
(2011) 04 MAD CK 0408

In the Madras High Court

Case No : O.A. No's. 155 to 157 of 2011 and A. No. 1002 of 2011

Financial Software and Systems Pvt. Ltd.

APPELLANT

Vs

ACI Worldwide Corporation and Others

RESPONDENT

Date of Decision : 12-04-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 1, 1(1), 11, 11(5), 11(6)
Singapore International Arbitration Centre Rules, 2010 — Rule 18, 18.1, 26

Citation : (2011) 3 CTC 261 : (2011) 6 MLJ 432

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Advocate : P.S. Raman, Yashod Vardhan, Arvind P. Datar, s for R and P Partners, for the Appellant; A.L. Somayaji, T.K. Seshadri, A.R. L. Sundaresan, Sr. Counsels for K. Harishankar and T.K. Baskar, for the Respondent

Final Decision : Dismissed

Judgement

Vinod K. Sharma, J.—The Applicant M/s. Financial Software & Systems Pvt. Ltd. has moved three Applications u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act"), for grant of interim measures.

2. In O.A. No. 155 of 2011, the interim measures prayed for are for grant of ad-interim injunction restraining the Respondents their affiliates, associates, agents, men, servants and/or any person/s claiming through or under the Respondents either directly or indirectly from providing any support whatsoever nature to other System Integrators/Service Providers/ Partners of the Respondents, by whatever bane cakked, in violation of Clause 6 of the Settlement and Release Agreement (SRA) dated 17.02.2010.

3. In O.A.156 of 2011, the prayer made by the Applicant is for grant of ad-interim injunction restraining the Respondents their affiliates, associates, agents, men, servants and/or any person/s claiming through or under the Respondents either directly or indirectly from invoicing the Applicant's customer banks (listed in Schedule 1 of this Application) without bifurcation of the Applicant's

intellectual properties and services and ACI's intellectual properties and services by the Applicant and the Respondents.

4. In O.A. No. 157 of 2011, the prayer made is for appointment of receiver to raise AMC invoices for the period commencing from 01.04.2010 to 31.03.2011 on the existing customers (as listed in Schedule 1 of this Application) of the Applicant in the already existing format of the Applicant and to receive the amounts so invoiced from the Applicant's customers and to deposit the same in the bank account to be opened for this specific and exclusive purpose, pending disposal of the proposed Arbitration proceedings.

5. Thereafter, another A. No. 1022 of 2011 has been moved for grant of interim direction, directing the Respondents to provide all required products, licenses, common development, environment and other support services including but not limited to product upgrades, version upgrades, fixes and release upgrades, etc. as per the Purchase Order dated 7th January 2011 issued by Kotak Mahindra Bank, as agreed to between the Applicant, Kotak Mahindra Bank and the Respondents, to enable the Applicant to meet the requirements of the RFP released by Kotak Mahindra Bank, on the basis the letter of support dated 2nd December 2010, issued by the 3rd Respondent to Kotak Mahindra Bank.

6. In support of these Applications, referred to above, in the Affidavit, it is pleaded that the Applicant was a distributor of ACI's software products, such as "BASE24" and "PRM" in India, under an International Distribution Agreement (IDA), executed on 29.04.1998, between the Applicant and ACI Worldwide (Asia) Pte. Ltd., Singapore, the 2nd Respondent. In the year 2005, certain disputes and differences arose between the parties and to settle those disputes and differences, several rounds of discussions and consultations took place, which culminated into the Settlement and Release Agreement (SRA) dated 17.02.2010.

7. The very intention of SRA was to settle some of the disputes and differences, subject to fulfillment of the terms and conditions of the SRA. The pending disputes and differences were agreed to be settled in good faith by the parties. The Applicant and ACI simultaneously entered into a letter agreement of even date agreeing to settle the pending disputes and differences in good faith, on or before 31.03.2010.

8. The disputes, which were agreed to be settled, read as under:

i. To modify the existing MCIND Agreement and transition the same to a new agreement to be called FSS NeT Processing Services Agreement on or before March 31, 2010.

ii. The Software Agreements/Customer Contracts identified in Exhibit C of the SRA included the Applicant's Intellectual Property and it was agreed that the parties will separate/bifurcate the Applicant's Intellectual Property from the Software Agreements and cause the customers to enter into a separate agreement for the same.

iii. ACI will pay the Applicant an amount equal to 30% of the Software License Fees that ACI receives from the Applicant's customers and any other person who licenses the Products from ACI in India (the "Transition Fee"). In the event the Transition Fee earned by the Applicant has not totaled at least US\$2.5 million by March 31, 2010, ACI agreed to pay the Applicant 30% of the Software License Fees and AMC from customers until such time as the Transition Fee paid to the Applicant equals US\$ 2.5 million.

iv. The parties shall enter into an FSS Customer Support License Agreement on or before March 31, 2010 to facilitate provision of Services by the Applicant to the Applicant's Customers through March 31, 2011.

v. The Parties shall settle/withdraw/purge/record, as the case may be, without prejudice, all the claims and counter-claims in the legal proceedings filed against each other in various legal forums in India and Singapore.

9. The SRA, among other things, provides for assignment of the Applicant's existing customer contracts, which include the software products of the Applicant ("FSS's Intellectual Property") as also ACI's Intellectual Property. As a condition precedent to the assignment, the Applicant and ACI agreed to bifurcate the software agreements/customer contracts, entered into with the Applicant's customers so as to separate their respective intellectual properties and also to execute two separate agreements for the respective parties' intellectual properties, with the customers.

10. Pending bifurcation, the parties agreed to co-operate with each other in a reasonable and lawful arrangement to avail the benefit of the software agreements with the customers by the Applicant and ACI for their respective intellectual properties. It was also agreed by the parties to withdraw all pending litigation in India and also arbitration proceedings from the Singapore International Arbitration Centre.

11. In view of the settlement between the parties, a consent decree based on the SRA was passed by this Court in C.S. No. 626 of 2008, decided on 26.03.2010, by recording terms of settlement as stipulated in the SRA.

12. Clause 14.6 of the SRA provided for settlement of disputes by arbitration.

13. Clause 14.6 reads as under:

Enforcement of Agreement: This Agreement shall be construed and enforced in accordance with and governed by the laws of Singapore. The parties hereby agree that any act to enforce the terms of this Agreement, or for any other remedy arising out of said Agreement, will be settled exclusively by compulsory Arbitration in accordance with Arbitration Rules of the Singapore International arbitration Centre (SIAC); except that either Party may pursue legal/equitable remedies in any Court of competent jurisdiction.

14. On execution of SRA, a joint announcement was also made on 07.05.2010,

to the customers in terms of Clause 7 of the SRA, executed between the parties.

15. The case set up in the Affidavit is that as per SRA and joint announcement, it was agreed between Applicant and ACI, that the AMC invoices for the current Finance Year i.e. from 01.04.2010 to 31.03.2011 were to be raised on the customers by the Applicant and ACI for the respective products and support services, only on completion of the following:

- i. transition of customer contracts for BASE24 and PRM by the Applicant to ACI;
- ii. transition of customer contracts for Golden Gate Products;
- iii. bifurcation of the Applicant's products and support services from the BASE24 customer contracts.

16. The customer contracts entered into by the Applicant with the customers also included software of a Company called "Golden Gate", which was earlier distributed by ACI globally and by the Applicant in India. The products of Golden Gate did not form part of SRA.

17. The case set up in the Affidavit is that ACI falsely and maliciously informed the customers that the Applicant had assigned the Golden Gate software products to ACI so as to cause confusion in the minds of the customers, for which, customers and the Applicant are likely to suffer.

18. It is also the case of the Applicant that without the assignment of customer contracts in terms of the SRA, it is not open to ACI to directly invoice the customers, as it will be contrary to the terms of SRA. In the pleadings, raising of invoices by ACI on the customers, is also challenged to be incorrect and erroneous, as the contracts include the Applicant's intellectual properties and there of support services and Golden Gate as also of other partner software products. The act of the Respondents has resulted in creating difficulties for the customers i.e. banks to make the AMC payments. By ignoring the violations and by showing its intention to perform its obligations under the SRA, the Applicant has prayed for the relief referred to above.

19. The Applications are contested by the Respondents on merits and also by raising primary objection to the maintainability of the Applications u/s 9 of the Arbitration and Conciliation Act, 1996.

20. The preliminary objections with regard to maintainability of the Applications, reads as under:

5. It is submitted that the Application u/s 9 of the (Indian) Arbitration and Conciliation Act, 1996, filed by the Applicant is not maintainable either under law or on facts and this Hon''ble Court may be pleased to dismiss the said Application for the reasons stated herein below.

6. It is submitted that the dispute resolution clause as contained in Clause 14.6 of the SRA stipulates:

14.6 Enforcement of Agreement: This Agreement shall be construed and enforced in accordance with and governed by the laws of Singapore. The parties hereby agree that any act to enforce the terms of this Agreement, or for any other remedy arising out of said Agreement, will be settled exclusively by compulsory arbitration in accordance with Arbitration Rules of the Singapore International arbitration Centre (SIAC); except that either Party may pursue legal / equitable remedies in any Court of competent jurisdiction.

Therefore, it is evident that the jurisdiction of the Indian Courts are barred under Clause 14.6 of the SRA and the present Application not maintainable. The clause states that the Agreement shall be construed and enforced in accordance with the laws of Singapore. Further, the enforcement of the terms of the SRA or for any other remedy arising out of the SRA is to be settled only in accordance with the compulsory arbitration under Singapore International Arbitration Centre ("SIAC"). It is further submitted that Rule 18 of the SIAC Rules, 2010 specifies that the seat of arbitration to be governed by SIAC Rules shall be Singapore, unless the Arbitral Tribunal decides otherwise.

18. Seat of Arbitration:

18.1 The parties may agree on the seat of arbitration. Failing such an agreement, the seat of arbitration shall be Singapore, unless the Tribunal determines, having regard to all the circumstances of the case, that another seat is more appropriate.

18.2 The Tribunal may hold hearings and meetings by any means it considers expedient or appropriate and at any location it considers convenient or appropriate.

Therefore, it is evident that the SRA is governed by (i) the foreign law (Singapore law); (ii) foreign rules of arbitration (SIAC Rules); and (iii) foreign seat of arbitration (Singapore). Therefore, there is exclusion of the Part I of the (Indian) Arbitration & Conciliation Act, 1996 and the jurisdiction of this Hon"ble Court in exercising the jurisdiction over the present Application is impliedly barred and as such the present Application is not maintainable.

7. It is stated that Rule 26 of the SIAC Rules, 2010 provides for grant of interim relief as has been sought by the Applicant herein. Therefore, the Applicant herein can seek the interim relief sought for herein before the Arbitral Tribunal.

26. Interim and Emergency Relief:

26.1. The Tribunal may, at the request of a party, issue an order or an award granting an injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief to provide appropriate security in connection with the relief sought.

26.2. A party in need of emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1.

It is therefore submitted that the Applicant herein has alternative remedy available under the SIAC Rules and that the present Application filed by the Applicant is not maintainable.

21. The other preliminary objections raised in the Counter, are that the Applicant suppressed material facts and mislead this Court in filing the present Applications and that the Affidavit does not disclose any cause of action for grant of interim orders.

22. The Applicant failed to prove prima facie case, balance of convenience, irreparable loss and injury, if the interim injunction is not granted.

23. It is also the stand taken in the Counter that the facts stated are not relevant for the purpose of deciding the Applications, as they are not related to the relief sought for. The Respondents, therefore, allege mala fide against the Applicant. Similar stand is taken by other Respondents also.

24. Before going into merit of the controversy and adjudication on the merits, as argued by the learned Counsel for both the parties, it would be necessary for this Court to first decide the question of jurisdiction and maintainability of these Petitions.

25. Two preliminary questions for consideration by this Court are:

(i) Whether Clause 14.6 can be said to be valid Arbitration Agreement ?

(ii) Whether the provisions of Part-1 of the Arbitration and Conciliation Act, 1996, stand excluded by express or implied consent ?

26. Sub-section (1) of Section 7 of the Act defines "Arbitration Agreement" as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

27. Sub-section (2) provides that an Arbitration Agreement may be in the form of an Arbitration clause in a contract or in the form of a separate agreement.

28. Sub-section (3) requires an Arbitration Agreement to be in writing.

29. Sub-section (4) provides that an Arbitration Agreement is in writing, if it is contained in - (a) document signed by the parties; or (b) in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

30. The Hon'ble Supreme Court in the case of Jagdish Chander Vs. Ramesh Chander and Others, , has been pleased to lay down the settled principles laying down as to what constitutes an Arbitration Agreement, which reads as under:

(i) The intention of the parties to enter into an Arbitration Agreement shall have

to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private Tribunal for adjudication and an willingness to be bound by the decision of such Tribunal on such disputes, it is Arbitration Agreement. While there is no specific form of an Arbitration Agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding Arbitration Agreement.

(ii) Even if the words "arbitration" and "Arbitral Tribunal (or Arbitrator)" are not used with reference to the process of settlement or with reference to the private Tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an Arbitration Agreement if it has the attributes or elements of an Arbitration Agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private Tribunal. (c) The private Tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an Arbitration Agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an Arbitration Agreement to make it an Arbitration Agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an Arbitration Agreement or contains anything that detracts from an Arbitration Agreement, it will not be an Arbitration Agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a Civil Suit seeking relief, it cannot be termed as an Arbitration Agreement.

(iv) But mere use of the word "arbitration" or "Arbitrator" in a clause will not make it an Arbitration Agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an Arbitration Agreement. Similarly, a clause

which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an Arbitration Agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an Arbitration Agreement, but an agreement to enter into an Arbitration Agreement in future.

31. The reading of Clause 14.6 in SRA would fall under Clause-iii of the judgment, referred to above, therefore, is a valid Arbitration Agreement. This fact is even accepted by the learned Counsel for both the parties to agreement, that Clause 14.6 is an Arbitration Agreement. In view of the stand of learned Counsel for the parties, this clause will otherwise fall u/s 7(4)(c) of the Act.

32. The first question is, accordingly, answered by holding that Clause-14.6 is a valid and enforceable Arbitration Agreement, for adjudicating the disputes between the parties.

33. The jurisdiction of this Court to entertain and file Applications, referred to above, is challenged by the Respondents on the ground that the parties had agreed, that the agreement is to be construed and enforced in accordance with governing laws of Singapore.

34. The parties also agreed that the arbitration shall be in accordance with Arbitration Rules of Singapore International Arbitration Centre (SIAC), except that either party may pursue legal/equitable remedies in any Court of competent jurisdiction.

35. Learned Senior Counsel for the Respondents vehemently contended that the reading of Clause 14.6 r/w Rule 18 of Singapore International Arbitration Centre Rules, 2010, shows that law governing the contract creating substantive right in the parties with respect to the dispute is the laws of Singapore.

36. Even the law governing the obligation of the parties to submit the dispute to arbitration and to honour the award is also to be governed by Singapore laws. The parties have failed to fix the seat of arbitration, then in view of Rule 18.1, the seat of arbitration is also Singapore, which means that impliedly Part-1 of the Arbitration and Conciliation Act, 1996, stands excluded.

37. In support of this contention, learned Counsel for the Respondents placed reliance on the judgment of the Hon''ble Supreme Court in Arbitration Petition No. 5 of 2008, decided on 08.10.2010 in the case of Dozco India P. Ltd. Vs. Doosan Infracore Co. Ltd., , wherein, the Hon''ble Supreme Court has been pleased to lay down that in case of International Commercial Arbitration, held out of India, provisions of Part-1 of the Act would apply unless the parties by

agreement, express or implied, exclude all or any of these provisions. By applying this principle, the Hon'ble Supreme Court dismissed the Application moved under Sections 9 and 11(6) of the Act for the reason that parties by agreement had stipulated that the agreement shall be governed and construed in accordance with the laws of Republic Korea, and that all disputes arising in connection with the agreement would be finally settled by the arbitration in Seoul, Korea (or such other place as the parties may agree in writing), pursuant to the rules of agreement, then in force of the International Chamber of Commerce.

38. In the said case, the Hon'ble Supreme Court considered the following contention of the respective parties:

8. Ms. Mohana, learned Counsel appearing on behalf of the Petitioner, heavily relied on a few judgments of this Court, namely, *Bhatia International Vs. Bulk Trading S.A. and Another*, ; *INDTEL Technical Services Pvt. Ltd. Vs. W.S. Atkins PLC.*, ; and *Citation Infowares Limited Vs. Equinox Corporation*, . All these cases, according to her have settled the law holding that even in case of International Commercial Arbitration, which are to be held out of India and to be governed by foreign law, the provisions of Part I of the Act would still apply unless the parties by agreement, express or implied, excludes all or any of provisions of Part I of the Act. She has also drawn the attention of the Court to another decision of this Court in *National Thermal Power Corporation v. Singer Co. and Ors.* 1992 (3) 7 SCC 551. The attention of the Court was also invited to the language of the decision in *C.M.C. Ltd. Vs. Unit Trust of India and Others*, . There are some other rulings which are relied upon by the learned Counsel. The main contention, however, is based on paragraph 32 of the decision in *Bhatia International v. Bulk Trading S.A. and Anr.* (cited supra) as also paragraph 36 of the decision in *Indtel Technical Services Private Ltd. v. W.S. Atkins Rail Ltd.* (cited supra), where reliance was placed on the decision in *Bhatia International v. Bulk Trading S.A. and Anr.* (cited supra) which is decision rendered by a Three-Judge Bench. The attention of the Court was also invited to paragraphs 30, 31 and 36 as also to paragraphs 35, 38 of that judgment where the decision in *Bhatia International v. Bulk Trading S.A. and Anr.* (cited supra) was relied upon. From all these three judgments, it becomes clear that unless the jurisdiction of the Indian Courts is not specifically excluded at least Part I of the Act where under there is a power to appoint Arbitrator is covered by Section 11(6) of the Act, this Court would have jurisdiction to appoint an Arbitrator even if the arbitration is to be governed by foreign law.

9. Shri Gurukrishna Kumar, learned Counsel for the Respondent, however, while opposing this plea urged that in this case and, more particularly, in paragraph 23 such exclusion can be specifically seen. He has compared the language of Clause 23, more particularly, with the jurisdictional cause which had fallen for consideration in *Citation Infowares Ltd. v. Equinox Corporation* (supra). The learned Counsel also argued that the bracketed portion in Article 23 cannot be

interpreted so as to mean that the seat of arbitration could be anywhere else as per the choice of the parties. He pointed out that the bracketed portion is only for the purpose of providing the convenience of holding proceedings of the arbitration elsewhere than Seoul. However, that cannot be allowed to override the main Clause of Article 23. The learned Counsel has contended that the law laid down in *Bhatia International v. Bulk Trading S.A. and Anr.* (cited supra) and the subsequent decisions would not be applicable. The learned Counsel relied on *Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. and Others*, . He also relied on a decision reported as *Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru*, 1998 Vol.1 Lloyd's Law Reports.

10. The learned Counsel earnestly argued that there is distinction between a legal seat of the arbitration and geographically convenient location for holding proceedings and that is a common feature of international arbitration. He also relied on a passage in *Redfern and Hunter* which runs as under:

The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties and it will be designated in the Arbitration Agreement or the terms of reference or the minutes of proceedings or in some other way as the place of "seat" of the arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meeting or hearings at the place of arbitration. International Commercial Arbitration often involves people of many different nationalities, from different countries. In these circumstances, it is by no means unusual for an Arbitral Tribunal to hold meeting - or even hearing - in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses... It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country - for instance for the purpose of taking evidence ... In such circumstances, each move of the Arbitral Tribunal does not in itself mean that the seat of arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties

11. According to him, as per the Agreement between the parties, it is clear that the parties have chosen the proper law of contract as also the Arbitration Agreement to be Korean law with a seat of arbitration in Seoul, South Korea and the arbitration law being conducted in accordance with exhaustive Rules of the International Chamber of Commerce.

39. On consideration, the Hon'ble Supreme Court held that:

(i) in view of language of Articles 22 and 23 of the Agreement between the parties, spell out a clear agreement between the parties to exclude Part-1 of the Act.

(ii) that the law laid down in *Bhatia International Vs. Bulk Trading S.A. and Another*, ; *INDTEL Technical Services Pvt. Ltd. Vs. W.S. Atkins PLC.*, ; as also in *Citation Infowares Limited Vs. Equinox Corporation*, will not be applicable;

(iii) as the interpretation of the agreement provides law governing arbitration is Korean Law and the seat of arbitration is at Seoul, Korea, therefore, the provisions of Section 11(b) of the Act would not be applicable.

40. Learned Senior Counsel for the Respondent contended that the judgment of the Hon''ble Supreme Court fully applies to the facts of the present case.

41. Learned Senior Counsel also placed reliance on the judgment of the Hon''ble Supreme Court in the case of National Thermal Power Corporation Vs. The Singer Company and others, , wherein, the Hon''ble Supreme Court was pleased to lay down that Arbitration proceedings are governed by the laws, stated by the parties to the contract. The Hon''ble Supreme Court in this case was pleased to lay down as under:

Where, however, the parties have, as in the instant case, stipulated that the arbitration between them will be conducted in accordance with the ICC Rules, those rules, being in many respect self-contained or self-regulating and constituting a contractual code of procedure, will govern the conduct of the arbitration, except insofar as they conflict with the mandatory requirements of the proper law of arbitration, or of the procedural law of the seat of arbitration. See the observation of Kerr, LJ. in *Bank Mellat v. Helliniki Techniki Sa.* 1983 (3) All E.R. 428. See also Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, 2nd Ed. (1990). To such an extent the appropriate Courts of the seat of arbitration, which in the present case are the competent English Courts, will have jurisdiction in respect of procedural matters concerning the conduct of arbitration. But the overriding principle is that the Courts of the country whose substantive laws govern the Arbitration Agreement are the competent Courts in respect of all matters arising under the Arbitration Agreement, and the jurisdiction exercised by the Courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters in respect of the Arbitration Agreement fall within the exclusive competence of the Courts of the country whose laws govern the Arbitration Agreement. See Musti and Boyd, *Commercial Arbitration*, 2nd Ed.; Allen Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 1986; Russel on Arbitration, Twentieth Ed., 1982; Cheshire & North's *Private International Law*, Eleventh Ed. (1987).

42. The contention of the learned Senior Counsel for the Respondents, that it is the Courts of the country, whose substantive laws govern the Arbitration Agreement, are the competent Court in respect of the matters arising under Arbitration Agreement and jurisdiction exercised by the Courts of seat of arbitration is merely concurrent and not exclusive, and strictly limited to matters of procedure. All other matters in respect of the Arbitration Agreement will fall within the exclusive competence of the Courts of the Country, whose laws govern the Arbitration Agreement. Therefore, it is only Singapore Courts, which would have jurisdiction and not the Courts in India.

43. Learned Senior Counsel for the Respondents vehemently contended that the "word" used in the Arbitration Agreement, i.e. "except that either party may pursue legal and equitable remedy in any Court of competent jurisdiction" would also not clothe this Court with the jurisdiction, as the Court of competent jurisdiction would be the Courts at Singapore and not the Indian Courts.

44. In support of this contention, learned Senior Counsel placed reliance on the judgment of the Hon"ble Delhi High Court in the case of Max India Limited v. General Binding Corporation, FAO (OS) No. 193 of 2009, decided on 16.07.2009, wherein the following clause with regard to interim measure was considered by the Hon"ble Delhi High Court and answered as under:

Article 9:

Arbitration Agreement and interim measures by Court:

It is not incompatible with an Arbitration Agreement for a party to request, before or during arbitral proceedings, from a Court an interim measure of protection and for a Court to grant such measure

34. In the present case, not only the substantive law but procedure law, which is to be applied, is that of Singapore. Furthermore, arbitration forum is at Singapore and Courts of Singapore are conferred with jurisdiction to decide. It is this sting in Article 19 of the Agreement which is clinching. When the parties have consciously chosen the applicability of Singapore laws, procedural as well as substantive, including the law governing arbitration proceedings, by necessary implication Indian law, i.e., Arbitration and Conciliation Act, 1996, is excluded. In that case, how Application u/s 9 of that Act is maintainable ? Obviously not. As a fortiori, this Court lacks jurisdiction to deal with such an application. Therefore, present case is more akin to what was held in Singer Company and British India Steam Navigation Co. Ltd.

45. Reliance was also placed by the learned Senior Counsel, on the judgment of the Hon"ble Delhi High Court in the case of DGS realtors Pvt. Ltd v. Realogy Corporation in OMP No. 508 of 2009, decided on 03.09.2009, wherein, the Hon"ble Delhi High Court was pleased to lay down as under:

11. Notwithstanding the aforesaid state of law, the Single Judge of this Court and the Division Bench in Appeal in Max India Ltd. (Supra) held the Petition in this Court u/s 9 of the Act to be not maintainable. While applying the test laid down in Bhatia International, this Court found that the parties had in the agreement in that case manifested the intention to have their disputes adjudicated by arbitration of a neutral Arbitral Tribunal at Singapore in accordance with the laws of Singapore and had also made clear that the Arbitration proceedings would be conducted as per the rules of the Singapore Tribunal and specifically vested jurisdiction in Singapore Courts. The Division Bench thus held that not only the proper law of contract but the proper law of Arbitration Agreement, procedural as well as substantive, was that of Singapore and it showed an unmistakable

intention of the parties to exclude the jurisdiction of this Court and the applicability of Part-I of the Act.

12. The Senior Counsel for the Petitioner contended that the agreement between the parties in Max India Ltd. of choosing the exclusive jurisdiction of the Singapore Courts and also choosing the law governing the arbitration to be that of Singapore is what distinguishes Max India Ltd. from the facts of this case. It is argued that in the present case there is no agreement that the procedural law applicable to arbitration would be the law of New Jersey, USA and the parties had not agreed to the jurisdiction of the Courts at New Jersey, USA.

13. To buttress the said argument, reliance was placed on Citation Infowares Ltd. (Supra). In that case, being an Application u/s 11(9) of the Act for appointment of the arbitrator in an agreement of International Commercial Arbitration, the parties had agreed to the governing law being of California, USA. The senior Counsel contended that notwithstanding the agreement as to the governing law, the Supreme Court held on the basis of Bhatia International that Part-I of the Act would be applicable and appointed the Arbitrator. However, in my opinion Citation Infowares Ltd. does not help the Petitioner. The Supreme Court in this case also in para 25 of the judgment reiterated that the law of arbitration is normally the same as the proper law of the contract and it is only in exceptional cases that it is not so, even where the proper law of contract is expressly chosen by the parties; it was further held that there is a presumption that the law of the country where the arbitration is agreed to be held is the proper law of arbitration National Thermal Power Corporation Vs. The Singer Company and others, . However, in spite of reiterating the said proposition, the Supreme Court in this case held the Application u/s 11(9) of the Act OMP No. 508/2009 Page 7 of 13 to be maintainable because the parties had in that case not agreed to the venue of arbitration. On this ground, the NTPC case (Supra) was distinguished and the arbitrator appointed, though to decide in accordance with the Californian law.

14. Once the aforesaid distinction is highlighted, in my view the dicta of this Court in Max India Ltd. would be squarely applicable. The parties in the present case have not only agreed to the governing law being that of New Jersey, USA but also to the place of arbitration being New York. It being the settled proposition that the governing law is presumed to be the law of arbitration also, it necessarily follows that the parties had expressly or impliedly agreed to the exclusion of Part-I of the Act. The parties having found to have so agreed, this Court would not have jurisdiction u/s 9 of the Act.

46. Learned Senior Counsel appearing on behalf of the Respondents also challenged the jurisdiction of this Court, to entertain the Applications moved u/s 9 on the ground that the SRA was executed between ACI Worldwide Corporation on behalf of itself, its affiliates, successors and assigns including without limitation ACI (Asia) Pte. Ltd (formerly known as ACI (Singapore) Pte. Ltd.).

47. Whereas Respondent Nos. 4 to 18 have been impleaded as parties in O.A.

No. 157 of 2011, which, on the face of it, would not be competent for want of Arbitration Agreement between the Applicant and Respondent Nos. 4 to 18.

48. In support of this contention, learned Senior Counsel for the Respondents placed reliance on a judgment of the Hon''ble Supreme Court in the case of S.N. Prasad Vs. Monnet Finance Ltd. and Others, , wherein, it has been authoritatively laid down by the Hon''ble Supreme Court, that in absence of specific Arbitration Agreement, the Application under Arbitration Act would not be competent.

49. Reliance was also placed on the judgment of the Hon''ble Supreme Court in the case of P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, .

50. Learned Senior Counsel appearing on behalf of the Petitioner controverted the contentions, by contending that the SRA was executed between the parties at Chennai. Subject matter of the dispute also falls within India, therefore, this Court would have jurisdiction to entertain and try the present Applications, specially in view of the fact that the SRA was entered into between the parties in pursuance to the consent order passed by this Court in pending proceedings between the parties.

51. It was also the contention of the learned Senior Counsel for the Applicant that Part-1 of the Arbitration and Conciliation Act, 1996, is applicable to the International Commercial Arbitration, held outside India, unless any or of such provisions have been excluded by agreement to the parties, by implication.

52. In support of this contention that this Court would have jurisdiction, learned Senior Counsel relied on the judgment of the Hon''ble Supreme Court in the case of Bhatia International Vs. Bulk Trading S.A. and Another, , wherein, the Hon''ble Supreme Court, while interpreting the provisions of Arbitration and Conciliation Act, was pleased to lay down as under:

If the submission made on behalf of the Appellant that Part I of the Arbitration and Conciliation Act, 1996 does not apply if the arbitration takes place outside India, is accepted it would:

(a) amount to holding that the Legislature has left a lacunae in the said Act. There would be a lacunae as neither Part I or II would apply to arbitrations held in a country which is not a signatory to the New York Convention or the Geneva Convention (hereinafter called a non-convention country). It would mean that there is no law, in India, governing such arbitrations.

(b) lead to an anomalous situation, inasmuch Part I would apply to Jammu and Kashmir in all International Commercial Arbitrations but Part I would not apply to the rest of India if the arbitration takes place out of India.

(c) lead to a conflict between Sub-section (2) of Section 2 on one hand and Sub-sections (4) and (5) of Section 2 on the other. Further Sub-section (2) of Section 2 would also be in conflict with Section 1 which provides that the Act extends to

the whole of India.

(d) leave a party remediless inasmuch as in International Commercial Arbitrations which take place out of India the party would not be able to apply for interim relief in India even though the properties and assets are in India. Thus, a party may not be able to get any interim relief at all.

It must be borne in mind that the very object of the Arbitration and Conciliation Act of 1996, was to establish a uniform legal framework for the fair and efficient settlement of disputes arising in International Commercial Arbitration.

A reading of the provisions of the Arbitration and Conciliation Act, 1996, shows that it applies to arbitrations which are held in India between Indian nationals and to International Commercial Arbitrations whether held in India or out of India. Section 2(1)(f) defines an International Commercial Arbitration. The definition makes no distinction between International Commercial Arbitrations held in India or outside India. An International Commercial Arbitration may be held in a country which is a signatory to either the New York Convention or the Geneva Convention (hereinafter called the convention country). An International Commercial Arbitration may be held in a non-convention country. The said Act nowhere provides that its provisions are not to apply to International Commercial Arbitrations which take place in a non-convention country. Admittedly Part II only applies to arbitrations which take place in a convention country.

The words "this Act" as used in Section 1(1) mean the entire Act. This shows that the entire Act, including Part I, applies to the whole of India. The fact that all Parts apply to whole of India is clear from the proviso which provides that Parts I, III and IV will apply to the State of Jammu and Kashmir only so far as International Commercial Arbitrations/conciliations are concerned. Significantly the proviso does not state that Part I would apply to Jammu and Kashmir only if the place of the International Commercial Arbitration is in Jammu and Kashmir. Thus if Sub-section (2) of Section 2 is read in the manner suggested by the Appellant there would be a conflict between Section 1 and Section 2(2). There would also be an anomaly inasmuch as even if an International Commercial Arbitration takes place outside India, Part I would continue to apply in Jammu and Kashmir, but it would not apply to the rest of India. The Legislature could not have so intended.

Section 2(1)(a) defines "arbitration" as meaning any arbitration whether or not administered by a permanent arbitral institution. Thus, this definition recognises that the arbitration could be under a body like the Indian Chambers of Commerce or the International Chamber of Commerce. Arbitrations under the International Chamber of Commerce would be held, in most cases, out of India.

Section 2(1)(f) of the said Act defines an International Commercial Arbitration and makes no distinction between International Commercial Arbitrations which take place in India or internal commercial arbitrations which take place outside India. Section 2(1) (e) defines "Court" but 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. An ouster of jurisdiction cannot be implied. An ouster of jurisdiction has to be express.

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

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

Awards in Arbitration proceedings which take place in a non-convention country are not considered to be "foreign awards" under the said Act. They would thus not be covered by Part II. An award passed in an arbitration which takes place in India would be a "domestic award". There would thus be no need to define an award as a "domestic award" unless the intention was to cover awards which would otherwise not be covered by this definition. Strictly speaking an award

passed in an arbitration which takes place in a non-convention country would not be a "domestic awards". Thus the necessity is to define a "domestic award" as including all awards made under Part I. The definition indicates that an award made in an International Commercial Arbitration held in a non-convention country is also considered to be a "domestic award"

If Part I was to apply to arbitrations which take place in India the term "Court" would have been used in Sections 5 and 8 of the said Act. The Legislature was aware that, in International Commercial Arbitrations, a matter may be taken before a judicial authority outside India. As Part I was also to apply to International Commercial Arbitrations held outside India the term "judicial authority" has been used in Sections 5 and 8.

Section 28 is in Part I. If Part I was not to apply to an arbitration which takes place outside India there would be no necessity to specify that the rules are to apply "where the place of arbitration is situate in India".

In International Commercial Arbitrations parties are at liberty to choose, expressly or by necessary implication, the law and the procedure to be made applicable. The procedure or the rules governing such arbitration may be of the country where the arbitration is being held or the body under whose aegis the arbitration is being held - all bodies which conduct arbitrations and all countries which have rules and laws governing arbitrations. Thus Section 28 does not provide for rules where the place of arbitration is out of India.

The said Act is one consolidated and integrated Act. General provisions applicable to all arbitrations will not be repeated in all chapters or parts. The general provisions will apply to all chapters or parts unless the statute expressly states that they are not to apply or where, in respect of a matter, there is a separate provision in a separate Chapter or Part.

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

Article 1(2) of the UNCITRAL Model Law which reads:

(2) The provisions of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State

(emphasis supplied)

Under Section 9, which provides for interim measures by Court, a party could

apply to the Court (a) before, (b) during Arbitral proceedings, or (c) after the making of the Arbitral award but before it is enforced in accordance with Section 36. The words "in accordance with Section 36" can only go with the words "after the making of the arbitral award". It is clear that the words "in accordance with Section 36" can have no reference to an Application made "before" or "during the Arbitral proceedings". Thus it is clear that an application for interim measure can be made to Courts in India, whether or not the arbitration takes place in India, before or during Arbitral proceedings. Once an Award is passed, then that award itself can be executed. Sections 49 and 58 provide that awards covered by Part II are deemed to be a decree of the Court. Thus, "foreign awards" which are enforceable in India are deemed to be decrees. A domestic award has to be enforced under the provisions of Code of Civil Procedure. All that Section 36 provides is that an enforcement of a domestic award is to take place after the time to make an Application to set aside the award has expired or such an Application has been refused. Section 9 does suggest that once an award is made an Application for interim measure can only be made if the award is a "domestic award" as defined in Section 2(7) of the said Act. Thus, where the Legislature wanted to restrict the applicability of Section 9 it has done so specifically.

There is no substance in the submission that there would be unnecessary interference by Courts in arbitral proceedings. Section 5 provides that no judicial authority shall intervene except where so provided. Section 9 does not permit any or all Applications. It only permits Applications for interim measures mentioned in Clauses (i) and (ii) thereof. Thus there cannot be Applications u/s 9 for stay of Arbitral proceedings or to challenge the existence or validity of Arbitration Agreements or the jurisdiction of the Arbitral Tribunal. All such challenges would have to be made before the Arbitral Tribunal under the said Act.

The Appellant has submitted that the term "arbitral award" includes an interim award. He had submitted that it would be open for the Arbitral Tribunal to pass interim awards and those interim awards could be enforced in India under Part II. However, there is a difference between an "interim award" and an "interim order". Undoubtedly, the Arbitral Tribunal could pass an interim award. But an interim order or directions passed by the Arbitral Tribunal would not be enforceable in India. Thus, even in respect of arbitrations covered by Part II a party would be precluded from getting any interim relief. In any event, on Mr. Sen's interpretation, an award passed in Arbitral proceedings held in a non-convention country could not be enforced. Thus such a party would be left completely remediless.

If a party cannot secure, before or during the pendency of the Arbitral proceedings, an interim order in respects of items provided in Section 9(i) & (ii) the result may be that the arbitration proceedings may themselves get frustrated e.g. by non-appointment of a guardian for a minor or person of unsound mind or the subject matter of the Arbitration Agreement not being preserved. This could

never have been the intention of the Legislature.

To conclude we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsory apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of International Commercial Arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.

Article 23 of the ICC rules permits parties to apply to a competent judicial authority for interim and conservatory measures. Therefore, in such cases an Application can be made u/s 9 of the said Act."

53. The contention of the learned Senior Counsel for the Applicant is that in the case in hand, though parties have agreed to apply the law of Singapore to the Arbitration proceedings, but they have not fixed seat of arbitration to be exclusively Singapore, as under the rules of Singapore International Arbitration Centre, it is open to the parties to fix any other seat of arbitration. Therefore, in case in hand, the parties have not given exclusive jurisdiction to Courts at Singapore but have only agreed to be governed by the laws of Singapore, therefore, in view of judgment of the Hon''ble Supreme Court referred to above, this Court would have jurisdiction to try Applications, moved u/s 9, as part-1 of the Arbitration and Conciliation Act also applies to International Commercial Arbitration, which takes place out of India unless parties by agreement exclude any of its provisions.

54. Learned Senior Counsel for the Applicant, thereafter, placed reliance of a judgment of the Hon''ble Supreme Court in the case of Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another, , wherein, the Hon''ble Supreme Court, by following the law laid down in Bhatia International case (supra), was pleased to lay down that foreign award may be challenged u/s 34 in an Indian Court and may be enforced in India, even in case award passed in International Commercial Arbitration, held outside India, as the provisions of Part-1 of the Arbitration and Conciliation Act, 1996, are equally applicable to International Commercial Arbitration, held outside India, unless any or of such provisions are excluded by agreement between the parties expressly or by implication.

55. Learned Senior Counsel for the Applicant also placed reliance on the judgment of the Hon''ble Supreme Court in the case of INDTEL Technical Services Pvt. Ltd. Vs. W.S. Atkins PLC., , to contend that international commercial agreement, which are governed by the laws of foreign country, would also attract the provisions of Part-1 of the Arbitration and Conciliation Act, 1996, unless excluded by agreement between parties expressly or impliedly.

56. Learned Senior Counsel for the Applicant also placed reliance on the judgment of the Hon'ble Supreme Court in the case of Citation Infowares Limited Vs. Equinox Corporation, , wherein, the Hon'ble Supreme Court, by placing reliance on the judgment of the Hon'ble Supreme Court in the case of Bhatia International case (supra) and Indtel Technical Services Private Limited (supra) and Venture Global Engineering v. Satyam Computer Services Ltd and Anr., was pleased to lay down as under:

In INDTEL Technical Services Pvt. Ltd. Vs. W.S. Atkins PLC., , the Supreme Court specifically held that unless the provisions of Part I of the Arbitration and Conciliation Act, 1996, are excluded by agreement between the parties either expressly or by implication, Part I of the Act including Section 11 would be applicable even where the international commercial agreements are governed by the laws of another country. It may be that the arbitrator might be required to take into account the applicable laws which may be the foreign laws but that does not affect the jurisdiction u/s 11 which falls in Part I which has been specifically held applicable in Bhatia International Vs. Bulk Trading S.A. and Another, .

In view of the above, it is not necessary to consider the argument of the Respondent to the effect that the law laid down in National Thermal Power Corporation Vs. The Singer Company and others, would govern the field. Even otherwise it is difficult to accept the contention that NTPC case can clinch the issue. In para 23 of NTPC case the Court undoubtedly expressed a view about the presumption arising that the law of the country where arbitration is agreed to be held is the proper law of arbitration. But the scope of the expressions in para 23 of NTPC case must be held to be limited. There may be a presumption where the parties have agreed to hold arbitration in a particular country. In that circumstance, the presumption would arise that the law of the country where the arbitration is agreed to be held would apply as the law of contract. Where there has been no specific expression about the law of contract, the situation is otherwise. Here the substantive law of contract governing the contract is specifically agreed upon. However, there is no agreement in respect of the law governing the procedure of arbitration. The place where arbitration would be held is not to be found in the language of Clause 10.1. Therefore, the situation in NTPC case is not applicable to the present case.

In this case, one of the contracting parties is the Indian party. The obligations under the contract were to be completed in India. Further, considering the nature of the contract, it is difficult to read any implied exclusion of Part I of the 1996 Act in the language of Clause 10.1.

In the result, the Application u/s 11(5) of the Arbitration and Conciliation Act, 1996, must succeed. Accordingly, an ex Chief Justice of India is appointed as the sole Arbitrator to arbitrate upon the disputes which have arisen between the parties hereto as set out in the present Application. The said arbitration would be entitled to decide upon the procedure to be followed in the Arbitration

proceedings, sittings of the proceedings as also to settle his fees in respect thereof. However, the law governing the contract would be the Californian law.

57. On consideration, I find force in the contention raised by the learned Senior Counsel for the Respondents. It is well settled law that mere application of foreign laws to agreement would not oust the jurisdiction of Court under Arbitration and Conciliation Act, 1996, nor its seat of arbitration, which will take away the jurisdiction, and the intention of the parties is to be gathered on the facts and circumstances of each case. The factor to be considered in order to arrive at a decision, as to whether a particular Court would have jurisdiction or not, the following factors are to be taken into consideration:

(i) the proper law of contract i.e. law governing the contract creating substantive right in the parties with respect to the dispute;

(ii) the procedural law of Arbitration Agreement i.e. law governing the obligation of the parties to submit the dispute to arbitration and to honour the award;

(iii) the curial law i.e. the law governing the conduct of the individual reference.

58. If the facts of the present case are considered in view of the settled principles of law, no other conclusion than the one, that the substantive law applicable to the agreement is the laws of Singapore. The procedure for holding Arbitration proceedings is also as per Arbitration Rules of Singapore International Arbitration Centre and the seat of arbitration is also Singapore. Though the Arbitration Rule of Singapore International Arbitration Centre permit the parties or Tribunal to select seat of arbitration anywhere else, but the parties knowingly did not choose to fix seat of arbitration, therefore, on correct interpretation, seat of arbitration is to be Singapore.

59. Therefore, this Court will have no jurisdiction to entertain and try Applications moved u/s 9.

60. The Original Application No. 157 of 2011 would not be maintainable also for the reason that all the parties to the Application i.e. Respondent Nos. 4 to 18 are not the parties to the Arbitration Agreement, therefore, in absence of parties being parties to the Arbitration Agreement, no Application u/s 9 of the Arbitration and Conciliation Act would be maintainable.

61. The reason for coming to this conclusion is, that in the case of Bhatia International v. Bulk Trading S.A. as well as other judgments of the Hon'ble Supreme Court i.e. Venture Global Engineering v. Satyam Computer Services Ltd. and Anr. (supra), Indtel Technical Services Private Limited v. W.S. Atkins Rail Limited (supra), the Hon'ble Supreme Court has laid down that the provisions of Part-1 of the Arbitration and Conciliation Act, 1996, would apply to the Arbitration under the foreign laws or to arbitration held outside India, but is subject to exclusion by the parties by expressly or impliedly.

62. Once substantive law as well as procedure law is outside the country, then no

other conclusion than the one that the parties impliedly have excluded the jurisdiction of Part-1 of the Arbitration and Conciliation Act, can be arrived at.

63. The Hon''ble Supreme Court in the case of Citation Infowares Ltd. v. Equinox Corporation interpreted Clause-10 of the contract in dispute, wherein the parties had agreed to refer the matter to the mutually agreed Arbitrator. Clause under interpretation in the said case was as under:

5. There was a Confidentiality Clause 10. Following was Clause 10:

10. Any dispute between the parties hereto arising from this agreement, or from an individual agreement concluded on the basis thereof, shall be finally referred to a mutually agreed Arbitrator.

Though the governing laws of California, USA, were agreed to be applied to the Arbitration proceedings, but the procedure laws and place of arbitration was not fixed.

64. In Para 27 of the judgment, the Hon''ble Supreme Court, held that there was no agreement with respect of law governing procedure of arbitration. It was in this view of the matter that, the Hon''ble Supreme Court came to the conclusion that Courts in India had jurisdiction to entertain and try the Application u/s 9.

65. Whereas, in Dozco India Private Limited v. Doosan Infracore Co. Ltd., where both substantive and procedural laws were Korean laws, the Hon''ble Supreme Court was pleased to lay down that the Courts in India will have no jurisdiction to entertain the Application moved under Arbitration and Conciliation Act.

66. The judgment of the Hon''ble Delhi High Court in the cases of Max India Limited v. General Binding Corporation forum (supra) and DGS Realtors Pvt. Ltd. v. Realogy Corporation (supra) is fully applicable to the facts of the present case, and the judgments relied upon by the learned Senior Counsel for the Applicant no way go contrary to the law laid down by the Hon''ble Supreme Court in the case of Bhatia International v. Bulk Trading.

67. For the reasons stated above, the second question framed is answered against the Applicant, and in favour of the Respondents. Consequently, all these Applications are ordered to be dismissed.

68. No costs.

69. Learned Counsel for the parties also addressed argument on merit. However, it is not necessary to go into the merit of the Application in view of the finding recorded on the preliminary objections.