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

Reserved on : 11th September, 2018

Date of decision :1st November, 2018

\+ **O.M.P. 214/2010 & I.A. 16732/2011**

FOCUS ENERGY LIMITED ..... Petitioner

Through Mr. Arun Kathpalia, Senior Advocate with Mr. Prashant Mishra, Ms. Jomol Joy, Ms. Bani Brar and Mr. Siddharth Nath, (Mob.9717068176)

versus

REEBOK INTERNATIONAL LIMITED ..... Respondent

Through Mr. Rajiv Nayar, Senior Advocate with Mr. Joy Basu, Senior Advocate and Mr. Joy Roy, Ms. Smarika Singh, Mr. Anand Raja, Mr. Shantanu Tyagi, Advocates.(Mob.9810098332)

+ O.M.P. 716/2011

FOCUS ENERGY LIMITED ..... Petitioner

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versus

REEBOK INTERNATIONAL LIMITED ..... Respondent

Through Mr. Rajiv Nayar, Senior Advocate with Mr. Joy Basu, Senior Advocate and Mr. Joy Roy, Ms. Smarika Singh, Mr. Anand Raja, Mr. Shantanu Tyagi, Advocates.(Mob.9810098332)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present petitions under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act") challenge the partial and final awards

dated 4th November, 2010 and 24th May, 2011, respectively, delivered by the London Court of International Arbitration (LCIA).

2. The Petitioner and the Respondent had entered into a Joint Venture Agreement (hereinafter, '*JVA*') dated 1st March, 1995 to establish a company in India by the name `Reebok India Company'. According to the Respondent, a written request was sent by it to the Petitioner, seeking to purchase shares of Reebok India as per Section 4 of the Agreement. Since the Petitioner did not agree to the said sale of shares, the Respondent invoked arbitration in terms of Section 4 and Section 11 of the JVA.

3. The invocation took place on 17th March, 2008. The parties nominated their respective arbitrators and the LCIA appointed the chairman. i.e. the presiding arbitrator. It was further agreed by the parties that the time limits for issuance of the award, as set out in Section 11(B), were waived and the Rules of LCIA would apply instead.

4. After completion of pleadings, the interim award was rendered on 4th November, 2009. The same came to be challenged before this Court under Section 34, vide OMP 214/2010. On 20th April, 2010, notice was issued in the petition. On the said date, the court directed as under.

> *"Issue notice to the respondent.*
> *Mr. Amar Gupta, Adv. accepts notice on behalf of respondent.*
> *He prays for and is granted six weeks' time to file a reply affidavit.*
> *Rejoinder, if any, be filed before the next date of hearing.*
> *Without prejudice to the rights and contentions of the parties, it is agreed that the Arbitral Tribunal may in the meantime pass a final award after valuing the shares.*

List on 23rd September, 2010."

5. On 15th December, 2010, an application moved by the Petitioner under Order VI Rule 17 was decided. Further grounds of challenge including those to the effect that Section 4 of the JVA is void, illegal and opposed to public policy, were permitted to be added, while reserving the right of the Respondent to rebut these submissions. The amended petition was thereafter filed.

6. The tribunal rendered its final award on 24th May, 2011. The Petitioner then filed OMP 716/2011, challenging the final award.

7. The Respondent initially filed its replies to the substantive grounds of challenge raised against the award. Thereafter the Respondent filed IA No. 16732 of 2011 seeking to place on record an additional reply. The additional reply takes a preliminary objection as to the maintainability of the Petition itself, under Section 34 of the Act.

8. The submission of the Respondent is that since the arbitration agreement is governed by the laws of England, Part I of the Act is excluded, hence a challenge under Section 34 is not maintainable. The matter was taken up for hearing on 20th July, 2018 on which date this preliminary objection was raised by the Respondent, and thereafter submissions have been heard on behalf of parties only in respect of the said preliminary objection. On behalf of the Respondent it is submitted by Mr. Rajiv Nayar and Mr. Joy Basu, Senior Counsels that the Petition is not maintainable, in view of the settled pronouncements of the Supreme Court in various judgments, starting with ***Bhatia International v Bulk Trading S.A. (2002) 4 SCC 105*** (hereinafter, '*Bhatia International'*). They rely on Sections 4 and 11 of the JVA to argue that an award rendered by LCIA in England, in a

proceeding where the arbitration agreement is governed by the laws of England, is a foreign award. It is further submitted that though the substantive law governing the agreement is Indian law, since the seat is in London, the Arbitration Agreement is governed by English law and parties have also accepted the same during the course of arbitral proceedings. Thus, the Petition itself is not maintainable. According to Ld. Counsels, there is no doubt that parties have clearly agreed to the exclusion of Part I.

9. On the other hand, Mr. Kathpalia appearing for the Petitioner submits that the entire objection is a complete afterthought. The matter has been pending before this court since 2010, when the partial award was challenged, and in response to paragraph 48 of Focus's petition under Section 34 i.e. OMP 214/2010, where the Petitioner specifically averred that this Court had jurisdiction, the Respondent, in its reply to the said petition, did not dispute the same. In its reply, the Respondent simply pleaded that the *`contents of paragraph no. 48 require no comment'*. Thus, according to the Petitioner, the Respondent has admitted to the jurisdiction of the courts in Delhi. He further submits that there has been no implied or express exclusion of Part I of the Act. Further, as per the principle laid down in ***Bhatia International (supra)***, even in an international commercial arbitration, Part I is not excluded. It is submitted by Counsel that the judgment of the Supreme Court in ***Bharat Aluminium Company Ltd. v Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 649*** (hereinafter, '*BALCO-I*') has no application to the present case, as the agreement is pre-***BALCO-I*** and the ***BALCO-I*** judgement is of prospective application. It is further submitted that even if it is presumed under Section 11(B) of the JVA that the law governing the arbitration agreement is English law, this is not

the case in respect of disputes arising under Section 4. The dispute in the present case purely relates to disputes under Section 4, which provide that only the *appointment process* would be as per Section 11(B). Thus, 11(B) cannot be read to apply to Section 4 in entirety. Section 4 is silent on the law governing the arbitration agreement and therefore, there is neither implied express nor implied exclusion of Part I of the Act.

Analysis and Findings

10. The agreement in the present case is dated 1st March, 1995. Section 11(A) and 11(B) of the agreement read as under:

> *" SECTION 11 - GOVERNING LAW*
> *A. Subject to the provision of Section 11(B) below, the parties agree that the validity, construction and interpretation of this Agreement shall be governed by the* ***law of India****.*
> *B. RIL and PHOENIX hereby agreed to submit to arbitration in London, England any disputes arising hereunder. Such arbitration shall be conducted by three arbitrators in the English language in accordance with the rules then in force of the* ***International Court of Arbitration, London, England.*** *The appointment of the arbitrators shall fall on such persons as the parties may appoint by mutual agreement within a period not to exceed 30 days from the statement by either of the parties that it intends to submit the matter to arbitration, or if not agreed by the parties on such arbitrators as may be appointed by the President of the International Court of Arbitration. The arbitrator shall render an award within a period not to exceed one month from the arbitrator's acceptance, and the parties undertake to observe all the terms of said award. Any expenses incurred in such arbitration shall be awarded as the arbitrator shall decide. In the event for whatsoever reason that*

the dispute is not resolved within 90 days of written notice to the other Party, either Party may terminate this agreement with immediate effect. ***The arbitration agreements contained in this section shall be governed by the internal laws of England.****"*

11. A reading of the above two clauses clearly shows that in this agreement, the parties agree as under:

1) Validity, construction and interpretation of the agreement was to be governed by Indian Law i.e., substantive law of the contract was Indian Law.
2) Parties agreed to submit to arbitration in London and the venue of the arbitration proceedings was London, England.
3) The arbitration was to be conducted in accordance with the Rules in force of ICA, London, England, thus the procedural law was of the ICA, London.
4) In case of disputes between the parties, the Arbitrators were to be appointed by the President of ICA.
5) The arbitration agreement was to be governed by the laws of England.

12. Section 4 of the Agreement reads as under:

"SECTION 4 – TRANSFER OF SHARES IN REEBOK INDIA TO RIL
PHOENIX has agreed that, in any event and for any reason whatsoever from 31st March, 2001, and additionally in the event of a) the termination or expiration of this Agreement or any of the Agreements referred to in Section 2(A) above, or b) the appointment of a receiver or liquidator of PHOENIX or any PHOENIX operating entity involved in the

REEBOK business, or c) PHOENIX's breach of this agreement, that PHOENIX (or any of its successors or assigns or any such company owning shares in REEBOK INDIA) shall, upon the written request of RIL and within 30 days, offer to sell to RIL, or to a party designated by RIL, all of the shares in REEBOK INDIA held by PHOENIX or its successors or assigns on the date of RIL's request. The price to be paid by RIL for each of these shares shall be the pro rata (per share) equivalent of the percentage of the net asset value of REEBOK INIDA which such shares represent of the total outstanding shares of REEBOK INDIA as at the close of business on the acquisition date. This valuation will assume that the "goodwill" of REEBOK INDIA at this date shall be zero. The accounts will be prepared in accordance with US GAAP and will contain accounting provisions for returns, defectives, bad debts and inventory in accordance with REEBOK group policies. The valuation shall be determined by an Ernst & Young auditor appointed by RIL. In the event of a dispute/the final price shall be determined by three arbitrators appointed in the manner set forth in paragraph 11(B) below, who shall have appropriate regard for both parties' valuations except in no event is any value for goodwill or similar value to be assigned to the shares. In the event that any government regulation or entity prevents the transfer of such shares to RIL, such shares may be transferred to such party as RIL shall designate in writing to PHOENIX."

13. As per the above clause, any disputes as to pricing of the shares were to be determined by three arbitrators appointed in the manner set forth in para 11(B).

14. One of the arguments of Mr. Kathpalia, appearing for the Petitioner is that in case of disputes under Section 4, while the procedure for the

appointment of the Arbitrators would be determined in the manner as provided in Section 11(B), this did not mean that the arbitration agreement would be governed by the laws of England or that the seat is England. According to him, the sentence relating to the law governing the arbitration agreement, as contained in Section 11(B), applied only to the said section and not to Section 4.

15. This argument though appealing, at first blush, is liable to be rejected for two reasons. First, the disputes, which have been adjudicated by way of the partial award and the final award, are not restricted only to disputes, which arise under Section 4. They relate to contractual disputes outside Section 4 as well. This is clear from a reading of Para 63 of the award which reads as under: -

> *"The Respondent has elaborated a number of variations or sub-divisions of such headings which will be addressed to the extent necessary in the discussion below. What is certain, as recognised by Claimant in its Post-Hearing Submission (Cl. Post-Hearing Brief para. A-1), is that this is not a case of a simple call-option for shares, but a far more complex contractual dispute."*

16. Secondly, the phrase "*in the manner set forth in paragraph 11(B) below*" has to, in the absence of any intention to the contrary, mean and include the procedures and other stipulations contained in 11(B). If the intention was to include Part-I of the Arbitration Act for disputes in respect of Section 4, considering that there was a clear exclusion in 11(B) with the stipulation that the arbitration agreement is governed by the laws of England, clause 4 would have had a stipulation to the contrary. In the absence of such a specific provision, the intention of the parties clearly is to

have the law of England as the law governing the arbitration agreement. It is the settled position in law as laid down in ***Dozco India Pvt. Ltd. v Doosan Infracore Co. Ltd. (2011) 6 SCC 179*** (hereinafter, *'Dozco'*) that the enforcement of the award is governed by the law of the arbitration agreement. The relevant observation of the Supreme Court in ***Dozco*** is set out hereinbelow:

> *"12. In the backdrop of these conflicting claims, the question boils down to as to what is the true interpretation of Article 23. This Article 23 will have to be read in the backdrop of Article 22 and more particularly, Article 22.1. It is clear from the language of Article 22.1 that the whole agreement would be governed by and construed in accordance with the laws of The Republic of Korea. It is for this reason that the respondent heavily relied on the law laid down in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. & Ors. (cited supra). This judgment is a complete authority on the proposition that the arbitrability of the dispute is to be determined in terms of the law governing arbitration agreement and the arbitration proceedings have to be conducted in accordance with the curial law. This Court, in that judgment, relying on Mustill and Boyd: the Law and Practice of Commercial Arbitration in England, 2nd Edition, observed in paragraph 15 that 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. In para 16, this Court, in no uncertain terms, declared 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.

13. The Court relied on the observations in Mustill and Boyd to the effect:-

> *"It may, therefore, be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws -*
>
> *1. The proper law of the contract, i.e. the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.*
>
> *2. The proper law of the arbitration agreement, i.e. the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award.*
>
> *3. The curial law, i.e. the law governing the conduct of the individual reference.*
>
> * * *
>
> *1. 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.*
>
> *2. The curial law governs the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract.*
>
> *3. The proper law of the reference governs the question whether the parties have been discharged*

from their obligation to continue with the reference of the individual dispute."

17. A similar clause, as in the present case, was considered by the Supreme Court in ***Reliance Industries Limited and Anr. v Union of India (2014) 7 SCC 603*** (hereinafter, *'Reliance – I'*). The arbitration clause in the said case had stipulated that the substantive law would be the laws of India. The Chairman of the Tribunal, in the absence of agreement between the two nominated Arbitrators, was to be appointed by the Secretary General of Permanent Court of Arbitration at The Hague. The arbitral proceedings were to be governed by the UNCITRAL Rules. The Arbitration Agreement was governed by the laws of England and the venue was London.

18. The Supreme Court, in ***Reliance-I*** after considering the entire law on the subject, observed as under.

> *"65. This principle of separability permits the parties to agree: that law of one country would govern the substantive contract and laws of another country would apply to the arbitration agreement. The parties can also agree that even the conduct of the reference would be governed by the law of another country. This would be rare, as it would lead to extremely complex problems. It is expected that reasonable businessmen do not intend absurd results. In the present case, the parties had by agreement provided that the substantive contract (PSC) will be governed by the laws of India. In contradistinction, it was provided that the arbitration agreement will be governed by laws of England. Therefore, there was no scope for any confusion of the law governing the PSC with the law governing the arbitration agreement. This principle of severability is also accepted specifically under Article 33.10 of the PSC, which is as under:-*
>
> *"The right to arbitrate disputes and claims under this*

Contract shall survive the termination of this contract."

.....

73. In view of the aforesaid binding precedent, we are unable to accept the submission of Mr. Ganguli that the Arbitration Act, 1996 has not been excluded by the parties by agreement. For the same reasons, we are unable to approve the conclusions reached by the Delhi High Court that reference to laws of England is only confined to the procedural aspects of the conduct of the arbitration reference.

74. We are also unable to agree with the submission of Mr. Ganguli that since the issues involved herein relate to the public policy of India, Part I of the Arbitration Act, 1996 would be applicable. Applicability of Part I of Arbitration Act, 1996 is not dependent on the nature of challenge to the award. Whether or not the award is challenged on the ground of public policy, it would have to satisfy the precondition that the Arbitration Act, 1996 is applicable to the arbitration agreement. In our opinion, the High Court has committed a jurisdictional error in holding that the provisions contained in Article 33.12 is relevant only for the determination of the curial law applicable too the proceedings. We have already noticed earlier that the parties by agreement have provided that the juridical seat of the arbitration shall be in London. Necessary amendment has also been made in the PSCs, as recorded by the final partial consent award dated 14-9-2011. It is noteworthy that the Arbitration Act, 1996 does not define or mention juridical seat. The term 'juridical seat' on the other hand is specifically defined in Section 3 of the English Arbitration Act. Therefore, this would clearly indicate that the parties understood that the arbitration law of England would be applicable to the arbitration agreement.

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76. In view of the above, we hold that:

76.1 The petition filed by respondents under Section 34 of the Arbitration Act, 1996 in the Delhi High Court is not maintainable.

76.2 We further over-rule and set aside the conclusion of the High Court that, even though the arbitration agreement would be governed by the laws of England and that juridical seat of arbitration would be in London, Part I of the Arbitration Act would still be applicable as the laws governing the substantive contract are Indian Laws.

76.3 In the event, a final award is made against the respondent, the enforceability of the same in India, can be resisted on the ground of Public Policy.

76.4 The conclusion of the High Court that in the event, the award is sought to be enforced outside India, it would leave the Indian party remediless is without any basis as the parties have consensually provided that the arbitration agreement will be governed by the English law. Therefore, the remedy against the award will have to be sought in England, where the juridical seat is located. However, we accept the submission of the appellant that since substantive law governing the con- tract is Indian Law, even the Courts in England, in case the arbitrability is challenged, will have to decide the issue by applying Indian Law viz. the principle of public policy etc. as it prevails in Indian Law."

19. There has been a considerable debate in the present case between the two parties in respect of the applicability of ***Bhatia International (supra)*** and ***BALCO-I (supra).*** While it is the submission of the Petitioner that the present case is governed by ***Bhatia International***, Ld. counsel for Respondent on the other hand submits that the case is governed by ***BALCO-I***.

20. The said issue is not germane to the present case, inasmuch as whether one applies ***Bhatia International*** or ***BALCO-I***, the consequences

would be the same. In ***Bharat Aluminium Company v Kaiser Aluminium Technical Services Inc. (2016) 4 SCC 126*** *(hereinafter 'BALCO-II')*, the Supreme Court, in para 14 further clarified the position as under:

> *"14. It is clear that the law applicable to arbitration agreement in the present case is English Law. Once it is found that the law governing the arbitration agreement is English Law, Part I of the Indian Arbitration Act stands impliedly excluded. This has been a long settled position and the latest judgment in Union of India v. Reliance Industries Limited and others reaffirms the same. In the words of R.F. Nariman J.,*
>
> > *"21. The last paragraph of Bharat Aluminium's judgment has now to be read with two caveats, both emanating from paragraph 32 of Bhatia International itself-that where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, Part-I of the Arbitration Act, 1996 would be excluded by necessary implication. Therefore, even in the cases governed by the Bhatia principle, it is only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India that would continue to be governed by the Bhatia principle. Also, it is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the Bhatia rule."*

21. However, Mr. Kathpalia submitted that ***BALCO-I (supra)*** has prospective application and it is ***Bhatia International(supra)***, which governs the dispute at hand. Specific reliance is placed on paras 21, 26, 32 &

35 of ***Bhatia International***, which read as under:

> *"21. Now let us look at sub-sections (2), (3), (4) and (5) of Section 2. Sub-section (2) of Section (2) provides that Part I would apply where the place of arbitration is in India. To be immediately noted that it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that Part I will "only" apply where the place of arbitration is in India (emphasis supplied). Thus the Legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The legislature is emphasising that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of sub-section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the affect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied.*
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> .....
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> *26. Mr. Sen had also submitted that Part II, which*

deals with enforcement of foreign awards does not contain any provision similar to Section 9 or Section 17. As indicated earlier Mr. Sen had submitted that this indicated the intention of Legislature not to apply Sections 9 and 17 to arbitrations, like the present, which are taking place in a foreign country. 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. Part II deals with enforcement of foreign awards. Thus Sections 44 in (Chapter I) and Section 53 (in Chapter II) define foreign awards, as being awards covered by arbitrations under the New York Convention and the Geneva Convention respectively. Part II then contains provisions for enforcement of "foreign awards" which necessarily would be different. For that reason special provisions for enforcement of foreign awards are made in Part II. To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to "foreign awards". The opening words of Sections 45 and 54, which are in Part II, read "notwithstanding anything contained in Part I". Such a non-obstante clause had to be put in because the provisions of Part I apply to Part II.

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32. To conclude we hold that the provisions of Part I would apply to all arbitrations and to all proceedings

relating thereto. Where such arbitration is held in India the provisions of Part I would 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.

.....

35. Lastly it must be stated that the said Act does not appear to be a well drafted legislation. Therefore the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta cannot be faulted for interpreting it in the manner indicated above. However, in our view a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act. On this interpretation there is no lacunae in the said Act. This interpretation also does not leave a party remediless. Thus such an interpretation has to be preferred to the one adopted by the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta. It will therefore have to be held that the contrary view taken by these High Courts is not good law."

22. Insofar as the facts of the present case are concerned, the only question that needs to be answered in view of the ratio of ***Bhatia International (supra)*** is, whether there is an express or implied exclusion of Part-I. Section 11(B) leaves no manner of doubt that the arbitration agreement is governed by English law. The fact that at the initial stage,

when the present petition was filed or during the arbitration proceedings, either of the parties may have proceeded under the wrong assumption that Indian Courts would have jurisdiction as Part-I is not excluded, would not result in a change in the legal position. The question, as to whether the petition is maintainable or not, involves the determination of legal issues, on which an admission by either party would be of no relevance. The Court, in this case, has to decide the said issue only on the basis of the clauses in the agreement. The agreement is clear and categorical i.e. the arbitration agreement is governed by the laws of England.

23. The reliance by the Petitioner on the judgment of the Supreme Court in ***Union of India v. Reliance Industries Limited & Ors***. ***(2015) 10 SCC 213*** (hereinafter, '*Reliance-II'*) to argue that the petition is maintainable in view of the observation, in para 21 of the said judgment, is not tenable. The Petitioner relies on para 197 of ***BALCO-I*** to argue that since the present agreement is governed by the decision in ***Bhatia International*** and there is no express or implied exclusion, coupled with the admission of the Respondent, this Court has jurisdiction. Para 197 of ***BALCO-I*** is set out herein below:

> "*197. The judgment in Bhatia International (supra) was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engineering (supra) has been rendered on 10- 1-2008 in terms of the ratio of the decision in Bhatia International (supra). Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.*"

24. This decision of ***BALCO-I*** has also been subsequently explained by the Supreme Court in ***Reliance-II (supra)***. The relevant portion is extracted hereinbelow:

> *"21. The last paragraph of Bharat Aluminium's judgment has now to be read with two caveats, both emanating from para 32 of Bhatia International itself – that where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, Part-I of the Arbitration Act, 1996 would be excluded by necessary implication. Therefore, even in the cases governed by the Bhatia principle, it is only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India that would continue to be governed by the Bhatia principle. Also, it is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the Bhatia rule.*
> *22. On the facts in the present case, it is clear that this Court has already determined both that the juridical seat of the arbitration is at London and that the arbitration agreement is governed by English law. "*

25. Thus, Reliance-II has clarified the legal position insofar as the cases to which the ***Bhatia International*** principle applies.

26. The Petitioner has also relied upon the following observations in ***Sasan Power Limited v. North American Coal Corporation (India) Private Limited, (2016) 10 SCC 813*** (hereinafter, '*Sasan*').

> *"40. From a plain reading of Part I of the 1996 Act, having regard to the scheme of the Act and language of Section 2(2), Part I of the Act applies to all*

arbitrations which take place in India. It is irrelevant whether any one of the parties to such arbitration agreement is an Indian entity (either a citizen or body corporate incorporated in India etc.) or not. If two non-Indian entities agree to have their disputes resolved through the process of arbitration with seat of arbitration in India, such an arbitration would obviously be governed by the provisions of Part I of the Act. By virtue of the law declared by this Court in the case of Bhatia International (supra), even if the seat of arbitration is not in India, if one of the parties to such arbitration is an Indian entity, Part I would apply unless parties by an agreement in such a case choose to exclude the application of all or some of the provisions of Part I by an agreement.

41. The question, therefore, is whether the arbitration agreement in question is one falling exclusively under Part-I of the 1996 Act or falling under both parts of the 1996 Act. Bhatia International never declared that the arbitration agreement falling under the scope of Part-I of the 1996 Act would automatically cease to fall under Part-II of the 1996 Act. On the other hand there are observations to the contra. A recent judgment of this Court clearly recorded that Bhatia International judgment leads to such a possibility. However, with reference to the agreements entered into subsequent to BALCO, this question does not arise. It is only for the interregnum between the date of the 1996 Act and the date of the judgment, in BALCO such a question arises.

42. To determine the question, whether an arbitration agreement governed by the law laid down by Bhatia International is one which falls exclusively within the operation of Part-I or one which falls within the operation of both Part-I and Part-II of the 1996 Act, depends on three factors:

i. who are the parties to the arbitration agreement;

ii. the venue of the arbitration; and

iii. in a foreign seated arbitration where one of the

parties is not an Indian entity whether parties agreed to exclude the application of Part I."

27. Applying the test in para 42 above, if the parties have agreed to exclude the application of Part-I, then the challenge to the award cannot lie in this Court. The present case is a case of a foreign seated arbitration where one of the parties is not an Indian entity and the law governing the arbitration agreement is clearly English Law, and not Indian law. Even ***Sasan (supra)*** does not help the Petitioner's case.

28. The Petitioner is incorrect in urging that there is an admission by the Respondent that Part I applies. There are further facts/correspondence, exchanged during the course of the arbitration proceedings which also clearly show that the parties understood that the Indian Courts would have no jurisdiction.

1) Procedural Order No.1 dated 25th September, 2008 also records as under:

> *Whereas, Section 11-B of the JV Agreement provides eg., that any disputes arising thereunder are to be submitted to arbitration in London, England and that such arbitration is to be conducted in accordance with the rules in force of the International Court of Arbitration, London, England;*
>
> …
>
> *Now, therefore, it is hereby Ordered that:*
>
> *1. Place of Arbitration: As set out in Section 11-B of the JV Agreement, the Seat of Arbitration shall be London, England, provided that the Arbitral Tribunal may hold meetings and deliberations in any location it may deem desirable, and may, with the agreement of the Parties, hold any or all hearings, examinations, or other meeting*

requiring the attendance of the Parties or their representatives, in such other location(s) as it may deem convenient or desirable.

…

4. Procedural Rules

4.1 The Arbitration shall be conducted in accordance with the LCIA Arbitration Rules as in effect on 1 January 1998 (The LCIA Rules). No municipal or national rules of procedure shall be applicable, other than the mandatory laws or rules of procedure (if any) applicable in England, the seat of arbitration."

2) The Respondent had, in its email dated 9th February, 2010, after passing of the partial award taken the stand that the Indian courts would have no jurisdiction. The relevant portion of the said email is extracted hereinbelow.

"We note that the Respondent is now threatening to appeal under the Arbitration and Conciliation Act, 1996 ("The Indian Act"). We can see no basis upon which the Indian Courts will accept jurisdiction given that the seat of arbitration is London and the arbitration agreement is governed by English Law."

29. When the parties chose a juridical seat outside India and provide for the laws of England to apply, the challenge to the award has to be raised in England as per the decision of the Supreme Court in ***Eitzen Bulk A/S v. Ashapura Minechem Limited & Anr. (2016) 11 SC 508***. The Supreme Court held as under:

"26. According to the learned Counsel, Clause 28, which is the arbitration clause in the contract clearly stipulates that any dispute under the contract "is to be settled and referred to arbitration in London." It further stipulates that English law to apply. The

parties have thus clearly intended that the arbitration will be conducted in accordance with English law and the seat of the arbitration will be at London.

27. The question is whether the above stipulations show the intention of the parties to expressly or impliedly exclude the provisions of Part I to the arbitration, which was to be held outside India i.e. in London. We think that the clause evinces such an intention by providing that the English law will apply to the arbitration. The clause expressly provides that Indian law or any other law will not apply by positing that English law will apply. The intention is that English law will apply to the conduct of the arbitration. It must also follow that any objection to the conduct of the arbitration or the award will be governed by English law. Clearly, this implies that the challenge to the award must be in accordance with English law. There is thus an express exclusion of the applicability of Part I to the instant arbitration by Clause 28. In fact, Clause 28 deals with not only the seat of arbitration but also provides that there shall be two arbitrators, one appointed by the charterers and one by the owners and they shall appoint an umpire, in case there is no agreement. In this context it may be noted that the Indian Arbitration and Conciliation Act, 1996 makes no provision for umpires and the intention is that arbitration should be conducted under the English law i.e. the English Arbitration Act, 1996. It may also be noted that Sections 67,68 and 69 of the English Arbitration Act provide for challenge to an award on grounds stated therein. The intention is thus clearly to exclude the applicability of Part I to the instant arbitration proceedings."

30. The Petitioner has relied on ***Gedela Satchidananda Murthy v Dy. Commissioner Endowments Deptt. A.P. and others (2007) 5 SCC 677*** to

argue that the conduct of the parties would imply that the Part-I of the Act was not excluded. In the present case, though in the reply to the Petitioner, the Respondent simply said "no comment", the other documents i.e. emails and procedural orders point to the contrary.

31. The fact that in its initial reply filed, the Respondent did not take this objection, does not mean that the objection cannot be raised at this stage. In any event, the Respondent has filed a specific additional reply taking an objection as to the maintainability of the present petition. In ***Roger Shashoua & Others v. Mukesh Sharma & Others*** ***2017 (14) SCC 722***, the Supreme Court has clearly held that even if a party has wrongly approached the Court in India and accepted the applicability of Part-I of the Act, the same would not confer jurisdiction on Indian Courts. The relevant observations are:

> "*60. The other ground of attack is that the appellants had themselves approached the courts in India and, therefore, by their own conduct applicability of Part I has been accepted by the appellants and the right to raise the issue of jurisdiction has been waived.*
>
> …
>
> *62. In Kanwar Singh Saini (supra), this Court has laid down that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes an order/or a decree having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the root of the cause. For the said purpose the two-Judge Bench has placed reliance upon United Commercial Bank Ltd. (supra), State of Gujarat v. Rajesh Kumar Chimanlal Barot Kesar Singh v. Sadhu, Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd.*

> *63. In Zuari Cement Ltd. (supra), the Court ruled that though the petitioner and the Corporation therein have subjected themselves to the ESI Court, the same could not confer jurisdiction upon the ESI Court to determine the question of exemption from the operation of the Act, for by consent, the parties cannot agree to vest jurisdiction in a court to try the dispute which the court does not possess.*
> *64. In view of the aforesaid, there cannot be any trace of doubt that any filing of an application by the appellant in the courts in India can clothe such courts with jurisdiction unless the law vests the same in them."*

32. The issues as to jurisdiction in the case of arbitral proceedings, have been repeatedly decided by the Supreme Court and the ratio of the various judgments is quite clear. Despite the same, there are several disputes pending before various courts, in respect of international commercial arbitrations, where jurisdictional issues continue to be raised. The various decisions rendered in respect of the applicability of Part I would show that where the law of the arbitration agreement is not Indian law, Part I would have no application, in spite of the substantive law governing the contract being Indian law or the venue of the arbitration proceedings being in India. In order to have an easy reference of some of the decisions rendered till date, the following tabular analysis is set out.

Sl. No	**Judgment, along with date of decision**	**Substantive law of contract**	**Law of arbitration agreement**	**Rules governing procedure**	**Venue**	**Whether Part-I applies**
1.	***Bhatia International v Bulk Trading SA(2002) 4 SCC 105.***	Not specified	Not specified	ICC Rules	Paris, France	Yes, Part I applicable even to foreign seated arbitrations unless expressly/ impliedly excluded

	Decided on 13th March, 2002					
2.	***Venture Global v. Satyam Corp., (2008) 4 SCC 190.*** Decided on 10th January, 2008	Laws of State of Michigan, United States	Not specified	Rules of the London Court of Arbitration	Not specified	***Bhatia International*** followed, hence Part I applicable
3.	***Indtel Technical Services Private Limited v. WS Atkins Rail Limited,(2008) 10 SCC 308***. Decided on 25th August, 2008.	Laws of England and Wales	Not specified	Not specified	Not specified	***Bhatia International*** followed, hence Part I applicable
4.	***Citation Infowares Limited v. Equinox Corporation, (2009) 7 SCC 220.*** Decided on 20th April, 2009.	Laws of California, USA	Not specified	Not specified	Not specified	***Bhatia International*** followed, hence Part I applicable
5.	***Dozco v. Doosan, (2011) 6 SCC 179.*** Decided on 8th October, 2010.	Laws of the Republic of Korea	Disputes to be settled by arbitration in South Korea	ICC Rules	Seoul, Korea/ such other place as may be agreed	***Bhatia International*** applied. Held, Part I had been excluded by the parties as South Korea was held to be the seat, though the contract did not specifically mention the law governing the arbitration

						agreement
6.	***Videocon v. Union of India, (2011) 6 SCC 161.*** Decided on 11th May, 2011.	Laws of India	Laws of England	Not specified	Contract designated Kuala Lumpur, as venue. However, proceedings were later held at London	***Bhatia International*** applied. Part I held to be impliedly excluded by agreeing to laws of England as law governing the arbitration agreement.
7.	***Yograj Infrastructure Limited v. Ssang Young Engineering and Construction Company Limited, (2011) 9 SCC 735.*** Decided on 1st September, 2011.	Laws of India	Seat was Singapore as per SIAC Rules	Singapore International Arbitration Centre (SIAC) Rules, 2010	Singapore	***Bhatia International*** applied. Held, Part I excluded because parties had agreed for proceedings to be held in accordance with SIAC rules
8.	***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.*** Decided on 6thSeptember, 2012.	Laws of India	Laws of England	Laws of England	London, United Kingdom	Part I not applicable to foreign seated arbitrations. However, decision applicable prospectively
9.	***Enercon (India) Limited and Others v. Enercon GMBH and Another,***	Laws of India	"The provisions of the Indian Arbitration and Conciliation Act, 1996 to	Not specified	London, United Kingdom	Part I to apply, as by making applicable the Indian Arbitration Act, 1996 to the proceedings, parties have made a

	(2014) 5 SCC 1. Decided on February 14, 2014.		apply"			choice that seat of arbitration would be in India
10.	***Reliance Industries Limited and Another v. Union of India, (2014) 7 SCC 603.*** Decided on 28th May, 2014.	Laws of India	Laws of England	UNCITRAL Rules, 1985	London, United Kingdom	Pre-***BALCO*** agreement; Part I excluded by the parties by having agreed to English law as the law governing the arbitration agreement
11.	***Harmony Innovation Shipping Limited v. Gupta Coal India Limited and Another, (2015) 9 SCC 172.*** Decided on 10th March, 2015.	Laws of England	Arbitration in London and contract to be governed by English law	Small Claims Procedure of the London Maritime Arbitration Association for where dispute of claim did not exceed $50,000	London, United Kingdom	Pre-***BALCO*** agreement; Part I impliedly excluded as contract interpreted to mean that the seat of arbitration was at London
12.	***Union of India v. Reliance Industries Limited,(2015) 10 SCC 213.*** Decided on 22nd September, 2015.	Laws of India	Laws of England	UNCITRAL Rules, 1985	London, United Kingdom	Pre-***BALCO*** agreement; Part I excluded by the parties by having agreed to English law as the law governing the arbitration agreement.
13.	***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc, (2016) 4 SCC 126.*** Decided on	Laws of India	Laws of England	"English Arbitration Law"	London, United Kingdom	Pre-***BALCO*** agreement; Part I impliedly excluded by the parties by having agreed to English law as the law governing the arbitration agreement

	28th January, 2016.					
14.	***Eitzen Bulk A/S v. Ashapura Minechem Limited and Another, (2016) 11 SCC 508.*** Decided on 13th May, 2016.	English law	English law	Small Claims Procedure of London Maritime Arbitration Association where dispute of claim did not exceed $50,000	London, United Kingdom	Pre-***BALCO*** agreement; Part I excluded as parties had chosen London as the seat of arbitration and agreed that arbitration would be governed by English law
15.	***IMAX Corporation v. E City Entertainment (India) Private Limited, (2017) 5 SCC 331.*** Decided on 10th March, 2017.	Laws of Singapore	Not specified in the agreement	ICC Rules of Arbitration	Not specified in the agreement, however arbitration was conducted in London pursuant to fixing of London as the juridical seat in accordance with Article 14(1) of ICC Rules	Pre-***BALCO*** agreement; Part I excluded because parties agreed that arbitration would be conducted according to ICC Rules and left place of arbitration to be chosen by it, and ICC chose London after consulting the parties
16.	***Roger Shashoua v. Mukesh Sharma, (2017) 14 SCC 722.*** Decided on 4th July 2017.	Laws of India	Not specified	ICC Rules	London, United Kingdom	Pre-***BALCO*** agreement; Part I excluded as agreement interpreted to mean that London was not the mere venue but the juridical seat
17.	***Union of India v. Hardy Exploration***	Laws of India	Not specified	UNICITRAL Model Law	Kuala Lumpur, Malaysia	Pre-***BALCO*** agreement; Part I not excluded because Kuala

	and production; Civil Appeal No. 4628 of 2018 . Decided on 25th September, 2018					Lumpur was only the venue, further no determination of the seat of arbitration either by the parties or by the Arbitral Tribunal under the UNCITRAL Rules

33. The above discussion clearly shows that even in those cases, which are governed by the ***Bhatia International (supra)*** principle, it is only when the seat of the arbitration is in India or the arbitration agreement is governed by the Indian law, or where a judgment cannot be reached as to the seat of arbitration that ***Bhatia International (supra)*** would continue to govern. In the present case, neither situation exists.

34. **Conclusions:**

(i) The contract in the present case is pre-***BALCO-I.***

(ii) It is governed by the principles in ***Bhatia International (supra)***.

(iii) The contract clearly specifies that the seat of arbitration is England and the law governing the arbitration agreement is that of England.

(iv) Part-I is clearly excluded in view of these clauses.

(v) The disputes adjudicated in the Award include disputes falling under Section 4 as also other contractual issues which would be governed by Section 11.

(vi) The ambiguity in the Reply filed by the Respondent, as to jurisdiction, cannot vest jurisdiction in this Court.

(vii) The Respondent, even during arbitral proceedings, has taken the stand that Courts in India have no jurisdiction.

(viii) This court, thus, has no jurisdiction to entertain challenges to the

impugned awards passed by the ICA of the LCIA.

35. The petitions are, accordingly, dismissed. The Petitioner is left to avail its remedies in accordance with the applicable laws. All I.As are disposed of. In the facts and circumstances of the present case, there shall be no order as to costs.

PRATHIBA M. SINGH
JUDGE

NOVEMBER 01, 2018/*dk*

HIGH COURT OF DELHI
सत्यमेव जयते