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Seat & Venue of Arbitration

Analysis of Recent Decisions

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INTRODUCTION & OVERVIEW

The seat and venue of arbitration have long been a matter of significant debate while interpreting arbitration clauses. At the very basic level, the seat determines the curial law governing the parties and the Courts of the seat have exclusive jurisdiction over the arbitration. On the other hand, the venue of arbitration is merely a geographical location for holding the hearings which is often decided based on the convenience of the parties. In the absence of a well-drafted arbitration clause clarifying the issue of seat and venue, crucial time and resources often get wasted on interpretation of this issue.

The Arbitration and Conciliation Act, 1996 (**"A&C Act"**) does not use the terms "seat" or "venue". It provides for "place of arbitration".[1] The Supreme Court has held that term "place" has been used to mean "seat" and venue" in Section 20 of the A&C Act.[2]

This article explains the key Indian cases which have clarified the law on the "seat" and "venue" of arbitration beginning with a discussion of the seminal case of *BALCO (2012)* which recognized the distinction between the seat and venue of arbitration and held that in case a "venue" is designated, then in absence of another place being designated as a "seat" and any other contrary indication, the venue is actually the seat of arbitration.

Subsequent decisions of the Supreme Court in *Indus Mobile (2017)* and *Brahmani River (2020)* held that the designation of a seat of arbitration confers exclusive jurisdiction on the appropriate court. The Supreme Court in *Hardy Exploration (2017)* held that in the absence of agreement between parties or determination by tribunal on the seat of arbitration, a venue can become a seat only if something else is added to it as a concomitant.

Recently in the case of *BGS SGS Soma (2020),* the Supreme Court relied on the *BALCO decision* and upheld the test for determination of seat when there is a venue specified in the agreement and held that the designation of a seat confers exclusive jurisdiction on the courts of said seat.

The Supreme Court in *Mankastu Impex (2020)* has held that "seat of arbitration" and "venue of arbitration" cannot be used interchangeably and that mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. The most recent case is that of *Inox Renewables (2021),* in which the Court held that the parties may mutually change the seat of arbitration, and choice of such seat is similar to an exclusive jurisdiction clause.
Two recent decisions of the Delhi High Court in *Cinepolis (2020)* and *My Preferred Transformation (2021)*, which relied on the law laid down by the Supreme Court, have also been discussed.

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[1] Section 20, A&C Act

[2] *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. ("BALCO"), (2012) 9 SCC 552*

SUPREME COURT DECISIONS

1. Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.[3] **("BALCO")**

This was the first judicial decision in India in which the Court addressed and clarified the distinction between the seat and venue of arbitration. The Court held that the arbitrations are anchored to the seat of the arbitration and referred to it as the center of gravity of the arbitration. Further it held that all the proceedings of the arbitration do not have to necessarily take place at the seat of the arbitration and therefore referred to the venue as being the place where parties may decide to hold proceedings as per mutual convenience. It was further made clear that Sections 20(1) and 20(2) where the word "place" is used, refers to "juridical seat", whereas in Section 20(3), the word "place" is equivalent to "venue".

The Court placed reliance on the English case of *Shashoua v. Sharma*[4] (**"Shashoua principle"**) which held that wherever there is an express designation of a "venue", and no designation of any alternative place as the "seat", combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding.

The Court however also gave a finding in Para 96 that has been the cause of confusion when it observed that two Courts have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.

2. *Indus Mobile Distribution v. Datawind Innovations*[5] **("Indus Mobile")**

In *Indus Mobile*, the Supreme Court was directly dealing with the issue as to whether the seat of arbitration connotes an exclusive jurisdiction and ousts the jurisdiction of all other courts.

After discussing the *BALCO decision*, the Court answered the issue in affirmative and held that the moment the seat is designated, it is akin to an exclusive jurisdiction clause which vests the courts in that territory with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

3. *Union of India v. Hardy Exploration & Production (India) Inc.*[6] **("Hardy Exploration")**

In this case, the arbitration agreement between the parties specified the "venue" for holding the arbitration sittings but did not specify the "seat" and the agreement provided that the arbitration proceedings were to be conducted in accordance with the UNICTRAL Model Law.

[3] (2012) 9 SCC 552
[4] 2009 EWHC 957 (Comm)
[5] (2017) 7 SCC 678
[6] (2019) 13 SCC 472

The Supreme Court held that either the juridical seat of the arbitral proceedings is indicated in the agreement between the parties, or if it is not, must be determined by the Arbitral Tribunal. Holding that the arbitration clause, on the facts of that case, referred to the "venue" as Kuala Lumpur, the Court went on to hold that there was no determination of any "juridical seat" by agreement, and would therefore have to be determined by the Arbitral Tribunal. As there was no such determination by the Arbitral Tribunal, the Court then concluded that the word "place" cannot be used as seat. A venue can become a seat if something else is added to it as a concomitant. But a place unlike seat, can become a seat if one of the conditions precedent is satisfied. It does not ipso facto assume the status of the seat. Therefore, the Court held that Kuala Lumpur is not the seat or place of arbitration and that courts in India have jurisdiction.

4. *Brahmani River Pellets v. Kamachi Industries* [7] **("Brahmani River")**

In *Brahmani River,* the Supreme Court was dealing with a situation wherein only the venue was specified and whether it would amount to being the seat of the arbitration.

The Supreme Court discussed *BALCO, Indus Mobile* and *Hardy Exploration*, and held that where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. Considering the agreement of the parties having specified a certain venue of arbitration, the Court held that the intention of the parties is to exclude all other courts.

5. *BGS SGS Soma JV v. NHPC*[8] **("BGS SGS")**

The Supreme Court in this case held that the *Hardy Exploration decision* is not good law as it is contrary to the *BALCO decision* since it failed to apply the *Shashoua principle* to the arbitration clause in question. The Court reaffirmed the *Shashoua principle* and concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression *"arbitration proceedings*" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place.

This Court explained that this language has to be contrasted with language such as "*tribunals are to meet or have witnesses, experts or the parties"* where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting.

Further, the language that the arbitral proceedings *"shall be held"* at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place,

[7] (2020) 5 SCC 462
[8] (2020) 4 SCC 234

signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a clause designates a "seat" of the arbitral proceedings. In an international context, if a supranational body of rules is to govern the arbitration, this would further indicate that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration.

The Court also clarified the confusion caused by the *BALCO decision* (Para 96), explaining that it does not hold that two courts have concurrent jurisdiction i.e. the seat court and the court within whose jurisdiction the cause of action arises since the *BALCO decision* as a whole clearly and unmistakably states that the choosing of a "seat" amounts to the choosing of the exclusive jurisdiction of the courts at which the "seat" is located.

6. *Mankastu Impex v. Airvisual* [9]*(Mankastu")*

The Supreme Court discussed *BALCO, Indus Mobile, Hardy Exploration and BGS SGS* and held that "seat of arbitration" and "venue of arbitration" cannot be used interchangeably. Further that mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties. The Court interpreted the phrase *"shall be referred to and finally resolved by arbitration administered in Hong Kong"* to mean that the parties agreed that the seat of arbitration shall be Hong Kong. It further held that the phrase *"without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction"* does not take away or dilute the intention of the parties that the arbitration be administered in Hong Kong and does not suggest that the seat of arbitration is in New Delhi.

7. *Inox Renewables Ltd. v. Jayesh Electricals Ltd.*[10] *("Inox Renewables")*

In this case, the Supreme Court held that the parties may mutually arrive at a seat of arbitration and may change the seat of arbitration by mutual agreement which is recorded by the arbitrator in his award to which no challenge is made by either party. While relying on the *BGS SGS decision*, the Court held that the moment the parties choose a new seat by mutual agreement, it is akin to an exclusive jurisdiction clause, thereby vesting the courts at the new seat with exclusive jurisdiction to deal with the arbitration.

[9] (2020) 5 SCC 399
[10] Civil Appeal No. 1556 of 2021, dated 13th April, 2021

RECENT DECISIONS OF THE DELHI HIGH COURT

8. *Cinepolis India Pvt. Ltd. v. Celebration City Projects Pvt. Ltd.*[11] *("Cinepolis)"*

In this case, the parties by agreement had conferred exclusive jurisdiction on the subject matter of the agreement on the courts in Ghaziabad, while the place of the arbitration was New Delhi.

The Delhi High Court followed the decisions of *BALCO, Indus Mobile* and *Brahmani River* and held that it is really the seat of arbitration which is akin to an exclusive jurisdiction clause. Where there are no contrary provisions in the agreement, the place would be the juridical seat which would determine the territorial jurisdiction of a Court. Where the words in the arbitration clause are neither seat nor place and the arbitration clause only refers to words such as `venue' or "held in" the intent of the parties would have to be seen from the agreement. If the parties intend that the arbitration proceedings are to be held as a whole at that particular venue then the venue also becomes a juridical seat. Further, it held that the seat or the juridical seat will be the guiding factor for a Court to determine its jurisdiction while examining a petition under Section 11 of the Act.

9. *My Preferred Transformation and Hospitality v. Sumithra Inn*[12] *("My Preferred Transformation")*

In this case, the Delhi High Court delineated four kinds of arbitration clauses: (i) Cases in which the contract only contained an "exclusive jurisdiction" clause, but no "seat of arbitration" clause; (ii) Cases in which the contract contained a seat of arbitration clause" but no "exclusive jurisdiction" clause; (iii) Cases in which the contract contained a "seat of arbitration" and an "exclusive jurisdiction" clause, and both clauses vested jurisdiction in the same court, or courts at the same territorial location; and (iv) Cases in which the contract contained a "seat of arbitration" and an "exclusive jurisdiction" clause, vesting jurisdiction in courts at different territorial locations.

The Court dealt with last category of arbitration clauses, relying on the principles of law laid down by the Supreme Court in *Mankastu* and held that a generalized exclusive jurisdiction clause would not suffice and therefore jurisdiction would vest in the Court where the seat of arbitration is located.

[11] 2020 SCC OnLine Del 301
[12] 2021 SCC OnLine Del 1536