Indian Journal of Agriculture Business
Volume 6 Number 1, July - December 2020
DOI: http://dx.doi.org/10.21088/ijab.2454.7964.6120.3

Review Article

"SEAT", "PLACE" & "VENUE":- A CATCH-22 WEB

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How to cite this article:
Archit Mishra & Neha Choudhary. "Seat", "Place" & "Venue":- A Catch-22 Web. Indian Journal of Agriculture Business 2020;6(1):2731.

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Abstract

The seat of the arbitration is one of the most significant features of any arbitration. Once the seat is determined the other facets related to arbitration proceedings are settled i.e., the court exercising jurisdiction over arbitration proceedings, law which will govern that arbitration and procedure related to the enforceability of the award passed in any arbitration proceedings. The UNCITRAL model law is one of the most important texts which guide the parties while deciding the seat of the arbitration proceedings. The Indian Arbitration & Conciliation Act 1996 was based on the scheme of the UNCITRAL model law and thus apart from the seat of the arbitration, the place where award was declared and signed also becomes important. It is needless to mention that under both the schemes, it is enshrined that the place where award is signed will determine whether the award is a domestic award or it is a foreign award. The seat of arbitration brings itself the character of permanency and it is not changed like the venue can be and this work is an effort to encapsulate the development of law and the interpretation resorted by the Hon'ble courts to settle the debate of seat vs. venue. This piece of work is an attempt to holistically examine the law related to "seat" and "venue" and highlighting a way forward in lieu of the principles of UNCITRAL model law. This work is expected to enhance the knowledge of the readers of laws related to Arbitration, and author is hopeful that it will contribute towards further research.

Keyword: Arbitration, Contract, Seat, Venue, Section & India.

Introduction

The conundrum of "seat", "venue" & "place" of arbitration especially in International Commercial Arbitration is widely debated around the world amongst the lawyers and the judges and legal scholars. The puzzle emanates from the basic questions like what law shall govern the arbitration proceedings, will the same law be applicable if the interim measure which is asked by one of the parties related to another country i.e., restraining the party from alienating the assets lying in another country from where the arbitration is taking place, what will happen in a case if the venue of arbitration proceedings are different and finally, what is a juridical seat or lex arbitri? It is a common accepted principle that the arbitration clause which is part and parcel of the main agreement is a separate agreement between the parties and that's how the "Competence Competence" principle has been evolved in the arena of arbitration. Thus, the law which governs the main agreement can be different than the law which governs the arbitration clause. The party autonomy principle which is bedrock of the sanctity of arbitration proceedings prescribes that the parties are empowered enough to agree on a different law which governs the arbitration between them[1]. Though, this principle is in line

with the principles of UNCITRAL model law but this issue brings with itself endless litigation.

The three terms used in the title of this article "seat", "place" & "venue" can be used interchangeably with each other but these words have entirely different connotation when it comes to law related to arbitration. To grasp a laymen understanding, the Hon'ble Apex Court in Bharat Aluminium v. Kaiser Technical Services[2], propounded an interpretation and said that the character of permanency is attached to the seat of arbitration and it has the supervisory jurisdiction over arbitration while venue is merely for the convenience of the parties and it is provisional or temporary in nature. During the course of this article, we will be dealing the law related to seat and venue of arbitration as mentioned under Arbitration Act, certain important judgements which has shaped the law in India, what is an actual difference between seat and venue and in the end we will try to conclude by defining this complex law in the easiest manner.

GOVERNING LAWS

One of the oldest English cases i.e., Naviera Amazonica Peruana SA v. Compania International de Seguros del Peru[3], has laid down the laws which govern the arbitration in the most beautiful manner. This judgement lays down three types of laws which are applicable to any arbitration proceedings and they are mentioned below:-

- Law which governs the entire (main) contract,
- Law which governs the arbitration clause and the performance of such clause which is commonly known as lex arbitri,
- Law which governs the procedural aspect of the arbitration which is commonly known as curial law.

One of the most significant aspects of drafting an arbitration clause is to stipulate these three things clearly because it can save the parties an extravagant cost of litigation. It is not necessary that every dispute which arises between the parties as per the contract is arbitrable. It is important to understand that only such disputes can be referred to arbitration which the parties intended to arbitrate and that is governed by the clause which is incorporated in the main agreement. Normally, in the arbitration agreement, the disputes which are arbitrable are mentioned and thus the arbitral tribunal is only empowered to adjudicate such issues only. Thus, a clear demarcation can easily be seen in the fact that the courts having jurisdiction over the disputes referred to arbitration can be different from the courts having jurisdiction on the disputes not referred to arbitration[4]. However, keeping this in mind, it becomes easy for parties by expressly mentioning the curial law and lex arbitri to determine which court will finally have supervisory jurisdiction.

In many cases decided by the Hon'ble Supreme Court of India, it was clearly held that parties while entering into an agreement if sign upon the terms ousting the jurisdiction of the courts completely is against the public policy of India and are null and void[5]. Without prejudice to whatever has been held in this judgement, many voices are raised that similarly ousting the jurisdiction of the courts at a primary level and referring the dispute to arbitration should also be considered as against the public policy but such argument lost sight of the fact that referring such dispute to arbitration does not obviate the jurisdiction of courts in its entirety, it only creates a different mechanism of dispute resolution between the parties and the supervisory jurisdiction still vest within the courts[6]. Such determination of rights and liabilities of the parties by arbitration is finally subjected to the jurisdiction of courts. It goes without saying that if the parties to an agreement are entering into a contract stating that they are eliminating the jurisdiction of the courts and giving that to a private person or an arbitral tribunal without recourse to the courts in case of gross error of law committed by the tribunal then the contract itself violates the public policy at large and is null and void[7].

Section 20 Of Arbitration Act Followed By Bhatia International & Balco

Section 20 of the Arbitration and Conciliation Act 1996 talks about the place of arbitration and it says that 20. Place of arbitration.—(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the

parties, or for inspection of documents, goods or other property.

It has been observed by the judges as well as the law commission reports that there are certain inherent ambiguities attached with the Arbitration & Conciliation Act 1996. One such glaring example is the unsolved puzzle of seat and venue. Nevertheless, judicial intervention in any arbitration proceedings is uncalled for and it is considered as repugnant to the growth of arbitration regime but in the case of India it has rather proved to be beneficial and has helped our country in giving this ambiguous law a good character. Before moving further, it is important to understand the basic fallacy which exists in arbitration act. The Indian arbitration act has four parts and part I of the act governs the arbitration proceedings which are conducted in India. Moreover, it also mentions under Section 5, when a judicial intervention is sought for in an arbitration proceedings[8].

Now, the scope of the part I of the arbitration act is defined under Section 2(2) which says that this Part shall apply where place of arbitration is in India. While reading this section, a plain interpretation is that it is applicable to arbitrations which are conducted in India[9]. Whether the words "place" is similar to "seat" or whether these two terms are different and if they are what is the difference between these two terms and it lacks appropriate judicial interpretation. The similar obstacle is visible in Section 20 as well where the parties are given the powers to agree on the place of arbitration as mentioned under Section 20(1) but the vagueness and obscurity is maintained because the legislature failed to describe the difference between what amounts to seat and venue of arbitration.

Bhatia International v. Bulk Trading SA[10]. , (2002) 4 SCC 105

In simple terms, the facts of the case are that two parties entered into an agreement and the arbitration clause provided that the arbitration was to be as per rules of International Chamber of Commerce (ICC). The dispute arose when one party filed an application under Section 9 of the Arbitration Act praying for an injunction against another party to restrain them alienating their assets. The Learned District Court and the Hon'ble High Court upheld the contention that nevertheless the fact that the arbitration is conducted outside India, the courts in India will have the jurisdiction. The matter came to the Hon'ble Apex Court and the argument was raised on behalf of the Appellant that on a bare perusal of Section 2(2), it becomes clear that unless the International Commercial Arbitration is conducted in India, the remedies available under Section 9 cannot be availed. The Hon'ble Supreme Court, however, resorted to such an interpretation which made the difference between seat and venue more clouded and held that whenever any Indian party is involved in any International Commercial Arbitration, it becomes immaterial in which part of the world that arbitration is conducted and Indian courts are empowered o exercise jurisdiction under Part I of the Act.

Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc[11].

This case is one of the cases where certain defects were cured of the poorly drafted Arbitration & Conciliation Act. The Hon'ble Apex Court expressly overruled the law laid down in Bhatia International and held in clear terms that the word "place" as used in the act means "seat" and "venue" depending on the context and the section where that term has been used. The Hon'ble Court tried to maintain the distinction between seat and venue and held that Part I is only applicable in the cases when the seat or place of the arbitration is in India. Substantiating such interpretation, a very meaningful idea of law has been laid down by the Hon'ble judges on this case and it was held that the words "place" which has been used in Section 20 of the Act amounts to seat in Section 20(1) and 20(2) and it amounts to venue in Section 20(3).

Agreeing to the position of law as stated in this case, the Hon'ble Apex Court in the case of Enercon (India) Ltd. v. Enercon GmbH[12] and in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc[13]. further reiterated the position of law and also followed the English judgement of Naviera Amazonica Peruana SA v. Compania International de Seguros del Peru[14] and relied on "closest and intimate connection test" and held that when parties failed to mention the seat and venue in an arbitration proceedings then the intention of parties is of paramount importance to determine the seat of the arbitration.

Two Recent Landmark Cases After Balco (Paving a Positive Way Forward)

After analysing the judgement of BALCO and the test laid down in this judgement, one thing which becomes clear is that the arbitration agreement should be read in its entirety i.e., it should be read holistically to ascertain the intention of the parties in cases where no explicit mentioning of "seat" and "venue" is done by the parties. Sometimes, the

parties failed to mention seat but while entering into the contract they mention the venue then the Courts take a cautious approach and look at various factors to determine the seat of the arbitration.

One such case is Union of India v Hardy Exploration and Production (India) Inc[15]. , wherein the seat of an arbitration agreement was not mentioned. Two parties entered in an arbitration agreement and the Hardy (HEPI) initiated arbitration proceedings against Union of India. The Learned Arbitral Tribunal announced the award in favour of Hardy and the ward was signed and declared in Kuala Lumpur. The arbitration clause which is the centre of controversy in this case read as

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

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.

Arbitration proceedings shall be conducted in accordance with the UNCITRAL 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.

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."

The Union of India filed an application under Section 34 of the Act in the Hon'ble Delhi High Court and HEPI opposed the application. The Hon'ble High Court agreed to the contention raised by the respondents i.e., the award was signed in Kuala Lumpur and hence Section 34 is not applicable and thus the matter went to the Hon'ble Supreme Court.

As laid down in the BALCO judgement i.e., when the seat of arbitration is not defined what becomes important is the intention of the parties to ascertain what is the seat of the arbitration. However, in this case the Court also mentioned in its judgement that when only "venue" is explicitly mentiuoned by the partiesin an agreement and there is no reference to "seat", then it can be considered as seat only if other factors are collateral to it. Thus, inevitable it can be concluded easily that by adjudicating the intention of the parties if it found that the venue and annexed factors to it make it seat also and that place is outside India then Part I of the Arbitration act is not applicable to such proceedings.

Now, the Hon'ble Court referred to the provisions of Section 20 and Section 31 wherein the word "place" has been used and held that according to the law laid down in BALCO's case the word place and seat are interchangeably used in the Act and thus according to Section 20 if the parties does not decide the seat of arbitration then the arbitral tribunal can decide the seat and while doing so any positive assertion or act is necessary while determining the seat of such arbitration. In this case, the venue is Kuala Lumpur and there is not such express determination being done by the Arbitral tribunal and thus it cannot be said that Kuala Lumpur is the seat of the arbitration and hence the Court held that Indian courts have jurisdiction ro entertain an application under Section 34 of the Act.

In another important case i.e., BGS SGS Soma JV v. NHPC Ltd[16]. , the Hon'ble Apex Court was again faced with conundrum of solving seat v. venue. The factual description of this case is that the parties have entered into the contract for a hydroelectric project located in Arunachal Pradesh. Certain disputes arose between the parties and the arbitration clause provided that "Arbitration Proceedings shall be held at New Delhi/Faridabad, India." Adhering to the clause, an arbitral tribunal was constituted and the proceedings were conducted in New Delhi and an award was passed in New Delhi. The parties exhausted various remedies under Arbitration Act and Commercial Courts Act to set aside the award. The Hon'ble Punjab and Haryana High Court while deciding an appeal under Section 37 of the Arbitration Act held that New Delhi is not a seat for arbitration and for the sake of administrative convenience the proceedings were conducted in New Delhi and thus the matter went to the Hon'ble Supreme Court.

While adjudicating this case, the Hon'ble Apex Court observed that

"It will thus be seen that wherever there is an express designation of a "venue" and no designation of any alternative place as the "seat", combines 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."

One of the most significant issues which the

judgement dealt with the correctness of the law laid down in Hardy's case. The Hon'ble Court explicitly mentioned that the "venue" in such case was Kuala Lumpur and it was also mentioned in the agreement that UNCITRAL model rules will apply, and there is nothing contrary in the agreement, thus inevitably Kuala Lumpur is the seat of arbitration and thus the judgement held that Hardy's case did not follow the law laid down in BALCO[17]. In this case, the Court held that the venue of the arbitration proceedings was New Delhi/Faridabad and the arbitration was conducted in New Delhi and thus the "venue" is really the "seat" as mentioned under Section 20(1) of the Arbitration Act and hence, the courts of New Delhi alone had the jurisdiction to entertain a petition related to Section 34 of the Act.

Difference Between Seat and Venue Of Arbitration

One of the most vital aspects of the arbitration proceedings is the seat of arbitration because the courts of the seat have supervisory jurisdiction of the arbitration proceedings. The seat of the Arbitration is clearly independent of the venue or where the hearings of the arbitration are conducted[18]. The BALCO judgement is a path breaking event in the arbitration regime because it expressly lays down the importance of the seat in arbitration. Moreover, the importance of the seat in arbitration also lies in the fact that the award will be enforced (rights and liabilities related to the award) according to the law governing the arbitration procedure.

Considering the convenience of the parties taking part in the arbitration, the hearing of the arbitration can be conducted in many places but that change in the geographical locations of conducting the hearing does not affect the seat of the arbitration in any manner and it remains unaltered[19].

While adjudicating cases like BALCO, Enercon and BGS SGS Soma certain things are very clear regarding seat and venue of the arbitration proceedings. Even in any case where there is an express mention of the "venue" of the arbitration clause, that in no manner imply the fact that the place where the "venue" is prescribed is the "seat" for arbitration. The law which governs the main contract, the law governing the arbitration agreement and the law governing the arbitration procedure determines the seat of the arbitration or else when a seat is not explicitly mentioned the closest connection test is resorted and then the seat is determined and the courts of such place has supervisory jurisdiction.

For example, in the case of Enercon, the parties mentioned about the venue and London was venue in that case. The judgement held that just because London is venue of that arbitration does not mean the courts of London have supervisory jurisdiction over the arbitration because the law which governs the main contract, the law governing the arbitration agreement and the law governing the arbitration procedure has close affinity with India and thus the Hon'ble Court held that courts in London cannot have concurrent jurisdiction[20].

Assuming the jurisdiction of the Indian courts in every case by adopting a parameter that if the party/ parties are Indian or Indian law is being followed as per the terms of the agreement might hurt the arbitration and its development in the longer run because unnecessary judicial intervention is anathema to the arbitration proceedings. The Hon'ble Supreme Court in the case of BALCO explicitly held that the moment the choice of "seat" is transferred to any other place than India then the law of that country will play the role of supervisory jurisdiction on that arbitration proceedings. In addition to this, the Hon'ble Court also clarified the fact that when the agreement entered between the parties clearly mentions the fact that the "seat" of the arbitration is outside India but the Indian Arbitration Act is applicable on the arbitration proceedings, even in that case the Indian Courts are bereft of exercising jurisdiction on that arbitration proceeding or the award passed in that arbitration.

Conclusion

Taking into consideration the abovementioned legal principles, a conclusion of the law related to seat and venue in arbitration proceedings can easily be reached. It goes without saying that the seat of arbitration proceeding is very relevant as it constitutes the heart of the arbitration proceedings because it is the courts of the seat which exercises supervisory jurisdiction over the arbitration proceedings. The caveat regarding the applicability of Arbitration & Conciliation Act 1996 is mentioned in the BALCO judgment at length by the Hon'ble Apex Court of the country however, we must not forget the fact that Section 9 of the Arbitration Act (Interim measures, etc., by court) can be made applicable by the parties even if the arbitration is not held in India if they consent to it in the agreement.

The Supremacy of the Parties and the Competence Competence principle are the substratum of the arbitration and these principles make it clear that the law governing the main contract can be different from the law governing the arbitration agreement. The parties are free to choose the law governing the

arbitration agreement and that law can be different from the law which governs the main contract of which the arbitration agreement is one part.

Pursuant to the judgement in BALCO and in Enercon, it becomes unequivocally clear that when the parties failed to prescribe seat to the arbitration and only venue is mentioned, then the Courts have to act cautiously and have to rely on "closest and intimate connection test" where the intention of the parties are ascertained to determine the seat of arbitration. Later, in BGS Soma case, further extension of this test was seen wherein the Hon'ble Court held that when a "venue" has been clearly mentioned and no "seat" has laid down in the agreement and the agreement mentions the rules or law which will govern the arbitration and there is nothing contrary mentioned in the agreement, then the only conclusion which can be arrived at is that the "venue" is actually the "seat" of the arbitration proceedings.

This attempt to explain the law in a clear manner would not be complete if the words of appreciation are not marked for the Hon'ble Apex court to provide the urgently needed clarity on this aspect and give vaguely worded legislation i.e., Arbitration & Conciliation Act 1996 a meaningful interpretation which can further develop the law in this arena. Moreover, the Indian courts have always mentioned the importance any seat carries in any arbitration and how relevant it becomes to draft an arbitration agreement with utmost care to save endless litigation in future.

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