

# Dispute Resolution Hotline

April 01, 2020

## DOES THE SELECTION OF A "SEAT" DETERMINE A COURT'S SUPERVISORY JURISDICTION? SUPREME COURT'S DECISION IN BGS SOMA AND BEYOND

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.
- Held that unless there are any contrary indications, the designation of a 'venue' in an arbitration clause can indicate the 'seat' of the arbitration;
- Reiterated that an appeal is permissible only under the limited grounds prescribed in the Arbitration Act.

### INTRODUCTION

A three-judge bench of the Supreme Court of India ("**Supreme Court**") in *BGS SGS SOMA JV v. NHPC Ltd.*<sup>1</sup> ("**BGS Soma**") demystified 'paragraph 96'<sup>2</sup> of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc.*<sup>3</sup> ("**BALCO**"), clarified the role of the 'seat' in an arbitration and set out the tests for determining the 'seat' of arbitration.

Consequently, the decision of the Division Bench of the Delhi High Court in *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.*<sup>4</sup> ("**Antrix Corporation**") was overruled, and the law set out by the Supreme Court in *Union of India v. Hardy Exploration and Production (India) Inc.*<sup>5</sup> ("**Hardy Exploration**"), which provided a contrary view, was declared as not being good law.

### BACKGROUND

The Petitioner was awarded a contract by the Respondent for constructing a large hydropower project in Assam and Arunachal Pradesh ("**Agreement**"). Clause 67.3 of the Agreement between the parties provided for dispute resolution, and the arbitration agreement stated that, "*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.*" (emphasis supplied).

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 arbitral award in favour of the Petitioner in Delhi on August 26, 2016 ("**Award**"). Aggrieved by the Award, the Respondent filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") 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 ("**Commercial Court**") allowed the application of the Petitioner and returned the challenge petition before the courts in New Delhi.

Thereafter, the Respondent filed an appeal under Section 37 of the Arbitration Act read with Section 13(1) of the Commercial Courts Act, 2015 before the Punjab & Haryana High Court ("**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.

### ISSUES BEFORE THE SUPREME COURT

The Supreme Court had to consider the following issues: (a) Whether the appeal before the High Court under Section 37 of the Arbitration Act was maintainable?; (b) Whether the designation of a "seat" is akin to an exclusive jurisdiction clause?; and (c) What is the test to determine the "seat" of arbitration?

### JUDGMENT OF THE SUPREME COURT a) Maintainability of Section 37 Appeal before the High Court:

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

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The Supreme Court referred to earlier judgments<sup>6</sup> and reiterated that Section 37<sup>7</sup> of the Arbitration Act 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 the Commercial Court does not have jurisdiction to hear challenge to the Award. Considering all these factors, the Supreme Court held that the appeal filed before the High Court was not maintainable.

#### b) *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.*,<sup>8</sup> ("**Indus Mobile**") observed that the arbitration clause in the present case only refers 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* shows that when parties have 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 Award.

Applying this principle, the Supreme Court concluded that:

- a. If the conflicting portion of *BALCO* is kept aside, the very fact that parties have chosen a seat would necessary intend that the courts at the seat have exclusive jurisdiction over the entire arbitral process.
- b. The ratio in *BALCO* does not unmistakably hold that two courts have concurrent jurisdiction. This is incorrect as the subsequent paragraphs of *BALCO* clearly and unmistakably state that choosing a seat amounts to choosing the exclusive jurisdiction of the courts at which the seat is located.

The Supreme Court observed that Section 42 of the Arbitration Act<sup>9</sup> has 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 has the jurisdiction to decide such an application. When a seat has 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 Section 42 of the Arbitration Act.

The Supreme Court also held that when a seat has not been designated by the arbitration agreement, and only a convenient venue has been designated, there may be several courts where a part of cause of action may have arisen. An application for interim relief before the commencement of arbitration under Section 9 of the Arbitration Act may then be preferred in any court where a part of the cause of action has arisen as the parties / arbitral tribunal has 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 Section 42 of the Arbitration Act.

#### c) *Tests for Determination of "Seat"*

Relying upon the English Court's decision in *Roger Shashoua & Ors. v. Mukesh Sharma*,<sup>10</sup> ("**Shashoua Principle**") 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." (emphasis supplied)

The Court further held that when there is a designation of a venue for "arbitration proceedings", the expression "arbitration proceedings" make 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 is 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 are no other significant contrary indicia to state that the venue is merely a *venue* and not the *seat*, would show that a venue has indeed been designated the "seat" of arbitral proceedings.

The Supreme Court held that the three-judge bench in *Hardy Exploration*<sup>11</sup> did not follow the *Shashoua Principle* which was confirmed by the Supreme Court in *BALCO*. Consequently, the Supreme Court declared that the law laid down in *Hardy Exploration* is not good law.

#### d) *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 *Shashoua Principle*, the Supreme Court held that either New Delhi or Faridabad is 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 Section 20 of the Arbitration Act. 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 is irrelevant as the "seat" has been designated by the parties at New Delhi and exclusive jurisdiction vests in the courts of New Delhi. Accordingly, the judgment of the High Court was set aside and the Supreme Court ordered that the Section 34 petition be presented before the courts in New Delhi.

#### FURTHER UPDATES

Relying upon the Supreme Court's judgment in *BGS Soma*, the Bombay High Court<sup>12</sup> has recently identified the tests to be applied while determining a seat of arbitration: (a) A 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; (b) 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 (c) 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.<sup>13</sup>

Recently, a three-judge bench of the Supreme Court in *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd*<sup>14</sup> had to determine 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...”<sup>15</sup>

The Supreme Court held that (a) the reference to courts at New Delhi do not take away or dilute the intention of the parties that the arbitration be administered in Hong Kong, and such reference appears to have been added to enable the parties to avail interim relief; (b) a mere expression of “place of arbitration” cannot be the basis to determine the intention of the parties that the “seat” of arbitration is at such place; and (c) 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 is in Hong Kong.

## International Dispute Resolution and Investigations Practice

<sup>1</sup> Civil Appeal No. 9307 OF 2019.

<sup>2</sup> “...In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. 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. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. 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 located.” (emphasis supplied)

<sup>3</sup> (2012) 9 SCC 552

<sup>4</sup> 2018 SCC Online Del 9338

<sup>5</sup> 2018 SCC Online SC 1640

<sup>6</sup> The Supreme Court relied upon the judgments in the cases of *Kandla Export Corporation & Anr. v. M/s OCI Corporation & Anr.* (2018) 14 SCC 715 and *South Delhi Municipal Corporation v. Tech Mahindra EFA (OS)* (Comm.) 3 of 2019.

<sup>7</sup> “37. Appealable Orders. -

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.”

<sup>8</sup> (2017) 7 SCC 678

<sup>9</sup> “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 sequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.”

<sup>10</sup> [2009] EWHC 957 (Comm).

<sup>11</sup> 2018 SCC Online SC 1640

<sup>12</sup> *L&T Finance Ltd. v. Manoj Pathak & Ors.*, Com. Arb. Petition No. 1315 of 2019.

<sup>13</sup> *Id.* at Paragraph 29.

<sup>14</sup> Arbitration Petition No. 32 OF 2018

<sup>15</sup> The governing law and dispute resolution clause has been reproduced below:

“...17. Governing Law and Dispute Resolution 17.1 This MoU is governed by the laws of India, without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction.

17.2 Any dispute, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered in Hong Kong. The place of arbitration shall be Hong Kong. The number of arbitrators shall be one. The arbitration proceedings shall be conducted in English language.

17.3 It is agreed that a party may seek provisional, injunctive, or equitable remedies, including but not limited to preliminary injunctive relief, from a court having jurisdiction, before, during or after the pendency of any arbitration proceeding.

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