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India—Supreme Court clarifies role of a seat in arbitration (BGS SGS SOMA JV v NHPC Ltd)

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Arbitration analysis: A December 2019 decision of a three-judge bench of the Supreme Court of India, overturning previous case law on the matter, clarified the role of the seat in an arbitration, holding that, unless there are any contrary indications, the designation of a 'venue' in an arbitration clause can indicate the seat. The Supreme Court confirmed that the choice of a seat automatically conferred jurisdiction on the courts at such seat for the purposes of interim orders and challenges to an award. The decision has been followed by the Bombay High Court but not in a subsequent Supreme Court case. The International Dispute Resolution and Investigations Practice at Nishith Desai Associates discuss the decision and the problems in determining the seat, which it sought to address.

BGS SGS Soma JV v NHPC Ltd 2019 SCC OnLine SC 1585 (not reported by Lexis®Nexis UK)

What are the practical implications of the decision?

The Supreme Court's decision in *BGS Soma* demystified a critical finding in the leading case, *Bharat Aluminium Co v Kaiser Aluminium Technical Service, Inc*. ('*BALCO*') ((2012) 9 SCC 552) (not reported by Lexis®Nexis UK) (at paragraph 96). It clarified the role of the 'seat' in an arbitration and set out the tests for determining the 'seat'.

The Supreme Court held that the concept of concurrent jurisdiction stipulated in *BALCO* must be read holistically. When parties have chosen a seat of arbitration, or if the arbitral tribunal has determined a seat, such a determination automatically confers jurisdiction on the courts at such seat of arbitration for the purposes of interim orders and challenges to an award. Unless there are any contrary indications, the designation of a 'venue' in an arbitration clause can indicate the 'seat' of the arbitration.

The decision of the Division Bench of the Delhi High Court in *Antrix Corporation Ltd v Devas Multimedia Pvt Ltd* (2018 SCC Online Del 9338) (not reported by Lexis®Nexis UK) was overruled, and the law set out by the Supreme Court in *Union of India v Hardy Exploration and Production (India)* (2018 SCC Online SC 1640) (not reported by Lexis®Nexis UK) was declared as not being good law.

Relying upon the Supreme Court's judgment in *BGS Soma*, the Bombay High Court, in *L&T Finance Ltd v Manoj Pathak & Ors*, Com. Arbitration Petition No 1315 of 2019 (not reported by Lexis®Nexis UK) identified the tests to be applied when determining a seat of arbitration:

- stated venue is the seat of the arbitration unless there are clear indicators that the place named is a mere venue, a meeting place of convenience, and not the seat
- where there is an unqualified nomination of a seat (i.e., without specifying the place as a mere venue), the courts at the seat would have exclusive jurisdiction and

- where no venue/seat is named (or where it is clear that the named place is merely a place of convenience for meetings), then any other consideration of jurisdiction may arise, such as cause of action

However, in a decision issued on 5 March 2020, a three-judge bench of the Supreme Court in *Mankastu Impex Pvt Ltd v Airvisual Ltd* (Arbitration Petition no 32 of 2018) (not reported by Lexis®Nexis UK) took a different approach in determining the seat of arbitration. Although the arbitration clause specified that '…the place of arbitration shall be Hong Kong…', the clause also mentioned that '…courts at New Delhi shall have the jurisdiction…'. The Supreme Court held that:

- the reference to courts at New Delhi did not take away or dilute the intention of the parties that the arbitration be administered in Hong Kong, and such reference appeared to have been added to enable the parties to avail interim relief

- a mere expression of 'place of arbitration' could not be the basis to determine the intention of the parties that the 'seat' of arbitration is at such place

- the intention of the parties as to the 'seat' of arbitration should be determined from other clauses in the agreement and the conduct of the parties

Relying upon a clause in the agreement which stated that the dispute 'shall be referred to and finally resolved by arbitration administered in Hong Kong', and the place of arbitration being Hong Kong, the Supreme Court held that the seat was in Hong Kong.

It follows from this contradictory approach that, in drafting arbitration agreements, parties should specify the 'seat' and make any necessary distinctions with the venue where hearings are to take place. Further, parties should avoid mentioning 'place' and 'seat' interchangeably, as the 'place' of arbitration may not necessarily be considered the 'seat' of arbitration. Thus, parties should explicitly specify the 'seat' of arbitration in their arbitration clauses to avoid extensive proceedings in courts or before arbitral tribunals on these potential preliminary objections.

What was the background?

The petitioner was awarded a contract by the respondent for constructing a large hydropower project in Assam and Arunachal Pradesh. Clause 67.3 of the contract provided for dispute resolution, and the arbitration agreement stated, 'Arbitration Proceedings shall be held at New Delhi/Faridabad, India and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.'

Disputes arose between the parties and an arbitral tribunal was constituted. Between August 2011 and August 2016, 71 sittings of the arbitral tribunal took place at New Delhi. The arbitral tribunal delivered a unanimous award in favour of the petitioner in Delhi on 26 August 2016. Aggrieved by the award, the respondent filed an application under section 34 of the Arbitration and Conciliation Act, 1996 (ACA 1996) seeking to set aside the award before the court at Faridabad.

The petitioner filed an application seeking a return of the petition challenging the award for presentation before the appropriate court at New Delhi and/or the District Judge at Dhemaji Assam. In 2017, the Special Commercial Court at Gurugram allowed the application of the petitioner and returned the challenge petition before the courts in New Delhi.

Thereafter, the Respondent filed an appeal under ACA 1996, s 37 read with section 13(1) of the Commercial Courts Act, 2015, before the Punjab & Haryana High Court. The High Court passed a judgment in favour of

the respondent, where it held that the appeal filed was maintainable, and that Delhi was only a *convenient venue* where arbitral proceedings were held and not the seat of the arbitration proceedings. The High Court held that Faridabad courts would have jurisdiction on the basis of the cause of action having arisen in part in Faridabad. Aggrieved by the order of the High Court, the petitioner filed a special leave petition before the Supreme Court.

The Supreme Court had to consider the following issues:

- whether the appeal before the High Court under ACA 1996, s 37 was maintainable?
- whether the designation of a 'seat' is akin to an exclusive jurisdiction clause?
- what is the test to determine the 'seat' of arbitration?

What did the Supreme Court decide?

Maintainability of section 37 appeal before the High Court

The High Court had held that it had jurisdiction to hear the appeal as the Commercial Court's order that the challenge petition be returned to court in New Delhi amounted to an order 'refusing to set aside an arbitral award under s 34'.

The Supreme Court referred to earlier judgments and reiterated that ACA 1996, s 37 makes it clear that appeals shall lie only pursuant to the grounds provided in sub-clauses 1(a)–(c) and from no others. Further, the Supreme Court observed that the order of the Commercial Court did not relate to a refusal to set aside an arbitral award, and merely provided that that the Commercial Court did not have jurisdiction to hear a challenge to the award. Considering all these factors, the Supreme Court held that the appeal filed before the High Court was not maintainable.

The juridical seat of arbitration proceedings

The High Court, while referring to the Supreme Court's decisions in *BALCO* and *Indus Mobile Distribution Private Limited v Datawind Innovations Private Limited & Ors* (2017) 7 SCC 678), observed that the arbitration clause in the present case only referred to the *venue* of arbitration proceedings and not the *seat* of arbitration. On this basis, the High Court held that since a part of the cause of action arose in Faridabad, and the Faridabad Commercial Court was approached first, the Faridabad courts alone would have jurisdiction over the arbitral proceedings.

The Supreme Court held that a reading of paragraphs 75, 76, 96, 110, 116, 123 and 194 of *BALCO* showed that when parties had selected the seat of arbitration, such a selection would confer an exclusive jurisdiction clause to the courts at the seat of arbitration for the purposes of interim orders and challenges to the award.

Applying this principle, the Supreme Court concluded that:

- if the conflicting portion of *BALCO* was kept aside, the very fact that parties had chosen a seat would necessarily intend that the courts at the seat have exclusive jurisdiction over the entire arbitral process
- the ratio in *BALCO* did not unmistakably hold that two courts had concurrent jurisdiction. This was incorrect as the subsequent paragraphs of *BALCO* clearly and unmistakably stated that

> choosing a seat amounted to choosing the exclusive jurisdiction of the courts at which the seat was located

The Supreme Court observed that ACA 1996, s 42 had been inserted to avoid conflicts in jurisdiction of courts by placing the supervisory jurisdiction over all arbitral proceedings in one court exclusively. An application must be made to a court which had the jurisdiction to decide such an application. When a seat had been designated, the courts at the seat alone would have jurisdiction and all further applications must be made to the same court by operation of ACA 1996, s 42.

The Supreme Court also held that when a seat had not been designated by the arbitration agreement, and only a convenient venue had been designated, there may be several courts where a part of a cause of action may have arisen. An application for interim relief before the commencement of arbitration under ACA 1996, s 9 may then be preferred in any court where a part of the cause of action has arisen as the parties / arbitral tribunal had not determined the seat yet. In such a case, the earliest court before which an application has been made would be deemed the court having exclusive jurisdiction and all further applications must lie before this court by virtue of ACA 1996, s 42.

Tests for determination of 'seat'

Relying upon the English Commercial Court's decision in *Shashoua v Sharma*, the Supreme Court set out 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 Supreme Court further held that when there was a designation of a venue for 'arbitration proceedings', the expression 'arbitration proceedings' made it clear that the venue should be considered the 'seat' of arbitration proceedings. Further, the expression 'shall be held' at a particular venue would further anchor the arbitral proceedings to a particular place and signify that such place was the seat of arbitral proceedings.

On the contrary, language such as 'tribunals are to meet or have witnesses, experts or the parties' may signify that such a place is only the 'venue' of the arbitral proceedings. These factors, along with the fact that there were no other significant contrary indicia to state that the venue was merely a *venue* and not the *seat*, would show that a venue had indeed been designated the 'seat' of arbitral proceedings.

The Supreme Court held that the three-judge bench in *Hardy Exploration* did not follow the principle in *Shashoua* which was confirmed by the Supreme Court in *BALCO*. Consequently, the Supreme Court declared that the law laid down in *Hardy Exploration* was not good law.

Application of the tests to the facts of the case

Upon the facts of the case before it, the Supreme Court noted that the venue of the arbitration in the arbitration agreement had been designated as 'New Delhi/Faridabad'. However, as there was no other contrary indication, applying the principle in *Shashoua*, the Supreme Court held that either New Delhi or Faridabad was the designated seat under the arbitration agreement. It was therefore up to the parties to choose in which place the arbitration is to be held.

The Supreme Court held that since all the arbitral proceedings were held in New Delhi and the final award was also signed in New Delhi, the parties chose New Delhi *and not Faridabad* as the 'seat' of the arbitration under ACA 1996, s 20. Therefore, the courts at New Delhi would have exclusive jurisdiction over the arbitral proceedings. Even if some part of the cause of action did arise in Faridabad, it was irrelevant as the 'seat'

had been designated by the parties at New Delhi and exclusive jurisdiction vested in the courts of New Delhi. Accordingly, the judgment of the High Court was set aside and the Supreme Court ordered that ACA 1996, s 34 petition be presented before the courts in New Delhi.

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