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Article on

"Difference between Seat and Venue in Arbitration"

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Abstract

The Arbitration and Conciliation Act, 1996 ('the Act') does not assimilate reference to the "seat" or "venue" of arbitration, instead uses the word 'place' of arbitration and creates confusion. The Act does not clearly define the two terms, and thus has created confusion as to the clear concept and usage. Various judgments by the Hon'ble Supreme Court and the High Courts have tried to settle down the dust and figure out the meaning of the terms. This article focuses on the dispute and the development of the concept after analyzing the case laws and the judgment given in those and the authors have tried to conclude with the current status of the subject and meaning of the two.

Introduction

The word "place" has different meanings in the subsections and the word "seat" has different meanings. Due to the ambiguous nature of the word 'place', it has come to the attention that such words should be differentiated well with seat or venue under different sections. For distinction, the seat determines as to which court shall have jurisdiction or which state or court's law or decision shall apply, whereas the venue is the geographical or physical location where arbitration hearings can be held. Their distinction is not only important to determine the place of arbitration or determine the supervisory jurisdiction of courts but also '*lex arbitri'* or procedural law, governing the arbitration.

The terms 'seat' and 'venue' have not been defined under the Act; instead the word 'place' has been used under section 2 and section 20 for 'seat' and 'venue'. These terms have always been defined through judicial decisions and not otherwise. Though, the nature, jurisdiction or terms have been discussed through cases but still it is ambiguous to understand. Let's try to understand the use of terms 'seat' and 'venue' and which word to be used when, through this research.

How did this Controversy arise?

The debate for the difference between "place" and "seat" of arbitration certainly arose because of sections 2(2) and 20 of the Arbitration and Conciliation Act, 1996. Those sections state

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the basic nature of the term 'place' but the ambiguity of the provision takes the lead towards controversy. It does not perfectly define when the place will be considered as 'seat' and when as 'venue'.

Section 2(2) reads as follows:

2(2). This Part shall apply where place of arbitration is in India.

While reading this Section, it certainly or literally states that Part-I shall apply only to the arbitrations where the place of arbitration is in India, i.e. not applicable to the place outside the territory of India. But still ambiguity lies as to whether this 'place' in this subsection relates to 'seat' or 'venue'. This debate was further settled through judicial decisions which interpreted it accordingly.

Further, Section 20 of the Act also in a similar unclear manner, while granting parties the autonomy to decide the "*place*" of arbitration, failed to distinguish between seat and venue.

The section reads as follows:

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 subsection (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.

The word "place" in the Section 20 of the Act necessarily should connote different meanings in the sub-section (2) and (3). The Section simply implies that the parties are at liberty to choose the 'place' (venue) of arbitration, but the parties have to decide it beforehand or else the arbitral tribunal would choose accordingly. Further, in regard to the 'place' (seat) of arbitration under sub-section 1 & 2, the parties are free to choose the same, but are restricted if they fail to

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reach an agreement, then tribunal will have power to do so according to the circumstance of the case.

Thus, this had led to discourse between the contractual parties as to what the word "place" actually means, whether it means "seat" or "venue" of arbitration.

Principles for determining juridical seat of arbitration – Confusion and Contradiction

As discussed above, "Seat" and "Venue" are different and independent in their concepts and should be used in the same manner. Many times, these words are used interchangeably in the Arbitration Agreement by the parties, which creates confusion in determining the actual 'seat' of Arbitration. Though, courts have already untangled such confused or poorly drafted agreements through various principles and shown a clear picture regarding actual seat. However, such principles have only added up contradiction and confusion. With new cases, the principles may be evolved or changed or arbitration agreements may be interpreted differently in regard to 'place' which creates further confusion.

Judicial Approach

While the Indian jurisprudence hasn't been able to provide with any consistent guidance or clarity in the terms of "seat", "venue" or "place", the first attempt to tackle the muddle was seen in the case of *Bhatia International v. Bulk Trading SA*[1] *("Bhatia")*, where the Supreme Court held that the provisions of Part I of the Act were applicable in domestic as well as international commercial arbitrations. The court did not truly discuss the word 'place' under Section 2(2) to be used as seat or venue of arbitration. Several cases discussed the difference between the "seat" and "place" of arbitration, but couldn't clearly give a distinction.

However, a decade later, the Supreme Court was suitably close enough in differentiating between the concepts of 'seat' and 'venue' in that of a constitution bench of the Supreme Court in *Bharat Aluminium Co (BALCO) v Kaiser Aluminium Technical Service Inc*.[2] The Supreme

[1]Bhatia International v. Bulk Trading SA [2002] 4 SCC 105
[2] Bharat Aluminium Co (BALCO) v Kaiser Aluminium Technical Service Inc. (2012) 9 SCC 552

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Court perused the concept of "Seat" and "Venue" at length and held that both the concepts are different. The Court further clarified that the "Seat" of arbitration is the center of gravity of the arbitration i.e. the place where the arbitration is harboured whereas the "Venue" is just the geographical location where such arbitration meetings are administered. The Court further elucidated that the term "Place of arbitration" is used synonymously under Section 20 of the Act viz. (i) as seat under Section 20 (1); and (ii) as venue under Section 20 (3). The Supreme Court, while highlighting on party autonomy, granted concurrent jurisdiction to two different courts to exercise powers under the Act i.e. the court with supervisory jurisdiction over the seat of arbitration and the court in whose jurisdiction the cause of action arose.

Further, in *Reliance Industries Ltd. v. Union of India*[3], parties entered into an arbitration agreement in 1994. The Supreme Court of India further, enthralled on the intention of the parties, and culminated that a seat in London, combined with reference to English law as the law applicable to the arbitration agreement, revealed the parties' intention to exclude the application of Part I of the Act. The fact that the arbitration agreement was governed by English law was a key factor considered by the Supreme Court of India to reach its culmination. *Judgment makes it unambiguous that the "juridical seat" is the "legal place" of arbitration.* The Supreme Court of India insinuated that it could have reached a distinct conclusion if Indian law applied to the arbitration agreement. *It had been held that as the juridical seat of arbitration was London, only English courts would have jurisdiction over the arbitration, hence excluding Part I of the Act.*

Report 246 — Law Commission of India

The Law Commission of India in 2014 proposed great amendments to the 1996 Act that would fundamentally change the arbitration jurisprudence established in India. The Report discussed in great detail the need to amend Sections 2(2) and 20. The changes recommended replacing the word "place" with the words "seat" and "venue", in accord with the elucidation provided by *BALCO* (supra). The amendment also proposed addition of a provision to Section 2(2) sanctioning parties to choose to remain under the supervisory jurisdiction of Indian courts. The Report further suggested replacing the word "place" in Section 20(1) with the words "seat" and

[3] Reliance Industries Ltd. v. Union of India (2014) 7 SCC 603

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"venue", replacing the word place with "seat" in Section 20(2) and with "venue" in Section 20(3). However, these amendments were not enacted.

In *Enercon (India) Ltd.* v. *Enercon GmbH*,[4] in this case the Supreme Court held that, the expressed mention in the arbitration clause, that London was the venue of arbitration couldn't lead to the inference that the London was to be the seat of arbitration, because although London was termed as the venue, the law governing the arbitration agreement and the conduct of the arbitration proceedings were chosen to be Indian Law. So, once the seat was India, Indian Courts would have exclusive supervisory jurisdiction and England Courts cannot have concurrent jurisdiction.

The Supreme Court implemented the famous English principle promulgated by Justice Cooke in *Roger Shashoua v Mukesh Sharma*[5], in the BALCO (supra) case. The Shashoua principle states that when an agreement expressly entitles the venue without any direct mention to seat, collective with a cosmopolitan body of laws and no considerable opposing indicia, the relentless conclusion is that the venue is actually the seat of arbitration. This principle was also accredited and adopted by the Supreme Court in Enercon India (supra).

The discussion up to here reaches a conclusion that -

- The Seat of Arbitration is of vital prominence, for it is the courts of the seat that have the supervisory jurisdiction over the arbitral process.
- Assortment of seat of arbitration, implied selecting the law pertinent on arbitration i.e. appointment of arbitrator, procedure, awards etc.
- It is not compulsory that the seat of arbitration and venue of arbitration should be the same, the seat and venue may be different, and the chosen Seat of Arbitration will remain unpretentious autonomous of the geographical place where the hearings take place.

But this doesn't end here, as the dispute is still prevalent and the situation in some cases wakes up the ongoing debate.

[4] Enercon (India) Ltd. *v.* Enercon GmbH (2014) 5 SCC 1
[5] Roger Shashoua v Mukesh Sharma 2009 EWHC 957 (Comm)

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In the case *Indus Mobile Distribution Private Ltd v. Datawind Innovations Private & Ors*[6], the Court discussed its earlier verdicts in BALCO (supra), Enercon (supra) and Reliance Industries (supra) and discoursed that the Court has regularly restated that when a seat of arbitration has been decided upon and fixed, it is analogous to a clause of exclusive jurisdiction. Subsequently the court which has territorial jurisdiction over the seat would exercise supervisory powers over the arbitration. Moreover, that the 'juridical seat" is equivalent to the "legal place" of arbitration. It was thus held that in the present case, the moment the seat of arbitration was chosen as Mumbai, the Courts of Mumbai alone would have jurisdiction over all proceedings in the arbitration to the segregation of all other courts in the country.

In September 2018, the Supreme Court decided the matter of *Union of India v. Hardy Explorations and Production Inc.*[7] (*"Hardy Explorations"*), where the arbitration agreement on condition that the *"venue of conciliation or arbitration proceeding shall be Kuala Lumpur"* and that the *"arbitration proceedings shall be conducted in accordance with the UNCITRAL Model Law on International Commercial Arbitration of 1985*". Thereafter, a dispute arose; the parties instigated arbitration proceedings in Kuala Lumpur and lead in an award signed in Kuala Lumpur itself. The Court renowned that the parties had indeed not chosen the 'seat' of arbitration and neither had the arbitral tribunal resolute the seat of arbitration. Consequently, it was held that the choice of venue of arbitration did not point toward the seat of the arbitration. It further held that the venue could not "by itself" undertake the status of the seat save *something else is additional to it as a concomitant* and therefore, held that Indian courts had jurisdiction to hear a challenge to the award.

What requirements to be emphasized here is that the Supreme Court did not provide any precision on this issue but relatively gave a simple deduction that a chosen venue could not be treated as the seat of arbitration in the absenteeism of any supplementary factors demonstrating towards the intent for it to be the seat of the arbitration. This peculiarity or rather, certain parameters to aid such lucidity was brought into the open much later in the succeeding cases.

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[6] Indus Mobile Distribution Private Ltd v. Datawind Innovations Private & Ors (2017) 7 SCC 678

[7] Union of India v. Hardy Explorations and Production Inc. (2018) 7 SCC 334

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The Supreme Court reexamined this issue in *BGS SGS Soma JV v. NHPC Ltd.*[8] *(BGS Soma) case.* The Court recommended a test for prompting whether a chosen venue could be treated as seat of the arbitration or not. It set that choice of venue will be the choice of seat of the arbitration only when a named place is acknowledged in the arbitration agreement as the "*venue*" of "*arbitration proceedings*", where, the use of the expression "*arbitration proceedings*" signifies that the entire arbitration proceedings is to be steered at such place, as opposed to certain hearings; or if the arbitration agreement provides that arbitration proceedings "*shall be held*" at a particular venue, then that indicates arbitration proceedings would be affixed at such venue, and therefore, the choice of venue is also a choice of the seat of arbitration. This test would avail unless there are "*significant contrary indicia*" which recommend that the titled place would be simply the venue for certain proceedings and not the seat of the arbitration. In contrast, the chosen venue cannot be treated as the seat of arbitration if the arbitration agreement contains language such as "*tribunals are to meet or have witnesses, experts or the parties*" at a particular venue, rather, this would suggest that only hearings are to be directed at such venues.

This test was contrary to the code that was placed down in *Hardy Exploration; w*hile *that case* postulated that a preferred venue could not by itself take up the status of the seat, *this certain case* suggested that a chosen venue for arbitration proceedings would become the seat of arbitration in the nonexistence of any "*significant contrary indicia*". Nonetheless, in this case the court botched to emphatically lay down the aspects which institute *significant conflicting indicia* and, in that way, displace the inference that a chosen venue is actually the seat of arbitration. The Supreme Court in *BGS Soma* similarly held that its earlier decision in *Hardy Exploration* was *per incuriam* since it failed to trail the "*Shashoua principle*" approved by the five-judge bench decision in *BALCO*.

Much freshly, in March 2020, the Supreme Court as a final point well thought-out the issue of choice of seat in arbitration agreements in *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd*[9]. The question before the Supreme Court of India was whether the parties had agreed that the seat of arbitration is in Hong Kong and did the Supreme Court be short of jurisdiction to appeal the petition? The Court laid down that, the usage of the expression "place of arbitration" could not

[8] BGS SGS Soma JV v. NHPC Ltd.2019 SCC 1585
[9] Mankastu Impex Pvt. Ltd. v. Airvisual Ltd 2020 SCC Online SC 301.

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plump the target of the parties to label that place as the seat of arbitration and such intention had to be resolved from other clauses in the agreement amongst the parties and their conduct. The Supreme Court held that the choice of Hong Kong as the "place of arbitration" itself did not lead to the result that the parties had chosen Hong Kong as the seat of arbitration. Nevertheless, because the parties had also settled that such arbitration was to be administered in Hong Kong, the Supreme Court in due course held that the parties had chosen Hong Kong as the seat of arbitration.

Conclusion

The Arbitration and Conciliation Act, 1996 though, has been a precise Act for arbitration but still has lacked in providing a clear picture for 'place', 'seat' and 'venue' of arbitration. As the 'place', 'seat' and 'venue' are not particularly defined under the Act or as such segregated with each, it has been used synonymously. Further, it has only created confusion in the arbitration agreement and for the parties, advocates, arbitrators or judges. But these confusions were sought by the Indian courts through judicial case laws regarding 'place', 'seat' or 'venue'.

The courts interpreted the muddled arbitration agreement and have provided principles for when the place can be considered a seat and when venue. But there have been times when such principles have been either evolved or due to situation or circumstances have been dealt differently. Hence, it would be considerate if the Act be amended according to the 'seat' or 'venue' of arbitration and precise guidelines be added as to when it will be seat and when venue.