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Determining the Seat of Arbitration in Commercial Agreements

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Abstract

In the Era of Globalization, it is inevitable to have commercial agreements between national and international parties, the law is rapidly changing and with that change, the need of the hour is to facilitate foreign party to work without constraint in India. Among other expectations of the international commercial player, the assurance to have access to speedy justice along with the confidence that the laws not only lenient toward India while undermining the foreign party in case of a dispute arose among the parties. As the Law is ever-evolving, The Arbitration Law of India is not an exception to the fundamental requirement of the same. The Arbitration Law of India clearly Defines International Commercial Arbitration and also bestow liberty to the parties to select the system and laws through which such agreement can be governed. The parties are also at the freedom to choose the seat and place of Arbitration. The "Seat" and "Place" of Arbitration are two different things when it comes to Law. With the recent judgments by Hon'ble Supreme Court of India along with several judgments by Hon'ble High Courts and with the understanding of International laws on the subject, the basic difference between the two things is to be understood very precisely. The paper will examine the basic idea of the "Seat" of Arbitration and highlighting the attempts of Indian laws to be in conscience with the international laws.

Keywords: Arbitration, Seat, Venue, Jurisdiction

1. Introduction

"*The courts of this country should not be the places where the resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried*."[3] These words certainly emphasize the need for an alternate dispute redressal process upon the arising of a dispute. The present age of the global market has led the contracts and transactions not only to be confined between the parties of the same nationality but have expanded to the world beyond

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borders. The possibility of the emergence of a dispute among the business of two or more corporations or between states and corporations, who had entered into a commercial relationship, is always there. The need of the hour is that the said dispute be resolved quickly without the hindrance or complications in this new denouement and possibilities. These new circumstances have led to the need and recommendations of the (Alternative Dispute Resolutions) ADRs even by the Courts. ADRs have become a useful tool for speedy justice while the burden of the courts is decreased and it has also pro-founded a way without the complexities of court procedure to achieve justice. As the law of Arbitration has been codified by the legislature, it has become one of the emerging dispute redressal forum in the commercial world to adjudicate upon the disputes among the parties whilst providing the freedom and liberty to the parties by letting them decide their own path of conciliations among themselves whilst having the supervision of the Courts.

Among other things, the Arbitration proceedings provide ample opportunities to the parties to address their claims before a person or a tribunal. The freedom and liberty to choose the forum are also provided to the parties so that there would be no doubt of favors. The parties are further allowed to choose the "seat" of Arbitration as where the proceedings would be held. The seat of arbitration is independently a critical facet of any arbitration proceeding as it is a legal concept and not a geographical concept. The seat of Arbitration not only ask the question as where an arbitration institution is station, what will be the place of hearing, manner in which the proceeding will be carried forward, or where there may be experienced and what are the exact number of arbitrators present. The seat of arbitration talks merely about the supervisory power of the court upon the proceedings of arbitration and what are said domain of that power. The seat of the arbitration is important as it is the seat of arbitration that will generally determine the law and the procedure through which the arbitration proceedings will commence and the laws that are to be adopt as well. The "seat" of arbitration will look upon the mediation or involvement, of the law of court practicing the jurisdiction supervisory over the hearing. The governing law of an agreement between two international parties, may follow the law of a particular nation or which may follow the nationality of one or both parties, a totally different nation as the "seat" of the Arbitration, it is the "seat" of the arbitration which is critical for the protection and enforceability of an arbitral award.

Section 2(1)(f) of Arbitration and Conciliation Act, 1996 talks about international commercial arbitration. There have been many recent legal developments over the issue of the "seat" of Arbitration which has been duly addressed both by Hon'ble Supreme Court of India and by High Courts of India. The issue of "seat" is not only confined to one nation's interest rather it is a global aspect and as a consequence, but it has also been regularly emphasized by the Courts of different nations. The question as to the difference between "seat" & "venue" of arbitration, The legal complexities of the two words has been of great importance among the Arbitration proceedings. The understanding of the concept of the difference between the two words along with the legal concepts of the same involves a study of the recent judgments and view of the Hon'ble Courts of India, along with the views taken by different Courts of the World.

2. English Laws

The notion of "seat" of arbitration and the constitution pertinent while deciding about the supervisory law over the issue has its roots embedded in the case laws which are still not clear. The Hon'ble courts of England had tried to address the issue from time to time and pointing out the jurisprudence of the same. The concept of "Lex Fori" i.e the constitution of the country (land) in which the action taken has always been a basic ingredient while deciding the outcome of the case. The English court has several times pointed out the complication of the matter by referring to the fact that the substantive law of the contract which governs the contract is a different concept and the arbitration agreement within the same contract is altogether a different contract. The dilemma of the concept of "seat" and "venue" can be seen by studying the relevant cases and the decisions so followed in the Courts of England.

In the case of Black Clawson International Ltd v Papierwerke Walfhpof-Aschaffenburg AG, 1982[4], Mustill J. had observed that "Where the laws diverge at all, one will find in most instances that the law governing the continuous agreement [arbitration agreement] is the same as the substantive law of the contract in which it is embodied and that the law of the reference is the same as the lex fori. He further observed that In an ordinary way, [the

[4] Black Clawson Case available at https://www.casemine.com/judgement/uk/5a8ff8ca60d03e7f57ecd7a2

proper law of the arbitration agreement] would be likely to follow the law of the substantive contract".

In Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd, [1993], Lord Mustill stated: "It is by now firmly established that more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. Less exceptionally it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the crucial law of the arbitration as it is often called".

After these cases, the English Courts adopted a different view regarding the subject and leaned toward the new prospects of the "seat". In the leading case of C vs D[5] where the main contract of insurance was to be governed by the US Laws. Clause (O) of the said agreement deals about Arbitration clause, which was pronounced to be imposed by the English law of Arbitration. Said parties made it quite clear as the clause (O) read as "Any dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950 as amended……". The Contract also gave the clause for the designation of an arbitrator by the High Court of England.

In the recent case, dispute arose among the parties and the opposition was indicated to arbitration in London. After the proceeding was done, an award was passed by the tribunal. The award was challenged in U.S Courts by Respondents. The Claimant on the other hand had asked the intervention of the courts of England on the pretext that the "seat" of Arbitration was London but the award for the same was passed in England. If the "seat" of the arbitration is London so the award can only be challenged in the courts of England as the supervisory jurisdiction is that of the English Courts.

[5] C v. D as available at https://www.trans-lex.org/311360/_/c-v-d-%5B2007%5D-ewca-civ-1282/

This contention of the claimants was contested with the argument that if the both the sides had already received consent that the contact will be look upon by the constitution of the US, then the power of the US courts to review the arbitration award cannot be ruled out.
Now the Learned Judge pointed out to a few judgments to make the concept clear. In the leading case of Black- Clawson v Papierwerke, Mustill J set out the three significant relevant laws, namely "(i) the law governing the substantive agreement; (ii) the law governing the agreement to arbitrate and the performance of that agreement; and (iii) the law of the place where the reference is conducted (the lex fori)". He then said:-
"In the great majority of cases, these three laws will be the same. But this will not always be so. It is by no means uncommon for the proper law of the substantive contract to be different from the lex fori; [The Compagnie Tunisienne De Navigation S.A. case was then one such an example]; and it does happen, although much more rarely, that the law governing the arbitration agreement is also different from the lex fori."

During the course of arguments, it was pointed out that Lord Mustill in the judgment of Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] had pointed out that:

"It is by now firmly established that more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. Less exceptionally it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration: the "curial law" of the arbitration, as it is often called. The construction contract provides an example. The proper substantive law of this contract is the law if such it can be called, chosen in clause 68. But the curial law must I believe be the law of Belgium. Certainly, there may sometimes be an express choice of a curial law which is not the law of the place where the arbitration is to be held: but in the absence of an explicit choice of this kind, or at least some very strong pointer in the agreement to show that such a choice was intended, the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible."

The learned Judge explained the same that It does not seem that Lord Mustill is, in fact, saying that although it is exceptional for the proper law of the underlying contract to be different from the proper law of the arbitration agreement, it is less exceptional (or more common) for the proper law of that underlying contract to be different from the lex fori or curial law namely the seat of the arbitration. He is not expressing any view on the frequency or otherwise of the law of the arbitration agreement differing from the law of the seat of the arbitration. One is therefore just left with his dictum in Black-Clawson (with which I would respectfully agree) that it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration. The reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place.

And it was decided that as the parties had chosen England as the "seat" of arbitration, English law is the proper authority to challenge the award. The basic idea of the recent trends on the topic leads to the fact that the contractual agreement can be void or voidable according to the terms of the said agreement but, the fact that the arbitration agreement within the contract deals with the dispute among the parties. As the law of arbitration is in itself a different branch of Law, the same should be treated as a "different agreement"

In the Salumercia Cia Nacional De Seguros S.A vs Enesa Engeharia S.A[6], case the Brazilian Law governs the agreement between both the parties together with the clause that the exclusive jurisdiction that to be of Brazilain Courts. The agreement also provided that arbitration in case of dispute were to be held in London under ARIAS Rules. After the arising of the dispute, the contention said that the Brazilian Courts have the exclusive jurisdiction to decide the dispute. The Courts went on to express that to determine the "seat" of arbitration it is proper to identify the "proper law of the arbitration agreement is to be determined by undertaking a three-stage enquiry: (i) whether the parties expressly chose the law of the arbitration agreement; (ii) whether the parties made an implied choice

[6] Salumercia Cia Case as discussed by Kristopher Kerstetter in his article by the title: Which Law Governs the Arbitration Agreement? An Analysis of Sulamérica CIA Nacional de Seguros S.A. and others v Enesa Engenharia S.A. and others

of the arbitration agreement; and (iii) in the absence of an express or implied choice, the system of law with which the arbitration agreement has the closest and most real connection". It was held that parties if by agreeing to the fact that the contract would be governed by the laws of Brazil.

3. Indian laws on the "seat" of arbitration

There have been many judgments by Hon'ble High Courts and by Hon'ble Supreme Court of India, which shed the light over this crucial part of Arbitration law. These critical judgments revolve around the issue of "seat" that can be pinned down to a few reported judgments which have cleared the standing of Indian law over the topic. To understand the Indian Law over the issue, a few cases will have to be referred.

When talking about prime cases of Bhatia International V Bulk Trading SA and Venture Global Engineering V Satyam Computers Services Ltd.[7], the Hon'ble Supreme court of India opined that if the parties had agreed (expressly or impliedly) to the contrary, the Indian Courts would have the jurisdiction in terms of a foreign seated arbitration.

The apex Court of India a five judges bench in BALCO[8] case had overruled the Bhatia and Venture judgments. The Court had further explained the fundamental propositions in the judgment as "(i) the application of the UNCITRAL Model Law was intended to be limited to the territorial jurisdiction of the seat of arbitration i.e. the territoriality principle and (ii) the seat of the arbitration is the 'center of gravity' of the arbitration and therefore a choice of a foreign-seated arbitration by the parties ordinarily meant that the parties also agreed to the application of the curial law of that foreign country". It was also opined by the Court of law that the decision led earlier was more over the same as giving extraterritorial jurisdiction to the Court and that cannot be the aim of the Parliament of India with regards to election of Arbitration Act.

In 2018, in the particular case of Union of India V. Hardy Explorations and Productions (India) Inc.[9], the Hon'ble Supreme Court of India while delivering in its judgment had

[7] Bhatia International v. Bulk Trading (2002) 4 SCC 105
[8] Bharat Aluminium v. Kesiar Techinical Services, Civ Appeal 3678 of 2016
[9] UOI v. Hardy Explorations, Civil Appeal No. 4628 of 2018

carefully examined the question of the seat of arbitration. The particular case has become a benchmark while deciding the question of "seat" of arbitration. Brief facts of the case are as follows, the parties entered into a contract that had an arbitration clause that provided the "venue of conciliation or arbitration proceedings… unless the parties otherwise agree, shall be Kuala Lumpur…" and that "[a]rbitration proceedings shall be conducted in accordance with the

UNCITRAL Model Law on International Commercial Arbitration of 1985". A dispute arose between the parties and the arbitration proceedings took place in Kuala Lumpur. An arbitral award was passed in favor of Hardy Explorations and signed in Kaula Lumpur. The said award was challenged before the Hon'ble High Court of Delhi by the Union of India under the Arbitration and Conciliation Act, 1996. The main contention of Union Of India was that the said arbitration agreement had failed to specify the seat of Arbitration. Furthermore, the agreement had in only referred to the venue of Arbitration. This contention indicated the fact that the Kaula Lumpur as merely as the venue not the seat of Arbitration.

The Hon'ble Supreme Court in its judgment came to the conclusion that both the side not did not considered Kaula Lumpur as the "seat of arbitration" and even the tribunal arbitral did not thought about determine the seat of arbitration. The court of law added to their statement that selecting Kaula Lumpur as the site cannot be considered to be the "seat" of Arbitration. The Hon'ble Court had further opined that the venue cannot itself become the seat of arbitration rather a site can act as a seat only if *"something else is added to it as a concomitant".* Supreme Court in the view of the observations came to the conclusion that Courts in India has the right of Jurisdiction to summons the award which was passed by Kaula Lumpur arbitral tribunal.

The above-noted issue was again discussed in the year 2019 in the case of BGS SGS Soma Jv V. NHPC Ltd[10] . When discussing about this case, the agreement on arbitration had a clause "Arbitration proceedings shall be held at New Delhi/ Faridabad…….". In the BGS case, the Indian cases as well English case along with the UNCITRAL model of laws. The Hon'ble Supreme Court of India had opined on the issue, as when can be the venue has be treated as "seat" of arbitration. The Supreme Court of India came to the conclusion that if

[10] BGS SGS SOMA JV v. NHPC LTd. Civil Appeal No. 9307 of 2019

in agreement had named a place as the "venue" of "arbitration proceedings" it itself amount to the fact that whole arbitration proceedings to be contacted as such place. In the particular circumstances, the venue is the "seat" of arbitration.

The Court further explained the same by pointing out the fact that if the agreement indicates as "tribunals are to meet or to have parties, witness" at a specific place, and only hearing of the argument or case can be further practiced at that venue. The Court also concluded that if according to the agreement of arbitration than the hearing "shall be carried" at a considered place, the language indicates that the proceedings of arbitration shall be carried at that place and the selection of venue is in itself the "seat" of arbitration. The test of no other "significant contrary indica" as it suggests the place to be the exact value of proceedings and will not be the "seat" of arbitration. Furthermore, if the either of side had chosen some body of rules to govern the arbitration may it be any set of particular rules it would suggest that the said venue will be the "seat" of arbitration.

The said observations of the courts are opposite to that of the principle laid down in Hardy Explorations. Hardy Explorations judgment signifies to the fact that the chosen venue of arbitration cannot get to be the "seat" of arbitration in absence of "additional indicia". Whereas, the Soma Jv judgment is inclined to the certitude that selected venue for the arbitration proceedings will be the "seat" of arbitration in the non- appearance of any "significant contrary indica".

The Hon'ble Supreme Court of India in the present case adopted the " Shashoua principle". "Shashoua Principle" sets the basic line that "When there is an express designation of the Arbitration venue as London and no designation of any alternative place as seat, combined with a supranational body of rules [i.e. ICC] governing the Arbitration and no other significant contrary indicia, the inexorable conclusion is, to my mind, that London is the juridical seat and English law the curial law". The said principle had been approved by the Hon'ble Court in BALCO case. Due to the findings in the SOMA JV case, it seems that Hardy Explorations did not hold a footing of good law and the decision in the SOMA JV would hold the ground on the topic of "seat" of arbitration.

The saga of the dispute does not stop here. The apex Court of India yet again reconciled the dilemma regarding "seat" of arbitration in the case of Mankastu Impex Pvt. Ltd. V. Airvisual Ltd. In this mentioned case, the parties had jumped into an agreement, which also about the agreement arbitration. Mentioned agreement regarding arbitration had the

clause that if "any dispute, controversy… shall be referred to and finally resolved by arbitration administered in Hong Kong" also "the place of arbitration shall be Hong Kong…".. Substantial part of the MoU had provided that the MoU will be ruled within the constitutional frame work of India and New Delhi High Court shall carry the jurisdictions. Subsequently, a dispute arose among the parties and the Indian party (Mankastu) proceed toward the Hon'ble Supreme Court under the umbrella of Indian Arbitration and Conciliation Act, of 1996 seeking mediation regarding the designation of a sole arbitrator. The main contention that was argued before the court was that since the MoU had the specific clause that the governing laws will be Indian laws and the Courts at New Delhi had the jurisdiction, then the Supreme Court has the power to appoint the arbitrator as New Delhi is the seat of arbitration. It was furthermore added that Hong Kong was the venue for the arbitration and it cannot be termed as the "seat" of arbitration. The said arguments were based upon the case of Hardy Explorations. The said contentions were opposed and it was exclaimed for the fact that Hong Kong is considered as the venue of arbitration agreement, moreover, this arbitration agreement is to be carried out in Hong Kong, and so Hong Kong is considered to be the "seat" of arbitration. Mentioned arguments were relied upon the SOMA Jv case. It was also argued that the Supreme Court lacks the jurisdiction in the appointment of the sole arbitrator.

The Supreme Court came to the conclusion that real intent of parties can't be clearly defined by the use word as of "places" of arbitration agreement. The parties intent and intention had to be considered by the comportment of the sides to the clause and by the all other agreement of the case . The apex institution came to the conclusion that by selecting Hong Kong to be the "venue" of arbitration, "seat" of arbitration can not be deemed by the Hang Kong. Any which way, the parties decided and came on one page on fact that the said arbitration is to be ruled in Hong Kong, which considered it the "venue" of arbitration.

4. Impact of Indian laws

The main goal of the Arbitration Act is to ease the way for the International business houses who are willing to participate in India. The factors like the complexity of the cost effectiveness, enforcement of foreign awards and the consumption of time becomes a drawback to the Indian Arbitration process.

Because of the lengthy process the cost in the due process ultimately increases and the whole concept of ADR seems to be subliming.

According to the Section 34(2)(b)(ii) of the Act, a party to an arbitration may appeal an award when: the arbitral award is in opposing with the public policy frame work of constitution of India. The word "Public Policy" is however mentioned in the constitutional frame work and it is the judgment passed by Court of law while adjudicating the case and the courts have to decide each case on its own merits. It became more complex for the business houses to work in an environment where the limits are not defined and the corporations have to work in an environment of unprecedented laws.

Due to these factors the corporations are hesitating regularly to work freely and India is not preferred for the Arbitration Proceedings.

5. Conclusion

The English courts in their settlement led to emphasis that it is right to say that the organized steps in the Sulamérica case has torched to the long going confusion and established clarity to the misunderstanding that has answered to the important argument of which constitution would rule the arbitration agreement when there is already a significant contract which covers the agreement related to both the parties and with conclusion. The question here is what the choice of the imposed law for the said agreement and also about the total no. of seat regarding arbitration to all different kind of jurisdiction. English Courts have successfully pointed out to a number of proper analysis which are to be undertaken while deciding the applicability on the issue for the law governing the main contract and the law governing the seat of arbitration. The foremost thing that the court has noted is the presumption about the certitude that the parties has deliberated that agreement regarding arbitration is to be ruled by the specific law which is made to handle the agreement completely. Analysis was taken out on the point that there was no implied or fixed choice of the law regarding agreement of Arbitration.

So, the agreement regarding arbitration is to be ruled by the law relating to the "seat" of Arbitration. There are many factors upon which that the court put reliance to sit upon the presumption as to the fact to favour of the proper law is not that much unchallengeable. This can also result to the establishment of a strong presumption or idea more in approbation of the stated law which lies under the agreement regarding arbitration is more

likely to conjointly enforce because of fact that other factors are neglected. The unpredictability that persist while decided the factors in this area of law, the Supreme Court of India could still reconsider the Salumercia case so as to make it a better unambiguous support in the motion of this issue . This will provide maximum level of certainty to commercial parties when negotiating their contracts.

While the Indian Courts have also tried to clear the clouds on the following dilemma of law, they seem to be far from reaching to a perfect finding of the same.

As, the result in the case of Mankastu Impex is correct to the certain level to decide that Hong Kong will be the "seat" of arbitration, the Supreme Court's disinclination regarding declaration of SOMA JV has marked several doubts upon authority and right of the judgment towards Soma JV.

Supreme court of India any which way did not directly followed the principle of judgment as in the argument of Hardy Exploration, still it seems to follow somewhat same steps when the argument was coming to an end of the discussion. It can be pointed out that the need for further and specific proof or confirmation of actual intent of the both the parties of the case in place of using the arbitration of place with the expression is in itself is there while deciding the same.``

Due to these factors, it is still bit ambiguous to the fact whether Hardy Exploration stays as a logo of sensible and perfect law or conclusion and statement made in case of Soma JV remains to have the rights upon such argument. The decision in the Soma JV is undoubtedly a bit clearer and it is certainly more in consonance with the principle of party autonomy.

It is safe to say that the issue to decide the "seat" is still a bit in the grey area and certainly a point that can be subject to more litigation. It is upto the Hon'ble Courts of India to profound a clear and unambiguous way to facilitate the Commercial parties to enjoy the freedom to work without any constraints and fear in today's world by deciding over the issue in near future. It is also advised to the parties to keep a close watch over to the arbitration agreement and keep an open mind while drafting the agreement as to where they would want to have the "seat' of arbitration. The parties along with their lawyers are advised to keep an open dialogue with the other party while deciding over the issue of "seat".

References

Arbitration and Conciliation Act, 1996

BGS SGS SOMA JV V. NHPC LTd. Civil Appeal No. 9307 of 2019

Bharat Aluminium v Kesiar Techinical Services, Civ Appeal 3678 of 2016

Bhatia International vs Bulk Trading (2002) 4 SCC 105

Black Clawson international Ltd v. Papierwerke AG. (n.d.). The Most Granular Mapping of US Case Law | CaseMine.

https://www.casemine.com/judgement/uk/5a8ff8ca60d03e7f57ecd7a2C VS D at https://www.trans-lex.org/311360/_/c-v-d-%5B2007%5D-ewca-civ-1282/

Supreme Court on Abritration and Contracts, Book by Universal Law Publishing

UNCITRAL model law on international commercial arbitration (1985), with Amendments as adopted in 2006. (n.d.). United Nations Commission On International Trade Law |. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration

UOI Vs Hardy Explorations, Civil Appeal No. 4628 of 2018