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Choice of Seat in Domestic Arbitration

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ABSTRACT

This paper examines the various considerations that parties to an arbitration must make when selecting a seat. Due to its conservative arbitration legislation and inability of its judiciary to effectively deal with arbitration disputes, India has long been neglected as a potential seat of arbitration. Parties must select a seat where the arbitral process can be completed expeditiously while respecting confidentiality. A seat must be adaptable enough to let the parties to choose the substantive laws under which the dispute will be resolved at their leisure, as well as have a plethora of facilities such as arbitration institutions and physical infrastructure. India is not yet ready to be an arbitration hotspot, and the legislature and judiciary will need to collaborate closely to broaden the scope of arbitration law to entice parties to hold their arbitrations in the country. The judiciary will have to demonstrate balance in their arbitration decisions while still deciding them quickly.

I. INTRODUCTION

The seat of arbitration is extremely important in arbitration law. The arbitral seat is the arbitration's legal or juridical home, and so its selection has several important legal implications. The term “seat” is not defined or used in the Arbitration and Conciliation Act of 1996 (“the Act”); instead, the language "place of arbitration" is used in Sections 20 and 28. Section 20 states that the location of arbitration can be decided by the parties or the Tribunal, and that, regardless of such conclusion, arbitration proceedings can be held at a location other than the agreed / determined location for convenience. Prior to the constitution bench ruling of the Hon'ble Supreme Court of India in the matter of ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.***,[2] the seat or site of arbitration was not given the weight it deserved in Indian arbitration law. Until Balco's ruling, Indian courts had held that the location of arbitration did not bestow any jurisdiction on courts to decide any matters arising out of or connected to the arbitration proceedings.

II. CONTEMPORARY ISSUES

- Use of different expressions in the arbitration clause like ‘venue’, ‘place’, ‘seat’ of arbitration and difficulties that arise in finding out the curial law governing the

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[2] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.

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arbitration proceedings

- Whether seat of arbitration and venue of arbitration can be used interchangeably
- International view on seat of arbitration

III. ANALYSIS

In Balco, the Supreme Court decided that the pivot point is the seat of arbitration, and that the Act has accepted the territorial principle recognised by the UNCITRAL Model Law (i.e., the Model Law would only apply if the place of arbitration was in the enacting state). It was also decided that Section 2(1)(e) of the Act, which defines court, gives jurisdiction to two courts: the court where the cause of action arises and the court where the arbitration is heard. Another consequence of the Balco decision was that Indian courts began to recognise that the courts in the location of arbitration will have concurrent jurisdiction with the courts where the cause of action arises in domestic arbitrations. However, the court in Balco maintained the distinction between 'seat' and 'venue' of arbitration, holding that Part-I would become inapplicable and Indian courts would have no jurisdiction only if the parties' agreement was construed to provide for a seat of arbitration outside India.

After reviewing the arbitration clause in the agreement, a three-judge bench of the Hon'ble Supreme Court of India decided that Kuala Lumpur was just a venue for arbitration and not a seat chosen by the parties in ***UOI Vs. Hardy Exploration and Production (India) Inc***.[3] On this basis, it was determined that Part I of the Act was not excluded, and that the Indian courts had jurisdiction to hear the challenge to the award petition filed under Section 34 of the Act. Even in the 2018 case of Hardy Exploration, the distinction between venue and seat of arbitration was judged to have played a significant influence, as the court continued to treat the two expressions as distinct.

In ***BGS-SGS SOMA-JV Vs. NHPC Ltd***.,[4] a three-judge bench of the Hon'ble Supreme Court held that where an express designation of venue and no designation of any alternative place as seat is merged with a supranational body of rules governing arbitration and no other significant contradictory obvious signs, the implacable conclusion is that the stated venue is a juridical seat of arbitrational proceedings. Simply put, the court decided that unless the agreement specifies otherwise, the venue of arbitration provided in a contract is identical to the seat of arbitration. The court also stated in this decision that the law established by the prior decision in the Hardy Exploration case was not a good law. With this decision, the dispute about the 'venue' or 'seat'

[3] UOI Vs. Hardy Exploration and Production (India) Inc., (2018) 7 SCC 374.
[4] BGS-SGS SOMA-JV Vs. NHPC Ltd 2019 (17) SCALE 369.

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of arbitration was significantly restricted. Furthermore, the court determined that because Delhi is the seat of arbitration, its courts have exclusive authority to hear petitions challenging the decision.

The Hon'ble Supreme Court of India recently dismissed a Section 11 Application for appointment of arbitrator in an International Commercial Arbitration in the case of ***Mankastu Impex Pvt. Ltd. Vs Airvisual Ltd***.,[5] (again, a three-judge panel). 'Disputes shall be referred to and fully addressed by arbitration administered in Hong Kong,' according to the paragraph in this case. The Supreme Court has once again concluded that the terms "seat of arbitration" and "venue of arbitration" cannot be used interchangeably, and that the site of arbitration cannot be used to determine whether the seat of arbitration is the same as the seat of arbitration. The court may have reached the same decision as it did in the BGS-SGS SOMA-JV case if it had followed the legislation laid down in that case. However, the court reasoned that the phrase "the dispute shall be referred to and fully addressed by arbitration administered in Hong Kong" clearly implies that the parties had agreed that the arbitration would be held in Hong Kong, that the arbitration proceedings would be governed by Hong Kong law, and that the Hong Kong courts would have judicial review authority over the arbitral award.

The court cited a previous ruling in ***Enercon (India) Limited and others v. Enercon GMBH and others***,[6] which said that "the location of the Seat would determine the courts that will have exclusive authority to oversee the arbitration proceedings." It was also decided that the Seat usually comes with the option of using that country's arbitration/curial law."

The court also cited its decision in ***Indus Mobile Distribution Pvt. Ltd. vs. Datawind Innovation (P) Ltd***.,[7] in which it was held that "In Arbitration law, however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest courts with exclusive jurisdiction for the purposes of regulating the arbitration proceedings arising out of the agreement between the parties." The court ended its decision in Mankastu Impex by ruling that the petition filed under Section 11 (6) of the Act was not maintainable because the arbitration was held in Hong Kong, and thus was rejected.

The importance of the juridical seat in an arbitration can also be seen in the decision of the Court of Appeal of the Republic of Singapore in the case of ***ST Group Co Ltd. & Ors Vs. Sanum Investment Limited***,[8] in which the court refused to enforce an award made and

[5] Mankastu Impex Pvt. Ltd. v. Airvisual Ltd, 2020 SCC Online SC 301.
[6] Enercon (India) Limited and others v. Enercon GMBH and others, (2014) 5 SCC 1.
[7] Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovation (P) Ltd, (2017) 7 SCC 678.
[8] ST Group Co Ltd. & Ors v. Sanum Investment Limited [2019] SGCA 65, Civil Appeal No. 113 of 2018 & Civil Appeal No. 114 of 2018.

published somewhere other than the agreed-upon seat of arbitration. The agreement stated that the seat of arbitration would be Macau, however the arbitration was held in Singapore. The Appellants did not participate in the arbitration proceedings, although they did write to the arbitral panel to express their dissatisfaction. The court of appeal, while declining to enforce the award, stated that "the choice of an arbitral seat is one of the most important matters for parties to consider when negotiating an arbitration agreement because the choice of seat carries with it the national law under whose auspices the arbitration shall be conducted..... While the parties can, whether intentionally or unintentionally, fail to identify a seat, this has been considered as imprudent.

"In our view, therefore, once an arbitration is wrongly seated, any award that results should not be recognised and enforced by the other jurisdiction in the absence of waiver of the wrong seat," the Court of Appeal continued, "because such award had not been obtained in accordance with the parties agreement." As a result, the award would not be the result of arbitration as agreed by the parties."

IV. CONCLUSION

Based on the legal position as derived from the cited judgments, one can conclude that because of the use of various expressions in the arbitration clause such as "venue," "place," and "seat," difficulties arise in determining the curial law governing the arbitration proceedings, as well as the courts exercising supervisory jurisdiction over the arbitration proceedings and the proceedings for challenging the awards. The difficulty is exacerbated by a proviso introduced to Section 2(2) of the Act. As a result, keep the following in mind while creating an arbitration agreement or clause:

In its arbitration clause, the parties must specifically specify for the 'seat' of arbitration. The terms 'venue' and 'arbitration site' should be avoided. The phrase "Judicial seat of arbitration shall be Delhi/Mumbai/London/Paris" is preferable.

Despite a precise designation of seat in an arbitration clause, there is no bar on the tribunal holding some of its sessions at locations other than the designated seat if necessary, and this will not result in a change of arbitration seat.

i. The choice of arbitration seat should be made with the idea that it will have two ramifications. Courts with jurisdiction will have exclusive jurisdiction to monitor arbitration processes and adjudicate any issues that arise from them, including challenges to arbitral awards, and
ii. arbitration proceedings will be regulated by the legislation of the designated seat nation.

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