2024 SCC OnLine Del 7284

In the High Court of Delhi at New Delhi

(BEFORE YASHWANT VARMA, J.)

O.M.P. (COMM) 17/2023 & IA Nos. 785/2023, 787/2023

Airports Authority of India ... Petitioner;

Versus

Delhi International Airport Ltd. ... Respondent.

And

O.M.P. (COMM) 18/2023 & IA Nos. 788/2023, 790/2023

Airports Authority of India ... Petitioner;

Versus

Mumbai International Airport Ltd. ... Respondent.

O.M.P. (COMM) 17/2023, IA Nos. 785/2023, 787/2023, O.M.P. (COMM) 18/2023 and IA Nos. 788/2023, 790/2023

Decided on October 18, 2024, [Judgment Reserved on : 15 May 2024]

Advocates who appeared in this case :

Mr. Tushar Mehta, SG with Mr. Raghav Shankar, Mr. Prateek Arora, Mr. Karan, Mr. Anubhab Atreya, Ms. Rishieka Ray, and Ms. Pallavi Misra, Advs.

Mr. Sandeep Sethi, Sr. Adv. with Mr. Milanka Chaudhury, Ms. Naina Dubey, Ms. Harshita Agarwal, Mr. Ravneet Singh, Mr. Lynn Pereira, and Mr. Chaitanya Kaushik, Ms. Seema Mehta, Mr. Vikalp Mudgal, Mr. Saket Sikri, Ms. Priya Singh, Advs.

Mr. Tushar Mehta, SG with Mr. Raghav Shankar, Mr. Prateek Arora, Mr. Karan, Mr. Anubhab Atreya, Ms. Rishieka Ray, and Ms. Pallavi Misra, Advs.

Mr. Kapil Sibal, Mr. Rajiv Nayyar, Sr. Advs. with Mr. Saket Sikri, Mr. Mahesh Agarwal, Mr. Manu Krishnan, Ms. Pallavi, Mr. R.K. Mohit, Mr. Ajay Pal Singh, Mr. K.V. Srinivas, Ms. Priya Singh, Mr. Vignesh Raj, Mr. Ankur Chawla, Mr. Aditya Samaddar and Mr. R.K. Mohit Gupta, Advs.

The Judgment of the Court was delivered by

YASHWANT VARMA, J.:—

A. INTRODUCTION

1. These two petitions under Section 34 of the Arbitration and Conciliation Act, 1996[1] instituted by the Airport Authority of India[2] seek to assail the Awards dated 16 July 2022 as corrected in terms of Section 33 of the Act by an order dated 29 August 2022 for

Mumbai International Airport Ltd.[3]. The Arbitral Tribunal[4] which comprised of three former Supreme Court Justices has rendered an Award, with two of the learned Arbitrators joining in rendering the Majority Opinion with the Presiding Arbitrator delivering a dissent. The Court shall, for the sake of brevity, refer to the views as expressed as the Minority and Majority Opinions. Both MIAL as well as the Delhi International Airport Limited[5] had raised similar disputes. The operative part of the impugned Award made in the matter of DIAL is extracted hereinbelow:

"Operative portion of the Award

The Award consists of two parts - (1) the A ward made by the Presiding Arbitrator; and (2) the Award made by the two Co-Arbitrators (Justice J. Chelameswar and Justice B. Sudershan Reddy).

The award of the Presiding Arbitrator sets out the facts and deals with all claims/reliefs. The award by the Co-Arbitrators deals with those claims/reliefs in respect of which they have taken a view differing from that of the Presiding Arbitrator.

In regard to the claims/reliefs on which the two Co-Arbitrators have taken a view different from that of the Presiding Arbitrator, their award, being the majority award would be the decision of the Tribunal and the award of the Presiding Arbitrator on those matters, will be the minority award.

Where the Co-Arbitrators have agreed with the decision of the Presiding Arbitrator on any particular claim/relief, or do not take a view different from the view of the Presiding Arbitrator, the decisions in the A ward of the Presiding Arbitrator become the unanimous decisions of the Tribunal. In view of the above, to avoid any confusion and to bring clarity, the position emerging from the award of the Presiding Arbitrator and the award of the two Co-Arbitrators is set out below after consolidation (with the concurrence of all three members of the Tribunal):—

Prayer para	Claim	Award G
78(a)(i) 78(a)(ii) 78(a)(iii) 78(a)(iv)	Declaration that the Annual Fee is payable by the Claimant to the Respondent only on the revenue generated from the Aeronautical Services	(i) It is declared that for the purpose of computing the Annual Fee payable by JVC the amounts representing the costs relating to aeronautical assets shall be excluded from the shareable revenue of JVC i.e.

		(Aeronautical Charges less cost relating to Aeronautical Assets recovered) and Non-Aeronautical Services, provided at IGI Airport, with exclusions specified in the definition of "Revenue" under OMDA. Declaration that the MAF/Annual Fee is payable on the "Revenue" as defined in OMDA and not on the basis of the gross receipts credited to P&L Account. Declaration that Annual Fee is not payable on depreciation, interest on borrowed funds and the return on equity to investors (Capital Costs) and the same shall be deducted from Aeronautical Charges while arriving at 'pre-tax gross revenue". Declaration that UDF and/or PSF being an appropriate and relevant proxy for the Capital Costs	a) the amounts spent from the borrowed capital proportionate to each succeeding year along with the interest payable thereon) and b) the amount spent from the equity of JVC towards the costs relating to the aeronautical assets are liable to be excluded from the 'Revenue' of the JVC. (ii) the JVC is entitled for a further declaration regarding the excess payment made by JVC from 21.06.2015 by mistakenly computing the Annual Fee without deducting the amounts falling under the above mentioned Heads mentioned in the previous sub-paragraph, are liable to be refunded.

	component shall be deducted from Aeronautical Charges while arriving at "Revenue".	
78(b)(i)	Declaration that in computing the applicable Revenue, the Claimant is entitled to exclude from the 'pre-tax gross revenue', the following payments made by the Claimant, if any, for the activities undertaken by the Relevant Authorities [exclusion (a) in the definition of "Revenue"]. (i) Power/Electricity Charges; (ii) Charges for supply of water, sewage removal and analogous services. (iii) Property taxes paid to municipal authorities. (iv) Upfront fee of Rs. 156.19 Crores paid by DIAL to AAI. (v) Amount incurred for initial capital works-in-progress.	It is declared that in computing the "Revenue", the Claimant is entitled to exclude from the 'pretax gross revenue', the Power/electricity charges (paid by DIAL to BSES Rajadhan Power Ltd) less the 'Pass-through amount received by DIAL (that is any payment received by DIAL for provision of electricity to its concessionaires/licensees to the extent of amount paid for such utility to BSES Rajadhani Power Ltd.). It is declared that in computing the "Revenue", the Claimant is entitled to exclude from the 'pretax gross revenue', the charges for supply of water, removal of sewage or analogous utilities paid by DIAL to Relevant Authorities, less any 'Pass-through amounts' received by DIAL (that is any payment received for provision of water, sewerage and analogous utilities to its concessionaires/licensees to the extent of the

	(vi) Payments towards voluntary retirement scheme. (vii) Payment of officers support cost (personnel). (viii) Payment of consultancy and audit cost. (ix) Payment of security equipment maintenance cost. (x) Payment of maintenance expenses with respect to the area occupied by the Relevant Authorities.	amount paid for such utilities to third party service providers). It is declared that in computing the "Revenue", the Claimant is entitled to exclude from the 'pretax gross revenue', all Property taxes paid by DIAL to the municipal authorities. Rejected. Rejected (as not pressed) Rejected Rejected Rejected It is declared that in computing the "Revenue", the Claimant is entitled to exclude from the 'pretax gross revenue', all payments towards security equipment maintenance cost. Rejected
78(b)(ii)	Declaration that in computing the applicable Revenue, the Claimant is entitled to exclude from the pre-tax gross revenue' payments received by the Claimant from the provision of electricity, water, sewerage or analogous utilities to the extent of amounts paid for such utilities to third party service	It is declared that in computing the "Revenue", the Claimant is entitled to exclude from the 'pretax gross revenue' payments received by the Claimant from the provision of electricity, water, sewerage or analogous utilities to the extent of amounts paid for such utilities to third party service providers.

	providers.	
78(b)(iii)	Declaration that in computing the applicable Revenue, the Claimant is entitled to exclude from the 'pre-tax gross revenue' entire consideration that accrues to the Claimant from the sale of any capital assets or items.	It is declared that in computing 'Revenue', the Claimant is entitled to exclude from the 'pretax gross revenue', the entire consideration that accrues to the Claimant from the sale of any capital assets or items. However, the prayer for return of Rs. 8.95 Crores (45.99% of Rs. 19.46 Crores) on account of sale of capital assets is rejected (on the ground of limitation etc).
78(c)	Declaration that no Annual Fee is payable on the Other Income, i.e., income other than from Aeronautical Services and Non-Aeronautical Services provided by the Claimant.	It is declared that in computing the 'Revenue', the Claimant is entitled to exclude from the 'pre-tax gross revenue', its 'Other Income' (i.e., income other than from Aeronautical Services and Non-Aeronautical Services).
78(d) 78(f)	Grant restitution by directing the Respondent to return the excess amount of Annual Fee paid by the Claimant under a mistake to the following extent: (i) Rs. 10,537.20 Crores comprising Rs. 6,663.26 Crores towards restitution/return of excess Annual Fee paid by the Claimant from	For arriving at the actual figure of the amount which are liable to be deducted from the total receipts of JVC under the heads of Aeronautical Charges and Non-Aeronautical Charges, it requires a very careful examination of the accounts of JVC for the period commencing from 21.06.2015. Therefore, such examination shall be undertaken by the Independent Auditor to determine the actual

		03.05.2006 to 30.09.2018 and interest thereon amounting to Rs. 3,873.94 Crores for the period 03.05.2006 to 30.09.2018, along with further interest on the said amount of Rs. 10,537.20 Crores at the rate equivalent to SBI PLR+ 300bps per annum thereon, from 01.10.2018 till the date of return of the aforesaid amount: AND (ii) Further amounts (to be quantified) towards restitution/return of excess Annual Fee paid by the Claimant from 01.10.2018 till the date of the Award along with interest at the rate equivalent to SBI PLR + 300bps per annum, calculated. from the end of each quarter in which such excess Annual Fee was paid till the date of return of the aforesaid amounts;	amounts liable to be deducted for the period commencing from 21.06.2015 to the date of this Award. Once such determination is made, the Annual Fee payable by JVC for each succeeding financial year commencing from 21.06.2015, is required to be re-calculated by the Independent Auditor. The difference between the actual amounts already paid towards the Annual Fee by JVC for each of the above mentioned years and the amount determined by the Independent Auditor as Annual Fee, as mentioned above, is liable to be refunded. However, we deem it appropriate that such amounts be given credit to while computing the Annual Fee payable by JVC in future. Whether the entire amount (liable to be refunded) is required to be given credit to in one or in three equal installments in three different financial years, is at the discretion of the AAI.

	Direction that the Claimant shall be entitled to set-off the amounts. awarded in terms of Prayers (a) to (e) above or any part thereof against any and all amounts including Annual Fee payable to the Respondent from time to time until full recovery/payments of the awarded amounts;	
78(e)	Grant all costs of the arbitration to the Claimant.	Both parties are directed to bear their respective costs.
78(g)	Grant such further and other reliefs as the nature and circumstances of the case may require.	NIL

2. For the purposes of evaluating the challenge which stands raised, we deem it apposite to take note of the following essential facts. AAI is an authority constituted under the Airports Authority of India Act, 1994[6] for the better administration and management of airports and civil aviation infrastructure. The Airports Authority of India (Amendment) Act, 2003[7] saw the introduction of Section 12-A in the aforesaid enactment and which enabled AAI to lease out premises of an airport in furtherance of the statutory functions entrusted to it.

3. Seeking private sector participation in order to scale up the standard of airports, the Government of India is stated to have invited bids for the infusion of private equity in respect of the Delhi and Mumbai airports. AAI, in furtherance of the above, is stated to have selected Joint Venture Companies[8] as private partners for grant of its functions in connection with the operation, maintenance, upgradation modernization, and development of the domestic and international airports at Mumbai and Delhi.

4. The concession for the Chhatrapati Shivaji Maharaj International Airport[9] in Mumbai ultimately came to be awarded to a GVK-led consortium and which was followed by the incorporation of MIAL as a 'Joint Venture Special Purpose Vehicle'[10]. The JVC of MIAL comprised of GVK (now known as Adani Airport Holdings Ltd. with effect from 14 July 2021) with approximately 74% of the shareholding and the balance 26% being held by AAI. A similar exercise was undertaken by AAI seeking infusion of private equity and the identification of a party which would undertake the restructuring and modernization of the Indira Gandhi International Airport[11] in New Delhi. A consortium led by the GMR Group came to be identified as the successful bidder. This was followed by the JVC of DIAL being incorporated in which the GMR-led consortium acquired 74% shares and the remaining 26% was held by AAI.

i. The Operation, Management and Development Agreement[12] and related agreements

5. Pursuant to the finalization of the bidding process, the successful bidders along with AAI executed the OMDA. The OMDA for both DIAL and MIAL were dated 04 April 2006. One of the central provisions of OMDA related to the Annual Fee which was payable by the JVC to AAI and constituted the revenue-sharing model between the principal stakeholders. The OMDA also envisaged additional and complimentary agreements being executed and which included a State Support Agreement[13] for each airport and which came to be entered into between the Government of India with the JVCs on 26 April 2006. Along with the OMDA and the SSA, which has been noticed hereinabove, the parties signed the Registered Lease Deed, State Government Support Agreement, Shareholders Agreement, Substitution Agreement, CNS-ATM Agreement, Airport Operator Agreement, and Escrow Agreement. These nine covenants were collectively defined as the 'Project Agreements' in Article 1.1 of OMDA.

6. Since the OMDA pertaining to DIAL and MIAL are more or less identical, we would for the sake of convenience, be referring to the provisions as they appear in the OMDA of DIAL. Article 2.1 the OMDA defined the scope of the grant in favour of the JVC and read as under:

"SCOPE OF GRANT

2.1 Grant of Function

2.1.1 AAI hereby grants to the JVC, the exclusive right and authority during the Term to undertake some of the functions of the AAI being the functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and to perform services and activities

constituting Aeronautical Services, and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport and the JVC hereby agrees to undertake the functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and at all times keep in good repair and operating condition the Airport and to perform services and activities constituting Aeronautical Services and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport, in accordance with the terms and conditions of this Agreement (the "Grant").

2.1.2 Without prejudice to the aforesaid, AAI recognizes the exclusive right of the JVC during the Term, in accordance with the terms and conditions of this Agreement, to:

(i) develop, finance, design, construct, modernize, operate, maintain, use and regulate the use by third parties of the Airport;

(ii) enjoy complete and uninterrupted possession and control of the Airport Site and the Existing Assets for the purpose of providing Aeronautical Services and Non-Aeronautical Services;

(iii) determine, demand, collect, retain and appropriate charges from the users of the Airport in accordance with Article 12 hereto; and

(iv) Contract and/or sub contract with third parties to undertake functions on behalf of the JVC, and sub-lease and/or license the Demised Premises in accordance with Article 8.5.7."

7. The provision of criticality and which constituted the fulcrum of the dispute which arose between the parties is the definition of 'Revenue' and which read as follows:

"-Revenue" means all pre-tax gross revenue of JVC, excluding the following: (a) payments made by JVC, if any, for the activities undertaken by Relevant Authorities or payments received by JVC for provision of electricity, water, sewerage, or analogous utilities to the extent of amounts paid for such utilities to third party service providers; (b) insurance proceeds except insurance indemnification for loss of revenue; (c) any amount that accrues to JVC from sale of any capital assets or items; (d) payments and/or monies collected by JVC for and on behalf of any governmental authorities under Applicable Law (e) any bad debts written off provided these pertain to past revenues on which annual fee has been paid to AAI. It is clarified that annual fee payable to AAI pursuant to Article 11 and Operational Support Cost payable to AAI shall not be deducted from Revenue"."

8. Chapter XI of the OMDA dealt with the Annual Fee which was

payable by the JVC to AAI and the relevant parts whereof are reproduced hereinbelow:

"11.1.2 Annual Fee

11.1.2.1 The JVC shall also pay to the AAI an annual fee ("AF") for each Year during the Term of this Agreement of the amount set forth below:

AF = 45.99% of projected Revenue for the said Year

Where projected Revenue for each Year shall be as set forth in the Business Plan.

11.1.2.2 The AF shall be payable in twelve equal monthly instalments, each instalment (hereinafter referred to as "Monthly AF" or "MAF") to be paid on the first day of each calendar month. The JVC shall from time to time cause the Escrow Bank to make payment of the MAF to AAI in advance on or prior to the 7th day of each month by cheque drawn in favour of AAI. IF AAI does not receive the payment of MAF due hereunder by the due date provided herein, the amount owed shall bear interest for the period starting on and including the due date for payment and ending on but excluding the date when payment is made calculated at State Bank of India Prime Lending Rate + 10% p.a. Notwithstanding anything contained herein, the JVC shall at all times be liable to pay the MAF in advance on or prior to the 7th day of each month by cheque drawn in favour of AAI. If AAI does not receive the payment of MAF due hereunder by the due date provided herein, the amount owed shall bear interest for the period starting on and including the due date for payment and ending on but excluding the date when payment is made calculated at State Bank of India Prime Lending Rate+ 10% p.a. Notwithstanding anything contained herein, the JVC shall at all times be liable to pay the MAF in advance on or prior to the 7th day of each month.

11.1.2.3 (i) In the event that in any quarter the actual Revenue exceeds the projected Revenue, then JVC shall pay to AAI the additional AF attributable to such difference between the actual quarterly Revenue and the projected quarterly Revenue within 15 days of the commencement of the next quarter; and (ii) in the event that the projected Revenue in any quarter exceeds the actual Revenue, then AAI shall pay to JVC such portion of the AF received as is attributable to the difference between that projected Revenue and the actual Revenue by way of an adjustment against the AF payable by the JVC to AAI in the current quarter; provided further that in the event the actual Revenue in any quarter is greater than 110% of the projected Revenue of such quarter, the JVC shall pay to AAI interest for difference between the actual Revenue and the

projected Revenue at the rate of State Bank of India Prime Lending Rate plus 300bps in the following manner:

(i) interest of three (3) months on 1/3rd of the difference between the projected Revenue and the actual Revenue;

(ii) interest of two (2) months on 1/3rd of the difference between the projected Revenue and the actual Revenue;

(iii) interest of one (1) month on 1/3rd of the difference between the projected Revenue and the actual Revenue.

It is clarified that if the projected quarterly Revenue is equal to or less than 110% of the actual quarterly Revenue, then no interest shall be payable; interest shall only be payable on the difference between the actual quarterly Revenue and the projected quarterly Revenue in the event the actual quarterly Revenue is greater than 110% of the projected quarterly Revenue.

11.1.2.4 The applicable Revenue used for final verification/reconciliation of the AF shall be the Revenue of the JFC as certified by the Independent Auditor every quarter.""

9. Chapter XII of OMDA dealt with the subject of 'Tariff and Regulation' and is extracted hereunder:

"CHAPTER XII

TARIFF AND REGULATION

12.1 Tariff

12.1.1 For the purpose of this Agreement, the charges to be levied at the Airport by the JVC for the provision of Aeronautical Services and consequent recovery of costs relating to Aeronautical Assets shall be referred to as Aeronautical Charges.

12.1.2 The JVC shall at all times ensure that the Aeronautical Charges levied at the Airport shall be as determined as per the provisions of the State Support Agreement. It is hereby expressly clarified that any penalties or damages payable by the JVC under any of the Project Agreements shall not form a part of the Aeronautical Charges and not be passed on to the users of the Airport.

12.2 Charges for Non-Aeronautical Services

Subject to Applicable Law, the JVC shall be free to fix the charges for Non-Aeronautical Services, subject to the provisions of the existing contracts and other agreements.

12.3 Charges for Essential Services

12.3.1 Notwithstanding the foregoing, those Aeronautical or Non-Aeronautical Services that are also Essential Services, shall be provided free of charge to passengers.

12.4 Passenger Service Fees

12.4.1 The Passenger Service Fees shall be collected and disbursed in accordance with the provisions of the State Support Agreement."

10. Of equal significance are the following expressions which stood defined in the OMDA:

""Aeronautical Assets" shall mean those assets, which are necessary or required for the performance of Aeronautical Services at the Airport and such other assets as JVC procures in accordance with the provisions of the Project Agreements (or otherwise on the written directions of the GOI/AAI) for or in relation to, provision of any Reserved Activities and shall specifically include all land (including Excluded Premises), property and structures thereon acquired or leased during the Term in relation to such Aeronautical Assets.

"Aeronautical Services" shall have the meaning assigned hereto in Schedule 5 hereof.

"Aeronautical Charges" shall have the same meaning assigned thereto in Article 12.1.1.

"Airport Business" shall mean the business of operating, maintaining, developing, designing, constructing, upgrading, modernising, financing and managing the Airport, and providing Airport Services.

"Airport Services" shall mean the services constituting Aeronautical Services, and Non-Aeronautical Services.

"Business Plan" means the plan for the Airport Business, updated periodically from time to time, that sets out how it is intended to operate, manage and develop the Airport over a planning horizon and will include financial projections for the plan period.

"Major Development Plan" shall mean a plan prepared for each major aeronautical or other development or groupings of developments which sets out the detail of the proposed development which has been set out in broad terms in the Master Plan and will include functional specification, design, drawings, costs, financing plan, timetable for construction and capital budget.

"Master Plan" means the master plan for the development of the Airport, evolved and prepared by the JVC in the manner set forth in the State Support Agreement, which sets out the plans for the staged development of the full Airport area, covering Aeronautical Services and Non-Aeronautical Services, and which is for a twenty (20) year time horizon and which is updated and each such updation is subject to review/observations of and interaction with the GOI in the manner described in the State Support Agreement.

"Non-Aeronautical Assets" shall mean:

1. all assets required or necessary for the performance of Non-

Aeronautical Services at the Airport as listed in Part I of Schedule 6 and any other services mutually agreed to be added to the Schedule 6 hereof as located at the Airport (irrespective of whether they are owned by the JVC or any third Entity); and

2. all assets required or necessary for the performance of Non-Aeronautical Services at the Airport as listed in Part II of Schedule 6 hereof as located at the Airport (irrespective of whether they are owned by the JVC or any third Entity), to the extent such assets (a) are located within or form part of any terminal building; (b) are conjoined to any other Aeronautical Assets, asset included in paragraph (i) above and such assets are incapable of independent access and independent existence; or (c) are predominantly servicing/catering any terminal complex/cargo complex

and shall specifically include all additional land (other than the Demised Premises), property and structures thereon acquired or leased during the Term, in relation to such Non-Aeronautical Assets.

"Non-Aeronautical Services" shall mean such services as are listed in Part I and Part II of Schedule 6 hereof.

"Project Agreements" shall mean the following agreements:

1. This Agreement;
2. The State Support Agreement;
3. Shareholders Agreement;
4. CNS-ATM Agreement;
5. Airport Operator Agreement;
6. State Government Support Agreement;
7. The Lease Deed;
8. Substitution Agreement; and
9. Escrow Agreement. and

Project Agreement shall mean any one of them.

XXXX XXXX XXXX

11. 2 Independent Auditor

(i) Appointment of Independent Auditor

(a) An Independent Auditor shall be appointed for the purposes mentioned herein.

(b) The procedure of the appointment of the Independent Auditor shall be as follows:

AAI shall nominate a panel of six (6) Chartered Accountancy Firms to the JVC. The JVC shall have the right to object to one or more of such nominees but not in any circumstance exceeding three (3) nominees. AAI shall appoint any one of the nominees to whom JVC has not objected, as the Independent Auditor.

(c) JVC and AAI shall bear equally all costs of, including costs associated with the appointment of, the Independent Auditor."

11. Schedule 5 of OMDA defined the scope of Aeronautical Services in the following terms:

"SCHEDULE 5

AERONAUTICAL SERVICES

"Aeronautical Services" means the provision of the following facilities and services:

1. provision of flight operation assistance and crew support systems;
2. ensuring the safe and secure operation of the Airport, excluding national security interest;
3. the movement and parking of aircraft and control facilities;
4. general maintenance and upkeep of the Airport;
5. the maintenance facilities and the control of them and hangarage of aircraft;
6. flight information display screens;
7. rescue and fire fighting services;
8. management and administration of personnel employed at the Airport;
9. the movement of staff and passengers and their inter-change between all modes of transport at the Airport;
10. operation and maintenance of passenger boarding and disembarking systems, including vehicles to perform remote boarding; and
11. any other services deemed to be necessary for the safe and efficient operation of the Airport.

A more detailed list of the above facilities and services would include the following:

12. Aerodrome control services
13. Airfield
14. Airfield lighting
15. Air Taxi Services
16. Airside and landside access roads and forecourts including writing, traffic signals, signage and monitoring
17. Common hydrant infrastructure for aircraft fuelling services by authorized providers
18. Apron and aircraft parking area
19. Apron control and allocation of aircraft stands
20. Arrivals concourses and meeting areas
21. Baggage systems including outbound and reclaim

22 Bird scaring
23. Check-in concourses
24. Cleaning, heating, lighting and air conditioning public areas
25. Customs and immigration halls
26. Emergency services
27. Facilities for the disabled and other special needs people
28. Fire service
29. Flight information and public-address systems
30. Foul and surface water drainage
31. Guidance systems and marshalling
32. Information desks
33. Inter-terminal transit systems
34. Lifts, escalators and passenger conveyors
35. Loading bridges
36. Lost property
37. Passenger and hand baggage search
38. Piers and gate rooms
39. Policing and general security
40. Prayer Rooms
41. Infrastructure/Facilities for Post Offices
42. Infrastructure/Facilities for Public telephones
43. Infrastructure/Facilities for Banks
44. Infrastructure/Facilities for Bureaux de Change
45. Runways
46. Signage
47. Staff search
48. Taxiways
49. Toilets and nursing mothers rooms
50. Waste and refuse treatment and disposal
51. X-Ray service for carry on and checked-in luggage
52. VIP/special lounges"

12. Similarly, Schedule 6 identified the Non-Aeronautical Services to be the following:

"SCHEDULE 6

NON-AERONAUTICAL SERVICES

"Non-Aeronautical Services" shall mean the following facilities and services (including Part I and Part II):

Part I

1. Aircraft cleaning services
2. Airline Lounges

3. Cargo handling
4. Cargo terminals
5. General aviation services (other than those used for commercial air transport services ferrying passengers or cargo or a combination of both)
6. Ground handling services
7. Hangars
8. Heavy maintenance services for aircrafts
9. Observation terrace

Part II

10. Banks / ATM*
11. Bureaux de Change*
12. Business Centre*
13. Conference Centre*
14. Duty free sales
15. Flight catering services
16. Freight consolidators/forwarders or agents
17. General retail shops*
18. Hotels and Motels
19. Hotel reservation services
20. Line maintenance services
21. Locker rental
22. Logistic Centers*
23. Messenger services
24. Potier service
25. Restaurants, bars and other refreshment facilities
26. Special Assistance Services
27. Tourist information services
28. Travel agency
29. Vehicle fuelling services
30. Vehicle rental
31. Vehicle parking
32. Vending machines
33. Warehouses*
34. Welcoming services
35. Other activities related to passenger services at the Airport, if the same is a Non-Aeronautical Asset

* These activities/services can only be undertaken/provided, if the same are located within the terminal complex/cargo complex and are primarily meant for catering the needs of passengers, air traffic services and air transport services."

ii. The Dispute

13. The dispute, as noted above, arose in light of AAI and DIAL/MIAL taking a divergent view with respect to the scope and meaning of the term "Revenue" as occurring in the OMDA, as well as Article 11.1.2, which set out the process for computation of the Annual Fee which was payable to AAI. Both DIAL and MIAL asserted that they had been paying the Annual Fee on the basis of the gross receipts credited to their respective Profit & Loss accounts and which comprised charges for Aeronautical Services, Charges for Non-Aeronautical Services and Other Income. It was their case that the Annual Fee incorrectly came to be remitted on the basis of gross receipts instead of the amount of "Revenue" as projected in the Business Plan.

14. It is pertinent to note that while OMDA in Chapter I relating to 'Definitions and Interpretation' had explained "Revenue" to mean '*all pre-tax gross revenue*' excluding the five principal heads of exclusion specified therein, Article 11.1.2 placed the JVC under an obligation to pay Annual Fee which was prescribed to be 45.99% for DIAL and 38.7% for MIAL of the 'projected Revenue' in the Business Plan.

15. 'Projected Revenue' was thus identified to be that which stood disclosed in the Business Plan. Further, Article 11.1.2.4 of the OMDA embodied a reconciliation exercise being undertaken dependent upon the difference that may ultimately be found to exist between projected and actual Revenue. In terms of that provision, the aforenoted reconciliation exercise was to be undertaken on the basis of a quarterly review to be overseen and certified by an Independent Auditor.

16. It has been noted by the Tribunal that both DIAL and MIAL continued to pay Annual Fee on the basis of the gross receipts credited to their individual Profit & Loss accounts till they allegedly discovered a mistake in February 2016 for DIAL and January 2019 for MIAL.

17. Due to the aforesaid mistake, DIAL asserted that it had paid an excess amount of INR 6663.25 crores as of 30 September 2018. This was sought to be explained by way of the following chart which stands extracted in the Minority Opinion:

Sl.No.	Description (excess payments as of 30.9.2018)	Amount (Rupees in crores)
(a)	Excess payment of Annual Fee, on account of Annual Fee being paid on capital costs recovered i.e., PSF(FC) and UDF.	5,331.73
(b)	Excess payment of Annual Fee, on account of payment of Annual fee on other/non-sharable income.	537.78
(c)	Excess payment of Annual Fee on the excludable (but not excluded) items i.e., payments made for the activities undertaken by relevant authorities and payments received by DIAL for provision of electricity, water, sewerage or analogues utilities to the extent of amounts paid for such utilities to third party service providers.	774.03
(d)	Excess payment of Annual Fee due to payment of Annual Fee on the cost of asset accrued from sale of capital assets, while the entire amount of sale consideration ought to be excluded from pre-tax gross revenue.	8.95
(e)	Penal interest paid in terms of Article 11.1.2.3 of OMDA which would not have triggered but for the payment by mistake of the excess Annual Fee.	10.76
	Total	**6663.25**

18. The Minority Opinion rendered in the case of MIAL takes note of the assertion of a similar mistake and the excess payment being claimed to be quantifiable at INR 3582.92 crores, details whereof were noticed in Para 23. The tabular statement which has been taken into consideration for MIAL is extracted hereinbelow:

(Table No.1) **(Figures in Crores)**

Sl.No.	Description (excess payments as of 31.3.2018)	Amount
(a)	Excess payment of Annual Fee, on account of non-deduction of the following from pre-tax gross revenue/Aeronautical Charges (vide Para 34 of SoC): Depreciation (return on investment) 980.51 Interest on borrowed funds - 1415.33 Return on equity 378.50	2774.34
(b)	Excess payment of Annual Fee, on account of payment of Annual fee on other income.	104.67
(c)	Excess payment of Annual Fee on the payments made for the activities undertaken by relevant authorities (vide Para 35 of SoC).	549.03
(d)	Excess payment of Annual Fee due to amount accrued on sale of capital asset not being deducted while computing pre-tax gross revenue.	154.69
(e)	Excess payment of Annual Fee on account of inadvertent inclusion of insurance proceeds in pre-tax gross revenue.	0.19
	Total	**3582.92**

19. Both DIAL and MIAL appear to have asserted that the Annual Fee came to be mistakenly paid on the basis of gross receipts credited to their respective Profit & Loss accounts, as was insisted by AAI. It was their case that excess payments came to be made on account of an incorrect understanding of their contractual obligations and was thus liable to be returned by AAI. On the basis of the pleadings that were taken in the claim petition, DIAL and MIAL sought reliefs which were identified by the Presiding Arbitrator in the following terms:

"25. On the above pleadings, DIAL has sought the following reliefs

(vide Para 78 of SoC):

a) Pass an Award declaring that:

(i) the Annual Fee is payable by the Claimant to the Respondent only on the revenue generated from the Aeronautical Services (Aeronautical Charges less cost relating to Aeronautical Assets recovered) and Non-Aeronautical Services, provided at IGI Airport, with exclusions specified in the definition of the term "Revenue" under OMDA.

(ii) the MAF/Annual Fee is payable on the "Revenue" as defined in OMDA and not on the basis of the gross receipts credited to P&L Account.

(iii) Annual Fee is not payable on depreciation, interest on borrowed funds and the return on equity to investors (Capital Costs) and the same shall be deducted from Aeronautical Charges while arriving at 'pre-tax gross revenue';

(iv) UDF and/or PSF being an appropriate and relevant proxy for the Capital Costs component shall be deducted from Aeronautical Charges while arriving at "Revenue".

b) Pass an Award declaring that in computing the applicable Revenue, the Claimant is entitled to exclude from the 'pre-tax gross revenue' inter-alia the following:

(i) payments made by the Claimant, if any, for the activities undertaken by the Relevant Authorities;

(ii) payments received by the Claimant from the provision of electricity, water, sewerage or analogous utilities to the extent of amounts paid for such utilities to third party service providers;

(iii) entire consideration that accrues to the Claimant from the sale of any capital assets or items.

c) Pass an Award declaring that no Annual Fee is payable on the Other Income, i.e., income other than from Aeronautical Services and Non-Aeronautical Services provided by the Claimant.

d) Pass an Award granting restitution and directing the Respondent to return the excess amount of Annual Fee paid by the Claimant under a mistake to the following extent:

(i) Rs. 10,537.20 Crores comprising Rs. 6.663.26 Crores towards restitution/return of excess Annual Fee paid by the Claimant from 03.05.2006 to 30.09.2018 and interest thereon amounting to Rs. 3,873.94 Crores for the period 03.05.2006 to 30.09.2018, as set out in Annexure C-15

(Colly) annexed to this Statement of Claim, along with further interest on the said amount of Rs. 10,537.20 Crores at the rate equivalent to SBI PLR + 300bps per annum thereon, from 01.10.2018 till the date of return of the aforesaid amount;

(ii) Further amounts (to be quantified) towards restitution/return of excess Annual Fee paid by the Claimant from 01.10.2018 till the date of the Award along with interest at the rate equivalent to SBI PLR + 300bps per annum, calculated from the end of each quarter in which such excess Annual Fee was paid till the date of return of the aforesaid amounts:

e) Pass an Award granting all costs of the arbitration to the Claimant:

(f) Pass an Award directing that the Claimant shall be entitled to setoff the amounts awarded in terms of Prayers (a) to (e) above or any part thereof against any and all amounts including Annual Fee payable to the Respondent from time to time until full recovery/payments of the awarded amounts;

g) Grant such further and other reliefs as the nature and circumstances of the case may require.

XXXX XXXX XXXX

25. On the above pleadings, MIAL has sought the following reliefs:

a) Pass an award for the refund of the excess payment towards Annual Fee made by the Claimant to the Respondent of an principal amount of INR.3,582.90 crores as on 31.03.2018, along with an excess payment towards Annual Fee made by the Claimant to the Respondent principal amount of INR 585.07 for year ending 31.03.2019 and all such amount paid in excess towards Annual Fee thereafter, along with interest calculated thereon as per State Bank of India Prime Lending Rate plus 10% p.a. from 03.05.2006 (Effective Date) till the actual date of refund of excess Annual Fees paid;

b) Pass an award declaring that the Annual Fee payable by the Claimant to the Respondent would only be on the revenue generated from Aeronautical Services and Non-Aeronautical Services only along with exclusions as contained in the definition of ‘Revenue’ as provided under OMDA and also such deductions (depreciation, interest on borrowed funds and the return on equity to investors) which may be allowed from time to time, as the case may be;

c) Pass an award allowing the Claimant to set-off the amount awarded in terms of prayer (a) above against any amount

payable by the Claimant to the Respondent including the Annual Fee, till full recovery of the awarded amount;

d) Pass an award directing the Respondent to pay full costs of this arbitration, to the Claimant; and

e) Pass such other or further orders as this Hon'ble Tribunal may deem fit and proper in the facts of the case, and in the interest of justice."

20. On being placed on notice of the claim, AAI filed its Statement of Defence[14] before the Tribunal and took identical objections to the claims that were raised by DIAL and MIAL. Since those objections were more or less common, we take note of the recordal of facts as appearing in the Minority Opinion in the case of DIAL and which identified those objections to be the following:

"Respondent's case in brief

26. AAI has filed a detailed Statement of Defence dated 30.4.2019 seeking dismissal of all claims made by DIAL. AAI has contended:

(a) The disputes arising in respect of the claims made by DIAL are not arbitrable;

(b) DIAL is not entitled to benefit of Section 17 (1) of the Limitation Act, 1963. The Statement of Claim was filed on 22.1.2019. The period of limitation being three years, all claims pertaining to causes of action that arose prior to 22.1.2016 are barred by limitation.

(c) DIAL is liable to pay 45.99% of the "Revenue", as defined in OMDA by way of Annual Fee in consideration of the grant of exclusive right and authority to undertake the enumerated functions of AAI in regard to the IGI Airport. The term "Revenue" is defined as the 'all pre-tax gross revenue' which means the cumulative value of all revenue of DIAL recognised in the Profit and Loss account without any deduction for taxes payable. The definition of "Revenue" is exhaustive in nature and no deductions or exclusions. except the five specific exclusions permitted under the definition of "Revenue" are permissible from the cumulative value of all revenue of DIAL recognising the P&L Account.

(d) The definition of term "Revenue" has to be given its plain and ordinary meaning. It is not permissible to deduct depreciation, interest on debt or return on equity from the Aeronautical Charges, or exclude the Other Income (income other than from Aeronautical Services and Non-Aeronautical Services), from the cumulative value of all revenue for the purpose of arriving at the 'pre-tax gross revenue'.

(e) There was no excess payment by DIAL towards annual value nor was any excess payment made by DIAL by mistake.

(f) DIAL is not entitled to deduct the following as 'payments made for the activities undertaken by Relevant Authorities under Exclusion No. (a) in the definition of "Revenue" : (i) Upfront fee under Article 11.1.1, (ii) payments for initial capital works in progress under Article 5.4, (iii) payments towards Voluntary Retirement Scheme under Article 6.1.4, (iv) payments towards Officers Support Cost under Article 6.2, (v) Consultancy and Audit Costs, (vi) power and electricity charges paid to BSES Rajadhani Power Ltd. (vii) property tax, (viii) security equipment maintenance cost and (ix) maintenance expenses with respect to area occupied by Relevant Authorities.

(g) DIAL is entitled to exclude only the profit booked upon sale of a capital asset under Exclusion (c) of "Revenue" and is not entitled to deduct the entire consideration received by sale of capital asset.

(h) Meaning of "Revenue" has to be ascertained from the definition and from the terms of OMDA entered between DIAL and AAI. Even though SSA is a project document, it is not permissible to rely upon any provision of SSA in particular, principles 1 and 2 of tariff fixation contained in Schedule I of SSA, to interpret or understand the meaning of "Revenue". The object and purpose of tariff fixation under SSA (to which AAI is not a party) and the object and purpose of Annual Fee under OMDA (to which AAI is a party) are different and one does not depend on the other.

(i) DIAL's reliance upon the judgment dated 23.4.2015 of the TDSAT, in regard to the definition of "Revenue" is misconceived as the decision of TDSAT, was in the context of liberty granted by the Supreme Court in *Union of India* v. *Association of Unified Telecom Service Providers of India*, (2011) 10 SCC 543 to challenge the demands raised by Government of India on Telecom Licensees and nothing to do with the determination of "Revenue" under OMDA.

The contentions of AAI are more fully set out while dealing with the different issues/questions."

21. A list of disputes is thereafter stated to have been drawn up. The points for determination in the case of *DIAL* and *MIAL* were ultimately identified to be the following:

"List of disputes

27. On the said pleadings, the parties formulated and filed the following joint list of disputes on 29.6.2019:

Joint List of Disputes

(1) Whether the disputes raised by the claimant are not arbitrable for the reasons stated in grounds (A), (B) and (C) in part III of the Statement of Defence?

(2) Whether the claims of claimant or part/s thereof are barred by limitation as contended by the respondent in ground (D) of Part III of the Statement of Defence?

(3) Whether claimant is entitled to any of the declaratory reliefs prayed for in para 78(a), (b) & (c) of the Statement of Claim?

(4) (a) Whether claimant has paid an excess annual fee of Rs. 6,663.26 crores to respondent between 3.5.2006 and 30.9.2018?

(b) If so, whether respondent is liable to pay to claimant a sum of Rs. 6.663.26 crores towards restitution/return of excess annual fee paid and Rs. 3.873.94 crores as interest thereon for the said period?

(5) (a) Whether claimant has paid excess annual fee even from 1.10.2018?

(b) Whether respondent is liable to pay/refund the excess annual fee paid from 1.10.2018 to date?

(6) Whether claimant is entitled to interest on Rs. 10,537.20 crores or any amount found due and payable under Dispute (5) (b), at a rate equivalent to SBI PLR plus 300 BPS per annum from 1.10.2018 till date of payment?

(7) Whether either party is entitled to costs?

XXXX XXXX XXXX

List of disputes

27. On the said pleadings, the parties formulated and filed the following joint list of points for determination on 13.10.2019:

Points for determination

(1) Whether the disputes raised by the Claimant or part(s) thereof are not arbitrable for the reasons stated under headings (A), (B) and (C) in Part III of the Statement of Defence?

(2) Whether the claims of the Claimants or part(s) thereof are barred by limitation as contended by the Respondent under heading (D) of Part III of the Statement of Defence?

(3) (a) Whether the Claimant has made an excess payment of Annual Fee to the Respondent of Rs. 3,582.90 Crores as on 31.03.2018 and Rs. 585.07 Crores for the year ended 31.03.2019?

(b) If so, whether the Claimant is entitled to claim set-off of a sum of Rs. 3,582.90 Crores + Rs. 585.07 Crores against amounts due and payable to the Respondent by the Claimant, as prayed for in

Prayer (a) read with Prayer (c) at Pg. 42 of the Statement of Claim?

(4) Whether the Claimant is entitled to the declaratory relief prayed for at Prayer (b) at Pg. 42 of the Statement of Claim?

(5) Whether either party is entitled to costs?"

B. THE ARBITRAL AWARD

22. Insofar as the present petitions are concerned, submissions were principally urged on the question of the meaning liable to be ascribed to the terms 'Revenue' and 'projected Revenue' as appearing in the OMDA, the computation of Annual Fee payable to AAI and the heads of income which were liable to be excluded therefrom. Although a plethora of issues were urged for the consideration of the Arbitral Tribunal, the arguments before this Court stood confined to the following : - (a) the items of income which were liable to be excluded, if at all, from shareable revenue, (b) whether "Other income" could have formed part of shareable revenue and (c) whether the exercise of computation of the monetary claims of DIAL/MIAL could have been entrusted to an Independent Auditor.

iii. The Minority Opinion

23. The Presiding Arbitrator whose opinion constitutes the minority notes that the primary contention of DIAL was that "capital costs" were liable to be excluded from gross receipts. This becomes evident from a reading of Para 58 which is extracted hereinbelow:

> "58. DIAL submits that neither the term "*all pre-tax gross revenue*" nor the term "*pre-tax gross revenue*" is defined either under the OMDA or under any applicable law or by the accounting standards. DIAL therefore contends that the phrase "*pre-tax gross revenue*" has to be interpreted and construed in terms of OMDA, and where necessary, aided by the terms of the other project agreements, in particular, the SSA; and on such interpretation, the "Revenue" is to be derived/arrived at from "gross receipts" and "pre-tax gross revenue" as under:
>
> I. "GROSS RECEIPTS"
>
> "Total receipts" of Claimant i.e., [*(i) Aeronautical Charges + (ii) charges for Non-Aeronautical Services + (iii) Other Income of the Claimant*]
>
> ↓(*minus*)
>
> (i) "Other income" of Claimant i.e., [income other than those arising from Aeronautical and Non-Aeronautical Services]
>
> (ii) "Capital Cost Recovery" i.e., [(depreciation)+(interest on debt)+(return on equity) in relation to Aeronautical Assets]
>
> = (*equals*)
>
> II. "PRE-TAX GROSS REVENUE"
>
> [*Referred in the definition of "Revenue" in Article 1.1 of OMDA*]

↓(*minus*)

Items that are specified to be deducted from "pre-tax gross revenue" to arrive at revenue, as per the definition of "Revenue":

(a) payments made by JVC, if any, for the activities undertaken by Relevant Authorities or payments received by JVC for provision of electricity, water, sewerage, or analogous utilities to the extent of amounts paid for such utilities to the party service providers;

(b) insurance proceeds except insurance indemnification for loss of revenue;

(c) any amount that accrues to JVC from sale of any capital assets or items;

(d) payments and/or monies collected by JVC for and on behalf of any governmental authorities under Applicable Law:

(e) any bad debts written off provided these pertain to past revenues on which annual fee has been paid to AAI.

= (*equals*)

III. "REVENUE"

[*Note : 45.99% of which is payable to the Respondent as Annual Fee*]"

24. AAI, on the other hand, had principally argued that 'projected Revenue' and which expression appears in Chapter XI of the OMDA would have to derive meaning and draw colour from the definition clause and consequently only the five exclusions specified therein being liable to be ignored and eliminated for the purposes of computation of 'Revenue'. It appears to have been urged that bearing in mind the definition of 'Revenue' and the use of the expression 'all pre-tax gross revenue' therein, it could only mean the total receipts which fell in the hands of DIAL and MIAL and thus comprise of Aeronautical Charges, Non-Aeronautical Charges as well as Other Income. This becomes apparent from a reading of Para 59 of the Minority Opinion and which while recording the submissions of AAI has noted as under:

"59. AAI on the other hand contends that "pre-tax gross revenue" refers to the "Total receipts" of Claimant i.e., the aggregate of *(i) Aeronautical Charges, (ii) charges for Non-Aeronautical Services and (iii) Other Income of the Claimant*. In other words, what DIAL describes as "gross receipts", is considered as "pre-tax gross revenue" by AAI. AAI further contends that there is no justification or legal basis, for deducting (i) depreciation, (ii) interest on borrowed funds, (iii) return on equity to investors, from the "total receipts" to arrive at "pre-tax gross revenue". The answer to the question would depend upon the interpretation of the definition of the term "revenue" in OMDA. This would in turn depend upon the question whether the other project agreements can be looked into or

relied upon for interpreting the definition of the term "revenue" in OMDA. It is therefore necessary to set out the Principles of Interpretation of Contract relevant to these two questions."

25. The crux of the dispute came to be succinctly identified in the Minority Opinion in Para 60 and which is extracted hereunder:

"60. There is no dispute that Aeronautical Charges and charges for Non-Aeronautical Services, are to be taken into account to arrive at "all pre-tax gross revenue". The areas of difference are:

(i) While AAI contends that the total receipts by way of Aeronautical Charges form part of "all pre-tax gross revenue", DIAL contends that the Capital Costs (depreciation, interest on debt and return on equity) should be deducted from the total receipts of Aeronautical Charges.

(ii) While AAI contends that "all pre-tax gross revenue", would include Other Income of DIAL (i.e., income other than from Aeronautical Services and Non-Aeronautical Services), DIAL contends that its "Other Income" (i.e., income other than from Aeronautical Services and Non-Aeronautical Services), cannot be included to arrive at "all pre-tax gross revenue".

(iii) What items would fall under Exclusion (a) in the definition of "Revenue" "*Payments made for the activities undertaken by relevant authorities*'.

(iv) While DIAL contends that Exclusion No. (c) in the definition of "Revenue" "*any amount that accrues to DIAL from sale of any Capital Assets or Items*" would refer to the entire sale proceeds, AAI contends it would only refer to the profit accrued to DIAL on sale of any capital asset/items."

26. The Minority Opinion firstly proceeded to rule upon the question of whether capital costs and which were asserted to consist of depreciation, interest on debt and return on equity were liable to be deducted from the total receipts for the purposes of calculating 'pre-tax gross revenue'. The aforesaid question ultimately came to be answered in the following terms:

"80. The "Annual Fee" is payable by DIAL to AAI in terms of Clause 11.1.2 of OMDA. The Annual Fee is 45.99% of the "Revenue". As per the scheme relating to calculation and payment of Annual Fee, DIAL has to pay 45.99% of the projected Revenue (as set forth in the Business Plan) payable in 12 equal monthly instalments subject to correction/adjustment every quarter, if the actual Revenue exceeds or less than the actual Revenue. Revenue as earlier noted is defined as "pre-tax gross revenue of JVC", excluding the five enumerated items. Each word, in the expression "pre-tax gross revenue of JVC" is clear and unambiguous.

81. It is an admitted position on both sides that the phrase "pre-tax gross revenue" is neither defined in the OMDA nor under any applicable law nor in the accounting standards. But the words "pretax", "gross" and "revenue" are terms used in accounting parlance, with generally recognised meaning (unless otherwise specifically defined).

82. The word "pre-tax" means "before tax" or "before provision for (or payment of) income tax" or "existing before the assessment or deduction of taxes" (vide *Black's Law Dictionary* 8th Edition Page 1225 and P. Ramanatha Aiyar's Advanced Law Lexicon). The word "pre-tax" is normally used, in the term "pre-tax earnings" or "pre-tax income". In this case, the parties have clearly used the words "pretax gross revenue", which means the total receipts (either by providing services or sale of products) without any kind of deduction. If the parties had intended that depreciation, interest on debt and return on equity, should be deducted from the total receipts to arrive at "pre-tax gross revenue" (in addition to the five specified exclusions), the parties would have enumerated them in addition to the specified exclusions, or would have defined "pre-tax gross revenue" as total receipts less 'depreciation, interest on debt and return on equity'. Alternatively, the Parties would have used appropriate words or phrases which would have indicated that the three items (depreciation, interest on debt and return on equity) should also be excluded in addition to the five enumerated items, to arrive at the "Revenue" per year, 45.99% of which will have to be paid to AAI as "Annual Fee".

83. 'Receipts', 'Revenue', 'Income', 'Gross Income', 'Net Income', 'Earnings', are commonly used phrases in accounting parlance. In generally followed accounting practice, 'Receipts' refers to any cash flow/receivables of a company; 'Gross Revenue' or 'Revenue' or 'Gross Income refers to any form of income of a company (either by sale of products or by rendering of services, apart from interest, royalty and dividends wherever applicable) generated, before deducting expenses; 'Capital Receipts' will refer to non-recurring receipts that either increase the liability or decrease the assets; 'Pretax Net Income' or 'Pre-tax Net Earnings' will refer to Gross Income or Gross Revenue less operational expenses, overheads, depreciation and interest on borrowings. While all 'Income' are 'Receipts', all 'Receipts' are not 'Income'. While 'Revenue Receipts' affect the statement of profit and loss, the 'Capital Receipts' will not affect the statement of profit and loss. These words may also have certain extended, restricted or special or specified meanings, if they are so defined in any statute or in contract, or so implied, depending on the context. The definition of 'Revenue' in the OMDA, is an

example of the term 'Revenue' having a specific meaning as contrasted from the general meaning. Thus, wherever the parties intend that the general accounting terms should have specific or special meaning, the words would be accordingly defined. As noticed above, the parties gave a special definition to the term "Revenue", but did not define the terms "pre-tax gross revenue", "Capital Asset" and "Bad Debts" used in the definition of the term "Revenue", thereby indicating those words in the definition of the term "Revenue" should carry the general meaning attached to those words in Indian accounting terminology.

XXXX XXXX XXXX

86. The use of the word 'all' preceding 'pre-tax gross revenue' is also significant. Referring to a similar provision where "gross revenue" was preceded by "all" and the definition contained a single exclusion, the Oregon Supreme Court held as under in *Lane Electric Cooperative Inc.* v. *Department of Revenue*, 765 P.2D 1237 (Or.1988):

> "The legislature tied the tax to gross revenue and underscored its inclusive intent by prefacing that term with (an arguably redundant) "all." No statutory language supports LEC's argument that other adjustments to "all gross revenue" must be allowed. LEC's argument that "all gross revenue" is subject to the adjustment it seeks in this case is defeated by the inclusion of a single express statutory exception (for revenue from government leases)..... With the single statutory exception, "all gross revenue" covers all pre-expenditure revenue."

Therefore, the use of the word 'all' preceding the words 'pre-tax gross revenue' and the specific enumeration of the five items to be excluded from "pre-tax gross revenue", give a clear indication that the "all pre-tax gross revenue" does not permit any additional exclusion of 'depreciation, interest on debt and return on equity' sought by DIAL.

XXXX XXXX XXXX

Whether words can be added to a provision in a contract to give business efficacy to the contract, when the terms of the contract are clear and unambiguous?

89. The definition of the term "Revenue" uses the words "Revenue means all pre-tax gross revenue of JVC excluding....". The definition is thus self-contained and exhaustive. What are to be included and what are to be excluded are specifically stated in the definition. The definition is clear and ambiguous. Further, the use of the word 'all' before 'pre-tax gross revenue of JVC' and use of the words 'excluding the following' after "pre-tax gross revenue of JVC" would indicate

that each and every revenue receipt, should be included in the "pre-tax gross revenue" and the only items are to be excluded from the "pre-tax gross revenue" are the five items enumerated in the definition.

XXXX XXXX XXXX

91. The following items enumerated as amounts to be deducted from the "pre-tax gross revenue" to arrive at "Revenue" also give an indication as to why the term "pre-tax gross revenue" used by the Parties in the definition of "Revenue" literally means only the "pretax gross revenue":

(a) Payments made by DIAL, for the activities undertaken by Relevant Authorities or payments received by DIAL for provision of electricity, water, sewerage, or analogous utilities to the extent of amounts paid for such utilities to the party service providers;

(b) Insurance proceeds except insurance indemnification for loss of revenue;

(c) Any amount that accrues to DIAL from sale of any capital assets or items;

(d) Payments and/or monies collected by DIAL for and on behalf of any governmental authorities under Applicable Law;

(e) Any bad debts written off provided these pertain to past revenues on which annual fee has been paid to AAI.

The enumeration of five items to be excluded shows that the "pre-tax gross revenue" refers to total receipts by way of Aeronautical Services, Non-Aeronautical Services and other income. It is also significant that the parties used the term "all pre-tax gross revenue" (as contrasted from "total receipts" which would have impliedly included amounts received by way of 'borrowings' also)."

27. It appears to have been asserted by the JVCs' before the Arbitral Tribunal that if the meaning of 'Revenue' as canvassed by AAI were to be accepted, it would lead to a complete commercial absurdity and fall foul of the principle of business efficacy which must imbue all commercial transactions. This argument came to be negated by the learned Arbitrator constituting the Minority as under:

"93. The Supreme Court has explained in what circumstances the business efficacy rule can be relied upon or implemented while interpreting contracts. In *Transmission Corporation of Andhra Pradesh* v. *GMR Vemagiri Power Generation Ltd.*, (2018) 3 SCC 716, the Supreme Court analysed the principles relating to interpretation of contracts with reference to the principles of business efficacy and held:

"21. In the event of any ambiguity arising, the terms of the

contract will have to be interpreted by taking into consideration all surrounding facts and circumstances, including correspondence exchanged, to arrive at the real intendment of the parties, and not what one of the parties may contend subsequently to have been the intendment or to say as included afterwards, as observed.

24. …..The contextual background in which the PPA originally came to be made, the subsequent amendments, the understanding of the respondent of the agreement as reflected from its own communications and pleadings make it extremely relevant that a contextual interpretation be given to the question…..

26. A commercial document cannot be interpreted in a manner to arrive at a complete variance with what may originally have been the intendment of the parties. Such a situation can only be contemplated when the implied term can be considered necessary to lend efficacy to the terms of the contract. If the contract is capable of interpretation on its plain meaning with regard to the true intention of the parties it will not be prudent to read implied terms on the understanding of a party, or by the court, with regard to business efficacy as observed in *Satya Jain* v. *Anis Ahmed Rushdie*, (2013) 8 SCC 131:

> "33. The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in Moorcock (1889) LR 14 PD 64 (CA). This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. in the Moorcock:…
>
> 'In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.'

> 34. Though in an entirely different context, this Court in *United India Insurance Co. Ltd.* v. *Manubhai Dharmasinhbhai Gajera*, (2008) 10 SCC 404 had considered the circumstances when reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto. Certain observations in this regard expressed by courts in some foreign jurisdictions were noticed by this Court in para 51 of the Report. As the same may have application to the present case it would be useful to notice the said observations:
>
> > 51. ."... 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander, were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!"" (*Shirlaw* v. *Southern Foundries (1926) Ltd.*, [1939] 2 K.B. 206 (CA)], at p. 227.)
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> > * * *
> >
> > '...An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract : it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them : it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.' (*Trollope and Colls Ltd.* v. *North West Metropolitan Regional Hospital Board*, [1973] 2 All ER 260 (HL), at p. 268)"
>
> 35. The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement...."

In this case the definition of "Revenue" is specific, clear and exhaustive. What should be the base and what should be the exclusion/deduction is specified. In such a case, it is necessary to give effect to the plain and ordinary meaning of the words and it is impermissible to add words, let alone additional terms to the definition of "Revenue" by relying upon the business efficacy principle.

94. If the Tribunal were to accept the interpretation suggested by DIAL by adding to the enumerated exclusions in the definition of "Revenue", the Tribunal would be committing what the Supreme

Court describes as fundamental breach of a fundamental principle of justice. In *Ssangyong Engineering & Construction Co. Ltd.* v. *NHAI*, (2019) 13 SCC 131, the Supreme Court reversed the decision of an Arbitral Tribunal which purported to substitute the workable formula under the contract, with another formula not found in the agreement, with the following observations:

> "...a(n) unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly such a course of conduct would be contrary to the fundamental principles of justice as followed in this country and shocks the judicial conscience of this Court."

Therefore, DIAL's claim and contention that the definition of 'Revenue" in the OMDA should be read in a manner that "Capital Costs"/"PSF and UDF" collected by DIAL (forming part of the Aeronautical Charges) are treated as exclusions from "all pre-tax gross revenue" in addition to the five enumerated exclusions, is rejected.

95. DIAL contended that if the Aeronautical Charges (as fixed by AERA) collected from the users of the airport, are treated as the "sharable revenue" without deducting the amounts borrowed to create the aeronautical assets, DIAL will not be able to recover the costs incurred for creating the aeronautical assets, from the Aeronautical Charges as provided in Article 12.1 of OMDA; and that any interpretation which leads to such "impossibility" to recover the cost of aeronautical assets and to service the debts secured for developing the aeronautical assets, would render Article 12.1 nugatory and any such interpretation rendering a provision of the contract nugatory should be avoided.

96. Even assuming what is contended/alleged by DIAL is true, the alleged impossibility is its own making. DIAL could have very well saved itself from such a situation by offering a lesser share to AAI. Having offered a higher share, either with the object of obtaining a huge and prestigious contract or by reason of assuming/estimating a higher revenue and lower expenditure, it cannot, when subsequent reality proves to be otherwise, attempt to put forth a construction which is neither warranted, nor permissible, nor thought of by it for more than a decade of its effective implementation, with a view to increase its revenue/income. It is not permissible to move the goal post after the game has started."

28. The Minority Opinion proceeded to come to the following conclusion:

"100. Article 11.1.2 of OMDA requires payment of Annual Fee to

AAI and sets out the manner in which the Annual Fee should be calculated and paid. The calculation of the Annual Fee is exclusively based on "Revenue", being 45.99% of the "Revenue". The term "Revenue" is used in Article 11.1.2 more than 25 times and bear the same meaning as contained in the definition of "Revenue". The effect of decision in Vanguard is that if the term "Revenue" has been used elsewhere in the contract in a different context and different background not related to calculation of Annual Fee, it may be possible to give a contextual meaning or the ordinary and natural meaning of the word "Revenue". Even where the definition of a word commences with the words 'unless the context otherwise requires', it is only where a contrary intention appears from the context, that the definition of the word can be given a go-bye and the word understood as in common parlance. But, the contention of DIAL is completely different. It is not the contention that the term "Revenue" used elsewhere in the contract in a different context should be interpreted differently. The contention of DIAL is that the definition itself should be differently read for the purpose of calculating the Annual Fee. This is impermissible."

29. The respondent-claimants further appear to have urged that the Project Agreements were liable to be read compendiously and in conjunction with each other and consequently all factors taken note of for the purposes of tariff determination under the SSA being liable to be considered in order to understand what could constitute 'Revenue' under the OMDA. This becomes apparent from a reading of Paras 104 and 106 of the Minority Opinion and which are extracted hereinbelow:

"104. DIAL submitted that OMDA uses the word 'pre-tax gross revenue' in the definition of "Revenue"; that SSA uses the word 'gross revenue'; that Schedule I of SSA contains the tariff determination principles for IGI Airport; and that the formula in Schedule I to SSA for calculating the "Aeronautical Charges in the shared till inflation - X Price Cap Model" refers to 'S' factor, as:

*30% of the gross revenue generated by JVC from the revenue share assets. The costs. in relation to such revenue shall not be included while calculating Aeronautical Charges.

It is contended when the project documents use the word 'gross revenue' and *pre-tax gross revenue', some significance to be attached to the use of the word 'pre-tax'; that this would mean that the term 'pre-tax' should be interpreted in a manner consistent with the commercial bargain underlying the OMDA and the SSA; that Commercial Principle No. 2 in SSA provides that 'in setting the price cap regard to the need for the JVC to generate sufficient revenue to cover efficient operating cost, obtain the return of capital over its economic life and achieve a reasonable return on investment

commensurate with the risk involved'; that when the provisions of OMDA are read with the provisions of SSA, it becomes evident that DIAL is entitled to the return of capital over its economic life and also to a reasonable return on the investment; that this was achieved by deliberately adding the word 'pre-tax' before 'gross revenue' thereby meaning that certain items of 'Revenue' should be logically be excluded from 'gross revenue'. Consequently, DIAL is justified in deducting 'depreciation, interest on debt and return on equity' from gross receipts to arrive at 'pre-tax gross revenue'. Firstly, the argument has no basis. If 'depreciation, interest on debt and return on equity' are to be excluded from 'gross revenue' in view of Commercial Principle No. 2 in Schedule I of SSA, it logically follows that 'efficient operating cost' should also be excluded as Commercial Principle No. 2 also mentions 'efficient operating cost' in addition to 'return of capital over economic life and reasonable return on investment'. But, if the efficient operating costs as also the other items are to be excluded, 'gross revenue' will no longer be 'gross revenue'. Further, the use of the word 'all pre-tax' before 'gross revenue' would refer to the stage before any deductions are made. Therefore, there is no merit in the contention that use of the word 'pre-tax enables exclusion of some items of expenditure.

XXXX XXXX XXXX

106. According to DIAL, if Article 12.1.1 by itself is not sufficient to hold that the Aeronautical Charges to be included in the 'all pretax gross revenue' is after deduction of capital costs (i.e., depreciation, interest on debt and return on equity), then a combined reading of Chapter XII of OMDA with the provisions of the SSA, would make the said position clear. It is submitted that Article 12.1.1 of OMDA and Clause 1.1 of SSA define 'Aeronautical Charges' as the charges to be levied at the Airport by JVC for the provision of Aeronautical Services and consequent recovery of costs relating to Aeronautical Assets. Article 12.1.2 of OMDA provides that the JVC shall at all times ensure that the Aeronautical Charges levied at the Airport shall be as determined as per the provisions of the SSA. Clause 3 of SSA lists the support to be provided by the Government of India (GoI) to DIAL. Under Clause 3.1.1 of SSA, GoI agreed to use reasonable efforts to have the Airport Economic Regulatory Authority (AERA) established and operating within two years. Under the said clause, and agreed and confirmed that:

> ".....subject to applicable law, it shall make reasonable endeavours to procure that the Economic Regulatory Authority shall regulate and set/reset Aeronautical Charges, in accordance with the broad principles set out in Schedule I appended hereto. Provided however, the upfront fee and the Annual Fee

paid/payable by the JVC to AAI under the OMDA shall not be included as part of costs for provision of Aeronautical Services and no pass-through would be available in relation to the same".

Schedule I to the SSA referred to in Clause 3.1.1 contains the principles of tariff fixation and the relevant portion of which are extracted below:

"Principles of Tariff Fixation

Principles

In undertaking its role, AERA will (subject to Applicable Law) observe the following principles:

1. Incentives Based : The JVC will be provided with appropriate incentives to operate in an efficient manner, optimising operating cost, maximising revenue and undertaking investment in an efficient, effective and timely manner and to this end will utilise a price cap methodology as per this Agreement.
2. Commercial : In setting the price cap, AERA will have regard to the need for the JVC to generate sufficient revenue to cover efficient operating costs, obtain the return of capital over its economic life and achieve a reasonable return on investment commensurate with the risk involved"."

30. Those submissions came to be negated by the Presiding Arbitrator standing in minority in the following terms:

"109. On a careful consideration of the provisions of the SSA, the Tribunal IS of the view that the reliance placed by DIAL on Clause 3.1.1 read with Schedule I of the SSA to contend that the Capital Costs should be excluded from the total gross receipts to arrive at "pre-tax gross revenue", is misconceived and untenable.

110. Clause 3.1.1 of SSA contains the undertaking by GoI that it will ensure that AERA regulates and sets/resets the Aeronautical Charges in accordance with the broad principles in Schedule 1. Schedule I provides that in AERA while undertaking the role of approving Aero Tariff, will provide DIAL with appropriate incentives to operate in an efficient manner maximising "Revenue" and optimising operating costs, by utilising the price cap methodology; and that in setting the price cap AERA will have regard to the need for DIAL to generate sufficient revenue to cover efficient operating cost, obtain the return of capital over its economic life and achieve a reasonable return on investment commensurate with the risk involved. The provisions of SSA relied upon by DIAL (Clause 3.1.1 read with Schedule 1 commercial principles 1 and 2) have nothing to do with the revenue-sharing arrangement agreed between AAI and DIAL under the OMDA. The relied-upon provisions of SSA merely

ensures that while determining/approving the tariff (i.e., the charges to be levied at the Airport by DIAL for providing Aeronautical Services and consequent recovery of costs relating to Aeronautical Assets, referred to as Aeronautical Charges), AERA will adopt a price cap methodology that would ensure generation of sufficient revenue by DIAL to cover not only efficient operating cost but also ensure that DIAL obtains the return of capital over its economic life (depreciation) and achieves a reasonable return on investment commensurate with the risk involved (i.e., interest on debt and return on equity).

111. Therefore, the scheme of OMDA and the project agreements is : (i) The payment of consideration by way of "Annual Fee" by DIAL to AAI for the grant of the exclusive right to operate, manage and develop the Delhi Airport (i.e., Grant of Function by AAI to DIAL) is governed by Chapter XI of the OMDA. (ii) The money to be earned by DIAL by providing Aeronautical Services through the development, operation and management of the Airport (to cover the operating costs, depreciation, interest on debt and return on equity) is governed by Chapter XII of the OMDA read with Clause 3.1.1, Schedule I and other provisions of SSA. Recovery of Capital Costs (depreciation, interest on debt and return on equity) is related to and provided for in tariff fixation. Capital Costs or recovery thereof have no role to play in determination and payment of Annual Fee by DIAL to AAI."

31. The aforesaid opinion was again reiterated in Para 112 which is reproduced below:

"112. ...The principles of tariff fixation in the SSA relate to the quantum of tariff. The recovery of capital costs or return of capital costs are taken care by the tariff fixation. If there is any error in tariff fixation, the remedy is to challenge the tariff fixation before TDSAT. Any problem in tariff fixation cannot be solved by reimagining the meaning of "Revenue" in the OMDA. The provision in the OMDA for payment of annual fee on the basis of definition of "Revenue" relates to sharing of profits by AAI and DIAL who have entered into a joint venture. Any attempt to bring in the principles of tariff fixation in to reworking the agreed profit-sharing ratio will be illogical and impermissible. The problems of DIAL arise due to its agreement to pay 45.99% of total "Revenue" and not because of any mistake in understanding and giving effect to what was agreed to be "Revenue". If DIAL had agreed to pay, say only 30% of "Revenue", it may not have the problem of inadequacy of funds. But no tribunal or court can re-write a solemn contract with clear terms and conditions, on the ground of hardship to one party, or on grounds of equity or fairness, or by importing the principles of tariff fixation into

calculation of sharing of profits or income."

32. The Minority Opinion also appears to have been influenced on account of the respondent-claimants having proceeded on the basis that "pre-tax gross revenue" would mean the total Revenue minus the five specified exclusions over a long period of time, and which in the case of DIAL ran from May 2006 to December 2016. This becomes apparent from a reading of Para 127 which is extracted hereunder:

> "127. It is an admitted position that continuously from May 2006 to December 2016, both parties proceeded on the basis that "all pre-tax gross revenue" would include the total of the gross revenue of DIAL as recognised in the Profit and Loss account of DIAL, less the five specified exclusions. But without the additional exclusions from "Revenue" now sought by DIAL (that is exclusion of capital costs from aeronautical charges and exclusion of 'Other Income'). This position has been accepted and acted upon by DIAL, AAI, DIAL's Internal Auditors, DIAL's External Auditors and the independent Auditors appointed under Article 11.2 of the OMDA."

33. Basis the above, the Minority Opinion came to the following conclusion:

> "134. In view of the above, the contention of DIAL that 'depreciation, interest on debt and return on equity' [or its alleged proxies-PSF(FC) and UDF] should be deducted from the total receipts of Aeronautical Charges that should be taken into account for arriving at the "all pre-tax gross revenue" is rejected. The total receipts of Aeronautical Charges should be taken into account for arriving at "all pre-tax gross revenue" and consequently "Revenue"."

34. The second significant aspect of contestation was the correlation between Annual Fee and Other Income. It appears to have been urged by the JVCs' that the following heads of income would constitute non-shareable income:

> "(i) Interest earnings on deposits, delayed payments, tax or other refunds;
>
> (ii) Earnings from sale of investments;
>
> (iii) Dividend income or other income from financial assets, including earnings on account of exchange rate differences;
>
> (iv) Earnings from sale of fixed assets. scrap or other assets other than from sale of capital assets; and
>
> (v) Other miscellaneous incomes, including tender fees recovered;"

35. The claim of DIAL in this respect stands noticed in the Minority Opinion in the following terms:

> "136. It is contended that these are earnings made by DIAL in its own private commercial sphere through prudent investments; that none of these activities/earnings/returns have any nexus to either

Aeronautical or Nonaeronautical Services; and that in view of the structure of OMDA and the clear exhaustion of the universe of possibilities of revenue between provision Aeronautical Services and Non-Aeronautical Services, such incomes from other sources cannot and should not form part of "pre-tax gross revenue", or "Revenue" which is derived therefrom.

137. DIAL alleges that the following amounts aggregating to Rs. 1,169.33 Crores being its Other Income, for the period 2006-2007 to 30.9.2018, have been wrongly included in "Revenue" for the purpose of calculating the Annual Fee:

(Rupees in Crores)

Revenue Item	Amount
Interest Income on Deposits	**221.12**
Interest Income on delayed payments	**145.62**
Interest received on IT Refund	**13.42**
Profit/Income from sale of Investments	**467.64**
Dividend Income on long term investments	**254.01**
Miscellaneous income	25.06
Tender cost recovery	12.89
Exchange Diff (net)	4.01
Liquidated damages received	14.95
Profit on sale of fixed asset	0.66
Sale of other material/scrap	7.27
Fair value gain of investments	2.68
Total	**1,169.33**
Impact on Annual fee	**537.78**

DIAL alleges that apart from the said Other Income up to the period 30.9.2018, the Other Income included in the "Revenue" even for the subsequent period should be excluded and it should be declared that Other Income shall not be included in "Revenue"."

36. The Presiding Arbitrator while penning the Minority Opinion, proceeded to emphatically reject those contentions holding that the claimants would have been in no position to earn "Other Income" but for the grant which stood embodied in the OMDA. This becomes apparent from a reading of Para 140 which is reproduced hereinbelow:

"140. The contention of DIAL that the "other income" is earned in its own private commercial sphere through prudent investments and that the activities, earnings and returns relating to "other income" have no nexus with either Aeronautical or Non-Aeronautical Services, is neither logical nor sound. DIAL is able to generate "other income" only as a consequence of "grant of function" under Article 2.1 of OMDA i.e., grant of exclusive right and authority by AAI to DIAL to undertake Aeronautical Services and Non-Aeronautical Services. When funds generated by working the grant under the OMDA were invested by DIAL thereby earning interest, though it may be "other income" (as contrasted from "Income from Aeronautical services, income from Non-Aeronautical services and Cargo") it is still part of "Revenue". "Income" or "Total Revenue" would therefore consist of Aeronautical, non-Aeronautical and Other Income, as can be

gathered from the independent Auditor's Reports for various quarterly periods."

37. The Minority Opinion also took into consideration the decisions of the Supreme Court in *Union of India* v. *Association of Unified Telecom Service Providers of India*[15] and *Union of India* v. *Association of Unified Telecom Service Providers of India*[16] and which were pressed into aid by AAI to contend that the expression "Revenue" as defined could neither be reinvented nor any additional exclusions being read into that provision. While dealing with this aspect, the Presiding Arbitrator held:

"144. In *AUSPI-I*, the Supreme Court rejected the contention of Telecom Service Providers that only 'revenue' arising from the activities carried out under the telecom licence would form 'adjusted gross revenue' and revenue realised from non-telecom activities cannot form part of 'adjusted gross revenue', on the following reasoning (vide para 49):

"If the wide definition of adjusted gross revenue so as to include revenue beyond the licence was in any way going to affect the licensee, it was open for the licensees not to undertake activities for which they do not require licence under Section 4 of the Telegraph Act and transfer these activities to any other person or firm or company. The incorporation of the definition of adjusted gross revenue in the licence agreement was part of the terms regarding payment which had been decided upon by the Central Government as a consideration for parting with its rights of exclusive privilege in respect of telecommunication activities and having accepted the licence and availed the exclusive privilege of the Central Government to carry on telecommunication activities, the licensees could not have approached the Tribunal for an alteration of the definition of adjusted gross revenue in the licence agreement."

145. In *AUSPI-II*, the Supreme Court again considered the term 'adjusted gross revenue' used in the Telecom Licence Agreement and held as under while reiterating what was held in *AUSPI-I* (vide paras 64, 65 and 66):

"62. . …. the meaning of revenue is apparent that it has to be gross revenue, and the license fee would be a percentage of the same. Thus, the licensees have made a futile attempt to submit that the revenue to be considered would be derived from the activities under the license; whereas it has been held in 2011 that the revenue from activities beyond the license have to be included in adjusted gross revenue, is binding.

64 ….. In our considered opinion, when there is a contractual definition as to what would be the gross revenue that would be

the revenue and also the total revenue, the revenue as mentioned in the mode of accounting AS-9 (Accounting Standard-9) cannot govern the definition. The general definition of revenue in the mode of accounting cannot govern the contractual definition of gross revenue.

65. As per Clause 20.4, a licensee must make quarterly payment in the prescribed format as Annexure II showing the computation of revenue and licence fee payable. The format is part of the licence and is independent of accounting standards and is in tune with the definition of gross revenue, and is the basis for the calculation of licence fee. It is only for uniformity that the account has to be maintained as per accounting standards AS-9 which are prescribed from time to time. Once the licensee provides the details to the Government in format Annexure II along with accounts certified by the auditor, the reconciliation has to take place. The accounting standard AS-9 is relevant only for whether the figure given by the licensee as to gross revenue is maintained in proper manner once gross revenue is ascertained. then after certain deductions, adjusted gross revenue has to be worked out. The accounting standard provided in AS-9 cannot override the definition of gross revenue, which is the total revenue for licence and the finding in *Union of India* v. *Assn. of Unified Telecom Service Providers of India* [*Union of India* v. *Assn. of Unified Telecom Service Providers of India*, (2011) 10 SCC 543] in this regard is final, binding and operative. The accounting standard AS-9 makes it clear that same is in the form of guidelines, it is not comprehensive and does not supersede the practice of accounting. It only lays down a system in which accounts have to be maintained. Accounting standards make it clear that it does not provide for a straitjacket formula for accounting but merely provides for guidelines to maintain the account books in systematic manner.

66. Though the definition of revenue given in Clause 4.1 of AS-9 cannot govern the contract, the contractual definition of gross revenue which is the gross revenue under Clause 19.1 and total revenue for the purpose of the agreement for which an independent definition has been carved out under the statutory power while parting with the privilege under Section 4 by the Central Government, once the contract has been entered into, the definition of gross revenue is binding, and the licensees cannot try to wriggle out of the decision by making impermissible attempts to depart from it. ... Given the definition of gross revenue, the same includes revenue from activities beyond the licence. Explanation to Clause 5 of AS-9 also makes it clear that the

agreement between the parties would determine the amount of revenue arising on a transaction."

146. The decisions in AUSPI-I and AUSPI-II dealt with the question of what constitutes shareable gross revenue in respect of telecom licences granted by Government of India to telecom service providers. The principles laid down by the Supreme Court while considering whether other income, that is, income other than telecom services, has to be considered as part of the gross revenue to be shared with the government are equally applicable in regard to the transfer of certain functions by AAI under OMDA in favour of DIAL.

147. In *Union of India* v. *Association of Unified Telecom Service Providers of India*, (2020) 3 SCC 525, the Supreme Court had occasion to consider a somewhat similar contention of Telecom Service Providers that the revenue earned by licensee from rent/leasing out passive infrastructure should not form part of adjusted gross revenue and should be excluded from 'adjusted gross revenue'. The Supreme Court held:

"145. In the definition of gross revenue, the item sharing of infrastructure facility is explicitly mentioned. In the format in Appendix 2 to Annexure II also, the entire amount is required to be shown. It has been specifically mentioned that there cannot be any setting off of the amount of gross revenue, and the entire money received has to be treated as the gross revenue for the determination of licence fee. It is not the determination of profit. The gross revenue carries a different definition, and the intendment is clear to prevent disputes. Thus, the entire amount received by the licensee on account of sharing of passive infrastructure has to be counted in the gross revenue while working out AGR. Thus, the finding to the contrary recorded by TDSA T is set aside."

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149. In view of the above, the Tribunal holds that 'Other Income' of DIAL cannot be excluded for determination of 'all pre-tax gross revenue' and consequently, the Annual Fee is payable on 'Other Income' of DIAL."

38. The third limb of the claims was with respect to exclusion of 'payments for activities undertaken by Relevant Authorities'. These were sought to be broadly classified by DIAL and MIAL as pertaining to payments made to AAI, expenses incurred for and on its behalf, payments made for activities undertaken by Relevant Authorities as defined as well as payments for provision of electricity, water and analogous utilities. It was asserted by DIAL and MIAL that such payments were also liable to be excluded from 'pre-tax gross revenue'.

The details of such payments, insofar as DIAL is concerned, appear in a tabular statement set out in Para 151 of the Minority Opinion and which is reproduced hereinbelow:

(Rupees in Crores paid/incurred between 2006-07 and 30.9.2018)

Particulars	Amount
(A) Payment made to AAI:	
(i) Upfront Fees	156.19
(ii) Initial Capital Work in Progress (CWIP)	45.50
(iii) Voluntary Retirement Scheme	279.29
Sub-Total (A)	**480.98**
(B) Expenses incurred by DIAL for AAI or on behalf of AAI:	
(i) Officers support cost	59.43
(ii) Consultancy and Audit Fee	6.59
Sub-Total (B)	**66.02**
(C) Expenses incurred by DIAL for or on behalf of Relevant Authorities (other than AAI):	
(i) Power/Electricity (net of recoveries)	932.20
(ii) Property Tax	99.87
(iii) Security Equipment Maintenance	90.08
(iv) Maintenance expenses of area occupied by Relevant Authorities	13.88
Sub-Total (C)	**1136.03**
Total (A+B+C)	**1,683.03**
Impact on Annual Fee (45.99% of Rs.1683.03 Crores)	**774.03**

39. Proceeding to deal with the payments which were made by DIAL to AAI, the Presiding Arbitrator constituting the Minority insofar as Upfront Fee was concerned, held that the same was of a non-refundable character which was to be paid and in any case, would not constitute a payment made for activities undertaken by AAI. It consequently proceeded to reject the claim for exclusion of Upfront Fee in the following terms:

> "159. The Upfront Fee paid by DIAL under Article 11.1.1, is a nonrefundable onetime payment made during the term of the OMDA and is part of the consideration for AAI granting the exclusive right in regard to the Airport under Article 2.1.1. Upfront fee is not a payment made 'for the activity undertaken' by AAI. Therefore, the claim of DIAL for exclusion of the payment of Upfront Fee of Rs. 156.19 Crores from "all pre-tax gross revenue" is rejected."

40. The issue of payments made towards Capital Works In Progress does not appear to have been pursued further and consequently came to be rejected as not pressed as follows:

> "160. DIAL claims to have made another payment of Rs. 45.50 Crores to AAI towards initial capital work in progress under Clause 5.4 of OMDA. Clause 5.4 provides that DIAL shall be liable for making all payments in respect of other capital works in addition to the capital works-in-progress mentioned in Clause 5.2 incurred by AAI at the Airport from 30.8.2005. AAI has contended that any payment falling under Clause 5.4 would be a payment which is deemed to be an activity undertaken by DIAL and would be considered as in discharge of its payment obligations. The payment under Article 5.4 is a contractual payment made in pursuance of

Clause 5.4 of OMDA by one party to the contract to the other and not a payment by DIAL for an 'activity undertaken' by AAI as an authority empowered under the AAI Act. During arguments, DIAL has stated that it is not pursuing this claim (relating to payment under Article 5.4 of OMDA) vide Para 93 (ii) and Para 129 of its written submissions. This part of the claim is therefore rejected as not pressed."

41. Yet another head of payment in respect of which exclusion was claimed was in respect of a Voluntary Retirement Scheme. This too came to be negated as would be evident from a reading of Para 167 of the Minority Opinion:

"167. Clause 6.1.4 makes it clear that DIAL agreed to absorb a portion of AAI' s employees at the Airport and agreed to pay AAI Retirement Compensation to a section of those employees in the event of such employees not accepting DIAL's offer of employment. The term of 'Retirement Compensation' mentioned in Clause 6.1.4 is defined in the OMDA as under:

"Retirement Compensation shall mean the average 'voluntary retirement scheme ("VRS") cost for all the General Employees other than those General Employees who have accepted offers of employment made by the JVC under the provisions of Article 6 hereof, as per the latest VRS of the AAI, if any, or, in the absence of an AAI specific VRS, the highest VRS as applicable for the then available profitable schedule A public sector undertakings."

In view of the above, it is clear that the VRS payment paid by DIAL to AAI, is part of the Operational Support Cost payable by DIAL to AAI under Chapter VI of OMDA in discharge of its contractual obligations. The said payments cannot therefore be considered as 'payments for activities undertaken by relevant authorities' falling under Exclusion (a) of "Revenue". Further, definition of "Revenue" in OMDA makes it clear that no part of Operation Support Cost payable to AAI shall be deducted from "Revenue". Therefore, the claim for deduction of Voluntary Retirement Scheme payments to AAI is rejected."

42. Proceeding then to consider the claim of payments that DIAL had made to Relevant Authorities other than AAI, the Minority Opinion insofar as power and electricity charges were concerned held that BSES Rajdhani Power Limited was a Relevant Authority and payments made to it would fall in the category of payments received for provision of electricity and paid for utilities and third party service providers. It accordingly held that any of those amounts, if included in computation of Annual Fee, would be liable to be refunded. Similar conclusions came to be rendered with reference to water, sewage and analogous utilities.

43. Another head in respect to which exclusion was claimed was property tax payments. Dealing with this aspect, the Minority while rejecting the claim raised in this respect held as follows:

> "194. The fact that a municipal authority is a 'local authority' is not in dispute. Therefore, Municipal Corporation of Delhi/South Delhi Municipal Corporation/Delhi Cantonment Board answer the definition of 'Relevant Authority' under OMDA. It is well settled that property tax is a tax imposed on lands and buildings by municipal authorities for the purpose of the maintenance and upkeep of local civic amenities of the area like roads, sewage system, streetlighting, parks and other infrastructural facilities. Therefore, the payment of property tax by DIAL to the concerned municipal authorities is a payment made towards the 'activities undertaken by the Relevant Authority'. As both requirements are satisfied, it is held that property tax paid by DIAL to the municipal authorities, is a payment made for activities undertaken by a relevant authority, which has to be excluded under Exclusion (a) from 'all pre-tax gross revenue'. The Tribunal will consider the quantum to be excluded under the first part of Exclusion (a) and the impact thereof on Annual Fee under Dispute No. 4."

44. The Presiding Arbitrator also held in favour of the claimants insofar as receipts from sale of capital assets was concerned, as would be apparent from a reading of Para 211 and which is extracted hereinbelow:

> "211. The definition of "Revenue" requires 'any amount that accrues to JVC from sale of any capital assets or items' should be excluded from "pre-tax gross revenue". It is significant to note that the Exclusion (c) in the definition of "Revenue" does not describe the amount to be excluded as 'any profit that accrues to JVC from sale of any capital asset or items' but as 'any amount that accrues to JVC from sale of any capital asset'. The contention of AAI that use of the word 'accrues' would mean that the amount to be excluded is only the profit on sale, is without any basis. As stated above, the words used are 'amount that accrues from sale of a capital asset' and not 'profit that accrues from sale of a capital asset'. The word 'accrues from sale' contextually means 'sum of money becomes receivable or payable on a sale', in this context. In view of it, it is held that the entire sale price that accrues by sale of any capital asset, is excluded from "Revenue". To restrict the Exclusion (c) to only the profit, would amount to rewriting the wording of the contract by substituting the words 'any profit that accrues' in place of the words 'any amount that accrues'. Such substitution/interference with the terms of the contract is impermissible. Having regard to the description of Exclusion (c) in the definition of "Revenue", where any asset is sold,

the entire sale price should be excluded; and if for any reason, only the profit from the sale has been excluded, the difference between the sale price and profit i.e., the cost as per books of account, will also have to be excluded. When the description of the exclusion is clear and unambiguous, there is no justification for restricting the exclusion only to a part of the exclusion item. DIAL is entitled to a declaration that the entire sale price, received by sale of the capital asset/item, has to be excluded from the definition of "Revenue"."

45. AAI also appears to have raised an issue of limitation with it being contended that the claim was clearly barred by virtue of the provisions of the Limitation Act, 1963. While answering the aforesaid issue, the Presiding Arbitrator held that bearing in mind the original notice of 21 June 2018 which had been issued by DIAL for amicable settlement, excess payments made within three years prior to that date alone would be within limitation. The claim of DIAL thus, in essence stood restricted to three years prior to 21 June 2018. This becomes apparent from Para 218 which is reproduced hereunder:

"218. Normally, the right to sue would occur when the excess payment is made and a suit will have to be filed within three years from that date. Section 43 (1) of the Act provides that the provisions of Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in court. Section 43 (2) read with Section 21 of the Act, provides that for the purpose of the said section and Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date on which a request for that dispute to be referred to arbitration is received by the respondent. In this case, DIAL issued a notice requesting that the disputes be referred to arbitration on 20.8.2018 (Ex.C25-CCC-II, Page 347). Article 15.1 provides that parties shall use their reasonable endeavours to settle any disputes amicably and if a dispute is not resolved within sixty days after written notice of dispute, then provisions of Article 15.2 providing for arbitration will apply. Article 15.2.1 provides that all disputes arising under OMDA that remain unresolved pursuant to the Article 15 relating to disputes, shall be referred to arbitration. A written notice for settling the disputes amicably and expiry of sixty days therefrom, is a condition precedent for arbitration. In this case, such a notice seeking amicable settlement was issued by DIAL on 21.6.2018 (C21-CCC-II, Page 337), which was served on AAI on the same day (vide acknowledgement of service contained therein). When there no amicable settlement, the notice of arbitration was issued on 20.8.2018. Therefore, the date of commencement of arbitration will have to be treated as 21.6.2018 by excluding the notice period of sixty days, by applying Section 15 (2) of Limitation Act. Consequently, any excess payment made within three years prior to

21.6.2018 i.e., any excess payment made on or after 21.6.2015, will be within limitation."

46. Insofar as the argument of excess payments having been made under a mistake or misconception, the same came to be answered against DIAL in the Minority Opinion in the following terms:

"233. In view of the above, it is held that firstly there was no excess payment of Annual Fee by mistake (except regarding electricity/power charges and the amount accruing by sale of capital assets). Secondly even if there was any mistake, it could have been found with reasonable diligence in the year 2006-2007 itself or at all events when the first quarterly statement was prepared. Therefore, the limitation would start to run from the respective dates of excess payments made from 2006-2007 itself.

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243. The law relating to mistake is designed to protect people who make mistakes and making mistakes is a human fallibility. If a 'mistake' leads to irrevocable closure as contended by AAI, there can be no law regarding a mistake and its consequences. So long as the payment is by mistake and is not a voluntary excess payment intended to be a non-refundable gift, the amount paid by mistake has to be returned. In this case obviously, both patties were under a mistake as to whether electricity charges, water charges and property tax, had to be excluded under Exclusion (a) and whether the entire sale proceeds should be excluded under Exclusion (c). In view of the above position, AAI would be liable to repay any excess Annual Fee paid by DIAL once it establishes a mistake in regard to payment of any part of Annual Fee, if the claim is made for such repayment within the period of limitation."

47. The argument of AAI that the excess payments made under a mistake cannot be refunded, however, was rejected. The learned Arbitrator constituting the Minority ultimately proceeded to record the following conclusions:

"255. Thus, except the limited relief granted relating to power/electricity charges paid to BSES Rajadhani Power Ltd. and the amount accruing by sale of capital assets, all other claims of DIAL are rejected. On the basis of the findings recorded above, the following award is made on the reliefs sought by DIAL:

I. Prayer in para 78(a)(i) of SoC : Declaration that the Annual Fee is payable by the Claimant to the Respondent only on the revenue generated from the Aeronautical Services (Aeronautical Charges less cost relating to Aeronautical Assets recovered) and Non-Aeronautical Services, provided at IGI Airport, with exclusions specified in the definition of "Revenue" under OMDA.

Award : Rejected.

Prayer in para 78(a)(ii) of SoC : Declaration that the MAP/Annual Fee is payable on the "Revenue" as defined in OMDA and not on the basis of the gross receipts credited to P&L Account.

Award : It is declared that Annual Fee is payable on the "Revenue" as defined in OMDA.

II. Prayer *in para 78(a)(iii) of SoC* : Declaration that Annual Fee is not payable on depreciation, interest on borrowed funds and the return on equity to investors (Capital Costs) and the same shall be deducted from Aeronautical Charges while arriving at 'pretax gross revenue'.

Award : Rejected

III. Prayer in para 78(a)(iv) of SoC : Declaration that UDF and/or PSF being an appropriate and relevant proxy for the Capital Costs component shall be deducted from Aeronautical Charges while arriving at "Revenue".

Award : Rejected

IV. Prayer in para 78(b)(i) of SoC : Declaration that in computing the applicable Revenue, the Claimant is entitled to exclude from the 'pre-tax gross revenue', payments made by the Claimant, if any, for the activities undertaken by the Relevant Authorities.

Award : It is declared that in computing the applicable Revenue, the Claimant is entitled to exclude the following from the 'pre-tax gross revenue':

(i) Power/electricity charges (paid to BSES Rajadhan Power Ltd) less the 'Pass-through amount' received by DIAL (that is any payment received by DIAL for provision of electricity to its concessionaires/licensees to the extent of amount paid for such utility to BSES Rajadhani Power Ltd.) under Exclusion (a) in the definition of "Revenue".

(ii) Charges for water, sewerage or analogous utilities paid to Relevant Authorities, less any 'Pass-through amounts' received by DIAL (that is any payment received for provision of water, sewerage and analogous utilities to its concessionaires/licensees to the extent of the amount paid for such utilities to third party service providers) under Exclusion (a) in the definition of "Revenue".

(iii) Property taxes paid to municipal authorities.

The declaration sought in regard to the following are rejected : (i) payment of upfront fee, (ii) amount incurred for initial capital works-in-progress, (iii) payments under voluntary retirement scheme, (iv) payment of officers support

cost (personnel), consultancy and audit cost, security equipment maintenance cost and maintenance expenses with respect to the area occupied by Relevant Authorities.

V. Prayer in para 78(b)(ii) of SoC : Declaration that in computing the applicable Revenue, the Claimant is entitled to exclude from the 'pre-tax gross revenue' payments received by the Claimant from the provision of electricity, water, sewerage or analogous utilities to the extent of amounts paid for such utilities to third party service providers.

Award : It is declared that in computing the "Revenue", the Claimant is entitled to exclude from the 'pre-tax gross revenue' payments received by the Claimant from the provision of electricity, water, sewerage or analogous utilities to the extent of amounts paid for such utilities to third party service providers.

VI. Prayer in para 78(b)(iii) of SoC : Declaration that in computing the applicable Revenue, the Claimant is entitled to exclude from the 'pre-tax gross revenue' entire consideration that accrues to the Claimant from the sale of any capital assets or items.

Award : It is declared that in computing the applicable Revenue, the Claimant is entitled to exclude from the 'pre-tax gross revenue', the entire consideration that accrues to the Claimant from the sale of any capital assets or items.

VII. Prayer in para 78(c) of SoC: Declaration that no Annual Fee is payable on the Other Income, i.e., income other than from Aeronautical Services and NonAeronautical Services provided by the Claimant.

Award : Rejected

VIII. Prayer in para 78(d)(i)&(ii) of SoC : Grant restitution by directing the Respondent to return the excess amount of Annual Fee paid by the Claimant under a mistake to the following extent:

(i) Rs. 1 0,537.20 Crores comprising Rs. 6,663.26 Crores towards restitution/return of excess Annual Fee paid by the Claimant from 03.05.2006 to 30.09.2018 and interest thereon amounting to Rs. 3,873.94 Crores for the period 03.05.2006 to 30.09.2018, along with further interest on the said amount of Rs. 10,537.20 Crores at the rate equivalent to SBI PLR + 300bps per annum thereon, from 01.10.2018 till the date of return of the aforesaid amount;

AND

(ii) Further amounts (to be quantified) towards

restitution/return of excess Annual Fee paid by the Claimant from 01.10.2018 till the date of the Award along with interest at the rate equivalent to SBI PLR + 300bps per annum, calculated from the end of each quarter in which such excess Annual Fee was paid till the date of return of the aforesaid amounts;

Award:

(a) The amounts paid by DIAL towards electricity/power charges to BSES Rajadhani Power Ltd. and amounts paid by DIAL towards property taxes to municipal authorities between 21.6.2015 to 30.9.2018 and between 1.10.2018 to date of award, are directed to be excluded under first part of Exclusion (a) in the definition of "Revenue". The amounts to be so deducted shall be determined by the independent auditor appointed under Clause 11.2 of OMDA within three months from today. DIAL is entitled to the credit of 45.99% of the amounts so determined by the independent auditor. The claim in this behalf relating to the period up to 21.6.2015 is rejected.

(b) If any amount has been received by DIAL by sale of any capital assets/items between 1.10.2018 until date of award, the same shall be calculated and determined by the independent auditor appointed under Clause 11.2 of OMDA within three months from today and DIAL is entitled to deduction of the said sum from "Revenue" and consequently DIAL will be entitled to credit of any amount paid as Annual Fee on such sum.

(c) DIAL will be entitled to adjust the excess payments, determined by the independent auditor (in regard to electricity/power charges and sale of capital assets) towards future Annual Fee payable by DIAL.

(d) The following prayers for refund of 'excess' Annual Fee paid for the period 2006-2007 to 2018-2019 (30.9.2018) and for the period 1.10.2018 to date of award, are rejected:

(i) on account of failure to deduct 'depreciation, interest on debt and return on equity'/PSF(FC) and UDF, from 'all pre-tax gross revenue'.

(ii) on account of failure to deduct 'Other Income' from 'all pre-tax gross revenue'.

(iii) on account of payments made to AAI, expenses incurred for or on behalf of AAI and expenses incurred for or on behalf of Relevant Authorities (except the

prayer relating to power/electricity charges and property taxes separately considered).

(e) The prayer for return of Rs. 8.95 Crores (45.99% of Rs. 19.46 Crores) on account of sale of capital assets is rejected.

(f) The prayer for return of Rs. 10.76 Crores being the penal interest (paid under Article 11.1.2.3 of OMDA) is rejected.

(g) The claim for interest for the period 03.05.2006 to 30.09.2018 is rejected.

IX. Prayer in para 78(e) of SoC : Grant all costs of the arbitration to the Claimant.

Award : Both parties are directed to bear their respective costs.

X. Prayer in para 78(j) of SoC : Direction that the Claimant shall be entitled to setoff the amounts awarded in terms of Prayers (a) to (e) above or any part thereof against any and all amounts including Annual Fee payable to the Respondent from time to time until full recovery/payments of the awarded amounts;

Award : This relief has been granted above in Item No. VIII above.

XI. Prayer in para 78(g) of SoC : Grant such further and other reliefs as the nature and circumstances of the case may require.

Award : NIL"

iv. The Majority Opinion

48. Turning then to the Majority Opinion which came to be pronounced in the case of DIAL, the Co-Arbitrators firstly concurred with the Minority view insofar as arbitrability of disputes was concerned. However, they expressed their inability to concur with that opinion insofar as the declaratory reliefs which were sought in Para 78 (a) of the Statement of Claim[17] of DIAL.

49. The first and principal issue which consequently came to be flagged was the exclusion of certain sums from the receipts credited to the Profit & Loss account of DIAL and the Majority thus proceeding to examine as to what would fall within the meaning of the expression "shareable revenue". After taking note of the provisions contained in the Project Agreements, they observed as follows:

"30. Obviously designing, construction, up-gradation, modernisation, operation, maintenance and development are all facets of the AIRPORT BUSINESS of the Airport assigned/granted to the JVC by AAI. JVC is also obliged under the GRANT to perform inter alia Aeronautical and Non-Aeronautical Services. For the

purpose of providing services either Aeronautical or Non-Aeronautical etc., appropriate infrastructure is required to be developed/created. Necessarily, the development of such an infrastructure requires huge amount of funding. Requirement of funding does not end with the creation of the necessary assets for rendering the services, appropriate personnel are required to be employed and necessary materials are required to be procured from time to time in order to render the above mentioned services. Such assets are required to be upgraded and modernised from time to time. JVC is obliged under OMDA to systematically undertake such activities in accordance with the stipulations contained in OMDA. JVC is also obliged to pay AAI an Upfront Fee and Annual Fee specified under Article 11.1 of OMDA, apart from various other amounts (such as Taxes and Fees payable under various laws and/or contracts.) To perform all those activities, JVC obviously requires huge amount of finances on a continuing basis throughout the subsistence of OMDA.

31. Such finances obviously are required to be raised by JVC either by drawing money from its equity or by borrowing from the Banks and other Financial Institutions. The other source of such finances is funds generated by carrying on 'Airport Business' and collecting various CHARGES etc. in accordance with the terms of OMDA.

32. Initially the funds required for creating all those Assets can only come either from the equity of JVC or borrowed by JVC from Financial Institutions. Necessarily, such borrowed amounts will have to be repaid to the lenders with appropriate interest. Similarly, the amounts drawn from the equity of JVC belongs to the investors/shareholders of JVC who would naturally expect not only to redeem the principal amount invested by them but also some profit/dividend thereon. Such repayments are possible only if JVC is able to recover sufficient amount of money through the collection of appropriate CHARGES Aeronautical and Non-Aeronautical, etc. We have already taken note of the fact that the need to employ funds does not stop with the creation of Assets. Funds are required throughout the subsistence of OMDA to full fill the obligations undertaken by JVC.

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35. It is apparent from the scheme of OMDA discussed so far that the demised property is the property over which the Delhi Airport exists. It vested in AAI and was being operated by AAI prior to OMDA. That property was leased under the LEASE DEED dated 25.04.2006 to JVC to enable it to exercise the Rights and perform the obligations arising out of the GRANT made under OMDA.

The legal relationship arising out of the OMDA and other Project

Agreements is designed to promote and operate an efficient commercial enterprise i.e. in the interest of BETTER MANAGEMENT OF THE AIRPORT (see Preamble to OMDA). If JVC - a commercial enterprise is required to invest huge amounts of funds (either from it's capital or borrowed) for fulfilling various obligations incurred by it under OMDA. Necessarily JVC will have to recover sufficient amounts in order to discharge IT's legal obligations to the lending Financial Institutions, etc. and IT's shareholders. It is in recognition of the fact that JVC is required to meet the above financial obligations to its lenders and shareholders; OMDA expressly confers necessary authority and right in favour of JVC to collect various CHARGES and Fees.

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37. Article 12.1.1 of OMDA declares that the Aeronautical Charges are charges that could be collected from the users of Aeronautical Services rendered by JVC and the purpose of collection of Aeronautical Charges is to recover the costs relating to the Aeronautical Assets.

> *".. . For the purpose of this Agreement, the charges to be levied at the Airport by the JVC for the provision of Aeronautical Services and consequent recovery of costs relating to Aeronautical Assets shall be referred as Aeronautical Charges ..."*

OMDA clearly recognises under Article 12.1.1 that the provision of such Aeronautical Services require creation, operation and maintenance of certain Aeronautical Assets. Therefore, Article 12.1.1 stipulates in express terms that the Aeronautical charges are meant to enable JVC to recover costs relating to aeronautical assets. The language is very significant. The purpose of collecting Aeronautical Charges is not to recover the costs of the creation of Aeronautical Assets alone. The purpose is to recover the costs RELATING TO Aeronautical Assets. Normally, it can only mean ALL the expenditure incurred by the JVC in relation to the AERONAUTICAL ASSETS. Therefore, the expression should comprehend not only the costs incurred by the JVC for the creation of Aeronautical Assets but also for the costs for the maintenance, upgradation of the Aeronautical Assets and providing various Aeronautical Services (specified in Schedule 5 to OMDA) but also the costs for securing and retaining the right to perform the AERONAUTICAL SERVICES i.e. the Upfront Fee and the Annual Fee."

50. Proceeding further to Chapter XI itself, the Majority observed:

"42. Be that as it may, the dispute on hand is essentially about the contours of the OBLIGATION of the JVC to pay the ANNUAL FEE and the magnitude of the financial liability. The legal obligation of th

JVC to pay the Annual Fee arises under Article 11.1.2.1 which reads:

> *"... The JVC shall pay to the AAI an annual fee (AF) for each year during the term of this agreement of the amount set forth below:*
>
> *AF = 45.99% of Projected Revenue for the said year Where Projected Revenue for year shall be as set forth in the Business plan ...."*

It obligates JVC to pay 45.99% of the PROJECTED REVENUE of the year to AAI. It can be seen from the above extracted Article, the Article itself clarifies that the PROJECTED REVENUE for each year is AS SET FORTH IN THE BUSINESS PLAN.

The expression 'PROJECTED REVENUE' is not defined. Therefore, its meaning is required to be ascertained.

OMDA refers to various PLANS.

(i) initial Development Plan,

(ii) Master Plan,

(iii) Major Development Plan, and

(iv) BUSINESS PLAN.

The expression 'Business Plan' is defined in Article 1.1 of the OMDA to mean

> *"... the plan for the 'AIRPORT BUSINESS' updated periodically from time to time setting out how it (the JVC) is intended to operate, manage and develop the Airport over a planning horizon and will include financial projections for the plan period ... ".*

The expression 'Airport Business' is defined in the OMDA as

> *"... Airport Business shall mean the business of operating, maintaining, developing, designing, constructing, upgrading, modernising, financing and managing the Airport, and providing AIRPORT SERVICES ..."*

From the above, it can be seen that Airport Business contains various components mentioned in the definition. 'Providing Airport Services' is one of the elements of the 'Airport Business'.

'Airport Services' is defined in OMDA to mean

> *"... the services constituting Aeronautical Services and Non-Aeronautical Services ... ".*

OMDA is silent about the periodicity of the 'Business Plan', by an implication from the scheme of Article 11.1.2.1 and the definition of the expression 'Business Plan, such a 'Business Plan' is required to be prepared by JVC (for each YEAR). It must contain along with other information, the FINANCIAL PROJECTIONS for the plan period. Obviously such projections should include:

(i) the various heads of expenditure to be incurred for operating,

maintaining, developing, etc. of the AIRPORT and providing AIRPORT SERVICES and

(ii) CHARGES/cash to be received from the USERS who avail the AIRPORT SERVICES of the AIRPORT, etc.

43. The FINANCIAL PROJECTIONS must also include "PROJECTED REVENUE" which JVC is required to share with AAI. The legal right to prepare the BUSINESS PLAN and make the FINANCIAL PROJECTIONS can only be with JVC because the JVC is GRANTED the right to carry on the AIRPORT BUSINESS. If such conclusion follows from the Scheme of OMDA particularly from the definition of the expression 'BUSINESS PLAN' where the expression 'FINANCIAL PROJECTION', occurs. Coupled with the stipulation under Article 11.1.2 saying that "where the Projected Revenue for each year shall be AS SET FORTH in the BUSINESS PLAN", it would be the legal right of JVC to set forth in the Business Plan, the Projected Revenue by appropriately providing for the deduction of the COSTS RELATING TO AERONAUTICAL SERVICES. Apparently the JVC fell into error by declaring in the BUSINESS PLANS submitted for successive years that all Cash Received by it to be its 'SHARABLE REVENUE'. Obviously it happened because the JVC followed the accounting practices applicable to the Companies registered under the Companies Act, (as required under sec 211 read with part 11 of the companies act) in preparing the annual Profit & Loss Statement without clearly analysing and understanding its RIGHTS flowing from the SCHEME and TEXT of OMDA. JVC failed to distinguish between the accounting practice of identifying the REVENUE for the purpose of preparing the annual PROFIT & LOSS Statement of JVC as required under the Companies Act and the need to identify 'PROJECTED REVENUE' for the purpose of sharing the same with AAI. It must be remembered that the obligation of JVC under Article 11.1.2.1 is to share only 45.99% of the 'PROJECTED REVENUE' but not the 'Revenue' as understood in the accounting parlance. The JVC while making the 'FINANCIAL PROJECTIONS' ought to have clearly identified its 'Projected Revenue' for the purpose of sharing with AAI after excluding the amounts necessary for RECOVERING the COSTS RELATING TO THE AERONAUTICAL ASSETS which includes the amount needed for discharging its obligations towards repayment of the installments of borrowed capital and the interest thereon. They are outstanding legal liabilities owed to the third parties such as banks and other financial institutions. In our opinion, in law, JVC would be perfectly justified in making such a Financial Projection. If all the cash receipts of the JVC are to be shared with the AAI, there is no purpose in the stipulation under Article 11.1.2.1 that

Annual Fee= 45.99% of Projected Revenue for the said year where

Projected Revenue for each year shall be set forth in the Business Plan".

If the submission of AAI that all the cash received by JVC is required to be shared with AAI is right, it would have sufficed to state in Article 11.1.2.1 that Annual Fee = 45.99% of the REVENUE. However, both JVC and AAI proceeded on the mistaken understanding that the Annual Fee payable by JVC is 45.99% of the "Revenue" as defined under OMDA.

Therefore, according to AAI, the entire pre-tax gross revenue i.e. all the money received by JVC from whatever source (for the sake of convenience hereafter referred to as 'RECEIPTS') unless anyone of those receipts falls under one of the five Heads of the excluded classes of financial transactions, enumerated in the definition of the expression 'Revenue' is liable to be taken into consideration for the purpose of sharing 45.99% thereof towards the Annual Fee.

44. On the other hand, it is the case of JVC that conceptually, revenue and cash receipts cannot be equated. To treat every RECEIPT as 'REVENUE' would lead to absurd commercial consequences. More so, having regard to the scheme of the OMDA, which restricts JVC's liberty to recover the amounts incurred by it for securing and performing the various obligations arising out of the contract (OMDA) by collecting and appropriating sufficient AERONAUTICAL CHARGES. Therefore, it must be understood in the commercial sense i.e. in the light of the well established principles of commerce."

51. It thereafter proceeded to significantly observe as under:

"45. In our opinion, both the parties misconstrued the OMDA and the legal obligation of JVC thereunder to pay the Annual Fee.

AAI is happy with such construction because it is more beneficial to AAI. On the part of JVC wisdom dawned on the JVC partially when IT realised after few years of the working of OMDA that such construction would never enable IT to service the DEBT incurred by IT. Therefore, by seeking to read a limitation in to the definition of REVENUE based on some purported commercial sense, raised a dispute regarding their liability, which eventually lead to this Arbitration. A classic demonstration of the adage that 'those who do not learn things by their brains will be compelled to learn by their stomach' - JVC would have done better by properly analysing the scheme and TEXT of the OMDA to understand its obligation i.e. to share 45.99% of its PROJECTED REVENUE with AAI.

Interpretation and construction of documents is always considered to be a question of law. In deciding the questions of law &public policy, etc. court/adjudicator is not bound by the understanding of the parties but owes a legal duty to take note of the correct legal

position. In our opinion, the duty of an Arbitrator (Adjudicator) is no different. To drive home the point, it may be stated if a dispute seeking the enforcement of a contract between an alien enemy and a citizen come for arbitration, whether somebody raises it or not, that one of the parties is an alien enemy and, therefore, the contract cannot be enforced is bound to be taken note of by the Arbitrator.

46. Enormous time and energy is spent by the learned counsel appearing on either side to expound the meaning of the expression "Revenue".

Number of decisions are cited on either side in support of their respective submissions as to the construction of expression 'Revenue' and 'Pre-Tax Gross Revenue' occurring in the definition of the expression 'Revenue'. Those decisions are elaborately discussed by the learned Presiding Arbitrator.

AAI's submission proceeded on the basis that what is sharable by the JVC is the total 'Pre-Tax Gross Revenue'. AAI for the said purpose relied on two American decisions in *Public Service* v. *Denver*, 387 P.ED 33 (Colo.1963) and *Lane Electric Cooperative Inc.* v. *Department of Revenue*, 765 P.2D 1237 (Or.1988). These two decisions deal with the construction of expression 'Gross Revenue' and 'All Gross Revenue'. Relying on them, AAI argued that the definition of the expression 'Revenue under OMDA cannot be read countenance to any limitations other than those expressly mentioned in the definition by resorting some undefined concept of commercial sense, as argued by JVC.

Reliance is also sought to be placed on the judgment of Supreme Court in reported in (2018) 3 SCC 716-*Transmission Corporation of Andhra Pradesh* v. *GMR Vemagiri Power Generation Ltd.* In our opinion, the said judgment would support the argument of JVC than the submission of AAI. At paragraph 26 of the said judgment, the Supreme Court recognized the possibility of interpreting a commercial document in a manner to arrive at a conclusion which is at complete variance what may originally the intendment of the parties and such a situation can only be contemplated when the implied terms can be considered to lend efficacy to the terms of contract. Insofar as it is relevant for our purpose, reads as follows:

> *A commercial document cannot be interpreted in a manner to arrive at a complete variance with what may originally have been the intendment of the parties. Such a situation can only be contemplated when the implied term can be considered necessary to lend efficacy to the terms of the contract. If the contract is capable of interpretation on its plain meaning with regard to the true intention of the parties it will not be prudent to*

read implied terms on the understanding of a party, or by the court, with regard to business efficacy.

The said decision also recognizes the possibility of implied unexpressed terms in a commercial contract relying upon the judgment of the House of Lords in (1973) 2 AllER 260 (HL), at p. 260 at page 268, where it was held:

An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract : it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them : it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.

In our opinion, all the above-mentioned judgments do recognize the possibility of implying a term into the commercial contract. Secondly, the Court also recognized the possibility of Business Efficacy Test in certain circumstances. At paragraph 35 of the judgment in *United India Insurance Co. Ltd.* v. *Manubhai Dharmasinhbhai Gajera*, (2008) 10 SCC 404, it was held in this regard, as follows:

The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement. …"

We are not really required to read any implication of commercial efficacy into the definition of the expression 'Revenue' under OMDA. As already mentioned, in our opinion the whole enquiry is misdirected. The obligation of the JVC is to share 'Projected Revenue' but not 'Revenue'. AAI case is that JVC is liable to share a part of the 'Revenue' as defined under OMDA. By adopting such an approach, AAI clearly ignores the language of OMDA which says under Article 11.1.2.1 that the Annual Fee is 45.99% of the "Projected Revenue for the said year"."

52. As is apparent from the above, the Majority principally found that both sides had misconstrued the terms of the contract and commended for the consideration of the Tribunal a view which was clearly misconceived. In its opinion, the obligation of the JVC was to share 'projected Revenue' as opposed to 'Revenue'. It thus observed that the heart of the dispute would be the meaning to be ascribed to the expression "projected Revenue" as occurring in Chapter XI.

53. Proceeding further to trace the various policy and legislative measures which had been adopted by the Union to uplift and upgrade

the aviation sector, the Majority took note of the following developments:

"49. The context in which the meaning of the expression 'PROJECTED REVENUE' is to be understood is the legal obligation of JVC to pay the ANNUAL FEE to AAI. In order to understand the true nature and purport of the obligation to pay the Annual Fee by JVC (under Article 11 of the OMDA), the following factors are required to be kept in mind.

A Corporation (AAI) deriving its authority from a statute entered into a commercial contract (OMDA) professedly to achieve the purposes indicated in the parent statute which created the AAI.

The authority of AAI to enter into a contract like OMDA flows from Sec. 12-A of the Airports Authority of India Act, 1994. The amplitude of the authority of the Respondent/AAI is also structured by the text and scheme of the AAI Act.

Therefore, the purpose sought to be achieved by the introduction of Sec. 12-A and the scheme of Sec. 12-A and Other connected provisions require examination.

It is already noticed that AAI came to be constituted by Act No. 55 of 1994. According to the Preamble of the Act, the purpose behind the creation of the Respondent Corporation is to provide better administration and cohesive management of the Airports and civil enclave. With the coming into existence of AAI all the Airports which had earlier vested in two statutory bodies (the history is already noted), stood transferred to AAI. THOUGH Section 12(1) declared that:

"... it shall be the function of the Authority to manage the Airports.....efficiently':

Within a decade thereafter, the Parliament opined that there is *"... need to improve the standard of services and facilities at the Airports to bring them at par with international standards".*

Obviously, Parliament was not happy with the existing state of affairs and the way AAI managed the airports and felt the need to improve the infrastructure and efficiency of the services at the Airports. Further Parliament was of the view that:

".. .in order to facilitate the process of such improvement there is need both for the infusion of private sector investment as also for restructuring of Airports. This will speed up airport infrastructure development, improve managerial efficiency ... ".

50. It is obvious that the Parliament was convinced that under the control and management of the AAI it is not possible either to 'Speed up Airport Infrastructure Development' or 'improve the

managerial efficiency'. The result is the Amendment Act 43 of 2003 by which Sec. 12A came to be introduced along with certain other amendments to the Parent Act. The scope of Sec. 12-A insofar as it is relevant for our purpose is already noticed earlier. But it is worthwhile recollecting that AAI is predominant purpose in leasing out the Delhi Airport as stated in OMDA is .. 'in the interest of better management of the Airport and or overall public interest'. No doubt, better management of the Airport would certainly be an aspect of overall public interest, though in the context of the GRANT the expression overall public interest may take within its sweep many other elements. But from the language of the OMDA what prevailed in the mind of the AAI appears to be that leasing of the Airport in question is in the interest of better management of the Delhi Airport. Examined in the light of the prefatory note - Statement of Objects and Reasons of Act 43 of 2003, the purpose of the Amendment is to provide statutory architecture for entrusting certain aspects of the operation and management of the Airports in order to improve the standard of services and facilities at the Airports to bring them on par with international standards i.e. BETTER MANAGEMENT OF THE AIRPORT as stated in Sec. 12-A.

51. For such improvement, it was felt by Parliament that there was a need for the infusion of private sector investment in order to speed up Airport Infrastructure Development and also improve Managerial Efficiency. In obedience to the mandate of the Parliament, AAI made the 'GRANT' under the OMDA. Consequently, JVC invested huge amounts of money in designing and developing the Aeronautical Assets. Such money is in two components - Equity of JVC and Borrowed Capital from the Banks and other Financial Institutions.

i) investment of money by the JVC is not one time affair, but it is a continuing process throughout the tenure of OMDA.

ii) It is a commercial venture which the JVC undertook and necessarily the JVC is bound to make every effort to recover its investment over a period of time and also make some profit.

Normally, any prudent businessman/organisation would seek to recover the investments made by collecting appropriate amounts from the users of the facility and the services offered by the businessman/organisation. What would be the appropriate charges is a matter normally required to be determined by the businessman/organisation."

54. While seeking to discern the true meaning liable to be accorded to 'projected Revenue', it made the following pertinent observations:

"53. The most significant factors which throw ample light on the scope, contours and expression 'Projected Revenue' are:

(i) clause 12.1.1 of the OMDA - makes it explicit that the purpose of collection of the Aeronautical Charges is to enable the JVC to 'recover the costs relating to Aeronautical Assets'

(ii) the limitations imposed by the SSA on the JVC to collect necessary charges from the users of the Airport to avail Aeronautical Services by expressly stipulating that the amounts of Annual Fee payable by the JVC to the Respondent cannot be taken into consideration by AERA while determining the TARIFF for AERONAUTICAL SERVICES

coupled with the fact that 45.99% of the 'REVENUE' of JVC is to be shared with AAI, that should straightaway reduce the possibility of recovering the costs relating to the AERONAUTICAL ASSETS from the users of those assets by 45.99% - IF the expressions REVENUE and PROJECTED REVENUE are understood to be synonyms. If all the cash RECEIPTS are treated as REVENUE to be shared by JVC with AAI, such construction would destroy substantive rights of the JVC flowing from Article 12.1.1 to collect and appropriate under Article 2.1.2(iii) AERONAUTICAL CHARGES in order to RECOVER the COSTS RELATING to the AERONAUTICAL ASSETS. Such a destruction is a consequence of the imposition of a limitation under SSA on the substantive right of JVC by excluding certain relevant elements from consideration for determining Aeronautical Charges (that can be collected by JVC) without actually amending Article 2.1.2(iii) and Article 12.1.1 of OMDA. Therefore, the rights under the said Article would by necessary implication become a limitation on the amplitude of the expression 'PROJECTED REVENUE' and (an important factor in ascertaining the true meaning of the expression PROJECTED REVENUE). Such an implication has to be legally read into OMDA. It is a permissible way of construing the contract as pointed by the Supreme Court in *Khardah Company Ltd.* v. *Raymon & Co. (India) Pvt. Ltd.*, (1963) 3 SCR 183:

> *"... The terms of a contract can be express or IMPLIED from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well established that in construing it would be legitimate to take into account surrounding circumstances ..."*"

55. Insofar as the interplay between OMDA and the SSA and the commercial principle which stood embodied therein was concerned, it held:

> "55. It is the agreed case of JVC that the method of determining the tariff (in theory) and also the tariff fixed in the last ten years did provide over a period of tenure of OMDA to enable the JVC to recover all the costs incurred or to be incurred by it for fulfilling its

obligations arising under OMDA but for the only hitch that JVC is being called upon to part with 45.99% CHARGES/RECEIPTS collected for rendering the AERONAUTICAL SERVICES thereby making it a mathematical impossibility to recover the costs relating to AERONAUTICAL ASSETS.

56. If all the cash received by collecting Aeronautical Charges fixed by AERA from the users of the Airport is to be treated as REVENUE to be shared with AAI (for the sake of convenience it may be called 'Sharable Revenue') of JVC, without providing for the deduction of necessary amount to service the DEBT (amounts borrowed to create and upgrade from time to time the AERONAUTICAL ASSETS and the amount required to maintain and operate the AERONAUTICAL ASSETS-which JVC claims as CAPITAL COST). It would result in a situation where JVC would not be able to recover the costs relating to the AERONAUTICAL ASSETS from the AERONAUTICAL CHARGES collected from the users of those ASSETS. Consequently, in the failure of the efficient management of the Airport, the avowed object for which the 1994 Act was amended to enable the AAI to ASSIGN its functions to a private party and to the professed purpose of AAI in entering the OMDA. It must be remembered that all amounts borrowed are required to be paid with a contractually fixed interest. The obligation to repay the borrowed amounts with interest is a liability of JVC owed to third parties. The method and manner of repayment (the terms of repayment) are determined by contract at the time of borrowing. Treating all cash received by JVC without providing for the repayment of the DEBT and interest thereon, as a SHARABLE REVENUE would only lead to a situation of impossibility of recovering the costs relating to the AERONAUTICAL ASSETS from the AERONAUTICAL CHARGES, thereby disabling JVC to service the debts secured by it for developing and operating the Airport. Such disability results in the destruction of a right expressly conferred under Article 12.1 on JVC to recover the costs relating to the ERONAUTICAL ASSETS by collecting AERONAUTICAL CHARGES. Ultimately resulting in the failure of the efficient administration and better management of the AIRPORT - one of the purpose sought to be achieved under Sec. 12A (1) of Act 55 of 1994.

The remedy suggested by AAI is that JVC should generate funds from NON AERONAUTICAL SERVICES to meet the shortfall in the COSTS RELATING TO AERONAUTICAL ASSETS.

In our opinion such a course of action would be plainly inconsistent with the right of JVC under Art 12.1.1 of OMDA to recover the costs relating to the aeronautical assets by collecting aeronautical charges. The submission is therefore required to be

rejected.

57. In our opinion, JVC would be perfectly justified in law by making such a financial Projection in the light of the right flowing in favour of the JVC under Article 12.1.1 of OMDA which declares that the purpose of collecting the AERONAUTICAL CHARGES is to recover the COSTS RELATING TO THE AERONAUTICAL ASSETS. There can only be two ways JVC could recover such costs (i) by passing on the legal liability to repay the borrowed capital along with the interest to the users of the Airport services or (ii) by excluding the amount representing such costs from the revenue sharable with AAI. Since JVC is expressly forbidden from passing on the liability to the users of the Airport Services, the only option left to JVC is to exclude the amount of COSTS RELATING TO AERONAUTICAL SERVICES from the revenue sharable with AAI - by appropriately working out the PROJECTED REVENUE in making the FINANCIAL PROJECTIONS while preparing the BUSINESS PLAN for each year."

56. It consequently came to the following significant conclusions:

"62. For the above mentioned reasons, the claim of JVC to the extent of the "Costs relating to the aeronautical assets" as explained above are required to be excluded for the purpose of arriving at the 'SHARABLE REVENUE/PROJECTED REVENUE' by JVC with AAI is required to be accepted-but not Capital Costs as claimed by JVC.

Costs relating to Aeronautical Assets would be the amounts spent on creating, operating, maintaining and upgrading the Aeronautical Assets whether such amounts come from the equity of JVC or borrowed by JVC from banks and other financial institutions. Necessarily, the interest payable on the borrowed amounts for the above mentioned purposes also forms part of the costs relating to the Aeronautical Assets. The claim of JVC to the above mentioned extent is required to be allowed declaring as such.

The question of refund of the amounts wrongly paid would be discussed later.

However, interest on the amounts insofar as they are from the equity of JVC cannot be deducted as there is no legal liability on the part of JVC to pay interest on such amount. There is only a commercial expectation to earn a profit on the investment but not any legal right in favour of either JVC or its shareholders. At the end of the day, when all other legal commitments of JVC are met, if JVC is still left with surplus money, it can be shared by the shareholders of JVC. It is a chance every investor legally takes and a risk inherent in any business. Therefore, the claim of JVC insofar as it pertains to RETURN ON EQUITY must fail."

57. The Majority also found itself unable to concur with the opinion expressed in respect of Other Income. Dealing with this question, it

held as under:

"65. It is the case of JVC that various amounts received under the above-mentioned heads are amounts received by JVC not because of any right created under the OMDA or any other PROJECT AGREEMENT, but as a part of prudent commercial operation of the JVC. For example, when the JVC makes some investment in the shares of other Companies and such shares fetch a dividend OR profit because of the appreciation of their value, neither the decision to make such investment nor the fact that such investment fetched some dividend or profit has any relationship with the contractual rights and obligations created by the GRANT under OMDA or any other PROJECT AGREEMENT. The GRANT consists of only *"…, the exclusive right and authority during the Term to undertake some of the Junctions of the AAI being the functions of operation, maintenance, development, design, construction, upgradation, modernisation, finance and management of the Airport and to perform services and activities consisting Aeronautical Services and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport ….."*

Further under Article 2.2 of OMDA, it is stated as follows:

"2.2 Sole Purpose of the JVC

2.2.1 The]VC having been set up for the sole purpose of exercising the rights and observing the performing its obligations and liabilities under this Agreement the]VC or any of its subsidiaries shall not, except with the previous written consent of AAI, be or become directly or indirectly engaged, concerned or interested in any business other than as envisaged herein."

Therefore, when JVC is depositing cash available with it in some Bank from time to time, JVC is only making an appropriate arrangement for safeguarding the amounts collected and lying with it but not carrying on any independent business. Such activity does not form part of the 'Airport Business' as defined. One of the component elements of the AIRPORT BUSINESS is to provide AIRPORT SERVICES defined under OMDA'

'shall mean *the services constituting Aeronautical Services and Non-Aeronautical Services.'*

66. The contention of AAI is that JVC is able to generate 'other income' only as a consequence of the GRANT of exclusive right and authority by AAI to undertake Aeronautical and non-aeronautical services, therefore such 'other income' forms part of 'Revenue' and is sharable.

67. In our opinion, AAI's submission cannot be accepted. Because JVC has no obligation arising from the OMDA to carry on anyone of

the activities leading to the earning of income/money under those various heads from which the 'other income' is derived. For the sake of argument,-if it is assumed-that if the JVC decides not to make any investment of the cash in its hands, either by making deposits in any bank or purchasing some shares or other securities, obviously no further income accrues from that cash lying idle in the hands of the JVC. AAI cannot either compel JVC to make such arrangement or terminate OMDA. Because such inaction on the part of JVC would not have any adverse legal consequences for JVC with reference to OMDA. It does not constitute an event of default on the part of JVC under Article 17.2 entitling AAI to terminate OMDA."

58. Insofar as Upfront Fee is concerned, the Majority concurred with the view expressed by the Presiding Arbitrator. They also expressed agreement with the Presiding Arbitrator insofar as retirement compensation, power and electricity charges, payments towards water, sewerage and analogous utilities as well as property tax.

59. Concurrence was also expressed on the question of limitation as would be apparent from a reading of the following paragraphs forming part of the Majority Opinion:

"99. Coming to the dispute No. 2 regarding whether the Claims either wholly or partly are barred by limitation, the DA records at paragraph 217 that the period of limitation applicable to the case falls under Article 113 of the Limitation Act, 1963 for the reasons recorded in paragraph 218. Thereafter, the DA concludes,

Therefore, the date of commencement of arbitration will have to be treated as 21.6.2018 by excluding the notice period of sixty days, by applying Section 15 (2) of Limitation Act. Consequently, any excess payment made within three years prior to 21.6.2018 i.e., any excess payment made on or after 21.6.2015, will be within limitation.

We respectfully agree with the conclusions.

For recording the above mentioned conclusions, the DA recorded the finding that the benefit of extended period of limitation, prescribed under Sec. 17 of the Limitation Act, will not be available to JVC on two grounds. *Firstly* with reference to the majority of the claims, in view of the conclusion recorded in the DA that most of the claims are untenable, the question whether there was a payment by mistake did not arise. *Secondly*, though with reference to some of the claims, the DA agreed that JVC is entitled to succeed with reference to certain payments made, obviously on the ground that the payments are made by mistake, but opined that to claim the benefit of Sec. 17 of the Limitation Act, JVC must establish that the mistake could not be detected in spite of it's due diligence but JVC failed to establish the exercise of due diligence on it's part.

100. With reference to the first of the two conclusions recorded in the DA that most of the claims are untenable, We have already recorded our disagreement with some of those conclusions and necessarily it follows that those amounts were paid by mistake arising out of a misunderstanding of the legal obligations arising under the OMDA. Therefore, with reference to such claims, the period of limitation would be three years prior to 21.06.2018 as pointed out in the DA. In other words, the amounts paid by mistake on or after 21.06.2015 will be within the period of limitation and the JVC would be entitled to recover the same from the AAI.

101. Coming to the question whether the JVC is entitled to the benefit of Sec. 17 of the Limitation Act, in the DA the learned Presiding Arbitrator opined that JVC is not entitled to the benefit of Sec. 17 of the Limitation Act.

We respectfully agree for the following reasons:

The mistake such as one pleaded by the JVC is mistake of law i.e. wrong understanding of the legal implications of various provisions of OMDA and SSA. Such a mistake could have been discovered only on a diligent analysis of the scheme, tenor and implications of the above mentioned two contracts. Such an analysis is possible only for a well trained legal mind. Obviously, JVC did not avail itself of such legal assistance. It must be remembered that the two contracts mentioned above, coupled with various other attendant circumstances, discussed earlier, created a very complicated legal regime. Such contracts are the first of their kind in this country. JVC carrying on business with investment running into thousands of crores, cannot be said to have acted diligently in the factual background of the case when IT TOOK ALMOST a DECADE to realize it's mistake to enable the JVC to claim the benefit of Sec. 17 of the Limitation Act."

60. On the basis of the aforesaid, the Majority framed the relief liable to be accorded in the following terms:

"RELIEFS

102. In view of the foregoing discussion, it follows that apart from the claims allowed by the learned Presiding Arbitrator, in our opinion JVC is entitled to succeed in its claim for the following declarations:

(i) that for the purpose of computing the Annual Fee payable by JVC the amounts representing the COSTS RELATING TO AERONAUTICAL ASSETS shall be excluded from the SHAREABLE REVENUE of JVC i.e.

(a) the amounts spent from the borrowed capital (proportionate to each succeeding year along with the interest payable thereon) and

(b) the amount spent, if any, from the equity of JVC towards the COSTS RELATING TO THE AERONAUTICAL ASSETS are liable to be excluded from the 'Revenue' of the JVC

(ii) the JVC is entitled for a further declaration regarding the excess payment made by JVC from 21.06.2015 by mistakenly computing the Annual Fee without deducting the amounts falling under the above mentioned Heads mentioned in the previous sub-paragraph, are liable to be refunded.

103. For arriving at the actual figure of the amount which are liable to be deducted from the total receipts of JVC under the heads of Aeronautical Charges and Non-Aeronautical Charges, it requires a very careful examination of the accounts of JVC for the period commencing from 21.06.2015. Therefore, such examination shall be undertaken by the Independent Auditor to determine the actual amounts liable to be deducted for the period commencing from 21.06.2015 to the date of this Award. Once such determination is made, the Annual Fee payable by JVC for each succeeding financial year commencing from 21.06.2015, is required to be re-calculated by the Independent Auditor. The difference between the actual amounts already paid towards the Annual Fee by JVC for each of the above mentioned years and the amount determined by the Independent Auditor as Annual Fee, as mentioned above, is liable to be refunded. However, We deem it appropriate that such amounts be given credit to while computing the Annual Fee payable by JVC in future. Whether the entire amount (liable to be refunded) is required to be given credit to in one or in three equal installments in three different financial years, is at the discretion of the AAI.

104. Similarly, the JVC is entitled for a declaration, the amounts falling under the Heads:

(a) Property Tax

(b) Other Income; and

(c) Costs relating to Security Equipment and Maintenance are liable to be excluded from the Annual Revenue of the JVC for the purpose of computing the Annual Fee payable by the JV.

JVC is also entitled for a declaration, the amounts falling under the above mentioned Heads from 21.06.2015 are liable to be excluded from the REVENUE and the amount of 45.99% thereof is liable to be refunded after duly ascertaining the quantum after appropriate enquiry by the Independent Auditor.

The amounts so required to be refunded may be given credit to in one or three equal installments at the discretion of the AAI while determining the Annual Fee payable by JVC in future.

The reliefs granted above are in addition to the reliefs granted by

the learned Presiding Arbitrator, as mentioned in the DA."

61. Since the view expressed by the Tribunal on aspects relating to DIAL which have been extracted hereinabove were expressed in terms similar or identical for MIAL, we for the sake of brevity do not deem it necessary to extract the findings for MIAL at this juncture.

C. SUBMISSIONS

62. The learned Solicitor General as well as learned senior counsels who represented the respondents had, with their characteristic erudition, addressed elaborate submissions upon the various aspects pertaining to the challenge which stood raised and were addressed before this Court.

63. Apart from the above, respective sides had also placed on our record, detailed written submissions at different stages of the proceedings before this Court and as the hearings progressed. However, rather than reproducing them in their entirety and in order to lessen the burden on the body of this judgment, we have, independently consolidated and amalgamated those written submissions for the purposes of reference and consideration. Those submissions are being made part of the record in the following order:

A. Appendix A - Rejoinder Submissions on behalf of AAI

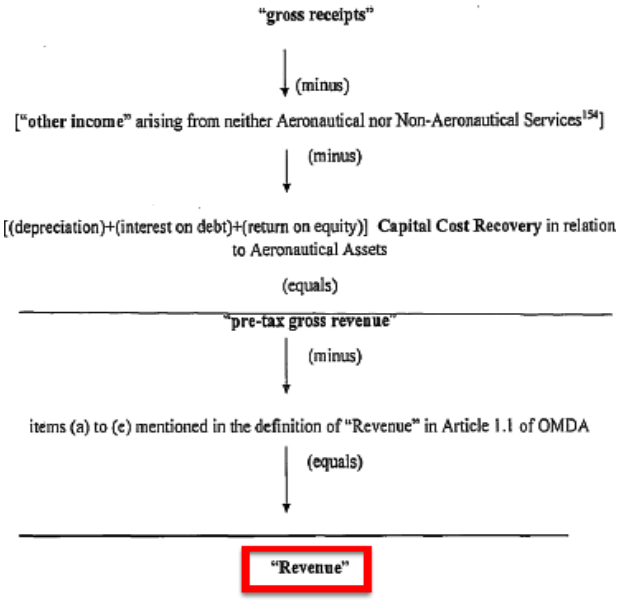
B. Appendix B - Combined Written Submissions on behalf of DIAL

C. Appendix C - Combined Written Submissions on behalf of MIAL

64. We thus proceed to chronicle the principal submissions which were advanced by the learned Solicitor General appearing for AAI.

v. AAI's submissions

65. The learned Solicitor, at the outset, drew our attention to a flowchart which had been presented by the respondents before this Court, as well as before the Tribunal, in order to explain and expand upon what according to them would constitute 'Revenue' under the OMDA. That flowchart is reproduced hereinbelow:



66. The learned Solicitor submitted that the claim of DIAL and MIAL could be broadly classified under the following heads:

(a) recovery of past excess payments of Annual Fee asserted to have been made under a mistake with regard to the meaning to be ascribed to the term 'Revenue'; and

(b) a declaration that DIAL/MIAL should be permitted to pay revenue as per their "revised understanding".

67. According to the learned Solicitor, while the Presiding Arbitrator had correctly concentrated its gaze upon the imperative need to discern the true meaning liable to be accorded to the word 'Revenue' as defined, the Majority has proceeded on a basis which neither constituted the foundation of the dispute, the pleadings of parties, or the arguments which were addressed. According to the learned Solicitor, the Majority has, in view of the above and in essence, proceeded down a path which was never suggested by parties quite apart from the fact parties were never put to notice of the requirement of meeting such a case.

68. Mr. Mehta submitted that the Majority proceeded on the premise that the obligation to pay Annual Fee is an issue which is liable to be answered not with reference to the word 'Revenue', but the concept of 'projected Revenue' which is spoken of in Article 11.1.2.1 of the OMDA. According to the learned Solicitor, this line of inquiry finds expression for the first time in the Impugned Award, since the same never constituted the case of either of the parties before the Arbitral Tribunal. It was the submission of the learned Solicitor that the conclusion of the Majority is clearly irreconcilable with the definition of 'Revenue' and

which had specifically alluded to only five heads which could be deducted to arrive at 'Revenue'. It was is in the aforesaid light that Mr. Mehta submitted that the Majority Opinion suffers from a patent illegality.

69. Before proceeding ahead, it would also be pertinent to take note of the contention of Mr. Mehta, who submitted that the Majority Opinion is rendered faulty, principally in light of the two learned Arbitrators having only partially reproduced Chapter XI of the OMDA. Mr. Mehta drew our attention to Para 24 of the Majority Opinion to highlight and underscore the fact that the Majority had chosen to extract only certain parts of Articles 11.1.1 and 11.1.2.1 of the OMDA. According to Mr. Mehta, the portions of Chapter XI which were crucial and of immense criticality, had thus been completely ignored and omitted from consideration.

70. Reverting then to the submissions which were addressed by Mr. Mehta in respect of the misdirected and undisclosed line of inquiry which was undertaken by the Majority, it was submitted that a completely novel line of reasoning came to be adopted by the learned Arbitrators constituting the Majority as would be manifest from a reading of Paras 46 and 47 of their opinion and which are extracted hereinbelow:

> "46. Enormous time and energy is spent by the learned counsel appearing on either side to expound the meaning of the expression "Revenue".
>
> Number of decisions are cited on either side in support of their respective submissions as to the construction of expression 'Revenue' and 'Pre-Tax Gross Revenue' occurring in the definition of the expression 'Revenue'. Those decisions are elaborately discussed by the learned Presiding Arbitrator.
>
> AAI's submission proceeded on the basis that what is sharable by the JVC is the total 'Pre-Tax Gross Revenue'. AAI for the said purpose relied on two American decisions in *Public Service* v. *Denver*, 387 P.ED 33 (Colo.1963) and *Lane Electric Cooperative Inc.* v. *Department of Revenue*, 765 P.2D 1237 (Or.1988). These two decisions deal with the construction of expression 'Gross Revenue' and 'All Gross Revenue'. Relying on them, AAI argued that the definition of the expression 'Revenue under OMDA cannot be read countenance to any limitations other than those expressly mentioned in the definition by resorting some undefined concept of commercial sense, as argued by JVC.
>
> Reliance is also sought to be placed on the judgment of Supreme Court in reported in (2018) 3 SCC 716-*Transmission Corporation of Andhra Pradesh* v. *GMR Vemagiri Power Generation Ltd.* In our opinion, the said judgment would support the argument of JVC than

the submission of AAI. At paragraph 26 of the said judgment, the Supreme Court recognized the possibility of interpreting a commercial document in a manner to arrive at a conclusion which is at complete variance what may originally the intendment of the parties and such a situation can only be contemplated when the implied terms can be considered to lend efficacy to the terms of contract. Insofar as it is relevant for our purpose, reads as follows:

> *A commercial document cannot be interpreted in a manner to arrive at a complete variance with what may originally have been the intendment of the parties. Such a situation can only be contemplated when the implied term can be considered necessary to lend efficacy to the terms of the contract. If the contract is capable of interpretation on its plain meaning with regard to the true intention of the parties it will not be prudent to read implied terms on the understanding of a party, or by the court, with regard to business efficacy.*

The said decision also recognizes the possibility of implied unexpressed terms in a commercial contract relying upon the judgment of the House of Lords in [1973] 2 All ER 260 (HL), at p. 260 at page 268, where it was held:

> *An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract : it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them : it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.*

In our opinion, all the above mentioned judgments do recognize the possibility of implying a term into the commercial contract. Secondly, the Court also recognized the possibility of Business Efficacy Test in certain circumstances. At paragraph 35 of the judgment in *United India Insurance Co. Ltd.* v. *Manubhai Dharmasinhbhai Gajera*, (2008) 10 SCC 404, it was held in this regard, as follows:

> *The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement. …"*

We are not really required to read any implication of commercial efficacy into the definition of the expression 'Revenue' under OMDA. As already mentioned, in our opinion the whole enquiry is

misdirected. The obligation of the JVC is to share 'Projected Revenue' but not 'Revenue'. AAI case is that JVC is liable to share a part of the 'Revenue' as defined under OMDA. By adopting such an approach, AAI clearly ignores the language of OMDA which says under Article 11.1.2.1 that the Annual Fee is 45.99% of the "Projected Revenue for the said year".

47. In our view, such an enquiry into the meaning of the expression 'Revenue' is unnecessary. The crux of the matter is what is the meaning of expression "Projected Revenue" occurring in Article 11.1.2.1. In substance, it is the question of construction of the Contract (OMDA) and the legal obligation of the JVC to share the "Projected Revenue", as stipulated under Article 11.1.2.1."

71. It was submitted that the entire basis of the Co-Arbitrators placing reliance upon 'projected Revenue' and thus completely removing from consideration 'Revenue' as defined was not even the case pleaded or urged by DIAL/MIAL. According to the learned Solicitor, both the respondents had consistently accepted that the definition of 'Revenue' would be determinative in order to answer the issue of liability towards Annual Fee payments. It was submitted that the respondents had merely sought the introduction of further exclusions from that definition and thus essentially sought additional deductions being factored in for the purposes of computation of Annual Fee.

72. According to Mr. Mehta, the procedure as adopted by the Co-Arbitrators is clearly violative of Section 34(2)(a)(iii) of the Act as was explained by the Supreme Court in *Ssangyong Engineering & Construction Co. Ltd.* v. *NHAI*[18] in the following terms:

"52. Under the rubric of a party being otherwise unable to present its case, the standard textbooks on the subject have stated that where materials are taken behind the back of the parties by the Tribunal, on which the parties have had no opportunity to comment, the ground under Section 34(2)(*a*)(*iii*) would be made out.

53. In *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards — Commentary*, edited by Dr. Reinmar Wolff (C.H. Beck, Hart, Nomos Publishing, 2012), it is stated:

"4. Right to Comment

According to the principle of due process, the tribunal must grant the parties an opportunity to comment on all factual and legal circumstances that may be relevant to the arbitrators' decision-making.

(*a*) Right to Comment on Evidence and Arguments Submitted by the Other Party

As part of their right to comment, the parties must be given an opportunity to opine on the evidence and arguments introduced in

the proceedings by the other party. The right to comment on the counterparty's submissions is regarded as a fundamental tenet of adversarial proceedings. However, in accordance with the general requirement of causality, the denial of an opportunity to comment on a particular piece of evidence or argument is not prejudicial, unless the tribunal relied on this piece of evidence or argument in making its decision.

In order to ensure that the parties can exercise their right to comment effectively, the Arbitral Tribunal must grant them *access to the evidence and arguments submitted by the other side*. Affording a party the opportunity to make submissions or to give its view without also informing it of the opposing side's claims and arguments typically constitutes a violation of due process, unless specific non-disclosure rules apply (e.g. such disclosure would constitute a violation of trade secrets or applicable legal privileges).

In practice, national courts have *afforded Arbitral Tribunals considerable leeway in setting and adjusting the procedures* by which parties respond to one another's submissions and evidence, reasoning that there were "several ways of conducting arbitral proceedings". Accordingly, absent any specific agreement by the parties, the Arbitral Tribunal has wide discretion in arranging the parties' right to comment, permitting or excluding the introduction of new claims, and determining which party may have the final word.

(*b*) Right to Comment on Evidence Known to or Determined by the Tribunal

The parties' right to comment also extends to facts that have not been introduced in the proceedings by the parties, but that the tribunal has raised *sua sponte*, provided it was entitled to do so. For instance, if the tribunal gained "*out of court knowledge*" of circumstances (e.g. through its own investigations), it may only rest its decision on those circumstances if it informed both parties in advance and afforded them the opportunity to comment thereon. The same rule applies to cases where an arbitrator intends to base the award on his or her own *expert knowledge*, unless the arbitrator was appointed for his or her special expertise or knowledge (e.g. in quality arbitration). Similarly, a tribunal must give the parties an opportunity to comment on *facts of common knowledge* if it intends to base its decision on those facts, unless the parties should have known that those facts could be decisive for the final award."

(emphasis in original)

XXXX XXXX XXXX

56. Similarly, in *Redfern and Hunter* (supra):

"11.73. The national court at the place of enforcement thus has a limited role. Its function is not to decide whether or not the award is correct, as a matter of fact and law. Its function is simply to decide whether there has been a fair hearing. One mistake in the course of the proceedings may be sufficient to lead the court to conclude that there was a denial of justice. For example, in a case to which reference has already been made, a US corporation, which had been told that there was no need to submit detailed invoices, had its claim rejected by the Iran-US Claims Tribunal, for failure to submit detailed invoices! The US court, rightly it is suggested, refused to enforce the award against the US company [*Iran Aircraft Industries* v. *Avco Corpn.* [*Iran Aircraft Industries* v. *Avco Corpn.*, 980 F 2d 141 (2nd Cir 1992)]]. In different circumstances, a German court held that an award that was motivated by arguments that had not been raised by the parties or the tribunal during the arbitral proceedings, and thus on which the parties had not had an opportunity to comment, violated due process and the right to be heard [*see* the decision of the Stuttgart Court of Appeal dated 6-10-2001 referred to in Liebscher, The Healthy Award, Challenge in International Commercial Arbitration (Kluwer law International, 2003), 406]. Similarly, in *Kanoria* v. *Guinness* [*Kanoria* v. *Guinness*, 2006 EWCA Civ 222], the English Court of Appeal decided that the respondent had not been afforded the chance to present its case when critical legal arguments were made by the claimant at the hearing, which the respondent could not attend due to a serious illness. In the circumstances, the court decided that 'this is an extreme case of potential injustice' and resolved not to enforce the arbitral award.

11.74. Examples of unsuccessful 'due process' defences to enforcement are, however, more numerous. In *Minmetals Germany GmbH* v. *Ferco Steel Ltd.* [*Minmetals Germany GmbH* v. *Ferco Steel Ltd.*, 1999 CLC 647], the losing respondent in an arbitration in China opposed enforcement in England on the grounds that the award was founded on evidence that the Arbitral Tribunal had obtained through its own investigation. An English court rejected this defence on the basis that the respondent was eventually given an opportunity to ask for the disclosure of evidence at issue and comment on it, but declined to do so. The court held that the due process defence to enforcement was not intended to accommodate circumstances in which a party had failed to take advantage of an opportunity duly accorded to it.""

73. Apart from the above, according to the learned Solicitor, the

opinion of the Co-Arbitrators also violates Section 34(2)(a)(iv) since their opinion would constitute decisions rendered on matters beyond the scope of arbitration itself. It was submitted that the Majority not only failed to decide the principal dispute which was the interpretation of 'Revenue' as defined in the OMDA, it also proceeded to frame reliefs based on an interpretative exercise of the contract which had not even found mention in the notice of arbitration, pleadings or submissions of the claimants.

74. Mr. Mehta further submitted that the Co-Arbitrators, while holding that the definition of 'Revenue' was irrelevant, have essentially embarked upon an expedition which can only be described to be a rewriting of the contract itself as well as amounting to ignoring the relevant contractual provisions. It was submitted that the revenue sharing formula was a fundamental term of the contract itself and owed its genesis to the financial bids submitted by parties and which were in the bidding exercise ranked on the basis of the percentage of revenue share being offered by the tenderer. Mr. Mehta submitted that in terms of the tender documents, the bid was to be awarded to that bidder which had offered the highest percentage of revenue-share. According to the learned Solicitor, the Award fails to accord due consideration upon these aspects and is thus liable to be set aside on this ground alone.

75. The learned Solicitor then submitted that if the opinion of the Co -Arbitrators were accepted to be correct and DIAL/MIAL consequently being recognized as obligated to pay on the basis of 'projected Revenue' alone, the 'actual Revenue' that may be generated would become wholly irrelevant since the payment of Annual Fee would thus be dependent on whatever figure that DIAL/MIAL chose to declare as 'projected Revenue' in their respective Business Plans.

76. According to Mr. Mehta, these findings of the Co-Arbitrators have resulted in and have the potentiality of rendering the reconciliatory mechanism comprised in Articles 11.1.2.3 and 11.1.2.4 wholly otiose and as having been struck off from the OMDA itself. It was in the aforesaid light that the learned Solicitor submitted that the interpretation of the contractual stipulations by the Majority is one which no fair minded or reasonable person could have arrived at quite apart from being contrary to the explicit and unambiguous provisions of the contract itself.

77. Mr. Mehta in this connection drew our attention to the following pertinent observations as were rendered by the Supreme Court in *Ssangyong Engineering* and which are extracted hereinbelow:

> "76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances

when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."

78. Proceeding further to the heart of the dispute and construction of Chapter XI of OMDA, Mr. Mehta submitted that the term 'Revenue' had been specifically defined in the OMDA to subserve the principal purpose of computation of Annual Fee. According to the learned Solicitor, if the aforesaid clause of OMDA were to be held to be irrelevant, it would inevitably result in the term being excluded from the contract. According to Mr. Mehta, the view taken by the Co-Arbitrators essentially renders the specific contractual definition adopted by parties redundant and thus amounts to a rewriting of Chapter XI itself.

79. According to the learned Solicitor, on a true and correct construction of the contract, the following position would emerge. It was firstly submitted that the term 'Revenue' as defined in Chapter I,

indisputably finds place in Chapter XI of the OMDA. Its definition in Article 1.1 must thus be understood as being intended by parties to guide and regulate all Articles falling in Chapter XI. It was then submitted that since the definition is couched in clear and unambiguous terms, it must be accorded a meaning which is apparent and plainly evident. The learned Solicitor submitted that the first part of the definition lays emphasis on 'all pre-tax gross revenue' being taken into consideration for the purposes of sharing revenue. According to the learned Solicitor, the Presiding Arbitrator had thus correctly come to hold that since each of those expressions have a clear and well-understood literal meaning, it is that which must be applied and given full effect.

80. It was then submitted that Article 1.1 specifies five expressly identified exclusions under the definition of 'Revenue'. It was in the aforesaid backdrop that learned Solicitor submitted that if it were intended by parties that elements other than those five were liable to be deducted from the figure of 'all pre-tax gross revenue', those would have been clearly and specifically enumerated in the definition of 'Revenue' itself alongside the five other specified exclusions.

81. Mr. Mehta also assailed the correctness of the contention which was addressed in these proceedings on behalf of DIAL/MIAL that the deduction of other income and capital costs from 'all pre-tax gross revenue' does not amount to adding words to the definition but is essentially warranted in order to give effect to the term "pre-tax". This, according to Mr. Mehta, was correctly answered by the Presiding Arbitrator against the claimants while basing its opinion on reputed law lexicons and which had explained the expressions 'before tax' or 'pretax' as being before assessment or deduction of taxes. In view of the above, it was his submission that 'pre-tax' had no bearing on the question of deductions which were sought to be introduced into the definition of 'Revenue' by DIAL/MIAL.

82. Mr. Mehta then assailed the view taken by the Majority insofar as it sought to draw sustenance and buttress its conclusions on the basis of the principle of business efficacy. It was his submission that the aforesaid view as taken by the Co-Arbitrators proceeds in ignorance of the well-settled principle that where terms of a contract are clear, no implied stipulations are liable to be read into the same. According to the learned Solicitor, the business efficacy rule is resorted to only in situations where the contractual stipulations suffer from ambiguity. According to Mr. Mehta, in light of the plain and clear language in which the term 'Revenue' stood defined, there was no occasion or justification for the principles of business efficacy or avoidance of commercial absurdity being imported.

83. The learned Solicitor then contended that the provisions of the

SSA would have no application on the construction liable to be accorded to 'Revenue' as contemplated under the OMDA. The learned Solicitor submitted that the approach as suggested by DIAL/MIAL was even otherwise fundamentally flawed when one bears the following in consideration. It was submitted that Article 12.1.1 of the OMDA is concerned with the tariff which would apply to Aeronautical Charges for the provision of Aeronautical Services and which in turn is recoverable from airport users. According to Mr. Mehta, there is no linkage between Annual Fee and Tariff fixation under Chapter XII of the OMDA. In view of the aforesaid, it was his submission that the conclusions rendered by the Majority are thus rendered wholly unsustainable insofar as it proceeds to import the commercial principle embodied in Schedule 1 of the SSA.

84. It was then submitted that tariff fixation under the SSA is undertaken by Airport Economic Regulatory Authority[19] and which is the statutory authority enjoined to determine the charges to be levied for the provision of Aeronautical Services and the recovery of costs relating to Aeronautical Assets. According to the learned Solicitor, all of the above when taken into consideration would lead one to the irresistible conclusion that the provisions of the SSA cannot possibly be read so as to influence the meaning to be assigned to the expression 'Revenue' or govern and regulate the subject of Annual Fee.

85. Mr. Mehta submitted that the Majority Award in essence ignores the underlying commercial package on which the OMDA stood constructed and rewrites its provisions so as to make it a "zero risk contract". This, according to the learned Solicitor, proceeds on the premise that if DIAL/MIAL were required to pay Annual Fee on the full amount of 'Revenue' generated, it would be unable to recover the costs relating to the creation of Aeronautical Assets. It was in this respect submitted that the levy of Aeronautical Charges is a subject which is exclusively governed by the SSA and the factors enumerated therein being wholly irrelevant for the purposes of the OMDA.

86. It was submitted that undisputedly charges for Non-Aeronautical Services under the OMDA were left totally unregulated and thus freeing DIAL/MIAL to levy such charges as they deemed appropriate. According to Mr. Mehta, the aforesaid right is liable to be viewed in the context of the indisputable fact that under the OMDA, DIAL/MIAL had been handed a virtual monopoly over an essential public utility. According to Mr. Mehta, right from the pre-bid stage of the privatization process, it was clearly contemplated and conceived that Non-Aeronautical Revenue would constitute a significant portion of the overall earnings of the JVC.

87. Mr. Mehta also drew our attention to the evidence tendered by Mr. G. Radha Krishna Babu and who had deposed that DIAL on a conservative estimate would stand enabled to generate at least INR

1.56 lakh crores over the period of the Grant from Non-Aeronautical Revenue alone. However, according to Mr. Mehta, this aspect has been cursorily rejected and its relevance completely ignored by the Co-Arbitrators and thus this significant stream of revenue removed from consideration altogether. It was submitted that the rationale underlying the Majority Award would result in absurd commercial consequences and if upheld, it would result in the respondents being handed over a public contract with "zero risk".

88. The learning Solicitor also assailed the view expressed in the Majority Award with respect to "Other Income". It was submitted that "Other Income" was a phraseology adopted by DIAL/MIAL to denote income arising from any source other than Aeronautical and Non-Aeronautical Services. It was, at the outset, submitted that the term "Other Income" finds no place in the OMDA nor is its exclusion contemplated from "all pre-tax gross revenue" as appearing in the definition of 'Revenue' in the OMDA. Taking us through the Majority Award, the learned Solicitor submitted that it is apparent that the opinion of the Co-Arbitrators flows from its central finding that the definition of 'Revenue' is irrelevant, and consequently Other Income could not have formed part of 'projected Revenue'. The learned Solicitor pointed out the Presiding Arbitrator had, to the contrary, correctly rejected this argument bearing in mind the plain language in which the 'Revenue' stood couched in the OMDA. Mr. Mehta submitted that regard must necessarily be had to the fact that but for the Grant of Function under the OMDA, DIAL/MIAL would have been in no position to generate Other Income.

89. Mr. Mehta then submitted that the aforesaid view, as taken by the Co-Arbitrators, is clearly not a conclusion which a fair minded or reasonable person could have possibly arrived at on a correct construction of OMDA. In any case, according to the learned Solicitor, the OMDA while defining 'Revenue' clearly did not aim or intend to exclude revenue that may be generated from an activity which DIAL/MIAL were unobligated to undertake.

90. The learned Solicitor laid stress upon the large revenue which DIAL/MIAL stood positioned to generate and earn from various development operations undertaken upon the land which stood leased to it. This aspect was sought to be further highlighted with reference to the revenue generated by DIAL from Aerocity. It was submitted that every penny generated from such activities was directly connected with the Grant under the OMDA and consequently, the view of the Co-Arbitrators that sharing of the same would be expropriatory is clearly absurd and illegal.

91. The learned Solicitor then drew our attention to the judgments of the Supreme Court in *AUSPI-I* and *AUSPI-II* to underline those

decisions having found that entities who had been granted a telecom licence would be obligated to share revenue earned from all activities, including those which were in no manner connected with such license and consequently, revenue generated from any activity which had a nexus with the Grant under the OMDA would necessarily have to be shared.

92. The learned Solicitor then proceeded to vehemently assail the direction comprised in the Impugned Award and which had, according to AAI, delegated an essential adjudicatory function to the Independent Auditor. It was submitted in this regard that in the Procedural Order dated 29 June 2019, the Tribunal had taken note of the submission addressed on behalf of the AAI for the hearing being split into two parts : the first being the determination of liability (if any), and the second relating to quantum. DIAL, at that stage, Mr. Mehta pointed out, had countered that suggestion, asserting that the matter could be referred to a mutually acceptable Independent Auditor for determination of the figures in dispute. Our attention was also drawn to the Procedural Order dated 13 October 2019, and in which the Tribunal had recorded that since parties had been unable to reach a consensus, it would proceed further by permitting both sides to adduce evidence and decide the matter thereafter.

93. According to Mr. Mehta, even at this stage, all that parties had contemplated was that an expert would ultimately be appointed by consensus to submit a report to the Tribunal with respect to quantification of alleged excess Annual Fee. It was submitted that at no stage had parties agreed to a wholesale delegation of this adjudicatory exercise to a third party by the Tribunal. It was submitted by Mr. Mehta that a serious dispute with respect to quantification stood raised before the Tribunal. It was argued that those aspects have been completely overlooked by the Co-Arbitrators and the Award has thus delegated an essential judicial function to the Independent Auditor.

94. It was submitted that the direction for quantification being undertaken by the Independent Auditor glosses over the objection taken by AAI on the admissibility of evidence which was sought to be introduced on behalf of DIAL/MIAL. According to Mr. Mehta, the aforesaid delegation can by no strength of imagination be termed as purely computational or the discharge of a ministerial function as was contended by DIAL/MIAL.

95. It was further vehemently urged that DIAL/MIAL had led no evidence with respect to quantum of borrowed capital proportionate to each year along with the interest paid thereon. The learned Solicitor submitted that DIAL/MIAL had also not laid any evidence indicative of the expenditure from equity towards ‘costs relating to aeronautical assets’. All evidence in this respect, according to Mr. Mehta, would be

laid for the first time before the Independent Auditor.

96. In view of the aforesaid, it was submitted that a core judicial function which was liable to be undertaken by the Tribunal has been impermissibly delegated in contravention of the fundamental policy of Indian law.

97. On an overall conspectus of the aforesaid, the learned Solicitor submitted that this was a fit case where the Court must invoke its powers conferred under Section 34 and set aside the impugned Awards.

vi. DIAL/MIAL's submissions

98. Mr. Sibal, Dr. Singhvi and Mr. Sethi, learned senior counsels addressed submissions on behalf of DIAL/MIAL. Both the respondents took us back to the adoption of the open air policy and the principled decision taken by the Union Government to adopt pragmatic measures so as to aid in the development, modernization as well as restructuring of airports. It was this policy decision which formed the bedrock for the introduction of Section 12-A in the AAI Act by way of the 2003 Amendment Act. Learned senior counsels drew our attention to the legislative objectives underlying the said amendment as well as the Statement of Objects and Reasons of the 2003 Amendment Act and which embodied the avowed objective of the Union Government to encourage private sector participation insofar as airports and the aviation sector was concerned as a whole. It was in furtherance of those legislative initiatives, learned senior counsels explained, that AAI had invited proposals for the privatization of the Delhi and Mumbai airports.

99. Our attention was then drawn to the provisions of the OMDA and more particularly to Article 2.1.2 in terms of which DIAL came to be granted the exclusive right to develop, finance, design, construct, modernize, operate, maintain, use and regulate IGIA, provide Aeronautical and Non-Aeronautical Services and determine demand, collect and retain charges from users of the airport facilities. Article 2.1.2 of the OMDA reads as follows:

> "2.l.2 Without prejudice to the aforesaid, AAI recognizes the exclusive right of the JVC during the Term, in accordance with the terms and conditions of this Agreement, to:
>
> (i) develop, finance, design, construct, modernize, operate, maintain, use and regulate the use by third parties of the Airport;
>
> (ii) enjoy complete and uninterrupted possession and control of the Airport Site and the Existing Assets for the purpose of providing Aeronautical Services and Non-Aeronautical Services;
>
> (iii) determine, demand, collect, retain and appropriate charges from the users of the Airport in accordance with Article 12 hereto; and

(iv) Contract and/or sub contract with third parties to undertake functions on behalf of the JVC, and sub-lease and/or license the Demised Premises in accordance with Article 8.5.7."

100. The respondents would contend that Article 12.1.1 of the OMDA while making provisions for the determination of Aeronautical Charges links not just their right to recover 'costs relating to Aeronautical Assets' but further provides that those charges shall be determined as per the provisions of the SSA. According to them, in order to discern the contractual scheme, it is Articles 12.1.1, 12.1.2 read along with Article 2.1.2 which are of pivotal significance. It is in the aforesaid backdrop that DIAL/MIAL contended that the Court would necessarily have to refer to the provisions made in Schedules 1, 6 and 8 of the SSA. It was further submitted that the execution of the SSA, which was also a part of the 'Request for Proposal' circulated in the course of the bidding process, was an essential component of the entire contract and designed to subserve the principal objective of the airports being modernized.

101. According to the respondents, these aspects would become apparent from a reading of the communication dated 30 May 2011 of the Ministry of Civil Aviation in the Union Government and addressed to AERA. The said communication is extracted hereinbelow:

"P. No. AV.24011/001/2011-AD
Government of India
Ministry of Civil Aviation
AD Section
* * * * *

Safdarjung Airport, New Delhi
Dated 30.05.2011

To,
Shri Yashwant Bhave,
Chairman,
Airport Economic Regulatory Authority,
Administrative Block, AERA Building,
Safdarjung Airport, New Delhi.

Subject:— OMDA as the 'concession offered' by the Central Government.

Sir,

I am directed to say that M/s Delhi International Airport Pvt. Ltd. (DIAL) and M/s Mumbai International Airport Pvt. Ltd. (MIAL) each had made representation to Ministry of Civil Aviation, inter-alia, stating that Airports Economic Regulatory Authority (AERA) vide its Order No. 10/2010-[ineligible] dated 10.12.2010 relating to approval

of X-Ray Charges for domestic cargo levied at IGI Airport, New Delhi and Order No. 13/2010-11 dated 12.01.2011 relating to Regulatory Philosophy and approach in Economic Regulation of Airport Operators, has concluded that the Operation, Management & Development Agreement (OMDA) signed between the JVCs and Airports Authority of India (AAI) was not the 'concession offered' by the Central Government.

2. In the above backdrop, the issue regarding status of the transaction documents for restructuring and modernization of Delhi and Mumbai airports has been examined in this Ministry in consultation with Law Ministry and it has been observed that:

(i) The Union Cabinet had accorded 'in-principle' approval tor restructuring and modernization of Delhi And Mumbai airports by adopting Joint Venture Route and by formation of two separate companies between Airports Authority of India and the selected Joint Venture Partner;

(ii) An Empowered Group of Ministers (EGoM) was constituted to take decisions on various issued connected with the restructuring exercise and to decide the detailed modalities including the design parameters, bid evaluation criteria etc.

(iii) EGoM in its meeting held on 15.02.2005, approved the key principles of the Transaction Documents i.e. Operation, Management & Development Agreement (OMDA), State Support Agreement (SSA), Lease Deed, State Government Support Agreement (SGSA), Shareholders Agreement (SHA), CNS/ATM Agreement etc., based on which the JV partners were selected.

(iv) OMDA can be considered as the principal document, because the right to Operate, Maintain, Develop, Construct, Upgrade, Modernize, Finance and Manage the airport has been given to the JVCs only under the provisions of clause 2.1 of OMDA. Hence, without OMDA there is no utility of other agreements. Further, in all other agreements cross referencing has been done to the provisions of OMDA for interpretation of the provisions of other transaction documents. Also, the definition of the Project Agreements has only been inserted in Clause 1.1 of OMDA and this includes all other Transaction Documents.

3. Further, this Ministry had sought the legal advice from the Ministry of Law & Justice on the issue. Ministry of Law & Justice has, inter-alia has opined as under:

Since admittedly the transaction documents like OMDA and SSA have been executed between GoI, AAI and DIAL & MIAL under Section 12A of the AAI Act read with subjection (4) of Section 12A and the functions of AAI have been assigned to DIAL

and MIAL for management of the respective Airports, non-consideration of the same may not be in accordance with the agreed terms and conditions of the agreements executed. Therefore the concessions, if any, offered under such agreements either by the Central Government or through AAI appear to be the 'concessions' under the domain of section 13(1)(vi) of the AERA Act. Hence, AERA being an instrumentality of the State cannot unilaterally ignore the said binding agreements on the ground that they have been formally signed by the AAI. In view of the above, it may be advisable to consider and not to ignore these binding principal documents executed for the purpose of restructuring of the Airports at Delhi and Mumbai.

4. In view of above, it has been observed thar all the Transaction Documents i.e. OMDA, SSA, SGSA, Lease Deed, SHA, CNS/ATM Agreement entered between the concerned Government/Organizations and the JVCs for restructuring and modernization of Delhi and Mumbai airports have been approved by the Empowered Group of Ministers (EGoM) i.e. the Central Government and cannot be considered in isolation just because they have been formally signed by Airports Authority of India or any other organization. Thus, the concession offered by OMDA and any of the other Agreements listed under Clause 1.1 of OMDA, need to be considered as the 'concession offered' by the Central Government in terms of Section 13(1)(a)(vi) of the AERA Act, 2008.

5. This issues with the approval of Minister for Civil Aviation.

Yours faithfully,
(Oma Nand)
Under Secretary to the Govt. of India
Tel. : 34640214"

102. Learned senior counsels appearing for the respondents thus submitted that the aforesaid communication aptly captures the fundamental understanding of parties and the interlinkage between the OMDA and the SSA. It was then submitted that the 'costs relating to Aeronautical Assets' would comprise of depreciation (i.e. return of capital, both borrowed and equity), interest on debt and return on equity. These capital costs, it was contended, are to be recovered from Aeronautical Charges that DIAL/MIAL may levy in accordance with the OMDA.

103. It was emphasized that in terms of Article 12.1.2, Aeronautical Charges are liable to be determined in accordance with the SSA and specifically Clause 2 to Schedule 1 which spells out the commercial principle. According to the respondents, the commercial principle in unambiguous terms spoke of the chosen operator being enabled to

generate sufficient revenue so as to not only obtain a return of capital over the economic life of the asset as also to achieve a reasonable return on that investment commensurate with the risk involved. It was on the aforesaid basis that the respondents submitted that a return of capital coupled with a reasonable return on investment were factors which were thus acknowledged to be of critical importance and imperative to sustain the viability of the modernization process. Our attention was also invited to the formula which the SSA adopted for the purposes of determining Target Revenue and which too takes into account depreciation, interest on debt and return on equity. It was in the aforesaid backdrop that learned senior counsels submitted that these capital costs are clearly recoverable by DIAL/MIAL.

104. Both DIAL and MIAL then urged that in order to understand the meaning of 'projected Revenue' it is imperative to bear in mind the meaning which OMDA assigns to Business Plan, Airport Business and Airport Services, expressions which have been noticed by us in the preceding part of this decision. The process of exclusions from 'gross revenue' was sought to be explained with the aid of a flowchart which has already been extracted hereinabove. It was with the aid of the aforesaid flow chart that learned senior counsels submitted that 'shareable revenue' is liable to be computed in light of the above and Annual Fee calculated accordingly.

105. It was submitted that both DIAL as well as MIAL had in the past mistakenly made payments of Annual Fee on the basis of the gross receipts credited to their individual Profit & Loss accounts as opposed to 'projected Revenue' as disclosed in their Business Plans. This, according to the respondents, led to payments being made in excess of their contractual liability and thus entitled them to seek the return of such excess payments.

106. Learned senior counsels submitted that both the Minority and Majority Opinions have concurrently held in favour of the respondents insofar as excess payments having been made under a mistaken belief. This, according to DIAL/MIAL, becomes apparent from a reading of the opinion of the Presiding Arbitrator and its findings in respect of payments made for electricity charges, charges, water and analogous utilities, property tax, as well as sale proceeds of capital assets.

107. In order to buttress the aforesaid submission, learned senior counsels drew our attention to the following passage as appearing in the opinion of the Minority:

> "243. The law relating to mistake is designed to protect people who make mistakes and making mistakes is a human fallibility. If a 'mistake' leads to irrevocable closure as contended by AAI, there can be no law regarding a mistake and its consequences. So long as the payment is by mistake and is not a voluntary excess payment

intended to be a non-refundable gift, the amount paid by mistake has to be returned. In this case obviously, both patties were under a mistake as to whether electricity charges, water charges and property tax, had to be excluded under Exclusion (a) and whether the entire sale proceeds should be excluded under Exclusion (c). In view of the above position, AAI would be liable to repay any excess Annual Fee paid by DIAL once it establishes a mistake in regard to payment of any part of Annual Fee, if the claim is made for such repayment within the period of limitation."

108. This aspect was sought to be further underscored with learned senior counsels referring us to the conclusions which the Presiding Arbitrator rendered in the context of 'Revenue' generated from the sale of capital assets. It was highlighted that the contention of AAI that the expression "any amount that accrues to" used in the context of sale of capital assets would be confined to the profit on sale alone came to be stoutly rejected by the Presiding Arbitrator as would be manifest from a reading of Para 211 of the Minority Opinion:

"211. The definition of "Revenue" requires 'any amount that accrues to JVC from sale of any capital assets or items' should be excluded from "pre-tax gross revenue". It is significant to note that the Exclusion (c) in the definition of "Revenue" does not describe the amount to be excluded as 'any profit that accrues to JVC from sale of any capital asset or items' but as 'any amount that accrues to JVC from sale of any capital asset'. The contention of AAI that use of the word 'accrues' would mean that the amount to be excluded is only the profit on sale, is without any basis. As stated above, the words used are 'amount that accrues from sale of a capital asset' and not 'profit that accrues from sale of a capital asset'. The word 'accrues from sale' contextually means 'sum of money becomes receivable or payable on a sale', in this context. In view of it, it is held that the entire sale price that accrues by sale of any capital asset, is excluded from "Revenue". To restrict the Exclusion (c) to only the profit, would amount to rewriting the wording of the contract by substituting the words 'any profit that accrues' in place of the words 'any amount that accrues'. Such substitution/interference with the terms of the contract is impermissible. Having regard to the description of Exclusion (c) in the definition of "Revenue", where any asset is sold, the entire sale price should be excluded; and if for any reason, only the profit from the sale has been excluded, the difference between the sale price and profit i.e., the cost as per books of account, will also have to be excluded. When the description of the exclusion is clear and unambiguous, there is no justification for restricting the exclusion only to a part of the exclusion item. DIAL is entitled to a declaration that the entire sale price, received by sale of the capital

asset/item, has to be excluded from the definition of "Revenue"."

Based on the above, it was pointed out that the Presiding Arbitrator not only rendered a declaration in favour of DIAL/MIAL, it also awarded consequential monetary relief in respect of those heads of expenditure.

109. It was submitted that the contentions advanced on behalf of AAI proceeds in ignorance of the legal relationship which came into existence and the evident interconnection and interdependence between the various agreements which were compendiously defined as Project Agreements under the OMDA. It was submitted that while DIAL/MIAL were conferred with some discretion with respect to Non-Aeronautical Services, they were statutorily obliged to provide Aeronautical and Essential Services, and this consequentially placing them under a binding obligation to create Aeronautical Assets. This, according to the respondents, clearly entailed huge investments being made for designing and developing Aeronautical Assets, through equity and borrowed capital. It was submitted that 'costs relating to Aeronautical Assets' which the respondents were statutorily enabled to recover would not only include costs relating to the creation of those assets but also all expenditure incurred in the course of operation and maintenance of those assets.

110. Learned senior counsels thus contended that if the entire cash receipts of DIAL/MIAL were to be treated as 'shareable revenue', without appropriate deductions being made for the purposes of servicing the above noted objectives, it would result in the destruction of the substantive right of the operator to recover 'costs relating to Aeronautical Assets'. It was submitted that these arguments, which were addressed in the context of the various provisions of the OMDA, and more particularly Article 12.1.1, were clearly lost sight of by the Presiding Arbitrator. This, according to learned senior counsels, becomes apparent from a reading of Paras 109 to 113 of the Minority Opinion:

> "109. On a careful consideration of the provisions of the SSA, the Tribunal IS of the view that the reliance placed by DIAL on Clause 3.1.1 read with Schedule I of the SSA to contend that the Capital Costs should be excluded from the total gross receipts to arrive at "pre-tax gross revenue", is misconceived and untenable.
>
> 110. Clause 3.1.1 of SSA contains the undertaking by GoI that it will ensure that AERA regulates and sets/resets the Aeronautical Charges in accordance with the broad principles in Schedule 1. Schedule I provides that in AERA while undertaking the role of approving Aero Tariff, will provide DIAL with appropriate incentives to operate in an efficient manner maximising "Revenue" and optimising operating costs, by utilising the price cap methodology; and that in setting the price cap AERA will have regard to the need

for DIAL to generate sufficient revenue to cover efficient operating cost, obtain the return of capital over its economic life and achieve a reasonable return on investment commensurate with the risk involved. The provisions of SSA relied upon by DIAL (Clause 3.1.1 read with Schedule 1 commercial principles 1 and 2) have nothing to do with the revenue-sharing arrangement agreed between AAI and DIAL under the OMDA. The relied-upon provisions of SSA merely ensures that while determining/approving the tariff (i.e., the charges to be levied at the Airport by DIAL for providing Aeronautical Services and consequent recovery of costs relating to Aeronautical Assets, referred to as Aeronautical Charges), AERA will adopt a price cap methodology that would ensure generation of sufficient revenue by DIAL to cover not only efficient operating cost but also ensure that DIAL obtains the return of capital over its economic life (depreciation) and achieves a reasonable return on investment commensurate with the risk involved (i.e., interest on debt and return on equity).

111. Therefore, the scheme of OMDA and the project agreements is : (i) The payment of consideration by way of "Annual Fee" by DIAL to AAI for the grant of the exclusive right to operate, manage and develop the Delhi Airport (i.e., Grant of Function by AAI to DIAL) is governed by Chapter XI of the OMDA. (ii) The money to be earned by DIAL by providing Aeronautical Services through the development, operation and management of the Airport (to cover the operating costs, depreciation, interest on debt and return on equity) is governed by Chapter XII of the OMDA read with Clause 3.1.1, Schedule I and other provisions of SSA. Recovery of Capital Costs (depreciation, interest on debt and return on equity) is related to and provided for in tariff fixation. Capital Costs or recovery thereof have no role to play in determination and payment of Annual Fee by DIAL to AAI.

112. The following illustration will demonstrate that the methodology for fixing the tariff has no bearing or connection to the methodology of calculating payment of "Annual fee" payable to AAI and the principles relating to fixing tariff cannot be brought into or adopted for calculating the "Annual fee":

> "A and B entered into a partnership to construct and run a Hotel, A contributing the land (value of which is Rs. 10 crores) and B contributing the funds (Rs. 10 crores) required for construction of the Hotel. The Firm completes the project by borrowing another Rs. 20 Crores from a Bank with B as managing partner. The revenue of the Hotel consisted of the Room rentals and sale of food and beverage in the Restaurant. The room rent and the food and beverage tariffs, were fixed by the Firm so as to

generate sufficient revenue to cover efficient operating costs and capital costs (to cover depreciation, interest on debt and return on equity).

As the value of the land contributed by A is Rs. 10 crores and the funds contributed by B for development of the project is Rs. 10 crores, the profits sharing ratio between A and B should have been 50 : 50. But to ensure that he is able to enter into a partnership with A (or being under a mistaken notion about the value of the land contributed by A), B agrees that A would be entitled to 40% of the gross revenue of the Firm towards his share (i.e., all receipts from rooms and the restaurant); and B would meet all the operating costs and expenses from the remaining 60% of the gross revenue and take the balance towards his share of profit.

On running the Hotel for some years, B finds that if 40% of the gross revenue is paid towards A's share in the Firm, the remaining 60% of gross revenue was not yielding a profit commensurate to his investment, after meeting the operating expenses.

Can B contend that as the room tariff and food tariff was fixed by taking note of the total investment (capital cost) and the operating cost, payment of 40% of the gross revenue/total receipts to be paid to A should be after deducting the capital costs?

The answer is obviously no, as the components and principles for fixing the room tariff and food and beverage tariff haves nothing to do with the sharing of profits and losses by A and B. Capital costs and operating costs are relevant to tariff fixation. Sharing of profits depends upon the ratio of investment or value of services rendered by each partner."

The principles of tariff fixation in the SSA relate to the quantum of tariff. The recovery of capital costs or return of capital costs are taken care by the tariff fixation. If there is any error in tariff fixation, the remedy is to challenge the tariff fixation before TDSAT. Any problem in tariff fixation cannot be solved by reimagining the meaning of "Revenue" in the OMDA. The provision in the OMDA for payment of annual fee on the basis of definition of "Revenue" relates to sharing of profits by AAI and DIAL who have entered into a joint venture. Any attempt to bring in the principles of tariff fixation in to reworking the agreed profit-sharing ratio will be illogical and impermissible. The problems of DIAL arise due to its agreement to pay 45.99% of total "Revenue" and not because of any mistake in understanding and giving effect to what was agreed to be "Revenue". If DIAL had agreed to pay, say only 30% of "Revenue", it may not have the problem of inadequacy of funds. But no tribunal or

court can re-write a solemn contract with clear terms and conditions, on the ground of hardship to one party, or on grounds of equity or fairness, or by importing the principles of tariff fixation into calculation of sharing of profits or income.

113. The lack of any basis, reason or logic in importing the principles of tariff fixation in calculating the Annual Fee will also be evident by taking the interpretation suggested by DIAL to its logical conclusion. If the contention of DIAL that in calculating the "pre-tax gross revenue", the Capital Costs (depreciation, interest on debt and return on equity) are to be deducted in view of Principle No. 2 of tariff fixation in Schedule I of the SSA, is logical and correct, then the operating costs should also be deducted. This is because, Principle No. 2 of Tariff fixation in the SSA states that AERA will, while settling the price gap, have regard to the need for the JVC to generate sufficient revenue to cover "efficient operating costs" and obtain the return of capital over the economic life and achieve a reasonable return on investment commensurate with the risk involved. If the contention of DIAL that having regard to commercial Principle No. 2 (in Schedule I of SSA), the Capital Costs (depreciation, interest on debt and return on equity) are to be deducted from the total Aeronautical Charge receipts, to arrive at "pre-tax gross revenue", by the same logic, the operating costs also will have to be deducted as commercial Principle No. 2 refers to it also. If these are deducted, what is "pre-tax gross revenue" will become "pre-tax net income" which is not what is provided or intended in the definition of "Revenue"."

111. Both DIAL and MIAL then sought to highlight the interplay between Business Plans and 'financial projections' which is a term used while defining the former. It was thus contended that while framing 'financial projections' and drawing up the Business Plan, the respondents were entitled to make appropriate deductions in respect of 'costs relating to Aeronautical Assets' while computing 'projected Revenue'. It was submitted that if the contention of AAI were to be accepted, Annual Fee would have been defined to mean 45.99% (DIAL) and 38.7% (MIAL) of "Revenue" as opposed to 'projected Revenue' as the OMDA chose to explain in Chapter XI.

112. The respondents also commended affirmation of the view which the Co-Arbitrators took with reference to Other Income. It was submitted that since DIAL/MIAL were in no manner obligated to share the income generated with reference to the deployment of funds and which had no correlation with Airport Business, the Co-Arbitrators correctly came to hold in their favour on this aspect. Learned senior counsels further submitted that the view of the Majority that the decisions of the Supreme Court in *AUSPI-I* and *AUSPI-II* were clearly

distinguishable was correct and clearly merits no interference. This since the definition of 'gross revenue' which formed the subject matter of consideration of the Supreme Court was couched in language clearly distinct and distinguishable from 'Revenue' as defined in the OMDA.

113. Learned senior counsels thus submitted that once the Arbitrators had in unison come to uphold their claims with respect to electricity charges, water and sewerage disposal facilities along with other analogous utilities, property tax, sale of capital assets, granted consequential monetary reliefs in respect thereof and all of which fundamentally rested on excess payments having been made under a mistake, the challenge as raised by AAI is liable to be negated.

114. Mr. Sibal, Dr. Singhvi and Mr. Sethi submitted that AAI's challenge essentially requires the Court to evaluate the validity of the Impugned Award as if these were proceedings akin to a regular appeal. According to learned senior counsels, the challenge as mounted clearly fails to bear in consideration the contours of the Section 34 power and which stands duly enunciated in the following decisions.

115. Our attention in this respect was firstly drawn to Paras 24 and 25 in *Dyna Technologies* v. *Crompton Greaves Limited*[20]:

> "24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.
>
> 25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."

116. Reliance was then placed on the following observations as appearing in *Rashtriya Ispat Nigam Limited* v. *Dewan Chandram*

Saran[21]:

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL* v. *Gupta Brother Steel Tubes Ltd.* and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd.* 10 to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows : (*Sumitomo case* [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459], SCC p. 313)

"*43*. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn.* v. *Central Warehousing Corpn.* [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

46. In view of what is stated above, the respondent as the contractor had to bear the service tax under Clause 9.3 as the liability in connection with the discharge of his obligations under the contract. The appellant could not be faulted for deducting the service tax from the bills of the respondent under Clause 9.3, and there was no reason for the High Court to interfere in the view taken by the arbitrator which was based, in any case on a possible interpretation of Clause 9.3. The learned Single Judge as well as the Division Bench clearly erred in interfering with the award rendered by the arbitrator. Both those judgments will, therefore, have to be set aside."

117. Learned senior counsels also placed reliance on the following

pertinent observations as appearing in *UHL Power Company Limited* v. *State Of Himachal Pradesh*[22]:

> "15. This Court also accepts as correct, the view expressed by the appellate court that the learned Single Judge committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking an entirely different view in respect of the interpretation of the relevant clauses of the implementation agreement governing the parties inasmuch as it was not open to the said court to do so in proceedings under Section 34 of the Arbitration Act, by virtually acting as a court of appeal.
>
> 16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In *MMTC Ltd.* v. *Vedanta Ltd.* [*MMTC Ltd.* v. *Vedanta Ltd.*, (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293], the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)
>
> > "*11*. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(*b*)(*ii*) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.*, [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.""

It was on the aforesaid basis that it was contended that a petition under Section 34 cannot be converted into a challenge pertaining to the merits of the Impugned Award.

118. Learned senior counsels then vehemently assailed the

correctness of the submission addressed on behalf of AAI and which had asserted that the Co-Arbitrators had travelled beyond the scope of the reference. Learned senior counsels submitted that the interpretation of 'Revenue' for the purpose of calculating Annual Fee constituted the core of the dispute between the parties. It was, according to learned senior counsels, thus imperative for the Tribunal to identify the constituents of 'shareable revenue'. It was pointed out that it had been the consistent case of the respondents that computation of Annual Fee revolves around the contractual obligation of the respondents to provide shareable revenue. In order to identify the streams of income which would form part of shareable revenue, it was imperative for the Tribunal to examine this aspect bearing in mind the concepts of 'projected Revenue' and Business Plan which stood incorporated in the OMDA.

119. It was submitted that the heart of the dispute is evident not only from a reading of the reliefs as claimed and set out in the SoC but also from the Written Submissions which were tendered before the Tribunal. By way of an exemplar, learned senior counsels drew our attention to Para 78(a) of the SoC of DIAL as well as Para 7 of its Written Submissions both of which are extracted hereinbelow:

"F. PRAYER

78. In view of the facts and circumstances stated hereinabove, the Claimant most respectfully prays that this Hon'ble Tribunal may kindly be pleased to grant the following reliefs in favour of the Claimant and against the Respondent:

a) Pass an Award declaring that:

(i) the Annual Fee is payable by the Claimant to the Respondent only on the revenue generated from the Aeronautical Services (Aeronautical Charges less cost relating to Aeronautical Assets recovered) and Non-Aeronautical Services, provided at IGI Airport, with exclusions specified in the definition of the term "Revenue" under OMDA.

(ii) the MAF/Annual Fee is payable on the "Revenue" as defined in OMDA and not on the basis of the gross receipts credited to P&L Account.

(iii) Annual Fee is not payable on depreciation, interest on borrowed funds and the return on equity to investors (Capital Costs) and the same shall be deducted from Aeronautical Charges while arriving at 'pre-tax gross revenue'.

(iv) UDF and/or PSF being an appropriate and relevant proxy for the Capital Costs component shall be deducted from Aeronautical Charges while arriving at "Revenue".

XXXX XXXX XXXX

7. The dispute in this arbitration relates entirely to, and revolves

around, the Claimant's obligation to pay AF to the Respondent and the Respondent's entitlement to receive the same, under OMDA, and involves a question whether the Claimant has paid AF in excess of its obligation, in the past, because of a mistake regarding such contractual obligation under OMDA. The Claimant has, in the past, made payments of AF on the basis of the gross receipts credited to the P&L Account of the Claimant (i.e. the sum of Aeronautical Charges, charges from Non-Aeronautical Services and other income of the Claimant) as projected in its Business Plan, while its obligation was to pay the same on the basis of Revenue as defined under OMDA. The *Claimant's case* is that it has made payments of AF to the Respondent in excess of its contractual liability, and is entitled to the return of such excess payments, together with interest thereon."

120. It was contended that both the Presiding Arbitrator as well as the Majority had correctly understood the aforesaid constituting the principal issue of contestation and thus it would be wholly incorrect for AAI to contend that the Tribunal had travelled beyond the scope of the disputes which had been submitted.

121. In order to buttress the aforesaid submissions, the respondents also sought to draw sustenance from the following passage from Russell on Arbitration[23]:

"To comply with its duty to act fairly under s. 33(1) of the Arbitration Act, 1996, the tribunal should give the parties an opportunity to deal with any issue which will be relied on by it as the basis for its findings. The parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award. If the tribunal is minded to decide the dispute on some other basis, the tribunal must give notice of it to the parties to enable them to address the point. Particular care is needed where the arbitration is proceeding on a documents-only basis or where the opportunity for oral submissions is limited. That said, a tribunal does not have to refer back to the parties its analysis or findings based on the evidence or argument before it, so long as the parties have had an opportunity to address all the 'essential building blocks' in the tribunal's conclusion. Indeed, the tribunal is entitled to derive an alternative case from the parties' submissions as the basis for its award, so long as an opportunity is given to address the essential issues which led the tribunal to those conclusions..."

122. Reliance in this respect was also placed upon Para 69 in *Ssangyong Engineering* and which had spoken of matters though not strictly in issue but connected with the principal question as being within the scope of submission to arbitration. The relevant passage from *Ssangyong Engineering* is reproduced hereinbelow:

> "69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent "errors of jurisdiction", it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as "disputes" within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of "patent illegality", which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28 (3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(*a*)(*iv*) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal."

On an overall conspectus of the aforesaid, DIAL and MIAL argued that it would be wholly incorrect for it being urged that the Impugned Award was contrary to the prohibitions and grounds of challenge which are spoken of in Section 34(2)(a)(iii) and (iv) of the Act.

123. Dr. Singhvi, Mr. Sethi, as well as Mr. Sibal also questioned the correctness of AAI's submission when it had urged that the opinion of the Majority had effectively deleted Articles 11.1.2.2, 11.1.2.3 and 11.1.2.4 of OMDA from consideration. It was in this respect submitted that the aforesaid submission is clearly misleading since those provisions were duly taken note of in order to answer what would constitute elements of shareable revenue. Proceeding further and controverting the submissions advanced by AAI with respect to the correctness of the Majority opinion on the interpretation liable to be accorded to the expression 'Revenue', it was at the outset submitted that the Majority had ultimately rested its decision on a plausible interpretation of the contractual terms. It was thus submitted that the said opinion cannot possibly be termed as being patently flawed and all that AAI suggests is for this Court to accept an alternative interpretation of the contractual terms.

124. According to learned senior counsels, once the Arbitrators had accepted that both parties appeared to have proceeded on a misconception with respect to the true meaning to be assigned to the expression 'Revenue', it was imperative upon the Arbitral Tribunal to examine and directly engage with the aspect of shareable revenue.

While doing so, according to learned senior counsels, it was clearly within the jurisdiction of the Co-Arbitrators to examine the contractual terms based on the precept of business efficacy. In fact, and it was so contended that the decision in Moorcock[24] which had been noticed by the Presiding Arbitrator would itself lend credence to the contentions which were advanced by DIAL/MIAL. In order to evaluate this submission we extract Para 93 of the opinion rendered by the Presiding Arbitrator hereinbelow:

> "93. The Supreme Court has explained in what circumstances the business efficacy rule can be relied upon or implemented while interpreting contracts. In *Transmission Corporation of Andhra Pradesh* v. *GMR Vemagiri Power Generation Ltd.*, (2018) 3 SCC 716, the Supreme Court analysed the principles relating to interpretation of contracts with reference to the principles of business efficacy and held:
>
> > "21. In the event of any ambiguity arising, the terms of the contract will have to be interpreted by taking into consideration all surrounding facts and circumstances, including correspondence exchanged, to arrive at the real intendment of the parties, and not what one of the parties may contend subsequently to have been the intendment or to say as included afterwards, as observed.
> >
> > 24. .....The contextual background in which the PPA originally came to be made, the subsequent amendments, the understanding of the respondent of the agreement as reflected from its own communications and pleadings make it extremely relevant that a contextual interpretation be given to the question.....
> >
> > 26. A commercial document cannot be interpreted in a manner to arrive at a complete variance with what may originally have been the intendment of the parties. Such a situation can only be contemplated when the implied term can be considered necessary to lend efficacy to the terms of the contract. If the contract is capable of interpretation on its plain meaning with regard to the true intention of the parties it will not be prudent to read implied terms on the understanding of a party, or by the court, with regard to business efficacy as observed in *Satya Jain* v. *Anis Ahmed Rushdie*, (2013) 8 SCC 131:
> >
> > "33. The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in *Moorcock*, [L.R.] 14 P.D. 64 (CA). This

test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. in the Moorcock:...

> 'In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.'

34. Though in an entirely different context, this Court in *United India Insurance Co. Ltd.* v. *Manubhai Dharmasinhbhai Gajera*, (2008) 10 SCC 404 had considered the circumstances when reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto. Certain observations in this regard expressed by courts in some foreign jurisdictions were noticed by this Court in para 51 of the Report. As the same may have application to the present case it would be useful to notice the said observations:

> 51. ."... 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander, were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!"" (*Shirlaw* v. *Southern Foundries (1926) Ltd.*, [1939] 2 K.B. 206 (CA)], at p. 227.)
>
> * * *
>
> '...An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract : it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them : it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.' (*Trollope and Colls Ltd.* v. *North West Metropolitan Regional Hospital Board*,

[1973] 2 All ER 260 (HL), at p. 268)"

35. The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement…."

In this case the definition of "Revenue" is specific, clear and exhaustive. What should be the base and what should be the exclusion/deduction is specified. In such a case, it is necessary to give effect to the plain and ordinary meaning of the words and it is impermissible to add words, let alone additional terms to the definition of "Revenue" by relying upon the business efficacy principle.

It was thus submitted that when tested on the principles of business efficacy it became apparent that if the interpretation as suggested by AAI were to be accepted, DIAL/MIAL would be faced with a mathematical impossibility and become totally disabled from recovering 'costs relating to Aeronautical Assets'.

125. Learned senior counsels also assailed the view expressed by the Presiding Arbitrator and which according to them had incorrectly proceeded on the basis of a perceived distinction and wedge between the OMDA and SSA. It was submitted that both those Project Agreements were liable to be read together and harmoniously interpreted in order to give effect to the intent of parties. In any view, it was submitted, the opinion rendered by the Co-Arbitrators can hardly be said to constitute a view that no reasonable or fair minded person would have reached on a plausible and possible construction of the OMDA.

126. Both the respondents then vociferously countered the contention of AAI that the entrustment of quantification to an Independent Auditor amounted to the delegation of a judicial function. It was in this regard submitted that the exercise of computation would have necessarily entailed the examination of voluminous financial accounts of parties as well as an exercise of arithmetical reconciliation. It was submitted that the placement of an Independent Auditor to undertake such a reconciliation is something which the OMDA itself envisaged in Article 11.2. It was thus submitted that it would be wholly incorrect for AAI to contend that the exercise of quantification had been delegated to a third party or a complete stranger to the contract. It was submitted that AAI itself had in its SoD acknowledged the existence of the office of an Independent Auditor for the purposes of reconciliation and computation. Reference in this respect was made specifically to Para 45 of the SoD. It was submitted that even the Presiding Arbitrator had set apart the issue of computation of amounts liable to be reversed and adjusted to the Independent Auditor as would be evident from Para

251 of its opinion and which is extracted hereinbelow:

> "251. The independent auditor appointed under Article 11.2 of OMDA, shall verify and certify (i) the extent of electricity/power charges paid by DIAL to BSES Rajadhani Power Ltd. for the period 21.6.2015 to 30.9.2018, which is not already excluded under second part of Exclusion (a); and (ii) the extent of property taxes paid to municipal authorities during the period 21.6.2015 to 30.9.2018. They shall also certify that 45.99% of such amount which has been paid in excess as Annual Fee and DIAL will be entitled for credit therefor."

127. According to learned senior counsels, this becomes further evident from the operative directions which were framed by the Presiding Arbitrator itself when it had held that the amounts liable to be deducted from Revenue would be determined by the Independent Auditor as envisaged under Article 11.2 of the OMDA. It was thus submitted that in light of the unanimity on this aspect, there existed no justification for this Court to consider interfering with the Impugned Award on this score in exercise of the powers conferred under Section 34.

128. Our attention was then invited to the Tribunal's Procedural Order dated 13 October 2019 with it being submitted that the lack of consensus between the parties stood restricted to a competent third party being identified. It was submitted that a careful reading of that Procedural Order would establish that parties were principally *ad idem* insofar as the entrustment of the quantification exercise was concerned. It was in the aforesaid backdrop that the Tribunal had ultimately left that issue open to be addressed at the time of final determination.

129. In order to appreciate the arguments addressed in this respect, we deem it apposite to extract the following parts from the Procedural Order dated 13 October 2019:

> "Re. Suggestion of Claimant that questions relating to quantum be referred to a mutually agreed independent Accountant/Auditor for certification/determination of the various figures which are in dispute
>
> 7. In regard to the Claimant's aforementioned suggestion during the hearing dated 29.06.2019, the learned Solicitor General had sought time to take instructions.
>
> 8. The Claimant, by letter dated 07.08.2019 addressed to the Respondent's counsel, proposed and gave its consent for appointment of one of the four audit firms named therein (who had been earlier appointed by AAI as independent auditors under Article 11.2 of the OMDA) as a mutually agreed independent Accountant/Auditor, as they were familiar with the relevant records and procedures and will be able to expedite the assignment.

9. The Claimant, by letter dated 07.08.2019, specified the scope of work of such independent Accountant/Auditor as verifying and certifying the item-wise aggregate of the following payments and receipts [items (i) to (iv) and payments and items (v) and (vi) are receipts] based on the records of DIAL:

(i) Consultancy and Audit Cost paid by DIAL to or on behalf of AAI;

(ii) Power/Electricity Charges paid by DIAL to the utilities;

(iii) Security Equipment Maintenance Charges paid by DIAL;

(iv) Maintenance Expenses of Area Occupied by Relevant Authorities paid by DIAL;

(v) Amount accrued to DIAL from Sale of Fixed Assets/Items : and

(vi) Amount accrued to DIAL from Sale of Non-current Investments

10. The Respondent has sent its reply dated 04.10.2019 (through counsel) to Claimant's proposal/offer dated 07.08.2019. The Respondent has stated that it is not agreeable to the proposal made by the Claimant. The Respondent has alternatively suggested that the matter be referred to the Comptroller and Auditor General of India (CAG) to undertake the audit of the Claimant's accounts. The Claimant by reply dated 12.10.2019 has indicated that it is not agreeable to the suggestion made by the Respondent in the letter dated 04.10.2019.

11. The views of both sides were ascertained during hearing today. Parties are not able to reach any consensus in regard to the suggestion under discussion. In the absence of any consensus the Tribunal is of the view that the matter should be proceeded in the normal manner by permitting both parties to adduce evidence and decide the matter thereafter."

130. Learned senior counsels submitted that the contentions which are sought to be advanced by AAI in these proceedings flies in the face of its own stated stand in the SoD as would be evident from the following extracts:

"41. On a combined reading of these provisions, the following position emerges:

a. Annual Fee, although payable on a monthly basis, is to be reconciled on a quarterly basis against the actual Revenue of DIAL.

b. Based on such reconciliation, any inter se transfers between AAI and DIAL that are required to "square off" the difference between the projected and actual revenue are to be completed in that quarter (in the case any balance is payable by DIAL to

AAI) or no later than the very next quarter (where excess Annual Fee paid by DIAL in the previous would be adjusted). In either event, the accounts of the parties in respect of the Annual Fee payable in a quarter are finalized at the end of that quarter.

c. The accounts based on which "actual Revenue" is arrived at are subject to audit by the Independent Auditor, who, as the designation implies, is a neutral, expert third party jointly appointed by AAI and DIAL.

d. Documents based on which actual Revenue is arrived at are at all times in the possession of DIAL and computation of actual Revenue is in the first instance done by DIAL and submitted to the Independent Auditor for audit.

e. The Independent Auditor undertakes "final verification/reconciliation" of the accounts of DIAL and certifies the "actual Revenue" for that Quarter. This figure constitutes the "Revenue" for the purposes of determination of Annual Fee payable under Clause 11.1.2.

f. Upon such "final verification/reconciliation" being completed, the accounts of DIAL for that quarter, to the extent relevant to payment of Annual Fee, stand closed.

g. The OMDA does not envisage any contractual mechanism for disputing or challenging the certification of "Revenue" for a Quarter by the Independent Auditor; rather, a contra-indication is found in the reference to finality in the language of 11.1.2.4.

XXXX XXXX XXXX

45. In the present case, a comprehensive contractual machinery for computation and finalization of Annual Fee was agreed to by the parties and recorded in Clause 11 of the OMDA, the details of which are set out hereinabove *in extenso*. The contractual machinery for finalization of Annual Fee has all the trappings of an adjudicatory process inasmuch as the adjudication was carried out by a neutral and independent expert third party appointed jointly by the parties to the contract. Further, the record of the case brings out that the accounts for each quarter were finalized with the full knowledge, involvement and participation of DIAL. Apart from interactions between DIAL and the Independent Auditor, DIAL's comments were routinely invited on the final Revenue Audit Report, and these comments were dealt with by the Independent Auditor in the Revenue Audit Report for the subsequent quarter. Therefore, every aspect of the audit findings and conclusions was put to DIAL for comments and duly addressed."

131. Learned senior counsels also questioned the correctness of

AAI's submission of the Independent Auditor being in no position to compute and quantify claims. It was in this regard submitted that firstly the Independent Auditor is a creation of the OMDA itself. Reference in this respect was made to Article 11.1.2.4 and which binds parties to accept the reconciled accounts as verified by the Independent Auditor. Article 11.1.2.4 is extracted hereinbelow:

> "11.1.2.4 The applicable Revenue used for final verification/reconciliation of the AF shall be the Revenue of the JFC as certified by the Independent Auditor every quarter."

In view of the above, it was submitted that it is clearly impermissible for AAI to now contend that the reference to the Independent Auditor amounts to an impermissible delegation.

132. Insofar as evidence relevant for purposes of computation is concerned, DIAL had relied upon the evidence affidavit of Mr. G. Radha Krishna Babu and the various disclosures made therein. In order to appreciate the contention addressed on this score it would be pertinent to extract the following parts of that affidavit:

> "46. The Respondent's Affidavit dated 03.08.2019 in response to the Claimant's queries/interrogatories specified in this Hon'ble Tribunal's Order dated 29.06.2019 ("Answers to Interrogatories"), as against the sum of INR 15,761.74 Crores which the Claimant has paid by way of Annual Fee of INR 15,751.18 Crores and penal interest aggregating to INR 10.56 Crores as of 30.09.2018, the Respondent has admitted payment of Annual Fee by the Claimant to the extent of INR 15,754.67 Crores, as set out in the table extracted below:

Annual Fee

Financial year	Annual Fee received by AAI (INR Crores)
2006-07	271.98
2007-08	402.72
2008-09	445.63
2009-10	538.92
2010-11	577.26
2011-12	704.06
2012-13	1,533.16
2013-14	1,838.06
2014-15	1,967.81
2015-2016	2,302.66
2016-17	2,634.84
2017-18	1,761.47
01.04.2018 to 30.09.2018	776.10

Total	15,754.67

The Claimant maintains its claim in respect of Annual Fee paid at INR 15,751.18 Crores, which is lesser than the amount of Annual Fee admitted by the Respondent. Also, the Claimant maintains its claim for penal interest at INR 10.56 Crores as against INR 10.76 Crores claimed in the SoC. This penal interest payment is fully supported by (a) bank statements, (b) Form 16-A, (c) interest payment vouchers and (d) Claimant's letters to the Respondent intimating payment of such penal interest. Copies of interest payment vouchers and the aforesaid correspondence have already been filed as Annexure C-33 (Colly.). Copies of the aforesaid bank statements and Form 16-A together with a summary statement showing (a) amount paid through bank, and (b) amounts reflected in Form 16-A towards TDS are annexed hereto and marked as Exhibit CW1/9 (Colly.).

47. As regards the claim f-or return of excess Annual Fee paid from 01.10.2018 onwards, the same wilt be quantified in due course, as the same is a continuing claim for the purpose of the prayer in paragraph 78(d)(ii) of the SoC, and Issue 5(b) of the agreed List of Disputes taken on record by this Hon'ble Tribunal pursuant to the Procedural Order dated 29.06.2019.

48. The Respondent has filed the revenue audit reports of the Independent Auditor up to the period ending 30.09.2018 (Annexures R-1 to R-47), *inter alia* in support of its case on computation of “Revenue”, and accord and satisfaction claimed by the Respondent. The Respondent does not dispute, but instead relies on, the contents of such revenue audit reports. Significantly, the Respondent has no counter-claim against the Claimant. The Respondent has also admitted the audited financial statements of the Claimant (Annexure C-42 (Colly.)). Thus, evidently the difference between the Claimant and the Respondent lies in the area or the items to be included or excluded in arriving at the “Revenue”, rather than the amounts involved in relation to each such item.

49. In this backdrop, and in order to avoid unnecessarily burdening the record in this arbitration, wherever possible, the Claimant has accepted, for the limited purpose of its claim in this arbitration, the relevant amounts reflected in such reports of the Independent Auditor. The Claimant has even done so where the amounts in such reports are marginally less than the amounts which the Claimant has claimed. The Claimant has even chosen not to press certain claims or parts thereof.

XXXX XXXX XXXX

51. The Independent Auditor's reports, produced and relied upon by the Respondent, in fact, establish the collection of an aggregate

amount of INR 10,977.59 Crores by way of UDF (gross of collection charges) during the period from 2006 to 30.09.2018. As against this, the certificate of the Claimant's Statutory Auditor (Annexure C-11) certifies an aggregate collection of INR 10,977.61 Crores by way of UDF (gross of collection charges) during the aforesaid period, as set out in the table below:

UDF

Financial year	Amount (INR Crores) from the Independent Auditor's reports	Amount (INR Crores) certified by the Claimant's Statutory Auditor
2006-07	-	-
2007-08	-	-
2008-09	-	-
2009-10	-	-
2010-11	-	-
2011-12	-	-
2012-13	1,326.16	1,326.16
2013-14	1,812.24	1,812.24
2014-15	1,957.42	1,957.42
2015-2016	2,320.22	2,320.23
2016-17	2,725.99	2,726.00
2017-18	789.38	789.38
01.04.2018 to 30.09.2018	46.18	46.18
Total*	10,977.59	10,977.61

*gross of collection charges.

It may be noted that there is a minor difference of INR 0.01 Crore in 2 financial years (2015-2016 and 2016-2017), being a rounding off difference. Therefore, the Claimant accepts, for the limited purpose of its claim in this arbitration, the aggregate gross amount of INR 10,977.59 by way of UDF collected, as reflected in the reports of the Independent Auditor (which is the lesser of the two amounts). A chart referencing the relevant page numbers of the reports of the Independent Auditor recording the aforementioned amounts of PSFFC and UDF received by the Claimant is annexed hereto and marked as Exhibit CW1/10.

ii. OTHER INCOME

52. As i have explained above, Annual Fee is not payable on Other Income of the Claimant. The Independent Auditors' reports, produced and relied on by the Respondent, set out amounts of Other Income during the period from 2006 to 30.09.2018, aggregating to

INR 1,164.28 Crores for the aforesaid period on which the Annual Fee is paid. As against this, the certificate of the Claimant's Statutory Auditor (Annexure C-12) certifies an aggregate amount of INR 1,169.33 Crores by way of Other Income received by the Claimant during the aforesaid period. The amounts of Other Income received by the Claimant, as recorded in the reports of the Independent Auditor and as certified by the Claimant's Statutory Auditor are as set out in the table below:

Other Income

Financial year	Amount (INR Crores) from the Independent Auditor's reports	Amount (INR Crores) certified by the Claimant's Statutory Auditor
2006-07	3.38	3.38
2007-08	5.08	5.07
2008-09	10.17	10.48
2009-10	12.57	18.56
2010-11	18.52	18.52
2011-12	39.32	38.32
2012-13	79.71	77.62
2013-14	79.97	81.73
2014-15	84.16	84.15
2015-2016	154.33	154.35
2016-17	211.80	211.76
2017-18	277.87	277.96
01.04.2018 to 30.09.2018	187.40	187.43
Total*	1,164.28	1,169.33

While there is a shortfall to the extent of INR 5.05 Crores in the aggregate amount of Other Income for the period from 2006-2007 to 30.09.2018 as recorded in the reports of the Independent Auditor, the same is largely due to the fact that the Independent Auditor did not consider the interest on delayed payments made by the Claimant's customers as Other Income and rather treated the same as Non-Aeronautical Revenue in one particular year (2009-10), though such interest on delayed payments have been considered as Other Income by the Independent Auditor in other years. This very amount has also been shown as Other Income in the audited financial statements for the relevant year (2009-10), which has been admitted by the Respondent (Annexure C-42 (Colly.) at page 1740). However, the Claimant does not wish to enter into any controversy on this account in the present arbitration and accordingly accepts,

for the limited purpose of its claim in this arbitration, INR 1,164.28 Crores, recorded in the reports of the Independent Auditor, as the aggregate amount of Other Income received by the Claimant as of 30.09.2018 on which Annual Fee is paid. This is without prejudice to the Claimant's right to treat the same as Other Income in subsequent years. A chart referencing the relevant page numbers or the reports or the Independent Auditor recording the aforementioned amounts or Other Income received by the Claimant is annexed hereto and marked as Exhibit CW1/11."

133. The submission in essence was that the quantification exercise would be liable to be undertaken bearing in mind the statutory returns and reports which had already been submitted before the Independent Auditor. In view of the above, it was their submission that AAI's contention that new evidence would have to be laid before the Independent Auditor is clearly misconceived.

134. The detailed written submissions tendered on behalf of MIAL largely advances identical arguments in support of the Impugned Award as rendered. However, we deem it apposite to deal with the aspect of Target Revenue which was dealt with in some detail in MIAL's filing. Referring to the concept of Target Revenue and the formula for its quantification as embodied in the SSA, MIAL contended that the capital cost recovery items formed part of the detailed formula which stands adopted in the SSA for the determination of Target Revenue. It was thus submitted that since these costs are duly factored in and taken into consideration it would be wholly incorrect for AAI to contend that those costs should be removed from consideration for the purposes of determination of Annual Fee.

135. MIAL also laid emphasis on the fundamental principle of tariff fixation and which according to Schedule 1 of the SSA would comprise of the following principal elements:

"a. operate in an efficient manner

b. optimizing operating cost

c. maximizing revenue

d. undertaking investment in an efficient, effective and timely manner

e. need for the JVC to generate sufficient revenue to cover efficient operating costs.

f. Obtain the return of capital over its economic life.

g. Achieve a reasonable return on investment commensurate with the risk involved."

It was thus contended that the underlying premise of tariff determination by AERA is of the JVC being enabled to earn enough 'Revenue' and which would, in turn, enable it to recover and recoup

operating costs, depreciation and at the same time enable it to achieve a reasonable return on investment commensurate with the risk. According to MIAL, the commercial principle as embodied in the SSA lends credence to the aforenoted contention.

136. Insofar as the aspect of Other Income is concerned, MIAL argued that the OMDA does not forbid it from and as part of prudent commercial planning, investing surplus funds and undertaking activities in connection with the Grant. However, and since these activities are not connected with Airport Business, the same cannot possibly form part of shareable revenue.

D. A BRIEF BACKGROUND

137. Before proceeding to deal with the rival contentions which were addressed, it would be appropriate to go back in point of time and acknowledge the principle shift in policy which came to be adopted by the Union in relation to the management of airports across the country. This essentially takes us back to the promulgation of Act 43 of 2003 and which saw the introduction of Section 12-A in the AAI Act. Section 12-A reads as under:

> "12A. Lease by the Authority -
>
> (1) Notwithstanding anything contained in this Act, the Authority may, in the public interest or in the interest of better management of airports, make a lease of the premises of an airport (including buildings and structures thereon and appertaining thereto) to carry out some of its functions under section 12 as the Authority may deem fit:
>
> Provided that such lease shall not affect the functions of the Authority under section 12 which relates to air traffic service or watch and ward at airports and civil enclaves.
>
> (2) No lease under sub-section *(1)* shall be made without the previous approval of the Central Government.
>
> (3) Any money, payable by the lessee in terms of the lease made under sub-section *(1)*, shall form part of the fund of the Authority and shall be credited thereto as if such money is the receipt of the Authority for all purposes of section 24.
>
> (4) The lessee, who has been assigned any function of the Authority under sub-section *(1)* shall have all the powers of the Authority necessary for the performance of such function in terms of the lease."

138. Prior to the insertion of that provision in the Act, AAI was statutorily obliged to discharge various functions set out in Section 12 and which included the establishment of airports, the planning and development of airports and civil enclaves. By virtue of Section 12-A AAI stood empowered to lease the premises of an airport in the interest

of better management to a lessee who would in turn discharge the various functions entrusted upon AAI by virtue of Section 12 of the AAI Act. It was in furtherance of that policy shift that AAI incorporated DIAL and MIAL on 01 March 2006 for the purposes of restructuring and modernization of IGIA at New Delhi and the CSMIA at Mumbai.

139. Pursuant to the bidding process that came to be initiated by AAI, a consortium consisting of GMR Infrastructure Ltd. (the lead member), GMR Energy Ltd., Malaysian Airport (Mauritius) Pvt. Ltd., Fraport AG Frankfurt Services Worldwide, GVL Investments Ltd. and India Development Fund came to be selected as the Joint Venture[25] partner of AAI for IGIA. A similar consortium led by GVK Airport Holdings Ltd. and consisting of ACSA Global Ltd. and Bid Services Division (Mauritius) Ltd. was selected as the JV partner of AAI for CSMIA.

140. It is pertinent to note that the JV partners were, in terms of the tender conditions, liable to be identified on the basis of the highest percentage of revenue that it offered to share with AAI. While DIAL had offered to share 45.99% of the revenue, the consortium which had bid for being selected as the JV partner in MIAL had offered 38.7% of such revenue.

vii. An Overview of the OMDA and SSA

141. Upon the selection of the JV partners, AAI proceeded to transfer 74% of its share capital in DIAL and MIAL to the successful bidders and retained the remaining 26% of the share capital in each entity with itself. Both DIAL and MIAL were, in 2017, converted into public limited companies, with both the JV partner and AAI being shareholders in the ratio of 74 : 26. The OMDA which came to be executed between AAI and DIAL/MIAL incorporated the following salient provisions.

142. ‘Aeronautical assets’ were defined under the OMDA to be those which were necessarily required to be created for the performance of Aeronautical Services. It further brought within its ambit such other assets as the JVC would procure for or in relation to the provision of various activities as defined. ‘Aeronautical Services’ were identified and particularized in Schedule 5, and which has already been extracted hereinabove. The expression ‘Airport Business’ as noticed earlier, was defined to mean the business of operating, maintaining, developing, designing, constructing, upgrading, modernizing, financing and managing the airport and providing airport services. The expression ‘Aeronautical Charges’ was defined in Article 12.1.1 of the OMDA. ‘Airport Services’ was explained by OMDA to constitute both Aeronautical as well as Non-Aeronautical Services.

143. Apart from the above, the following significant expressions

used at different places of the OMDA came to be defined in the following terms:

> ""Business Plan" means the plan for the Airport Business, updated periodically from time to time, that sets out how it is intended to operate, manage and develop the Airport over a planning horizon and will include financial projections for the plan period.
>
> "Essential Services" shall mean those Aeronautical Services and Non-Aeronautical Services that are listed in Schedule 16 hereof and such other services that are mutually agreed to be added to the schedule from time to time.
>
> "Major Development Plan" shall mean a plan prepared for each major aeronautical or other development or groupings of developments which sets out the detail of the proposed development which has been set out in broad terms in the Master Plan and will include functional specification, design, drawings, costs, financing plan, timetable for construction and capital budget.
>
> "Master Plan" means the master plan for the development of the Airport, evolved and prepared by the JVC in the manner set forth in the State Support Agreement, which sets out the plans for the staged development of the full Airport area, covering Aeronautical Services and Non-Aeronautical Services, and which is for a twenty (20) year time horizon and which is updated and each such updation is subject to review/observations of and interaction with the GOI in the manner described in the State Support Agreement.
>
> XXXX XXXX XXXX
>
> 11. 2 Independent Auditor
>
> (i) Appointment of Independent Auditor
>
> (a) An Independent Auditor shall be appointed for the purposes mentioned herein.
>
> (b) The procedure of the appointment of the Independent Auditor shall be as follows:
>
> AAI shall nominate a panel of six (6) Chartered Accountancy Firms to the JVC. The JVC shall have the right to object to one or more of such nominees but not in any circumstance exceeding three (3) nominees. AAI shall appoint any one of the nominees to whom JVC has not objected, as the Independent Auditor.
>
> (c) JVC and AAI shall bear equally all costs of, including costs associated with the appointment of, the Independent Auditor."

144. 'Non-Aeronautical Assets' was, as per the OMDA, defined as under:

> ""Non-Aeronautical Assets" shall mean:
>
> 1. all assets required or necessary for the performance of Non-Aeronautical Services at the Airport as listed in Part I of

Schedule 6 and any other services mutually agreed to be added to the Schedule 6 hereof as located at the Airport (irrespective of whether they are owned by the JVC or any third Entity); and

2. all assets required or necessary for the performance of Non-Aeronautical Services at the Airport as listed in Part II of Schedule 6 hereof as located at the Airport (irrespective of whether they are owned by the JVC or any third Entity), to the extent such assets (a) are located within or form part of any terminal building; (b) are conjoined to any other Aeronautical Assets, asset included in paragraph (i) above and such assets are incapable of independent access and independent existence; or (c) are predominantly servicing/catering any terminal complex/cargo complex

and shall specifically include all additional land (other than the Demised Premises), property and structures thereon acquired or leased during the Term, in relation to such Non-Aeronautical Assets."

145. The expression 'Non-Aeronautical Services', which was a term used in the earlier provisions was explained to mean those services as listed in Schedule 6. The expression 'Project Agreements' came to be defined as follows:

""Project Agreements" shall mean the following agreements:

1. This Agreement;
2. The State Support Agreement;
3. Shareholders Agreement;
4. CNS-ATM Agreement;
5. Airport Operator Agreement;
6. State Government Support Agreement;
7. The Lease Deed;
8. Substitution Agreement; and
9. Escrow Agreement. and

Project Agreement shall mean any one of them."

146. OMDA identified the 'Relevant Authority' to be the following:

""Relevant Authority" includes the GOI, AAI, DGCA, BCAS, Department of Immigration & designated security agency of the Ministry of Home Affairs, quarantine department of Ministry of Health and plant quarantine department of Ministry of Agriculture, Meteorological department of Ministry of Science & Technology, Regulatory Authority, if any, Department of Customs, the Ministry of Finance or any other subdivision or instrumentality thereof, any local authority or any other authority empowered by the Applicable Laws."

147. Of critical significance and which in fact formed the bone of contention between the parties was the word 'Revenue' which was

defined in OMDA as under:

> "-Revenue" means all pre-tax gross revenue of JVC, excluding the following : (a) payments made by JVC, if any, for the activities undertaken by Relevant Authorities or payments received by JVC for provision of electricity, water, sewerage, or analogous utilities to the extent of amounts paid for such utilities to third party service providers; (b) insurance proceeds except insurance indemnification for loss of revenue; (c) any amount that accrues to JVC from sale of any capital assets or items; (d) payments and/or monies collected by JVC for and on behalf of any governmental authorities under Applicable Law (e) any bad debts written off provided these pertain to past revenues on which annual fee has been paid to AAI. It is clarified that annual fee payable to AAI pursuant to Article 11 and Operational Support Cost payable to AAI shall not be deducted from Revenue"."

148. Chapter II of OMDA dealt with the Scope of Grant, and since Article 2.1 would have an important bearing on the questions which stand posited, we extract that provision hereunder:

"SCOPE OF GRANT

2.1 Grant of Function

2.1.1 AAI hereby grants to the JVC, the exclusive right and authority during the Term to undertake some of the functions of the AAI being the functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and to perform services and activities constituting Aeronautical Services, and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport and the JVC hereby agrees to undertake the functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and at all times keep in good repair and operating condition the Airport and to perform services and activities constituting Aeronautical Services and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport, in accordance with the terms and conditions of this Agreement (the "Grant").

2.1.2 Without prejudice to the aforesaid, AAI recognizes the exclusive right of the JVC during the Term, in accordance with the terms and conditions of this Agreement, to:

(i) develop, finance, design, construct, modernize, operate, maintain, use and regulate the use by third parties of the Airport;

(ii) enjoy complete and uninterrupted possession and control of the Airport Site and the Existing Assets for the purpose of

providing Aeronautical Services and Non-Aeronautical Services;

(iii) determine, demand, collect, retain and appropriate charges from the users of the Airport in accordance with Article 12 hereto; and

(iv) Contract and/or sub contract with third parties to undertake functions on behalf of the JVC, and sub-lease and/or license the Demised Premises in accordance with Article 8.5.7."

149. It would also be apposite to extract Article 2.2.1, 2.2.3 and 2.2.4 and which are reproduced hereinbelow:

"2.2 Sole Purpose of the JVC

2.2.1 The JVC having been set up for the sole purpose of exercising the rights and observing and performing its obligations and liabilities under this Agreement, the JVC or any of its subsidiaries shall not, except with the previous written consent of AAI, be or become directly or indirectly engaged, concerned or interested in any business other than as envisaged herein. Provided however that the JVC may engage in developing, constructing, operating or maintaining a second airport pursuant to exercise of the Right of First Refusal granted to the JVC under the State Support Agreement.

XXXX XXXX XXXX

2.2.3 Aeronautical Services, Non-Aeronautical Services and Essential Services

Subject to the foregoing and to Applicable Law, JVC shall undertake/provide Aeronautical Services and Essential Services at the Airport Site. JVC may seek to undertake/provide Non-Aeronautical Services at the Airport Site by including them in the proposed (draft) Master Plan, provided however, if the same form a part of the (final) Master Plan then the same shall be undertaken as provided in this Agreement. JVC and AAI shall upon mutual agreement between the Parties update the list of Non-Aeronautical Services to include such other activities, as requested by AAI or JVC.

Notwithstanding anything contained in this Agreement, the JVC shall not undertake any activities at the Airport Site other than Aeronautical Services, Non-Aeronautical Services and Essential Services.

2.2.4 It is expressly understood by the Parties that JVC shall provide Non-Aeronautical Services at the Airport as above, provided however that the land area utilized for provision of Non-Transfer Assets shall not exceed five percent (or such different percentage as set forth in the master plan norms of the competent local authority of Delhi, as the same may change from time to time) of the total land area constituting the Demised Premises. Provided however that

the Non-Transfer Assets, if any, that form part of the Carved-Out Assets and/or situated upon the Existing Leases shall be taken into account while calculating the percentage of total land area utilized for provision of Non-Transfer Assets."

150. Chapter III specified the Conditions Precedent and dealt with the obligations which were to be discharged by AAI and the JVC. This becomes clear from a reading of Article 3.1.1 and 3.1.2 which are reproduced hereunder:

"3.1 Conditions Precedent

3.1.1 Conditions Precedent to be satisfied by the AAI

The obligations of the JVC hereunder are subject to the satisfaction by the AAI of the following conditions precedent ("AAI Conditions Precedent") unless any such condition has been waived by the JVC as hereinafter provided:

(i) AAI shall have executed and delivered to the JVC a counterpart of the Shareholders Agreement.

(ii) AAI shall have executed and delivered to the JVC a counterpart of the CNS-A TM Agreement.

(iii) AAI shall have executed and delivered to the JVC a counterpart of the Escrow Agreement.

(iv) AAI shall have provided to the JVC a list of all General Employees along with details of their designations, salary and other employment related costs as part of a schedule or the Operation Support Cost to AAI.

(v) AAI shall have provided a list of all existing contracts and agreements between AAI or any Relevant Authority and any third party as relatable to the Airport proposed to be transferred/novated to JVC pursuant to Article 5.1 hereof.

(vi) AAI shall have obtained and furnished to the JVC a copy of the approval of the GOI under Section 12 A (2) of the Airports Authority of India (Amendment) Act, 2003, authorizing the AAI to make a lease of the Airport.

(vii) AAI shall have reviewed and commented on the Airport Operator Agreement in accordance with Article 3.1.2 (v) below. Provided however that AAI may offer comments to the Airport Operator Agreement only if it does not contain and/or is inconsistent with the principles set forth in Schedule 8 hereunder and for no other reason.

(viii) AAI shall have executed and delivered to the JVC a counterpart of the Lease Deed. Provided however that Parties agree that AAI shall execute the Lease Deed only after all other conditions precedent mentioned in this Chapter 3 have been fulfilled.

3.1.2 Conditions Precedent to be satisfied by JVC

The obligations of the AAI hereunder are subject to the satisfaction by JVC of the following conditions precedent ("JVC Conditions Precedent") unless any such condition has been waived by the AAI as hereinafter provided:

(i) The JVC shall deliver to the AAI the original copy of the Performance Bond (in accordance with Article 8.6).

(ii) The JVC shall have executed and delivered to the AAI a counter part of the CNS-ATM Agreement.

(iii) The JVC shall have executed and delivered to the AAI a counterpart of the Escrow Agreement.

(iv) The Consortium Members shall have executed and delivered to the AAI, the Shareholders Agreement and undertaken initial capitalisation of the JVC in order to convert the same into a joint venture between AAI and the Consortium Members;

(v) The JVC shall have executed and delivered to the AAI, the Airport Operator Agreement, consistent with and containing all the principles set forth in Schedule 8 hereunder;

In this regard, it is clarified that the Airport Operator Agreement, as drafted, shall contain all the principles set forth in Schedule 8 hereunder and shall have been commented on and reviewed by the AAI. The procedure of obtaining AAI review/comments on the draft Airport Operator Agreement is as contained hereunder:

(a) Within 14 days from the date hereof, the draft Airport Operator Agreement shall be presented to AAI.

(b) The AAI shall furnish its comments on the Airport Operator Agreement within 14 days of receipt of the draft Airport Operator Agreement.

(c) AAI shall convey the reasons of its comments to the JVC who shall address the same in the revised draft of the Airport Operator Agreement to be presented to the AAI within 14 days of receipt of AAI's reasons.

(d) Thereafter the procedure mentioned in Clauses (a), (b) and (c) shall be repeated once again.

(vi) The JVC shall have paid the full Upfront Fee to AAI;

(vii) Upon satisfaction of condition precedent set forth in Article 3.2(iv), the JVC and the Consortium Members shall have executed and delivered to the AAI the Disclaimer Certificate in the form attached hereto as Schedule 20 hereof.

(viii) The Consortium Members shall have delivered to the AAI a bank guarantee(s) (the "Equity Bank Guarantee") from a scheduled commercial bank in India in favour of JVC in the form enclosed in Schedule 22, guaranteeing the equity

commitment in the JVC of the Consortium Members up to Rs. 500 Crores. The said Equity Bank Guarantee shall be maintained until the entire amount of Rs. 500 Crores is infused by the Consortium Members as its equity contribution into the JVC, provided however that the value of the Equity Bank Guarantee may be progressively reduced correspondingly as amounts are actually infused by the Consortium Members into the JVC as equity. Within seven days of receipt of the Equity Bank Guarantee, AAI would duly return the commitment letters from the ultimate holding company of Consortium Members and also return the joint and several undertaking with respect to the equity commitment of the Consortium Members as received from the Consortium Members during the competitive bidding procedure undertaken by AAI for the purposes of the selection of the private participants in the JVC. In the event AAI invokes the Equity Bank Guarantee, the receivables therefrom shall be deposited into the Escrow Account.

(ix) The JVC shall have executed and delivered to the AAI a counter part of the Lease Deed."

151. Of equal significance is Article 3.1.3 and which specified the Common Conditions Precedent. The said covenant forming part of the OMDA is extracted hereunder:

"3.1.3 Conditions Precedent to be satisfied jointly by both Parties The obligations of the Parties are subject to the satisfaction of the following conditions precedent ("Common Conditions Precedent"):

(i) JVC shall have entered into the State Government Support Agreement with Government of National Capital Territory of Delhi.

(ii) JVC shall have entered into the State Support Agreement with GOI and GOI shall have provided the guarantee thereunder.

(iii) The JVC shall have received all Clearances then requisite for operation and management of the Airport by the JVC as set forth in Schedule 24 hereof. AAI shall use all reasonable endeavours to grant such Clearances as are within its power to grant, as soon as possible, subject to receipt of the relevant application duly completed and in full compliance with Applicable Law."

152. The shareholding pattern of the JVC, as would have come into effect upon the execution of OMDA stands specified in Article 4.1(f) for DIAL and MIAL respectively and which are reproduced hereinbelow:

As on the date hereof:

S. No.	Shareholder	Percentage

		shareholding
1.	AAI	100%

As on the Effective Date:

S. No.	Shareholder	Percentage shareholding
1.	GMR Infrastructure Ltd.	31.1%
2.	GMR Energy Ltd.	10.0%
3.	Fraport AG Frankfurt Airport Services Worldwide	10.0%
4.	Malaysia Airports (Mauritius) Private Limited	10.0%
5.	GVL Investments Pvt. Ltd.	09.0%
6.	India Development Fund	03.9%
7.	AAI	26%

XXXX XXXX XXXX

As on the date hereof:

S. No.	Shareholder	Percentage shareholding
1.	AAI	100%

As on the Effective Date:

S. No.	Shareholder	Percentage shareholding
1.	ACSA Global Limited	10%
2.	GVK Airport Holdings Pvt. Ltd.	37%
3.	Bid Services Division (Maritius) Ltd.	27%
4.	AAI	26%

153. In terms of Article 5.1 upon satisfaction of the conditions precedent and on and from the effective date all rights and obligations associated with the operation and management of the airports at Delhi and Mumbai stood transferred to the JVC. This becomes apparent from a reading of Article 5.1 which is reproduced hereunder:

> "5.1 Upon satisfaction or waiver, as the case may be, of the Conditions Precedent, on and from the Effective Date, the rights and obligations associated with the operation and management of the

Airport would stand transferred to the JVC, who shall be solely responsible and liable for the performance of all Aeronautical Services, Essential Services and all other activities and services as presently undertaken at the Airport (other than Reserved Activities). JVC shall perform under all existing contracts and agreements between AAI or any Relevant Authority and any third party as relatable to the Airport from the Effective Date, as if JVC was an original party to such contracts and agreements instead of AAI and towards this end shall perform all responsibilities, liabilities and obligations of AAI at JVC's risk and cost (including payment obligations to counter parties).

Provided however that in order to ensure smooth transfer of the Airport from the AAI to the JVC, AAI shall during the Transition Phase provide assistance to the JVC (on a best endeavour basis) in the manner provided hereinbelow."

154. The General Obligations which the JVC became liable to discharge were specified in Article 8.1 in the following terms:

"8.1 General Obligations

(i) JVC shall at all times comply with Applicable Law in the operation, maintenance, development, design, construction, upgradation, modernising, financing and management of the Airport. JVC shall operate, maintain, develop, design, construct, upgrade, modernise, manage, and keep in good operating repair and condition the Airport, in order to ensure that the Airport at all times meets the requirements of an international world class airport. The JVC shall further operate, maintain, develop, design, construct, upgrade, modernise, and manage the Airport in accordance with Good Industry Practice and, in accordance with the Development Standards and Requirements; and Operation and Maintenance Standards and Requirements and renew, replace and upgrade to the extent reasonably necessary. All maintenance, repair and other works shall be carried out in such a way as to minimise inconvenience to users of the Airport.

(ii) JVC shall at all times, obtain and maintain all Clearances, including registrations, licenses and permits (including immigration, temporary residence, work and exit permits), which are required by Applicable Law for the performance of its obligations hereunder.

(iii) The JVC will operate, maintain, develop, design, construct, upgrade, modernize and manage the Airport during the Term with regard to safety precautions, fire protection, security, transportation, delivery of goods, materials, plant and equipment, control of pollution, maintenance of competent

personnel and labour and industrial relations and general Airport Services including, without limitation, access to and on the Airport, allocation of space for contractors' and sub-contractors' offices and compounds and the restriction of access to the Airport to authorized Entities only, ensuring at all times smooth operation of the Airport and minimum interference with day to day running of the Airport and will prepare and issue a manual of rules and regulations relating to the Airport to be observed by all Entities having business upon the Airport and which shall apply to all such Entities without discrimination. The NC shall provide such manual to the AAI who may require JVC to make reasonably appropriate modifications in the said manual.

(iv) The JVC will ensure that all materials, equipment, machinery, etc. installed and/or used at the Airport including the constructions or repair of the Airport will be of sound and merchantable quality, that all workmanship shall be in accordance with Good Industry Practices applicable at the time of installation, construction or repair and that each part of the construction will be fit for the purpose for which it is required as stated in or as may be reasonably inferred from the Master Plan and the Major Development Plan.

(v) Neither the submission of any drawing or document under or pursuant to any provision of this Agreement or otherwise, nor its approval or disapproval, nor the raising of queries on, or the making of objections to or the making of comments, suggestions or reconmendations on the same by the AAI shall prejudice or affect any of the JVC's obligations or liabilities in relation to design and construction, which shall not be relieved, absolved or otherwise modified in any respect.

(vi) The JVC shall pay all taxes, levies, import duties, fees (including any license fees) and other charges, dues, assessments or outgoings payable in respect of the Demised Premises or the structures to be constructed thereon or in respect of the materials stored therein which may be levied by any Governmental Authority and any other governmental, quasi governmental, administrative, judicial, public or statutory body, ministry, department, instrumentality, agency, authority, board, bureau, corporation entrusted with, and carrying out, any statutory functions(s) or commission."

155. OMDA also required the JVC to undertake various Mandatory Capital Projects in terms of Article 8.2 and reads thus:

"8.2 Mandatory Capital Projects

8.2.1 The JVC shall, latest by March 31, 2010, commence, carry out and complete the Mandatory Capital Projects set out under Schedule 7 at the times set forth therein and in accordance with the terms and conditions set forth therein.

8.2.2 In the event that the JVC delays in commencement of construction of a Mandatory Capital Project at the time set forth in Schedule 7 and no lawful explanation for delay is provided by the JVC that is satisfactory to AAI (at its sole discretion), AAI shall have the right to levy liquidated damages on the NC equivalent to 0.5% (zero decimal five percent) of the estimated capital cost of the such Mandatory Capital Project for each week (or part thereof) of delay in commencement of construction of such Mandatory Capital Project.

8.2.3 AAI shall further have the right to levy liquidated damages on JVC at the same rate in the event the time period for the completion of any Mandatory Capital Project exceeds the time period for completion of such Mandatory Capital Project as set out in Schedule 7, subject to the delay not being on account of delay in commencement, in respect of which liquidated damages have been paid by JVC to the AAI.

Provided however that the total liability of the NC under this Article 8.2 for delay in respect of a particular Mandatory Capital Project shall not exceed 10% (ten percent) of the capital cost of the relevant Mandatory Capital Project.

8.2.4 Notwithstanding the foregoing, in the event the commencement of construction of a particular Mandatory Capital Project has been delayed and liquidated damages for such delay have been levied and paid according to Article 8.2.2 above, and such Mandatory Capital Project has, notwithstanding the delay in commencement in construction, been completed by the time it would have been completed had the construction of the relevant Mandatory Capital Project been commenced on time, as set forth in Schedule 7, then the liquidated damages that have been paid for delay in commencement of construction shall be returned by AAI to JVC without any interest."

156. In terms of Article 8.3, the JVC was obligated to prepare a Master Plan and which was to incorporate details of the development initiatives which were proposed to be undertaken spread over a 20-year time period. The Master Plan was envisaged to include the overall development strategy as also incorporate details of plans for commercial development, surface transport, runway systems, traffic for cars, the vision of the airport itself and various other aspects which are spelt out in Article 8.3.1.

157. That then takes us to Chapter XI, and which sets out the manner and modalities for the computation of Annual Fee. Since the

challenge centers and revolves upon the covenants forming part of the said Chapter, the same is extracted in toto:

"CHAPTER XI

FEES

11.1 In consideration of the aforementioned Grant, the JVC hereby agrees to make the following payments to the AAI in the manner and at the times mentioned hereunder.

11.1.1 Upfront Fee

The JVC shall pay to the AAI an upfront fee (the "Upfront Fee") of Rs. 150 Crores (Rupees one hundred and fifty Crores only) on or before the Effective Date. It is mutually agreed that this Upfront Fee is non-refundable (except on account of termination of this Agreement in accordance with Article 3.3 hereof) and payable only once during the Term of this Agreement.

11.1.2 Annual Fee

11.1.2.1 The JVC shall also pay to the AAI an annual fee ("AF") for each Year during the Term of this Agreement of the amount set forth below:

AF = 45.99% of projected Revenue for the said Year

Where projected Revenue for each Year shall be as set forth in the Business Plan.

11.1.2.2 The AF shall be payable in twelve equal monthly instalments, each instalment (hereinafter referred to as "Monthly AF" or "MAF") to be paid on the first day of each calendar month. The JVC shall from time to time cause the Escrow Bank to make payment of the MAF to AAI in advance on or prior to the 7th day of each month by cheque drawn in favour of AAI. IF AAI does not receive the payment of MAF due hereunder by the due date provided herein, the amount owed shall bear interest for the period starting on and including the due date for payment and ending on but excluding the date when payment is made calculated at State Bank of India Prime Lending Rate + 10% p.a. Notwithstanding anything contained herein, the JVC shall at all times be liable to pay the MAF in advance on or prior to the 7th day of each month by cheque drawn in favour of AAI. If AAI does not receive the payment of MAF due hereunder by the due date provided herein, the amount owed shall bear interest for the period starting on and including the due date for payment and ending on but excluding the date when payment is made calculated at State Bank of India Prime Lending Rate+ 10% p.a. Notwithstanding anything contained herein, the JVC shall at all times be liable to pay the MAF in advance on or prior to the 7th day of each month.

11.1.2.3 (i) In the event that in any quarter the actual Revenue exceeds the projected Revenue, then JVC shall pay to AAI the additional AF attributable to such difference between the actual quarterly Revenue and the projected quarterly Revenue within 15 days of the commencement of the next quarter; and (ii) in the event that the projected Revenue in any quarter exceeds the actual Revenue, then AAI shall pay to JVC such portion of the AF received as is attributable to the difference between that projected Revenue and the actual Revenue by way of an adjustment against the AF payable by the JVC to AAI in the current quarter; provided further that in the event the actual Revenue in any quarter is greater than 110% of the projected Revenue of such quarter, the JVC shall pay to AAI interest for difference between the actual Revenue and the projected Revenue at the rate of State Bank of India Prime Lending Rate plus 300bps in the following manner:

(i) interest of three (3) months on 1/3rd of the difference between the projected Revenue and the actual Revenue;

(ii) interest of two (2) months on 1/3rd of the difference between the projected Revenue and the actual Revenue;

(iii) interest of one (1) month on 1/3rd of the difference between the projected Revenue and the actual Revenue.

It is clarified that if the projected quarterly Revenue is equal to or less than 110% of the actual quarterly Revenue, then no interest shall be payable; interest shall only be payable on the difference between the actual quarterly Revenue and the projected quarterly Revenue in the event the actual quarterly Revenue is greater than 110% of the projected quarterly Revenue.

11.1.2.4 The applicable Revenue used for final verification/reconciliation of the AF shall be the Revenue of the JFC as certified by the Independent Auditor every quarter.

11. 2 Independent Auditor

(i) Appointment of Independent Auditor

(a) An Independent Auditor shall be appointed for the purposes mentioned herein.

(b) The procedure of the appointment of the Independent Auditor shall be as follows:

AAI shall nominate a panel of six (6) Chartered Accountancy Firms to the JVC. The JVC shall have the right to object to one or more of such nominees but not in any circumstance exceeding three (3) nominees. AAI shall appoint any one of the nominees to whom JVC has not objected, as the Independent Auditor.

(c) JVC and AAI shall bear equally all costs of, including costs

associated with the appointment of, the Independent Auditor.

11.3 Right of Inspection

The AAI and its representatives shall be pemitted to inspect at any reasonable time the books, records and other material kept by or on behalf of the JVC in order to check or audit any information (including the calculation of Revenue) supplied to the AAI under this Agreement. The JVC shall make available to the AAI and its representatives such information and grant such access or procure the grant of such access (including to or from third parties) as they shall reasonably require in connection therewith. If any such exercise reveals that information previously supplied to the AAI was in any material respect inaccurate on the basis of information available to the JVC at the time, the costs of any such exercise shall be borne by the JVC."

158. The subject of tariff was regulated by the provisions enshrined in Chapter XII and which is reproduced in its entirety hereinbelow:

"CHAPTER XII

TARIFF AND REGULATION

12.1 Tariff

12.1.1 For the purpose of this Agreement, the charges to be levied at the Airport by the JVC for the provision of Aeronautical Services and consequent recovery of costs relating to Aeronautical Assets shall be referred to as Aeronautical Charges.

12.1.2 The JVC shall at all times ensure that the Aeronautical Charges levied at the Airport shall be as determined as per the provisions of the State Support Agreement. It is hereby expressly clarified that any penalties or damages payable by the JVC under any of the Project Agreements shall not form a part of the Aeronautical Charges and not be passed on to the users of the Airport.

12.2 Charges for Non-Aeronautical Services

Subject to Applicable Law, the JVC shall be free to fix the charges for Non-Aeronautical Services, subject to the provisions of the existing contracts and other agreements.

12.3 Charges for Essential Services

12.3.1 Notwithstanding the foregoing, those Aeronautical or Non-Aeronautical Services that are also Essential Services, shall be provided free of charge to passengers.

12.4 Passenger Service Fees

12.4.1 The Passenger Service Fees shall be collected and disbursed in accordance with the provisions of the State Support Agreement."

159. As is manifest from a reading of the stipulations contained in

Chapter XI, the JVC took on the obligation to make payment of an Upfront Fee and Annual Fee in consideration of the Grant. The Upfront Fee was stipulated to be INR 150 crores, and was to be paid on or before the Effective Date. This payment was to be a non-refundable one-time payment except where the agreement were to be terminated in accordance with Article 3.3. Similar provisions exist in the OMDA which was executed for CSMIA.

160. Apart from the aforenoted Upfront Fee, the JVC was liable to pay AAI an Annual Fee for each year comprised in the term of the Agreement. The Annual Fee was prescribed to be 45.99% and 38.7% of the 'projected Revenue' for each year with 'projected Revenue' being that as disclosed in the Business Plan. The Annual Fee was payable in 12 equal monthly instalments and to be paid on the first day of each calendar month. Article 11.1.2.3 embodied a process of reconciliation and truing up of accounts in case there be a disparity between the projected and actual revenue that may be generated. It thus provided that in case in any quarter the actual revenue exceeded the projected revenue, the JVC would become liable to pay additional Annual Fee representing the difference between the actual quarterly and the projected quarterly revenue. Parallel provisions were made to cater to a contingency where the projected revenue were to exceed the actual revenue generated. In such a situation, a corresponding obligation came to be placed upon AAI to make good the difference. This exercise of reconciliation and computation of applicable revenue and its final verification was entrusted by both parties to the Independent Auditor.

161. Chapter XII spelt out the manner in which the JVC would recoup the costs connected with the provision of Aeronautical Services. The Aeronautical Charges were to be determined in accordance with the provisions contained in the SSA. Both DIAL and MIAL thus bound by the provisions pertaining to tariff regulation contained in Chapter XII could levy and collect only such Aeronautical Charges as would be determined under the provisions of the SSA. These Aeronautical Charges were to pay for the provision of Aeronautical Services and aid in the recovery of 'costs relating to aeronautical assets'. However, and as per Article 12.2, the JVC was enabled to charge such fee as it deemed fit in respect of Non-Aeronautical Services. The levy of fees for Non-Aeronautical Services was thus left unregulated and at the discretion of DIAL/MIAL.

162. The SSA undoubtedly formed part of the Project Agreements as defined in the OMDA and essentially formed part of the family of nine principal and foundational agreements which came to be contemporaneously executed. This becomes apparent from the following provisions which form part of the SSA. The SSA at the outset acknowledged the shift in policy in relation to the management of

airports in the country, of liberalization and the enablement of AAI to search for private participants who were desirous to operate, maintain and develop airports. The SSA proceeds further to record that in consideration of the JVC having entered into the OMDA, the Union Government was agreeable to provide support in the manner detailed in that Agreement. The support that the Union was liable to extend came to be spelt out in Clause 3 of the SSA and which could be broadly classified under the following heads:

(a) The establishment of the 'Economic Regulatory Authority' and which was the specialized body liable to deal with all aspects pertaining to regulation of Aeronautical Charges. Those Aeronautical Charges were, the SSA explained, liable to be calculated in accordance with Schedule 6. The Union Government further confirmed that till such time as the Economic Regulatory Authority commences the exercise of determining Aeronautical Charges, the same would be approved by it in accordance with the principles set up in Schedule 1.

(b) Passenger Service Fees[26] : This was explained to be the fee that would be chargeable at the airport and a facilitation component being payable to the JVC being 35% of the PSF levied and prevalent.

(c) Clearances : The Union Government held out that subject to the JVC ensuring compliance with all statutory mandates, it would assist in ensuring that all requisite clearances as required in connection with the airport, are granted with expedition.

(d) Government of India Services : The Union undertook to provide various services at the airport during the term of the contract. These were explained to include customs control, immigration services, planned quarantine, annual quarantine, health, meteorological and security services.

(e) Right of First Refusal : The SSA further accorded the JVC the right of first refusal in case a second airport within a 150 km radius were to come up.

(f) Master Plan Review : This obligated the JVC to submit a master plan to the Union Government every ten years setting out traffic forecasts, details with respect to development standards and laying out the future vision for the airport.

(g) Major Development Review : This placed the JVC under an obligation to submit a Major Development Plan for the consideration of the Union Government from time to time.

163. The Principles of Tariff Fixation were set out in Schedules 1 and 6. Schedules 1 and 6 are reproduced hereinbelow:

"SCHEDULE 1

PRINCIPLES OF TARIFF FIXATION

Background

If despite all reasonable efforts of the GOI, AERA is not in place by the time required to commence the first regulatory review, the Ministry of Civil Aviation will continue to undertake the role of approving aero tariff, user charges, etc.

Principles

In undertaking its role, AERA will (subject to Applicable Law) observe the following principles:

1. *Incentives Based:* The JVC will be provided with appropriate incentives to operate in an efficient manner, optimising operating cost, maximising revenue and undertaking investment in an efficient, effective and timely manner and to this end will utilise a price cap methodology as per this Agreement.
2. *Commercial:* In setting the price cap, AERA will have regard to the need for the JVC to generate sufficient revenue to cover efficient operating costs, obtain the return of capital over its economic life and achieve a reasonable return on investment commensurate with the risk involved.
3. *Transparency:* The approach to economic regulation will be fully documented and available to all stakeholders, with the Airports and key stakeholders able to make submissions to AERA and with all decisions fully documented and explained.
4. *Consistency:* Pricing decisions in each regulatory review period will be undertaken according to a consistent approach in terms of underlying principles.
5. *Economic Efficiency* : Price regulation should only occur in areas where monopoly power is exercised and not where a competitive or contestable market operates and so should apply only to Aeronautical Services. Further in respect to regulation of Aeronautical Services the approach to pricing regulation should encourage economic efficiency and only allow efficient costs to be recovered through pricing, subject to acceptance of imposed constraints such as the arrangements in the first three years for operations support from AAI.
6. *Independence:* The AERA will operate in an independent and autonomous manner subject to policy directives of the GOI on areas identified by GOI.
7. *Service Quality:* In undertaking its role AERA will monitor, preset performance in respect to service quality performance as defined in the Operations Management Development Agreement (OMDA) and revised from time to time.

8. *Master Plan and Major Development Plans* : AERA will accept the Master Plan and Major Development Plans as reviewed and commented by the GOI and will not seek to question or change the approach to development if it is consistent with these plans. However, the AERA would have the right to assess the efficiency with which capital expenditure is undertaken.
9. *Consultation* : The Joint Venture Company will be required to consult and have reasonable regard to the views of relevant major airport users with respect to planned major airport development.
10. *Pricing responsibility* : Within the overall price cap the JVC will be able to impose charges subject to those charges being consistent with these pricing principles and IATA pricing principles as revised from time to time including the following:
    (i) *Cost reflectivity:* Any charges made by the JVC must be allocated across users in a manner that is fully cost reflective and relates to facilities and services that are used by Airport users;
    (ii) *Non discriminatory:* Charges imposed by the JVC arc to be non discriminatory as within the same class of users;
    (iii) *Safety:* Charges should not be imposed in a way as to discourage the use of facilities and services necessary for safety;
    (iv) *Usage:* In general, aircraft operators, passengers and other users should not be charged for facilities and services they do not use.

Calculating the aeronautical charges in the shared till inflation — X price cap model.

The revenue target is defined as follows

$$TR_i = RB_i x WACC_i + OM_i + D_i + T_i + S_i$$

Where TR= target revenue

RB= regulatory base pertaining to Aeronautical Assets and any investments made for the performance of Reserved Activities etc. which are owned by the JVC, after incorporating efficient capital expenditure but does not include capital work in progress to the extent not capitalised in fixed assets. It is further clarified that working capital shall not be included as part of regulatory base. It is further clarified that penalties and Liquidated Damages, if any, levied as per the provisions of the OMDA would not be allowed for capitalization in the regulatory base. It is further clarified that the Upfront Fee and any pre-operative expenses incurred by the Successful Bidder towards bid preparation will not be allowed to be capitalised in the regulatory base.

WACC = nominal post-tax weighted average cost of capital, calculated using the marginal rate of corporate tax

OM = efficient operation and maintenance cost pertaining to Aeronautical Services. It is clarified that penalties and Liquidated Damages, if any, levied as per the provisions of the OMDA would not be allowed as part of operation and maintenance cost.

D = depreciation calculated in the manner as prescribed in Schedule XIV of the Indian Companies Act, 1956. In the event, the depreciation rates for certain assets are not available in the aforesaid Act, then the depreciation rates as provided in the Income Tax Act for such asset as converted to straight line method from the written down value method will be considered. In the event, such rates are not available in either of the Acts then depreciation rates as per generally accepted Indian accounting standards may be considered.

T = corporate taxes on earnings pertaining to Aeronautical Services.

S = 30% of the gross revenue generated by the JVC from the Revenue Share Assets. The costs in relation to such revenue shall not be included while calculating Aeronautical Charges.

"Revenue Share Assets" shall mean (a) Non-Aeronautical Assets; and (b) assets required for provision of aeronautical related services arising at the Airport and not considered in revenue from Non-Aeronautical Assets (e.g. Public admission fee etc.)

i = time period (year) i

$RB_i = RB_{i-1} - D_i + I_i$

Where RB_0 for the for the first regulatory period would be the sum total of:

(i) the Book Value of the Aeronautical Assets in the books of the JVC

and

(ii) the hypothetical regulatory base computed using the then prevailing tariff and the revenues, operation and maintenance cost, corporate tax pertaining to Aeronautical Services at the Airport, during the financial year preceding the date of such computation.

I = investment undertaken in the period

The X factor is calculated by determining the X factor that equates the present value over the regulatory period of the target revenue with the present value that results from applying the forecast traffic volume with a price path based on the initial average aeronautical charge, increased by CPI minus X for each year. That is, the

following equation is solved for X:

$$\sum_{i=1}^{n} \frac{RB_i \times WACC_i + OM_i + D_i + T_i - S_i}{(1+WACC_i)^i} = \sum_{i=1}^{n} \sum_{j=I}^{m} \frac{AC_{ij} \times T_{ij}}{(1+WACC_i)^1}$$

where AC_{ij} = average aeronautical charge for the j^{th} category of aeronautical revenue in the i^{th} year

T_{ij} = volume of the j^{th} category of aeronautical traffic in the i^{th} year

X = escalation factor

n = number of years considered in the regulatory period

m = number of categories of aeronautical revenue e.g. landing charges, parking charges, housing charges, Facilitation Component etc.

The maximum average aeronautical charge (price cap) in a particular year 'i' for a particular category of aeronautical revenue 'j', is then calculated according to the following formula:

$$AC_i = AC_{i-1} \times (1 + CPI - X)$$

where CPI = average annual inflation rate as measured by change in the All India Consumer Price Index (Industrial Workers) over the regulatory period.

The following is an illustrative numeric example of a price cap model showing how the X factor is determined. The example relates to a five-year regulatory period where the X is calculated as an average factor for each of the five years.

Illustrative Numerical Example of the Price Cap Approach

The following is an indicative numerical example illustrating the methodology to calculate aeronautical charges. This is just an example and may not be followed by AERA or the GOI, as the case may be.

Assumptions

AirportCo is an airport company with the following parameters:

Existing regulated asset base = $500m

Net working capital for aeronautical services = nil

Existing aeronautical revenue = $67m

Aeronautical related revenue shared in regulated till = 30%

Existing traffic volume = 48 million passengers, aeronautical charges levied on a per passenger basis only

Post-tax nominal WACC = 7.0%

Pre-tax cost of debt = 4.0%

Debt — equity ratio for financing regulatory base = 2 : 1

CPI based inflation = 3.0%

Book life of existing regulated assets = 32.5 years

Book life of new regulated capital expenditure = 35 years

Rate of corporate tax = 10%, assumed to be the rate of corporate tax applicable to the earnings from Aeronautical Services as computed according to the Indian Income Tax Act.

Assumption (all figures in current prices)	2003	2004	2005	2006	2007	2008
O&M Costs ($m)		20	22	24	26	28
Capex ($m)		40	60	60	50	40
Aeronautical related revenue	30	32	34	37	39	42
Traffic (passengers million)	48	50	52	54	56	58
Depreciation rate for initial regulated asset base (%)		3.1	3.1	3.1	3.1	3.1
Depreciation rate for new regulated capex (%)		2.9	2.9	2.9	2.9	2.9

Step 1 : Determine Target Revenue

Target revenue is O&M plus depreciation plus WACC × RAB plus tax

Step 2 : Set escalation factors

The calculations for determining the escalation factor are outlined below:

($m)	2003	2004	2005	2006	2007	2008
EBIT - Tax		37	39	42	44	45
less : Interest		14	14	15	16	17
PAT		23	25	26	28	28
add : Tax		3	3	3	3	3
add :		14	14	15	16	17

Interest						
add : Depreciation		16	17	19	20	22
EBITDA		55	59	64	67	70
add : O&M costs		20	22	24	26	28
less : Share of aeronautical related revenue		10	10	11	12	13
Target revenue requirement		66	71	77	82	85
Discounted target revenue requirement		61	62	62	62	61
Revenue based on escalation factor	67	70	73	76	79	81
Discounted revenue based on escalation factor		65	64	62	60	58
CPI based inflation (%)		3.00	3.00	3.00	3.00	3.00
Index of nominal aeronautical tariffs based on CPI - X	1.00	1.00	1.00	1.00	1.00	1.00
Post-tax nominal WACC used to calculate NPV	7.00%					
NPV of Target Revenue	309					
NPV of	309					

expected revenue based on escalation factor	
Difference in NPV	0.00
X factor	+2.89%

The X factor for this numerical example is calculated to be +2.89% over the five year regulatory period.

XXXX XXXX XXXX

SCHEDULE 6

AERONAUTICAL CHARGES

Aeronautical Charges, for the purposes of this Agreement, shall be determined in the manner as set out hereunder:

1. The existing AAI airport charges (as set out in Schedule 8 appended hereto) ("Base Airport Charges") will continue for a period of two (2) years from the Effective. Date and in the event the JVC duly completes and commissions the Mandatory Capital Projects required io be completed during the first two (2) years from the Effective Date, a nominal increase of ten (10) percent over the Base Airport Charges shall he allowed for the purposes of calculating Aeronautical Charges for the duration of the third (3rd) after the Effective Date ("Incentive"). It is hereby expressly clarified that in the event JVC does not complete and commission, by the end of the second (2nd) year from the Effective Date, the Mandatory Capital Projects required to be completed and commissioned, the Incentive shall not be available to the JVC for purposes of calculating Aeronautical Charges for the third (3rd) year alter the Effective Date.

2. From the commencement of the fourth (4th) year after the Effective Date and for every year thereafter for the remainder of the Term. Economic Regulatory Authority/GOI (as the case may be) will set the Aeronautical Charges in accordance with Clause 3.1.1 read with Schedule 1 appended to this Agreement, subject always to the condition that, at the least, a permitted nominal, increase of ten (10) percent of the Base Airport Charges will be available to the JVC for the purposes of calculating Aeronautical Charges in any year after the commencement of the fourth year and for the remainder of the Term.

3. For abundant caution, it is hereby expressly clarified that in the event AAI increases the airport charges (as available on the AAI website www.airportsindia.org anytime during the first two (2) years from the Effective Date, such increase shall not be considered for revising calculating the Aeronautical Charges chargeable by the JVC."

viii. The Role of AERA

164. The 'Economic Regulatory Authority', AERA, envisaged under Clause 3 and Schedule 1 of the SSA read along with Chapter XII of OMDA was constituted in 2009 by virtue of the Airports Economic Regulatory Authority of India Act, 2008[27] for the purposes of tariff fixation for Aeronautical Services, the determination of PSF, User Development Fees[28] and other related functions. Further, a specialised statutory tribunal was also set up under the AERA Act to adjudicate upon any dispute relating to tariff determination. On 09 March 2012, the Ministry of Civil Aviation issued a letter to AERA emphasising that the tariff for Aeronautical Services should be fixed in accordance with the provisions set out in the OMDA and SSA. Through another letter of the same date, the Ministry wrote to AERA on the issue of classification of cargo and ground handling services as Non-Aeronautical Services and for treating the revenue from these services as Non-Aeronautical Revenue.

165. AERA thereafter, in exercise of its powers under Section 13(1)(a) of the AERA Act, passed the First Tariff Order dated 20 April 2012 and 15 January 2013 for DIAL and MIAL respectively determining the aeronautical tariff and tariff structure for the 'first five year control period' extending from 01 April 2009 to 31 March 2014. The rates determined therein for UDF, PSF and other Aeronautical Charges were ceiling rates and exclusive of taxes.

166. AERA noted in its First Tariff Orders that one of the important revenue parameters for adjudging different bids was the revenue share percentage. The JVCs' bids for the revenue to be shared with AAI was not to be taken as a cost while determining aeronautical tariffs. Further, AERA spelt out details pertaining to the 'Price Cap Mechanism' and its general approach in the determination of Aeronautical Charges. The statutory body decided to consider the provisions of the SSA read with the OMDA and other Project Agreements, insofar as they were consistent with the provisions of the AERA Act. Further, in the absence of any other basis for the allocation of aeronautical and non-aeronautical assets, AERA accepted DIAL/MIAL's proposals for the allocation of such assets. However, it also held that it would commission an independent study for the truing up of asset allocation, leaving it open to be corrected in the following control period if

required. In respect of capital costs, AERA decided not to allow any collection charges on Development Fees to be covered as operating expenditure and additionally delinked the Facilitation Component from PSF and included the same as part of UDF. AERA further held that if the service providers of Aeronautical Services were the airport operators themselves, then revenues accruing from those services to the airport operator would be treated as Aeronautical Revenue and in such a case, the costs incurred by the service providers would also be taken into account while determining aeronautical tariff.

167. However, if the provision of those services were to be outsourced to a third party, including a JVC as in the case of DIAL/MIAL, the third party would be liable to be viewed as the service provider and consequently come within the ambit of regulation including tariff determination.

E. ANALYSIS

ix. The Scope of Section 34

168. Having identified the principal submissions which were addressed on these appeals, this would be an appropriate juncture to delineate the broad contours and extent of scrutiny and review which we could justifiably undertake whilst adjudging the validity of the award which stands impugned before us. It would at the outset be important to bear in mind that the recourse against an award, as constructed in terms of Section 34 of the Act, is not intended to be an appeal on the merits of the dispute. In the context of the present petitions, it would essentially have to be supervisory and corrective to the extent of fundamental and apparent errors, patent perversity or illegality and where the award be said to be unsustainable when viewed through the eyes of the metaphorical reasonable person. The remedy under Section 34 is thus neither intended to be resorted to correct an error of judgment nor is it liable to be wielded to review an award basis an independent formation of opinion of what the court may consider to be more eminent or justified. Interference with an award would also not be justified on an alternative interpretation or view which could be legitimately harboured. As would be evident upon a review of the body of precedent which has evolved on the subject of the Section 34 power, it is universally acknowledged to be the test of *"unpardonable perversity"*. The patent perversity thus must be of a degree which exposes the very foundation of the award to an assertion of inexcusable fallacy as opposed to errors of judgment.

169. Courts while being called to exercise their corrective jurisdiction as conferred by Section 34 must, at all times, be cognizant of an arbitral tribunal having been chosen by respective sides to render judgment which is contractually agreed to be binding and an outcome of the consensual mechanism of resolution of disputes which was

agreed to by parties. Courts while evaluating a challenge under Section 34 would not be justified in faulting an award merely because an alternative view were possible or where they find that, in their opinion and when independently evaluated, a more just conclusion could have been possibly reached. It is equally important to bear in mind that an arbitral tribunal is empowered to interpret the terms of the contract. An interpretation of those covenants is not outside the remit or the jurisdiction which parties chose to confer. Thus, a view taken on a fair and reasonable evaluation of those covenants is not liable to be interfered with merely because the court were to harbour an alternative opinion.

170. The Court finds a lucid enunciation of these foundational principles and restrictions on the power to interfere with an award in a judgment penned by Chief Justice Menon of the Singapore Supreme Court in *AKN* v. *ALC*[29]. The learned Chief Justice summarized the legal position as under:

> "The law - Setting aside arbitral awards on breach of natural justice grounds
>
> 36. The law on setting aside arbitral awards for breaches of natural justice is reasonably clear. Nevertheless, the three appeals before us present us with the opportunity to restate the proper relationship between arbitral tribunals and the courts, as well as revisit the seminal High Court decision of *Front Row Investment Holdings (Singapore) Pte Ltd.* v. *Daimler South East Asia Pte Ltd.*, [2010] SGHC 80 ("*Front Row*").
>
> 37. A critical foundational principle in arbitration is that the parties choose their adjudicators. Central to this is the notion of party autonomy. Just as the parties enjoy many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases. This important proscription is reflected in the policy of minimal curial intervention in arbitral proceedings, a mainstay of the Model Law and the IAA (see *BLC* v. *BLB*, (2014) 4 SLR 79 at ([51]-[53])
>
> 38. In particular, there is no right of appeal from arbitral awards. That is not to say that the courts can never intervene. However, the grounds for curial intervention are narrowly circumscribed, and generally concern process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. It follows

> that, from the courts' perspective, the parties to an arbitration do not have a right to a "correct" decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process.
>
> 39. In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration. A prime example of this would be a challenge based on an alleged breach of natural justice. When examining such a challenge, it is important that the court assesses the *real nature* of the complaint…."

171. Though the contours of the power conferred upon a court under Section 34 are well-settled, it would be appropriate to briefly revisit the precepts enunciated by courts and which must be borne in mind while evaluating a challenge to an award. It is trite law that the court while examining a challenge to an arbitral award is not exercising powers akin to that of an appeal. The award as rendered must lead the court to find that one or more of the grounds of challenge set out in Section 34 (2) stand attracted. It is in order to underline the narrow confines of the challenge that the Legislature uses the expressions "*only if*" and "*the Court finds that*" in Section 34. Additionally, and post the amendments which came to be introduced in Section 34 by virtue of Act 3 of 2016, the court stands conferred with the additional power of setting aside an award if it finds the same to be vitiated by a patent illegality which is manifest or *ex facie* apparent. Of equal significance is the Proviso which stands erected by virtue of sub-section (2A) to Section 34 and which introduces a note of caution by providing that no award shall be set aside merely on the ground of an erroneous application of the law or upon reappreciation of evidence.

172. This Court, therefore, would have to tread forward bearing in mind those and the other well-settled precepts. Rather than burdening this decision with various precedents which have explained the extent of the curial power and the limited contours of Section 34, it would be apposite to refer to the following passages which appear in the recent decision of the Supreme Court in *DMRC Ltd.* v. *Delhi Airport Metro Express (P) Ltd.*[30]:

> "34. The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2-A) of the Arbitration

Act, a domestic award may be set aside if the Court finds that it is vitiated by "patent illegality" appearing on the face of the award.

35. In *Associate Builders* v. *DDA* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], a two-Judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of persons could possibly have taken it. This Court held with reference to Sections 28(1)(*a*) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are:

(*i*) based on no evidence;

(*ii*) based on irrelevant material; or

(*iii*) ignores vital evidence.

36. Patent illegality may also arise where the award is in breach of the provisions of the arbitration statute, as when for instance the award contains no reasons at all, so as to be described as unreasoned.

37. A fundamental breach of the principles of natural justice will result in a patent illegality, where for instance the arbitrator has let in evidence behind the back of a party. In the above decision, this Court in *Associate Builders* v. *DDA* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] observed : (SCC pp. 75 & 81, paras 31 & 42)

> "*31*. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:
>
> (*i*) a finding is based on no evidence, or
>
> (*ii*) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
>
> (*iii*) *ignores vital evidence in arriving at its decision*, such decision would necessarily be perverse.
>
> * * *
>
> *42.1*. … *42.2*. (*b*) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example *if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set*

aside."

(emphasis supplied)

38. In *Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI* [*Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213], a two-Judge Bench of this Court endorsed the position in *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], on the scope for interference with domestic awards, even after the 2015 Amendment : (*Ssangyong Engg. & Construction Co. case* [*Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213], SCC p. 171, paras 40-41)

"*40*. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, *unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction*. *This ground of challenge will now fall within the new ground added under Section 34(2-A)*.

41. … *Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality*. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

(emphasis supplied)

39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. [*Patel Engg. Ltd.* v. *North Eastern Electric Power Corpn. Ltd.*, (2020) 7 SCC 167 : (2020) 4 SCC (Civ) 149.] A "finding" based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of "patent illegality". An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle

of natural justice.

40. A judgment setting aside or refusing to set aside an arbitral award under Section 34 is appealable in the exercise of the jurisdiction of the court under Section 37 of the Arbitration Act. It has been clarified by this Court, in a line of precedent, that the jurisdiction under Section 37 of the Arbitration Act is akin to the jurisdiction of the Court under Section 34 and restricted to the same grounds of challenge as Section 34. [*MMTC Ltd.* v. *Vedanta Ltd.*, (2019) 4 SCC 163, para 14 : (2019) 2 SCC (Civ) 293; *Konkan Railway Corpn. Ltd.* v. *Chenab Bridge Project Undertaking*, (2023) 9 SCC 85, para 18 : (2023) 4 SCC (Civ) 458 : 2023 INSC 742, para 14.]

41. In the statutory scheme of the Arbitration Act, a recourse to Section 37 is the only appellate remedy available against a decision under Section 34. The Constitution, however, provides the parties with a remedy under Article 136 against a decision rendered in appeal under Section 37. This is the discretionary and exceptional jurisdiction of this Court to grant special leave to appeal. In fact, Section 37(3) of the Arbitration Act expressly clarifies that no second appeal shall lie from an order passed under Section 37, but nothing in the section takes away the constitutional right under Article 136. Therefore, in a sense, there is a third stage at which this Court tests the exercise of jurisdiction by the courts acting under Section 34 and Section 37 of the Arbitration Act.

XXXX XXXX XXXX

(*i*) *Interpretation of the termination clause by the Tribunal was unreasonable*

46. Interference with an arbitral award cannot frustrate the "*commercial wisdom behind opting for alternate dispute resolution*", merely because an alternate view exists. [*Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1, paras 24-25.] However, the interpretation of a contract cannot be unreasonable, such that no person of ordinary prudence would take it. The contract, which is a culmination of the parties' agency, should be given full effect. If the interpretation of the terms of the contract as adopted by the Tribunal was not even a possible view, the award is perverse. [*Konkan Railway Corpn. Ltd.* v. *Chenab Bridge Project Undertaking*, (2023) 9 SCC 85 : (2023) 4 SCC (Civ) 458 : 2023 INSC 742.]"

173. In *Dyna Technologies*, the Supreme Court while speaking on the width of the power conferred by Section 34 made the following pertinent observations:

"24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein

> or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.
>
> 25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."

This particular case essentially deals with a challenge which revolves upon the interpretation liable to be accorded to various covenants of a contract i.e. the OMDA. Undisputedly, the Tribunal did stand conferred with the jurisdiction and authority to undertake that exercise of interpretation.

174. An error that may be committed by an arbitral tribunal while undertaking an interpretative exercise of a contract and when that would constitute sufficient ground to interfere with an award was succinctly explained in *Rashtriya Ispat Nigam Limited* in the following terms:

> "43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.
>
> 44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL* v. *Gupta Brother Steel Tubes Ltd.* and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd.* 10 to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows : (*Sumitomo case* [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459], SCC p. 313)

> "*43*. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn.* v. *Central Warehousing Corpn.* [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

175. In a more recent decision, in *UHL Power Company Limited*, the Supreme Court after noticing the string of precedents which had ruled on the scope of interference with an award summarized the legal position as follows:

> "15. This Court also accepts as correct, the view expressed by the appellate court that the learned Single Judge committed a gross error in reappreciating the findings returned by the Arbitral Tribunal and taking an entirely different view in respect of the interpretation of the relevant clauses of the implementation agreement governing the parties inasmuch as it was not open to the said court to do so in proceedings under Section 34 of the Arbitration Act, by virtually acting as a court of appeal.
>
> 16. As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In *MMTC Ltd.* v. *Vedanta Ltd.* [*MMTC Ltd.* v. *Vedanta Ltd.*, (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293], the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act have been explained in the following words : (SCC pp. 166-67, para 11)
>
> > "*11*. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground

provided under Section 34(2)(*b*)(*ii*) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.*, [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract."

XXXX XXXX XXXX

18. It has also been held time and again by this Court that if there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found, if the learned arbitrator proceeds to accept one interpretation as against the other. In *Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.* [*Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1], the limitations on the Court while exercising powers under Section 34 of the Arbitration Act has been highlighted thus : (SCC p. 12, para 24)

"*24*. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."

19. In *Parsa Kente Collieries Ltd.* v. *Rajasthan Rajya Vidyut Utpadan Nigam Ltd.* [*Parsa Kente Collieries Ltd.* v. *Rajasthan Rajya Vidyut Utpadan Nigam Ltd.*, (2019) 7 SCC 236 : (2019) 3 SCC (Civ)

552], adverting to the previous decisions of this Court in *McDermott International Inc.* v. *Burn Standard Co. Ltd.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] and *Rashtriya Ispat Nigam Ltd.* v. *Dewan Chand Ram Saran* [*Rashtriya Ispat Nigam Ltd.* v. *Dewan Chand Ram Saran*, (2012) 5 SCC 306], wherein it has been observed that an Arbitral Tribunal must decide in accordance with the terms of the contract, but if a term of the contract has been construed in a reasonable manner, then the award ought not to be set aside on this ground, it has been held thus : (*Parsa Kente Collieries case* [*Parsa Kente Collieries Ltd.* v. *Rajasthan Rajya Vidyut Utpadan Nigam Ltd.*, (2019) 7 SCC 236 : (2019) 3 SCC (Civ) 552], SCC pp. 244-45, para 9)

> "*9.1*. … *It is further observed and held that construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do*. It is further observed by this Court in the aforesaid decision in para 33 that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. *A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award*. It is further observed that thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.
>
> *9.2*. Similar is the view taken by this Court in *NHAI* v. *ITD Cementation India Ltd.* [*NHAI* v. *ITD Cementation India Ltd.*, (2015) 14 SCC 21 : (2016) 2 SCC (Civ) 716], SCC para 25 and *SAIL* v. *Gupta Brother Steel Tubes Ltd.* [*SAIL* v. *Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16], SCC para 29."

(emphasis supplied)

20. In *Dyna Technologies* [*Dyna Technologies (P) Ltd.* v. *Crompton Greaves Ltd.*, (2019) 20 SCC 1], the view taken above has been reiterated in the following words : (SCC p. 12, para 25)

> "*25*. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the

Arbitration Act."

(emphasis supplied)

22. In the instant case, we are of the view that the interpretation of the relevant clauses of the implementation agreement, as arrived at by the learned sole arbitrator, are both, possible and plausible. Merely because another view could have been taken, can hardly be a ground for the learned Single Judge to have interfered with the arbitral award. In the given facts and circumstances of the case, the appellate court has rightly held that the learned Single Judge exceeded his jurisdiction in interfering with the award by questioning the interpretation given to the relevant clauses of the implementation agreement, as the reasons given are backed by logic."

176. The most succinct and lucid explanation of the extent of intervention which would be liable to be wielded while evaluating a challenge to an award, and which courts have repeatedly turned to, is found in the following observations rendered by the Supreme Court in *Ssangyong Engineering*:

"58. So far as this defence is concerned, standard textbooks on the subject have held that the expression "submission to arbitration" either refers to the arbitration agreement itself, or to disputes submitted to arbitration, and that so long as disputes raised are within the ken of the arbitration agreement or the disputes submitted to arbitration, they cannot be said to be disputes which are either not contemplated by or which fall outside the arbitration agreement. The expression "submission to arbitration" occurs in various provisions of the 1996 Act. Thus, under Section 28(1)(*a*), an Arbitral Tribunal "... shall decide the dispute submitted to arbitration ...". Section 43(3) of the 1996 Act refers to "... an arbitration agreement to submit future disputes to arbitration ...". Also, it has been stated that where matters, though not strictly in issue, are connected with matters in issue, they would not readily be held to be matters that could be considered to be outside or beyond the scope of submission to arbitration. Thus, in *Fouchard* (supra), it is stated:

"This provision applies where the arbitrators have gone beyond the terms of the arbitration agreement. It complements Article V, Para 1(*a*), which concerns invalid arbitration agreements. The two grounds are similar in nature : in both cases, the arbitrator will have ruled in the absence of an arbitration agreement, either because the agreement is void [as in sub-section (*a*)] or because it does not cover the subject-matter on which the arbitrator reached a decision [as in sub-section (*c*)]. For that reason, more recent arbitration statutes often either treat the two grounds as one, as in Article 1502 1° of the French New Code of Civil

Procedure, or refer generally to the "absence of a valid arbitration agreement", as in Article 1065 of the Netherlands Code of Civil Procedure.

However, Article V, Para 1(*c*) does not cover all the cases listed in Article 1502 3° of the French New Code of Civil Procedure, which provides that recognition or enforcement can be refused where "the arbitrator ruled without complying with the mission conferred upon him or her". That extends to decisions that are either *infra petita* and *ultra petita*, as well as to situations where the arbitrators have exceeded their powers in the examination of the merits of the case (for example, by acting as *amiable compositeurs* when that was not agreed by the parties, or by failing to apply the rules of law chosen by the parties). Generally speaking, such situations cannot be said to be outside the terms of the arbitration agreement within the meaning of the New York Convention. In practice, it is only where the terms of reference — which, provided that they have been accepted by the parties, can constitute a form of arbitration agreement — set out the parties' claims in detail that arbitrators who have decided issues other than those raised in such claims can be said both to have ruled *ultra petita* and to have exceeded the terms of the arbitration agreement. If, on the other hand, the arbitration agreement is drafted in general terms and the claims are not presented in a way that contractually determines the issues to be resolved by the arbitrators, a decision that is rendered *ultra petita* would not contravene Article V, Para 1(*c*).

It is important to note that the Convention provides that the refusal of recognition or enforcement can be confined to aspects of the award which fail to comply with the terms of the arbitration agreement, provided that those aspects can be separated from the rest of the award [Article V(1)(*c*)].

Once again, the courts have taken a very restrictive view of the application of this ground."

XXXX XXXX XXXX

69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent "errors of jurisdiction", it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as "disputes" within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this

would be a jurisdictional error which could be corrected on the ground of "patent illegality", which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(*a*)(*iv*) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal."

177. One of the grounds which is available to a challenger who impugns an award is the ground of patent illegality. An error which could be said to fall within the scope of that phrase was explained in the following words by the Supreme Court in *Indian Oil Corporation Limited* v. *Shree Ganesh Petroleum*[31]:

"43. An Arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract.

44. However, a distinction has to be drawn between failure to act in terms of a contract and an erroneous interpretation of the terms of a contract. An Arbitral Tribunal is entitled to interpret the terms and conditions of a contract, while adjudicating a dispute. An error in interpretation of a contract in a case where there is valid and lawful submission of arbitral disputes to an Arbitral Tribunal is an error within jurisdiction.

45. The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one."

178. In *PSA Sical Terminals (P) Ltd.* v. *Board of Trustees of VO Chidambranar Port Trust Tuticorin*[32], the Supreme Court explained and laid down the law with respect to when an award could be said to be contrary to the fundamental policy of Indian law. Explaining the concepts underlying the oft used phrase 'public policy', the Supreme Court observed:

"39. Another bench of this Court, again to which one of us (R.F. Nariman, J.) was a party, has considered various judgments of this

Court including the judgment in *Associate Builders* (supra) and the effect of the Arbitration and Conciliation (Amendment) Act, 2015 in the case of *Ssangyong Engineering and Construction Company Limited* v. *National Highways Authority of India (NHAI)*, to which we will refer shortly.

40. Before that, it will be apposite to refer to judgment of this Court in the case of *MMTC Limited* (supra), wherein this Court has revisited the position of law with regard to scope of interference with an arbitral award in India.

41. It will be relevant to refer to the following observations of this Court in the case of *MMTC Limited* (supra):

> "11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e., if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses* v. *Wednesbury Corpn.*, [1948] 1 K.B. 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.
>
> 12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See *Associate Builders* v. *DDA* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. *Also see ONGC Ltd.* v. *Saw Pipes Ltd.* [*ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705]; *Hindustan Zinc Ltd.* v. *Friends Coal Carbonisation* [*Hindustan Zinc Ltd.* v. *Friends Coal Carbonisation*, (2006) 4 SCC 445]; and *McDermott International*

Inc. v. *Burn Standard Co. Ltd.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

42. In *Ssangyong Engineering* and *Construction Company Limited* (supra), this Court after considering various judgments including the judgment in *Associate Builders* (supra) observed thus:

"34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as explained in paras 28 and 29 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], would no longer obtain, as under the

guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34 (2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204].

35. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that *Western Geco* [*ONGC* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as understood in *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], and paras 28 and 29 in particular, is now done away with.

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

42. Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to advert to the grounds contained in Sections 34(2)(a)(iii) and (iv) as applicable to the facts of the present case."

43. It will thus appear to be a more than settled legal position,

that in an application under Section 34, the court is not expected to act as an appellate court and reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

44. A decision which is perverse, though would not be a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality."

179. The decision in *PSA Sical* assumes added significance, insofar as the present case is concerned, when one views Para 45 and where the Court summarised and chronicled the various factors which would constitute the test of perversity. Para 45 of that decision is reproduced hereinbelow:

"45. To understand the test of perversity, it will also be appropriate to refer to paragraph 31 and 32 from the judgment of this Court in *Associate Builders* (supra), which read thus:

"31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such

decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority* v. *Gopi Nath & Sons* [1992 Supp (2) SCC 312], it was held : (SCC p. 317, para 7)

> "7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In *Kuldeep Singh* v. *Commr. of Police* [(1999) 2 SCC 10 : 1999 SCC (L&S) 429], it was held : (SCC p. 14, para 10)

> "10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.""

180. Thus, the fundamental and default rule which informs Section 34 is of minimal curial intervention. This rule is in turn based upon the principle of party autonomy and resting upon parties having entrusted the dispute resolution function to a body of their own choosing. The validity of an award would be liable to be tested on the principles of patent illegality and which in turn would require a curative court to come to the firm conclusion that the decision rendered is so perverse and irrational that no reasonable person would have arrived at that conclusion. An award would be equally susceptible if it ignores the evidence on record or where its conclusion be ex facie contrary to the uncontested terms of the contract.

181. Having broadly recognised the principles which would inform the exercise of power under Section 34 of the Act, we note that in these two petitions, we are principally concerned with the interpretation of the contract and whether the view ultimately expressed would satisfy the tests as enunciated and noticed hereinabove.

x. Interpretation of "Revenue"

182. It is ironic that a singular word in the definition section of a complex contract became the principal cause for the dispute which arose *inter partes*. While elaborate submissions appear to have been addressed and voluminous evidence laid before the Tribunal, the

disputation centered around the meaning to be assigned to the word "Revenue" as it stands defined in the OMDA and the expression "*...all pre-tax gross revenue...*" which appears therein. This becomes evident from the Presiding Arbitrator in Para 60 of his opinion crystallizing the "areas of difference" as follows:

> "60. There is no dispute that Aeronautical Charges and charges for Non-Aeronautical Services, are to be taken into account to arrive at "all pre-tax gross revenue". The areas of difference are:
>
> (i) While AAI contends that the total receipts by way of Aeronautical Charges form part of "all pre-tax gross revenue", DIAL contends that the Capital Costs (depreciation, interest on debt and return on equity) should be deducted from the total receipts of Aeronautical Charges.
>
> (ii) While AAI contends that "all pre-tax gross revenue", would include Other Income of DIAL (i.e., income other than from Aeronautical Services and Non-Aeronautical Services), DIAL contends that its "Other Income" (i.e., income other than from Aeronautical Services and Non-Aeronautical Services), cannot be included to arrive at "all pre-tax gross revenue".
>
> (iii) What items would fall under Exclusion (a) in the definition of "Revenue" - *'Payments made for the activities undertaken by relevant authorities*'.
>
> (iv) While DIAL contends that Exclusion No. (c) in the definition of "Revenue" - "*any amount that accrues to DIAL from sale of any Capital Assets or Items*" would refer to the entire sale proceeds, AAI contends it would only refer to the profit accrued to DIAL on sale of any capital asset/items."

183. The OMDA compounds the dispute further by refraining from employing "Revenue" in the singular in any of its material articles and clauses. That term which forms the crux of contestation invariably appears in conjunction with other words and thus phrases such as "pretax gross revenue", "projected Revenue" and "actual Revenue" appear in different parts of the contract. It is also pertinent to note that the word "gross" which appears in the defining clause is not replicated in either Chapters XI or XII of the OMDA. While the Presiding Arbitrator does dwell on the significance and meaning liable to be attributed to the term "gross", indisputably the same does not find place in either the revenue-sharing or tariff fixation provisions and around which arguments were principally centered. It is these complexities which led to the members of the Arbitral Tribunal resorting to principles pertaining to interpretation of contracts to act as a guide.

184. The Presiding Arbitrator opined that the general rules of interpretation are liable to be invoked only in cases where the terms of the contract are found to suffer from ambiguity, vagueness or where

the word may be found susceptible to be ascribed more than one meaning. The Presiding Arbitrator thus appears to have adopted the strict rule of interpretation and given precedence to the adoption of a particular word or expression in the contract as opposed to courts embarking upon an exercise of discerning the real intent of parties. However, the Presiding Arbitrator, while propounding those tests also observes that the tests of true meaning and intention of parties are liable to be invoked to avoid absurdity, inconsistency and for the clauses of the contract "*to make business sense*". From amongst the host of authorities which were considered by the Presiding Arbitrator, of significance are the following principles which were culled out by Lord Hoffman in *Investors Compensation Scheme Limited* v. *West Bromwich Building Society*[33]:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only. legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties

must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd.* v. *Eagle Star Life Assurance Co. Ltd.*, [1997] 2 WLR 945

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Campania Neviera SA* v. *Salen Rederierna AB*, [1985] A.C. 191 201:

"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common-sense, it must be made to yield to business common-sense.""

185. The principal takeaways from the aforementioned principles are the ascertainment of the meaning from the point of view of the reasonable person, the background not being restricted to the "matrix of fact" but extending to any facet which could be said to impact the understanding and comprehension of the contractual terms by a reasonable person. Of significance is Principle 4 and which bids courts to bear in mind that while interpreting contracts, we should not be overly bound by lexicons and grammar and the surer test being of discerning the meaning of a particular word or term as would have been understood by the parties to the contract.

186. Of equal significance were the principles enunciated by our Supreme Court in *DLF Universal Ltd.* v. *Town and Country Planning Deptt.*[34], a decision noticed by the Presiding Arbitrator, and which succinctly explains the importance of purposive interpretation of commercial contracts in the following words:

"13. It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises the joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both the parties and the joint

intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation."

187. As was explained by the Supreme Court in *DLF Universal*, the primary test of interpretation of contracts is of ascertainment of purpose and objective on the basis of which parties formed the contract. The decision thus reiterates the well-settled principle of courts not being bound by the mere letter or the word forming part of the contract. Courts would, in the course of such an interpretative analysis and while determining the meaning to be ascribed to a word or a clause of the contract accord pre-eminence upon the context and meaning which the parties sought to confer rather than resorting to lexicological aids.

188. The view taken by the Co-Arbitrators, on the other hand, proceeds on a broader and a cumulative consideration of the legislative objective underlying the introduction of Section 12-A in the AAI Act, the envisaged commercial enterprise which both parties agreed to undertake, a balancing of the obligation to fund and create assets and infrastructure and thus the concomitant requirement of funding those investments and earning a reasonable return. The view taken by the Majority primarily proceeds on the basis of a conjoint reading of the Project Agreements, commercial pragmatism and the rule of business efficacy. It is pertinent to note that the Presiding Arbitrator had in this respect taken a diametrically opposite view when it held that the SSA could not guide or regulate the OMDA provisions.

189. The Co-Arbitrators further held that, and this attains some significance, both parties appear to have proceeded on a mistaken premise and misconstrued the OMDA. The aspect of mistake also finds resonance in the opinion of the Presiding Arbitrator, albeit in the context of electricity charges and other exclusions, from "Revenue" as defined. The panel of arbitrators thus appear to have found unanimously that both sides clearly appeared to have misconstrued the terms of the contract. Faced with such a situation, while the Presiding Arbitrator chose to adhere to the stricter and more traditional rules of interpretation, the Co-Arbitrators adopted the route of business efficacy and a consideration of the larger contractual bargain as emerging from a conjoint reading of the Project Agreements. It is this foundational distinction which appears to inform the views which were ultimately expressed by the panel of arbitrators.

190. While we have taken note of the views expressed by the panel of arbitrators including the minority opinion which was rendered we remain conscious of the legal position that even though individual members of an arbitral tribunal may render dissenting opinions, this does not affect the finality of the majority award or its status as an "award". The dissent merely reflects the personal disagreement of the

arbitrator with the conclusions reached by the majority. Moreover, the dissenting award does not constitute an enforceable award and the majority award alone being considered valid for execution. In this regard, the following extracts from Gary B. Born's International Commercial Arbitration[35], would be of relevance:

> "An almost inevitable consequence of the possibility of majority awards is the possibility of "separate" or "dissenting" views by individual members of the arbitral tribunal. One mechanism for indicating disagreement or dissent is for the arbitrator simply to decline to sign the award in question. Under most contemporary national arbitration legislation, this will not prevent the award from being final, or from being an "award," but will signify the arbitrator's personal disagreement with his or her colleagues' conclusions.
>
> Nevertheless, consistent with the tradition of requiring reasoned awards, and sometimes for reasons of professional pride, some arbitrators wish to go further and explain the reasons for their dissent. This is sometimes expressed in the form of a separate or dissenting statement or opinion, which is often annexed to the tribunal's award.
>
> Notably, a dissenting or concurring opinion is not part of the award, nor is it another or independent award; rather, it is merely a separate statement by the dissenting arbitrator, without any of the legal consequences of an award. Separate, dissenting and concurring opinions are common in both litigation and arbitration in some legal systems, particularly in common law jurisdictions; they are somewhat less common in international commercial arbitration, particularly in civil law regimes. According to the ICC, for example, dissenting opinions accompanied less than 10% of all ICC awards made in 2018."

191. On the subject of interpretation of contracts and before we proceed further to evaluate the rival submissions which were addressed, we deem it apposite to take note of the following illuminating and instructive passages which appear in a decision handed down by the Court of Appeal in *Crema* v. *Cenkos Securities plc*[36]. While evaluating the subject of when and how a court would imply a term in a contract, the Court of Appeal in *Crema* renders the following pertinent observations:

> "*Issue (2) : when and how does a court imply a term in a contract?*
>
> 36 The question of when and how a court decides whether there is an implied terms in a written instrument has been considered recently by the Privy Council in *Attorney General of Belize* v. *Belize Telecom Ltd.*, [2009] 1 WLR 1988. That analysis and approach was

adopted by the Court of Appeal in *Mediterranean Salvage and Towage Ltd.* v. *Seamar Trading and Commerce Inc (The Reborn)*, [2009] 1 All ER 411. That case concerned a charterparty, i.e. a contract entirely in writing.

37 In the *Belize case*, the Privy Council was dealing with the question of how a court should decide whether a term was to be implied into the articles of association of Belize Telecommunications Ltd. But, in giving the advice of the Board, Lord Hoffmann made it clear that the principles he set out were applicable to all types of written instrument, including contracts wholly in writing and statutes. However, in my view the principles stated by Lord Hoffmann at paras 16—18 of the Board's advice are equally relevant to contracts that are partly oral and partly in writing and also those that are wholly oral, with any necessary modifications to suit specific cases.

38 The principles are : (1) a court cannot improve the instrument it has to construe to make it fairer or more reasonable. It is concerned only to discover what the instrument means. (2) The meaning is that which the instrument would convey to the legal anthropomorphism called "the reasonable person", or the "reasonable addressee". That "person" will have all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed. The objective meaning of the instrument is what is conventionally called the intention of "the parties" or the intention of whoever is the deemed author of the instrument. (3) The question of implication of terms only arises when the instrument does not expressly provide for what is to happen when some particular (often unforeseen) event occurs. (4) The default position is that nothing is to be implied in the instrument. In that case, if that particular event has caused loss, then the loss lies where it falls. (5) However, if the "reasonable addressee" would understand the instrument, against the other terms and the relevant background, to mean something more, i.e. that something is to happen in that particular event which is not expressly dealt with in the instrument's terms, then it is said that the court implies a term as to what will happen if the event in question occurs. (6) Nevertheless, that process does not add another term to the instrument; it only spells out what the instrument means. It is an exercise in the construction of the instrument as a whole. In the case of all written instruments, this obviously means that term is there from the outset, i.e. from the moment the contract was agreed, or the articles of association were adopted or the statute was passed into law.

39 Lord Hoffmann went on to make two further points, at paras

21—27. The first is that the phrases which courts have used as "tests" to decide whether a term should be implied (e g that the term is necessary to give "business efficacy" to the contract, or that the term is one that was "obvious") can detract from the task that the court has to undertake. That is to see whether the proposed implication spells out what the instrument would reasonably be understood to mean. Lord Hoffmann emphasised that those tests are not freestanding. Secondly, the oft-expressed requirement that an implied term must not just be reasonable but be "necessary" simply reflects the requirement that the court has to be satisfied that the term must be implied because that is what the contract must mean."

192. Although in *Crema*, the contract was partly oral and a component thereof reduced in writing, the Court of Appeal observed that the principles which were culled out and noticed above would govern the subject of interpretation even in respect of such contracts. This becomes evident from a reading of Paras 40 and 41 of the report which are reproduced hereinbelow:

"40 There can be problems determining the terms of a contract when it is not wholly written, but is either entirely oral or is partly oral and partly in writing, particularly when it is a business contract between two people who are used to dealing in a particular business or trade. This is because commercial men frequently use their own kind of shorthand. There may well be common assumptions about what is to happen in certain circumstances and neither the particular circumstances, nor what is assumed will happen if they occur, are articulated expressly when the contract is agreed orally or some of its terms are put in writing.

41 However, it seems to me that the logic of Lord Hoffmann's approach in the *Belize case*, [2009] 1 WLR 1988 must apply where the contract is either wholly oral or is partly oral and partly in writing, so the task of the court is no different from a case where the contract is entirely in writing. In all instances the question is : what would the meaning of the contract be to the "reasonable addressee" who had all the background knowledge which would reasonably be available to the two parties who concluded the contract at the time when they did so. In this case, given my conclusions above, the contract between Mr. Crema and Cenkos was partly in writing and partly oral. It is clear that the parties did not agree expressly on what was to happen about Mr. Crema's commission, payable by Cenkos, if GPV failed to pay to Cenkos the commission to which Cenkos was entitled. Therefore the court has to work out what, from the viewpoint of the "reasonable addressee", the parties intended should happen in that event. The judge's answer, in terms of Lord Hoffmann's analysis, is that the contract, on its proper meaning,

provides that Mr. Crema was not entitled to be paid until Cenkos had received the commission from GPV to which it was contractually entitled. I consider whether that is correct or not under issue (4)."

193. In the considered opinion of this Court, faced with a situation where the word "Revenue" was not independently deployed or utilized, the Co-Arbitrators were clearly justified in proceeding to analyze and search for the underlying intent of parties when they penned the contract. The Court is cognizant of the fact that the term "Revenue" appears in the definition section of the OMDA, and thus adequate weight being liable to be accorded to that covenant in the contract. Sir Kim Lewison, in his work titled The Interpretation of Contracts[37], highlighted the importance of definition clauses in the following words:

"5.92 So also in *JIS (1974) Ltd.* v. *MCE Investment Nominees I Ltd.*, a lease contained as definition of the "demised premises" and it was argued the expression should be given a more limited meaning in the context of a tenant's break clause and that part of the demise should be excluded. Carnwath LJ said:

"'Demised premises', for the purposes of the break clause, are defined as including the shop units. To put it beyond doubt, the schedule says that they are excluded only for the purpose of the rent review. That is what the language says, and no amount of background evidence will change that stark fact."

In *Pierse Development Ltd.* v. *Liberty Property Investment Ltd.,* cl.15(g) of a contract defined "Completion Date". Etherton LJ said:

"It would be a highly unusual approach to interpretation to give the expression in cl 15(g) a meaning other than that expressly ascribed to it by the parties, especially since the parties did not state that the definition was subject to any contrary intention apparent from the Agreement."

5.93 A definition clause contained in a contract will take priority over a recital to the contract.

5.94 If a contract contains an express definition, then in the absence of a claim for rectification or a plea of estoppel, evidence of the negotiations is not admissible for the purpose of contradicting the definition, even where it is alleged that the parties negotiated on the basis of an agreed meaning.

5.95 In deciding what a defined term means, the court may have regard to the contractual label chosen by the parties as the defined term. In *Chartbrook Ltd.* v. *Persimmon Homes Ltd.*, Lord Hoffmann said:

"But the contract does not use algebraic symbols. It uses labels. The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a

concept intended to be more precisely stated in the definition. In such cases the language of the defined expression may help to elucidate ambiguities in the definition or other parts of the agreement."

In *Cattles Plc* v. *Welcome Financial Services Ltd.*, Lloyd LJ said that the label:

"is not something to which reference should only be made if the matter is otherwise in doubt. The word used by way of a label may well not be arbitrary or neutral, and here I have no doubt that the labels used were not arbitrary or neutral.""

194. However, of equal import are the following observations which appear in that work, and which explain the interplay between a definition clause and operative parts of a contract:

"5.98 In *AIB Group (UK) Ltd.* v. *Martin*, a mortgage entered into by two people named as 'the mortgagor' contained a clause which said:

"If the expression "the mortgagor" includes more than one person it shall be construed as referring to all and/or any one of those persons and the obligations of such persons hereunder shall be joint and several."

The question was whether each of the named persons was liable not only for his own debts but also those of the other named borrower. A majority of the House of Lords held that he was. Lord Millett said:

"The fact that the question concerns the application of an interpretation clause is also significant. The purpose of such a clause is twofold. It shortens the drafting and avoids unnecessary repetition; and it enables the form to be used in a variety of different situations. It is not the purpose of such a clause to enlarge the parties' rights and obligations beyond those provided by the operative provisions by imposing, for example, a secondary liability as surety in addition to a primary liability as principal debtor. The application of such a clause is not merely a question of construction. If it is capable of being applied to the operative provisions in more than one way, it should be applied in a way which serves its purpose rather than in a way which extends the parties' obligations beyond those contemplated by the operative provisions a. Of course, an interpretation clause may have this effect; but if so it should do so plainly and unambiguously."

However, Lord Scott of Foscote considered that the clause in that case was plain and unambiguous; and Lord Rodger of Earlsferry regarded it as not merely a definition clause. He considered that it was concerned not with the question who is to be taken to be the

borrower-that is to say, with the person or persons to whom that expression extends-but with the measure of the obligations undertaken by those persons in that capacity. Accordingly, a provision found in the definition clause was capable of extending the substantive obligations of the parties.

5.99 Where the background or usage elsewhere in the contract plainly shows that something has gone wrong with the definition, the court should not adopt an excessively literal interpretation. In some cases this may lead the court to disapply the definition. In *City Inn (Jersey) Ltd.* v. *Ten Trinity Square Ltd.*, Jacob LJ said:

> "It is obviously a strong thing to say that where a draftsman has actually defined a term for the purposes of his document that in some places (but not others) where he uses his chosen term he must have intended some other meaning. It is not impossible, however. It, approaching the document through the eyes of the intended sort of reader (here a conveyancer), the court concludes that notwithstanding his chosen definition the draftsman just must have meant something else by the use of the term, it will so construed the document. Such a conclusion will only be reached where, if the term is given its defined meaning the result would be absurd, given the factual background, known to both parties, in which the document was prepared. Nothing less than absurdity will do-it is not enough that one conclusion makes better commercial sense than another."

However, in *Margerison* v. *Bates*, Edward Bartley-Jones QC, sitting as a judge of the Chancery Division, said to *City Inn:*

> "I note, in particular, that Jacob L.J. went on to construe the relevant Transfer. He did not confine himself, solely, to issues of commercial absurdity. Ultimately (paragraph 31) Jacob L.J. addressed the rival contentions as to 'commercial sense'. Indeed, he pointed out that the submissions (on commercial sense) as to why the definition should not be applied according to its express terms had caused him to 'pause long and hard'. Taking the judgment as a whole, I see Jacob L.J. doing nothing more than construing the relevant Transfer in accordance with the principles I have identified above, albeit against the background that strong and cogent reasons must be advanced as to why a definition in a professionally prepared document should be departed from or given in different places alternative meanings. I do not see Jacob L.J. establishing any point of law to the effect that only commercial absurdity would suffice for departure, as a question of construction, from a specific definition. I am fortified in reaching this conclusion not merely by the terms of Jacob L.J.'s judgment as a whole but, also, from the whole basis of the approach to

issues of construction as identified by Lord Hoffmann in *West Bromwich* (at 912G) where he indicated that, under the modern approach, 'Almost all the old intellectual baggage of "legal" interpretation has been discarded'. The modern approach to construction involves an interpretation of meaning applying the principles I have identified above, not an approach which is governed in respect of specific issues or instances by fixed rules of law."

In the result he held that a covenant in a conveyance not to erect buildings except with the consent of "the Vendor" means the original vendor alone and did not extend to her successors in title. Similarly, in *Starlight Shipping Co.* v. *Allianz Marine And Aviation Versicherungs AG*, Flaux J was doubtful whether the approach of Jabob LJ was consistent with the decision of the Supreme Court in *Rainy Sky* v. *Kookmin Bank.*

5.100 In *Europa Plus SCA SIF* v. *Anthracite Investments (Ireland) Plc* Popplewell J said:

"Where the Court is interpreting a contractual provision which uses a defined term, the starting point for a textual analysis will often be the defined meaning, because the fact that the parties have chosen to use it in the provision being interpreted is often an indication that they intended it to bear its defined meaning when so used. Often, but not always. It is a common experience that defined terms are not always used consistently by contractual draftsmen throughout a commercial contract. Where a defined term is used inconsistently within a contract, so as sometimes to bear the de-fined meaning and sometimes a different meaning, the potency of the inference that the parties intended it to bear its defined meaning in a particular provision is much diminished. The question becomes whether they intended to use it in its defined meaning, as in some other clauses, or as meaning something other than its defined meaning, as in different other clauses. Even where there is not inconsistency of use within the contract outside the provision being interpreted, it does not follow that effect must always be given to the defined meaning. If, as is well known, parties sometimes use defined terms inappropriately, it follows that they may have done so only once, in the provision which is being interpreted. The process of interpretation remains the iterative process in which the language used must be tested against the commercial consequences and the background facts reasonably available to the parties at the time of contracting. Such an exercise may lead to the conclusion that the parties did not intend the defined term to bear the defined meaning in the provision in question. That is no different from the Court

concluding that the parties intended a word or phrase to have a different meaning from what would at first sight seem to be its ordinary or natural meaning."

He held further that:

"...the dictum of Jacob LJ in *City Inn Jersey Ltd.* v. *10 Trinity Square Ltd.*, to the effect that the court will only fail to give effect to the use of a defined term if absurdity is established, is not consistent with the reasoning of the Supreme Court in Rainy Sky (or indeed subsequent authority) and is not the law."

195. Tested in light of the above, the Court notes that while the word "Revenue" was independently defined, the clause itself clarified that neither the Upfront Fee nor the Annual Fee would be liable to be deducted therefrom. The definition clause went no further and made no attempt to regulate the revenue which was shareable between AAI and the JVCs'. The Upfront Fee as well as Annual Fee were thus left to be determined on the basis of the provisions contained in Chapter XI of the OMDA. The words *"pre-tax"* and *"gross"* are conspicuously absent from Chapter XI and which in turn ties the computation of Annual Fee to the 'projected Revenue' as shown in the Business Plans of the JVC. Of equal import was the adoption of the reconciliation mechanism in Chapter XI and which contemplated the Independent Auditor examining the difference between 'projected Revenue' and 'actual Revenue'. In terms of the provisions made in Chapter XI and the other parts of the OMDA, AAI was guaranteed two well-identified sources of revenue. The first of those was the Upfront Fee which was to be paid on or before the Effective Date. The Upfront Fee was a nonrefundable and one-time payment. The second stream of recurring revenue was the Annual Fee. The Annual Fee was stipulated to be 45.99% (for DIAL) and 38.7% (for MIAL) of the 'projected Revenue' and was payable on the first day of each calendar month. The 'projected Revenue' was additionally made subject to the reconciliation exercise which was to be undertaken by the Independent Auditor.

196. We thus find that although OMDA chose to define the word "Revenue", that expression was not employed independently in the latter parts of the contract. This assumes significance since the aspect of shareable revenue and the tariff which the operator could impose in respect of Aeronautical Services came to be governed solely by Chapters XI and XII of the OMDA. The general obligations which stood placed upon the JVC by OMDA envisaged it taking appropriate steps towards development, design, construction, upgradation, modernizing, financing and management of the airport. It was placed under the obligation to ensure that the airport met the standards of an international world-class airport. Article 8.2 of the OMDA mandated the JVC to undertake Mandatory Capital Projects, details whereof were set

out in Schedule 7. Additionally, the Master Plan, as noticed hereinabove, was to be prepared to cover development activities planned and spread over a twenty-year time period. This required the JVC to submit details of land development, traffic forecasts, draw out the vision of the airport and submit a futuristic plan embodying the various activities connected with the development and modernizing measures which were to be taken over a twenty-year period. Hence, the OMDA placed significant capital-intensive obligations upon DIAL/MIAL.

197. The OMDA further obliged the JVC to provide Aeronautical Services, Non-Aeronautical Services and Essential Services. The Essential Services were to be provided free of charge to all passengers visiting the airport. The terms of the OMDA further empowered the JVC to fix the charges leviable for the provision of Non-Aeronautical Services which were specified in Schedule 6 of the OMDA. Insofar as the charges for those services were concerned, the JVC was left free to determine those charges. Insofar as Aeronautical Services were concerned, they were indelibly connected to the obligation of the JVC to create Aeronautical Assets. and in lieu of such activities, being enabled to levy and collect Aeronautical Charges. OMDA itself envisaged the levy of Aeronautical Charges as being the consideration for the provision of Aeronautical Services and the recovery of '*costs relating to Aeronautical Assets*'. Thus, the right conferred upon the JVC to recover the costs incurred in the creation of Aeronautical Assets could have neither been ignored nor could the import thereof been doubted. A covenant which enables a party to recover costs incurred cannot derogate from the creation of assets and infrastructure in terms of overarching contractual obligations.

198. It cannot possibly be doubted that the levy of Aeronautical Charges was subject to the regulatory authority of the AERA under the SSA and Chapter XII of the OMDA and contemplating recompense for the creation of Aeronautical Assets. The expression "Project Agreements" was compendiously defined to include the nine primary agreements which formed the foundation for the handover of the airport to the JVC. It would thus be fundamentally erroneous for us to exclude from consideration the interplay which the OMDA itself acknowledged between the said primary contract document and the SSA. As we proceed to the SSA, we find an unambiguous recital in the introductory parts of the said agreement, and which establishes beyond a measure of doubt, that the same was being executed in consideration of the JVC having entered into the OMDA. Of significance was the use of the expression "*to enhance the smooth functioning and viability*" of the JVC in the introductory provisions of the SSA. The Union thus appears to have been aware and conscious of the support which was liable to be extended in order to lend strength to the JVC, add to its viability and

the larger objective of modernizing existing airports and thus assisting the JVC in attaining global standards and the said objective constituting one of the primary objectives underlying the execution of the SSA.

199. The Aeronautical Charges, as mentioned in Clause 3.1.2 of the SSA, were to be calculated in accordance with Schedule 6 of that agreement. The said covenant further clarified that Aeronautical Charges were liable to be determined in accordance with the principles set out in Schedule 1 and the factors enumerated therein being non-negotiable and unalterable upon the culmination of the bidding process and identification of a successful bidder.

200. Schedules 1 and 6 of the SSA are of significant import since they were intended to guide and regulate parties with respect to the principles that would have to be borne in mind for the purposes of fixation of Aeronautical Charges. Some of those principles were declared to be incentive-based, commercial, economic efficiency and pricing responsibility. Of the aforenoted fundamental principles which were ordained to regulate the fixation of tariff, the incentives-based principle promised that the JVC would be provided with appropriate incentives so as to enable it to work efficiently, optimize operating costs, maximize revenue and undertake investments in an efficient, effective and timely manner. The commercial principle embodied in Schedule 1 of the SSA enjoined AERA to have regard to the imperative of the JVC being able to generate sufficient revenue to attain efficient operating costs, a return of capital over its economic life and achieve a reasonable return on investment. The economic efficiency principle postulated that the AERA would undertake the exercise of pricing regulation bearing in mind the need to encourage economic efficiency and to ensure that only efficient costs were recovered through pricing. The guidelines for determination of Aeronautical Charges were thereafter spelt out in Schedule 6. These provisions embodied in the SSA would invariably have to dovetail with Chapter XII of the OMDA since shareable revenue was dependent upon the levy and collection of Aeronautical Charges itself.

201. The Presiding Arbitrator, however, came to the conclusion that the percentage of ‘projected Revenue’ which was spoken of in Chapter XI while dealing with the subject of Annual Fee, would have to be read as being connected with “Revenue” as defined in Chapter I of the OMDA. It thus appears to have taken the view that the phrase “projected Revenue” would have to necessarily draw colour from the definition clause of the OMDA. This becomes evident from a reading of Para 80 of the Minority View which is extracted hereunder:

> “80. The “Annual Fee” is payable by DIAL to AAI in terms of Clause 11.1.2 of OMDA. The Annual Fee is 45.99% of the “Revenue”.

> As per the scheme relating to calculation and payment of Annual Fee, DIAL has to pay 45.99% of the projected Revenue (as set forth in the Business Plan) payable in 12 equal monthly instalments subject to correction/adjustment every quarter, if the actual Revenue exceeds or less than the actual Revenue. Revenue as earlier noted is defined as "pre-tax gross revenue of JVC", excluding the five enumerated items. Each word, in the expression "pre-tax gross revenue of JVC" is clear and unambiguous."

202. The Presiding Arbitrator continued along this line of reasoning and held that "Revenue", as that term appears in Chapter XI, would continue to control and since exclusions stood duly enumerated, no further additions thereto could be made. This becomes evident from a reading of Paras 88 to 91 which are reproduced hereunder:

> "88. Neither the OMDA, nor the SSA relied upon by DIAL, nor any applicable law, define "all pre-tax revenue" as "total revenue" less "Capital Costs" (consisting of 'depreciation, interest on debt and return on equity', equated to PSF and UDF collected), nor contain any provision that 'depreciation, interest on debt and return on equity (equated to PSF and UDF collected)' should be deducted from the "gross revenue" to arrive at "pre-tax gross revenue".
>
> 89. The definition of the term "Revenue" uses the words "Revenue means all pre-tax gross revenue of JVC excluding …. ". The definition is thus self-contained and exhaustive. What are to be included and what are to be excluded are specifically stated in the definition. The definition is clear and ambiguous. Further, the use of the word 'all' before 'pre-tax gross revenue of JVC' and use of the words 'excluding the following' after "pre-tax gross revenue of JVC" would indicate that each and every revenue receipt, should be included in the "pre-tax gross revenue" and the only items are to be excluded from the "pre-tax gross revenue" are the five items enumerated in the definition.
>
> 90. Therefore, necessarily the ordinary and normal meaning of the words used is to be taken as what the parties meant and intended. Even if the object of the contract is taken note of and even if the entire contract is considered as a whole, no meaning other than the natural and ordinary meaning of the phrase "pre-tax gross revenue" emerges. The contention that application of ordinary and normal meaning would result in a consequence which is seemingly imprudent for a party, is not a ground to ignore the ordinary, natural and normal meaning of the words used, nor supply words to make commercial common sense.
>
> 91. The following items enumerated as amounts to be deducted from the "pre-tax gross revenue" to arrive at "Revenue" also give an indication as to why the term "pre-tax gross revenue" used by the

Parties in the definition of "Revenue" literally means only the "pre-tax gross revenue":

(a) Payments made by DIAL, for the activities undertaken by Relevant Authorities or payments received by DIAL for provision of electricity, water, sewerage, or analogous utilities to the extent of amounts paid for such utilities to the party service providers;

(b) Insurance proceeds except insurance indemnification for loss of revenue;

(c) Any amount that accrues to DIAL from sale of any capital assets or items;

(d) Payments and/or monies collected by DIAL for and on behalf of any governmental authorities under Applicable Law;

(e) Any bad debts written off provided these pertain to past revenues on which annual fee has been paid to AAI.

The enumeration of five items to be excluded shows that the "pretax gross revenue" refers to total receipts by way of Aeronautical Services, Non-Aeronautical Services and other income. It is also significant that the parties used the term "all pre-tax gross revenue" (as contrasted from "total receipts" which would have impliedly included amounts received by way of 'borrowings' also)."

203. However, the said conclusions would have to necessarily be tested bearing in mind the indubitable fact that the shareable revenue would necessarily include Aeronautical Charges, and the tariff fixation whereof was to be guided by the recovery of costs spoken of in Article 12.1.1, as well as the commercial principles enumerated in Schedule 1 to the SSA. In the considered opinion of this Court, the view expressed by the Presiding Arbitrator with respect to the question of "Revenue" is based on an extremely narrow and constricted construction of the OMDA and fails to bear in consideration the interplay and reciprocity which parties intended to convey while alluding to "Project Agreements" as constituting the family of nine agreements which formed a compendious bargain. If the view as expressed by the Presiding Arbitrator were to be accepted, it would essentially amount to factors such as recovery of costs as well as the principles of tariff fixation embodied in Schedule I to the SSA being rendered wholly otiose and completely excluded from consideration. The interpretation as accorded would perhaps render a harmonious and collaborative construction between the various stipulations contained in the OMDA and SSA an impossibility. While narrowly construing a definition clause, the Presiding Arbitrator has essentially canvassed an interpretation which struck at the very root and foundation of the commercial principles underlying the contract.

204. The emphasis which the Presiding Arbitrator sought to place upon the word "Revenue" in the singular again comes to the fore when one reads Paras 100 and 103. The submissions on behalf of the JVCs' resting on the commercial principles incorporated in the SSA were thereafter negated in the following terms:

> "100. Article 11.1.2 of OMDA requires payment of Annual Fee to AAI and sets out the manner in which the Annual Fee should be calculated and paid. The calculation of the Annual Fee is exclusively based on "Revenue", being 45.99% of the "Revenue". The term "Revenue" is used in Article 11.1.2 more than 25 times and bear the same meaning as contained in the definition of "Revenue". The effect of decision in Vanguard is that if the term "Revenue" has been used elsewhere in the contract in a different context and different background not related to calculation of Annual Fee, it may be possible to give a contextual meaning or the ordinary and natural meaning of the word "Revenue". Even where the definition of a word commences with the words 'unless the context otherwise requires', it is only where a contrary intention appears from the context, that the definition of the word can be given a go-bye and the word understood as in common parlance. But, the contention of DIAL is completely different. It is not the contention that the term "Revenue" used elsewhere in the contract in a different context should be interpreted differently. The contention of DIAL is that the definition itself should be differently read for the purpose of calculating the Annual Fee. This is impermissible.
>
> XXXX XXXX XXXX
>
> 103. Thus, the use of the words 'unless the context otherwise requires', preceding the definition of the term "Revenue", do not enable addition of two completely new exceptions to the "all pretax gross revenue" in the definition of "Revenue"."

205. The Presiding Arbitrator while proceeding along that line of reasoning, ultimately came to reject the argument of harmonious construction by observing thus:

> "104. DIAL submitted that OMDA uses the word 'pre-tax gross revenue' in the definition of "Revenue"; that SSA uses the word 'gross revenue'; that Schedule I of SSA contains the tariff determination principles for IGI Airport; and that the formula in Schedule I to SSA for calculating the "Aeronautical Charges in the shared till inflation - X Price Cap Model" refers to 'S' factor, as:
>
> > *30% of the gross revenue generated by JVC from the revenue share assets. The costs. in relation to such revenue shall not be included while calculating Aeronautical Charges.
>
> It is contended when the project documents use the word 'gross revenue' and *pre-tax gross revenue', some significance to be

attached to the use of the word 'pre-tax'; that this would mean that the term 'pre-tax' should be interpreted in a manner consistent with the commercial bargain underlying the OMDA and the SSA; that Commercial Principle No. 2 in SSA provides that 'in setting the price cap regard to the need for the JVC to generate sufficient revenue to cover efficient operating cost, obtain the return of capital over its economic life and achieve a reasonable return on investment commensurate with the risk involved'; that when the provisions of OMDA are read with the provisions of SSA, it becomes evident that DIAL is entitled to the return of capital over its economic life and also to a reasonable return on the investment; that this was achieved by deliberately adding the word 'pre-tax' before 'gross revenue' thereby meaning that certain items of 'Revenue' should be logically be excluded from 'gross revenue'. Consequently, DIAL is justified in deducting 'depreciation, interest on debt and return on equity' from gross receipts to arrive at 'pretax gross revenue'. Firstly, the argument has no basis. If 'depreciation, interest on debt and return on equity' are to be excluded from 'gross revenue' in view of Commercial Principle No. 2 in Schedule I of SSA, it logically follows that 'efficient operating cost' should also be excluded as Commercial Principle No. 2 also mentions 'efficient operating cost' in addition to 'return of capital over economic life and reasonable return on investment'. But, if the efficient operating costs as also the other items are to be excluded, 'gross revenue' will no longer be 'gross revenue'. Further, the use of the word 'all pre-tax' before 'gross revenue' would refer to the stage before any deductions are made. Therefore, there is no merit in the contention that use of the word 'pre-tax enables exclusion of some items of expenditure.

XXXX XXXX XXXX

106. According to DIAL, if Article 12.1.1 by itself is not sufficient to hold that the Aeronautical Charges to be included in the 'all pretax gross revenue' is after deduction of capital costs (i.e., depreciation, interest on debt and return on equity), then a combined reading of Chapter XII of OMDA with the provisions of the SSA, would make the said position clear. It is submitted that Article 12.1.1 of OMDA and Clause 1.1 of SSA define 'Aeronautical Charges' as the charges to be levied at the Airport by JVC for the provision of Aeronautical Services and consequent recovery of costs relating to Aeronautical Assets. Article 12.1.2 of OMDA provides that the JVC shall at all times ensure that the Aeronautical Charges levied at the Airport shall be as determined as per the provisions of the SSA. Clause 3 of SSA lists the support to be provided by the Government of India (GoI) to DIAL. Under Clause 3.1.1 of SSA, GoI agreed to use reasonable efforts to have the Airport Economic Regulatory Authority (AERA)

established and operating within two years. Under the said clause, and agreed and confirmed that:

> ".....subject to applicable law, it shall make reasonable endeavours to procure that the Economic Regulatory Authority shall regulate and set/reset Aeronautical Charges, in accordance with the broad principles set out in Schedule I appended hereto. Provided however, the upfront fee and the Annual Fee paid/payable by the JVC to AAI under the OMDA shall not be included as part of costs for provision of Aeronautical Services and no pass-through would be available in relation to the same".

Schedule I to the SSA referred to in Clause 3.1.1 contains the principles of tariff fixation and the relevant portion of which are extracted below:

> "Principles of Tariff Fixation Principles
>
> In undertaking its role, AERA will (subject to Applicable Law) observe the following principles:
>
> 1. Incentives Based : The JVC will be provided with appropriate incentives to operate in an efficient manner, optimising operating cost, maximising revenue and undertaking investment in an efficient, effective and timely manner and to this end will utilise a price cap methodology as per this Agreement.
> 2. Commercial : In setting the price cap, AERA will have regard to the need for the JVC to generate sufficient revenue to cover efficient operating costs, obtain the return of capital over its economic life and achieve a reasonable return on investment commensurate with the risk involved".

107. Relying upon the said provisions, DIAL submitted that Aeronautical Charges comprise of two distinct components : (a) charges for provision of Aeronautical Services and (b) Capital Costs recovery; that such division of Aeronautical Charges into charges for provision of Aeronautical Services and Capital Costs recovery is also contained in the commercial principles underlying the contractual arrangements between the Parties, which are embodied in the OMDA and SSA; and that the SSA, consistent with the principle of Capital Costs recovery, categorically sets forth as a fundamental commercial principle that tariff for Aeronautical Charges will have to be determined for (a) obtaining 'the return of capital', and (b) achieving a reasonable return on investment. DIAL submits that inclusion of the word "pre-tax" prior to the term "gross revenue", in the phrase, 'pre-tax gross revenue' appearing in the definition of the term "Revenue", in contrast with the unqualified term 'gross revenue'

used in Schedule 1 of SSA shows that the distinction was always intended to be dovetailed into the definition of "Revenue"; that the addition of the word 'pretax' in the phrase "pre-tax gross revenue" demonstrates the intention of the parties to exclude Capital Costs from 'gross revenue'. besides certain other specific exclusions provided in the definition of "Revenue.,. DIAL contends that the same distinction is also recognized not just as a commercial principle of the SSA, but also in the computation of the Target Revenue for the purposes of Aeronautical Charges, where the 'return *of* investment' (depreciation) and 'return on investment' (interest on debt and return on equity) are the two components which represent Capital Costs. DIAL further contends that the intent of the Parties to ensure the recovery, return or reimbursement of Capital Costs is also enshrined in the OMDA which prescribes the transfer of Aeronautical Assets without the payment of any consideration (other than assumption of outstanding debt) upon the normal expiry of the extended term of the OMDA; and that the Capital Costs are therefore intended to be received/recovered by the Claimant, as it is against this recovery of Capital Costs that the Aeronautical Assets are eventually to be transferred to the Respondent without any further consideration.

XXXX XXXX XXXX

110. Clause 3.1.1 of SSA contains the undertaking by GoI that it will ensure that AERA regulates and sets/resets the Aeronautical Charges in accordance with the broad principles in Schedule 1. Schedule I provides that in AERA while undertaking the role of approving Aero Tariff, will provide DIAL with appropriate incentives to operate in an efficient manner maximising "Revenue" and optimising operating costs, by utilising the price cap methodology; and that in setting the price cap AERA will have regard to the need for DIAL to generate sufficient revenue to cover efficient operating cost, obtain the return of capital over its economic life and achieve a reasonable return on investment commensurate with the risk involved. The provisions of SSA relied upon by DIAL (Clause 3.1.1 read with Schedule 1 commercial principles 1 and 2) have nothing to do with the revenue-sharing arrangement agreed between AAI and DIAL under the OMDA. The relied-upon provisions of SSA merely ensures that while determining/approving the tariff (i.e., the charges to be levied at the Airport by DIAL for providing Aeronautical Services and consequent recovery of costs relating to Aeronautical Assets, referred to as Aeronautical Charges), AERA will adopt a price cap methodology that would ensure generation of sufficient revenue by DIAL to cover not only efficient operating cost but also ensure that DIAL obtains the return of capital over its economic life

(depreciation) and achieves a reasonable return on investment commensurate with the risk involved (i.e., interest on debt and return on equity).

111. Therefore, the scheme of OMDA and the project agreements is : (i) The payment of consideration by way of "Annual Fee" by DIAL to AAI for the grant of the exclusive right to operate, manage and develop the Delhi Airport (i.e., Grant of Function by AAI to DIAL) is governed by Chapter XI of the OMDA. (ii) The money to be earned by DIAL by providing Aeronautical Services through the development, operation and management of the Airport (to cover the operating costs, depreciation, interest on debt and return on equity) is governed by Chapter XII of the OMDA read with Clause 3.1.1, Schedule I and other provisions of SSA. Recovery of Capital Costs (depreciation, interest on debt and return on equity) is related to and provided for in tariff fixation. Capital Costs or recovery thereof have no role to play in determination and payment of Annual Fee by DIAL to AAI."

206. The correctness of the view so expressed clearly appears to be tenuous and may not possibly sustain when one bears in consideration that OMDA constituted one out of the umbrella of agreements which came to be executed *inter partes* and constituted a composite package concerned with the modernization of the airports in question. Insofar as reference to the terms of the SSA was concerned and the meaning liable to be ascribed to 'Revenue', the Presiding Arbitrator, in our considered opinion, clearly erred in holding that the OMDA was liable to be interpreted in isolation. The view so taken clearly failed to bear in consideration the indubitable fact that the grant represented the first initiative for infusion of equity and takeover of airports by a private entity. The initiative thus represented a paradigm shift in the aviation sector and thus compelled the Union Government itself to step in to provide a degree of comfort and support to any party which chose to enter the fray. In the considered opinion of the Court, the test of shareable revenue which came to be ultimately adopted by the Majority clearly appeals to reason and was correctly identified as assuming a position of centrality and crucial to the resolution of the dispute which stood raised. There thus arose an imperative necessity to harmoniously interpret the different clauses of the OMDA alongside the Project Agreements. This necessitated a harmonious reading of the defining provision alongside the covenants governing revenue sharing.

207. The Majority has correctly borne in consideration the status and position of AAI and which apart from being entitled to the two streams of revenue, namely, Upfront Fee and Annual Fee, was also a JV partner and held a substantial stake of 26% in the JVCs'. This was therefore not a case where the interests of the AAI stood confined to the fees payable

in terms of Chapter XI. It was indelibly connected with and a significant stakeholder in the JVC and thus entitled to partake in the revenue and profitability of the operator as a whole. Thus, apart from the guaranteed streams of revenue, the earnings would inevitably endure to the benefit of an entity in which AAI held a considerable stake.

208. This would be an appropriate juncture to take note of the view that was expressed by the Co-Arbitrators on the aspect of 'Revenue' and Chapter XI. The Co-Arbitrators first took into consideration the legislative changes brought about in the AAI Act and culminating in the passing of the 2003 Amendment Act and which had introduced Section 12-A. They held that the gross receipts credited to the Profit & Loss account of the JVC could not be countered or taken into consideration for the purposes of quantifying sharable revenue. This, according to the Co-Arbitrators would militate against the commercial principles underlying the contract.

209. Taking note of the scope of the Grant itself, the Co-Arbitrators bore in consideration the right conferred upon the JVC to determine, demand, collect and appropriate charges from the users of the airport. In the opinion of the Court, the Co-Arbitrators correctly identified the principal streams of 'Revenue' relevant for the purposes of computing sharable revenue. The Majority Opinion essentially proceeds on the precept of the commercial principles embodied in the SSA, the contractual obligations placed upon the JVC and the imperatives of a conjoint reading of the Project Agreements. This becomes apparent from a reading of the following observations which appear in Para 24 of the Majority Opinion:

> "24. The consideration for OMDA is stated to be" …. in consideration of the respective covenants and agreements, set forth in this Agreement … ".The Agreements referred to can only be the various PROJECT AGREEMENTS specified in the Article 1.1. One of the covenants (Article 11.1) under OMDA is that JVC agreed to make certain payments to the Respondent.
>
> *"11.1 In consideration of the aforementioned Grant, the JVC hereby agrees to make the following payments to the AAI in the manner and at the times mentioned hereunder."*
>
> *They are (i) Upfront Fee of Rs. 150 crores and (ii) an Annual Fee ("AF") for every year during the subsistence of OMDA @ 45.99% of the projected revenue for the year*
>
> *11.1.1 Upfront Fee : The JVC shall pay to the AAI an upfront fee (the "Upfront Fee") of Rs. 150 Crores (Rupees one hundred and fifty Crores only) on or before the Effective Date. It is mutually agreed that this Upfront Fee is non-refundable (except on account of termination of this Agreement in accordance with Article 3.3 hereof) and payable only once during the Term of this*

Agreement.

11.1.2 Annual Fee : The JVC shall also pay to the AAI an annual fee ("AF") for each Year during the Term of this Agreement of the amount set forth below:

AF = 45.99% of Projected Revenue for the said Year

where projected revenue for each year shall be as set forth in the business plan."

210. On the basis of an interpretive exercise of the family of agreements, the Majority held that since the operator stood placed under an overarching obligation to create infrastructure and assets as well as rendering Aeronautical and Non-Aeronautical Services, the same would clearly entail the creation of facilities and assets which would necessarily have to be funded through equity infusion or funds borrowed by the JVCs from financial institutions. It was in the aforesaid backdrop that they proceeded to hold as follows:

"31. Such finances obviously are required to be raised by JVC either by drawing money from its equity or by borrowing from the Banks and other Financial Institutions. The other source of such finances is funds generated by carrying on 'Airport Business' and collecting various CHARGES etc. in accordance with the terms of OMDA.

32. Initially the funds required for creating all those Assets can only come either from the equity of JVC or borrowed by JVC from Financial Institutions. Necessarily, such borrowed amounts will have to be repaid to the lenders with appropriate interest. Similarly, the amounts drawn from the equity of JVC belongs to the investors/shareholders of JVC who would naturally expect not only to redeem the principal amount invested by them but also some profit/dividend thereon. Such repayments are possible only if JVC is able to recover sufficient amount of money through the collection of appropriate CHARGES Aeronautical and Non-Aeronautical, etc. We have already taken note of the fact that the need to employ funds does not stop with the creation of Assets. Funds are required throughout the subsistence of OMDA to full fill the obligations undertaken by JVC.

33. Various CHARGES that can be collected by JVC are mentioned in Article 12.1 of OMDA. They are (i) Aeronautical Charges (ii) charges for Non-Aeronautical Services and (iii) Passengers Service Fee. The expression 'Aeronautical Charges' is defined under Article 1.1 of OMDA. The other two expressions mentioned above are not defined. Article 12.1 provides for the method/procedure for determination of the scale of various CHARGES and the matters incidental thereto. Article 12.1.2

declares that the Aeronautical Charges shall be determined as per the provisions of the SSA. Article 12.2 declares that JVC shall be free to fix the charges for Non-Aeronautical Services. Coming to the Passengers Service Fee, Article 12.4.1 declares that such Fee shall be collected and disbursed in accordance with the provisions of the SSA. Obviously, from the language of Article 2.1.2, such Charges could be collected by JVC only from the users of the property (Airport) for the services rendered by JVC.

34. Aeronautical Charges are the charges which JVC can collect for providing "Aeronautical Services" numbering 32, enumerated in Schedule 5 to OMDA. Similarly JVC is authorised to collect charges for rendering "Non-Aeronautical Services" numbering 35, enumerated in Schedule 6 to OMDA.

35. It is apparent from the scheme of OMDA discussed so far that the demised property is the property over which the Delhi Airport exists. It vested in AAI and was being operated by AAI prior to OMDA. That property was leased under the LEASE DEED dated 25.04.2006 to JVC to enable it to exercise the Rights and perform the obligations arising out of the GRANT made under OMDA.

The legal relationship arising out of the OMDA and other Project Agreements is designed to promote and operate an efficient commercial enterprise i.e. in the interest of BETTER MANAGEMENT OF THE AIRPORT (see Preamble to OMDA). If JVC - a commercial enterprise is required to invest huge amounts of funds (either from it's capital or borrowed) for fulfilling various obligations incurred by it under OMDA. Necessarily JVC will have to recover sufficient amounts in order to discharge IT's legal obligations to the lending Financial Institutions, etc. and IT's shareholders. It is in recognition of the fact that JVC is required to meet the above financial obligations to its lenders and shareholders; OMDA expressly confers necessary authority and right in favour of JVC to collect various CHARGES and Fees."

211. It is the aforesaid view which forms the central theme of the Majority Opinion. Insofar as the significance of Chapter XII of the OMDA is concerned and the factor of recovery of costs which stands embodied therein, the Co-Arbitrators held:

"37. Article 12.1.1 of OMDA declares that the Aeronautical Charges are charges that could be collected from the users of Aeronautical Services rendered by JVC and the purpose of collection of Aeronautical Charges is to recover the costs relating to the Aeronautical Assets.

".. . For the purpose of this Agreement, the charges to be levied at the Airport by the JVC for the provision of Aeronautical

Services and consequent recovery of costs relating to Aeronautical Assets shall be referred as Aeronautical Charges …"

OMDA clearly recognises under Article 12.1.1 that the provision of such Aeronautical Services require creation, operation and maintenance of certain Aeronautical Assets. Therefore, Article 12.1.1 stipulates in express terms that the Aeronautical charges are meant to enable JVC to recover costs relating to aeronautical assets. The language is very significant. The purpose of collecting Aeronautical Charges is not to recover the costs of the creation of Aeronautical Assets alone. The purpose is to recover the costs RELATING TO Aeronautical Assets. Normally, it can only mean ALL the expenditure incurred by the JVC in relation to the AERONAUTICAL ASSETS. Therefore, the expression should comprehend not only the costs incurred by the JVC for the creation of Aeronautical Assets but also for the costs for the maintenance, up-gradation of the Aeronautical Assets and providing various Aeronautical Services (specified in Schedule 5 to OMDA) but also the costs for securing and retaining the right to perform the AERONAUTICAL SERVICES i.e. the Upfront Fee and the Annual Fee."

212. What appears to have weighed ultimately upon the Co-Arbitrators was the definition of "Revenue" excluding Upfront Fee and Annual Fee from consideration since those were specifically identified as non-excludable. The opinion of the Majority also rested on the financial projections which would necessarily stand embodied in the Business Plans. This becomes evident from a reading of Para 43 and where the following pertinent observations came to be made:

"43. The FINANCIAL PROJECTIONS must also include "PROJECTED REVENUE" which JVC is required to share with AAI. The legal right to prepare the BUSINESS PLAN and make the FINANCIAL PROJECTIONS can only be with JVC because the JVC is GRANTED the right to carry on the AIRPORT BUSINESS. If such conclusion follows from the Scheme of OMDA particularly from the definition of the expression 'BUSINESS PLAN' where the expression 'FINANCIAL PROJECTION', occurs. Coupled with the stipulation under Article 11.1.2 saying that "where the Projected Revenue for each year shall be AS SET FORTH in the BUSINESS PLAN", it would be the legal right of JVC to set forth in the Business Plan, the Projected Revenue by appropriately providing for the deduction of the COSTS RELATING TO AERONAUTICAL SERVICES. Apparently the JVC fell into error by declaring in the BUSINESS PLANS submitted for successive years that all Cash Received by it to be its 'SHARABLE REVENUE'. Obviously it happened because the JVC followed the accounting practices applicable to the Companies registered under the Companies Act, (as required under sec 211 read with part 11 of the

companies act) in preparing the annual Profit & Loss Statement without clearly analysing and understanding its RIGHTS flowing from the SCHEME and TEXT of OMDA. JVC failed to distinguish between the accounting practice of identifying the REVENUE for the purpose of preparing the annual PROFIT & LOSS Statement of JVC as required under the Companies Act and the need to identify 'PROJECTED REVENUE' for the purpose of sharing the same with AAI. It must be remembered that the obligation of JVC under Article 11.1.2.1 is to share only 45.99% of the 'PROJECTED REVENUE' but not the 'Revenue' as understood in the accounting parlance. The JVC while making the 'FINANCIAL PROJECTIONS' ought to have clearly identified its 'Projected Revenue' for the purpose of sharing with AAI after excluding the amounts necessary for RECOVERING the COSTS RELATING TO THE AERONAUTICAL ASSETS which includes the amount needed for discharging its obligations towards repayment of the installments of borrowed capital and the interest thereon. They are outstanding legal liabilities owed to the third parties such as banks and other financial institutions. In our opinion, in law, JVC would be perfectly justified in making such a Financial Projection. If all the cash receipts of the JVC are to be shared with the AAI, there is no purpose in the stipulation under Article 11.1.2.1 that:

Annual Fee= 45.99% of Projected Revenue for the said year where Projected Revenue for each year shall be set forth in the Business Plan".

If the submission of AAI that all the cash received by JVC is required to be shared with AAI is right, it would have sufficed to state in Article 11.1.2.1 that Annual Fee = 45.99% of the REVENUE. However, both JVC and AAI proceeded on the mistaken understanding that the Annual Fee payable by JVC is 45.99% of the "Revenue" as defined under OMDA.

Therefore, according to AAI, the entire pre-tax gross revenue i.e. all the money received by JVC from whatever source (for the sake of convenience hereafter referred to as 'RECEIPTS') unless anyone of those receipts falls under one of the five Heads of the excluded classes of financial transactions, enumerated in the definition of the expression 'Revenue' is liable to be taken into consideration for the purpose of sharing 45.99% thereof towards the Annual Fee."

213. It was on an overall consideration of the above that the Co-Arbitrators came to the following conclusion:

"45. In our opinion, both the parties misconstrued the OMDA and the legal obligation of JVC thereunder to pay the Annual Fee.

AAI is happy with such construction because it is more beneficial to AAI. On the part of JVC wisdom dawned on the JVC partially when IT realised after few years of the working of OMDA that such

construction would never enable IT to service the DEBT incurred by IT. Therefore, by seeking to read a limitation in to the definition of REVENUE based on some purported commercial sense, raised a dispute regarding their liability, which eventually lead to this Arbitration. A classic demonstration of the adage that 'those who do not learn things by their brains will be compelled to learn by their stomach' - JVC would have done better by properly analysing the scheme and TEXT of the OMDA to understand its obligation i.e. to share 45.99% of its PROJECTED REVENUE with AAI.

Interpretation and construction of documents is always considered to be a question of law. In deciding the questions of law &public policy, etc. court/adjudicator is not bound by the understanding of the parties but owes a legal duty to take note of the correct legal position. In our opinion, the duty of an Arbitrator (Adjudicator) is no different. To drive home the point, it may be stated if a dispute seeking the enforcement of a contract between an alien enemy and a citizen come for arbitration, whether somebody raises it or not, that one of the parties is an alien enemy and, therefore, the contract cannot be enforced is bound to be taken note of by the Arbitrator.

46. Enormous time and energy is spent by the learned counsel appearing on either side to expound the meaning of the expression "Revenue".

Number of decisions are cited on either side in support of their respective submissions as to the construction of expression 'Revenue' and 'Pre-Tax Gross Revenue' occurring in the definition of the expression 'Revenue'. Those decisions are elaborately discussed by the learned Presiding Arbitrator.

AAI's submission proceeded on the basis that what is sharable by the JVC is the total 'Pre-Tax Gross Revenue'. AAI for the said purpose relied on two American decisions in *Public Service* v. *Denver*, 387 P.ED 33 (Colo.1963) and *Lane Electric Cooperative Inc.* v. *Department of Revenue*, 765 P.2D 1237 (Or.1988). These two decisions deal with the construction of expression 'Gross Revenue' and 'All Gross Revenue'. Relying on them, AAI argued that the definition of the expression 'Revenue under OMDA cannot be read countenance to any limitations other than those expressly mentioned in the definition by resorting some undefined concept of commercial sense, as argued by JVC.

Reliance is also sought to be placed on the judgment of Supreme Court in reported in (2018) 3 SCC 716-*Transmission Corporation of Andhra Pradesh* v. *GMR Vemagiri Power Generation Ltd.* In our opinion, the said judgment would support the argument of JVC than the submission of AAI. At paragraph 26 of the said judgment, the

Supreme Court recognized the possibility of interpreting a commercial document in a manner to arrive at a conclusion which is at complete variance what may originally the intendment of the parties and such a situation can only be contemplated when the implied terms can be considered to lend efficacy to the terms of contract. Insofar as it is relevant for our purpose, reads as follows:

> *A commercial document cannot be interpreted in a manner to arrive at a complete variance with what may originally have been the intendment of the parties. Such a situation can only be contemplated when the implied term can be considered necessary to lend efficacy to the terms of the contract. If the contract is capable of interpretation on its plain meaning with regard to the true intention of the parties it will not be prudent to read implied terms on the understanding of a party, or by the court, with regard to business efficacy.*

The said decision also recognizes the possibility of implied unexpressed terms in a commercial contract relying upon the judgment of the House of Lords in [1973] 2 All ER 260 (HL), at p. 260 at page 268, where it was held:

> *An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract : it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them : it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.*

In our opinion, all the above mentioned judgments do recognize the possibility of implying a term into the commercial contract. Secondly, the Court also recognized the possibility of Business Efficacy Test in certain circumstances. At paragraph 35 of the judgment in *United India Insurance Co. Ltd.* v. *Manubhai Dharmasinhbhai Gajera*, (2008) 10 SCC 404, it was held in this regard, as follows:

> The *business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement. …"*

We are not really required to read any implication of commercial efficacy into the definition of the expression ‘Revenue’ under OMDA. As already mentioned, in our opinion the whole enquiry is misdirected. The obligation of the JVC is to share ‘Projected Revenue’ but not ‘Revenue’. AAI case is that JVC is liable to share a part of the

'Revenue' as defined under OMDA. By adopting such an approach, AAI clearly ignores the language of OMDA which says under Article 11.1.2.1 that the Annual Fee is 45.99% of the "Projected Revenue for the said year"."

214. The significance of the 2003 Amendment Act and the execution of OMDA and the SSA were aspects which were re-emphasized by the Co-Arbitrators in Paras 52 and 53:

"52. In the instant case, such an opportunity is denied to JVC by imposing limitations on the right of JVC to determine the Aeronautical Charges. Such fetter on the rights of JVC to recover money invested with appropriate return thereon by the condition imposed under Clause 3.1.1 of the SSA, which was an agreement entered into some twenty days after the execution of OMDA. Such fetter was later reinforced by a statutory prescription under Sec. 42 of the AERA Act, 2008, which declares that the AUTHORITY constituted under Sec. 3 of the Act is bound by the policy decisions of the Government of India. It is the agreed case of both the parties that the AUTHORITY is strictly avoiding taking into consideration of the payment of UPFRONT FEE and ANNUAL FEE liability of the JVC while determining the TARIFF of AERONAUTICAL CHARGES.

53. The most significant factors which throw ample light on the scope, contours and expression 'Projected Revenue' are:

(i) clause 12.1.1 of the OMDA - makes it explicit that the purpose of collection of the Aeronautical Charges is to enable the JVC to 'recover the costs relating to Aeronautical Assets'

(ii) the limitations imposed by the SSA on the JVC to collect necessary charges from the users of the Airport to avail Aeronautical Services by expressly stipulating that the amounts of Annual Fee payable by the JVC to the Respondent cannot be taken into consideration by AERA while determining the TARIFF for AERONAUTICAL SERVICES coupled with the fact that 45.99% of the 'REVENUE' of JVC is to be shared with AAI, that should straightaway reduce the possibility of recovering the costs relating to the AERONAUTICAL ASSETS from the users of those assets by 45.99% - IF the expressions REVENUE and PROJECTED REVENUE are understood to be synonyms. If all the cash RECEIPTS are treated as REVENUE to be shared by JVC with AAI, such construction would destroy substantive rights of the JVC flowing from Article 12.1.1 to collect and appropriate under Article 2.1.2(iii) AERONAUTICAL CHARGES in order to RECOVER the COSTS RELATING to the AERONAUTICAL ASSETS. Such a destruction is a consequence of the imposition of a limitation under SSA on the substantive right of JVC by excluding certain relevant elements from consideration for

> determining Aeronautical Charges (that can be collected by JVC) without actually amending Article 2.1.2(iii) and Article 12.1.1 of OMDA. Therefore, the rights under the said Article would by necessary implication become a limitation on the amplitude of the expression 'PROJECTED REVENUE' and (an important factor in ascertaining the true meaning of the expression PROJECTED REVENUE). Such an implication has to be legally read into OMDA. It is a permissible way of construing the contract as pointed by the Supreme Court in *Khardah Company Ltd.* v. *Raymon & Co. (India) Pvt. Ltd.*, (1963) 3 SCR 183:
>
> *"... The terms of a contract can be express or IMPLIED from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well established that in construing it would be legitimate to take into account surrounding circumstances ..."*"

215. They further came to conclude that any other interpretation, if accepted, would inevitably lead to the commercial principles underlying OMDA and SSA being destroyed. As would be evident from the aforesaid discussion, the view of the Majority ultimately rests upon a harmonious interpretation of the Project Agreements, the necessity of striking a just balance between the creation of infrastructure and facilities and the agreements themselves embodying enabling provisions aimed towards the JVC recouping costs and generating a reasonable return. The aforesaid reasoning not only appears to be a view which could have possibly been taken, but it, in any case, cannot be said to suffer from the vice of unpardonable perversity as propounded by courts.

216. It would, therefore, be fundamentally incorrect for AAI to contend that the Co-Arbitrators had constructed an entirely new case, re-written the contract or travelled outside its contours. The opinion expressed ultimately turned upon how the Co-Arbitrators construed and understood the relevant clauses and covenants of the OMDA and the other Project Agreements. The view so taken, and which was in extension of the power conferred upon the Tribunal to interpret and construe the relevant terms of the contract, can neither be said to be in excess of jurisdiction nor based on reasoning which is wholly untenable so as to warrant interference by the Court.

217. We also find ourselves unable to accept the contention of AAI that the Majority Opinion in effect adds to the five enumerated exclusions specified in the definition of 'Revenue'. As noted hereinabove, the Co-Arbitrators have interpreted the provisions of Chapters XI and XII of the OMDA in conjunction with the SSA. It was on a conjoint reading of the Project Agreements that they came to

answer the issue of shareable revenue. This necessarily entailed due consideration being accorded to the contractually prescribed procedure for computation of Aeronautical Charges as set out in the SSA and thereafter identify what exactly would constitute "projected Revenue" and "actual Revenue". As was noticed by us in Para 195, a defining clause need not always for the purpose of textual analysis be determinative and conclusive. If that term were to be found to have been intended to be conferred a different connotation in one of the operative covenants of the contract, we would be justified in departing from the plain text of the definition bearing in mind the intent of parties. In any event, the view expressed by the Co-Arbitrators on a construction of OMDA and the Project Agreements cannot possibly be said to be implausible or one which a reasonable person could not have harboured. We, in this regard, bear in mind the well-settled precept of the Section 34 challenge being concerned with the possibility of the view ultimately expressed as opposed to its implausibility.

218. Although it had been contended that the Co-Arbitrators had also failed to consider Article 11.1.2 in its entirety and the same resulting in a flawed view being taken, this Court finds itself unable to sustain this submission since, and as is evident from a reading of the introductory parts of the opinion of the Majority, they had chosen not to reproduce all the terms and conditions which stood embodied in the OMDA since they had been copiously extracted and taken into consideration by the Presiding Arbitrator. The imperatives of brevity thus appear to have informed the decision of the Co-Arbitrators resisting unnecessary replication and concentrating their analysis to the core of the dispute which merited consideration.

xi. Other Income

219. This then takes us to evaluate the correctness of the Award insofar as it dealt with 'Other Income'. It would appear from the record that both DIAL/MIAL asserted that the following sources of income and which were broadly classified as falling under the category 'Other Income' would not form part of shareable revenue. Those heads were identified to be the following:

"(i) Interest earnings on deposits, delayed payments, tax or other refunds;

(ii) Earnings from sale of investments;

(iii) Dividend income or other income from financial assets, including earnings on account of exchange rate differences;

(iv) Earnings from sale of fixed assets. scrap or other assets other than from sale of capital assets; and

(v) Other miscellaneous incomes, including tender fees recovered;"

It appears to have been contended before the Arbitral Tribunal that

these earnings were not even remotely connected to the discharge of Aeronautical or Non-Aeronautical Services. In view of the aforesaid, it was DIAL/MIAL's submission that 'Other Income' could not form part of shareable revenue or be liable to be factored in for the purposes of computing the Annual Fee.

220. The Presiding Arbitrator took the view that neither OMDA nor any of the Project Agreements restricted 'Revenue' to earnings from Aeronautical and Non-Aeronautical Services. It opined that this income cannot be said to be independent of the operation of the airport. The Presiding Arbitrator took the position that but for the Grant, neither DIAL nor MIAL would have been enabled to earn other income. In view of the above, it ultimately came to conclude that 'Other Income' as classified and projected cannot be excluded from the scope of Chapter XI.

221. The opinion so formed also rested on the decisions rendered by the Supreme Court in *AUSPI-I* and *AUSPI-II*. This becomes apparent from a reading of the following portion of the opinion of the Minority and which is extracted hereinbelow:

> "144. In *AUSPI-I*, the Supreme Court rejected the contention of Telecom Service Providers that only 'revenue' arising from the activities carried out under the telecom licence would form 'adjusted gross revenue' and revenue realised from non-telecom activities cannot form part of 'adjusted gross revenue', on the following reasoning (vide para 49):
>
> > *"If the wide definition of adjusted gross revenue so as to include revenue beyond the licence was in any way going to affect the licensee, it was open for the licensees not to undertake activities for which they do not require licence under Section 4 of the Telegraph Act and transfer these activities to any other person or firm or company. The incorporation of the definition of adjusted gross revenue in the licence agreement was part of the terms regarding payment which had been decided upon by the Central Government as a consideration for parting with its rights of exclusive privilege in respect of telecommunication activities and having accepted the licence and availed the exclusive privilege of the Central Government to carry on telecommunication activities, the licensees could not have approached the Tribunal for an alteration of the definition of adjusted gross revenue in the licence agreement."*
>
> 145. In *AUSPI-II*, the Supreme Court again considered the term 'adjusted gross revenue' used in the Telecom Licence Agreement and held as under while reiterating what was held in *AUSPI-I* (vide paras 64, 65 and 66):
>
> > "62. . …. the meaning of revenue is apparent that it has to be

gross revenue, and the license fee would be a percentage of the same. Thus, the licensees have made a futile attempt to submit that the revenue to be considered would be derived from the activities under the license; whereas it has been held in 2011 that the revenue from activities beyond the license have to be included in adjusted gross revenue, is binding.

64 ….. In our considered opinion, when there is a contractual definition as to what would be the gross revenue that would be the revenue and also the total revenue, the revenue as mentioned in the mode of accounting AS-9 (Accounting Standard-9) cannot govern the definition. The general definition of revenue in the mode of accounting cannot govern the contractual definition of gross revenue.

65. As per Clause 20.4, a licensee must make quarterly payment in the prescribed format as Annexure II showing the computation of revenue and licence fee payable. The format is part of the licence and is independent of accounting standards and is in tune with the definition of gross revenue, and is the basis for the calculation of licence fee. It is only for uniformity that the account has to be maintained as per accounting standards AS-9 which are prescribed from time to time. Once the licensee provides the details to the Government in format Annexure II along with accounts certified by the auditor, the reconciliation has to take place. The accounting standard AS-9 is relevant only for whether the figure given by the licensee as to gross revenue is maintained in proper manner once gross revenue is ascertained. then after certain deductions, adjusted gross revenue has to be worked out. The accounting standard provided in AS-9 cannot override the definition of gross revenue, which is the total revenue for licence and the finding in *Union of India* v. *Assn. of Unified Telecom Service Providers of India* [*Union of India* v. *Assn. of Unified Telecom Service Providers of India*, (2011) 10 SCC 543] in this regard is final, binding and operative. The accounting standard AS-9 makes it clear that same is in the form of guidelines, it is not comprehensive and does not supersede the practice of accounting. It only lays down a system in which accounts have to be maintained. Accounting standards make it clear that it does not provide for a straitjacket formula for accounting but merely provides for guidelines to maintain the account books in systematic manner.

66. Though the definition of revenue given in Clause 4.1 of AS-9 cannot govern the contract, the contractual definition of gross revenue which is the gross revenue under Clause 19.1 and total revenue for the purpose of the agreement for which an

> independent definition has been carved out under the statutory power while parting with the privilege under Section 4 by the Central Government, once the contract has been entered into, the definition of gross revenue is binding, and the licensees cannot try to wriggle out of the decision by making impermissible attempts to depm1 from it. ... Given the definition of gross revenue, the same includes revenue from activities beyond the licence. Explanation to Clause 5 of AS-9 also makes it clear that the agreement between the patties would determine the amount of revenue arising on a transaction."
>
> 146. The decisions in AUSPI-1 and AUSPI-11 dealt with the question of what constitutes shareable gross revenue in respect of telecom licences granted by Government of India to telecom service providers. The principles laid down by the Supreme Court while considering whether other income, that is, income other than telecom services, has to be considered as part of the gross revenue to be shared with the government are equally applicable in regard to the transfer of certain functions by AAI under OMDA in favour of DIAL."

222. It would be pertinent to briefly pause here and note that both *AUSPI-I* and *AUSPI-II* were liable to be appreciated bearing in mind how the contracts which formed the subject matter of those proceedings defined the term 'gross revenue'. Quite apart from the fact that *AUSPI-I* had already ruled on what would constitute revenue and income generated from all activities including those beyond the terms of the license, Clause 19.1 of the license agreement significantly employed the phrase "*...and any other miscellaneous revenue...*" being liable to be included in gross revenue. Thus all streams of revenue, no matter how far removed from the core business that was undertaken was envisaged to be taken into consideration. That is clearly not the position which would emerge when one were to undertake a harmonious interpretation of the Project Agreements. The reliance placed on those two decisions was, thus, clearly misplaced.

223. Insofar as the Co-Arbitrators are concerned, they approached the issue of "Other Income" in the following manner. While there was no dispute with respect to the identification of the broad heads which would fall in the genre of Other Income, the Co-Arbitrators held that the amounts received under the aforesaid heads did not flow from any right created in favour of DIAL/MIAL under the OMDA or the Project Agreements. The submission of AAI that Other Income was also fundamentally based on the Grant of an exclusive right and obligation came to be negated with the Co-Arbitrators coming to the conclusion that neither DIAL nor MIAL were obliged to undertake any of the activities which would have led to the earning of Other Income.

224. They observed that it would have been open for the JVC to desist from making any investments of surplus cash available in its hands at all. They further held that even AAI could not have compelled the JVC to undertake any such investment activity. This becomes evident from a reading of the following passages forming part of the Majority Opinion:

> "67. In our opinion, AAI's submission cannot be accepted. Because JVC has no obligation arising from the OMDA to carry on anyone of the activities leading to the earning of income/money under those various heads from which the 'other income' is derived. For the sake of argument,-if it is assumed-that if the JVC decides not to make any investment of the cash in its hands, either by making deposits in any bank or purchasing some shares or other securities, obviously no further income accrues from that cash lying idle in the hands of the JVC. AAI cannot either compel JVC to make such arrangement or terminate OMDA. Because such inaction on the part of JVC would not have any adverse legal consequences for JVC with reference to OMDA. It does not constitute an event of default on the part of JVC under Article 17.2 entitling AAI to terminate OMDA.
>
> 68. Another factor which must be kept in mind in deciding this question is that the amounts due under the head of 'Annual Fee' are required to be paid by JVC on the first of each calendar month and any delay in the payment of the monthly installment would entail payment of interest on the amount due (see Article 11.1.2 of OMDA). Therefore, normally, the amounts either deposited in banks or invested in shares or other securities, etc. by JVC would be the amounts remaining in the hands of JVC after making payments due to AAI towards installments of Annual Fee. Therefore, to hold that AAI would have claim on the amounts invested/deposited by JVC and interest/dividend, accruing on such investment, merely because such accretion is made possible only by virtue of the earnings made out of the concession granted by AAI would amount to allowing expropriation of the property of the JVC without any authority of law. The nexus between the grant under the OMDA and other income of JVC is legally an UNTENABLE nexus to make the 'other income' sharable with AAI. State is constitutionally prohibited from collecting EVEN taxes (a basic Sovereign Activity) without a clear and express authority of law - always interpreted to mean a statute. To conclude that the State or its instrumentalities, in exercise of their contractual rights could collect money by virtue of some purported factual inferences flowing from the contract would be contrary to the fundamental limitation on the authority of the State to collect money from the citizens/subjects. The reliance sought to be placed on the bid documents, which refer to 'other income' for construing the

scope and ambit of the expression 'Revenue' in the context of the 'Annual Fee' may not be consistent with the basic principles of interpretation of the contracts. Such reliance is impressible even under Sec. 92 of the Evidence Act, 1872 Innumerable matters are considered and discussed during the course of negotiations of a contract. It is much more so in the context of the formation of a complicated contract like OMDA. Some of these factors may throw some light in understanding the true purport of the terms of contract, but they are not determinative or conclusive of the rights and obligations arising under the contract.

On the other hand, Article 20.3.2(a) of OMDA stipulates:

"This Agreement supersedes all previous agreements or arrangements between the parties, including any memoranda of understanding entered into in respect of the contents hereof and represents the entire understanding between the Parties in relation thereto."

The reliance placed upon the judgment of the Supreme Court in

(i) *Union of India* v. *Association of Unified Telecom Service Providers of India*, (2011) 10 SCC 543 and

(ii) *Union of India* v. *Association of Unified Telecom Service Providers of India*, (2020) 3 SCC 525 by AAI, in our opinion is wholly misplaced.

They are cases where the Union of India while granting telecom licenses stipulated that license fee payable to be a percentage of 'gross revenue' of the licensee. The percentage was required to be determined after obtaining recommendations from the TRAI. Pending such recommendation, tentatively it was decided by the Government of India that 15% of the gross revenue would be provisionally collected as license fee. On receipt of TRAI's recommendations, the Government took a final decision fixing the quantum of the license fee. In the process, Government of India came out with the concept of adjusted gross revenue. The expression 'Gross Revenue' was DEFINED to include inter alia revenue on account of interest, dividend, value added services, etc. The legality of such inclusive definition was questioned by the licensees. It was argued (particularly in relation to the interest income and dividend income, etc.,) that only the revenue directly arising out of telecom operation for the purpose of determining the license fee can be taken into account."

225. The Co-Arbitrators found themselves unable to concur with the view expressed by the Presiding Arbitrator in this respect as would be evident from a reading of Para 70 and which reads thus:

"70. In the case on hand, there is certainly no express inclusion

> of various items in question, falling under the head of 'Other Income'. That being the case, reliance placed on the above mentioned decisions of the Supreme Court is wholly misplaced. To say that the expression REVENUE under OMDA should be understood to take within its sweep 'interest and dividends, etc.,' received by JVC, though there is no express inclusion of those items in the definition of the expression 'REVENUE' only because it was so held in the twin cases mentioned above would be completely contrary to the principle of *ratio decidandi*."

226. The Court notes that the shareable revenue in terms of Chapter XI was liable to be quantified basis the income that the JVC would have earned from the charges which it imposed and collected in the course of performing and providing Aeronautical and Non-Aeronautical Services. The investment activity which it independently undertook was not in discharge of any contractual obligation. The investments which the JVC ultimately chose to make was in order to undertake a prudent deployment of surplus funds and was clearly a business activity which the JVC undertook of its own volition and which was neither guided by nor subject to regulation by the OMDA or the other Project Agreements. It is here that the expressions Airport Business, Aeronautical Services and Non-Aeronautical Services attain critical importance. The Co-Arbitrators have principally borne in consideration the contractual obligations which stood imposed upon the JVCs to hold that income earned independent of 'Airport Business' could not have formed part of shareable revenue. The view so expressed appeals to reason and is in any case one which could have possibly been taken on a reasonable and plausible interpretation of the contractual terms. The said finding, for reasons which are assigned hereinafter, in any case, cannot be said to be either manifestly erroneous or suffering from the vice of perversity.

227. The Court in this respect additionally bears in mind that the investment activity and the income generated therefrom was to ultimately benefit the constituents of the JVC itself and which necessarily would include AAI. However, it would be clearly erroneous to read and interpret Chapters XI or XII as being suggestive of such income independently earned and which was wholly unconcerned with 'Airport Business' to be pooled together with Aeronautical and Non-Aeronautical Charges for the purposes of computing shareable revenue. It is pertinent to note that even the SSA did not take 'Other Income' into account for the purposes of tariff fixation. The Co-Arbitrators thus appear to have taken a correct view insofar as this aspect is concerned. In any case, the view as taken cannot possibly be characterized as constituting a patent illegality.

xii. Payments to Relevant Authorities and receipts for provision of electricity, water, sewage, or analogous utilities

228. One of the other issues of disputation was with respect to the payments made towards electricity charges, property taxes, and the income earned from the sale of capital assets. Insofar as these payments are concerned, the panel of arbitrators has unanimously held in favour of DIAL/MIAL. Having evaluated the findings so rendered, this Court finds no error which may warrant interference with the ultimate conclusions rendered by the Arbitral Tribunal when tested on the anvil of Section 34 of the Act.

xiii. The Role of the Independent Auditor

229. The last aspect of significance was the assertion of the Tribunal having delegated an essential adjudicatory function to the Independent Auditor. It becomes pertinent to note at the outset that both the Presiding Arbitrator as well as the Co-Arbitrator had independently arrived at the conclusion that the quantification exercise would have to be undertaken by the Independent Auditor. This becomes evident when one reads the operative directions as were suggested by the Presiding Arbitrator itself:

> "251. The independent auditor appointed under Article 11.2 of OMDA, shall verify and certify (i) the extent of electricity/power charges paid by DIAL to BSES Rajadhani Power Ltd. for the period 21.6.2015 to 30.9.2018, which is not already excluded under second part of Exclusion (a); and (ii) the extent of property taxes paid to municipal authorities during the period 21.6.2015 to 30.9.2018. They shall also certify that 45.99% of such amount which has been paid in excess as Annual Fee and DIAL will be entitled for credit therefor.
>
> 252. Even in regard to electricity/power charges paid by DIAL to BSES Rajadhani Power Ltd. and property taxes paid by DIAL to municipal authorities and in regard to sale proceeds of capital asset/items for the period 1.10.2018 till date of award, the independent auditor shall verify and certify the amounts to be deducted under Exclusions (a) and (c) and 45.99% of such amount which has been paid in excess as Annual Fee (as was directed in regard to the period 30.9.2018 above in the previous paras) and DIAL will be entitled for credit therefor."

230. The Co-Arbitrators also came to the conclusion that the exercise of computation would be liable to be referred to an expert who could undertake a detailed computational exercise on the basis of the material existing on the record including the Annual Reports and Returns submitted so as to complete the mathematical exercise of identifying the amounts liable to be paid to the JVCs' bearing in mind the reliefs granted. This becomes evident from a reading of Paras 103 and 104 of the opinion of the Majority:

> "103. For arriving at the actual figure of the amount which are

liable to be deducted from the total receipts of JVC under the heads of Aeronautical Charges and Non-Aeronautical Charges, it requires a very careful examination of the accounts of JVC for the period commencing from 21.06.2015. Therefore, such examination shall be undertaken by the Independent Auditor to determine the actual amounts liable to be deducted for the period commencing from 21.06.2015 to the date of this Award. Once such determination is made, the Annual Fee payable by JVC for each succeeding financial year commencing from 21.06.2015, is required to be re-calculated by the Independent Auditor. The difference between the actual amounts already paid towards the Annual Fee by JVC for each of the above mentioned years and the amount determined by the Independent Auditor as Annual Fee, as mentioned above, is liable to be refunded. However, We deem it appropriate that such amounts be given credit to while computing the Annual Fee payable by JVC in future. Whether the entire amount (liable to be refunded) is required to be given credit to in one or in three equal installments in three different financial years, is at the discretion of the AAI.

104. Similarly, the JVC is entitled for a declaration, the amounts falling under the Heads:

(a) Property Tax

(b) Other Income; and

(c) Costs relating to Security Equipment and Maintenance are liable to be excluded from the Annual Revenue of the JVC for the purpose of computing the Annual Fee payable by the JV.

JVC is also entitled for a declaration, the amounts falling under the above mentioned Heads from 21.06.2015 are liable to be excluded from the REVENUE and the amount of 45.99% thereof is liable to be refunded after duly ascertaining the quantum after appropriate enquiry by the Independent Auditor.

The amounts so required to be refunded may be given credit to in one or three equal installments at the discretion of the AAI while determining the Annual Fee payable by JVC in future.

The reliefs granted above are in addition to the reliefs granted by the learned Presiding Arbitrator, as mentioned in the DA."

231. It was in the aforesaid light that the operative directions, insofar as the issue of computation was concerned, were framed in the following terms:

"For arriving at the actual figure of the amount which are liable to be deducted from the total receipts of JVC under the heads of Aeronautical Charges and Non-Aeronautical Charges, it requires a very careful examination of the accounts of JVC for the period commencing from 21.06.2015. Therefore, such

examination shall be undertaken by the Independent Auditor to determine the actual amounts liable to be deducted for the period commencing from 21.06.2015 to the date of this Award. Once such determination is made, the Annual Fee payable by JVC for each succeeding financial year commencing from 21.06.2015, is required to be re-calculated by the Independent Auditor. The difference between the actual amounts already paid towards the Annual Fee by JVC for each of the above mentioned years and the amount determined by the Independent Auditor as Annual Fee, as mentioned above, is liable to be refunded. However, we deem it appropriate that such amounts be given credit to while computing the Annual Fee payable by JVC in future. Whether the entire amount (liable to be refunded) is required to be given credit to in one or in three equal installments in three different financial years, is at the discretion of the AAI."

232. The issue of computation appears to have arisen earlier also and in the course of the arbitral proceedings itself as would be evident from some of the Procedural Orders which were passed and are noticed hereinbelow. The attention of the Court was invited to the Procedural Order dated 29 June 2019 and relevant extracts whereof are reproduced hereunder:

"Re. : Hearing

Ld. Solicitor General made a suggestion that the hearing could be split into two tranches-the first in respect of liability; and the second, if necessary, relating to quantum. Ld. Counsel for the Claimant sought time to take instructions on this suggestion.

Ld. Counsel for Claimant also made a suggestion that instead of requiring the Tribunal to examine the voluminous evidence and to expedite the final hearing, the questions relating to quantum may be referred to a mutually agreed Independent accountant/auditor for certification/determination of the various figures which are in dispute. The Ld. Solicitor General sought time to take instructions on this suggestion."

233. The Procedural Order dated 13 October 2019 was also brought to our attention wherein the Tribunal recorded that it would allow both sides to adduce evidence and decide the matter of assigning the determination of quantum to an independent accountant/auditor thereafter. This is apparent from the following extracts of that order:

"Re. Suggestion of Claimant that questions relating to quantum be referred to a mutually agreed independent Accountant/Auditor for certification/determination of the various figures which are in dispute.

7. In regard to the Claimant's aforementioned suggestion during

the hearing dated 29.06.2019, the learned Solicitor General had sought time to take instructions.

8. The Claimant, by letter dated 07.08.2019 addressed to the Respondent's counsel, proposed and gave its consent for appointment of one of the four audit firms named therein (who had been earlier appointed by AAI as independent auditors under Article 11.2 of the OMDA) as a mutually agreed independent Accountant/Auditor, as they were familiar with the relevant records and procedures and will be able to expedite the assignment.

9. The Claimant, by letter dated 07.08.2019, specified the scope of work of such independent Accountant/Auditor as verifying and certifying the item-wise aggregate of the following payments and receipts [items (i) to (iv) and payments and items (v) and (vi) are receipts] based on the records of DIAL:

(i) Consultancy and Audit Cost paid by DIAL to or on behalf of AAI;

(ii) Power/Electricity Charges paid by DIAL to the utilities;

(iii) Security Equipment Maintenance Charges paid by DIAL;

(iv) Maintenance Expenses of Area Occupied by Relevant Authorities paid by DIAL;

(v) Amount accrued to DIAL from Sale of Fixed Assets/Items : and

(vi) Amount accrued to DIAL from Sale of Non-current Investments

10. The Respondent has sent its reply dated 04.10.2019 (through counsel) to Claimant's proposal/offer dated 07.08.2019. The Respondent has stated that it is not agreeable to the proposal made by the Claimant. The Respondent has alternatively suggested that the matter be referred to the Comptroller and Auditor General of India (CAG) to undertake the audit of the Claimant's accounts. The Claimant by reply dated 12.10.2019 has indicated that it is not agreeable to the suggestion made by the Respondent in the letter dated 04.10.2019.

11. The views of both sides were ascertained during hearing today. Parties are not able to reach any consensus in regard to the suggestion under discussion. In the absence of any consensus the Tribunal is of the view that the matter should be proceeded in the normal manner by permitting both parties to adduce evidence and decide the matter thereafter."

234. It must at the outset be noted that the exercise of computation has not been entrusted to a stranger to the contract. The office of the Independent Auditor stands duly recognized in Chapter XI of the OMDA itself. It was this very authority which had been regularly undertaking a

reconciliation of accounts and certifying Revenue for the purposes of computation of Annual Fee. Since the Arbitral Tribunal had already ruled on all the principal issues which formed the subject matter of the arbitral proceedings, the only exercise which was left over to be undertaken was of computation. Since that exercise would have necessarily entailed an authority to delve into the returns and the records which existed as well as the examination of financial statements, the Arbitral Tribunal appears to have deemed it prudent to assign and entrust an authority to undertake that arithmetical exercise.

235. It appears that the Arbitral Tribunal, in the absence of respective sides being able to agree upon an independent authority who could be entrusted with the task of computation, deemed it appropriate to vest that power upon the Independent Auditor who already stood identified under the OMDA.

236. The Court finds that the Independent Auditor under the OMDA while undertaking the exercise of computation has not been entrusted with any essential decision-making power. It is to merely quantify the amounts payable to the claimants based upon the findings in the Award and the material existing on the record. The Court notes that what the law proscribes is the power to make a decision or the arbitral tribunal abdicating its obligation to render a judgment on the disputes which may be raised. We, in this regard, find the following illuminating passages in Russell on Arbitration[38] and which would lend credence to the procedure as adopted by the Arbitral Tribunal:

> "6-056 Delegating the drafting of the award. A tribunal may obtain legal advice on the drawing up of its award to ensure that it is in a proper form and may even delegate the drafting of the award. It may also consult an expert on some issue required to be dealt with in the award. However the tribunal may not delegate the making of its decision to another and when employing a draftsman, it remains the function of the tribunal itself to decide on findings of fact, to evaluate and analyse the submissions of law and to arrive at their own reasons for their decision. The tribunal must exercise its own judgment in deciding the issues.
>
> XXXX XXXX XXXX
>
> 6-074 Decision may not be delegated. The tribunal may consult an expert on some issue required to be dealt with in the award. However the tribunal may not delegate the making of its decision to another and must exercise its own judgment in deciding the issues. An award seeking to delegate the decision to a third party will not be valid.
>
> XXXX XXXX XXXX
>
> 6-078 A complete decision. An award must be final in the

sense that, in relation to the issues or claims with which it deals, it is a complete decision on the matters requiring determination. A tribunal cannot reserve to itself, or delegate to another, the power of performing in the future any act of a judicial nature in relation to matters dealt with in the award. The tribunal's duty is to make a complete and final decision by its award, and it is a breach of that duty to leave any part of the decision to be determined subsequently or by another. The tribunal may, however, reserve to itself or delegate to another purely ministerial acts, even after the time limited for making the award has expired, though care should be taken to ensure that the act is not in fact the collation of further evidence.

XXXX XXXX XXXX

6-091 Failure to deal with quantum. Where the award in effect comprises a decision on liability but fails to decide the amount due or to make provision for payment, it may be remitted to the tribunal for it to deal with these further points. Alternatively the tribunal may be able to make an additional award dealing with quantum.

6-092 Who must do what? The award must not only make clear exactly what is required to be done but also which of the parties is required to do it. The person who is to receive payment or otherwise to receive benefit from performance, or towards whom performance of the award is to be directed, must also be sufficiently identified, even if not named.

6-093 Method of calculation sufficient. It is, however, sufficiently certain if the award sets out the method of calculation of the amount due to be paid, so that all that is required to determine the actual amount is “mere arithmetic”.

XXXX XXXX XXXX

8-012 Form of award. Provided the terms of the award are sufficiently clear there is now no reason why a declaratory award cannot been forced under s. 66. Indeed, the courts do enforce declarations under s. 66. Previously expressed doubts about whether an award which is couched in purely declaratory terms can be enforced as a judgment under s. 66 of the Act are, it is suggested, no longer applicable. The court will however enforce an award which is in terms that are not clear nor grant permission to enforce an award for the payment of money which does not specify the sum due. In order to be enforceable under this summary procedure the award “must be framed in terms which would make sense if those were translated straight into the body of a judgment”.”

237. A learned Judge of our Court while dealing with the issue of enforcement of a declaratory award made the following pertinent

observations in *Union of India* v. *Reliance Industries Ltd.*[39]:

> "54. Essentially, therefore, the petitioner is seeking execution of an award which does not determine all the elements which are required to be determined in order for the liability of the respondents to the petitioner, if any, to be fixed. In doing so, the petitioner is proceeding unmindful of the specific clarification, voiced many times over by the learned AT, and also acknowledged by the petitioner itself, that *application* of the findings in the 2016 AT *would have to await resolution of all issues by the learned AT and the rendering of its final quantum award thereafter*.
>
> 55. The entire arbitral process, in which the petitioner and respondents are locked, is one, emanating from a single Notice invoking arbitration, dated 16th December 2010, issued by the respondents to the petitioner, and a single Statement of Claim filed by the respondents before the learned AT (though the petitioner filed counter-claims). Each FPA is, therefore, merely an additional step towards resolution of the disputes between the petitioner and the respondents. No FPA, therefore, completely resolves the disputes between them. Inasmuch as all elements of the disputes are intertwined, and, unless they are all resolved, the reciprocal rights and liabilities cannot be contractually ascertained, no FPA can be executed by itself, even while other pertinent issues, relevant to the determination of the liability of the respondents to the petitioner, if any, remain pending. That, however, is precisely what the petitioner seeks to do by the present petition.
>
> 56. To the extent that the petitioner seeks its enforcement in execution, there is no dispute about the fact that the 2016 FPA is purely declaratory in nature, and does not specifically award a single farthing to the petitioner. Can such a purely declaratory award be enforced?
>
> 57. The issue is vexed. There is no real authoritative pronouncement by any Indian court on the issue. Foreign Courts have differed on the point. Even in a case where the award was not purely declaratory but merely failed to quantify the amount payable thereunder, the Queens' Bench Division, through Diplock, LJ., held, in *Marguiles Brothers Ltd.* v. *Dafnis Thomaides & Co. (UK) Ltd.*, that the award was not enforceable. The Supreme Court of Victoria, before whom *Marguiles Brothers* was cited, however, distinguished the decision on the ground that the award in question in that case was uncertain regarding the amount to be paid, and held, in *AED Oil Ltd.* v. *Puffin FPSO Ltd.*, relying on Russell on Arbitration for the purpose, that, "provided the terms of the award are sufficiently clear there is now no reason why a declaratory award cannot be enforced

under section 66".

58. The proposition is, however, easier stated than applied. While I also subscribe to the view that there is no proscription against enforcement of a declaratory award - no such proscription being contained in the 1996 Act either - the enforcement would, clearly, require the declaration to be *practically enforceable.* This principle would have to be applied keeping in mind the fact that the executing Court merely executes; it does not pronounce or adjudicate. The executing Court can, therefore, execute only if the award - or decree - is executable, and not otherwise. Mere declarations, which cannot be reduced to hard cash cannot, therefore, be executed in terms of money. If, however, the declarations are sufficiently explicit as to require a mere application of the principles declared to accepted facts and figures and application of mere arithmetic to arrive at the liability, then the award would probably be executable; but not otherwise. Russell, therefore, correctly expressed the principle in the passage on which the petitioner itself relies:

> "It is, however, sufficiently certain if the award sets out the method of calculation of the amount due to be paid, so that *all that is required to determine the actual amount is "mere arithmetic".* It is not unusual, for example, for an award to set out the basis on which interest is to be calculated, without actually including a specific figure."
>
> (Emphasis supplied)

59. What would be required, therefore, for a purely declaratory award to be executed like a money decree is, therefore, that the award must, firstly, identify one of the parties to the dispute as entitled to receive a quantifiable sum of money from the other, and, secondly, to set out the principles on the basis of which such quantification is to be done, *so that all that is required to be done by the executing Court is application of pure arithmetic.*"

238. The Court also bears in mind the averments contained in the SoD submitted by AAI and which itself had pleaded that the documents relevant for ascertainment of 'actual Revenue' is to be undertaken in accordance with the comprehensive contractual machinery for computation which stands embodied in Chapter XI as would be evident from the following extracts of the SoD:

> "41. On a combined reading of these provisions, the following position emerges:
>
> a. Annual Fee, although payable on a monthly basis, is to be reconciled on a quarterly basis against the actual Revenue of DIAL.
>
> b. Based on such reconciliation, any inter se transfers between

AAI and DIAL that are required to "square off" the difference between the projected and actual revenue are to be completed in that quarter (in the case any balance is payable by DIAL to AAI) or no later than the very next quarter (where excess Annual Fee paid by DIAL in the previous would be adjusted). In either event, the accounts of the parties in respect of the Annual Fee payable in a quarter are finalized at the end of that quarter.

c. The accounts based on which "actual Revenue" is arrived at are subject to audit by the Independent Auditor, who, as the designation implies, is a neutral, expert third party jointly appointed by AAI and DIAL.

d. Documents based on which actual Revenue is arrived at are at all times in the possession of DIAL and computation of actual Revenue is in the first instance done by DIAL and submitted to the Independent Auditor for audit.

e. The Independent Auditor undertakes "final verification/reconciliation" of the accounts of DIAL and certifies the "actual Revenue" for that Quarter. This figure constitutes the "Revenue" for the purposes of determination of Annual Fee payable under Clause 11.1.2.

f. Upon such "final verification/reconciliation" being completed, the accounts of DIAL for that quarter, to the extent relevant to payment of Annual Fee, stand closed.

g. The OMDA does not envisage any contractual mechanism for disputing or challenging the certification of "Revenue" for a Quarter by the Independent Auditor; rather, a contra-indication is found in the reference to finality in the language of 11.1.2.4.

XXXX XXXX XXXX

45. In the present case, a comprehensive contractual machinery for computation and finalization of Annual Fee was agreed to by the parties and recorded in Clause 11 of the OMDA, the details of which are set out hereinabove *in extenso*. The contractual machinery for finalization of Annual Fee has all the trappings of an adjudicatory process inasmuch as the adjudication was carried out by a neutral and independent expert third party appointed jointly by the parties to the contract. Further, the record of the case brings out that the accounts for each quarter were finalized with the full knowledge, involvement and participation of DIAL. Apart from interactions between DIAL and the Independent Auditor, DIAL's comments were routinely invited on the final Revenue Audit Report, and these comments were dealt with by the Independent Auditor in the Revenue Audit Report for the subsequent quarter. Therefore, every aspect of the audit findings and conclusions was put to DIAL for

comments and duly addressed."

239. Insofar as the aspect of evidence which may be taken into consideration by the Independent Auditor, the Court notes that both DIAL and MIAL had submitted that the exercise of computation may be undertaken basis the financial statements which had already been placed before the Arbitral Tribunal, the business plans and other material which already existed on the record. The JVC appears to have alluded to the Audit Reports as well as the various Tariff Orders framed by AERA as being sufficient for the purposes of the Independent Auditor completing the exercise of quantification. It is this material which appears to have been borne in consideration and guided the Arbitral Tribunal to place the obligation of quantification upon the Independent Auditor. This becomes apparent from a reading of Para 103 of the opinion of the Co-Arbitrators, which has been extracted hereinabove.

240. The submission of AAI, therefore, that fresh evidence would have to be led and presented before the Independent Auditor or that a core decision-making function had been placed upon that authority clearly appears to be erroneous. The Court thus, and on an overall conspectus of the aforesaid, finds itself unable to sustain the argument of abdication or delegation of an essential adjudicatory function.

F. CONCLUSION

241. Accordingly and for reasons set out hereinabove, the Court finds no ground to interfere with the Awards as rendered. The petitions under Section 34 shall, consequently stand dismissed.

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[1] Act

[2] AAI

[3] MIAL

[4] Tribunal

[5] DIAL

[6] AAI Act

[7] 2003 Amendment Act

[8] JVCs

[9] CSMIA

[10] JVC

[11] IGIA

[12] OMDA

[13] SSA

[14] SoD

[15] (2011) 10 SCC 543; AUSPI-I

[16] (2020) 3 SCC 525; AUSPI-II

[17] SoC

[18] (2019) 15 SCC 131

[19] AERA

[20] (2019) 20 SCC 1

[21] (2012) 5 SCC 306

[22] (2022) 4 SCC 116

[23] *Russell on Arbitration*, Twenty Fourth Edition [Thomson - Sweet & Maxwell] at para 5-050

[24] [L.R.] 14 P.D. 64 (CA)

[25] JV

[26] PSF

[27] AERA Act

[28] UDF

[29] [2015] SGCA 18

[30] (2024) 6 SCC 357

[31] (2022) 4 SCC 463

[32] 2021 SCC OnLine SC 508

[33] [1998] 1 WLR 896 HL.

[34] (2010) 14 SCC 1

[35] Gary B. Born, *International Commercial Arbitration*, Volume III, Third Edition [Wolters

Kluwer]

[36] [2010] EWCA Civ 1444

[37] *The Interpretation of Contracts*, Seventh Edition [Sweet & Maxwell]

[38] *Russell on Arbitration*, Twenty Third Edition [Thomson - Sweet & Maxwell]

[39] 2023 SCC OnLine Del 3538