WHETHER SEAT GIVE RISE TO JURISDICTION: EVOLVING PERSPECTIVE THROUGH JUDICIAL PRONOUNCEMENT

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Abstract

The seat of arbitration is an essential concept which determines which court would supervise the arbitration proceeding, enforce the arbitral award and entertain any challenge to such award. Such a court has been defined under Section 2 (e) clause (i) and clause (ii) of the Arbitration and Conciliation Act, 1996 ("the Arbitration Act") for domestic arbitration and international commercial arbitration respectively. The concept of seat and venue has not been specifically defined under the Arbitration and Conciliation Act, 1996 (hereafter "The Act"). As a result, it is now the responsibility of the courts to resolve any discrepancies through judicial pronouncements. This article consists of evolution of Seat through Judicial Pronouncements.

Introduction

The Latin phrase Lex Arbitri, which translates to "law of arbitration," denotes that the parties are free to select the procedural guidelines governing their conflicts. It might allude to the local arbitration rules that will be used. The general foundation for the conduct of an international arbitration is established by a corpus of national laws. Lex arbitri covers a wide range of topics, however some sources say that, in the absence of a party's agreement or specific language in the applicable arbitration rules, it largely serves as a "gap-filling" tool.

It is important to note right away that Section20[1]of the Arbitration and Conciliation Act, 1996, which is the relevant statutory instrument, does not use the terms "seat" or "venue" of arbitration and only uses the term "place" of arbitration in the sense of "juridical seat." The

[1] 20. Place of arbitration.—
(1) The parties are free to agree on the place of arbitration.
(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

Seat of Arbitration is crucially important because its courts have supervisory jurisdiction over the arbitration procedure and it is important in ascertaining the curial law which governs arbitration. The location of the arbitration can have a significant impact on any subsequent arbitration. The procedure governing arbitral procedures and the court with the authority to intervene in arbitration proceedings, such as by issuing interim measures or annulling an award, are normally determined by the arbitration's seat.

In contemporary contracts, parties frequently choose a specific court to the exclusion of all others, and such courts receive exclusive jurisdiction to resolve the disputes, in order to avoid conflicts connected to court jurisdictions. A court that does not otherwise have jurisdiction cannot be given jurisdiction by the parties by their decision. After the decision of *ABC Laminart Pvt Ltd vs., A.P Agencies*[2], courts had to consider the facts to determine if a case's jurisdiction was impliedly excluded. It allowed a lot of latitude to the party requesting to depart from an exclusive jurisdiction clause.

Arbitration's central theme is freedom of choice. Parties are able to decide, among other things, where the arbitration would be headquartered legally. This choice of location, or "seat," is significant because it encompasses both procedural rules governing internal arbitration issues, such as the composition and nomination of the panel, as well as rules governing the exterior interaction between the arbitration and the courts. Since it is the location where the arbitration is "legally domiciled," the "seat" of the arbitration is a legal concept that has special significance in international arbitration. "The country where an international arbitration has its legal domicile or juridical home is the arbitral seat."

The concept of seat and venue has not been specifically defined under the Arbitration and Conciliation Act, 1996 (hereafter "The Act"). As a result, it is now the responsibility of the courts to resolve any discrepancies through judicial pronouncements.The parties have the option to select the "location" of arbitration under Section 20(1)[3]. The word "location" is likewise used in subsection (3), although it refers to a gathering of arbitral tribunal members.

[2](1989) 2 SCC 163

[3](3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

Case Laws

In ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. (BALCO)***[4], a five-judge Constitution bench of the Supreme Court first resolved this seeming uncertainty by identifying the location as the "Centre of gravity" of arbitration, which is actually the juridical seat of Arbitration. e Supreme Court filled the legislative lacuna with regard to this idea in the ***BALCO*** case. According to the Apex Court's interpretation of the word "place," it would mean either "seat" or "venue" depending on which portion of the statute the word was being used in. However, the Supreme Court granted concurrent jurisdiction to two different courts to exercise powers under the Act, namely the court with supervisory jurisdiction over the seat of arbitration and the court in whose jurisdiction the cause of action arose, while highlighting the importance of party autonomy.

Immediately after the Supreme Court's concurrent jurisdiction ruling in BALCO (supra), there was a deviation from that norm in 2014. It would be in the nature of exclusive jurisdiction to exercise the supervisory powers over the arbitration after the seat of arbitration has been set in India, the Supreme Court stated in ***Enercon (India) Limited v. Enercon GmBH***[5]**.** In addition, the Supreme Court clearly ruled in this case if the parties did not name a venue for the arbitration, it would have to be chosen by examining which venue had the "closest and most intimate connection" to the dispute.

In both of the abovementioned cases the Supreme Court adopted the view of the famous principle postulated by the ***Justice Cooke in Roger Shashoua v. Mukesh Sharma***[6]**.** According to the Shashoua principle, it is inevitable to assume that the place of arbitration is where an agreement specifically defines it will take place when there is no direct reference to the seat, a supranational body of laws, and no compelling evidence to the contrary.

A three-judge bench was consulted in the case ***Union of India v. Hardy Exploration***[7]and Production (India) Inc. to ascertain the potential impact of the ruling in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. & Ors. on the juridical seat doctrine. The Court provided a negative response to the referral. The Appellant in that case had submitted an application under Section 34 of the Arbitration and Conciliation Act to the High Court contesting the validity of the award reached by arbitrators in favour of the respondents. Respondent disputed

[4] 2012 SCC OnLine SC 693
[5] 2014 SCC OnLine SC 129
[6] 2017 SCC OnLine SC 697
[7] 2018 SCC OnLine SC 1640

the validity of the aforementioned application on the grounds that Indian courts lacked jurisdiction to hear it. The Supreme Court used the pertinent Contract Articles to address the dispute and determine whether they preclude the Indian courts' ability to hear the case.It was observed in this case that-

"Context must be taken into account when using the word "determination." When a "place" is chosen, it acquires the status of "seat," which refers to the judicial seat. As we've already mentioned, the words "place" and "seat" are frequently used interchangeably. When the word "place" is the only one used and no other conditions are proposed, it is identical to the word "seat," which completes the aspect of jurisdiction. But if the term "place" carries a condition prior, that condition must be met before the place may be considered equivalent to a seat. In the present instance, one of the two different and disjunct riders must be satisfied in order to become a location. It is clear that there is no consensus."

When the Supreme Court heard the case of ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited***[8], it specifically addressed the question of whether the location of the arbitration confers exclusive jurisdiction and displaces the authority of all other courts. The Supreme Court thoroughly analysed the notions of Seat and Venue and came to the conclusion that once a seat is chosen, it functions similarly to an exclusive jurisdiction clause. To the exclusion of all other courts, including the courts where the cause of action began, the courts at the "Seat" are therefore granted exclusive competence to exercise powers and oversee arbitral procedures.

The rules and principles enunciated in the above case was used in a recent landmark judgement of ***Brahmani River Pellets Ltd. v. Kamachi Industries Ltd***[9]**.**Adeal for the selling of iron ore pellets was made between Brahmani River Pellets (also known as "Brahmani") and Kamachi Industries (also known as "Kamachi"). Chennai served as the destination port, while the loading port was in Odisha. The parties got into a dispute over the terms of payment and product delivery. The arbitration clause was invoked and it said that venue of arbitration will be Bhubaneshwar by Kamachi under section 11(6) [10]of the Arbitration and Conciliation

[8] (2019) 13 SCC 472
[9] (2020) 5 SCC 462
[10](6) Where, under an appointment procedure agreed upon by the parties, -
(a) a party fails to act as required under that procedure; or

Act, 1996 and it was contested by Brahmani by challenging the Jurisdiction of Madras High Court on the ground that it should be under the High Court of Odisha. The Madras High Court held that in the absence of an express clause ousting the jurisdiction of other courts, both Madras and Orissa High Courts had jurisdiction over the arbitration proceedings. It is impossible to find fault with the Supreme Court's determination in Brahmani that Bhubaneswar served as the location of the arbitration. Bhubaneshwar served as the location of one of the parties (the seller), the location of the payment, and the location of performance (for loading the items). Unfortunately, the Supreme Court's justification that designating a location would be similar to designating a seat runs counter to established practice.

Despite earlier precedence on the subject holding to the contrary, the Court does not seem to consider established principles and seems to equate venue with seat. ***Enercon*** already established the strategy that the Supreme Court should have used in ***Brahmani***. In Enercon, the Supreme Court ruled that as the parties had not agreed upon a location for the arbitration, the location should be determined by applying the "closest connection" test. The Court would have reached the same conclusion—that Bhubaneshwar served as the arbitration site—had the criteria been used. Though the decision in Brahmani by the Supreme Court was made in the midst of a reasonably straightforward factual matrix, it seems to have confused the legal position on this matter. The ruling serves as a reminder to parties to utilise specific language when writing arbitration agreements so that courts rarely have to engage in interpretive manoeuvres.

In ***Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.***[11], the Delhi High Court held that even courts where cause of action arose would have concurrent jurisdiction under the Act, notwithstanding designation of seat of arbitration. It did this by relying on decisions made by the Bombay High Court and the Calcutta High Court. To reach this decision, the High Court relied on the observations made in BALCO (above), para. 96. The High Court also pointed out that Section 42 [12]of the Act presumes that more than one forum is qualified to hear

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

[11] (2014) 11 SCC 560

[12]42. Jurisdiction. - Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

applications under the Act; as a result, the provision gives the Courts who are first seized of the matter the authority to have exclusive jurisdiction in order to ensure the effectiveness of dispute resolution.

Union of India v. Hardy Exploration and Production and ***Antrix Corporation Ltd v. Devas Multimedia Pvt Ltd*** were declared invalid in the BGS Soma case by the Supreme Court because they had erroneously construed the BALCO judgement. The Supreme Court in 2019 eventually resolved this inconsistency in the case of ***BGS SGS SOMA JV v. NHPC Ltd.***[13], where it was clearly noted that the conclusions listed in para. 96 of BALCO (above) are inconsistent with other observations of the same judgement and cannot be regarded as ratio decidendi. The law upheld in the Antrix Corporation (above) judgement was likewise overturned. The Supreme Court reaffirmed that once the parties choose the location of the arbitration, only the courts located there have jurisdiction to oversee the arbitration proceedings, and the jurisdiction of all other courts is therefore superseded. According to the Supreme Court, when a clause names a location for arbitration and specifies that the arbitration will take place there, it means that the location is truly the seat of the arbitration. This, together with the absence of any notable contradictory indications that the "Venue" is genuinely the seat rather than merely a venue, further supports the claim that it is the seat. The Shashoua concept was therefore reiterated by the Court. In a recent decision involving ***Mankatsu Impex Private Limited v. Airvisual Limited***[14], the exclusive jurisdiction concept was upheld.

Conclusion

"Seat" and "Venue" are separate and independent concepts. But reality paints an entirely different picture. They play a key role in any arbitration procedure since they not only determine where the arbitration will take place, but also greatly influence the curial legislation (lex arbitri) that will govern the arbitration. Poorly written arbitration agreements sometimes use the terms "seat" and "venue" interchangeably without specifying the actual seat and venue of the arbitration. This invariably causes disagreements and complication when deciding the actual location of the arbitration. The courts have developed a number of

[13] (2020) 4 SCC 234
[14] (2020) 5 SCC 399

criteria throughout time to sort through the tangle and determine the proper location of arbitration in such shoddy contracts. However, there has been a lot of confusion caused by the fact that these ideas frequently conflict with one another.

BGS-SGS Soma(supra) has finally and hopefully resolved the question pertaining to the exclusive jurisdiction of courts at the seat. The Supreme Court has taken a positive step in resolving the ambiguity brought on by paragraph 96 of the BALCO case, which was later followed by the Antrix Corporation case and other similar rulings. The tests and criteria for separating seats from venues, however, have not yet been fully developed. Criticism was levelled at the BGS-SGS Soma (supra) principles for superseding those established by Hardy Exploration (supra) by a co-ordinate bench, or bench of similar strength. The Supreme Court in Mankatsu Impex (above) (another three-judge bench) adopted a stance similar to that of Hardy Exploration (supra) without explicitly overturning BGS-SGS Soma, which furthers the confusion (supra). It is anticipated that this matter will soon be brought before a larger bench to determine the ultimate set of criteria.

Evidently, the complex topic of "Seat/venue/Place" has generated a lot of judicial discussion. A larger five-judge bench would be desperately needed to settle the matter once and for all. Until then, it is the responsibility of legal professionals to utilise precise language in arbitration clauses to clear up any ambiguity regarding "Seat/venue/Place" and prevent misinterpretation.