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Place v Seat v Venue of Arbitration: An Analysis

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INTRODUCTION

The Place-Seat-Venue of Arbitration is one of the latest and most prominent controversies of Indian Arbitral Jurisprudence. The controversy has arisen out of the vague terminology used in the Arbitration and Conciliation Act, of 1996, and by a number of conflicting decisions by the Supreme Court of India.

The Arbitration and Conciliation Act, 1996 does not use the words "seat" or "venue". Section 20 (1) of the Act states that the parties are free to choose the "place" of arbitration. Section 20(3) of the Act again mentions the word "place" but this time it refers to the location that the members consider appropriate for consultation. The distinction between place, seat, and venue has not been clearly brought out by the Act. This ambiguity in the provision has given birth to a number of controversies.

The conflicting decisions by the Supreme Court have not helped in clearing this confusion. The five Judge Bench in BALCO v Kaiser Aluminum, the Court overruled its decision in Bhatia International [¶58] and adopted a principle that was enunciated by the England & Wales High Court in Roger Shashoua v Mukesh Sharma (popularly known as the *Shashoua Principle*). However, cases like Union of India v Hardy Exploration and Makatsu Imptex took a deviation from the *Shashoua principle*, and cases like BGS Soma and Inox Renewables reiterated the *Shashoua Principle*. Since all of these last four decisions have been rendered by 3 Judges Bench, Benches of equal or lesser strength are often in a conflict to decide which principle to apply.

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WHAT IS PLACE, SEAT, AND VENUE OF ARBITRATION AND WHY IS IT IMPORTANT?

In *Enercon (India) Ltd. v Enercon GmbH*, the Supreme Court stated that:

"The location of the seat will determine the Courts that will have exclusive jurisdiction to oversee the arbitration proceedings. It was further held that the seat normally carries with it the choice of that country's arbitration/curial law." [¶89]

If the Arbitration Agreement provides that the Seat of the Arbitration is outside India, the Indian Courts cannot exercise supervisory jurisdiction over the passing of the award. The parties cannot approach an Indian Court for setting off an arbitral award if the seat of the said arbitration is outside India. In *BALCO v Kaiser Aluminium Technical Services Inc.*, the Supreme Court observed that "the Indian Courts do not have the power to grant interim measures when the seat of arbitration is outside India." The Court in this case further opined that "In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as the applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India." [¶161]

The terms "seat" and "place" are often used interchangeably in International Arbitration. This is because arbitration is usually governed by the law of the place where it is held. Both the New York Convention and the Geneva Protocol accept the territorial link between the place of arbitration and the law governing that arbitration.

However, there exists a distinction between "Seat" and "Venue". The "Seat" and "Venue" might not be the same in an arbitration. Once the seat is chosen, the venue might be chosen based on the convenience of the parties. In such a case, the Seat of arbitration remains unaffected by the geographical location of the Venue. The venue of the arbitration is merely the location where the arbitration proceedings are carried out.

The confusion between "seat" and "venue" arises when the arbitration agreement does not clearly distinguish between the two. In such cases, the arbitration clause makes a reference to the

venue of the arbitration but does not name a specific seat. The burden falls upon the Court to determine the seat of arbitration in such cases.

For the sake of this article, the Arbitral Jurisprudence post-BALCO era is divided into four parts: the *Shahsoua Principle* era, the Hardy Exploration Case, BGS Soma & Inox Renewables Cases, and the Mankastu Imptex Case.

THE SHASHOUA PRINCIPLE ERA (2012-17)

In 2012, the Supreme Court in *BALCO v Kaiser Aluminium* overruled *Bhatia International* in its entirety. The Supreme Court made the juridical seat the center of gravity [¶72]. The Court stated that courts at the seat will have exclusive jurisdiction and not the Courts where the cause of action arises [¶96]. The Court noted the territorial link between the place/seat of arbitration and the law governing the proceedings [¶74]. By making the seat the center of gravity, the Court essentially recognized party autonomy. The seat-based approach is in line with the scheme of the UNCITRAL Model Law on International Commercial Arbitration (1985 version).

This was also the first time the Court laid down an objective test to determine the seat of arbitration. The Court adopted the principle propounded by Justice Cooke in the England and Wales High Court's decision in *Roger Shashoua v Mukesh Sharma*. According to this principle, when an agreement explicitly designates the venue without expressly mentioning the seat, combined with a supranational body of laws and no significant contrary indicia, the venue can become a seat.

This principle was also adopted and applied in *Enercon India Ltd. v Enercon GmbH*. Although the Supreme Court overruled the *Bhatia Internationa*l case prospectively, it adopted a seat-centric approach in cases ruled by *Bhatia International*. An example of this is the *Union of India v* Reliance Industries case.

A confusion, however, arose in Para 96 of the Judgement which stated that courts of both the seat of arbitration as well as the place where the cause of action arises. This was contrary to what the rest of the judgement stated. This contradiction was dealt with in BGS Soma.

THE HARDY EXPLORATION CASE (2018)

Union of India v Hardy Exploration was a dispute between the Indian Government and an American oil exploration company. Arbitration proceedings took place in Kuala Lumpur and an award was passed in favor of the oil exploration company. The Government filed a Section 34 application in Delhi High Court for setting aside the arbitral award. The High Court dismissed the application stating that Indian Courts do not have jurisdiction as the seat of arbitration was in Kuala Lumpur. An appeal was filed before the Supreme Court and a three-judge bench heard the dispute.

The Supreme Court relying on the principles enunciated in *Bhatia International* and *BALCO*, stated that the seat of arbitration was in Delhi, India and Indian Courts can exercise supervisory jurisdiction over this arbitration [¶34]. It reasoned its decision by stating that in case if the venue is mentioned, the mentioned venue can become a seat provided that there was a prescription of *something else* [¶23]. Simply put:

Venue ≠ Seat

& Venue + Δ = Seat

Where Δ is *something else* that, depending upon its prescription, could make the venue the seat of arbitration.

The judgement has been heavily criticized by legal academicians and scholars. *Firstly*, the Supreme Court gave contradictory views on when a "place" becomes a seat. At Para 24, the Court says that a 'place' can become a seat if there are no conditions precedent. However, in Para 34 it states that a place becomes a seat if one or more condition precedents are satisfied. The Court uses the 2nd principle to reach its conclusion.

Furthermore, the application of the principle enunciated in *Bhatia International* has been criticized on the grounds that Bhatia International does not deal with the concept of a juridical seat but implied or explicit exclusion of Part I of the Arbitration & Conciliation Act. Scholars have accused the Court of taking a 'shortcut' to reach a conclusion.

Secondly, some scholars have questioned the manner in which the test to determine the seat has been applied. If the test laid down by the Court is applied, Kuala Lumpur should be the seat and not Delhi. This is because there are a lot of *'something else'* factors that the Court did not consider- like choosing Kuala Lumpur as the venue for disputes when the two disputing parties are based in India and the United States, the fact that the arbitral award was rendered in Kuala Lumpur itself and the fact that the clause mentioned that the 'arbitration proceedings' shall be held in Kuala Lumpur. The lack of reasoning to reach the conclusion that Delhi is the seat of arbitration is a gaping hole in this judgement.

BGS SGS SOMA & INOX RENEWABLES CASES (2019 & 2021): REITERATION OF SHASHOUA

In *BGS-SGS Soma v NHPC*, the Supreme Court had to decide whether New Delhi or Faridabad was the seat of arbitration. The award was rendered in Delhi and the respondent filed a Section 34 application in the District Court in Faridabad. The appellant opposed the petition stating that New Delhi was both the venue and seat of arbitration.

The Court decided that New Delhi was the seat of the arbitration. The judgement clarified Para 96 of the BALCO judgement, stating that the Paragraph should be read in a holistic manner with respect to the entire judgement. Reading the judgement in this manner, the Court stated that BALCO made it clear that the only seat courts will have jurisdiction [¶59].

To determine the seat, the Court adopted the Shashoua test as laid down in *BALCO*:

"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", combined 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. " [¶63]

Simply put:

Venue = Seat

Venue - $\Delta \neq$ Seat

Where Δ is that significant contrary indicia which takes away from the venue being the seat. This test was also applied in another two judge-bench decision in *Inox Renewables v Jayesh Electricals.*

Since arbitration proceedings were held in New Delhi and there were no significant contrary indicia to suggest that New Delhi was not the seat, the Court stated that the Courts of New Delhi will have supervisory jurisdiction over the passing of the arbitral award.

While the judgement has gone to a certain extent in clearing the mystery around the seat, it is not free from criticism. Scholars have seen this as judgement more of an academic exercise. While the Court went on to explain why *Hardy Exploration* is a bad law, this does not have any precedential value as Hardy Exploration had a bench of equal strength. The Court in this case should have referred the matter to a larger bench and should have put the matter to rest. The flaw in this judgement gave rise to another deviation in Mankastu Imptex.

MANKASTU IMPTEX CASE (2020)

In *Mankastu Imptex v Airvisual*, a Memorandum of Understanding (MoU) was signed between the Petitioner and the Respondent. Clause 17.2 of the MoU stated that any dispute arising between the two will be settled through "arbitration administered in Hong Kong." The MoU also mentioned that the place of arbitration will be Hong Kong. The petitioner filed a Section 11 application for the appointment of a sole arbitrator. A Three Judge Bench heard the issue.

The respondent contended that Hong Kong was both the venue and seat of arbitration, relying on Hardy Exploration. The Court agreed that Hong Kong was indeed the seat of arbitration. It reasoned its decision stating:

"It is well-settled that "seat of arbitration" and "venue of arbitration" cannot be used interchangeably. It has also been established that mere expression "place of arbitration" cannot be the basis to determine the intention of the parties that they have intended that place as the "seat" of arbitration. **The intention of the parties as to the "seat" should be determined from other clauses in the agreement and the conduct of the parties**." [¶20]

Applying the above test to the facts, the Court came to its decision stating:

"The agreement between the parties that the dispute "shall be referred to and finally resolved by arbitration administered in Hong Kong" clearly suggests that the parties have agreed that the arbitration be seated at Hong Kong and that laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award." [¶21]

The Court by stating that the place of arbitration cannot become a seat of arbitration until the parties have an intention to assign the place as the seat essentially deviates from the BALCO decision, which states that "place" and "seat' can be used interchangeably. Furthermore, the Court could have rendered a decision by harmoniously relying on both Hardy Exploration and BGS Soma. According to the Hardy Exploration Principle, Hong Kong would have been the seat since there was a '*something else*' factor- the fact that they have agreed to resolve disputes through "arbitration administered in Hong Kong" showed that Hong Kong was a venue as well as a seat of arbitration and that the entire arbitration proceedings were anchored in Hong Kong. According to the BGS Soma Test, Hong Kong would have been the seat since there were no significant contrary indicia postulating a different seat. The Court also does not refer to any precedent on juridical seats and does not follow any clear legal principle. This was another missed opportunity for the Court to clarify this matter.

THE WAY FORWARD

The confusion regarding venue, seat, and place can be clarified in the following ways:

Reference to a larger bench to decide the correctness of the decisions in *Hardy Exploration* and *Mankastu Imptex*

As discussed earlier, the decisions in these cases were different from what the Supreme Court ruled in *BALCO* and *BGS SGS Soma*. Three Judges and lower strength Benches are unable to decide which principle to apply clearly.

Amendment to the S. 20 of the Arbitration and Conciliation Act, 1996

The 246th Law Commission Report suggested replacing the word "place" with "seat" in Section 20(2) of the Act and "venue" in Section 20(3) of the Act. The confusion between seat, venue, and place led to the Mankatsu Imptex Judgement.

Better drafting of arbitration clauses

While drafting arbitration clauses, the drafter should specifically mention the "seat" of arbitration to prevent any dispute or disagreement from arising.