Disortho S.A.S vs Meril Life Sciences Pvt. Ltd on 18 March, 2025

Author: Sanjay Kumar

Bench: Sanjay Kumar

2025 INSC 352

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO.48 OF 2023

DISORTHO S.A.S. ...

VERSUS

MERIL LIFE SCIENCES PRIVATE LIMITED ...

JUDGMENT

SANJIV KHANNA, CJI.

Disortho S.A.S,1 the petitioner before us, is a company incorporated in Bogota, Colombia. The respondent, Meril Life Science Private Limited,2 is a company incorporated in Gujarat, India. Disortho and Meril executed an International Exclusive Distributor Agreement,3 dated 16th May 2016, for distribution of medical products in Colombia. Later, disputes emerged between the parties.

2. Disortho has filed this petition under Section 11(6) of the Arbitration and Conciliation Act, 19964, for appointment of an arbitral panel in terms of 1 Hereinafter referred to as, “Disortho”.

2 Hereinafter referred to as, “Meril”.

3 Hereinafter referred to as, “Distributor Agreement”. 4 Hereinafter referred to as, “A&C Act”.

Clauses 16.5 and 18 of the Distributor Agreement. Meril has opposed the petition on jurisdictional grounds, contending that these clauses do not grant Indian Courts jurisdiction to appoint arbitrators. The clauses 16.5 and 18 read:

> "16. Miscellaneous 16.5. This Agreement shall be governed by and construed in accordance with the laws of lndia and all matter pertaining to this agreement or the matters arising as a consequence of this agreement with be subject to the jurisdiction of courts in Gujarat, India.
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> 18. Direct Settlement of Disputes The Parties mutually agree and pact that any dispute, controversy or claim arising during this Agreement related to subscription, execution, termination, breach, as well as non-

contractual relationships, related to the clauses mentioned above; They may be submitted to conciliation in accordance with the Rules of Arbitration and Conciliation of the Chamber of Commerce of Bogota DC., or instead. of this city, where the Director of the Centre so determine.

Similarly, the Parties mutually agree and pact that if the dispute or difference has not been settled in conciliation, or to the extent that has not been resolved; it will be committed to Arbitration by either party for final settlement in accordance with the Arbitration and Conciliation Center of the Chamber of Bogota DC. The Arbitral Tribunal shall consist of one (1) arbitrator in cases of minor or no value E according to the Rules of Conciliation and Arbitration Center of the Chamber of Commerce of Bogota DC. Also, in the event of greater amount, the Court of conformity shall comply with the Regulations of the Center for Conciliation and Arbitration of the Chamber of Commerce of Bogota DC., With three (3) arbitrators appointed by the Centre and by drawing lots. The arbitration will take place in Bogota DC. On the premises of Center for Conciliation and Arbitration of the Chamber of Commerce of Bogota DC., or at the place where the Director of the Centre as determined in this city. The award shall be in law and standard will be applicable Colombian law governing the mailer, Expenditure in the conciliation and arbitration proceedings shall be borne equally."

3. What initially appeared to be a straightforward question has, in fact, become a vexed one, primarily for two salient reasons. First, there exists a divergence of opinion, both internationally and domestically, on the appropriate test to determine jurisdiction in a case of trans-border arbitration. This divergence stems from the interaction between three distinct legal systems which come into play when a dispute occurs: (i) lex-contractus, the law governing the substantive contractual issues; (ii) lex arbitri, the law governing the arbitration agreement and the performance of this agreement; and (iii) lex-fori, the law governing the procedural aspects of arbitration. These legal systems may either differ or align, depending on the parties' choices. Furthermore, there may be internal splits within these legal systems, such as for lex arbitri.5 Secondly, when contractual clauses conflict, as is the case here, the resolution becomes legalistic and complicated.

4. In the interest of avoiding prolixity, we deem it unnecessary to separately address each argument raised or delve into the extensive body of jurisprudence surrounding the issue. It suffices to note that a similar, though not in pari materia, question was examined by this Court in M/s. Arif Azim Co. Ltd. v. M/s. Micromax Informatics Fze.6 This judgment 5 Lex arbitri might be split into two components if the parties so desire – (i) law governing the agreement to arbitrate or the proper law of arbitration and (ii) the law governing the arbitration. While the former relates to validity, scope and interpretation of the arbitration agreement, the later refers to the supervisory jurisdiction

exercised by the courts. We will refer to this split later in this judgment. 6 (2024) INSC 850.

references earlier precedents of this Court on the subject, and we will discuss these judgments subsequently.

5. We begin by referring to Redfern and Hunter's Commentary on International Arbitration.7 Chapter 7, titled "Agreement to Arbitrate", emphasizes the cardinal importance of parties' chosen law. It is stated that the law governing the arbitration agreement sets the rules and norms that determine the validity, scope, and interpretation of the agreement. This chosen law assumes paramount significance when disputes arise concerning the tribunal's jurisdiction. For instance, disputes related to actions in rem may not be arbitrable in India but arbitrable in another jurisdiction. Additionally, it determines whether the arbitration agreement extends to third parties, such as parent or sister concerns.8 Equally, it plays a key role in determining the validity of the arbitration agreement itself—some national laws may render the agreement void or unenforceable, thereby affecting the arbitrability of the dispute, while others may uphold its enforceability. Finally, this law serves as a guiding principle when the dispute resolution mechanism is unclear, inconsistent or when conflicting dispute resolution clauses are bundled together in the same agreement.

7 Blackaby KC, Nigel, Constantine Partasides, and Alan Redfern, Redfern and Hunter on International Arbitration, 7th Edition (2022), Oxford University Press. 8 See the Group of Companies Doctrine, Cox and Kings Ltd. v. SAP India Pvt. Ltd. and Another, 2023 INSC 1051.

6. In our opinion, the law governing the arbitration may differ from both the lex contractus and the lex fori.9 This distinction was succinctly brought out in the recent English High Court decision of Melford Capital Partners (Holdings) LLP and Others v. Frederick John Wingfield Digby.10 This decision refers to the earlier decision of Paul Smith Ltd. v. H&S International Holdings Inc.,11 which dealt with two conflicting clauses. One clause provided for resolution of disputes through ICC arbitration, while the other designated the courts of England as having exclusive jurisdiction. The conflict between these provisions was resolved by the Steyn J. by adopted the following analysis:

> "Fortunately, there is a simple and straight forward answer to the suggestion that cll. 13 and 14 are inconsistent. Clause 13 is a self-contained agreement providing for the resolution of disputes by arbitration. Clause 14 specifies the lex arbitri the curial law or the law governing the arbitration, which will apply to this particular arbitration. The law governing the arbitration is not to be confused with (1) the proper law of the contract, (2) the proper law of the arbitration agreement, or (3) the procedural rules which will apply in the arbitration. These three regimes depend on the choice, express or presumed, of the parties. In this case it is common ground that both the contract and the arbitration agreement are governed by English law. The procedural rules applicable to the arbitration are not rules derived from English law. On the contrary, the procedural regime is the comprehensive and sophisticated ICC rules which apply by virtue of the parties' agreement.

> What then is the law governing the arbitration? It is, as Martin Hunter and Alan Redfern, International Commercial Arbitration, p. 53, trenchantly explain, a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules 9 This is assuming that the law governing the (i) agreement to arbitrate, and (ii) arbitration itself, are the same, which is most often the case. As explained earlier, the former relates to validity, scope, and interpretation of the arbitration agreement, while the later relates to inter alia the supervisory jurisdiction by national courts.
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> 10 [2021] EWHC 872 (Ch).
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> 11 [1991] 2 Lloyd's Rep 127.

governing interim measures (e.g. Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (e.g. filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (e.g. removing an , arbitrator for misconduct).

(emphasis supplied)"

7. This ratio distinguishes between four choices of law – (i) the law governing the arbitration, (ii) the proper law of arbitration agreement, (iii) the proper law of contract, and (iv) the procedural rules which apply in the arbitration. These choices are either expressly provided or implied by the parties involved. The passage also highlights the subtle distinction between the proper law of arbitration agreement (i.e., law governing the agreement to arbitrate) and the law governing the arbitration as a whole. The law governing the agreement to arbitrate determines the validity, scope, and interpretation of the agreement. In contrast, the law governing the arbitration itself is concerned with determining which court has supervisory jurisdiction over the arbitration. This jurisdictional framework pertains to the conduct of the arbitration, the rules governing interim measures, and the provisions under which the court may exercise its supervisory authority, such as in the removal of arbitrators.

8. While parties may elect to differentiate between the lex arbitri — the law governing the agreement to arbitrate and the law governing the arbitration itself — such a distinction warrants caution. A distinction should not be readily drawn unless the parties intended to preserve such a distinction. Invariably, these concepts are subsumed in each other.

They are inherently intertwined as a part and parcel of the lex arbitri. This is particularly apparent in matters such as the filling of vacancies within the arbitral tribunal or the removal of an arbitrator for misconduct. In these situations, the law governing the arbitration agreement and the law governing the arbitration overlap, as both are essential to the functioning and integrity of the arbitral process. Consequently, unless the parties have provided otherwise, it is prudent not to

divide lex arbitri.

9. A more common distinction exists between the lex arbitri and the lex fori, that is the governing law of arbitration and the procedure of arbitration. The lex arbitri determines which court exercises supervisory jurisdiction. In Melford Capital (supra), it was held that both the contract and the arbitration agreement would be governed by English Law but the procedural rules shall be the rules of ICC.

10. This position is also clear from the judgment of Christopher Clark, J. in Ace Capital Limited v. CMS Energy Corporation,12 which had examined Paul Smith (supra) to observe that the law governing the arbitration decides the extent of the court's supervisory jurisdiction. Agreeing on the approach adopted in Ace Capital (supra), the judgment in Milford Capital (supra) states that it is the appropriate lodestar. 12 2008 EW SC 1843 Comm.

11. We are of the view that matters such as filling vacancies on arbitral tribunals and the removal of an arbitrator through the exercise of supervisory jurisdiction, in the absence of a clear mechanism within the arbitration agreement, should be normally governed by the law applicable to the arbitration agreement itself, rather than by the procedural rules that govern the arbitration process. It is, after all, the lex arbitri that governs the arbitration and its associated processes. However, as noticed above, this may not be the position in all cases as the mutually agreed terms may stipulate otherwise.

12. At this juncture, the pertinent question that arises is: how do we determine the law that governs the arbitration agreement?

13. In Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb,13 the UK Supreme Court examined this legal issue and divergent opinions surrounding it. One line of precedents suggest that the lex contractus should govern the arbitration agreement. Although the arbitration agreement is separable from the main contract, it is not completely detached from it. Conversely, there is case law indicating that the law of the seat of arbitration should typically govern the arbitration agreement. Enka Insaat (supra) follows the principles stipulated in Sulamérica Cia Nacional De Seguros S.A. and Others v. Enesa Engenharia S.A. and 13 2020 UK SC 38.

Others,14 which it observes straddles both views. The Court ultimately establishes the following principles:

> "X Conclusions on applicable law
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> 170. It may be useful to summarise the principles which in our judgment govern the determination of the law applicable to the arbitration agreement in cases of this kind:
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> i) Where a contract contains an agreement to resolve disputes arising from it by arbitration, the law applicable to the arbitration agreement may not be the same as the law applicable to the other parts of the contract and is to be determined by

applying English common law rules for resolving conflicts of laws rather than the provisions of the Rome I Regulation.

ii) According to these rules, the law applicable to the arbitration agreement will be (a) the law chosen by the parties to govern it or (b) in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected.

iii) Whether the parties have agreed on a choice of law to govern the arbitration agreement is ascertained by construing the arbitration agreement and the contract containing it, as a whole, applying the rules of contractual interpretation of English law as the law of the forum.

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

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

vi) Additional factors which may, however, negate such an inference and may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat are: (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the

14 [2012] EWCA Civ 638.

arbitration agreement would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.

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

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

ix) The fact that the contract requires the parties to attempt to resolve a dispute through good faith negotiation, mediation or any other procedure before referring it to arbitration will not generally provide a reason to displace the law of the seat of arbitration as the law applicable to the arbitration

agreement by default in the absence of a choice of law to govern it.

(emphasis supplied)"

14. The conclusions in Enka Insaat (supra) summarizes the tie breaker rules. Sub-paragraph (i) explains that the law governing the arbitration agreement may differ from the law governing the contract. The former should be determined through conflict of law rules. Sub-paragraph (ii) states that the law governing the arbitration agreement is the law chosen by the parties. If no such choice is made, the law most closely connected to the agreement applies. However, sub-paragraph (ii) must be read alongside sub-paragraph (iii), which clarifies that the law chosen for the arbitration agreement is determined by interpreting the agreement, and if necessary, the entire contract using rules of contractual interpretation. Sub-paragraph (iv) states that when the law governing the arbitration agreement is not specified, the law of the contract (lex contractus) usually applies. Sub-paragraph (v) highlights that selecting a country for the seat of arbitration does not automatically alter the presumption that lex contractus governs the arbitration agreement. Sub-paragraph (vi) outlines factors that may override this presumption. This can happen when the law of the seat mandates that the arbitration agreement must be governed by the law of that country. For instance, this becomes relevant in the context of the A&C Act. Section 2(2) of the A&C Act stipulates that Part I of the A&C Act applies to arbitrations seated in India.15 The second exception is when there is a serious risk that the agreement will become ineffective, or the dispute will become inarbitrable, if governed by the same law as that of the contract.16 Third factor is where the seat is deliberately chosen as a neutral forum. These factors will displace the presumption in favour of lex contractus governing the arbitration agreement. The factors mentioned in sub-para

(vi) are not exhaustive and there may be other additional factors negating the presumption. Sub-para (vii) deals with cases where a particular place is chosen as the venue in contrast to the seat of arbitration. A place being chosen, does not by itself justify an inference that the arbitration agreement is intended to be governed by the law of this venue. Sub-para

(viii) states that in the absence of any choice of law governing the arbitration agreement, the arbitration agreement will be governed by the 15 See Arif Azmi (supra) quoted in paragraph 25 post. 16 See Anupam Mittal v. Westbridge Ventures II Investment Holdings, [2023] SGCA 1. law with which it is most closely connected. The close connection test applies only when the law governing the arbitration agreement cannot be ascertained even after applying the earlier paragraphs. In such a case, the law applicable to the seat of arbitration will be the law having the closest connection to the arbitration even if it differs from the parties' contractual obligations.17 The closest connection test and a presumption in favour of seat in terms of sub-para (viii) will only apply when the contract does not stipulate the lex contractus. Sub-para (ix) states cases relating to attempt to resolve a dispute through good faith, negotiation, mediation, etc. will not generally provide reason to displace the law of the seat of arbitration18.

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

resolution mechanisms.

16. Earlier, Sulamérica Cia (supra) had laid down this three-fold test to determine the law governing the arbitration agreement:

> "25. Although there is a wealth of dicta touching on the problem, it is accepted that there is no decision binding on this court. However, the authorities establish two propositions that were not controversial but which provide the starting point for any enquiry into the proper law of an arbitration agreement. The first is that, even if the agreement forms part of a substantive contract (as is

17 For the Indian Law relating to closest connection test see Arif Azmi (supra). 18 Recently enacted Arbitration Act, 2025, in the United Kingdom, which subject to significant exceptions takes a different position from that in Enka Insaat (supra). commonly the case), its proper law may not be the same as that of the substantive contract. The second is that the proper law is to be determined by undertaking a three-stage enquiry into (i) express choice, (ii) implied choice and (iii) closest and most real connection. As a matter of principle, those three stages ought to be embarked on separately and in that order, since any choice made by the parties ought to be respected, but it has been said on many occasions that in practice stage (ii) often merges into stage (iii), because identification of the system of law with which the agreement has its closest and most real connection is likely to be an important factor in deciding whether the parties have made an implied choice of proper law: see Dicey, Morris & Collins, op. cit. paragraph 32-006. Much attention has been paid in recent cases to the closest and most real connection, but, for the reasons given earlier, it is important not to overlook the question of implied choice of proper law, particularly when the parties have expressly chosen a system of law to govern the substantive contract of which the arbitration agreement forms part.

(emphasis supplied)" Sulamérica Cia (supra) observes that the law governing the arbitration agreement may differ from the law of the contract. However, it is reasonable to presume that the parties intended for their entire relationship to be governed by the same system of law throughout the contract. In this context, a distinction is made between a stand-alone arbitration agreement and one that is embedded within a contract. In the former, a choice of seat of arbitration becomes highly significant, and the law of the seat would likely govern the arbitration agreement. However, when the arbitration agreement forms part of a contract, the express choice of a lex contractus strongly indicates the parties' intention. It would generally be inferred that the arbitration is governed by the same law as the substantive contract. However, this presumption is rebuttable as previously highlighted. Even when the arbitration agreement is part of the contract, the court must conduct a three-step inquiry: first, looking at the express choice of law; second, considering any implied choice; and third, determining the closest and most real connection. Second step is applied when the first step is negative, and the third step is applied when the first and second steps are negative.

17. In BYC v. BCZ,19 the High Court of Singapore references Sulamérica Cia (supra) and notes sharply divided legal opinions. Some argue that the choice of law, often expressed in broad and general terms, would usually distinguish the main contract from the arbitration agreement. The

opposing view is that courts would require additional factors to apply a governing law different from that of the seat of arbitration. However, BCY (supra) favours the first view. The argument of severability, it was observed, would be ineffective. The doctrine simply ensures that the arbitration clause remains enforceable even if the main contract is found to be invalid. It is designed to prevent arbitration from being avoided by denying the existence of the underlying contract. This, however, does not mean that the arbitration clause is completely insulated or detached from the main contract.20

18. BCY (supra) acknowledges that the seat of arbitration is chosen based on a desire for a neutral forum. The law of seat would govern the procedure of arbitration. However, it does not necessarily follow that the said law would govern the law of formation of the arbitration agreement, 19 [2016] SGHC 249.

its validity, etc. Therefore, where the arbitration agreement is a part of the main contract, the lex contractus is a strong indicator of the law governing the arbitration agreement unless there are indications to the contrary. The choice of a seat different from the lex contractus is not, by itself, enough to displace this presumption.

19. In BNA v. BNP and Another,21 the Singapore Court of Appeal noted each of the following may be distinct – a seat of arbitration, the arbitral institution, the arbitral rules and the governing law of arbitration agreement. It endorsed the three-step test from Sulamérica Cia (supra) and BCY (supra). In this case, the phrase "arbitration at Shanghai" was interpreted to indicate Shanghai as the seat of arbitration. This was based on a natural reading of the clause. Although Singapore International Arbitration Centre22 governed the procedural aspects of arbitration, the Court ruled that the implied choice of the law governing the arbitration agreement was the same as the seat and lex contractus— the law of the People's Republic of China.

20. In Enercon (India) Ltd. v. Enercon GmbH,23 this Court affirmed the principle that the parties may agree to hold arbitration in a particular place or country (Country X), but subject it to the procedural laws of another country (Country Y). The Court also distinguished between the venue and seat of arbitration. It accepted the notion that the parties could 21 [2019] SGCA 84.

22 Hereinafter referred to as, "SIAC".

23 (2014) 5 SCC 1.

agree on the law of one country to govern the arbitration, irrespective of where the arbitration takes place. Reference was made to Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred McAlpine Business Services Ltd.,24 and the Court of Appeal's decision in C v. D25. Reference was also made to Sulamérica Cia (supra), with which the court agreed. In that case, despite the venue of the arbitration proceedings being London, it was held that the seat of arbitration was not necessarily London. In international commercial arbitration, the venue can differ from the seat. The argument for concurrent jurisdiction was rejected.

21. In Arif Azim (supra), this Court has examined the arbitration regime change following the Constitution Bench judgment in BALCO v. Kaiser Aluminium Technical Services Inc26. Reference was made to the Court's decision in Bhatia International v. Bulk Trading S.A. and Another27. There is also a discussion on applicability of Section 9 of the A&C Act to international commercial arbitrations. It was observed that Part 1 of the A&C Act and its provisions apply when the arbitration takes place in India—i.e., (i) when the seat of arbitration is in India; or (ii) when the arbitration agreement is governed Indian law. The Court also referred to Sulamérica Cia (supra) and Roger Shashoua (1) v. Sharma28. 24 [2008] EWHC 426.

25 [2007] EWCA Civ 1282.

26 2016 (4) SCC 126.

27 (2002) 4 SCC 105.

28 [2009] EWHC 957 (Comm).

22. In Mankastu Impex Private Limited v. Airvisual Limited,29 the agreement stipulated that all disputes arising out of the contract shall be referred to and finally resolved by arbitration administered in Hong Kong. The contract was to be governed by the laws of India and the courts in Delhi shall have jurisdiction. Clause 17 reads as under:

> "17. Governing law and dispute resolution 17.1 This MoU is governed by the laws of India, without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction.
>
> 17.2 Any dispute, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered in Hong Kong." In the context of Clause 17(2), this Court refused to entertain an application for appointment of an arbitration panel. It stated that the parties must approach the courts of Hong Kong. Clearly a distinction was drawn between the law governing the arbitration agreement and the law governing the contract i.e., lex contractus. The lex contractus was Indian law, but the law applicable to the arbitration agreement had to be in terms of Hong Kong law. Thus it was held that, lex contractus, being different from lex arbitri, the Indian Courts lacked jurisdiction.

23. In Roger Shashoua (2) and Others v. Mukesh Sharma and Others,30 this Court affirmed Roger Shashoua (1) (supra), leading to the 29 (2020) 5 SCC 399.

30 [2009] EWHC 957 (Comm).

acceptance of the Shashoua principle. In that case, London was explicitly designated as the place of arbitration, with no alternative location as the seat. Given this, along with the application of a supranational body of arbitration rules, and the absence of any significant contrary indications, London was determined to be the juridical seat, with English law as the curial law.

24. In Arif Azim (supra), the Shashoua principle was applied to the dispute resolution clause. The dispute resolution specified that any disputes or differences arising from the agreement, including its validity and applicability, would be referred to arbitration under the UAE Arbitration and Conciliation Rules. The venue for the arbitration was designated as Dubai, UAE. A separate clause related to law and jurisdiction stated that the agreement would be governed by and construed in accordance with the laws of the UAE, subject to the non-exclusive jurisdiction of the Dubai courts. In this factual background, it was held that the courts in Dubai, UAE, not Indian courts, would have the jurisdiction to appoint an arbitrator. The conclusions drawn by the Court are as follows:

> "E. CONCLUSION
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> 71. From the above exposition of law, the following position of law emerges: (i) Part I of the Act, 1996 and the provisions thereunder only applies where the arbitration takes place in India i.e., where either (I) the seat of arbitration is in India OR (II) the law governing the arbitration agreement are the laws of India.

(ii) Arbitration agreements executed after 06.09.2012 where the seat of arbitration is outside India, Part I of the Act, 1996 and the provisions thereunder will not be applicable and would fall beyond the jurisdiction of Indian courts.

(iii) Even those arbitration agreements that have been executed prior to 06.09.2012 Part I of the Act, 1996 will not be applicable, if its application has been excluded by the parties in the arbitration agreement either explicitly by designating the seat of arbitration outside India or implicitly by choosing the law governing the agreement to be any other law other than Indian law.

(iv) The moment 'seat' is determined, it would be akin to an exclusive jurisdiction clause whereby only the jurisdictional courts of that seat alone will have the jurisdiction to regulate the arbitral proceedings. The notional doctrine of concurrent jurisdiction has been expressly rejected and overruled by this Court in its subsequent decisions.

(v) The 'Closest Connection Test' for determining the seat of arbitration by identifying the law with which the agreement to arbitrate has its closest and most real connection is no longer a viable criterion for determination of the seat or situs of arbitration in view of the Shashoua Principle. The seat of arbitration cannot be determined by formulaic and unpredictable application of choice of law rules based on abstract connecting factors to the underlying contract. Even if the law governing the contract has been expressly stipulated, it does not mean that the law governing the arbitration agreement and by extension the seat of arbitration will be the same as the lex contractus.

(vi) The more appropriate criterion for determining the seat of arbitration in view of the subsequent decisions of this Court is that where in an arbitration agreement there is an express designation of a place of arbitration anchoring the arbitral proceedings to such place, and there being no other significant contrary indicia to show otherwise, such place would be the 'seat' of arbitration even if it is designated in the nomenclature of 'venue' in the arbitration agreement.

(vii) Where the curial law of a particular place or supranational body of rules has been stipulated in an arbitration agreement or clause, such stipulation is a positive indicium that the place so designated is actually the 'seat', as more often than not the law governing the arbitration agreement and by extension the seat of the arbitration tends to coincide with the curial law.

(viii) Merely because the parties have stipulated a venue without any express choice of a seat, the courts cannot sideline the specific choices made by the parties in the arbitration agreement by imputing these stipulations as inadvertence at the behest of the parties as regards the seat of arbitration. Deference has to be shown to each and every choice and stipulations made by the parties, after all the courts are only a conduit or means to arbitration, and the sum and substance of the arbitration is derived from the choices of the parties and their intentions contained in the arbitration agreement. It is the duty of the court to give weight and due consideration to each choice made by the parties and to construe the arbitration agreement in a manner that aligns the most with such stipulations and intentions.

(ix) We do not for a moment say that, the Closest Connection Test has no application whatsoever, where there is no express or implied designation of a place of arbitration in the agreement either in the form of 'venue' or 'curial law', there the closest connection test may be more suitable for determining the seat of arbitration.

(x) Where two or more possible places that have been designated in the arbitration agreement either expressly or impliedly, equally appear to be the seat of arbitration, then in such cases the conflict may be resolved through recourse to the Doctrine of Forum Non Conveniens, and the seat be then determined based on which one of the possible places may be the most appropriate forum keeping in mind the nature of the agreement, the dispute at hand, the parties themselves and their intentions. The place most suited for the interests of all the parties and the ends of justice may be determined as the 'seat' of arbitration."

25. We now turn our attention to the two clauses of the Distributor Agreement. Clause 16.5 stipulates that the agreement shall be governed by and construed in accordance with laws of India. It further provides that all matters arising from the agreement shall be subject to the jurisdiction of the courts in Gujarat, India. Clause 18, which deals with the settlement of disputes, outlines both a conciliation and arbitration process. Should disputes or differences remain unresolved through conciliation, either party has the right to submit them to arbitration. The arbitration will be conducted by the Arbitration and Conciliation Centre at the Chambers of Commerce in Bogota. The arbitration will take place in Bogota, either at the Centre's premises or at a location determined by the Director of the Centre. The award shall be in law and in the standard as per the Colombian law governing the mailer (sic matter). The costs of arbitration and conciliation will be shared equally by

the parties.

26. To decide the controversy, we will address the conflict between these clauses. Accordingly, we turn our attention to the conflict of law principles. Milford Capital Holdings (supra) states that to resolve conflicts between competing or inconsistent clauses, the court should read the contract as a whole, striving to give effect to all its provisions. One clause may influence the content of another, and a clause should not be rejected unless it is clearly inconsistent or repugnant to the rest of the agreement. Only when such a reconciliation is not possible will the court consider one clause to prevail over an incorporated standard. This approach marks a slight departure from the principle that prioritizes the first clause in the event of conflicting terms. While we do not need to explore these principles exhaustively, it is significant to note that a clause should not be dismissed as redundant unless it is manifestly inconsistent with or repugnant to the rest of the agreement. This is particularly important in the present case, as both parties have agreed to these clauses. We must seek to interpret the clauses in a manner that harmonizes their provisions, giving effect to each wherever possible.

27. In Arnold v. Britton,31 the Supreme Court of United Kingdom observed as under:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease,
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> (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions [...]."

28. The interpretation of a contract involves determining the meaning that a reasonable person, with all relevant background knowledge available to the parties at the time of the contract, would derive from the document. A similar principle is outlined in Chitty on Contracts,32 which, when discussing inconsistent terms, observes:

> "Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the purpose of the contract as gathered from the instrument as a whole and the available background, and that part which would defeat it must be rejected. The old rule was, in such a case, that the earlier clause was to be received and the later rejected; but this rule was a mere rule of thumb, totally unscientific, and out of keeping with the modern construction of

documents. When considering how to interpret a contract in the case of alleged inconsistency, the courts distinguish between a case where the contract makes provision for the possibility of inconsistency and the case where there is no such provision. In the latter case the contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner." 31 2015 AC 1619.

32 Hugh Beale, Chitty on Contracts, Sweet and Maxwell, Vol. 1, 33rd Ed. (2019).

29. Clause 16.5 is clear and unambiguous. It explicitly states that the entire agreement shall be governed by and construed in accordance with the laws of India, and all matters arising from the agreement shall fall under the jurisdiction of the courts in Gujarat, India. Given this, it is reasonable to assume that, when drafting this clause, the parties were fully aware of Clause 18, which provides for arbitration and conciliation under the Arbitration and Conciliation Centre of the Chambers of Commerce in Bogota. In our view, Bogota has been designated as the venue for conciliation and arbitration, while the courts in Gujarat, India, retain exclusive jurisdiction over disputes. This must, unless there is a divergence in lex arbitri, include jurisdiction over appointments and act as a conduit for the arbitration in Bogota, Colombia.

30. The law governing the arbitration agreement, being Indian law, means that its validity, scope, and interpretation will be determined in accordance with Indian law. But which national courts—those in India or Colombia—exercise supervisory jurisdiction over the arbitration proceedings? Does the A&C Act apply to these arbitration proceedings? Upon a consistent reading of the Distributor Agreement, it is clear that only the courts in Gujarat, India, are referenced. While it is acknowledged that the venue for arbitration is Bogota, Colombia, and that the procedural rules of the Arbitration and Conciliation Centre at the Chambers of Commerce in Bogota are to apply, this does not diminish the supervisory powers of Indian courts, as explicitly outlined in Clause 16.5.

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

32. We reiterate that the use of the premises at the Centre, or any other location designated by the Director of the Centre in Bogota, does not imply that Colombian law governs the arbitration

agreement. Although Clause 18 specifies that the award shall conform to Colombian law, this provision pertains solely to the arbitration proceedings or the award matters. It does not override or diminish the effect of Clause 16.5, which clearly stipulates that Indian law shall govern the agreement and the related disputes. The legal implications of this would include the applicability of the A&C Act, and the appointment jurisdiction of Indian courts. We do not interpret the final portion of Clause 18 as undermining the legal impact of Clause 16.5. Therefore, we affirm the applicability of the A&C Act under Section 11(6) of the Arbitration and Conciliation Act.

33. In accordance with Clause 16.5 and 18, the procedural rules of the arbitration would be the rules of the Conciliation and Arbitration Centre of the Chamber of Commerce of Bogota DC, with Bogota DC as the venue of arbitration.

34. However, during the course of the hearing, the learned counsel for both parties, Meril and Disortho, unanimously stated that, should the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996, be allowed, the parties are agreeable to the arbitration being held in India. Furthermore, the parties have consented to the appointment of a sole arbitrator to adjudicate and decide the disputes in question.

35. In view of this consensus, we appoint Mr. Justice S.P. Garg, retired judge of the High Court of Delhi, as the sole arbitrator. The venue of the arbitration shall be decided mutually by the parties and the learned arbitrator. The arbitration shall be governed by the rules applicable to the Delhi International Arbitration Centre attached to the High Court of Delhi.

The fee schedule applicable to international arbitrations shall apply.

36. The arbitration petition is allowed in the above terms and disposed of accordingly.

.....CJI.

(SANJIV KHANNA) .....J. (SANJAY KUMAR) .....J. (K.V. VISWANATHAN) NEW DELHI;

MARCH 18, 2025.