clause, such stipulation is not to be regarded as a contrary indicium, such stipulation does not mean that no seat has been designated rather such stipulation is a positive indicia that the place so designated is actually the 'seat'.

54. The aforesaid test was approvingly applied by this Court in ***Mankastu Impex Private Ltd. v. Airvisual Ltd.*** reported in **(2020) 5 SCC 399** and it was held that where the reference to a place in the arbitration agreement is not simply as "venue" and rather a reference as place for final resolution by arbitration, such place shall be construed as the seat of arbitration. The relevant observations read as under: -

> *"20. It is well settled that "seat of arbitration" and "venue of arbitration" cannot be used interchangeably. It has also been established that mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties.*
>
> *21. In the present case, the arbitration agreement entered into between the parties provides Hong Kong as the place of arbitration. The agreement between the parties choosing "Hong Kong" as the place of arbitration by itself will not lead to the conclusion that the parties have chosen Hong Kong as the seat of arbitration. The words, "the place of arbitration" shall be "Hong Kong", have to be read along with Clause 17.2. Clause 17.2 provides that "... any dispute, controversy, difference arising out of or relating to MoU shall be referred to and finally*

resolved by arbitration administered in Hong Kong….". On a plain reading of the arbitration agreement, it is clear that the reference to Hong Kong as "place of arbitration" is not a simple reference as the "venue" for the arbitral proceedings; but a reference to Hong Kong is for final resolution by arbitration administered in Hong Kong. The agreement between the parties that the dispute "shall be referred to and finally resolved by arbitration administered in Hong Kong" clearly suggests that the parties have agreed that the arbitration be seated at Hong Kong and that laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award.

22. As pointed out earlier, Clause 17.2 of MoU stipulates that the dispute arising out of or relating to MoU including the existence, validity, interpretation, breach or termination thereof or any dispute arising out of or relating to it shall be referred to and finally resolved by the arbitration administered in Hong Kong. The words in Clause 17.2 that "arbitration administered in Hong Kong" is an indicia that the seat of arbitration is at Hong Kong. Once the parties have chosen "Hong Kong" as the place of arbitration to be administered in Hong Kong, the laws of Hong Kong would govern the arbitration. The Indian courts have no jurisdiction for appointment of the arbitrator."

(Emphasis supplied)

iii. Whether the Seat of Arbitration in the underlying Distributorship Agreement is in India?

55. Now coming to the facts of the present case, Clause 26 of the aforesaid Distributorship Agreement stipulates that the arbitration shall be subject to UAE Arbitration and Conciliation rules. The aforesaid arbitration clause

further designates only one place i.e., Dubai, UAE as the venue of arbitration.

56. In view of the law laid down by this Court in ***BGS SGS SOMA*** (supra), since only one place has been designated in the arbitration clause, and such place has been categorically fixed inasmuch as there is no scope for the place designated as venue to change in terms of Clause 26, and furthermore, the said clause has explicitly stipulated that the curial law would be the UAE Arbitration and Conciliation rules and there being no other contrary indicia let alone a significant contrary indicia, we are of the considered opinion that the Dubai, UAE has not been designated merely as a venue but rather as the juridical seat of arbitration in terms of clause 26 of the Distributorship Agreement.

57. We are further reinforced in our findings in light of the Shashoua Principle as laid down in ***Roger Shashoua (1)*** (supra) wherein it was held that more often than not the law of the arbitration agreement and by it the seat of the arbitration coincides with the curial law. Since the parties herein have expressly chosen the curial law of arbitration to be the UAE Arbitration and Conciliation rules, there is no second opinion that the seat of arbitration in the underlying Distributorship Agreement is Dubai, UAE and not India.

58. It has been contended by the petitioner herein that, no one fixed place or seat of arbitration has been designated under the Distributorship Agreement since Clause 27 of the aforesaid Agreement stipulates that it shall be subject to the non-exclusive jurisdiction of the Dubai Courts. It has been submitted that since the parties had agreed not to confer exclusive jurisdiction to courts in Dubai, neither of the parties to the agreement construed the arbitration clause as designating courts in Dubai as the seat of arbitration. It was also contended that the non-exclusive jurisdiction clause had been specifically incorporated to confer jurisdiction on other courts too.

59. In ***Enercon*** (supra), this Court held that the 'seat' or the situs of arbitration is a crucial location as it determines the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. The relevant observations read as under: -

> *"97. This now clears the decks for the crucial question i.e. is the "seat" of arbitration in London or in India. This is necessarily so as the location of the seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. Therefore, understandably, much debate has been generated before us on the question whether the use of the phrase "venue shall be in London" actually refers to designation of the seat of arbitration in London."*
>
> (Emphasis supplied)

60. Similarly, in ***Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd*** reported in **(2017) 7 SCC 678**, this Court held that in arbitration law,

the moment 'seat' is determined, it would be akin to an exclusive jurisdiction clause whereby only the jurisdictional courts of that seat will have the jurisdiction to regulate the arbitral proceedings. It further held that where more than one court has jurisdiction, it is open for the parties to exclude all other courts and choose to submit to the jurisdiction of one court alone. The relevant observations read as under: -

> *"19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction — that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 CPC be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.*
>
> *20. It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts. …"*
>
> (Emphasis supplied)

61. In ***Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.,*** reported in **(2013) 9 SCC 32,** it was held that in a jurisdictional clause even if words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used

it would make no material difference as to the exclusive nature of the jurisdiction conferred by such clause. This Court observed that this is because, the moment a jurisdiction is conferred, the maxim *expressio unius est exclusio alterius* i.e., expression of one is the exclusion of another comes into play, and it would be as if its an exclusive clause if there is nothing to indicate the contrary. The relevant observations read as under: -

> *"31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, the Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11(12)(b) and Section 2(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of Clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of Clause 18 of the agreement, the jurisdiction of the Chief Justice of the Rajasthan High Court has been excluded?*
>
> *32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. <u>It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties—by having Clause 18 in the agreement—is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata</u>*

alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.

xxx

55. It will be seen from the above decisions that except in A.B.C. Laminart [A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163] where this Court declined to exclude the jurisdiction of the courts in Salem, in all other similar cases an inference was drawn (explicitly or implicitly) that the parties intended the implementation of the exclusion clause as it reads notwithstanding the absence of the words "only", "alone" or "exclusively" and the like. The reason for this is quite obvious. The parties would not have included the ouster clause in their agreement were it not to carry any meaning at all. The very fact that the ouster clause is included in the agreement between the parties conveys their clear intention to exclude the jurisdiction of courts other than those mentioned in the clause concerned. Conversely, if the parties had intended that all courts where the cause of action or a part thereof had arisen would continue to have jurisdiction over the dispute, the exclusion clause would not have found a place in the agreement between the parties."

(Emphasis supplied)

62. As discussed in the foregoing paragraphs, since the Distributorship Agreement already designates Dubai, UAE as the seat of arbitration, the same would be akin to an exclusive jurisdiction clause with only the courts in Dubai, UAE having the jurisdiction over such arbitration in view of the decision of this Court in ***Indus Mobile Distribution*** (supra).

63. Even if it is assumed that the aforesaid clause does not confer jurisdiction exclusively to the courts where the seat of arbitration is situated, still this Court will not have jurisdiction to entertain the present Section 11 petition. This is because, in view of the law laid down in ***BALCO*** (supra) and ***Reliance Industries*** (supra), Part I of this Act, 1996 will not be applicable where the seat of arbitration is outside India or where the law governing the arbitration agreement is not Indian laws. In the present case as discussed in the foregoing paragraphs, the Distributorship Agreement, more particularly Clauses 26 & 27 respectively makes it abundantly clear that the seat of arbitration is in fact Dubai, UAE, furthermore both the law governing the contract and the curial law are not Indian laws. In such scenario, even if the argument of the petitioner that the non-exclusive jurisdiction clause had been incorporated to confer jurisdiction on other courts too is accepted in *toto*, even then this Court will not have any jurisdiction to exercise its powers under Section 11 of the Act, 1996 as neither the seat is India nor is the arbitration agreement governed by Indian

laws. Since Part I of the Act, 1996 is inapplicable, the parties cannot confer any jurisdiction to a court which otherwise has no jurisdiction even if such conferment is permissible as per the Distributorship Agreement.

64. Clause 27 of the aforesaid Distributorship Agreement reads as follows: "*This Agreement shall be governed by and construed in accordance with the laws of UAE and shall be subject to the non-exclusive jurisdiction of the Dubai Courts*". The expression "*non-exclusive jurisdiction of the Dubai Courts*" occurring in the said clause cannot be singled out and construed devoid of its context. The said clause provides the law governing the entire Distributorship Agreement and the stipulation that it shall be subject to the non-exclusive jurisdiction of the Dubai Court only relates to the substantive agreement and not the arbitration agreement contained in the preceding clause. The said clause can at best be construed to stipulate that any substantive part pertaining to such agreement which might not fall within the scope of 'disputes' covered under Clause 26 i.e.., those disputes which are not arbitrable between the parties will then in turn be amenable to the jurisdiction of Dubai Courts or any other courts. The said clause in no manner can be construed to mean that there exists no 'seat' or 'situs' of arbitration and that parties merely because there is no court that has been conferred exclusive jurisdiction in respect of the said agreement. It is the

seat of arbitration which determines which court will have exclusive jurisdiction and not vice-versa.

a. Doctrine of Forum non Conveniens

65. The aforesaid may be looked at from one another angle, through the doctrine of forum non conveniens. The term 'forum non conveniens' is a latin term which means "an inconvenient forum" and provides that a court which otherwise might have jurisdiction may decline jurisdiction over a case if there is a more appropriate forum available to the parties, and is typically invoked in respect of cross-border subject-matters that are amenable to multiple concurrent jurisdictions. Depending upon the nature of the dispute, the subject-matter involves and the parties thereto, the courts by invoking this doctrine proceed to determine which one of the available forums may be more convenient and fair for entertaining and adjudicating the matter.

66. In order to apply the doctrine of forum non conveniens an dequate alternative forum must exist where the subject-matter may be espoused. The alternative forum must be capable of providing a fair and adequate remedy for the dispute, however this does not mean that the alternative forum must offer identical remedies, and this doctrine may be applied as

long as the other alternative forum offers a reasonably fair process of remedy and is more convenient or appropriate in the opinion of the court invoking the doctrine. Courts in doing so must weigh the relative importance of private and public interest factors. In doing so, they exercise a high level of discretion and often issue rulings that are fact-specific.

67. In ***Spiliada Maritime Corp v. Cansulex Ltd.*** reported in **[1987] AC 460**, the House of Lords while considering a non-exclusive jurisdiction clause laid down the test for applying the doctrine of *forum non conveniens* to decline jurisdiction on the grounds that another forum is more appropriate. It held that where the court is satisfied that there is some other available forum, having competent jurisdiction, which is more appropriate to decide the dispute the courts can decline its jurisdiction or stay the proceedings before it in favour of a more suitable forum for the interests of all the parties and the ends of justice. The relevant observations read as under: -

> "*The existence of a non-exclusive jurisdiction clause is a factor, but it is not conclusive. It must be weighed alongside other considerations of convenience and connection to determine the appropriate forum.*
>
> *The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e., in which the case may be tried more suitably for the interests of all the parties and the ends of justice. The principle of forum non conveniens allows discretion to stay proceedings in favor of a clearly more appropriate forum unless justice*

requires the case to proceed in the chosen forum due to special circumstances.

If the court concludes at the end of stage one that there is another clearly more appropriate forum, it will ordinarily grant a stay unless the plaintiff can show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in England. While the plaintiff's choice of forum is significant, it is not decisive; the court must weigh it against factors that might inconvenience the defendant or make the chosen forum less appropriate for the interests of justice.

If the defendant shows another available forum is more suitable, then the court should only retain jurisdiction if the plaintiff can show that substantial justice would not be achieved in the alternative forum. In determining whether there is another forum which is more appropriate for the trial of the action, the court will look for the forum with which the action has the most real and substantial connection."

(Emphasis supplied)

68. In ***Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd.*** reported in **(2003) 4 SCC 341,** this Court observed that while construing a non-exclusive jurisdiction clause, where more forums than one are available, the court in exercise of its discretion will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties. It further observed that Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes

arising under the contract, ordinarily should not be entertained as s it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum. It also held that the burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same. The relevant observations read as under: -

> "*24. From the above discussion the following principles emerge:*
>
> *(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:*
>
> *(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;*
>
> *(b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and*
>
> *(c) the principle of comity — respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained — must be borne in mind.*
>
> *(2) In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.*

(3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.

(4) A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like.

(5) Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum.

(6) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it

would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.

(7) The burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same."

(Emphasis supplied)

69. What can be discerned from above is that where more than one forum is available, it is the discretion of the court to entertain the matter by examining as to which is the appropriate forum more suited for the interests of all the parties and the ends of justice. Ordinarily, the burden to prove that the court or forum in *seisin* of the matter is an inconvenient forum or the proceeding therein are oppressive or vexatious lies on the party contending the same, yet the choice of forum by the other party is not decisive, and that it is for the court to determine whether the proceedings before it might be an inconvenience to the interests of the parties or less appropriate for the subject-matter in question.

70. Thus, even if it is assumed that Clause 27 of the aforesaid Distributorship Agreement conferred concurrent jurisdiction to both the courts in UAE and the other courts and thus, the petitioner herein was well-within its right to

approach this Court in terms of the non-exclusive jurisdiction clause for the purpose of appointment of arbitrator, this Court can decline to exercise its jurisdiction if there exists a more appropriate forum. As discussed in the foregoing paragraphs, the seat of arbitration in terms of the aforesaid Distributorship Agreement is Dubai, UAE, both the law governing the contract and the curial law are the laws of UAE, the respondent no. 1 herein with whom the petitioner's credit account lies is also situated in Dubai, even the venue of arbitration is Dubai, thus by all reasons of logic the more appropriate forum suitable for appointment of arbitrator is Dubai, UAE and not the courts of India.

E. CONCLUSION

71. From the above exposition of law, the following position of law emerges: -

(i) Part I of the Act, 1996 and the provisions thereunder only applies where the arbitration takes place in India i.e., where either **(I)** the seat of arbitration is in India **OR** **(II)** the law governing the arbitration agreement are the laws of India.

(ii) Arbitration agreements executed after 06.09.2012 where the seat of arbitration is outside India, Part I of the Act, 1996 and the provisions thereunder will not be applicable and would fall beyond the jurisdiction of Indian courts.

(iii) Even those arbitration agreements that have been executed prior to 06.09.2012 Part I of the Act, 1996 will not be applicable, if its application has been excluded by the parties in the arbitration agreement either explicitly by designating the seat of arbitration outside India or implicitly by choosing the law governing the agreement to be any other law other than Indian law.

(iv) The moment 'seat' is determined, it would be akin to an exclusive jurisdiction clause whereby only the jurisdictional courts of that seat alone will have the jurisdiction to regulate the arbitral proceedings. The notional doctrine of concurrent jurisdiction has been expressly rejected and overruled by this Court in its subsequent decisions.

(v) The 'Closest Connection Test' for determining the seat of arbitration by identifying the law with which the agreement to arbitrate has its closest and most real connection is no longer a viable criterion for determination of the seat or situs of arbitration in view of the Shashoua Principle. The seat of arbitration cannot be determined by formulaic and unpredictable application of choice of law rules based on abstract connecting factors to the underlying contract. Even if the law governing the contract has been expressly stipulated, it does not mean

that the law governing the arbitration agreement and by extension the seat of arbitration will be the same as the *lex contractus*.

(vi) The more appropriate criterion for determining the seat of arbitration in view of the subsequent decisions of this Court is that where in an arbitration agreement there is an express designation of a place of arbitration anchoring the arbitral proceedings to such place, and there being no other significant contrary indicia to show otherwise, such place would be the 'seat' of arbitration even if it is designated in the nomenclature of 'venue' in the arbitration agreement.

(vii) Where the curial law of a particular place or supranational body of rules has been stipulated in an arbitration agreement or clause, such stipulation is a positive indicium that the place so designated is actually the 'seat', as more often than not the law governing the arbitration agreement and by extension the seat of the arbitration tends to coincide with the curial law.

(viii) Merely because the parties have stipulated a venue without any express choice of a seat, the courts cannot sideline the specific choices made by the parties in the arbitration agreement by imputing these stipulations as inadvertence at the behest of the parties as regards the

seat of arbitration. Deference has to be shown to each and every choice and stipulations made by the parties, afterall the courts are only a conduit or means to arbitration, and the sum and substance of the arbitration is derived from the choices of the parties and their intentions contained in the arbitration agreement. It is the duty of the court to give weight and due consideration to each choice made by the parties and to construe the arbitration agreement in a manner that aligns the most with such stipulations and intentions.

(ix) We do not for a moment say that, the Closest Connection Test has no application whatsoever, where there is no express or implied designation of a place of arbitration in the agreement either in the form of 'venue' or 'curial law', there the closest connection test may be more suitable for determining the seat of arbitration.

(x) Where two or more possible places that have been designated in the arbitration agreement either expressly or impliedly, equally appear to be the seat of arbitration, then in such cases the conflict may be resolved through recourse to the Doctrine of Forum Non Conveniens, and the seat be then determined based on which one of the possible places may be the most appropriate forum keeping in mind the nature of the agreement, the dispute at hand, the parties themselves and their

intentions. The place most suited for the interests of all the parties and the ends of justice may be determined as the 'seat' of arbitration.

72. Thus, for all the foregoing reasons, we have reached the conclusion that the present petition under Section 11 of the Act, 1996 is not maintainable as neither the seat of arbitration is India nor is the arbitration agreement governed by laws of India.

73. In the result, the present petition filed by the petitioner fails and is hereby dismissed.

74. The parties shall bear their own costs.

75. Pending application(s), if any, also stand disposed of.

..... CJI.
(Dr. Dhananjaya Y. Chandrachud)

..... J.
(J.B. Pardiwala)

..... J.
(Manoj Misra)

New Delhi;
7th November, 2024.