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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 05.08.2025
Judgment pronounced on: 24.12.2025

\+ FAO(OS)(COMM) 292/2018

DELHI AIRPORT METRO EXPRESS PRIVATE LIMITED (INDIA) .....Appellant

Through: Mr. Anirudh Bakhru, Mr. Rishi Agarwal, Ms. Tarini Khurana and Ms. Shruti Arora, Advs.

versus

CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES &ANR. ..... Respondents

Through: Mr. Shantanu Tyagi, Ms. Aishani Das and Ms. Balapragatha Moorthy, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
HON'BLE MR. JUSTICE OM PRAKASH SHUKLA

JUDGMENT

% 24.12.2025

OM PRAKASH SHUKLA, J.

1. This is an appeal filed under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996[1], read with Section 13 of the Commercial Courts Act, challenging the impugned order dated 25.10.2018 passed by the learned Single Judge of this Court in the OMP (Comm.) bearing No. 7/2017 titled *Delhi Airport Metro Express Private Limited (India) v. Construcciones Y Auxiliar De Ferrocarriles & Anr*. By the

[1]"the Act' hereinafter

said order, the learned Single Judge had dismissed the Section 34 petition filed by appellant under Section 34 of the Act, on the ground of lack of jurisdiction, holding therein that Part I of the Arbitration and Conciliation Act, 1996 was inapplicable.

FACTUAL BACKGROUND

2. The brief factual matrix necessary for the purposes of adjudication of the present appeal is delineated below.

3. The appellant is a company duly incorporated and registered under the provisions of the Companies Act, 1956. The Respondent No. 1 is a foreign company and the Respondent No. 2 is its wholly owned Indian subsidiary.

4. Respondent no. 1 and Reliance Infrastructure Limited (RIL)[2] had jointly participated in the bid for the Airport Metro Express Line Project, which connects the Indira Gandhi International Airport, New Delhi with the city of New Delhi. In this regard, Respondent no. 1 and RIL entered into a Memorandum of Understanding[3] dated 24.03.2007, followed by a Consortium Agreement dated 09.10.2007. Their bid was successful, and consequently, the Delhi Metro Rail Corporation (DMRC)[4] awarded the project to the consortium *vide* a Letter of Acceptance dated 21.01.2008.

[2] "RIL" hereinafter
[3] "MoU" hereinafter
[4] "DMRC" hereinafter

5. Pursuant thereto, Respondent No. l and RIL incorporated the Appellant company as a Special Purpose Vehicle (SPV) for the partial implementation and subsequent operation of the project. RIL held 95% of the equity shares in the SPV-Appellant company, while Respondent No.1 held the remaining 5%.

6. In furtherance of the requirement of the project, the appellant and Respondent No. l entered into two agreements dated 30.06.2008, namely: (i) the Rolling Stock Supply Contract,[5] and (ii) the Maintenance Services Agreement (MSA)[6]. Clause 22 of the Supply contract and Clause 14 of the MSA provided for resolution of disputes through arbitration. The aforesaid Clauses read as follows respectively:

> **Clause 22 of Supply Contract:**
>
> *"22.1 In case of disputes, the Parties hereby agree to exhaust all informal senior level determination mechanisms before submitting a request to settle them under the formal dispute resolution system.*
>
> *22.2 Any dispute arising in connection with the interpretation or performance of this Contract shall be finally settled by arbitration under the rules of the International Chamber of Commerce, Paris ("ICC"). The arbitration tribunal shall consist of three arbitrators. One arbitrator shall be nominated by each of the Parties, and the third arbitrator shall be a person nationality and origin other than India or Span [sic], and shall be appointed by the ICC in accordance with the "Rules of the ICC as Appointing Authority in UNCITRAL or Adhoc Arbitration Proceedings".*
>
> *22.3 The seat of the arbitration shall be London and the language of the arbitration shall be English.*
>
> *22.4 Continuation of performance: Pending final resolution of any dispute, the Parties shall continue to perform their respective obligations hereunder.*

[5] "Supply contract" hereinafter
[6] "MSA" hereinafter

22.5 Governing Law & Jurisdiction:

22.5.1 This contract shall be governed by and construed in accordance with the laws of India.

22.6 Survival

22. 6.1 It is expressly stated herein that the provisions of this Article 22 shall survive termination or expiry of this Contract. "

Article 14 of the Maintenance Contract reads as follows:

"DISPUTE RESOLUTION

14.1 In case of disputes, the Parties hereby agree to exhaust all informal senior level determination mechanisms before submitting a request to settle them under the formal dispute resolution system.

14.2 Any dispute arising in connection with the interpretation or performance of this Contract shall be finally settled by arbitration under the rules of the International Chamber of Commerce, Paris ("ICC"). The arbitration tribunal shall consist of three arbitrators. One arbitrator shall be nominated by each of the Parties, and the third arbitrator shall be a person nationality and origin other than India or Spain, and shall be appointed by the ICC in accordance with the "Rules of the ICC as Appointing Authority in UNCITRAL or Adhoc Arbitration Proceedings".

14.3 The arbitration shall take place in London and the language of the arbitration shall be English.

14.4 The parties expressly exclude the application of Part 1 of the Indian Arbitration and Conciliation Act, 1996.

14.5 Continuation of performance Pending final resolution of any dispute, the Parties shall continue to perform their respective obligations hereunder.

14. 6 Governing Law & Jurisdiction:

14. 6.1 This contract shall be governed by and construed in accordance with the laws of India.

14. 7 Survival

14. 7.1 It is expressly stated herein that the provisions of this Article 14 shall survive termination or expiry of this Contract."

7. Subsequently, by an Assignment Agreement dated 17.05.2010, Respondent No.1 assigned its obligations under the Maintenance Services Agreement to Respondent No.2.

8. In the interregnum, Respondent No.1 had also issued a Performance Bank Guarantee dated 20.08.2008 in favour of the Appellant, in furtherance of the contractual arrangements between the parties.

9. However, during the performance of the contract, certain difficulties arose, leading to disputes between the parties due to some technicalities.

10. On 16.07.2013, the Appellant notified Respondent No. l of its intention to invoke the Performance Bank Guarantee on the ground of the Respondent's alleged failure to cure the stated defects. Respondent No.1 in response approached this Court under Section 9 of the Act, seeking restraint on invocation of the said Performance Bank Guarantee. However, the Section 9 petition was dismissed by this Court *vide* order dated 17.01.2014. An appeal filed against the said dismissal was subsequently withdrawn and dismissed as such.

11. Consequently, the Appellant encashed the Performance Bank Guarantee for an amount of Euro 4,761,963.50/- on 20.01.2014.

12. In the meantime, the Concession Agreement with DMRC stood terminated. Thereafter, the Respondents invoked arbitration under

Article 22 of the Supply Contract and Article 14 of the Maintenance Services Agreement (MSA) in respect of their claims, inter alia, alleging wrong encashment of the Performance Bank Guarantee. Pursuant thereto, an Arbitral Tribunal was constituted to adjudicate upon the disputes between the parties.

13. Aggrieved by the initiation of the arbitral proceedings, the Appellant filed an anti-arbitration Injunction suit before this Court seeking a stay of the arbitration proceedings pending in London. The said suit, however came to be dismissed *vide* judgement dated 14.08.2014.

ARBITRAL PROCEEDINGS

PARTIAL AWARD ON JURISDICTION (MAJORITY OPINION)

14. Consequently, the arbitral proceedings continued, and prior to adjudicating the substantive dispute, the Arbitral Tribunal rendered a partial award on jurisdiction.

15. Before the learned Arbitral Tribunal, the Appellant contended that pursuant to the assignment agreement, under which Respondent No.1 assigned its obligations to Respondent No.2, the Respondent No.2 had stepped into the shoes of Respondent No.1. It was therefore submitted that the arbitration was effectively between two Indian

companies and, as such, the arbitration was required to be seated and conducted in India.

16. The Respondents denied this contention, asserting that the MSA was not an agreement between two Indian companies. It was further contended that, even assuming arguendo that the MSA was between two Indian companies, the arbitration proceedings could not be held in India.

17. The Arbitral Tribunal held that the MSA was not an agreement between two Indian companies and that Respondent No.1 continued to remain a party to the MSA. The Arbitral Tribunal observed that the MSA expressly permitted Respondent No.1 to assign or sub-contract its obligations to any wholly owned subsidiary without the Appellant's consent. Further, the assignment agreement expressly stipulated that Respondent No.1 would remain responsible and liable for all obligations under the MSA.

18. Accordingly, the jurisdictional objection raised by Appellant was rejected, and the Tribunal held that it had jurisdiction to adjudicate the claims arising under both, the Supply Contract and the MSA.

19. It is pertinent to note that no costs were imposed in this partial award. A separate partial award dealing with the costs of the jurisdictional challenge was subsequently rendered, which we shall refer to herein below.

PARTIAL AWARD ON COSTS OF JURISDICTIONAL CHALLENGE

20. The Respondents argued that, pursuant to Article 37(3) of the International Chamber of Commerce Arbitration Rules, 2021[7], the Arbitral Tribunal was vested with the authority to award costs and that, in accordance with Section 61(2) of the English Arbitration Act 1996, costs should follow the event in the absence of any agreement to the contrary or exceptional circumstances.

21. The respondents further contended that the present matter was a textbook case for ordering the losing party to bear the prevailing party's costs. In this regard, they relied on the Appellant's conduct before the Tribunal, including its insistence on an oral hearing despite having nothing new to add beyond its written submissions, as well as the fact that the Tribunal had rejected the Appellant's jurisdictional objection in unequivocal terms. On this basis, the Respondents sought recovery of £97,004.05 in legal fees incurred in responding to the Appellant's jurisdictional challenge.

22. The Appellant, on the other hand, argued that even if the Tribunal were inclined to award costs, it could do so only after the conclusion of the hearing on merits. According to the Appellant, the "event" to which costs should attach refers to the final determination of the arbitration, and the Tribunal would be better positioned &

[7] "ICC Rules" hereinafter

acquainted at that stage to assess costs in the context of the proceedings as a whole.

23. The appellant maintained that costs could only be awarded only once it was determined which party ultimately prevailed. It further submitted that deferring a decision on costs was particularly appropriate in the present case, as it believed it had a strong case on the merits. While acknowledging that Article 37(3) of the ICC Rules grants tribunals the discretion to award costs at any stage of the proceedings, the Appellant argued that Tribunals rarely exercise this power at a preliminary stage and that the jurisdictional costs should not be awarded on a "pay-as-you-go" basis.

24. The Tribunal, relying on Article 37 of the ICC Rules, held that it had the power to award costs at the present stage of the proceedings. It further held that, having successfully defeated the Appellant's jurisdictional objection, the respondents were, in principle, entitled to recover the costs incurred in that regard. The Tribunal observed that its decision in the final award would not alter the fact that the Appellant's jurisdictional objections were unjustified. Accordingly, the Tribunal ordered the Appellant to pay costs in the amount of £80,000/- to the Respondents.

FINAL AWARD (MAJORITY OPINION)

25. The Respondents' claim before the Tribunal was that the retention of the Performance Bank Guarantees was unlawful. In

addition, they sought payment of the amounts secured under the bank guarantees. The respondents challenged the retention on the ground that Article 12 of the Supply Contract precluded the Appellant from claiming any remedy for breach of specification. It was further contended that, even assuming a breach, the Appellant had suffered no loss.

26. The Appellant, in response, submitted that Article 12 was irrelevant to its claim for damages and that the Respondents had breached the internal noise specifications prescribed under the Supply Contract. On the issue of damages, the Appellant contended that damages were payable notwithstanding the assumption that no actual loss had been incurred.

27. Against this backdrop of the rival submissions, the Arbitral Tribunal framed three sub-questions for determination:

(i) *Do the provisions of Article 12 of the Supply Contract preclude Respondent from claiming damages for breach of specifications?*
(ii) Did the rolling-stock supplied by Claimant No. 1 pursuant to the Supply Contract satisfy the requirements of that contract?
(iii) If so, what compensation should be awarded to Respondent?

28. With respect to the first sub-question, the Respondent No. 1 contended that its obligations under Article 12.4 of the Supply Contract were limited to the repair or replacement of faulty or defective components and that the alleged defect did not arise within

the warranty period. It was further argued that Article 12.2 required the Appellant to provide written notice of any warranty claim within 15 days of discovering the defect, along with the information specified under Article 12.3. According to the Respondents, no such notice was ever furnished in relation to the alleged noise issue.

29. The appellant countered these submissions by asserting that its claim was founded under section 12 of the Sale of Goods Act and not under Article 12 of the Supply Contract. It further contended that, on a plain reading, Article 12 governed defects arising after the issuance of the Provisional Acceptance Certificate, whereas the defects in question has arisen prior thereto. Consequently, the Respondents remained liable.

30. The Arbitral Tribunal accepted the Appellant's submissions on the first sub-question and held that Article 12 created warranty obligations for Respondent No.1 only in relation of defects arising after the issuance of the Provisional Acceptance Certificate, and not for defects occurring prior to it.

31. On the second sub-question, the Respondents argued that the noise level specifications contained in the Supply Contract were ambiguous and that such ambiguity ought to be resolved by reference to industry practice, in accordance with Article 21.2 of the ICC rules.

32. The Respondents also disputed the testing methodology and submitted that the noise testing ought to have been conducted under free field conditions.

33. The Appellant, on the other hand, submitted that there was no ambiguity whatsoever in the contractual specifications relating to noise levels. It was further argued that extrinsic evidence demonstrated a clear and mutual intention of the parties that noise testing would be conducted under real operating conditions rather than under free field conditions.

34. The Tribunal rejected the Respondents' contention that the specifications pertaining to noise levels were ambiguous. It further held that the vehicles supplied by the Respondents failed to comply with the contractual specifications and, consequently, did not satisfy the requirements of the Supply Contract.

35. With respect to the third sub-question, the Respondents submitted that even assuming a breach of the noise level specifications, the Appellant had not suffered any financial loss and had failed to adduce any evidence to substantiate such loss. In response, the Appellants argued that, had it been aware of the Respondents' inability to supply goods of the requisite standard, it would have negotiated the contract with a different party on different commercial terms.

36. The Appellant further contended that the amount withheld under the Performance Bank Guarantee represented a reasonable quantification of the diminution in price arising from the breach. In support of this contention, the Appellant relied on Section 14 of the Consumer Protection Act, 1986, which prescribes a minimum compensation of 5% of the value of defective goods, as well as Article 14 of the Supply Contract, which provided for liquidated damages in the event of delay.

37. Additionally, the Appellant submitted that the law does not require damages to be proved with mathematical precision and that the mere difficulty in quantifying damages cannot preclude recovery. Reliance was placed on Section 59(1) of the Sale of Goods Act, which provides that where goods fail to conform to warranted specifications, the buyer is entitled to claim a reduction in price for breach of warranty.

38. The Tribunal, however, observed that the Appellant had failed to produce any evidence demonstrating actual loss or diminution in value. It held that proof of damage was a prerequisite for the grant of compensation and that, in the absence of such proof, the Appellant was not entitled to retain any amount under the Performance Bank Guarantee.

39. Accordingly, despite holding that Respondent No.1 has failed to comply with the requirements of the Supply Contract, the Tribunal concluded that the Appellant was not entitled to encash or retain the

proceeds of the Performance Bank Guarantee. The Tribunal therefore passed its final award in favour of the Respondents and directed the Appellant to refund a sum of £4,761,963.50, which had been recovered by encashment of the said Guarantee.

IMPUGNED ORDER

40. Aggrieved by the arbitral award, the Appellant filed a Section 34 petition before the learned Single Judge of this Court, challenging (i) the final award dated 22.08.2016; (ii) the partial award on jurisdiction dated 02.02.2015; and (iii) the partial award on costs out of the jurisdictional challenge dated 15.12.2015.

41. The learned Single Judge dismissed the aforesaid petition on the ground that it was not maintainable and further held that Part I of the Act was inapplicable to the facts of the present case. The findings of the learned Single Judge are summarised as below.

42. The learned Single Judge relying upon the decisions of the Supreme Court in ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.***[8], ***Union of India v. Reliance Industries Ltd*** **& Ors.**[9] and ***Union of India v. Hardy Exploration***[10], held that the Appellant's reliance on ***National Thermal Power Corporation Vs.***

[8](2012) 9 SCC 552; "BALCO" hereinnafter
[9]**(2015) 10 SCC 213**
[10]**2018 SCC OnLine 1640**

Singer Company & Ors.[11] and ***Sumitomo Heavy Industries Ltd. Vs. ONGC ltd***[12] was misplaced.

43. The learned Single Judge further relied upon the decision in ***Roger Shashoua & Ors. v. Mukesh Sharma & Ors.***[13] to hold that a distinction between the "seat" and "venue" of arbitration does exist, and that the determination of the juridical seat must be made on a consideration of the facts and circumstances of each case.

44. Further, it was opined that the facts of the present case were identical to those in ***Roger Shashoua*** (supra), since in both cases London was stipulated as the place of arbitration, the arbitral proceedings were governed by the ICC Rules, and Indian law governed the substantive contract. Accordingly, it was held that, in respect of both the Supply Contract and the MSA, London constituted the juridical seat of arbitration.

45. The Court also emphasized that Part I of the Arbitration and Conciliation Act, 1996stood expressly excluded. Therefore, following the decision in ***Roger Shashoua*** (supra), it concluded that London is the juridical seat of arbitration, and that the English courts alone had jurisdiction over any supervisory or setting-aside proceedings relating to the awards.

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[11] **(1992) 3 SCC551**
[12] **(1994) 1LLR45**
[13] **(2017) 14 SCC 722**

46. While addressing the coexistence of ***Bhatia International vs Bulk Trading S.A & Anr***.[14] and ***BALCO*** (supra), the learned Single Judge observed that the ruling in ***BALCO*** was expressly prospective, in as much as agreements executed after September 6, 2012, would be governed by ***BALCO***, whereas agreements executed prior thereto would continue to be governed by the ***BHATIA*** regime.

47. In the present case, since, the Supply and Maintenance Contracts herein were executed on 30.06.2008, the Court held that the ***BHATIA*** principle would apply. However, it was further observed that even under ***BHATIA***, Part I of the Act would apply to a foreign-seated arbitration only in the absence of an express or implied exclusion. In the instant case, the Court found that Part I stood expressly excluded.

48. The learned Single Judge underscored that the designation of London as the seat/place of arbitration, read in conjunction with the ICC Rules and the explicit exclusion of Part I in the MSA, unequivocally demonstrated the parties' intention to exclude Part I of the Act in respect of both contracts.

49. On this basis, the learned Single Judge held that Part I of the Act was inapplicable to the arbitral proceedings in question, both by virtue of express agreement and by necessary implication arising from the choice of a foreign seat. Consequently, it was held that a challenge under Section 34 of the Act was not maintainable before an Indian

[14](2002) 4 SCC 105; "BHATIA" hereinafter

court in respect of awards rendered in these London-seated ICC arbitrations.

50. The learned Single Judge, therefore, concluded that the Court lacked jurisdiction to entertain the petition and dismissed the Section 34 challenge as not maintainable, without examining into the merits of the arbitral awards.

51. Aggrieved by the above impugned order, the Appellant has approached this Court by way of the present appeal under Section 37(1)(c) of the Act.

PROCEEDINGS BEFORE THIS COURT

52. Notice in the present appeal was issued *vide* order dated 10.11.2019. The parties were heard at length, and the matter was reserved for orders *vide* order dated 05.08.2025.

RIVAL SUBMISSIONS

53. Mr. Anirudh Bakhru, learned counsel for the Appellant submitted that Article 22 of the Supply Contract contains the Dispute Resolution Clause, the provisions of which are materially different from the Dispute Resolution Clause contained in the MSA. It was pointed out that Article 14.4 of the MSA expressly excludes the application of Part I of the Arbitration and Conciliation Act, 1996

("A&C Act"), whereas no such exclusion is found in the Supply Contract.

54. It was further submitted that both agreements were executed prior to 06.09.2012 and, therefore, are governed by the legal position prevailing at that time, as laid down by the Supreme Court in ***Bhatia International v. Bulk Trading S.A and Another***[15] (2002). In ***BHATIA*** (supra), the Supreme Court clarified that Part I of the A&C Act would apply to international commercial arbitrations seated outside India, unless its applicability was expressly or impliedly excluded by the parties.

55. Mr. Bakhru contended that the parties have always been *ad-idem* with respect to the applicability of Part I of the A&C Act to disputes arising under the Supply Contract. In support of this submission, it was pointed out that Respondent No. 1 had itself filed a petition under Section 9 of the A&C Act before the learned Single Judge of this Court in OMP No. 695/2013, seeking an injunction against the encashment of the Bank Guarantee. He further pointed out that in the said petition, the Respondent No. 1 categorically asserted that this Court has territorial jurisdiction and the petition was adjudicated on merits and ultimately dismissed. It was thus emphasized that the Respondent's own conduct unequivocally demonstrated that Article 22 of the Supply Contract was intended to

[15] **2002) 4 SCC 1059**

be governed by Part I of the A&C Act. Reliance in this regard was placed on ***Godhra Electricity Co. Ltd. v. State of Gujarat*** [16].

56. It was submitted that the legal position prevailing in 2013, when Respondent No.1 filed the Section 9 petition, made it amply clear that an application under Section 9 could be maintained only before the Court of the Seat. Consequently, having consciously invoked Section 9 jurisdiction before this Court, the Respondent cannot now be permitted to approbate and reprobate by contending that Part I of the Act would not apply.

57. Our attention was drawn to Article 26.6 of the Supply Contract, which expressly excludes any terms implied by law. It was argued that, in view of this provision, the Learned Single erred in holding that Part I of the A&C Act stood impliedly excluded from the Supply Contract.

58. It was further submitted that, in the facts and circumstances of the case, as mandated by law, the use of the term "seat" in Clause 22.3 of the Supply Contract did not constitute a stipulation of the juridical seat of arbitration, but merely denoted a convenient and neutral venue for conducting the arbitral proceedings. It was further contended that London was only a convenient venue and not the juridical seat of arbitration, and that the Respondent is therefore estopped from contending that Part I of the A&C Act stands excluded.

[16] **(1975) 1 SCC 199**

59. It was further argued that, had the parties intended to exclude Part-I of the Act, they would have done so expressly. In this regard, it was pointed out that on the very same day the Supply Contract was executed, the parties also entered into another agreement, namely the Maintenance Services Agreement ("MSA"). The MSA contained a similar arbitration agreement clause; however, with one material distinction, there was an express exclusion of Part I of the Act. It was therefore submitted that if the parties intended to exclude Part I in the arbitration clause contained in the Supply Contract as well, they would have been expressly provided for such exclusion, as they had done in the MSA. Learned counsel for the Appellant emphasized that the absence of such an exclusion in the Supply Contract clearly demonstrate that the Parties did not intend to exclude Part I of the Act.

60. It was also submitted that, in the present case, the closest and most real connection to the performance of the Contract is in India, because: (i) both the Supply Contract and the Maintenance Agreement were executed in New Delhi; (ii) The Rolling Stock was required to be commissioned in Delhi pursuant to a Tender issued by the Delhi Metro Rail Corporation (DMRC); and (iii) the Rolling Stock was to be used exclusively for the Delhi Airport Metro Express Line, situated in Delhi, India.

61. Reliance was placed on judgement of the English Court in ***Braes of Doune Wind Farm (Scotland) Limited v. Alfred McAlpine Business Services Limited*** [17]wherein the arbitration agreement

[17] (2008) EWHC 426.

stipulated Glasgow, Scotland as the “seat” of arbitration, while English law was the governing law of the arbitration. The Court held that, in those circumstances, the term "seat" was not indicative of the juridical seat but merely denoted the venue of arbitration, and that the juridical seat was England. Consequently, a petition for annulment of the arbitral award was held to be maintainable before the English courts.

62. It was contended that the common and shared understanding of the Parties until the filing of the Section 34 Petition by the Appellant, was that Part 1 of the Act was applicable and had not been excluded, and that the "juridical seat” of arbitration was not outside India but in Delhi, being the place where the Contract was entered into and was to be substantially & materially performed.

63. It was contended that Section 42 of the Act clarifies that once an application with respect to an arbitration agreement under Part I is made before a court, that court alone would have exclusive jurisdiction over all arbitral proceedings and all subsequent applications arising out of that agreement. Thus, it was contended that a petition under section 9 of the A& C Act was filed by the Respondent No.1 even before the constitution and initiation of the Arbitral Proceedings, this court has very much the territorial Jurisdiction to entertain the subsequent proceedings (read section 34 petition) due to operation of section 41 of the A & C Act.

64. Lastly, it was urged that since the contract explicitly stipulated that Indian law would govern the arbitration agreement, the provisions of Part I of the Act would necessarily apply. It was contended that where parties expressly choose the law governing the arbitration agreement, the seat of arbitration does not determine the law governing the arbitral process, rather, the seat operates merely as the physical venue of arbitration and does not determine the *lex arbitri*. Reliance in this regard was placed on ***Enercon (India) Ltd. v. Enercon GMBH & Anr***[18], and ***Disortho S.A.S v. Meril Life Sciences Pvt Ltd***[19]**.**

65. *Per contra,* Mr. Shanatanu Tyagi, learned counsel for the Respondents, submitted that the jurisdiction of the arbitral tribunal flowed from Article 22 of the Supply Contract and Article 14 of the MSA. He submitted that Article 22 of the Supply Contract expressly provided that: (i) the seat of arbitration shall be London; and (ii) the law governing the conduct of arbitration shall be the ICC Rules. He further pointed out that, similarly, Article 14 of the MSA contemplated that: (i) the arbitration would be governed by the ICC Rules; (ii) the arbitration shall take place in London; and (iii) the Part-I of the Act stood expressly excluded. It was further pointed out that while both Agreements stipulated that Indian law would govern the substantive contract, the procedural law of arbitration was contractually governed by the agreed arbitral framework.

[18] **(2014) 5 SCC 1**
[19] **2025 INSC 352**

66. Mr. Tyagi submitted that the arbitral tribunal had correctly and harmoniously construed the dispute resolution clauses, in accordance with the contractual intent of the Parties. In support of this submission, he highlighted that: (i) the MSA was executed in furtherance of and contemporaneously with the Supply Contract; (ii) the execution of the MSA as well as the Assignment Agreement was intrinsically and inextricably linked to the Supply Contract, as evidenced by express incorporation and repeated references thereto; (iii) the effectiveness of the MSA was contingent upon achievement of the Commercial Operation Date (COD) under the Supply Contract; (iv) the maintenance services under the MSA were required to be performed exclusively in relation to the rolling stocks supplied under the Supply Contract; and (v) fault rectification timelines under the MSA were aligned with schedules contained in the Supply Contract (Article 4.6, MSA), and site access obligations were dependent upon delivery schedule under the Supply Contract. Therefore, it was his contention that the dispute resolution clauses in the Agreements must necessarily be construed holistically and harmonious, particularly where allegations of inconsistency are raised.

67. Mr. Tyagi further challenged the Appellants reliance on Clause 26.6 to contend that no implied exclusion of Part I could be read into the agreement. He submitted that such an interpretation was misplaced, as entire agreement clauses do not *ipso facto* prohibit the implication of terms, especially those necessarily implied in law to give effect to the express terms of the contract. He contended that Clause 26.6 could not be construed as impliedly incorporating Part-I

of the Act, as doing so would fall outside the express scope of the dispute resolution mechanism under the Supply Contract and would lead to interpretative anomalies. It further argued that entire agreement clauses pertain to the subject matter of the contract and cannot be extended to override or reconfigure the arbitration clause, especially where the latter reflects a clear and deliberate procedural choice. Reliance was placed on ***Ng Giap Hon v. Westcomb Securities Pte Ltd Singapore Court of Appeal***[20].

68. The learned counsel for the Respondent submitted that in ***Union of India v. Reliance Industries Limited & Ors***[21] it was held that Part-I of the Act stands excluded by 'necessary implication' where either: (i) the juridical seat of arbitration is outside India, which is expressly the position under the Supply Contract in the present case; OR (ii) the law governing the arbitration agreement is not Indian law.

69. He further placed reliance on ***Eitzen Bulk A/S v. Ashapura Minechem Ltd.***[22] where the Apex Court, following the ratio in ***RELIANCE II*** (supra), held that: (i) where Part I is excluded, no Indian court would have jurisdiction to entertain objections to the arbitral award under Section 34 of the Act; and (ii) the mere designation of a juridical seat of arbitration attracts, *ipso jure*, the law of that seat,, and it is not necessary for the parties to separately specify the law governing the arbitral proceedings.

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[20] **[2009] 3 SLR(R) 518**
[21] [(2015) 10 SCC 213] ; "Reliance II" hereinafter
[22] **2016 11 SCC 508**

70. Reliance was also placed on ***Arif Azim Co. Ltd. V Micromax Informatic FZE***[23], wherein it was held that for arbitration agreements prior to ***BALCO*** (supra), Part-I of the Act would apply only if: (i) the seat of arbitration is in India; OR (ii) the arbitration agreement is governed by Indian law. He further pointed out that even where the substantive law of the contract is expressly stipulated, such stipulation cannot be construed to mean that the law governing the arbitration agreement or by extension, the seat of arbitration will be the same as the substantive law of the contract.

71. Mr. Tyagi, submitted that Article 22.3 of the Supply Contract unequivocally designates London as the seat of arbitration. Article 14.3 of the MSA, which specifies London as the place of arbitration, must therefore be construed as confirmatory of London being the juridical seat, rather than a mere venue. In any event, it was contended that while the Supply Contract expressly designates London as the seat of arbitration, the MSA explicitly excludes the application of Part I of the Act, thereby reinforcing the intention of the parties.

72. He further relied on ***BGS SGS SOMA JV v. NHPC LTD***[24]. wherein the Apex Court laid down a three-condition test for determining when a 'venue' may be construed as the 'seat' of arbitration. The Supreme Court held that such construction would follow where: (i) the arbitration agreement designates or mention only one place; (ii) the arbitral proceedings are anchored to that place; (iii) there are no significant contrary indicia to suggest that the place

[23] **2024 SCC OnLine SC 3212**
[24] **(2020) 4 SCC 234**

designated is merely a venue and not the seat; and (iv) the stipulation of a supranational body of rules (such as the ICC Rules) does not constitute a contrary indicium, but rather serves as a positive indicator that the place designated is the juridical seat of arbitration.

73. Lastly, it was submitted that the Section 9 petition was validly instituted before this Court, because the Bank Guarantee was issued by Yes Bank, Chanakyapuri Branch, New Delhi, and the Appellant's registered office is situated in Delhi. It was further pointed out that the Bank Guarantee is governed by Indian law, and Clause 14 thereof confers exclusive jurisdiction on the courts at Delhi, coupled with the invocation of the Bank Guarantee was to take place in Delhi.

74. He contended that at the pre-arbitration stage, jurisdiction under Section 9 of the Act may be invoked based on the location of the subject matter or asset. In support of this submission, reliance was placed on Article 28 of the ICC Rules, which expressly permits parties to seek interim relief from a competent judicial authority, clarifying that such recourse neither amounts to a breach or waiver of the arbitration agreement nor restricts the powers of the Arbitral Tribunal.

ANALYSIS

75. We have heard the learned counsel for both parties at considerable length, perused the material placed on record, and carefully examined the relevant statutory provisions judicial precedents governing the field.

76. At the outset, it would be apposite to advert to the preamble to the Arbitration and Conciliation Act, 1996 ("the Act"), which underscores the legislative intent to provide a unified and comprehensive legal framework for the fair, expeditious, and efficient resolution of disputes arising out of international commercial relations. Arbitration, particularly in the international commercial context, is founded upon the principles of party autonomy, certainty, and minimal judicial intervention, which collectively constitute the bedrock of the arbitral process.

77. Before proceedings further, we deem it apposite to reiterate that party autonomy forms the backbone of arbitration. The choices consciously made by parties in their contractual arrangements, particularly with respect to the seat of arbitration, governing law, and procedural framework, are of paramount importance and assume decisive significance while determining jurisdictional issues in international commercial arbitration. It is with this foundational principle in mind that we proceed to adjudicate the present controversy.

78. The present appeal arises out of a dispute embedded in an international commercial relationship. In order to address the controversy in a structured and effective manner, it is necessary to briefly recapitulate the relevant facts.

79. The Respondent No.1 is a company incorporated in Spain, which entered into two distinct agreements with the Appellant herein in furtherance of a commercial project. The first agreement, namely the Supply Contract, contained a dispute resolution clause stipulating that arbitration proceedings would be conducted in accordance with the Rules of the International Chamber of Commerce (ICC), Paris. The governing law of the agreement was expressly stated to be the Indian law, while the "seat" of arbitration was designated as London.

80. The second agreement, namely the MSA, also adopted a substantially similar arbitral framework. It provided that disputes would be resolved by arbitration under the ICC Rules Paris, the governing law of the agreement would be Indian law, and the "place" of arbitration would be London. A significant distinction, however, lies in the fact that the MSA expressly excluded the applicability of Part I of the Act.

81. Upon disputes arising between the parties, the Respondents initiated arbitral proceedings in London. The arbitral tribunal, by a majority award, ruled in favour of the Respondents. Aggrieved thereby, the Appellant sought to challenge the arbitral award by invoking Section 34 of the Act before this Court. The learned Single Judge dismissed the petition on the ground of lack of jurisdiction, holding that since the seat of the arbitration was outside India, Part-I of the Act stood excluded by necessary implication.

82. The Appellant contends before us that the Supply Contract expressly stipulates Indian law governing the arbitration agreement and, therefore, Indian courts would have jurisdiction to entertain a challenge under Section 34 of the Act. On the other hand, the Respondents contend that it is a settled position of law that Part-I of the Act has no application to foreign-seated arbitrations and that, in the present case, its applicability stands excluded both expressly (under the MSA) and by necessary implication.

83. In the aforesaid factual backdrop, and having regard to the impugned order and the rival submissions advanced before us, the core issue that arises for our consideration is **whether the learned Single Judge was correct in holding that Part I of the Arbitration and Conciliation Act of 1996 is not applicable to the arbitral proceedings and awards in question.**

84. It is not in dispute that the place of arbitration in both agreements is outside India. Hence, before addressing the core issue, it becomes imperative to examine the evolved legal position governing the applicability of Part-I of the Act to international commercial arbitrations placed outside India

85. In this context, reference must be made to the relevant statutory provisions forming the basis of our analysis. Section 2(f) of the Act defines “international commercial arbitration”. Section 2(1)(e) defines the term "Court", while Section 2(2) delineates the extent of the applicability of Part I of the Act, and Section 42 stipulates the

jurisdiction. These provisions collectively constitute the statutory framework that governs the present controversy and as such it would in the best of things that these provisions are re-capitulated as herein below:

> *"(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least 1 of the parties is – (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or*
>
> *"(e) "Court" means – (i) in the case of an arbitration other than an international commercial arbitration, the principal Civil Court of original jurisdiction in the district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration is the same had been the subject-matter of the suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;*
>
> *(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;"*
>
> *"(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 sections 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 recognised under the provisions of Part II of this Act."*
>
> *Section 42. Jurisdiction Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all*

sequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

86. Thus, having considered the relevant statutory provisions, we now advert to the judicial pronouncements which have authoritatively settled the law on this issue. The question of applicability of Part I of the Act to arbitrations seated or placed outside India is no longer *res integra*. The legal position has been crystallized through a consistent line of decisions, especially in light of ***Arif Azim Co. Ltd. (Supra).***

87. However, for the sake of ease of analytical clarity and completeness, it would be apposite to trace the doctrinal evolution of this principle through the seminal judgments of the Apex Court, which have progressively shaped the legal tapestry governing the interplay between seat of arbitration, governing law, and the applicability of Part I of the Act.

THE *BHATIA* REGIME

88. The Supreme Court in ***Bhatia International v. Bulk Trading S.A.***(supra) expanded the doctrine of concurrent jurisdiction by holding that Part I of the Act applied even to arbitrations held outside India, unless the arbitration agreement expressly or impliedly excluded its applicability. The Court reasoned that Section 2(2) merely stated that Part I *"shall apply where the place of arbitration is in India"* and did not employ the restrictive word "only". On this interpretation, Part I was held applicable irrespective of the place of

arbitration, including foreign-seated arbitrations The relevant extract of ***BHATIA*** (supra) is reproduced below:

> *"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 nonconvention 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 nonconvention 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)

89. After ***BHATIA*** (supra), this position was subsequently reaffirmed in ***Venture Global Engineering v. Satyam Computer Services Ltd.***[25] and ***Indtel Technical Services (P) Ltd. v. W.S. Atkins***

[25] **(2008) 4 SCC 190**

Rail Ltd[26], thereby entrenching the doctrine of concurrent jurisdiction under India ***arbitration law.***

THE *BALCO* REGIME*:* SEAT-CENTRIC APPROACH

90. However, the correctness of the decision in ***BHATIA*** (supra) came under serious judicial scrutiny due to its departure from the territorial principle embodied in the UNCITRAL Model Law, which India intended to adopt. This divergence culminated in the landmark Constitutional Bench judgment of the Supreme Court in ***BALCO*** (supra), which expressly overruled ***BHATIA*** (supra).

91. In ***BALCO*** (supra), the Supreme Court held that Part-I of the Act applies exclusively to arbitrations seated in India. Section 2(2) was interpreted as embodying a territorial limitation, consistent with the UNCITRAL Model Law. The Court unequivocally rejected the doctrine of concurrent jurisdiction and held that the seat of arbitration is the determinative factor for conferring supervisory jurisdiction upon courts.

92. The Court emphasized that the seat of arbitration constitutes the juridical home or "centre of gravity" of the arbitral proceedings, and it is the law of the seat (*lex arbitri*) that governs and determines the courts competent to exercise supervisory jurisdiction. Importantly, the Court clarified that the seat is distinct from the venue, as arbitral hearings may be conducted at locations other than the seat for convenience, without altering the juridical seat of arbitration.

[26] **(2008) 10 SCC 308**

93. However, recognizing the disruptive impact of a retrospective overruling, the Court held that ***BALCO*** (supra) would apply prospectively, i.e., only to arbitration Agreement executed on or after 6 September 2012. Consequently, arbitration agreements executed prior to this date, in principle, came to be governed by the ***BHATIA*** (supra) regime. The relevant extract capturing the above-mentioned observation reads as under:

> *"75. We are also unable to accept the submission of the learned counsel for the appellants that the Arbitration Act, 1996 does not make seat of the g arbitration as the centre of gravity of the arbitration.* ***On the contrary, it is accepted by most of the experts that in most of the national laws, arbitrations are anchored to the seat/place/situs of arbitration. Redfern in Para 3.54 concludes that "the seat of the arbitration is thus intended to be its centre of gravity."*** *This, however, does not mean that all the proceedings of the arbitration have to take place at the seat of the arbitration. The arbitrators at times hold meetings at more convenient locations ……*
>
> ***
>
> *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. 76.*
>
> *78.****For the reasons stated above, we are unable to support the conclusion reached in Bhatia International and Venture Global Engineering (supra), that Part I would also apply to arbitrations that do not take place in India****.*
>
> ***

116. The legal position that emerges from a conspectus of all the decisions, seems to be, that the choice of another country as ***the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings****.*

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."***

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 lnternational2. ***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.***

THE *ENERCON* ENDORSEMENT

94. However, subsequent decisions of the Supreme Court substantially narrowed the practical distinction between pre-***BALCO*** and post-***BALCO*** agreements.

95. In ***Enercon (India) Ltd. & Ors. v. Enercon GMBH & Anr.***[27], the Court reaffirmed that the seat of arbitration alone determines

[27] **AIR 2014 SC 3152**

exclusive supervisory jurisdiction, and merely referring to a place as the "venue" would not automatically elevate it to the status of a "seat" unless supported by additional *indicia*. The Court clarified that phrases such as "*venue of arbitration shall be in London*" are not by themselves, conclusive, whereas expressions like "*arbitration in London*" may, depending on the context, denote both seat and venue. The relevant para capturing the above understood observation reads as follow –

> *"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.*
>
> ***
>
> *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 Lond****on. 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 intlmate connection with India. In contrast, London is described only as a venue which Dr Singhvi says would be the natural forum.*
>
> (emphasis supplied)

RELIANCE II

96. This jurisprudence was further refined in Reliance Industries Ltd. v. Union of India (***RELIANCE II)*** *(supra).* The Apex Court clarified that even under the ***BHATIA*** regime, Part I of the Act stood excluded wherever such exclusion was express or could be inferred by necessary implication. The Apex Court held that a foreign seat or a foreign governing law of the arbitration agreement constitutes such necessary implication, thereby excluding Part I of the Act, regardless of whether the agreement was executed pre or post-***BALCO***. Thus, ***RELIANCE II*** significantly diluted the formal prospective limitation imposed in ***BALCO*** and effectively curtailed the applicability of concurrent jurisdiction even for pre-***BALCO*** agreements. The relevant extract is reproduced as follows:

> "*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)*

THE NORTHERN STAR: *ARIF AZIM*

97. The law was comprehensively consolidated and the applicability of Part-I of the Act to arbitration seated outside India, now stands conclusively settled by the Supreme Court in ***Arif Azim*** (supra). The Court undertook a detailed review tracing the jurisdictional evolution beginning from ***National Thermal Power Corporation*** (supra) through ***BHATIA***, ***BALCO***, ***RELIANCE II*** and subsequent authorities, culminating in a definitive restatement of principles thus clarifying the legal position with precision, as follows:

> *"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".*

98. A comprehensive reading of ***Arif Azim*** (supra) makes it abundantly clear and demonstrates that the earlier perceived dichotomy between pre-***BALCO*** and post-***BALCO*** agreements has now been substantially neutralized. The Apex Court authoritatively held that irrespective of the date of execution of the arbitration agreement, the applicability of Part I is now strictly confined to the two situations, i.e (i) where the juridical seat of arbitration is in India; or (ii) where no categorical determination of the seat or place of arbitration is possible even after applying settled legal tests, and the law governing the arbitration agreement is Indian law.

99. Therefore, in light of the law established in ***RELIANCE II*** (supra) and as clarified in ***Arif Azim*** (supra), the applicability of Part I is contingent upon the satisfaction of specific jurisdictional condition and in absence of these conditions, Indian courts lack supervisory jurisdiction, and Part I stands excluded in respect of foreign seated arbitrations. Thus, this pronouncement decisively eliminates all residual ambiguity and uncertainty surrounding the continued relevance of ***BHATIA*** *to pre-***BALCO*** agreements and conclusively restricts the application of Part I in harmony with Section 2(2) of the Act to foreign seated arbitrations, whether pre or post-***BALCO***.

POSITION OF LAW- APPLICABILITY OF PART-I

100. A combined reading of the Post- ***BALCO*** authorities make it abundantly clear that supervisory jurisdiction is inseparably linked to the seat of arbitration. While, parties retain autonomy to distinguish

between "seat and "venue", the designation of a juridical seat automatically attracts the curial law of that seat and vests exclusive supervisory jurisdiction in the courts of that seat. This seat-centric approach is now firmly entrenched in Indian Arbitration Law and brings it in consonance with the UNCITRAL Model Law, which is founded on the territorial principle.

101. The Supreme Court in para 39 (iii) in ***Arif Azim case*** (supra) reaffirmed that Part I of the Act would apply only if the seat or place of arbitration is in India. It is further clarified that recourse to the law governing the arbitration agreement arises only as a last resort and only in cases where no categorical determination of the seat or place is possible even after applying settled legal principles and exhausting all legally recognized mechanisms. The law governing the arbitration agreement becomes relevant merely as a residual consideration. Given that supervisory jurisdiction is inseparably linked to the seat, the determination of the seat becomes a threshold inquiry. The "juridical seat", being the legal home of arbitration, determines which court alone may exercise supervisory control and only after the seat is identified, the applicability of Part I and the jurisdiction of Indian courts can be conclusively resolved and concluded.

DETERMINATION OF SEAT

102. As the law regarding the applicability of Part-I is understood, we shall now apply the same in reverting to the main issue regarding determination of seat of Arbitration, as admittedly the same would

concur supervisory jurisdiction on the territorial courts.

103. The decision in ***Arif Azim*** (supra) plays a significant role in streamlining the law of arbitration in India. While respecting established precedents, it decisively clarifies lingering doctrinal uncertainties. Building upon the principles established in ***BGS SGS Soma JV*** (supra), this decision carved out a distinction between 'seat' and 'venue' particularly where arbitration clauses specify a "place" of arbitration without expressly using the term "seat", thereby granting supervisory jurisdiction to the courts of that place. While determining the aforesaid proposition, the Court examined and harmonized the principles relating to the now discarded doctrine of concurrent jurisdiction, the *Shashoua* principle and the close connection test propounded in NTPC (supra).

104. Thus, pertaining to the test regarding determination of the seat of arbitration, the Apex Court re-affirmed the *Shashoua* principle and categorically held that the doctrine of concurrent jurisdiction is no longer sustainable in Indian law The Supreme Court in ***Arif Azim*** (supra) interpreting ***Roger Shashoua*** (supra), clarified that, where a venue is expressly designated, coupled with the adoption of curial or supranational rules associated with that place and supported by additional indicia pointing to exclusivity, the named venue must be construed as the juridical seat of arbitration. The Court further clarified that ***BALCO*** (supra) expressly affirmed the *Shashoua* principle, this affirmation was recognized in ***Enercon*** (supra) and any contention that ***BALCO*** (supra) diluted or rejected *Shashoua* was

unequivocally rejected. Thus, *Shashoua* principle stands as settled law in India. The relevant observation made regarding the same makes for an interesting read and is being curled in as follows:

> *"51. In Roger Shashoua (2) v. Mukesh Sharmareported 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.*
>
> ***
>
> *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.

***

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.

***

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.

***

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 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."

(emphasis supplied)

105. Thereafter, the Apex Court reaffirmed the three prong test laid

down in ***BGS SOMA (supra),*** which governs the circumstances when a "`venue" can be construed as a "seat". The Apex Court observed that where an arbitration clause stipulated only one place, which is designated or mentioned in the arbitration agreement, and the arbitral proceedings are fixed or anchored to that place, typically through expressions such as "*arbitration shall be held at .....*", indicating that the place is not merely for occasional hearings or meetings and there is no strong contrary indication suggesting that the designated place is merely a convenient venue and not the juridical seat, such place must be treated as the juridical seat of arbitration. Once the place is construed as the seat, it confers exclusive supervisory jurisdiction on the courts of that place. The observation capturing the three-condition test reads as follows:

> *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'.

106. The Court further clarified that where there is a reference of institutional rules, procedural rules or curial law of a particular jurisdiction, it constitutes a positive *indicia* supporting the conclusion that the designated place is the juridical seat of the arbitration, and not merely a venue for conducting hearings.

107. The Apex Court, at the culmination of its judgment in paragraph 71 of ***Arif Azim*** (supra), summarised the overall law governing to the applicability of Part-I of the Act, determination of the arbitral seat, and supervisory jurisdiction of courts. This authoritative summary conclusively dispels any residual ambiguity regarding the role of Indian courts in arbitrations seated outside India, and now serves as the guiding & controlling legal framework for adjudicating jurisdictional issues. The principles enunciated therein provide a clear, predictable, and internationally aligned approach, ensuring minimal judicial intervention and reinforcing India's pro'arbitration stance. We, therefore, deem it necessary to reproduce the summarised position of law mentioned in paragraph 71 of ***Arif Azim*** (supra), the same reads as follows:

"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 side line 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, after all 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."

108. From the foregoing analysis of statutory provisions and binding judicial precedents, it emerges with unmistakable clarity that the supervisory jurisdiction over arbitral proceedings under the Act is exclusively seat centric. The juridical seat of arbitration determines the curial law and the court vested with supervisory authority. Part I of the Act applies only where the seat is situated in India; for foreign seated arbitrations, Part I is excluded, save for the limited statutory

exceptions under the proviso to Section 2(2). Further, the doctrine of concurrent jurisdiction stands conclusively rejected. Once the seat is identified, courts at the seat alone exercise supervisory jurisdiction. As held in ***BGS SOMA*** (supra), applying the *Shashoua* principle, the designation of a place as the "venue" of arbitration ordinarily constitutes the seat in the absence of contrary indicia. This position has been reaffirmed in ***Arif Azim*** (supra), which clarifies that Indian courts lack supervisory jurisdiction over foreign seated arbitrations, irrespective of any contractual, commercial or territorial connections with India, does not alter this legal position. This settled position of law must guide the adjudication of the present case, leaving no scope for deviation based on obsolete doctrines or misconceived assertions of jurisdiction.

DISORTHO

109. Having understood the law regarding the applicability of Part-I of the Act, and the principles governing determination of the juridical seat of arbitration, it becomes necessary to understand the decision of Apex Court in ***Disortho*** (supra).

110. The dispute in ***Disortho*** (supra) arose between a Colombian entity and an Indian company. The governing clause of the agreement expressly provided that the contract would be governed by Indian law and that all matters arising out of the agreement would be subject to the exclusive jurisdiction of courts at Gujarat, India. However, the dispute resolution clause stipulated that disputes would be referred to

arbitration under the rules of the Chamber of Commerce of Bogotá (Colombia), and that the arbitral proceedings would be conducted at Bogotá.

111. The Apex Court, while adjudicating the controversy, clarified that parties to an arbitration agreement may expressly or impliedly choose different laws governing distinct aspects of the arbitral process, namely, (i) the law governing the arbitration (*lex arbitri*), (ii) the law governing the arbitration agreement, (iii) the law governing the substantive contract, and (iv) the procedural rules applicable to the conduct of arbitration. It was observed that the law governing the arbitration determines which courts exercise supervisory jurisdiction over the arbitral proceedings, while the law governing the arbitration agreement governs its validity, scope, interpretation, and enforceability. Significantly, the Apex Court emphasized that the law governing the arbitration agreement and the law governing the arbitration are closely intertwined and, in many cases, subsumed within each other. The Court cautioned against mechanically differentiating between these concepts unless the contract clearly warrants such a distinction. The relevant paragraph capturing the above observation reads as follows:

> *" 7. This ratio distinguishes between four choices of law – (i) the law governing the arbitration, (ii) the proper law of arbitration agreement, (iii) the proper law of contract, and (iv) the procedural rules which apply in the arbitration. These choices are either expressly provided or implied by the parties involved. The passage also highlights the subtle distinction between the proper law of arbitration agreement (i.e., law governing the agreement to arbitrate) and the law governing the arbitration as a whole.* ***The law governing the agreement to arbitrate determines the validity, scope, and interpretation of the agreement. In contrast, the law***

governing the arbitration itself is concerned with determining which court has supervisory jurisdiction over the arbitration. *This jurisdictional framework pertains to the conduct of the arbitration, the rules governing interim measures, and the provisions under which the court may exercise its supervisory authority, such as in the removal of arbitrators.*

8. ***While parties may elect to differentiate between the lex arbitri — the law governing the agreement to arbitrate and the law governing the arbitration itself — such a distinction warrants caution. A distinction should not be readily drawn unless the parties intended to preserve such a distinction. Invariably, these concepts are subsumed in each other. They are inherently intertwined as a part and parcel of the lex arbitri. This is particularly apparent in matters such as the filling of vacancies within the arbitral tribunal or the removal of an arbitrator for misconduct. In these situations, the law governing the arbitration agreement and the law governing the arbitration overlap, as both are essential to the functioning and integrity of the arbitral process. Consequently, unless the parties have provided otherwise, it is prudent not to divide lex arbitri."***

(emphasis supplied)

112. The Apex Court relying upon the judgment of the UK Supreme Court in E**nka *Insaat Ve Sanayi AS v. OOO Insurance Company Chubb***[28],reiterated that the law governing the arbitration agreement may, in appropriate case, be different from the law governing the main contract. It was held that the determination of the law chosen by contracting parties to govern the arbitration agreement must be carried out by interpreting the arbitration clause, and if necessary, the contract as a whole, in accordance with established principles of contractual interpretation. It was further held that where the arbitration clause is embedded in the main contract and there is no separate or distinct choice of law governing the arbitration agreement, the

[28] **2020 UK SC 38.**

presumption is that the law governing the substantive contract (*lex contractus)* also governs the arbitration agreement. The mere selection of a foreign seat or venue, in the absence of a clear contrary intention, does not displace this presumption. Where neither the arbitration agreement nor the substantive contract specifies a governing law, the law having the closest and most real connection with the arbitration agreement would apply. The observations drawn read as follows:

> ***13. In Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb,13 the UK Supreme Court examined this legal issue and divergent opinions surrounding it. One line of precedents suggest that the lex contractus should govern the arbitration agreement. Although the arbitration agreement is separable from the main contract, it is not completely detached from it. Conversely, there is case law indicating that the law of the seat of arbitration should typically govern the arbitration agreement. Enka Insaat (supra) follows the principles stipulated in Sulamérica Cia Nacional De Seguros S.A. and Others v. EnesaEngenharia S.A. and Others,14 which it observes straddles both views. The Court ultimately establishes the following principles:***
>
> ***"X Conclusions on applicable law***
>
> ***170. It may be useful to summarise the principles which in our judgment govern the determination of the law applicable to the arbitration agreement in cases of this kind:***
>
> ***i) Where a contract contains an agreement to resolve disputes arising from it by arbitration, the law applicable to the arbitration agreement may not be the same as the law applicable to the other parts of the contract and is to be determined by applying English common law rules for resolving conflicts of laws rather than the provisions of the Rome I Regulation.***
>
> ***ii) According to these rules, the law applicable to the arbitration agreement will be (a) the law chosen by the parties to govern it or (b) in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected.***
>
> ***iii) Whether the parties have agreed on a choice of law to govern the arbitration agreement is ascertained by construing the arbitration agreement and the contract containing it, as a whole,***

applying the rules of contractual interpretation of English law as the law of the forum.

iv) Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.

v) The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.

vi) Additional factors which may, however, negate such an inference and may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat are: (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the 14 [2012] EWCA Civ 638. Arb.Pet. No.48/2023 Page 10 of 26 arbitration agreement would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.

vii) Where there is no express choice of law to govern the contract, a clause providing for arbitration in a particular place will not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of that place.

viii) In the absence of any choice of law to govern the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations.

ix) The fact that the contract requires the parties to attempt to resolve a dispute through good faith negotiation, mediation or any other procedure before referring it to arbitration will not generally provide a reason to displace the law of the seat of arbitration as the law applicable to the arbitration agreement by default in the absence of a choice of law to govern it. (emphasis supplied)"

14. The conclusions in Enka Insaat (supra) summarizes the tie breaker rules. Sub-paragraph (i) explains that the law governing the arbitration agreement may differ from the law governing the contract. The former should be determined through conflict of law rules. Sub-paragraph (ii) states that the law governing the arbitration agreement is the law chosen by the parties. If no such choice is made, the law most closely connected to the agreement applies. However, sub-paragraph (ii) must be read alongside sub-paragraph (iii), which clarifies that the law chosen for the arbitration agreement is determined by interpreting the agreement, and if necessary, the entire contract using rules of contractual interpretation. Sub-paragraph (iv) states that when the law governing the arbitration agreement is not specified, the law of the contract (lex contractus) usually applies. Sub-paragraph (v) highlights that selecting a country for the seat of arbitration does not automatically alter the presumption that lex contractus governs the arbitration agreement. Sub-paragraph (vi) outlines factors that may override this presumption. This can happen when the law of the seat mandates that the arbitration agreement must be governed by the law of that country. For instance, this becomes relevant in the context of the A&C Act. Section 2(2) of the A&C Act stipulates that Part I of the A&C Act applies to arbitrations seated in India. The second exception is when there is a serious risk that the agreement will become ineffective, or the dispute will become inarbitrable, if governed by the same law as that of the contract. Third factor is where the seat is deliberately chosen as a neutral forum. These factors will displace the presumption in favour of lex contractus governing the arbitration agreement. The factors mentioned in sub-para (vi) are not exhaustive and there may be other additional factors negating the presumption. Sub-para (vii) deals with cases where a particular place is chosen as the venue in contrast to the seat of arbitration. A place being chosen, does not by itself justify an inference that the arbitration agreement is intended to be governed by the law of this venue. Sub-para (viii) states that in the absence of any choice of law governing the arbitration agreement, the arbitration agreement will be governed by the law with which it is most closely connected. The close connection test applies only when the law governing the arbitration agreement cannot be ascertained even after applying the earlier paragraphs. In such a case, the law applicable to the seat of arbitration will be the law having the closest connection to the arbitration even if it differs from the parties' contractual obligations. The closest connection test and a presumption in favour of seat in terms of sub-para (viii) will only apply when the contract does not stipulate the lex contractus. Sub-para (ix) states cases relating to attempt to resolve a dispute through good faith, negotiation,

mediation, etc. will not generally provide reason to displace the law of the seat of arbitration

15. We believe the above conclusions state the good and correct legal position, except on the aspects where the Courts in India have taken a different view. Consistency and uniformity in applying legal principles are crucial for ensuring fairness and comity in international commerce and dispute resolution mechanisms.

113. Further, relying on ***Sulamérica Cia Nacional De Seguros S.A. and Others v. Enesa Engenharia S.A. and Others***[29] the Supreme Court affirmed the three-stage enquiry to determine the proper law of the arbitration agreement. The Supreme Court endorsed the principle that it is reasonable to presume that the parties intend their entire contractual relationship to be governed by a single system of law throughout the contract. Accordingly, the test being (i) whether there is an express choice of law governing the arbitration agreement, (ii) in the absence of an express choice, whether an implied choice can be discerned, and (iii) failing both, which law has the closest and most real connection with the arbitration agreement. It was clarified that the second stage arises only if the first stage yields a negative result, and as a logical corollary, the third stage is triggered only if both the first and second stages fail. The relevant extract is reproduced below:

> *16. Earlier, SulaméricaCia (supra) had laid down this three-fold test to determine the law governing the arbitration agreement: "25. Although there is a wealth of dicta touching on the problem, it is accepted that there is no decision binding on this court. However, the authorities establish two propositions that were not controversial but which provide the starting point for any enquiry into the proper law of an arbitration agreement. The first is that, even if the agreement forms part of a substantive contract (as is commonly the case), its proper law may not be the same as that of the substantive contract. The second is that the proper law is to be*

[29] **[2012] EWCA Civ 638.**

determined by undertaking a three-stage enquiry into (i) express choice, (ii) implied choice and (iii) closest and most real connection. As a matter of principle, those three stages ought to be embarked on separately and in that order, since any choice made by the parties ought to be respected, but it has been said on many occasions that in practice stage (ii) often merges into stage (iii), because identification of the system of law with which the agreement has its closest and most real connection is likely to be an important factor in deciding whether the parties have made an implied choice of proper law: see Dicey, Morris & Collins, op. cit. paragraph 32-006. Much attention has been paid in recent cases to the closest and most real connection, but, for the reasons given earlier, it is important not to overlook the question of implied choice of proper law, particularly when the parties have expressly chosen a system of law to govern the substantive contract of which the arbitration agreement forms part. (emphasis supplied)" Sulamérica Cia (supra) observes that the law governing the arbitration agreement may differ from the law of the contract. However, it is reasonable to presume that the parties intended for their entire relationship to be governed by the same system of law throughout the contract. In this context, a distinction is made between a stand-alone arbitration agreement and one that is embedded within a contract. In the former, a choice of seat of arbitration becomes highly significant, and the law of the seat would likely govern the arbitration agreement. However, when the arbitration agreement forms part of a contract, the express choice of a lex contractus strongly indicates the parties' intention. It would generally be inferred that the arbitration is governed by the same law as the substantive contract. However, this presumption is rebuttable as previously highlighted. Even when the arbitration agreement is part of the contract, the court must conduct a three-step inquiry: first, looking at Arb.Pet. No.48/2023 Page 14 of 26 the express choice of law; second, considering any implied choice; and third, determining the closest and most real connection. Second step is applied when the first step is negative, and the third step is applied when the first and second steps are negative."

114. The dispute resolution clause in ***Disortho*** (supra) designated Bogotáas the venue of arbitration, while another clause in the agreement expressly stipulated that the overall contract would be governed by Indian law and that courts in Gujarat, India shall possess supervisory jurisdiction. The Court therein noted that the agreement did not expressly designate Bogota as the juridical seat of arbitration.

It was further held that the mere designation of a venue or place for conducting arbitral proceedings, is not sufficient to displace the presumption in favour of the *lex contractus.* Hence, the Supreme Court observed that while Bogotá was the venue and the procedural rules of the Arbitration and Conciliation Centre at the Bogotá Chamber of Commerce governed the conduct of the arbitration, such stipulations did not curtail or exclude the supervisory jurisdiction of Indian courts. Consequently, Part I of the Act was held to be applicable, and Indian courts were found to retain supervisory jurisdiction over the arbitral proceedings. The observation drawn reads as follows:

> *"29. Clause 16.5 is clear and unambiguous. It explicitly states that the entire agreement shall be governed by and construed in accordance with the laws of India, and all matters arising from the agreement shall fall under the jurisdiction of the courts in Gujarat, India. Given this, it is reasonable to assume that, when drafting this clause, the parties were fully aware of Clause 18, which provides for arbitration and conciliation under the Arbitration and Conciliation Centre of the Chambers of Commerce in Bogota.* ***In our view, Bogota has been designated as the venue for conciliation and arbitration, while the courts in Gujarat, India, retain exclusive jurisdiction over disputes. This must, unless there is a divergence in lex arbitri, include jurisdiction over appointments and act as a conduit for the arbitration in Bogota, Colombia****.*
>
> *30. The law governing the arbitration agreement, being Indian law, means that its validity, scope, and interpretation will be determined in accordance with Indian law. But which national courts—those in India or Colombia—exercise supervisory jurisdiction over the arbitration proceedings? Does the A&C Act apply to these arbitration proceedings? Upon a consistent reading of the Distributor Agreement, it is clear that only the courts in Gujarat, India, are referenced.* ***While it is acknowledged that the venue for arbitration is Bogota, Colombia, and that the procedural rules of the Arbitration and Conciliation Centre at the Chambers of Commerce in Bogota are to apply****,* ***this does not diminish the supervisory***

> ***powers of Indian courts, as explicitly outlined in Clause 16.5. 31****. While recording the above findings, we are also guided by the principles outlined above for locating the law governing the arbitration agreement. We begin by applying the three-step test developed by SulaméricaCia (supra). First, neither Clause 16.5 nor Clause 18 explicitly stipulates the governing law of the arbitration agreement. Therefore, we proceed to the next step of the test, which involves identifying the parties' implied choice of law for the arbitration agreement. At this stage, there is a strong presumption that the lex contractus, i.e., Indian law, governs the arbitration agreement. As explained earlier, this presumption may be displaced if the arbitration agreement is rendered non-arbitrable under Indian law. But that is not the case here.* ***Furthermore, the mere choice of 'place' is not sufficient, in the absence of other relevant factors, to override the presumption in favor of the lex contractus****. In this case, it is important to note that no seat of arbitration has been explicitly chosen. In conclusion, at this second stage of the inquiry, we find that the parties have impliedly agreed that Indian law governs the arbitration agreement, and the controversy can be resolved accordingly."*

Thus, the Supreme Court unequivocally accorded primacy to the *lex contractus* over the mere designation of a venue and procedural rules while determining the law governing the arbitration and the consequent supervisory jurisdiction, particularly in the absence of an express designation of seat. Applying ***Enka*** (supra), the Apex Court held that although the contract provides for arbitration in Bogotá under Bogotá Institutional rules, this did not, by itself, constitute an express designation of Bogota as the seat. The "mere choice of venue" was held insufficient to override the presumption in favour of *lex contractus*, in light of no express indication of seat.

115. Therefore, in the light of the various aforesaid judicial pronouncements and settled legal principles, the framework is now firmly established for examining the facts of the present case. It is well

settled that the juridical seat of arbitration determines the court which exercises supervisory jurisdiction over the arbitral proceedings and the applicability of Part I of the Act.

116. The controversy involved in the present case arises out of two distinct contracts, namely- (i) the Supply Contract, and (ii) the MSA. Both contract must therefore be independently analysed to ascertain the governing law, the nature of the arbitration clauses contained therein, and most importantly, the juridical seat of arbitration. Such an analysis must be undertaken keeping in mind that, unless there is a clear and unmistakable designation of a foreign seat, the presumption in favour of the *lex contractus* and the supervisory jurisdiction of Indian courts continues to apply. Only upon such an examination can the juridical seat of arbitration in the present case be conclusively determined.

SUPPLY CONTRACT

117. Clause 22.3 of the Supply Contract expressly designates London as the seat of arbitration, while Clause 22.2 provides for arbitration under ICC Rules, Paris and Clause 22.5 stipulates Indian law as the governing law of the contract.

118. In light of settled law, the dispute resolution mechanism under the Supply Contract admits no ambiguity. The seat of arbitration, the governing law of the substantive contract, and the procedural framework are clearly and unequivocally defined.

119. The express use of the term 'seat' Clause 22.3, which is akin to jurisdiction, leaves no scope for interpreting London as a mere venue. A holistic reading of the supply contract reveals no reference to any alternative place or venue for arbitration proceedings. Also, there is nothing to suggest that London was intended merely as a convenient location for hearings. The clause 22.3 read as follows:

> *22.3* ***The seat of the arbitration shall be London and the language of the arbitration shall be English****.*

120. The parties' intention to designate London as the juridical seat is explicit and unambiguous, and there exists no "contrary *indicia'* to suggest otherwise.

121. The Apex Court in ***BGS SGS SOMA(supra)*** held that once a seat is designated, the courts of that seat alone exercise exclusive supervisory jurisdiction over the arbitration proceedings. This position was consistent with ***BALCO*** (supra), which clarified that the designation of a seat amounts to an exclusive jurisdiction clause, thereby excluding the possibility of two courts having concurrent jurisdiction.

122. The Court further observed that Section 42 of the Act merely intended to prevent jurisdictional conflicts by confining all arbitral proceedings to a single court, provided that such court otherwise has jurisdiction. Accordingly, once London is designated as the seat, English courts alone have supervisory jurisdiction, and Indian courts

are barred from exercising such jurisdiction. For the sake of ease of analysis, the observation of the Apex Court in ***BGS SOMA*** (supra) is reproduced:

> *"40. A reading of paragraphs 75, 76, 96, 110, 116, 123 and 194 of BALCO (supra)* ***would show that where parties have selected the seat of arbitration in their agreement, such selection would then amount to an exclusive jurisdiction clause, as the parties have now indicated that the Courts at the "seat" would alone have jurisdiction to entertain challenges against the arbitral award which have been made*** *at the seat. The example given in paragraph 96 buttresses this proposition, and is supported by the previous and subsequent paragraphs pointed out hereinabove. The BALCO judgment (supra), when read as a whole, applies the concept of "seat" as laid down by the English judgments (and which is in Section 20 of the Arbitration Act, 1996), by harmoniously construing Section 20 with Section 2(1)(e), so as to broaden the definition of "court", and bring within its ken courts of the "seat" of the arbitration.*
>
> *41. However, this proposition is contradicted when paragraph 96 speaks of the concurrent jurisdiction of Courts within whose jurisdiction the cause of action arises wholly or in part, and Courts within the jurisdiction of which the dispute resolution i.e. arbitration, is located.*
>
> *42. Paragraph 96 is in several parts. First and foremost, Section 2(1)(e), which is the definition of "Court" under the Arbitration Act, 1996 was referred to, and was construed keeping in view the provisions in Section 20 of the Arbitration Act, 1996, which give recognition to party autonomy in choosing the seat of the arbitration proceedings. Secondly, the Court went on to state in two places in the said paragraph that jurisdiction is given to two sets of Courts, namely, those Courts which would have jurisdiction where the cause of action is located; and those Courts where the arbitration takes place.* ***However, when it came to providing a neutral place as the "seat" of arbitration proceedings, the example given by the Five Judge Bench made it clear that appeals under Section 37 of the Arbitration Act, 1996 against interim orders passed under Section 17 of the Arbitration Act, 1996 would lie only to the Courts of the seat*** *- which is Delhi in that example - which are the Courts having supervisory control, or jurisdiction, over the arbitration proceedings. The example then goes on to state that this would be irrespective of the fact that the obligations to be performed under the contract, that is the cause of action, may arise in part either at Mumbai or Kolkata. The fact*

that the arbitration is to take place in Delhi is of importance. However, the next sentence in the said paragraph reiterates the concurrent jurisdiction of both Courts.

***

47. It *was not until this Court's judgment in Indus Mobile Distribution Private Limited (supra) that the provisions of Section 20 were properly analysed in the light of the 246th Report of the Law Commission of India titled, 'Amendments to the Arbitration and Conciliation Act, 1996' (August, 2014) (hereinafter referred to as the "Law Commission Report, 2014"), under which Section 20(1) and (2) would refer to the "seat" of the arbitration, and Section 20(3) would refer only to the "venue" of the arbitration.* ***Given the fact that when parties, either by agreement or, in default of there being an agreement, where the arbitral tribunal determines a particular place as the seat of the arbitration under Section 31(4) of the Arbitration Act, 1996, it becomes clear that the parties having chosen the seat, or the arbitral tribunal having determined the seat, have also chosen the Courts at the seat for the purpose of interim orders and challenges to the award.***

***

55. ***In Indus Mobile Distribution Private Limited and Ors. (supra), after clearing the air on the meaning of Section 20 of the Arbitration Act, 1996, the Court in paragraph 19 (which has already been set out hereinabove) made it clear that the moment a seat is designated by agreement between the parties, it is akin to an exclusive jurisdiction clause, which would then vest the Courts at the "seat" with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties***.

***

61. Equally incorrect is the finding in Antrix Corporation Ltd. (supra) that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of Courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one Court exclusively. This is why the section begins with a non-obstante clause, and then goes on to state "…where with respect to an arbitration agreement any application under this Part has been made in a Court…" It is obvious that the application made under this part to a Court must be a Court which has jurisdiction to decide such application. ***The subsequent holdings***

> ***of this Court, that where a seat is designated in an agreement, the Courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the Court where the seat is located, and that Court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement****. So read, Section 42 is not rendered ineffective or useless. Also, where it is found on the facts of a particular case that either no "seat" is designated by agreement, or the so called "seat" is only a convenient "venue", then there may be several Courts where a part of the cause of action arises that may have juris- 70 diction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a Court in which a part of the cause of action arises would then be the exclusive Court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled.*

123. There is another aspect of the matter, in as much as it is undisputed that the Supply Contract and the MSA were executed prior to the decision in ***BALCO*** (supra). Ordinarily, such agreements would fall under the ***BHATIA*** regime. However, the Apex Court in ***RELIANCE II*** (supra) clarified that Part I of the Act would stand excluded by necessary implication where the seat of arbitration is outside India or where the arbitration agreement is governed by foreign law. The relevant observation made in ***RELIANCE II*** case (supra) reads as follows:

> *"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."*

124. This position was reaffirmed in ***Arif Azim*** (supra) wherein it was held that even for pre-***BALCO*** agreements, Part-I would be inapplicable if the juridical seat of arbitration is outside India.

125. Therefore, the agreement despite being executed prior to ***BALCO*** (supra), Part-I of the Act stands excluded in the present case by virtue of the express designation of London as the seat.

MAINTENANCE SERVICE AGREEMENT(MSA)

126. Clause 14 of the Maintenance Service Agreement ("MSA") governs dispute resolution and is largely *pari materia* with the arbitration framework in the Supply Contract. Both agreements were executed on the same day, and form part of a composite commercial transaction. Significantly, the learned Singh Judge in CS(OS) No. 1678/2014, by judgment dated 14.08.2014, while considering a challenge to the arbitration agreement, expressly observed that the MSA was executed in furtherance of the Supply Contract. This judicial finding lends substantial weight to the conclusion that the two agreements must be construed harmoniously and conjointly, rather than in isolation.

127. Clause 14.3 of the MSA stipulates that arbitration "*shall take*

place" in London. While the term "seat" is not expressly used, as has been mentioned in the Supply Contract, the use of the mandatory phrase "shall take place" is of considerable significance. It indicates a definitive and exclusive choice of London as the juridical seat of the arbitration. Clause 14.6 further provides that the contract shall be governed by Indian law, thereby designating the *lex contractus*.

128. However, it is now well settled under Indian law that the governing law of the contract does not *ipso facto* determine the *lex arbitri* or the supervisory jurisdiction over the arbitral proceedings. The distinction between *lex contractus*, *lex arbitri*, and *lex fori* has been consistently recognized by the Apex Court, and parties are free by virtue of party autonomy to choose different laws governing these aspects of their arbitration of their agreement.

129. The clause of decisive and overriding importance in the MSA is Clause 14.4. This clause does not find mention in the Supply Contract, nevertheless, its presence in the MSA is unambiguous and categorical. Critically, Clause 14.4 of the MSA expressly excludes the applicability of Part-I of the Act. This Clause assumes paramount significance and removes any residual ambiguity regarding the parties' intention. The clause reads as:

> " *14.4 The parties expressly exclude the application of Part 1 of the Indian Arbitration and Conciliation Act, 1996".*

130. Even assuming the applicability of ***BHATIA*** (supra), the parties have both expressly and impliedly excluded Part I through Clause 14.4, which constitutes an explicit manifestation of such exclusion,

thereby satisfying even the most stringent tests laid down in pre-***BALCO*** jurisprudence. The choice of London as the place of arbitration, adoption of ICC Rules, and express exclusion of Part I, collectively constitute a clear and determinative indication of parties' intent to have arbitration at London.

131. The Apex Court has, in a plethora of decisions has consistently emphasized "party autonomy" as the cornerstone of arbitration. Parties have liberty to determine the seat of arbitration, the procedural law governing the arbitration, and the substantive law governing the contract. Accordingly, the conscious choice of the parties must be respected, particularly in the context of international commercial arbitration. In the present case, several positive indicia unequivocally demonstrate the intention of the parties to exclude the application of Part I of the Act, namely, (i) selection of London as the place where arbitration "shall take place", (ii) conduct of arbitration in accordance with the ICC rules, with the procedural framework linked to ICC Paris, (iii) absence of any alternative or concurrent venue or seat, and most importantly, (iv) the express exclusion of Part I under clause 14.4 of the MSA. When these factors are read cumulatively, they form an unbreakable chain of coherent and unmistakable expression of the parties' intention that the arbitration be seated outside India and be governed by a foreign curial law, notwithstanding Indian law governing the substantive contract.

132. The Apex Court in ***BALCO*** (supra) recognized party autonomy as the "*overarching and guiding spirit*" of arbitration law in India.

This principal has since been reaffirmed and expanded in subsequent decisions, including ***PASL*** (supra) which held that even two Indian parties are free to designate and are entitled to choose a foreign seat of arbitration. Arbitration jurisprudence in India thus celebrates Party autonomy as the very foundation of arbitration, particularly in context of international commercial arbitration. Court must interpret arbitration agreement in the manner that gives effect to the commercial intent and conscious choices of the contracting parties, rather than frustrating them through hyper-technical or artificial distinctions between "seat" and "place".

133. In light of the foregoing analysis, we conclude that the parties have made a deliberate choice in selecting London as the "place" of arbitration, invoking the procedural rules of ICC and by incorporating Clause 14.4 of the MSA. These decisions clearly reflect the conscious choice of the parties to exclude Part I of the Act and no contrary indicia or evidence has been presented to suggest a different interpretation. As such reading or interpreting the agreement in a manner that applies Part I of the Act, or diverges from the express terms, would be contrary to the legislative intent behind the Act, which seeks to promote arbitration as a speedy and efficient dispute resolution mechanism while respecting the autonomy of the parties involved. This position stands fortified by the observations in ***PASL*** (supra).

134. In this regard, we deem it relevant to refer to the observation made by the Apex Court in ***PASL*** (supra) which after considering

various earlier precedents and the available literature on the said aspect, concluded in the following words:

> *42. Be that as it may, the legal position as we understand it is that the parties to an arbitration agreement have the autonomy to decide not only on the procedural law to be followed but also the substantive law. The choice of jurisdiction is left to the contracting parties. In the present case, the parties have agreed on a two-tier arbitration system through Clause 14 of the agreement and Clause 16 of the agreement provides for the construction of the contract as a contract made in accordance with the laws of India. We see nothing wrong in either of the two clauses mutually agreed upon by the parties."*

135. Further, we reiterate that a conjoint reading of the arbitration clauses in both the Supply Contract and the MSA demonstrate that London is designated as the venue of arbitration, and the arbitral proceedings are to be conducted in accordance with ICC Rules Paris. No other place is specified either as the venue or as the seat of arbitration. Significantly, Clause 14.4 of the MSA expressly excludes the applicability of Part I of the Act. The contractual framework, therefore, leaves no ambiguity as to the intention of the parties.

136. Applying the ratio laid down in ***Arif Azim*** (supra), and in view of Section 2(2) of the Act, this Court is unable to accept the contention that Indian courts could exercise supervisory jurisdiction over the arbitral proceedings.

137. On a plain, natural and harmonious construction of the dispute resolution clauses, read in harmony with the other provisions of the contracts, this Court finds no indication, express or implied, that the parties intended Part I of the Act to apply. The contracts, though

distinct, were executed on the same date, relate to the same commercial project, and are intrinsically interlinked in their performance. Consequently, they must be read as a composite whole. This approach is also consistent with the principle laid down by the Apex Court in ***Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan***[30]. The relevant observation reads as follows:

> *"30.If there is a situation where there are disputes and differences in connection with the main agreement and also disputes in regard to "other matters" "connected" with the subject matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This clause 39 no doubt does not refer to any named arbitrators. So far as clause 5 of the Interior Design Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and the said clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of the parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for a named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute) – it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the schedule to the main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated clause 39 in the main agreement and clause 5 in the Interior Design Agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and*

[30] **(1999) 5 SCC 651**

differences were confined only to the Interior Design Agreement. A case containing two agreements with arbitration clauses arose before this Court in Agarwal Engg. Co. v. Technoimpex Hungarian Machine Industries Foreign Trade Co. There were arbitration clauses in two contracts, one for sale of two machines to the appellant and the other appointing the appellant as sales representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the "sole repository" of the sale transaction of the two machines. Krishna Iyer, J. held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and "later purchases", other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they are distinct and not connected. Thus, in the present case, clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents."

138. In this backdrop, this Court finds no infirmity in the conclusion of the learned Single Judge that the petition under Section 34 of the Act was not maintainable for want of jurisdiction.

139. The reliance placed by the learned Single Judge on ***Roger Shoshuoa*** (supra) to elucidate the distinction between "venue" and "seat" is also well founded. While the determination of the juridical seat depends upon the facts of the case, the present case admits of no ambiguity. The Supply Contract explicitly stipulates London as the seat of arbitration, and Clause 14.4 of the MSA expressly excludes Part I of the Act. The subsequent reliance on ***RELIANCE II*** (supra), was therefore, apposite, and the conclusion that the juridical seat of the arbitration lies outside India warrants no interference.

140. In the backdrop of the above analysis, we shall now proceed to consider the submissions advanced by both the parties.

141. The submission advanced on behalf of the appellant that the Respondent, by filing a petition under Section 9 of the Act before this Court, had accepted the applicability of Part I and thereby attracted Section 42 of the Act, is devoid of merit. We find that jurisdiction cannot be conferred by consent, acquiescence, or conduct. In our view, Section 42 is attracted only when the initial application is filed before a court having jurisdiction in law. This position has been authoritatively settled in *BGS SGS Soma* (supra), wherein it was held that supervisory jurisdiction vests exclusively in the courts of the seat of arbitration.

142. The observation made by the Apex Court in ***BGS SGS Soma*** (supra) reads as follows:

> *"61. Equally incorrect is the finding in Antrix Corporation Ltd. (supra) that Section 42 of the Arbitration Act, 1996 would be rendered ineffective and useless. Section 42 is meant to avoid conflicts in jurisdiction of Courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one Court exclusively. This is why the section begins with a non-obstante clause, and then goes on to state "...where with respect to an arbitration agreement any application under this Part has been made in a Court..."* ***It is obvious that the application made under this part to a Court must be a Court which has jurisdiction to decide such application***. ***The subsequent holdings of this Court, that where a seat is designated in an agreement, the Courts of the seat alone have jurisdiction, would require that all applications under Part I be made only in the Court where the seat is located, and that Court alone then has jurisdiction over the arbitral proceedings and all subsequent applications arising out of the arbitral agreement. So read, Section 42 is not rendered ineffective or useless***. *Also, where it is found on the facts of a particular case that either no "seat" is*

designated by agreement, or the so called "seat" is only a convenient "venue", then there may be several Courts where a part of the cause of action arises that may have juris- 70 diction. Again, an application under Section 9 of the Arbitration Act, 1996 may be preferred before a court in which part of the cause of action arises in a case where parties have not agreed on the "seat" of arbitration, and before such "seat" may have been determined, on the facts of a particular case, by the Arbitral Tribunal under Section 20(2) of the Arbitration Act, 1996. In both these situations, the earliest application having been made to a Court in which a part of the cause of action arises would then be the exclusive Court under Section 42, which would have control over the arbitral proceedings. For all these reasons, the law stated by the Bombay and Delhi High Courts in this regard is incorrect and is overruled".

143. That being said, the learned counsel for the appellant further argued that since the arbitration agreement in the Supply Contract was governed by Indian Law, Part I of the Act would apply regardless of the seat. Reliance placed on ***Disortho*** (supra), ***Enercon(supra)*** and ***braes of doune wind farm (Scotland) limited vs Alfred Mcalpine business services limited***(supra).

144. We are unable to accept this contention. As clarified in ***Arif Azim*** (supra), the juridical seat playsa decisive role in determining the supervisory jurisdiction. In ***Disortho*** (supra), the seat was not expressly specified, and Part I was held applicable only after interpreting the clauses as a whole. In the present case, however, the Supply Contract expressly designates London as the seat, and Clause 14.4 of the MSA categorically excludes Part I. Therefore, reliance in ***Disortho*** (supra) is misplaced. As, in the present case, the seat of arbitration is expressly stipulated, and the exclusion of Part I is explicit.

145. It was also argued that Clause 26.6 of the MSA excludes implied terms, and therefore, the learned Single Judge erred in implying exclusion of Part I. We find this submission untenable. Clause 14.4 excludes Part I, and any interpretation suggesting its inclusion would render Clause 14.4 obsolete and defeat the clear contractual intent. In the light of the above analysis, the learned Single Judge's decision to hold that Part I of the Act is inapplicable to this case is sound and supported by the intention of the parties as reflected in the clear language of the contracts. The choice of London as the seat of arbitration in the "supply contract", coupled with the exclusion of Part I of the Act in the "MSA Contract", indicates a clear intent to subject the arbitration to international standards and exclude Indian courts from having jurisdiction over the matter. The, Appellant's reliance on Section 9 petition and Section 42 is misplaced, as these provisions only apply when Indian courts have jurisdiction in the first place. The case law cited by the Appellant, such as ***Disortho*** (supra) and ***Enercon*** (supra), is distinguishable, as those involved different facts, where the seat of arbitration was not explicitly specified. The contracts in this case clearly designate London as the seat of arbitration, and the intention of the parties must be respected.

146. It is a settled principle of contractual interpretation that the court must ascertain and give effect to the intention of the parties as expressed in the contract. The language of the contract must be construed in its natural and ordinary meaning. Where different clauses appear to be inconsistent, the court must adopt an interpretation that advances the purpose of the contract and reject one that defeats its

existence. The contract documents must be read harmoniously and conjointly, keeping in view the "party autonomy" and the consistent intention of the parties to get resolved their issues through alternative dispute resolution mechanism of arbitration.

147. In present case, we find that no implied exclusion of Part-I of the Act can be specifically inferred from Clause 14.4. However, a reading of the agreements that results in the inclusion of Part I would clearly defeat the very purpose of Clause 14.4 and would breach the "party autonomy", as they have consciously agreed to not be governed by part-I of the Arbitration & Conciliation Act, 1996.

148. Additionally, as discussed above, the execution of the MSA is intrinsically linked to completion of the Supply Contract, and the effectiveness of the MSA can reasonably be said to be contingent upon the fulfilment of obligations under the Supply Contract. Both agreements were executed on the same day and were aimed at achieving a single commercial objective, namely, the completion of the Airport Express project connecting the airport to the city of New Delhi. Therefore, both contracts must be read in harmony and as part of a composite transaction.

149. Thus, upon careful consideration to facts of the present case, the evolved legal position, and the clearly discernible intention of the parties, we are unable to agree with the submissions advanced by the learned counsel of the Appellant on the issue of jurisdiction.

150. Since, the seat of the arbitration is admittedly outside India, this court lacks jurisdiction under section 2(2) of the Act and the learned Single Judge was correct in holding that Part-I of the Act is not applicable to the facts of the present case.

151. In light of the foregoing analysis, we conclude that the parties have made a deliberate and informed choice in selecting London as the "**place**" of arbitration, invoking the procedural rules of the International Chamber of Commerce (ICC), and incorporating Clause 14.4 of the MSA. These decisions clearly reflect the intent of the parties to exclude the provisions of Part I of the Arbitration and Conciliation Act, 1996, ("Act") and no contrary indicia or evidence has been presented to suggest a different interpretation.

152. As per Indian law, particularly the principles enshrined in the Act, the parties have the autonomy to define the framework within which their dispute will be resolved. Section 2(1)(f) of the Act, which governs the definition of "arbitration agreement", and Section 9, which governs interim relief, establish the significance of the parties' agreement in shaping the arbitration procedure. The express choice of London as the seat of arbitration, along with the inclusion of ICC rules, underscores the parties' intent to be governed by a neutral international framework that excludes the mandatory application of Part I of the Act.

153. Further, the concept of party autonomy plays a pivotal role in international arbitration. Under Indian law, as articulated in ***BHATIA***

(supra), Indian courts respect the autonomy of parties to choose the seat and rules of arbitration, provided such choice is unambiguous. The position established in ***BHATIA*** was that if the parties explicitly select a foreign seat of arbitration, the provisions of Part I of the Act would generally not apply, unless specifically agreed to by the parties. This reflects India's commitment to ensure that international arbitration is governed by principles of party autonomy and minimal judicial intervention.

154. In this context, it is clear that the inclusion of ICC rules and the determination of London as the seat are not mere formalities but fundamental aspects of the parties' agreement, designed to ensure a neutral, well established procedural framework. As such, reading or interpreting the agreement in a manner that applies Part I of the Act, or diverges from the express terms, would be contrary to the legislative intent behind the Act, which seeks to promote arbitration as a speedy and efficient dispute resolution mechanism while respecting the autonomy of the parties involved.

155. Having regard to the totality of circumstances, the evolved position of law, and the clear contractual intent, this Court finds no error in the impugned judgment. Since the seat of arbitration is outside India, the bar contained in Section 2(2) of the Act squarely applies and the jurisdiction of Indian courts is excluded, rendering Part I of the Act inapplicable. The dispute shall be governed by the arbitral proceedings in London as per the ICC Rules, Paris.

156. Accordingly, in view of the facts and circumstances of the case and the legal position discussed hereinabove, we find no reason to interfere with the impugned order passed by the learned Single Judge.

157. Consequently, the present appeal is, therefore, dismissed, along with all pending applications, if any, and the order of the learned Single Judge is upheld.

158. There shall be no order(s) as to cost.

OM PRAKASH SHUKLA, J

C.HARI SHANKAR, J

DECEMBER 24, 2025/pa/at