IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 18TH DAY OF DECEMBER 2017

THE HON'BLE DR.JUSTICE ANITA SUMANTH

O.A.Nos.249 to 251 of 2017

In the matter of Arbitration & Conciliation Act, 1996
And
In the matter of dispute between ACI Worldwide (Asia) Pte Ltd.
And
Financial Software & Systems Private Ltd.
And
Arbitration Agreement dt. 30.03.2001

ACI WORLDWIDDE (ASIA) PTE LTD
a company incorporated under the laws of Singapore,
having its registered office at
8 Marina Blvd., #05/02, Marina Bay Financial Centre,
018981, Singapore

Also at:
300 Beach Road,
#21-03/06
The Concourse, Singapore – 199555
represented by
its authorized signatory Mr.Shekhar Ganapathy
...Applicant

vs

Financial Software & Systems Private Limited
a company incorporated under the laws of India,
having its registered office at
“SARADHA” Ground Floor,
No.42, Third Main Road,
Gandhi Nagar, Adyar,
Chennai- 600 020 ...Respondent

O.A.No.249 of 2017:

Original Application praying that this Hon'ble Court be pleased to pass an order of interim/ad-interim injunction may not be issued restraining the Respondent or anyone acting on behalf of or through the Respondent from using, licensing/sub-licensing, appropriating, distributing or providing access to third parties to the Software Products of the Applicant set out in the schedule attached herein till the disposal of the arbitration proceedings between the parties pending before the Singapore International Arbitration Centre in Arbitration Case No.55 of 2017 seated in Singapore and enforcement of the award passed therein.

O.A.No.250 of 2017:

Original Application praying that this Hon'ble Court be pleased to pass an order interim/ad-interim injunction may not be issued restraining the Respondent or anyone acting on behalf of or through the Respondent representing to third parties that it is authorized to use, license/Sub-license, appropriate, distribute or provide access to third parties to the Software Products of the Applicant set out in the Schedule attached hereto till the disposal of the arbitration proceedings between the parties pending before the Singapore International Arbitration Centre in Arbitration Case No.55 of 2017 seated in Singapore and enforcement of the award passed therein.

O.A.No.251 of 2017:

Original Application praying that this Hon'ble Court be pleased to pass an order interim/ad-interim injunction may not be issued restraining the Respondent or anyone acting on behalf of or through the Respondent from interfering with the business operations of the Applicant in any manner whatsoever, including but not limited to interfering with the meetings of the Applicant, its affiliates, business partners, customers, etc till the disposal of the arbitration proceedings between the parties pending before the Singapore International Arbitration Centre in Arbitration Case No.55 of 2017 seated in Singapore and enforcement of the award passed therein.

These original applications coming on this day before this court for hearing the court made the following order:

These Original Applications are filed at the instance of ACI Worldwide (Asia) PTE Ltd. (in short, 'ACI') seeking the grant of ad interim injunctions restraining Financial Software & Systems Private Limited (in short, 'FSSPL') from (i) using or licensing to third parties the software products of ACI detailed in agreement dated 30.03.2001 between the parties (ii) representing to third parties that it is authorized to use the software products of ACI (iii) interfering with the business operations of ACI.

2.Mr.P.S.Raman, learned Senior Counsel appearing for M/s.R & P Partners, learned counsel for FSSPL, would, at the outset, challenge the maintainability of the applications on the ground of lack of jurisdiction of this court to hear the same.

3.The relevant facts to be noticed in regard to the present dispute have their genesis in an International Distributor Agreement (in short, 'IDA') dated 29.04.1998 between ACI and FSSPL. ACI is incorporated in Singapore and is stated to be a market leader in the development of software for electronic payment solutions. Financial Institutions and retailers use the software to process electronic payments, automate back office systems and manage risk. ACI entered into an agreement on 29.04.1998 under which FSSPL was granted a non-exclusive non-transferable license to market and support the software products of the applicant within the territory of India. The product licensed was software called BASE 24, which comprises a suite of modules designed to support electronic payment transactions across various channels such as Automated Teller Machines (ATM), Point of Sale devices and remote banking services. The software runs non-stop, 24/7. The IDA was renewed and extended vide two subsequent agreements dated 30.04.2001 and 30.04.2004 respectively.

4.On 30.03.2001, a licence agreement, MCIND, was entered into between the parties under which the respondent was granted a non-transferable and non-exclusive license to use the software products of the applicant.

5. Admittedly, disputes have arisen inter se the parties that are the subject matter of arbitration before the Singapore International Arbitration Centre (SIAC). Pending proceedings for arbitration, the applicant has

moved the present applications before this Court seeking the above interim reliefs.

6.The clauses relevant to determine jurisdiction of this Court to hear and decide this matter are set out below:

> '*12.13. This Agreement will be governed by and interpreted under the laws of the State of Nebraska, excluding its conflict of laws principles. ACI and Customer also exclude the United Nations Convention on Contracts for the International Sale of Goods, if applicable.*
> *. . . . . .15. In the event the executives are unable to resolve any dispute within fourteen days after submission to them, either party may then refer such disputes to arbitration under the Arbitration Rules of Singapore will be submitted for resolution conducted in Singapore at the facilities of Singapore International Arbitration Centre by a sole arbitrator appointed in accordance with the rules. Any notice of arbitration response or other communication given to or by a party to the arbitration shall be given and deemed received as provided in the Rules. The costs of arbitration shall be determined and pay by the parties to the arbitration as provided by the Rules. Notwithstanding the foregoing, either party may seek injunctive relief against the other party from any other judicial or administrative authority pending the resolution of such controversy or claim.'*

7.Maintainability is challenged on the ground that the substantive law governing the contract is the law of the State of Nebraska and curial law governing the conduct of arbitration, the law of Singapore. Thus, according to FSSPL, the Courts in India stand specifically excluded from entertaining any dispute between the parties. FSSPL relies on the decision of the Division Bench of this Court dated 08.11.2011 in the case of the same parties holding the section 9 applications filed by FSSPL not maintainable. Reliance is also placed by the respondent on the following judgments of the Supreme Court:

(i) *Reliance Industries Limited and another V. Union of India* (2014) 7 SCC 603
(ii) *Swastik Gases Private Lmited V. Indian Oil Corporation Limited* (2013) 9 SCC 32
(iii) *Videocon Industries Limited V. Union of India and another* CDJ 2011 SC 525
(iv) Bharat Aluminium Company V. Kaiser Aluminium Technical Services Inc. ((2012) 9 SCC 552
(v) Dozco India Private Limited V. Doosan Infracore Company Limited ((2011) 6 SCC 179
(vi) *Imax Corporation V. M/s.E-City Entertainment (I) Pvt. Ltd.* 2017 SCC Online SC 239
(vii) *Harmony Innovation Shipping Limited V. Gupta Coal India Limited and another* ((2015) 9 SCC 172
(viii) Bhatia International V. Bulk Trading S.A. and another ((2002) 4 SCC 105

8. Mr.Vijay Narayan, learned Senior Counsel appearing for Mr.Vinod Kumar, learned counsel for ACI, places reliance on the provisions of section 2(2) (as amended in 2015), particularly the proviso thereto, extracted below:

'*(2) This part shall apply where the place of arbitration is in India:*
Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral

award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.'

9. Mr.Narayan places reliance on the following cases:

(i)Bharat Aluminium Company vs. Kaiser Aluminium Technical Services INC.

(2012) 9 SCC 552;

(ii)*Indian Oil Corporation Ltd. vs. Amritsar Gas Service and others* (1991) 1 SCC 533;

(iii) *Adhunik Steels Ltd. V. Orissa Manganese and Minerals (P) Ltd.* ((2007) 7 SCC 125;

(iv) *Financial Software and Systems P. Ltd. vs. ACI Worldwide Corporation and others 2012 (1) CTC 337;*

(v)*Indian Railways Catering & Tourism Corp. Ltd. V. Cox & Kings India Ltd.* 2012 SCC OnLine Delhi 113;

(vi) *Raffles Design International India Private Limited and another vs. Educomp Professional Education Limited and others* 2016 SCC OnLine Del 5521;

(vii) *Trammo DMCC v. Nagarjuna Fertilizers and Chemicals Ltd*. 2017 SCC Online Bom 8676;

10.Having heard learned senior counsel and carefully examined the rival contentions, my conclusions are set out hereunder:

11. The proviso to section 2(2) inserted with effect from 23.10.2015, extracted earlier in this order, makes it possible for parties to a foreign seated Arbitration to take recourse to the jurisdiction of Indian Courts, provided that there is no agreement between the parties to the contrary. Thus it boils down to whether the parties have expressed a clear intention to restrict jurisdiction specifically to foreign courts only, to the exclusion of

Indian courts.

12. The Supreme Court, in the case of *Bhatia International vs Bulk Trading SA and another (*(2002) 4 SCC 105) had, even before the insertion of the proviso to section 2(2), held that Part I of the Act would applicable to foreign seated arbitrations excepting if the parties had excluded such application by agreement, express or implied. The Bench, in this context holds thus:

> *'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 remedy less. 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.'*

13. This position was reversed by the Constitutional Bench of the Supreme Court in Bharat Aluminium (supra) prospectively, in regard to Arbitration Agreements executed on or after 06.09.2012. The Bench states thus:

> *'100. True, that in an international commercial arbitration, having a seat in India, hearings may be necessitated outside India. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but it would not have the effect of changing the seat of arbitration which would*

remain in India. The legal position in this regard is summed up by Redfern and Hunter, The Law and Practice of International Commercial Arbitration (1986) at Page 69 in the following passage under the heading "The Place of Arbitration":-

"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 the reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings – or even hearings – 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 of 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." This, in our view, is the correct depiction of the practical considerations and the distinction between "seat" (Section 20(1) and 20(2)) and "venue" (Section 20(3)). We may point out here that the distinction between "seat" and "venue" would be quite crucial in the event, the arbitration agreement designates a foreign country as the "seat"/"place" of the arbitration and also select the Arbitration Act 1996 as the curial law/law governing the arbitration proceedings. It would be a matter of construction of the individual agreement to decide whether:

i) The designated foreign "seat" would be read as in fact only providing for a "venue" / "place" where the hearings would be held, in view of the choice of Arbitration Act, 1996 as being the curial law – OR *ii) Whether the specific designation of a foreign seat, necessarily carrying with it the choice of that country's Arbitration / curial law, would prevail over and subsume the conflicting selection choice by the parties of the Arbitration Act, 1996.*

ONLY if the agreement of the parties is construed to provide for the "seat" / "place" of Arbitration being in India – would Part I of the Arbitration Act, 1996 be applicable. If the agreement is held to provide for a "seat" / "place" outside India, Part I would be inapplicable to the extent inconsistent with the arbitration law of the seat, even if the agreement purports to provide that the Arbitration Act, 1996 shall govern the arbitration proceedings.'

14. The Act thereafter underwent a major overhaul in 2015 and the question of Judicial Intervention in Foreign seated Arbitration was deliberated upon by the Law Commission. In its 246th Report, the Law Commission summarized its findings and made recommendations as under:

JUDICIAL INTERVENTIONS IN FOREIGN SEATED ARBITRATIONS

38. Section 2(2) of the Arbitration and Conciliation Act, 1996 (the "Act"), contained in Part I of the Act, states that "This Part shall apply where the place of arbitration is in India." In comparison, Article 1(2) of the UNCITRAL Model Law provides: "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." The central issue, therefore, that was before the two judge Bench of the Supreme Court in Bhatia International vs. Interbulk Trading SA, (2002) 4 SCC 105, and before the five-judge Bench in Bharat Aluminum and Co. vs. Kaiser Aluminium and Co., (2012) 9 SCC 552 (hereinafter called "BALCO") was whether the exclusion of the word "only" from the Indian statute gave rise to the implication that Part I of the Act would apply even in some situations where the arbitration was conducted outside India.*

39. The Supreme Court in Bhatia, held that Part I mandatorily applied to all arbitrations held in India. In addition, Part I applied to arbitrations conducted outside India unless it was expressly or impliedly excluded. While Bhatia was a case arising out of section 9, the same principle was extended by the Supreme Court to sections 11 and 34 as well (in Venture Global v Satyam Computer, (2008) 4 SCC 190; Indtel Technical Services v W.S. Atkins, (2008) 10 SCC 308; Citation Infowares Ltd v Equinox Corporation, (2009) 7 SCC 220; Dozco India v Doosan Infrastructure, (2011) 6 SCC 179; Videocon Industries v Union of India, (2011) 6 SCC 161). As a result, Indian Courts were competent to provide interim relief pending arbitration, appoint arbitrators and set aside arbitral awards even if the arbitration was conducted outside India. These powers existed unless Part I was expressly or impliedly excluded. Further, an implied exclusion was construed not on the basis of conflict of laws principles but in an ad hoc manner. This position now stands overruled following BALCO.

40. The Supreme Court in BALCO decided that Parts I and II of the Act are mutually exclusive of each other. The intention of Parliament that the Act is territorial in nature and sections 9 and 34 will apply only when the seat of arbitration is in India. The seat is the "centre of gravity" of arbitration, and even where two foreign parties arbitrate in India, Part I would apply and, by virtue of section 2(7), the award would be a "domestic award". The Supreme Court recognized the "seat" of arbitration to be the juridical seat; however, in line with international practice, it was observed that the arbitral hearings may take place at a location other than the seat of arbitration. The distinction between "seat" and "venue" was, therefore, recognized. In such a scenario, only if the seat is determined to be India, Part I would be applicable. If the seat was foreign, Part I would be inapplicable. Even if Part I was expressly included "it would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the [foreign] Procedural Law/Curial Law." The same cannot be *used to confer jurisdiction on an Indian Court. However, the decision in BALCO was expressly given prospective effect and applied to arbitration agreements executed after the date of the judgment.*

41. While the decision in BALCO is a step in the right direction and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.

***(i)** Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a practical remedy to the party seeking to enforce the interim relief obtained by it.*

That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company.

***(ii)** While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration agreement executed pre-BALCO.*

42. The above issues have been addressed by way of proposed Amendments to sections 2(2), 2(2A), 20, 28 and 31.

15. Substantial reliance has been placed by FSSPL on the decision of the Division Bench of this Court that considered an application by FSSPL under Section 9 seeking various reliefs against ACI pending an earlier proceeding for arbitration. The defence taken by ACI earlier was that the parties had excluded the application of Part I of the Act insofar as the clause provided for the seat of arbitration as well as curial law to be Singapore. The objection was accepted in the context of the following clause in the Settlement and Release Agreement (SRA) dated 17.02.2010 between the same parties as before me now.

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.

16. The learned Single Judge, which considering the maintainability of the applications has held thus:

' 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 under Section 9.

....

61.The reason for coming to this conclusion is, that in the case of Bhatia International vs. Bulk Trading S.A. as well as other judgments of the Hon'ble Supreme Court i.e. Venture Global Engineering vs. Satyam Computer Services Ltd and another (supra), Indtel Technical Services Private Limited vs. 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.'*

17.In appeal, FSSPL had placed great emphasis on the last line of clause 14.6 of the SRA arguing that the Part I of the Act stood specifically included by the parties. The Bench, at paragraphs 27 and 28 rejects the argument in the following terms:

> *'27. Learned Senior Counsel for Appellant has contended that Appellant company is incorporated in Chennai and parties have entered into an agreement in Chennai and the area of operation and the services are provided to various banks in India and SRA was entered into between the parties in C.S.No.638 of 2010. Learned Senior Counsel for Appellant would therefore submit that Madras High Court has certainly jurisdiction to entertain Petition under Section 9 of Arbitration and Conciliation Act. Laying emphasis upon the express used in Clause 14.6 - " ...... except that either party may pursue legal/equitable remedies in any Court of competent jurisdiction", the learned Senior Counsel for Appellant has submitted that by the language of Clause 14.6, there is no implied exclusion of Part I of the Act and the learned single Judge has not properly interpreted the last limb of Clause 14.6.*
>
> *28. The above contention cannot be countenanced. Clause 14.6 has three limbs:- (i) the law governing the contract is the laws of Singapore; (ii) the curial law i.e. law governing the conduct of arbitration is the Arbitration Rules of SIAC and (iii) either party may pursue legal/equitable remedies in any Court of competent jurisdiction. Clause is silent on the*

law governing the arbitration agreement. As per the decisions of the Supreme Court, in the absence of express agreement there is a strong prima facie presumption that the parties intend the curial law to be the law of "Seat of Arbitration". This is also evident from Clause 18 of SIAC Rules. Insofar as the substantive law governing the contract and curial law governing the procedure for conduct of arbitration, the parties intentionally chosen Singapore law. Therefore, the law governing arbitration is the Singapore law. The language is clear indication of exclusion of Part I of the Act. If there is any such exclusion, the ratio in Bhatia International case would squarely apply. Applying the ratio of Bhatia International, Dozco, Videocon and Yograj Infrastructure cases, we are of the view that Madras High Court had no jurisdiction to entertain Petition under Section 9 of Arbitration and Conciliation Act. We do not find any reason warranting interference with the order of the learned Judge.'

18. The conclusion arrived at by the Bench is in the context of two factors. The provisions of section 2 as it stood then were to the effect that Part I would apply only if the place of arbitration was India and there was no proviso carving out an exception as inserted with effect from 23.10.2015. Secondly, both substantive as well as curial law was the law of Singapore.

19. The Bench thus, on a combined application of the aforesaid factors, came to the conclusion that the parties had impliedly excluded the application of Indian courts,

specifically noting that in the absence of any law designated to govern the arbitration agreement, it is the lex arbitri that would govern the same.

20. Reliance is also placed on a recent judgement of the Supreme Court in *Imax Corporation vs E-City Entertainment (I) Private Limited* (2017 SCC 239) which dealt with an agreement wherein the parties agreed that the seat shall be determined as per the Rules of the ICC. The relevant clause in the agreement was as follows:

> '*This Agreement shall be governed by and construed according to the laws of Singapore, and the parties attorn to the jurisdiction of the courts of Singapore. Any dispute arising out of this master agreement or concerning the rights, duties or liabilities of E-City or Imax hereunder shall be finally settled by arbitration pursuant to the ICC Rules of Arbitration.*'

21. The parties submitted the dispute to the ICC on 16.06.2004, and the International Court of Arbitration, in exercise of powers under article 14(1) of the ICC Rules chose London to be place of Arbitration. The Bench notes that the determination of seat as London was made after consultation with the parties. Moreover, clause 14 of the Agreement itself leaves the determination of the place of arbitration to the ICC to be decided in accordance with Article 14 of the Rules of the ICC. Once the situs was determined by the ICC, the only inference thereafter is that the parties have consciously excluded the applicability of Part 1 of the Act.

22. The present case stands on a different footing legally. The commencement of proceedings in the present

case was on 14.02.2017. Clause 27 of the Arbitration and Conciliation (Amendment) Act 2015 makes the amended act applicable in cases where the commencement of proceedings is subsequent to the coming into force of the Act i.e. 23.10.2015. Thus the provisions of amended section 2(2) that include the proviso thereto, stand attracted in the present case.

23. Prior to examining the application of section 2(2) as amended, I examine briefly the breadth and width of the proviso itself. Pursuant to the recommendations of the Law Commission, proviso to section 2 was inserted with effect from 23.10.2015 and applies to all matters where the reference to Arbitration has been made after coming into force of the amendment. The exclusion of jurisdiction of this Court will have to be seen in the context of the spirit and intention behind the insertion of the proviso as gleaned from the report of the Law Commission. The seat of arbitration is always intended to be its centre of gravity and brings with it the applicable law as well. The following passage from Redfern and Hunter on International Arbitration 5th Edition elaborates this position as follows:

> *'This introduction tries to make clear, the place or seat of the arbitration is not merely a matter of geography. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated:*
> *When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely*

to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and the arbitrators.'

Notwithstanding the above basic tenet of Arbitration law, the provisions of section 2(2) law as they stand now, in my view, permit access to Part I of the Act in cases which there is no agreement to the contrary expressed by the parties.

24. I have carefully examined the relevant clauses in the contract in the light of the proviso to section 2(2) to determine the existence or otherwise of an agreement between the parties to exclude the jurisdiction of Indian courts. Clause 12.13 confers jurisdiction substantively, on the courts of Nebraska. Clause 12.15 as I see it has two parts. The first confers jurisdiction on courts in Singapore for the conduct of proceedings for arbitration, which then is the curial law. The second part is clearly an expression of agreement conferring jurisdiction on '*any other judicial or administrative authority*' '*notwithstanding*' the conferring of jurisdiction on Singapore as the seat of arbitration. In my opinion, the

requirement in the proviso is fully met by the statement of the parties that '*Notwithstanding the foregoing, either party may seek injunctive relief against the other party from any other judicial or administrative authority pending the resolution of such controversy or claim.*' My understanding of the applicable clauses is that the parties have not restricted the jurisdiction of the courts to consider injunctive reliefs to only the courts exercising substantive or curial jurisdiction but to any other courts as well, the present court included. The petition is thus held to be maintainable in law.

25. Now I address the merits of the reliefs sought. The agreement between the parties admittedly stands terminated as on 23.11.2016. Upon termination under clauses 11.1 and 11.2 of the Agreement, clauses 11.3 to 11.5 stand triggered. Clause 11 is extracted below:

> *11. TERMINATION:*
> *11.1. ACI may immediately terminate the Agreement or any Attachment, without judicial notice or resolution, by giving written notice to Customer, if Customer(i) commits a material breach of any provision of this Agreement and fails to cure such breach within thirty (30) days after ACI demands such cure (ii) becomes insolvent or assigns all or substantially all of its assets or business for the benefit of creditors, (iii) resolves to wind up business, dissolve or liquidate or (iv) otherwise ceases to conduct business.*
> *11.2. Customer may immediately terminate the Agreement, without judicial notice or resolution, by giving written notice to ACI, if ACI (i) commits a material breach of any provision of this Agreement and fails to cure such breach within thirty (3) days after Customer demands such cure (ii) becomes insolvent or assigns all or substantially all of its assets or business*

for the benefit of creditors, (iii) resolves to wind up business, dissolve or liquidate or (iv) otherwise ceases to conduct business.
11.3. Upon the termination of this Agreement, Customer shall, within ten (10) calendar days, (i) pay all amounts due and outstanding hereunder and (ii) deliver to ACI or its designee all Software Products within Customer's possession or control.
11.4. In the event of termination by ACI for breach by Customer, Customer shall owe ACI all the remaining amounts due under this Agreement until such period of time that Customer could terminate this Agreement without breach. In the event of termination by Customer for breach by ACI, ACI shall owe Customer as damages an amount equal to a pro-rata refund of all one-time or initial license fees paid under this Agreement based upon a five year straight line depreciation beginning at the end of the Warranty Period and a pro-rata share of any pre-paid maintenance or periodic license fees paid. EACH PARTY AGREES THAT THIS PARAGRAPH CONSTITUTES THE SOLE REMEDY FOR BREACH OF THIS AGREEMENT OTHER THAN FOR BREACH OF SECTIONS 4.0, 5.0 OR 7.0.
11.5. The following Sections shall survive termination of the Agreement Section 4.0; Section 5.0 Section 6.0; Section 7.0; Section 8.0; Section 9.0 and Section 12.

26. The agreement between the parties is categoric to the effect that the only remedy for breach of the agreement is a claim for damages. Such claim is to be determined and quantified after a process of adjudication by the Arbitral Tribunal. The only exceptions to the operation of clause 11 are clauses 4, 5 and 7 that deal with warranty, infringement and confidentiality.

27. In the light of the aforesaid express agreement between the parties I am of the view that the reliefs sought in these applications are not liable to be granted. ACI seriously pursues only prayer (i) and does not pursue

prayers (ii) and (iii) sought. Prayer (i) seeks the return of all BASE 24 software currently in use in the Automated Teller machines of the banks to which FSSPL has sub-licensed the software. Incidentally, the banks are not parties to these applications. But more relevant is the serious prejudice that would be caused to lakhs of consumers if the operations of the ATM's were to stand interrupted. The question of balance of convenience in a case like this should take into account not merely the maintenance of status quo inter se parties, but that inter se all stakeholders, including the general public. The parties have rightly agreed that any breach of the agreement will result solely in monetary consequences. This will follow as and when the Arbitral Tribunal completes the adjudication of the disputes being agitated before it.

28. In any event, the SIAC Rules also provide, in terms of Clause 30 thereof, for measures for the grant of interim and emergency interim relief as extracted below.

> *"30. Interim and Emergency Interim Relief.*
>
> *30.1. 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.*
>
> *30.2. A party that wishes to seek emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1.*

30.3 A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules.'

It is thus always open to the parties to approach the Tribunal for any such relief, if thought necessary, pending arbitration.

29. The applications are held to be maintainable in law but rejected on merits.

Sd/.Dr.A.S.M.J.
18.12.2017

//Certified to be a true copy//
Dated this the 09TH day of JANUARY 2018.

DL/08.01.2018 COURT OFFICER