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CONCEPT OF "SEAT" AND "VENUE" OF ARBITRATION

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I. From 1998 to 2012 : English Judgments to *BALCO*

- Section 2(2) of the 1996 Act provides that Part I shall apply when the place of arbitration is in India. In the famous case of ***Naviera Amazonica Peruana vs. Compania Internacionale De Seguros Del Peru***[1], the Court of Appeal has clarified the difference between place/seat and venue of arbitration as follows:

  "…there is only one "place" of arbitration. This will be the place chosen by the or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of 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. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an Arbitral Tribunal to hold meetings or even hearings in a place other than designated place of arbitrations, either for its own convenience or for the convenience of the parties or their witnesses…..it may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country, for instance, for the purpose of taking evidence…In fact circumstances each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of arbitration remains the place initially agreed by or on behalf of the parties"

- The Importance of seat/place of arbitration lies in its close nexus with the proper law of arbitration.

- The UNCITRAL Model Law ("Model Law") on which the 1996 Act is based, provides that law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link 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- New York Convention, 1958 and Geneva Protocol, 1923.

- In International Commercial Arbitration the seat can either be in India or outside India. If the seat is in India, it was clear that provisions of Part I of the 1996 Act would apply. However, prior to amendment of 2015, the question as to whether provisions of Part I will apply to an International Commercial Arbitration seated outside India has been the subject matter of various Supreme Court decisions.

[1] 1998 1 Lloyd's Rep 116

- The ***Bhatia International*** judgment[2] settled the question of applicability of the provisions of Part I of the Act to international arbitrations held outside India, by holding that the Arbitration Act 1996 shall be applicable to all arbitrations, including those arbitrations which are held outside India, unless the parties expressly or impliedly excludes the applicability of all or any of the provisions.

- In ***Shashoua v Sharma***[3] Cooke J. held that in the absence of 'significant contrary indicia' England was the seat on the basis of the parties agreement that England was the venue for the arbitration. Known as the *'Shashoua Principle'*

- The Bhatia International judgment was overruled by a Constitution Bench judgment in ***BALCO***'s judgment[4], but was overruled prospectively i.e. applicable for only those disputes arising out of agreements which were entered after 6th September, 2012 effectively making the Bhatia international judgment applicable to other arbitrations agreements which were entered prior to 6th September, 2012.

- BALCO made the distinction between seat and venue. It was held in BALCO that if the arbitration agreement designates a foreign country as the "seat"/"place" of the arbitration and also selects the Arbitration Act, 1996 as the curial law/law governing the arbitration proceedings, then it would be a matter of construction of the individual agreement to decide whether the place such chosen would be the "seat" or "venue" for the purposes of deciding the applicability of provisions of Part I of the Act.

[2] Bhatia International vs. Bulk Trading S.A 2002 (4) SCC 105
[3] [2009] 2 All ER (Comm) 477
[4] Bharat Aluminium Company vs. Kaiser Aluminium Technical Services (Balco) 2012 9 SCC 552

II. POST *BALCO*

- In **Enercon (India) Ltd. and Ors. v. Enercon GMBH and Anr**[5], the Supreme Court dealt with the issue of determination of seat of arbitration. The facts of the case reveal that the parties had agreed to resolve any dispute with respect to the contract by way of arbitration in accordance with the Indian Laws. The issue before the Court was with regard to the phrase "venue shall be in London" used in the contract. The Court relied on various judgments to conclude that "venue" of arbitration cannot be read as "seat" of arbitration. The Court, while holding seat of arbitration to be India, observed that the legal seat of arbitration should not be confused with the geographically convenient place for holding hearings of the arbitration. The relevant findings of the court are reproduced below:

  "In the present case, even though the venue of arbitration proceedings has been fixed in London, it cannot be presumed that the parties have intended the seat to be also in London. In an International Commercial Arbitration, venue can often be different from the seat of arbitration. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but this would not bring about a change in the seat of the arbitration"

III. AMENDMENT INSERTED BY AMENDMENT ACT OF 2016 W.E.F 23RD OCTOBER, 2015

Extract of Section 2 (2) of the Arbitration and Conciliation Act, 1996, as amended -

"(2) This Part shall apply where the place of arbitration is in India:

**[Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (b) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.]*

[5] (2014) 5 SCC 1

IV. JURISDICTION OF INDIAN COURTS IN INTERNATIONAL COMMERCIAL ARBITRATION IN THE CONTEXT OF 'VENUE' VIS-A-VIS 'SEAT'

❖ ***Union of India v. Hardy Exploration & Production***[6] **("Hardy Exploration") delivered on 25th September, 2018**

Coram: Hon'ble Chief Justice Mr. Dipak Misra, Hon'ble Justice Mr. A.M. Khanwilkar, and Hon'ble Justice Mr. D.Y. Chandrachud)

The Bench had to determine that given the Arbitration clause of the Contract whether jurisdiction of Indian Courts is ousted

Article 32 of the arbitration agreement reads as follows:-

"32.1 This Contract shall be governed and interpreted in accordance with the ***laws of India.***

32.2 Nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India."

26. Article 33 deals with "Sole expert, conciliation and arbitrator". Article 33.9 and 33.12 read thus:-

"33.9 ***Arbitration proceedings shall be conducted in accordance with the UNICITRAL Model Law*** *on International Commercial Arbitration of 1985 except that in the event of any conflict between the rules and the provisions of this Article 33, the provisions of this Article 33 shall govern.*

xxx xxx xxx 33.12 ***The venue of conciliation or arbitration proceedings pursuant to this Article unless the parties otherwise agree, shall be Kuala Lumpur*** *and shall be conducted in English language. Insofar as practicable the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitration proceedings and any pending claim or dispute."*

Findings and observations of the Hon'ble Court –

1. The place of arbitration was to be agreed upon between the parties. It had not been agreed upon ; and in case of failure of agreement, the Arbitral Tribunal is required to determine the same taking into consideration the convenience of the parties. It is also incumbent on the Arbitral Tribunal that the determination shall be clearly

[6] 2018 SCC OnLine SC 1640

stated in the "form and contents of award" that is postulated in Article 31. There has been no determination.

2. The word "determination" has to be contextually determined. When a "place" is agreed upon, it gets the status of seat which means the juridical seat. We have already noted that the terms "place" and "seat" are used interchangeably.
3. When only the term "place" is stated or mentioned and no other condition is postulated, it is equivalent to "seat" and that finalises the facet of jurisdiction. But if a condition precedent is attached to the term "place", the said condition has to be satisfied so that the place can become equivalent to seat. In the instant case, as there are two distinct and disjunct riders, either of them have to be satisfied to become a place. As is evident, there is no agreement. As far as determination is concerned, there has been no determination.
4. A venue can become a seat if something else is added to it as a concomitant. But a place unlike seat, at least as is seen in the contract, can become a seat if one of the conditions precedent is satisfied. It does not ipso facto assume the status of seat.
5. Thus understood, Kuala Lumpur is not the seat or place of arbitration and the interchangeable use will not apply in stricto sensu.

The Ratio

A 'venue' can become a 'seat' only if (i) no other condition is postulated; (ii) if a condition precedent is attached to the term 'place', the said condition/indicia has to be satisfied first for the 'venue' to be equivalent to 'seat'.

- ***BGS SGS Soma JV v/s NHPC Ltd.***[7] ***("Soma JV")*** delivered on 10th December 2019

Coram: Hon'ble Justice Mr. R.F. Nariman, Hon'ble Justice Mr. Aniruddha Bose and the Hon'ble Justice Mr. R. Ramasubramanian.

Facts of the case:

The Petitioner was a Joint Venture specializing in infrastructure projects, and in 2004 was given a contract by the National Hydroelectric Power Corporation Limited ("NHPC") for construction of several concrete dams and hydroelectric works in the States of Assam and Arunachal Pradesh.

[7] 2019 (17) SCALE 369

The Arbitration Clause of the contract provided for Arbitration under the 1996 Act and for an Arbitral Tribunal of 3 members, and designated the venue/seat/place in the following words –

"67.3 (vi) Arbitration Proceedings shall be held at New Delhi/Faridabad, India…"

Disputes had arisen between the Parties and subsequently Arbitration was invoked by the Petitioner in 2011. The Arbitral Tribunal was constituted, and all the arbitral sittings/hearings were held in New Delhi between 2011 and 2016 and an Award was pronounced in 2016 at New Delhi. The Award granted part of the Claims of the Petitioner/Original Claimant. Aggrieved by the Award, the Respondent preferred a Challenge under Section 34 before the Faridabad District Court. The Petitioner applied for the Section 34 Application to be returned for presenting before the appropriate Court i.e. the Court at New Delhi, which prayer was granted.

The Respondent – NHPC filed an Appeal under Section 37 of the 1996 Act before the Punjab & Haryana High Court at Chandigarh, challenging the return of the Section 34 Application to be presented at New Delhi. The High Court held that an order challenging return of Section 34 Petition can be appealed under Section 37, and that the New Delhi was merely a convenient "Venue" of the Arbitration proceedings, as part of the cause of action had arisen in Faridabad, a Section 34 challenge would lie before the Faridabad District Court.

The Petitioner – JV then appealed by Special Leave to the Supreme Court.

Issue to be decided

1. **Whether the "seat" of the arbitration proceedings in the instant case was New Delhi or Faridabad?**
2. **Does the designation of 'place' in the arbitration clause confer exclusive jurisdiction on the Court of that place to decide disputes arising out of the arbitration ?**

Findings and observations of the Hon'ble Court –

(1) Whether the "seat" of the arbitration proceedings in the instant case was New Delhi or Faridabad?

The Bench relied heavily on the "*Shashoua principle*"[8] propounded by English Courts, to hold that designation of "venue" or "place" should be held to be the "juridical seat"

[8] Shashoua v Sharma 2009 EWHC 957 (Comm)

of the Arbitration. The judgement therefore upheld the concept of "juridical seat", derived from English case.

The Bench held that the place where the proceedings were held and the Award was signed, would be the 'Seat' of the Arbitration, unless there is a contrary indication from the arbitration clause or the contract.

(2) Does the designation of a "place" of arbitration confer exclusive jurisdiction on the courts of said place to decide disputes arising out of the arbitration ?

The Bench held that in case there is only one "place' mentioned in the Arbitration Clause – or even no place indicated, but proceedings are held and Award is pronounced in a particular place, that place will de facto and de jure be clothed with the character of "**juridical Seat**" and the Court at that place will exercise supervisory jurisdiction. The judgement in Soma JV clarifies that Courts at "Seat" of Arbitration have ***exclusive*** supervisory jurisdiction over the Arbitration proceedings and would oust the jurisdiction of any other Court where the "cause of action" arose.

The Bench observed that arriving at such a conclusion is necessary in view of the legislative intent to avoid confusion and chaos in implementing commercial arbitration in India. Otherwise, if the Cause of Action jurisdiction is upheld, then applications under Section 9 or 34 may lie even in District Courts located in remote of the country – where many such infrastructure contracts are supposed to be performed. Such Courts may not always be commercially minded and equipped to deal with Arbitrations of such value and importance – thereby defeating the provisions of the Act; and may also cause chaos and confusion.

Conclusion

The judgement in ***SOMA JV*** thus provides much needed clarity on Court jurisdiction in International Commercial Arbitration and provides quietus to the hitherto chaotic situation wherein a Foreign Award was often litigated upon both by Indian and foreign Courts. An Indian party entering a contract with International Commercial Arbitration with a foreign seat/venue will thus now be certain that no remedy shall lie before an Indian Court from an Award made in a foreign seat – in the absence of contrary indication in the Contract.

The **Soma JV** judgement provides some quietus on the debate between Seat/Place and Venue of Arbitration with reference to Section 20 (1) & (3) of the Arbitration &

Conciliation Act, 1996 **("Act");** and did not agree with the view taken by the Constitution Bench in Paragraph 96 of the judgment in **BALCO** on "concurrent jurisdiction" of Courts in arbitrations.

Extract of paragraph 96 of the BALCO Judgment is as under :

*"**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.**"*

The Bench in SOMA JV held that this Paragraph 96 has to be read in harmony with the rest of the Constitution Bench judgment in BALCO, which is in favour of exclusive jurisdiction of Courts of the seat of Arbitration. The conclusion being that BALCO continues to be good law with regard to the question of seat, jurisdiction and governing law; with the interpretation as stated in Soma JV.

- **Mankastu Impex Private Limited vs Airvisual Limited[9] ("Mankastu Impex") delivered on 5th March 2020**

Coram: Hon'ble Justice R. Banumathi, A.S. Bopanna & Hrishikesh Roy JJ.

Facts of the Case:

[9] 2020 SCC OnLine SC 301

An Indian company (Applicant in this case) and a Hong Kong based company entered into an MOU in 2016, giving the Indian company sole distribution rights for the Hong Kong products in India for 5 years.

Thereafter in 2017, the Hong Kong company was acquired by another company who announced that they shall not continue the contract signed by the acquired company, and asked the Indian company to sign a fresh contract with it. The Indian company invoked Arbitration by notice dated 15.10.2017, and proposed the name of an Indian Sole Arbitrator. Arbitration clause was made up of three sub clauses - 17 (1), (2) and (3)

First sub clause provided that **MoU is governed by the laws of India and the courts at New Delhi have the jurisdiction**.

Second sub clause stated that **"the place of Arbitration" shall be Hong Kong** and **all disputes arising out of the MoU shall be referred to and finally resolved and administered in Hong Kong.**

Third clause provided that a party may seek injunctive remedies, including but not limited to preliminary injunctive relief, from a court having jurisdiction, before, during or after the pendency of any arbitration proceeding.

When the Indian party invoked Arbitration and proposed name of an Indian Arbitrator, the Hong Kong party replied that the contract states the Arbitration must be based in Hong Kong and Arbitrator must be appointed by a Hong Kong institution.

Thereafter, **the Indian company filed a Section 9 Petition in the Delhi High Court and got interim reliefs against the Hong Kong party**. The **Indian company then filed Section11(6) Application before the Supreme Court** praying for appointment of Arbitrator in India as an International Commercial Arbitration seated in India. The prayer was vigorously opposed by the Respondent by contending that the Arbitration clause envisaged arbitral proceedings entirely administered and conducted in Hong Kong, hence Indian Courts would have no jurisdiction to appoint an Arbitrator.

Findings and observations of the Hon'ble Court –

The Bench resolved the contradictory wording and structure of the Arbitration Clause in the following way, summarized in four points -

1. In light of ratio led down by co-ordinate bench in ***BGS SGS Soma JV*** above, when Arbitration proceedings are to be held at a particular venue and award is also to be made there, Courts there assume complete jurisdiction as 'juridical seat' unless a contrary indication appears in the contract.

2. In case of International commercial arbitrations based outside India, while Indian Courts retain jurisdiction under Section 9 and 37, its jurisdiction under Section 11 is completely ousted in light of Section 2 (2) of the Act, as held in ***SOMA JV*** and ***BALCO***. Hence **the S. 11 application is misconceived.**

3. Wording of the Arbitration clause clearly indicates Parties intention to conduct entire Arbitration proceedings in Hong Kong and also to submit to institutional administration in Hong Kong. **Hence applying *SOMA JV* ratio, venue and seat would be one and the same i.e. Hong Kong and thus Indian Courts would have no jurisdiction under Section 11.**

4. A harmonious reading of the first sub clause of the Arbitration clause which stated that Courts in New Delhi would have jurisdiction, was intended only for the purpose of Section 9, 27 and 37.

Therefore, the HongKong Institution for International Arbitration alone has complete jurisdiction to appoint an Arbitrator to adjudicate the Applicant's claim.

Conclusion:

The three Judge Bench has reaffirmed the ratio laid down in ***BGS SGS SOMA JV*** (supra) by a co-ordinate bench, that the venue of Arbitration proceedings and arbitral award would ordinarily determine the juridical seat of the Arbitration, in absence of any significant contrary indications.

Further, the judgment in ***Mankastu Impex*** has additionally clarified, that the jurisdiction of Indian Court in Foreign seated arbitration is clearly fixed by the Section 2(2) of the Arbitration and Conciliation Act 1996, which excludes applicability of Part I of the Act (except Section 9,27 and 37), unless a contrary intention appears.

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V. Our Concluding Remarks on a joint reading of *Soma JV* and *Mankastu Impex Judgment*:

- Both **Soma JV** and **Mankastu Impex** are supplementary to each other and do not contradict on any point of law, and they are both pronounced by Benches of equal strength.
- In the absence of any contrary intention in the Arbitration clause, the place where the Arbitration proceedings are to take place, is automatically clothed with the status of juridical seat and the Courts in that place assume supervisory jurisdiction over the arbitral proceedings and the Award.
- Even when the Arbitration clause mentions two 'places' or 'venues' to have jurisdiction, the place where the proceedings are held, the Courts in that place assume exclusive supervisory jurisdiction over the arbitral proceedings and the Award.
- The jurisdiction of Indian Court in Foreign seated arbitration is clearly fixed by the Section 2(2) of the Arbitration and Conciliation Act 1996, which excludes applicability of Part I of the Act (except Section 9,27 and 37), unless a contrary intention appears.

VI. MKA Views on jurisdiction of Indian Courts in Foreign seated arbitrations

- **Soma JV** holds that in case there is only one "place' mentioned in the Arbitration Clause – or even no place indicated, but proceedings are held and Award is pronounced in a particular place, that place will de facto and de jure be clothed with the character of "**juridical Seat**" and the Court at that place will exercise supervisory jurisdiction. In order to obviate such an outcome, the Arbitration Clause must make the contrary indication clear by specifying the Seat and the Place of which the Courts shall be clothed with supervisory jurisdiction. This follows from the ratio in **Shashoua Case** (Supra) which has been extensively relied upon by the Supreme Court – which lays down the test of "significant contrary indicia". This test propounds that if an arbitration clause states that an arbitration will take place, for example, in London, the arbitration is deemed to be "seated" in London and the Courts in London will have supervisory jurisdiction over the arbitral proceedings in the absence of any obvious or significant indicator that the parties intended otherwise.

- The effect of judgement in **Soma JV**, and its interpretation of **BALCO**, is that Foreign Award cannot be challenged under Section 34 of the Arbitration & Conciliation Act before an Indian Court. Separate and deliberate wording would have to be incorporated in the Arbitration Clause to enable otherwise.

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