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CLARITY BETWEEN SEAT AND VENUE IN ARBITRATION[1]

ABSTRACT

In the backdrop of insufficient clarity available for seat and venue of arbitration this article aims to bring the one stop reading solution to clarify the intricacies of seat and venue which is the important constituents of an arbitration agreement.The article begins with briefly introducing the concepts and their relevancy in an arbitrationagreement. With that it focusses on the legislative provisions enumerated under Arbitrationand Conciliation Act 1996 which explains and regulates the concepts. Not only the articlestates the legal framework under the concerned statute but also discusses the loopholes andgave the detailed knowledge by breaking down the concepts into simpler interpretations.After that it gives detailed discussion on the evolution of seat and venue and it's journey ofclarification from time to time through a series of precedents and explained the newestamendment brought by Law Commission Report no. 246 to said issue. It has discussed all thelandmark judgments and principle governing the minute crucial aspects of seat and venue inarbitration. The article tried to cite case laws which includes judgments of both Foreign andIndian Courts so that it will give better understanding of the concepts in the context ofdomestic and cross-border jurisdictions.Lastly, the article gave the analysis and opinion of the author and its way forward in thecontinuing the cases of arbitration.

INTRODUCTION

Arbitration being another wing and the final stage of alternative dispute resolution mechanism means that the process of settlement of disputes between the parties through a quasi-judicial authority (herein arbitral tribunal) without dragging the case to lengthy procedures of the Courts. The first and foremost thing right after the parties agree to go for arbitration for settling their disputes in future and expressly mentions them in the contract it is of utmost importance to decide and clearly mention the seat and venue of their arbitration. Seat and Venue acts as a technical tool in the whole arbitration process as it deals with jurisdiction, choice of arbitral

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proceedings, law governing the entire arbitration process, power and scope of judicial interference in the matters of arbitration. Below we will discuss the conundrum of seat and venue of arbitration in a detailed manner.

FUNDAMENTALS OF SEAT AND VENUE

Initially, both the concepts may seem to be of have the same approach in law and same meaning which gives rise to many confusions. However, both of them are different and has evolved over the period of time as different Courts in India and abroad has defined their meaning, role and scope to make the roadmap of arbitration clearer.

Under Arbitration and Conciliation Act 1996, till now there is no such express provision that defines the seat and venue of arbitration. However, the Law Commission Report 246 in 2014 decided to bring the concepts of seat and venue by clearly mentioning them under section 20 of Arbitration and Conciliation Act 1996. As of now, the provision talks about the place of arbitration under section 20[2] where section 20(1) says that parties have the freedom to agree and settle their place of arbitration as per their convenience and on mutual terms.

Section 20(2) says that even parties are free to choose and agree on the procedure which is to be followed by the arbitral tribunal during their arbitration proceedings.

Section 20(3)says that the arbitral tribunal if not otherwise agreed by the parties may allow the parties to meet at any place that it is appropriate or convenient for them for consulting, hearing of witnesses, inspection of documents, etc.

This provision represents very insufficient knowledge and vague information regarding seat and venue of arbitration. In simple words decoding the word “seat” as “situs” of arbitration which acts as the epicenter of whole arbitration proceedings and govern three main aspects which are territorial jurisdiction of an arbitration matter, procedures to be followed and power of Courts to interfere in the matter of an arbitration. On the other hand, “venue” simply means the place where the hearings of the arbitration will be held.

Further breaking down into more simpler terms, seat of arbitration basically leads the role of supervisory jurisdiction and determination of procedural law or curial law that is to be followed in the entire arbitration process. Now this procedural law chosen by the parties has to be mentioned expressly in the arbitration agreement or in the arbitration clause so that right after the time when the disputes arise and comes before the arbitral tribunal, this law starts governing the whole arbitration matter. Some of the examples of procedural law of some distinctive institutional arbitral tribunals are which are often chosen by the parties are- the rules prescribed

[2] The Arbitration and Conciliation Act,1996,§ 20,No. 26, Acts of Parliament, 1996 (India)

by Singapore International Arbitration Centre (SIAC), International Chamber of Commerce, London Court of International Arbitration(LCIA), New Delhi International Arbitration Centre, *ad hoc* arbitrations before the High Courts will follow and enjoy the liberties enumerated under the concerned legislation.

Thus, seat lays down entire power and capacity of Courts to interfere, freedom and liberty of parties to choose the procedures and most importantly the governing law to be followed in cases of institutional or *ad hoc* arbitration. In fact, at international level the decision of seat of arbitration helps in determination of *lex arbitri*and curial law for the entire arbitration process.

Therefore, to magnify the difference between seat and venue, the role and scope of seat is much wider and heavier than the venue of arbitration which shows that the parties has to be very cautious while drafting their arbitration agreement or arbitration clause since the seat ends up as the governing law for the entire arbitration matter.

EVOLUTION OF "SEAT" AND "VENUE" IN ARBITRATION

In this context we have to consider a series of precedents and principle that has tried to define a clear concept and role of seat and venue in arbitration.

In the case of ***Bharat Aluminium Co. Vs Kaiser Aluminium Technical Service Inc.,***[3] disputes arose regarding non-performance of the contract and when the matter was referred to arbitration issues raised regarding governing law or the curial law for the arbitration agreement after the award was passed in favour of the appellants. The parties in this case chose London as their venue for arbitration, seat in England and prevailing Indian law as the governing law. However, English Arbitration law was made applicable to those proceedings in London thus lex fori (the law of the forum or venue in which a legal action is taken) was the English Arbitration Law and the substantive law for the arbitration was the prevailing Indian Law. The appellants challenged that English law cannot be made binding since the substantive law for the agreement is Indian law.

Hon'ble Supreme Court after going through the submissions held that the intention of the parties in choosing any place thereby referring it to "venue" and "seat" is to be examined thoroughly. In this case, the Court observed that the parties choose England to be the seat of arbitration which clearly shows that the proceedings initiated to decide the rights and obligations of the parties under arbitration clause or the arbitration agreement will be governed by the English Arbitration Law even though the substantive law for the contract is Indian Law. Also, the Apex Court found that parties even made reference to Glasglow as a venue which will

[3] Bharat Aluminium Co. Vs Kaiser Aluminium Technical Service Inc., MANU 2012 SCOR 6940

not impact the seat or the curial law in any way. The seat and place of arbitration is used interchangeably and in international commercial arbitration venue can be changed as per the convenience on mutual terms of the parties. Besides, Supreme Court upheld that no appeal filed under section 34 of the Act can be set aside on the basis of choice of seat and venue so as to determine the curial law and lex arbitri as application under section 34 falling under Part I of the Act can only be set aside for domestic arbitrations seated in India.

In the matter of *Enercon (India) Limited &Ors. Vs Enercon GmbH and Ors*[4], issues arose regarding anti-suit injunction and jurisdiction of English Court in this case. Briefly stating the facts of the case where parties in the contract has agreed to choose London as their venue of Arbitration without determining the seat of arbitration. However, in their contract they have agreed to be binded by Indian Arbitration law as their substantive law for the contract.

The Court after examining the clauses for seat and venue in the contract found that the parties chose *lex arbitri*as *curial law* that means that the arbitration proceedings will be governed by the Indian Arbitration law. This states that when there is no express mentioning about the seat of arbitration in the contract then the governing law or the substantive law of the contract which the parties agreed to apply on their contract will become the curial as in whole and not in parts for the arbitration in the case. Now, the Court held that the choice of selecting London as their venue is the convenient geographical location to hold the hearing of the arbitration and the English Courts have the concurrent jurisdiction to support the arbitration if need.

THE SHASHOUA PRINCIPLE

Next, we come to the Shashoua Principle which has evolved the ruling of England and Wales High Court (Commercial Division) in the case of *Shashoua Vs Sharma*[5]**,** where the claimants prayed before the Court to grant them anti-injection in the arbitration case but their agreement stated that the anti-injunction should be obtained on the basis of seat of the arbitration.

In this case, the parties chose London as their venue of arbitration without expressly mentioning the seat of their arbitration. Thus, the issue came before the Court that how the seat of arbitration will be determined in the absence of any expressive term in the contract?

Justice Cooke held that when there is expressive term of venue made by the parties in their arbitration agreement or contract without defining the seat for their arbitration then except anything contrary mentioned in the contract it is to be concluded that the jurisdiction of venue

[4] Enercon (India) Limited &Ors. Vs Enercon GmbH and Ors., MANU 0102 SC 2014
[5]Shashoua Vs Sharma, MANU 2009 UKCM 0160

will become the juridical seat in the case and the law of that jurisdiction will become the curial law for the entire arbitration proceedings.

Therefore, in this case London was the venue of the arbitration chosen by the parties and that London will become the juridical seat and the English Law will become the curial law for the *lex arbitri.*

This judgment became a rescue in the circumstances absence of crucial elements of jurisdiction of arbitration are absent concerning the conduct of arbitration.

However, in the case of Union*of India Vs Hardy Exploration and Production (India)*[6] this principle has been given negative reference in the context of Indian Arbitration. In this case, the parties chose Kuala Lumpur as their venue but did not mention the seat for their arbitration. After an appeal was filed before the Delhi High Court, the Court found that since the parties chose their venue as Kuala Lumpur and remained silent on the seat and that by only choosing venue will not automatically determine the seat of arbitration on the basis of venue. The Court deviating from the Shashuoa principle held that to become a seat from venue there has to be a positive act and something concomitant should be attached to it and thus any of the criteria has to be satisfied to construe venue as the seat of arbitration.

But again, in the case of *BGS –SGS SOMA*[7], same issue came before the Court regarding determination of seat in the absence of expressed term or clause and in presence of an expressed term about venue where it held that when venue is mentioned and award to be obtained at that venue, the venue becomes the seat of the arbitration provided that there is no such contrary provision is made with respect to the venue of the arbitration. This judgment reiterated the Shashuoa principle and overrule the judgment of Hardy Exploration.

In 2014 by Law Commission Report no.246 it has been notified that amendment to be brought to section 20 of Arbitration and Conciliation Act 1996 where which says that the word “place” is to be deleted and the words “seat” and “venue” is to be inserted before the word arbitration. Also, in section 20(1) to delete the word “place” after the words “agree on the” and add “seat and venue” and in section 20(3) to delete the word “place” after the words “meet at any” and add the word “venue”.

[6] Union of India Vs Hardy Exploration and Production(India), MANU 2018 SC 1046
[7] BGS SGS SOMA JV Vs NHPC Ltd, MANU 2019 SC 1715

This amendment will clearly define the seat and venue, that the parties may have a clear idea while choosing the conduct of their arbitration and thereby bringing focus on the technicalities and crucial role of seat and venue in arbitration.

CONCLUSION

The long discussion of this article clearly promotes the effort of the judiciary to remove the confusion between seat and venue in arbitration in cases where the clauses in the arbitration agreement are silent and vague. However, after the detailed discussion of the evolution of seat and venue it seems that the judgment held in Hardy Exploration is welcoming since it has brought the concept of criteria that is to be satisfied in cases of silent and vague clauses of seat in arbitration. This minute scrutiny of the essential elements will bring more solutions and scope to build strong and tight conditions for seat and venue so as to prevent any deviation or losses in commercial agreements. Lastly, in this confused environment the Law Commission Report no. 246 was the need of the hour to clearly dictate the concept and necessity of "seat" and "venue" in arbitration.