

(2015) 06 DEL CK 0026

In the Delhi High Court

Case No : O.M.P. 193/2013 and O.M.P. 732 of 2013

Carzonrent India Pvt. Ltd.

APPELLANT

Vs

Hertz International Ltd.

RESPONDENT

Date of Decision : 30-06-2015

Acts Referred:

Arbitration Act, 1940 — Section 14, 30, 33

Arbitration and Conciliation Act, 1996 — Section 34, 9

Citation : (2015) 6 AD 41 : (2015) 151 DRJ 628

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Darpan Wadhwa and Manik Dogra, for the Appellant; Dayan Krishnan, Senior Advocate, A. Fraser and Jatin Zaveri, Advocates for the Respondent

Judgement

Dr. S. Muralidhar, J.—By this order, the Court deals with the preliminary objections raised by the Respondent Hertz International Ltd., to the maintainability of these petitions by Carzonrent India Pvt. Ltd. under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act") challenging the Partial Awards dated 7th March 2011 and 29th November 2012 and the Final Award dated 11th April 2013 passed by the sole Arbitrator at the ICC International Court of Arbitration, Singapore.

2. In terms of the Partial Award dated 29th November 2012, the Petitioner has to pay the Respondent US Dollars ("USD") 1,307,831 together with simple interest at 5 % from 28th September 2007 till the date of payment. Under the Final Award dated 11th April 2013 the Petitioner has to pay costs to the Respondent in the sum of USD 777,117.26 and Singapore Dollars 114,802.54.

3. The common preliminary objection raised in both petitions by the Respondent is that the Awards in question are foreign Awards and cannot be challenged under Section 34 of the Act. It is submitted that although the law governing the contract is Indian law, the procedural rules of arbitration are the rules of the

International Chambers of Commerce ("ICC"). It is asserted that "the venue and seat of arbitration is Singapore and that the governing law of arbitration is Singapore."

4. The case of the Petitioner on the other hand is that Clause 14 of the agreement between the parties specifies that the law governing the agreement is the Indian law and since the arbitration clause is part of the agreement, and in the absence of anything to the contrary, the law governing the arbitration agreement would also be the Indian law.

Submissions of counsel

5. It is submitted by Mr. Darpan Wadhwa, learned counsel appearing for the Petitioner that in the present case since the agreement was entered into between the parties prior to the decision of the Supreme Court in *Bharat Aluminium Company and Others Vs. Kaiser Aluminium Technical Service, Inc. and Others etc. etc.*, (2012) 3 ARBLR 515 : (2012) 110 CLA 293 : (2012) 4 ComplJ 345 : (2012) 5 CTC 615 : (2012) 9 JT 27 : (2012) 9 JT 105 : (2013) 1 RCR(Civil) 1 : (2012) 8 SCALE 333 : (2012) 9 SCC 552 (hereafter referred to as the BALCO decision), the principles laid down in *Bhatia International Vs. Bulk Trading S.A. and Another*, AIR 2002 SC 1432 : (2002) 1 ARBLR 675 : (2002) 2 ComplJ 361 : (2002) 3 JT 150 : (2002) 2 SCALE 612 : (2002) 4 SCC 105 : (2002) 37 SCL 434 : (2002) 2 SCR 411 : (2002) 1 UJ 660 : (2002) AIRSCW 1285 : (2002) 2 Supreme 395 (hereafter referred to as *Bhatia International*) which held that Courts in India have jurisdiction over arbitration Awards whether the arbitration was held in India or outside, and Part I of the Act would apply to such proceedings. He also referred to the decision in *Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another*, AIR 2008 SC 1061 : (2008) 1 ARBLR 137 : (2008) 2 CLT 477 : (2008) 1 ComplJ 224 : (2008) 1 CTC 348 : (2008) 1 JT 468 : (2008) 1 SCALE 214 : (2008) 4 SCC 190 : (2008) AIRSCW 667 : (2008) 1 Supreme 1 which, following *Bhatia International*, also held that the Part I of the Act would apply even to a foreign Award. He submitted that the test was to examine whether there was either an express or implied exclusion of the Indian law in the agreement between the parties and that in the instant case there is no such exclusion, express or implied, of Indian law. He emphasised that merely because Clause 14 of the agreement envisages that the place of arbitration would be Singapore did not mean that the "seat of arbitration" was also Singapore. He maintained that the seat of arbitration was India as it had the closest nexus to the subject matter of the arbitration. The contract was performed in India and the Petitioner, an Indian company was party to the agreement which had to perform its obligations under the contract in India. Barring the fact that the arbitration took place at Singapore, that place had no connection whatsoever with the contract itself. In other words, naming Singapore as the venue or making the ICC Rules applicable were not decisive factors so as to exclude the applicability of Part I of the Act.

6. Mr. Dayan Krishnan, learned Senior counsel appearing for the Respondent, on

the other hand submitted that while the decision in BALCO was made prospective, the declaration of law cannot be said to be prospective. He submitted that the place of arbitration as designated in the present case is Singapore and arbitration proceedings had been held there. In terms of the decision of the English Court of Appeal in *Naviera Amazonica Peruana SA v. Compania International De Seguros Del Peru* (1988) 1 Lloyd's Law Reports 116 CA, once the place of arbitration was specified and the arbitration proceedings took place there, for all practical purposes that would be the seat of arbitration. The law governing the arbitration would be the law applicable to the seat of arbitration. He also placed reliance on the decision in *Reliance Industries Limited and Another Vs. Union of India (UOI)*, (2014) AIRSCW 3641 : (2014) 2 ARBLR 423 : (2014) 7 JT 388 : (2014) 3 RCR(Civil) 458 : (2014) 7 SCALE 401 : (2014) 7 SCC 603, *Enercon (India) Ltd. and Others Vs. Enercon GMBH and Another*, (2014) AIRSCW 3513 : (2014) 3 JT 49 : (2014) 2 SCALE 452 : (2014) 5 SCC 1 : (2014) 3 SCJ 742 and *Dozco India P. Ltd. Vs. Doosan Infracore Co. Ltd.*, (2010) 12 JT 198 : (2011) 3 RCR(Civil) 592 : (2011) 6 SCC 179 : (2010) 9 UJ 4521 and *Harmony Innovation Shipping Ltd. Vs. Gupta Coal India Ltd. and Others* (2015) 4 AD 139 : AIR 2015 SC 1504 : (2015) 2 ARBLR 116 : (2015) 125 CLA 338 : (2015) 2 CompLJ 213 : (2015) 2 RCR(Civil) 978 : (2015) 3 SCALE 295 : (2015) 4 SCJ 1 : (2015) 130 SCL 331. Both counsel also referred to other cases which will be discussed hereafter.

The Naviera decision

7.1 The Court would like to begin the analysis of the legal position as regards the "seat" of arbitration by discussing the decision of the Court of Appeals in the U.K. in *Naviera Amazonica Peruana* (supra) which has been repeatedly cited in the decisions of our Supreme Court. There the Court was dealing with an arbitration clause contained in a Hull insurance policy which provided that courts in Lima, in Peru, would have jurisdiction over all disputes. However, the arbitration proceedings were to be held under the "laws and conditions of London". The issue was whether the disputes that arose between the parties had to be resolved by arbitration in London or in Lima.

7.2 While holding that the above clause meant that the seat of arbitration was London, the Court of Appeal in *Naviera* observed as under:

"All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law. (1) The law governing the substantive contract. (2) The law governing the agreement to arbitrate and the performance of that agreement. (3) the law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely, (2) may also differ from (3)."

7.3 The Court of Appeal also commented on the danger of confusing the legal "seat of arbitration" with the "geographically convenient place or places for

holding hearings".

The Sumitomo decision

8.1 The above decision in *Naviera Amazonica Peruana* (supra) was followed by the Supreme Court in *Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. and Others*, AIR 1998 SC 825 : (1998) 1 ARBLR 10 : (1998) 91 CompCas 349 : (1997) 9 JT 666 : (1997) 7 SCALE 338 : (1998) 1 SCC 305 : (1997) 6 SCR 186 Supp : (1998) 1 UJ 82 : (1998) AIRSCW 556 : (1997) 10 Supreme 157 .

8.2 The facts in *Sumitomo* were that the parties entered into a contract for installation and commission of oil platform on Bombay High. The contract stipulated that it would be subject to the laws of India and that the disputes between the parties would be referred to arbitration which shall be held at London, UK in accordance with the provisions of the ICC. *Sumitomo* served notice of arbitration on ONGC and appointed an Arbitrator. ONGC also appointed its Arbitrator. *Sumitomo* then applied to the Queen's Bench Division (QBD), Commercial Court in London for leave to issue and serve on ONGC an Originating Summons seeking an order under Section 5 of the English Arbitration Act 1979 to confirm that the Arbitrators had the power to proceed with the arbitration in default of a defence having been served by ONGC. The Commercial Court granted the leave as prayed for.

8.3 Thereafter ONGC was served and it issued summons to set aside the earlier order of the Commercial Court. This application was decided by Potter J. who held that the proper law of the underlying contract as well as the proper law of the arbitration agreement was the Indian law whereas the curial law, that is the law governing the arbitration proceedings and the manner in which the reference was to be conducted, was held to be the law of London. The judgment of Potter J. became final. Subsequently, an Umpire entered upon the reference and made an Award in favour of *Sumitomo*. ONGC then filed a petition in the Bombay High Court under Section 14 of the Arbitration Act 1940 for a direction to the Umpire to file the Award in the Court. The High Court allowed the petition. *Sumitomo* challenged the said order in the Supreme Court contending that such a direction to the umpire that the Award be filed could only be given by the Court in England.

8.4 The Supreme Court rejected the submission of *Sumitomo* and held that "The law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement". Article 17.0 of the contract which dealt with laws/arbitration stated "All questions, disputes or difference arising under, out of or in connection with this Contract shall be subject to the laws of India". Article 17.2 dealt with arbitration in particular and stated that it shall be held at London and further that "the arbitration proceeding shall be held in accordance with the provision of International Chamber of Commerce and the rules made thereunder as amended from time to time".

8.5 The Supreme Court in *Sumitomo* cited the judgment of *Naviera Amazonica*

Peruana I (supra) and concluded that "curial law operates during the continuance of the proceeding before the arbitrator to govern procedure and conduct thereof". However, the enforcement process, which was subsequent to and independent of the proceedings before the Arbitrator, was "not governed by the curial or procedural law that governed the procedure that the arbitrator followed in the conduct of the arbitration".

8.6 The Court in Sumitomo held:

"Where the law governing the conduct of the reference is different from the law governing the underlying arbitration agreement, the court looks to the arbitration agreement to see if the dispute is arbitrable, then to the curial law to see how the reference should be conducted, and then returns to the first law in order to give effect to the resulting award".

8.7 The Court while dismissing the appeal concluded:

"Having regard to the clear terms of clause 17 of the contract between the appellant and the first respondent, we are in no doubt that the law governing the contract and the law governing the rights and obligations of the parties arising from their agreement to arbitrate, and, in particular, their obligation to submit disputes to arbitration and to honour the award, are governed by the law of India; nor is there any dispute in their behalf".

8.8 The Supreme Court in Sumitomo appeared to favour exposition of the law in the commentary by Mustill and Boyd titled Law and Practice of Commercial Arbitration in England, 2nd Edition which stated that "it is open to the parties to submit, expressly or by implication, the conduct of the reference to a different law from the one governing the underlying arbitration agreement". The authors pointed out that the "proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes".

The NTPC decision

9.1 In National Thermal Power Corporation Vs. The Singer Company and others, AIR 1993 SC 998 : AIR 1992 SC 998 : (1992) 2 ARBLR 154 : (1992) 2 CompLJ 256 : (1992) 3 JT 198 : (1992) 1 SCALE 1034 : (1992) 3 SCC 551 : (1992) 3 SCR 106 : (1992) 2 UJ 201 , a contract was entered into in Delhi between the NTPC and a Singapore company for the supply of equipment, erection and commissioning of certain work in India. The general terms and conditions of the contract stated that the law applicable to the contract would be the law in force in India and that "The Court of Delhi shall have exclusive jurisdiction in all matters arising under this Contract." Clause 27.7 stated that there would be a

three-member Arbitral Tribunal (AT) and that the ICC Rules would apply to such arbitration. The arbitration was to be conducted in accordance with the provisions of the Indian Arbitration Act 1940 and the venue of arbitration was to be at Delhi.

9.2 When the disputes arose between the parties it was referred to the AT in terms of the ICC Rules. The ICC Court chose London to be the place of arbitration. An interim Award was made in London. Thereafter NTPC filed an application under Sections 14,30 and 33 of the Arbitration Act 1940 in the High Court of Delhi to set aside the Award. The High Court rejected the application of the NTPC holding that the Award was not governed by the laws of India and being a foreign award, it was beyond the jurisdiction of Indian Courts.

9.3 In allowing the further appeal of NTPC, the Supreme Court emphasised that the selection of Courts of a particular country as having jurisdiction in matters arising under the contract is usually an indication of the intention of the parties that the system of law followed by those courts is the proper law by which they intend their contract to be governed. However, there were exceptions to the rule. The Court observed as under:

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

9.4 The Supreme Court in National Thermal Power Corporation (supra) further observed as under:

"23. The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as a whole,

or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption.

25. The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Such choice is exercised either expressly or by implication. Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract."

9.5 The Court in National Thermal Power Corporation (supra) concluded that the proper law of the agreement was the Indian law. Even an Award rendered in a foreign state would be regarded as a domestic Award since the Indian law was the law governing the arbitration agreement.

9.6 One important aspect dealt with by the decision in NTPC (supra) was the one relating to the nature of the contract itself and whether it has "closest and most real connection with the Indian system of law". The following observations in para 44 (SCC) of the judgment are relevant in this context:

"It was in Delhi that the agreement was executed. The form of the agreement is closely related to the system of law in India. Various Indian enactments are specifically mentioned in the agreement as applicable to it in many respects. The contract is to be performed in India with the aid of Indian workmen whose conditions of service are regulated by Indian laws. One of the parties to the contract is a public sector undertaking. The contract has in every respect the closest and most real connection with the Indian system of law and it is by that law that the parties have expressly evinced their intention to be bound in all respects. The arbitration agreement is contained in one of the clauses of the contract, and not in a separate agreement. In the absence of any indication to the contrary, the governing law of the contract (i.e., in the words of Dicey, the proper law of the contract) being Indian law, it is that system of law which must necessarily govern matters concerning arbitration, although in certain respects the law of the place of arbitration may have its relevance in regards to procedural matters."

9.7 In this context, it was further observed that the London had significant connection with the parties "except that it is a neutral place and the Chairman of

the Arbitral Tribunal is a resident there, the other two members being nationals of the United State and India respectively". The decision of the Delhi High Court was set aside. The Award was treated as a domestic Award governed by the Indian Arbitration Act of 1940.

Bhatia International and the later decisions

10.1 The question in Bhatia International (supra) concerned the applicability of Section 9 of Part I of the 1996 Act to an international commercial arbitration. It was held, in para 35 (SCC) that:

"Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act".

10.2 In Bhatia International, the contract was governed by the laws of Switzerland and the venue of the arbitration as agreed between the parties was Paris. It was further agreed that the arbitration would be as per the ICC Rules.

11.1 In Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another, AIR 2008 SC 1061 : (2008) 1 ARBLR 137 : (2008) 2 CLT 477 : (2008) 1 CompLJ 224 : (2008) 1 CTC 348 : (2008) 1 JT 468 : (2008) 1 SCALE 214 : (2008) 4 SCC 190 : (2008) AIRSCW 667 : (2008) 1 Supreme 1 the Appellant (VG), which was incorporated in USA, entered into a joint venture with the Respondent No. 1(Satyam) which was registered in India. On the same day, the parties entered into a Shareholders Agreement which provided inter alia that the disputes would be referred to arbitration. In terms of the Shareholders Agreement, the agreement would be governed by the laws of State of Michigan, USA, and the disputes were to be submitted to the London Court of International Arbitration (LCIA) for final arbitration. It was further submitted that the shareholders would act in accordance with the Companies" Act and other applicable rules/act being in force at India at any time.

11.2 Disputes having arisen, at the request of Satyam a sole Arbitrator was appointed by the LCIA. An Award was passed against VG. Satyam then filed a petition in the United States District Court of Michigan to recognise and enforce the Award. VG filed a cross- petition in the US Court objecting to the enforcement of the Award, alleging that it was in violation of the Foreign Exchange Management Act, 1999 ("FEMA"). VG also filed a suit in the Court of the Additional Chief Judge, City Civil Court, Secunderabad. The ad interim ex parte injunction was passed in the said suit against Satyam. In an appeal by Satyam, the High Court of Andhra Pradesh suspended the order of the Civil Court and directed that Satyam would not effect transfer of shares till further orders.

11.3 Satyam appeared in the Civil Court and filed a petition under Order 17 Rule 7 CPC for rejection of the plaint. This application was allowed by the Civil Court and VG's plaint was rejected. VG's appeal against the order of the Civil Court

was dismissed by the High Court on the ground that the Award could not be challenged in the Indian Courts even if it was against the public policy of India. It is against this order that VG approached the Supreme Court.

11.4 The Supreme Court followed the dictum in *Bhatia International* (supra) and held that Part I of the Act would apply to international commercial arbitrations as well, unless the parties had by agreement, express or implied, excluded any or all of its provisions. In this case, it was held that Clause 11.05 (c), which begun as a non obstante clause, prevented Satyam from approaching the US Court for enforcement of the Award. Its enforcement had to be necessarily in India. The Court reiterated that Part I of the Act was applicable to the Award in question "even though it is a foreign Award".

12. The decision of the Constitution Bench of the Supreme Court in *BALCO* (supra) reversed the decision in *Bhatia International* (supra). However, the Court clarified that the decision would be prospective. In other words, it would not apply to the disputes arising out of the agreements entered into prior to 6th September 2012.

Law applicable to the present case

13. As far as the present case is concerned, it is not in dispute between the parties that the date of the agreement is prior to the date of the judgment in *BALCO*. It is, however, contended by Mr. Dayan Krishnan, learned senior counsel appearing for the Respondent, relying on the decision in *Konkola Copper Mines (PLC) Vs. Stewarts and Lloyds of India Limited*, (2013) 4 ARBLR 19 : (2013) 5 BomCR 29 that the judgment in *Bhatia International* overruled the issue as to whether Part I would be attracted to foreign seated commercial arbitration but the declaration of the law was itself not made prospective. A similar contention has however has been expressly negatived by the Supreme Court in *Harmony Innovation Shipping Ltd. Vs. Gupta Coal India Ltd. and Others* (2015) 4 AD 139 : AIR 2015 SC 1504 : (2015) 2 ARBLR 116 : (2015) 125 CLA 338 : (2015) 2 ComplJ 213 : (2015) 2 RCR(Civil) 978 : (2015) 3 SCALE 295 : (2015) 4 SCJ 1 : (2015) 130 SCL 331 . Therefore, in the present case, with the agreement having been entered into prior to 6th September 2012, the Court has to decided this case with reference to the law declared in *Bhatia International*.

14. Conscious of the above legal position, it is submitted by Mr. Krishnan that even applying the ratio in *Bhatia International* to the facts of the present case, it must be held that there was an implied exclusion of the applicability of the Indian law since the parties had agreed that the arbitration would be held in Singapore.

15. At the outset, the Court would like to refer to Clause 14 of the agreement in the present case which provides for resolution of the disputes between the parties by "compulsory arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce". It further states that "the arbitration shall be held in Singapore". However, the opening para of Clause 14 clearly states that the agreement was negotiated with a view towards its

interpretation "under the law of the jurisdiction in which the Licensed Business shall be or is conducted and this agreement shall be applied, interpreted and construed according to said law."

16. In view of the clear wording of the Clause 14, there can be no doubt that the law governing the contract between the parties is the Indian law and this position was not disputed even by the Respondent. There is, however, a serious dispute between the parties as to the law governing the arbitration agreement and what the "seat of arbitration" is. The case of the Respondent is that since the parties had agreed that the arbitration would take place in Singapore and it did in fact take place entirely in Singapore and in no other place, there was an implied exclusion to the applicability of the Indian law to the arbitration agreement. It is accordingly submitted that the procedure for challenge to the Awards would be governed by the law of the seat i.e. the law applicable in Singapore and not the Indian law.

17. On the other hand, the stand of the Petitioner is that the agreement does not specify what the "seat of arbitration" is. In the absence of such indication it must be construed that the law applicable to the contract would apply. Since the Indian laws apply to the contract as a whole, it also applies to the arbitration agreement which is an integral part of the contract. It is further urged that Singapore was merely the "venue" of the arbitration and not the "seat" of arbitration". There was no implied exclusion of the applicability of Indian law to the arbitration proceedings.

18. The law previous to the decision of the Constitution Bench in BALCO was indeed governed by Bhatia International. That decision made it clear that unless there was an expressed or implied exclusion of the applicability of Indian law to the arbitration agreement, or to the contract, Part I of the Act would apply to international arbitration and for foreign awards. This also flows from the decision in Venture Global Engg (supra) which followed and applied the law laid down by Bhatia International.

19. This, therefore, takes the discussion to the question whether on the facts of the present case it could be said that there is an express or implied exclusion of the applicability of the Indian law to the arbitration particularly in the context of Clause 14 which states that the arbitration "shall be held in Singapore" and in fact it was held in Singapore.

Decisions post BALCO

20. There have been decisions subsequent to BALCO where the Supreme Court had to apply the law as explained in Bhatia International since the agreement in question was entered into prior to 6th September 2012. In Reliance Industries Ltd. (supra), Article 32 of the contract in question dealt with the applicable law and language of the contract. Article 32.1 specified that the proper law of the contract was the law of India. Article 33 dealt with the resolution of the disputes by Arbitrator. The venue of arbitration was to be in London as per Article 33.12.

Article 33.9 provided that the arbitral proceedings were to be conducted in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL) of 1985. Article 33.12 stated "the arbitration agreement contained in this Article 33 shall be governed by the laws of England". It appears that the arbitral tribunal was constituted and a partial consent Award was passed on 14th September 2011, in terms of which "the juridical seat (or legal place) of arbitration for the purposes of the arbitration initiated under the Claimants' Notice of Arbitration dated 16th December, 2010 shall be London, England". The parties were agreed that hearings of the notice of arbitration may take place in Paris, France, Singapore or any other location that the AT considers convenient. Relying on all the above clauses, as well as the partial consent Award the Supreme Court concluded that the proper law of the arbitration agreement was the law of England and the applicability of Part I of the Act had been excluded.

21. In *Enercon (India) Ltd. and Others Vs. Enercon GMBH and Another*, (2014) AIRSCW 3513 : (2014) 3 JT 49 : (2014) 2 SCALE 452 : (2014) 5 SCC 1 : (2014) 3 SCJ 742 , the contract provided that it would be subject to Indian law. The venue of the arbitration was London. However, the Court found on the facts of the case that the law governing the contract, the law governing the arbitration agreement and the law of arbitration/curial law are all stated to be Indian. In that view of the matter, the Court rejected the submission of Enercon GMBH that the term "venue" ought to be read as "seat". It was observed that "in virtually all jurisdictions, it is an accepted proposition of law that the seat normally carries with it the choice of that country's arbitration/Curial law. But this would arise only if the curial law is not specifically chosen by the parties". On the facts of that case it was concluded that the parties had exclusively chosen the Indian Law i.e. 1996 as the curial law. It was further observed:

"If one has regard to the factors connecting the dispute to India and the absence of any factors connecting it to England, the only reasonable conclusion is that the parties have chosen London, only as the venue of the arbitration. All the other connecting factors would place the seat firmly in India."

(emphasis in original).

22. Recently in *Harmony Innovation Shipping* (supra), the Supreme Court dealt with an agreement Clause 34.12 of which stipulated that "the arbitration agreement contained in this Article 34 shall be governed by the laws of England". In the said case again the question arose as to whether the seat of arbitration could be stated to be in London. The parties had agreed that the venue of arbitration would be London. The contract was to be governed by English law and that the arbitration should be conducted, if the claim is for a sum, lesser than USD 50,000, in accordance with small claims procedure of the London Maritime Arbitration Association. It was held that "There is ample indication through various phrases like "arbitration in London to apply", arbitrators are to be the members of the London Arbitration Association, and the contract "to be governed and construed according to English Law", to reflect the intention of the parties

that the juridical seat of arbitration would be London". Accordingly, the Court applied the implied exclusion rule in *Bhatia International* and held that the Indian law was impliedly excluded.

Conclusion as to maintainability of present petitions

23. In the present case the parties chose "Singapore" as a venue of arbitration. However, there is nothing in Clause 14 which indicates that there is any implied exclusion of the applicability of Indian law. On the other hand, the clause begins by stating that the agreement is being negotiated by the parties with a view towards its interpretation under the law of the jurisdiction in which the licensed business shall be conducted in India. This reflects the close connection of Indian law to the arbitration agreement as well since it forms part of the contract.

24. In *Venture Global Engg.* which followed *Bhatia*, the Supreme Court emphasised the aspect of "closest and most real connection". Likewise in *National Thermal Power Corporation v. Singer Company* (supra) one of the tests that was applied was to examine whether the contract "has in every respect the closest and most real connection with the Indian system of law". It was observed in the said case although the venue of the arbitration was outside India, that venue had no connection with the contract of the parties, except that it was a neutral place. Recently the Court of Appeals in England and Wales in *Sul America Cia Nacional De Seguros SA v. Enesa Engenharia SA* (2012) 1 Lloyd's Rep. 671 held that the proper law of the arbitration agreement is to be determined by undertaking "a three stage enquiry into: (i) express choice, (ii) implied choice, and (iii) closest and most real connection". It was further held that in practice, "stage (ii) often merges with 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".

25. In the present case, there is absolutely no connection between Singapore and the present contract except that the arbitration took place there. The Petitioner is an Indian party and the Respondent company is incorporated in the U.S.A. The contract was to be performed entirely in India. As already noted the governing law of contract is Indian law. Applying the "closest and most real connection" test, it can safely be concluded that there is no implied exclusion of the applicability of Indian law to the arbitration proceedings.

26. For the aforementioned reasons, the Court overrules the preliminary objection of the Respondent as regards the maintainability of the present petitions.

27. The petitions be set down for final hearing in their turn in due course.