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THE 'SEAT'ING ARRANGEMENT

- CONTROVERSIES IN CHOICE OF SEAT

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SOLICITORS AND ADVOCATES

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Introduction

The seat of arbitration is a significant facet of any arbitration proceeding. The seat not only determines the location of hearings and availability of arbitrators for adjudication of the dispute, but also determines which court shall exercise supervisory jurisdiction over the entire proceeding. In the wake of controversies regarding the choice of seat of arbitration, this article discusses and analyses the recent judicial trend concerning law and the jurisdiction of the court at the seat of arbitration in the backdrop of the provisions of the Arbitration and Conciliation Act, 1996, as amended from time to time ("**the Act**").

Law at the Seat

Considering so much has been written on 'seat' and 'venue' of arbitration proceedings, and questions concerning exclusive supervisory jurisdiction of the court at the seat have arisen, it is interesting to note that the Act defines not the 'seat', but the 'place' of arbitration. Section 20, being the relevant provision, is quoted hereinbelow for ready reference:

> ***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[1].*

It is settled law that there is only one "*place*" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of the reference or the minutes of proceedings or in some other way as the place or "*seat*" of the arbitration.

This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. As International commercial arbitration[2] often involves people of many different nationalities, it is often the case that the arbitration hearings are held in places other than the designated place of arbitration. In such circumstances, each move of the arbitral tribunal does not mean to be a change in the seat of arbitration. The seat of the arbitration remains the place initially agreed by or on behalf of the parties[3].

The selection of seat of arbitration is as much for convenience of the parties as to determine the law that is applicable to the proceeding. It is well known that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments, namely, the New York Convention of 1958 and the UNCITRAL Model Law of 1985[4]. The Court of Appeal, England has succinctly summarized the position of law applicable to

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[1] Section 20 of the the Arbitration and Conciliation Act, 1996

[2] Section 2(1)(f)"*international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is –*
(i) an individual who is a national of, or habitually resident in, any country other than India; or
(ii) a body corporate which is incorporated in any country other than India; or
*(iii) 2 *** an association or a body of individuals whose central management and control is exercised in any country other than India; or*
(iv) the Government of a foreign country;

[3] Redfern and Hunter, The Law and Practice of International Commercial Arbitration (1986) at Page 69

[4] The New York Convention provides a clear territorial link between the place of arbitration and the law governing that arbitration. Model Law which provides in Article 1(2) that "the provision of this law, except Articles 8, 9, 35 and 36 apply only if the place of arbitration is in the territory of the State."

international commercial arbitration proceedings. The same is quoted hereinbelow for ready reference:

> *"All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law. (1) The law governing the substantive contract. (2) The law governing the agreement to arbitrate and the performance of that agreement. (3) The law governing the conduct of the arbitration. In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely, (2) may also differ from (3)"*[5].

The Court also culled out the principle that where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate prima facie, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings[6].

Therefore, the distinction between "seat" and "venue" would be quite crucial in the event, the arbitration agreement designates a foreign country as the "seat"/ "place" of the arbitration and also selects the Act as the law governing the arbitration proceedings. It is important to mention that only if the arbitration agreement provides that the "seat" of Arbitration is in India, provisions of Part I of the Act will be applicable to the arbitration proceeding[7]. If the agreement is held to provide for a "seat" outside India, certain provisions of Part I would be applicable, subject to agreement between the parties in case the award passed is enforceable and recognized under the provisions of Part II of the Act[8].

Therefore, the importance of choice of seat in an international commercial arbitration cannot be overstated and the parties to contract must clearly indicate the seat of arbitration keeping well in mind that such choice would also determine the law governing the arbitration proceedings. If a party in Mumbai and a party in Sydney agree to take their arbitral reference to Geneva in Switzerland, it implies that the parties embrace Swiss Law as the law governing the arbitration proceedings and it would be Swiss Law that would govern the adjudication of the procedure adopted at the arbitration reference and the outcome of the arbitral reference. Of course, such a choice of seat for the arbitral reference is subject to a contrary agreement between the parties. However, what is true for international law may not hold the good for domestic arbitration for one reason: if a party in Mumbai were to agree with a party in Kolkata to take their arbitral reference to Delhi, the chosen seat would have no impact on the choice of law since the law governing the arbitration proceedings in Kolkata, Mumbai and Delhi would be the same[9].

Court at the Seat

Before delving into the question of exercise of jurisdiction of the court at the seat of an arbitration proceeding, it is essential to understand the definition of "Court" as provided in the Arbitration and Conciliation Act, 1996. Section 2(1)(e) of the Act contains an exhaustive definition marking out only the principal civil court of original jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Act (emphasis supplied)[10]. One must also not lose sight of the fact that the words used in the definition are "means and includes". It is settled law that such definitions are meant to be exhaustive in nature[11]. The provision is quoted hereinbelow for ready reference:

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[5] *Naviera Amazonica Peruana S.A. Vs. Compania Internacionale De Seguros Del Peru* 1988 (1) Lloyd's Law Reports 116
[6] See also Conflict of Law Rules as quoted in Dicey & Morris on the Conflict of Laws (11th Edition) Volume 1; later approved by the House of Lords in James Miller & Partners Vs. Whitworth Street Estates (Manchester) Ltd. [1970] 1 Lloyd's Rep. 269; [1970] A.C.583
[7] Section 2(2) of the Arbitration and Conciliation Act, 1996, as amended vide the Arbitration and Conciliation (Amendment) Act, 2015
[8] *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.* (2012)9SCC552
[9] *Hirok Chowdhury & Ors vs Khagendra Nath Mandal & Ors.* AIR 2018 Cal 272
[10] *State of West Bengal v. Associated Contractors* (2015) 1 SCC 32)
[11] *P. Kasilingam & Ors. v. P.S.G. College of Technology & Ors.*, (1995) Suppl. 2 SCC 348

> *2(1)(e) "Court" means— (i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;*
> *(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;*

It may not be out of place to mention here that the Supreme Court of India has settled the question as to what may be called a Court having territorial jurisdiction over the 'subject matter of a suit' in *A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies*[12]. The relevant portion of the judgment is reproduced hereinbelow for ready reference:

> *"15. In the matter of a contract there may arise causes of action of various kinds… The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where the suit would lie.…"*

A plain reading of Section 2(1)(e) of the Act in light of the aforesaid decision would go on to show that for domestic arbitrations, only a court within whose jurisdiction the cause of action in respect of the dispute in question arises, may be considered to be a "Court" under Section 2(1)(e) of the Act.

In the backdrop of such premise, the question that arises for consideration is whether the situs of arbitration can confer jurisdiction to a court, even when the cause of action in respect of the dispute has not arisen within its jurisdiction.

The question as to whether situs of arbitration confers jurisdiction on the court was considered quite some time ago by a learned Single Judge of the Delhi High Court in *Sushil Ansal v. Union of India*[13]. In such decision, it was held that the situs of arbitration did not confer jurisdiction to the courts and that while considering the question of territorial jurisdiction, it is vital to consider the competency of the court for deciding the subject-matter of the dispute had a suit been filed instead of invocation of arbitration. The Court, after examining the provisions of Sections 41, 31 and 2(c) of the Arbitration Act, 1940 held that:

> *"Thus one has to ascertain what are the questions forming the subject-matter of the reference to arbitration which resulted in the award. Suppose those questions arise in a suit then find out which would be the competent court to decide such suit. The court competent to decide such questions in the suit would be the court having jurisdiction to*

[12] AIR 1989 SC 1239
[13] AIR 1980 Delhi 43

> *decide the present petition under the Arbitration Act for making the award a rule of the court."*

Sushil Ansal v. Union of India was later followed in *Gulati Construction Company, Jhansi v. Betwa River Board and Anr.*[14], and in *GE Countrywide Consumer Financial Services Ltd v. Surjit Singh Bhatia*[15] (judgment rendered in respect of the Act of 1996), wherein the Court made the following observation:

> *"To determine the jurisdiction of a court for the purposes of Section 34, one has to look at the subject-matter of the arbitration and not at the situs of arbitration because that is wholly irrelevant. The situs of arbitration or the fact that the award was made at a particular place, would not be relevant for conferring jurisdiction. It is only the subject-matter of the arbitration construed in a manner as if the arbitration proceeding was a suit that would be determinative of a court having jurisdiction to entertain and hear a petition under Section 34 of the Arbitration and Conciliation Act, 1996."*

Demonstrating a complete departure from the aforesaid position, the Supreme Court of India, in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.* (2012)9SCC552 (BALCO), interpreted Section 2(1)(e) of the Act to hold that the legislature has, in such provision, intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the court within whose jurisdiction the arbitration takes place. The Court noted that this was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. In such circumstances, both the Courts would 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 conducted.

The basis of such interpretation perhaps arose from the fact that the regulation of conduct of arbitration and challenge to an award needs to be by the courts of the country in which the arbitration is being conducted. Such a court is then the supervisory court possessed of the power to annul the award. This is in keeping with the scheme of the international instruments, such as the Geneva Convention and the New York Convention as well as the UNCITRAL Model Law. It also recognizes the territorial principle which gives effect to the sovereign right of a country to regulate, through its national courts, an adjudicatory duty being performed in its own country. However, what is true for international arbitrations may not hold the good for domestic arbitrations for one reason: if a party in Mumbai were to agree with a party in Kolkata to take their arbitral reference to Delhi, the chosen seat would not have an impact on the choice of Court since the law governing the arbitration proceedings in Kolkata, Mumbai and Delhi would be the same[16].

It could be argued that the interpretation in BALCO appears to be an apparent movement in the direction towards party autonomy, however, such approach may be problematic in view of the fact that this interpretation renders Section 2(1)(e) partly ineffectual. Possibly, the Court has incorrectly applied the law applicable to foreign seated international commercial arbitration to the domestic arbitrations, without considering that the Act clearly draws a distinction between them.

Interestingly, the Supreme Court took a step forward *in Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd.* (Indus Mobile)[17], to rely upon BALCO, and hold that even in domestic arbitrations, the Court at the seat will have exclusive jurisdiction for the purpose of regulating arbitral proceedings. The relevant portion of the judgment is quoted hereinbelow for ready reference:

> *"19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case,*

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14 AIR 1984 Delhi 299
15 (2006) 129 DLT 393
16 *Hirok Chowdhury & Ors vs Khagendra Nath Mandal & Ors.* AIR 2018 Cal 272
17 (2017) 7 SCC 678

> *it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction - that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties."*

The observation of the Court that the provisions of Sections 16 to 21 of CPC will not be attracted is contrary to the legal proposition settled by a three Judge Bench of the Supreme Court that application of Section 20 of the Code of Civil Procedure, 1908 to the Arbitration Act is clear, unambiguous and explicit[18]. However, it may follow from the facts of the case that as the agreement between the parties contained a forum selection clause and also a clause designating the seat of the arbitral reference; both of which identified Mumbai as the appropriate place, the Court reached the right conclusion for the wrong reasons. The result, however, is that the judgment in Indus Mobile cannot govern a situation where the agreement between the parties does not indicate a chosen seat for the arbitral reference[19]. Notwithstanding the aforesaid, it is perhaps surprising to note that courts in India have relied on the Indus Mobile, even where its applicability is questionable specially in cases where the "seat" of arbitration is not a Court having jurisdiction under Section 2(1)(e) of the Act[20].

This is perhaps why the decision in Indus Mobile has been correctly considered and distinguished by the High Court at Calcutta in *Hirok Chowdhury & Ors. vs. Khagendra Nath Mondal & Anr.*[21] and *Debdas Routh vs. Hinduja Leyland Finance Limited*[22]. The judgments state that Indus Mobile has been read down in the light of dictum in *Hakam Singh v. M/s. Gammon (India) Limited*[23] to hold that, in case of a domestic arbitration when parties to an arbitration agreement choose a seat for the arbitral reference and a court at the seat of the arbitral reference as the exclusive court, such court would have exclusive jurisdiction only if it is is otherwise clothed with the authority under S.2(1)(e)(i) of the Act read with sections 15 to 20 of the Code of Civil Procedure, 1908, where applicable.(emphasis supplied)[24].

Seat Vs. Venue

In certain cases, the "venue" of the arbitration proceeding may be designated, while the "seat" is not. It may be worthwhile to delve into certain precedents that consider its consequences.

The significance of the parties not specifying a "seat" of arbitration proceeding is far and wide. In *Shashoua & Ors v. Sharma*[25], the England and Wales High Court (Commercial), while hearing an anti-suit injunction, understood the expression "venue" as seat, as the parties had agreed that the ICC Rules would apply to the arbitration proceedings. Here, the Court was concerned with the construction of the shareholders' agreement between the parties, which provided that the venue of the arbitration shall be London, United Kingdom and the arbitration proceedings should be

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18 *Swastik Gases Pvt. Ltd. v. Indian Oil Corporation Ltd.* (2013) 9 SCC 32. The Court held: *"When it comes to the question of territorial jurisdiction relating to the application under Section 11, besides the above legislative provisions, Section 20 of the Code is relevant."*

19 *Hirok Chowdhury & Ors vs Khagendra Nath Mandal & Ors.* AIR 2018 Cal 272

20 *Britannia Industries Limited v. Easwaran* 2018(3) KHC 574 and *Sasidharan v. Sundaram Finance Limited* 2018(3) KHC 638

21 AIR 2018 Cal 272

22 AIR 2018 Cal 322

23 (1971) 1 SCC 286

24 *Khazana Projects & Industries Pvt. Ltd. Vs. Indian Oil Corporation Ltd.* (In the High Court at Calcutta; F.M.A. No. 2748 of 2016; decided on August 27, 2019)

25 [2009] 2 All ER (Comm) 477

conducted in English in accordance with the ICC Rules while the governing law of the shareholders' agreement would be the law of India. The Court concluded that London is the seat, since the phrase "*venue of arbitration shall be London, U.K.*" was accompanied by the provision in the arbitration clause for arbitration to be conducted in accordance with the Rules of ICC in Paris (a supranational body of rules). It was also noted that "*the parties have not simply provided for the location of hearings to be in London for the sake of convenience and there is indeed no suggestion that London would be convenient in itself, in the light of the governing law of the Shareholders Agreement, the nature and terms of that agreement and the nature of the disputes which were likely to arise and which did in fact arise.*"[26]

In *Union of India v Hardy Exploration*[27]*,* it had been held that a venue in an arbitration proceeding can become the "seat" if something else is added to it as a concomitant. The Court held that the "venue" does not ipso facto assume the status of seat. Here, the parties had designated Kuala Lumpur as the venue of arbitration, and the agreement did not specify a "seat". The Court interpreted the agreement to hold that as the place of arbitration to be agreed upon between the parties, had not been agreed upon, the Arbitral Tribunal was required to determine the same. As there had been no adjudication and expression of an opinion on the determination of the "seat", the Supreme Court held that Kuala Lumpur was not "seat" of the arbitration proceeding, and Indian Courts had jurisdiction over the arbitration proceeding.

However, in *Brahmani River Pellets Limited v. Kamachi Industries Limited*[28], where the parties had selected Bhubaneshwar as the "venue" of arbitration proceeding, the Division Bench of the Supreme Court was of the opinion that the Court at such venue will have exclusive jurisdiction. It was particularly observed:

"In the present case, the parties have agreed that the "venue" of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts."

In this regard, the Bench placed reliance on Swastik Gas[29] where the Supreme Court had clarified that where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, an inference may be drawn that parties intended to exclude all other courts. However, it is settled law that the distinction between the venue and the seat remains, and it has to be adjudged on the facts of each case to determine the juridical seat[30]. But, in Brahmani, while arriving at its conclusion, the Bench did not treat Bhubaneshwar as the "seat" of arbitration but the "venue".

It may well be argued that as Brahmani pertained to a domestic arbitration, a different choice of seat would not have altered the law governing the arbitration proceeding, however, as it is settled law that venue of the arbitral tribunal may be moved as per the parties' convenience[31], it may be questioned whether now each move in such venue would confer exclusive jurisdiction on a new Court. It is also doubtful as to whether in cases where parties to an international commercial arbitration choose India as merely a "venue" and another country as a "seat", Brahmani will result in conferring upon courts in India exclusive jurisdiction in respect of the arbitration proceeding, when a bare perusal of the provisions of the Act clearly indicate otherwise.

Conclusion

It may be said that BALCO carved out an exception to the established norm that jurisdiction cannot be conferred on a court by consent of the parties, when it does not have inherent jurisdiction. Indus Mobile conferred exclusivity of jurisdiction on such Court, limiting the applicability of the Code of Civil Procedure, 1908. It may be an acceptable argument that party autonomy being paramount in

[26] Also see *Enercon (India) Ltd. and Ors. Vs. Enercon GMBH and Ors.* AIR2014SC3152
[27] (2018) 7 SCC 374
[28] Civil Appeal No. 5850 of 2019 (SLP (C) No. 15672 of 2019; decided on July 25, 2019)
[29] Supra
[30] *Roger Shashoua and Ors.v. Mukesh Sharma and Ors*. AIR2017SC3166
[31] Redfern and Hunter, The Law and Practice of International Commercial Arbitration (1986) at Page 69

arbitration proceedings, the court at the parties' chosen seat should have exclusive jurisdiction to avoid jurisdictional challenges and dilatory litigations. However, it may be prudent to bring in this change through an amendment of the Act, rather than conflicting judicial precedents that endanger the consistency of law and process. In an age when positive signals should be sent to the international business community, in order to create a conducive arbitration culture in this country, such inconsistency is certainly not welcome.

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