THE SCRIMMAGE BETWEEN THE ‘SEAT’ AND ‘VENUE’ OF ARBITRATION: *AN ANALYSIS WITH SPECIAL REFERENCE TO INTERNATIONAL COMMERCIAL ARBITRATION*

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THE SCRIMMAGE BETWEEN THE 'SEAT' AND 'VENUE' OF ARBITRATION: *AN ANALYSIS WITH SPECIAL REFERENCE TO INTERNATIONAL COMMERCIAL ARBITRATION*

Mohit SINGHVI [1]

Abstract : *The author here has tried to explain and clarify the inconsistency and confusion which has arose in the recent past by way of interpreting the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act' or 'Act of 1996'), judicial precedents and the amendment brought it by the (Indian) Central Government. Not only this, the author has also understood and relied upon the verdicts of various courts around the globe relating to the curial law and their understanding which has a material and direct effect on the international commercial arbitration to be conducted in future and the precautions which the parties entering into cross border transaction might take note of while contemplating the stipulations in their respective agreements.*

Keywords : *Seat, Venue, Jurisdiction, Commerce, International Commercial Arbitration, Indian Law.*

With the advancement of global commerce and trade, the need for the effective and swift mechanism for adjudication of dispute has almost become a *sine qua non* to it. At the same time, the transactions bring along with them, a stint of possible differences which may arise between the parties not only with respect to the sub-standard service and material but also regarding the seat, venue and the jurisdictional applicability. This tussle is more akin to trade and execution of the agreements involving cross-border transactions involving possible application of law of two different nations having kinship with the parties so concerned. Hence, it is more vital to converse and comprehend the mainstream features of international commercial arbitration. Arguendo, the term "*international commercial arbitration*" is

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explicated under Section 2(1)(*f*)[2] of the Act. Due to the availability of multi-national interest of parties, the possibility of the conflict of laws between two or more jurisdictions cannot be ruled out. In order to avoid such divergence between jurisdictions, the dogma of party autonomy comes into role for curbing out the possibly variance or dispute between the parties. It authorizes parties to opt the seat, the venue and the law that is germane to the agreement executed for carrying out the transaction.

At the outset, it is noteworthy to learn that as per the law of the land[3], it is illegal to oust the command of the any court of law[4], though the reference to arbitration while ousting is valid as it is not against the public policy and is based on the maxim, "*expressio unius est exclusio alterius*". The law governing the arbitration is of paramount magnitude as it determines the legitimacy, consequence and elucidation of the arbitration agreement which in turn is relied by the arbitrator to establish the extent of his powers and the procedure which is required to be followed by the tribunal in adjudication of the dispute between the parties, except in those circumstances wherein the parties have chosen an institution for adjudication of the dispute.

The provisions of the Act do not *per se* define about the concept of seat and venue and the same have principally been discovered and revolutionized by judicial activism, expansion and interpretation of the provisions. Although, a constant intercession by the courts is abhorrence to the procedure of arbitration, it has almost proved to be beneficial for the growth and advancement of the law of Arbitration. Due to catena of lacunae in the Act, the Law Commission submitted its 246th Report suggesting a plethora of amendments radically reforming the Act. Despite having tabled comprehensive changes, handful of them were actually amended by the Arbitration and Conciliation (Amendment) Act, 2015.

Furthermore, it would be relevant to mention here that section 2 (2) of the Act talks about applicability of Part 1 only in cases where the 'Place of Arbitration' is India which is considered

[2] S. 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*) 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] Section 28 of the Indian Contract Act, 1872.

[4] Halsbury's Laws of England, Vol. 9, 352.

to be *para materia* to 'seat' of Arbitration, though remained a obscurity. Further, Section 20 also in a correspondingly fuzzy and wooly manner while granting parties the autonomy to decide the "*place*" of arbitration, failed to distinguish between seat and venue augmenting bewilderment. A conflict between two jurisdictions would necessarily arise only in international commercial arbitrations as the parties mandatorily belong to a different jurisdiction. The fact that the word 'place' connotes seat or venue was not lucid and ***per se*** the driving force behind the Central Government to amend the existing law which depicts legislative precision and intelligibility.

According to the elucidation emitted by the Supreme Court in ***Bhatia International***[5], way back in the year 2002, an international commercial arbitration involving an Indian party is involved which may be conducted at any place in across the globe, Part 1 of the would be applicable and the Indian courts would have the jurisdiction to set aside the award or execute the same and no one else. This law although overruled, continued to prevail for a elongated epoch.

Expressly overruling the settled, though with dicey understanding of Section 2(2) of the Act, the Hon'ble Supreme Court in ***Balco's judgment***[6] observed that the Part 1 has to be read, understood and applied only to those international commercial arbitrations when the seat/place of arbitration is in India, restoring and emphasizing the dissimilarity between seat and venue of Arbitration. Further the court clarified that the term "place" used in Sections 20(1) and (2) would presage "*seat*" and "place" used in Section 20(3) would presage "*venue*". This precise understanding was nothing less than the legislative intent behind framing of the Act though it must not have hit the wisdom of the legislators that seat and venue may be construed in a way and shall have the effect of mechanism failure even at the executing stage of the award passed by the Arbitral Tribunal.

The legislating wing of the Government of India which is the empowered one, introduced amendments to the Act in the year 2015 and Section 2(2) was amended to include a Proviso to the effect that, unless agreed to the contrary, Section 9, 27 and 37(1)(a) and 37(3) shall also apply to international commercial arbitrations even if the place of arbitration was outside India. So with this amendment, law laid down in ***Balco's case*** was slightly diluted and the issue that

[5] (2002) 4 SCC 105.

[6] (2012) 9 SCC 552.

started arising in international commercial arbitration agreements having seat outside India, as to whether parties had excluded the applicability of the provisions of Part I of the Act.

Slightly different from the approach of the Indian courts, in ***Atlas Power v National Transmission***[7] Mr. Justice Phillips confirmed that the seat of the arbitration in question was London as the agreement stipulated 'London' to be the seat of Arbitration and this entitled the claimant to permanently restrain the defendant from challenging or executing the Final Award in Lahore, Pakistan or anywhere other than England & Wales.

The decision to select the 'seat' of arbitration may well be quite independent of the place and is totally distinct from selecting the 'venue' where the proceeding might be conducted. The process of classification of the seat of arbitration which ultimately governs the arbitral process post ***Balco's*** judgment has become one of the most imperative and distinguishing feature of an arbitration clause. The selection of the seat determines the law governing the Arbitration procedure, the process and rights relating to enforcement of the arbitration award.

That was not the end in as much as post ***Balco judgment***, the courts were faced with yet another issue as to whether in international commercial arbitration arising out of an agreement providing for the 'place or venue of arbitration' to be outside India, is to be construed as parties specifically designating juridical/legal seat of arbitration outside India or not. In ***UOI Vs. Hardy Exploration and Production (India) Inc.***[8] after considering the arbitration clause in the agreement, a three judges' bench of Hon'ble Supreme Court of India held that Kuala Lumpur only as a venue of conducting the arbitral proceedings and could never mean to be a 'Seat' thereby rendering the sole jurisdiction of the courts of Malaysia. Hence, it was held that Part I of the Act was not excluded and the courts in India only had the jurisdiction for entertaining any petition arising out of the Act in relation to the award thereby continuing to play an imperative responsibility considering the expressions, 'Seat' and 'Venue' to connote different meanings. Also, ***Roger Shashoua* v. *Mukesh Sharma***[9] the Hon'ble Supreme Court held that since the parties provided for ICC rules, Paris for arbitration and place of arbitration was London, hence London will be deemed to be seat of Arbitration.

[7] [2018] EWHC 1052 (Comm).

[8] AIR 2018 SC 4871.

[9] (2017) 14 SCC 422

The grundnorm idea behind this philosophy seems to be based upon the dogma of party autonomy which gives the power to the parties to act as a primary decider of the jurisdiction which will be heading the arbitral proceedings. As held by the Hon'ble Supreme Court in ***National Thermal Power Corporation Limited vs. Singer Limited***, "party autonomy is the cornerstone of the law of arbitration. The signatories to the contract are free to decide not only the law that is applicable to the contract, but also *lex arbitri* and the procedural law governing the curial law".[10]

Not only this, the Hon'ble Supreme Court in the case of ***TDM Infrastructure Private Limited v UE Development India Private Limited***[11] while rejecting the petition for appointment of Arbitrator, has held that "*the intention of the legislature is clear and ex facie transpires that Indian parties to an arbitration should not be permitted to refrain from applying Indian law in the agreement as it is against the public policy of the country and can only choose a foreign venue of arbitration and cannot chose a foreign Seat of Arbitration*".

However, reiterating the canon of party autonomy and giving paramount importance to the rights of the parties to choose the seat and venue of Arbitration and not relying upon the obiter of the aforesaid judgment, the Hon'ble Supreme Court in ***Reliance Industries Limited & Anr v Union of India***[12] which talks about two Indian parties having a foreign Seated Arbitration, appointed an Arbitrator for adjudication of the dispute at their seat of Arbitration.

That it would not be out of place to mention and refer to the general understanding of the courts of the Republic of China, in as much as in ***Longlide Packaging Co. Ltd. vs. BP Agnati SRL***[13], and in ***Ennead Architects International LLP v R&F Nanjing Real Estate Development Company Limited***[14]**,** the courts placed a great importance to the underlying concept of seat of arbitration, and its direct connotation with applicability of law and the validity of the award amidst the international commercial arbitration while differentiating with the venue and seat of Arbitration and rendering the 'Seat' to be the sole and determining factor to be pertinent for deciding the jurisdiction of the court, courts and law.

[10] (1992) 3 SCC 551

[11] (2008) 14 SCC 271

[12] (2014) 7 SCC 603

[13] [2013] Min Si Ta Zu Di 13 Hao

[14] (2016) Su 01 RenGang No.1

Not only this, in ***Process & Industrial Developments Limited vs. The Federal Republic of Nigeria***[15]*, a decision of Butcher J, discusses a number of points relating to the seat of the arbitration, emphasising the distinction between the juridical seat and the place where hearings are conducted and also the jurisdiction of a tribunal to confer the power of adjudication.*

Arguendo, in ***Indus Mobile Distribution Private Limited vs. Datawind Innovation (P) Limited***[16] it was held that *"In Arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest courts with exclusive jurisdiction for purposes of regulating the arbitration proceedings arising out of the agreement between the parties"*. The importance of juridical seat in an arbitration can also be understood from the judgment of the Court of Appeal of the Republic of Singapore, in the matter of ***ST Group Co Ltd. & Ors Vs. Sanum Investment Limited***[17] where the court refused to enforce an award made and published at a place other than the agreed seat of arbitration in the agreement. This judgment must have if not having any authoritative value, persuaded the Indian Courts as well to give pertinence to the doctrine of party autonomy as well as the word 'seat' to be the sole rationale to confer jurisdiction to that country/city/court for that particular award.

The Hon'ble Supreme court once again was faced with a situation in ***BGS-SGS SOMA-JV Vs. NHPC Limited***[18] **and while interpreting the agreement** held that, the venue of arbitration mentioned in a contract shall be equivalent to seat of arbitration unless otherwise agreed between the parties. With this judgment, the hullabaloo stemming out of 'venue' or 'seat' of arbitration, was lessened considerably. Recently, in ***Mankastu Impex Private Limited. Vs Airvisual Limited***[19] the Hon'ble Supreme Court of India while rejecting the application filed under Section 11 of the Act held that *since* the parties had agreed that the arbitration shall be seated at Hong Kong, the law as well as the courts at Hong Kong shall have power to do all acts which falls within the purview of challenging and execution of the award passed by the Arbitral Tribunal so formed.

The upshot of the above discussion as well as the law laid down by courts across the globe suggests that the word 'seat' is the sole repository for determination of the jurisdiction and

[15] *[2019] EWHC 2241 (Comm)*

[16] (2017) 7 SCC 678

[17] [2019] SGCA 65, Civil Appeal No. 113 of 2018 & Civil Appeal No. 114 of 2018

[18] 2019 (17) SCALE 369

[19] 2020 SCC online SC 301

applicable law in an international commercial arbitration. Not only this, the confusion and the divergence in the opinion of the Hon'ble Supreme Court in its decisions has for the time being put at rest and has also clarified the open ended Act, even though amended and the same hold the field by virtue of Article 141 of the Constitution of India, 1950. The wait continues till the time legislature realizes and paves the path for clarity in the law itself.

THE AUTHOR'S VIEWPOINT

To wrap up, it is imperative to note that firstly, the courts across the globe are almost on the same track and have always differentiated between the 'seat' and 'venue' of arbitration. The issue prima facie arises during the adjudication and execution of an international commercial arbitration. In view of the above discussion and in humble opinion of the author the verdict gathers around the words used in the Arbitration Agreement which are of paramount importance and becomes the most important to draft in a way which transpires the intention of the parties so that the dispute with respect to the jurisdiction and applicable does not arise in future and the interpretation gymnastics of the court can be avoided. It is in the humble opinion of the author submitted that the base to remain shall be the doctrine of party autonomy and is only in the absence of the clarity, the other provisions shall be resorted to. It would not be out of place to conclude this write up mentioned below:

"Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organizations."[20]

[20] Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 2004 at p 315.