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The Seat and the Venue of Arbitration under the Arbitration and Conciliation Act, 1996: The Controversy Still Prevails

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ABSTRACT

Commercialization coupled with Globalization has changed the system as well as fashion of business transactions between the parties, where previously people were accustomed to dealing in domestic market that too with extreme caution, now they are eager and scrumptious to jump into the international markets, leading to large number of international business transactions. This in turn lead to rising number of disputes which may arise between people while carrying out trade, disputes like non-payment of price, escaping of excise duties, or dissatisfaction of contractual obligations due change in political policies or natural phenomena etcetera. Arbitration helps in resolving these disputes in relatively lesser time and cost as compared to litigation, though it has its own limitations. One such drawback of the Arbitration and Conciliation Act, 1996 has been discussed here in this article. The article aims to study the controversy between the 'seat' and the 'venue' of arbitration under the Arbitration and Conciliation Act, 1996 in a doctrinal manner with the aid of judicial interpretations on the subject.

I. INTRODUCTION

World has indeed become a small place after the globalisation. With drastic increase in commercial transactions, an urgent need has also arisen for a mechanism for quick and efficient method of adjudicating disputes, and this explains the rise of international commercial arbitrations in the modern era. Transactions between entities belonging to different nationalities invite the supervisory jurisdictions of their respective nations. Hence, it is in this context that it becomes important to explain the concept of seat and venue of arbitration under the Arbitration and Conciliation Act, 1996, judicial precedents that have comprehensively interpreted the 1996 Act, and the subsequent amendment to the 1996 Act in 2015.

II. INTERNATIONAL COMMERCIAL ARBITRATION

The Arbitration and Conciliation Act, 1996 defines the term "international commercial

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arbitration" under Section 2(1)(*f*).[2]

"international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

- ***(i)*** *an individual who is a national of, or habitually resident in, any country other than India; or*
- ***(ii)*** *a body corporate which is incorporated in any country other than India; or*
- ***(iii)*** *an association or a body of individuals whose central management and control is exercised in any country other than India; or*
- ***(iv)*** *the Government of a foreign country;"*

Due to the involvement of participants of different nationalities in international agreements, there is always an issue of conflict of laws between two or more jurisdictions. The doctrine of party autonomy plays a prominent role in avoiding such conflicts between jurisdictions. It permits the parties to choose the seat of arbitration, the venue of the arbitration and the law that is applicable to the contract itself.

Although the concerned issue pertains to conflict of laws and law of arbitration, as much as it is concerned with choice of law and arbitral proceedings, it is however crucial to also briefly discuss the law of contract for addressing the issue of legality of clauses in a contract which exclude jurisdiction of courts.

III. CONTRACT LAW

In India, it is a well-settled position that parties by a contractual agreement cannot oust the jurisdiction of courts absolutely, as such clauses are considered to be contrary to public policy and hence are void.[3] But, referring disputes to an Arbitral Tribunal instead of courts for adjudication is not barred. Such reference is permitted as it does not entirely oust the jurisdiction of courts. Resorting to arbitration only for some potential disputes create a mechanism for dispute resolution whereby questions of fact and law may be decided by an Arbitral Tribunal. But, this adjudication is finally and ultimately subject to a court's approval.

Lord Denning's observation in ***Lee* v. *Showmen's Guild of Great Britain***[4] summarizes the aforesaid position:

[2] S. 2(1)(*f*) of The Arbitration and Conciliation Act, 1996,
[3] *ABC Laminart (P) Ltd.* v. *A.P. Agencies*, (1989) 2 S.C.C. 163.
[4] Lee v. Showmen's Guild of Great Britain, (1952) 2 Q.B 329, 342 (CA).

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... parties cannot by contract oust the ordinary courts from their jurisdiction. They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to courts in case of error of law, then the agreement to that extent is contrary to public policy and void.

The Contract Act, 1872 protects contracts which refer disputes to arbitration from being declared void.[5] The parties being permitted to exclude jurisdiction of courts for adjudication of disputes, the next question that arises is regarding the permissibility to choose the law applicable to the contract and arbitral proceedings.

IV. APPLICABLE LAWS

As mentioned earlier, party autonomy is the cornerstone of the law of arbitration. The signatories to the contract are free to decide not only the law that is applicable to the contract, but also the law applicable to the arbitration agreement (lex arbitri), and the procedural law governing the arbitration (curial law).[6]

A. LAW APPLICABLE ON CONTRACT

A contract between parties creates obligations on them and requires a legal system in accordance with which such obligations may be fulfilled. The law governing the performance of such obligations under the contract may be different from the law that is applicable to the arbitration clause. The term "applicable law" or "proper law of the contract" is the law that governs the discharge of the contract. In case of any disputes arising, the Arbitral Tribunal applies the applicable law to determine the substantive disputes.[7] Applicable law or the proper law of the contract includes such terms which refer to a legal system in which a contract may be executed.

B. LAW APPLICABLE ON ARBITRATION AGREEMENT

A clause stating that parties to contract may refer to arbitration in case of a dispute arising between them is treated as a separate agreement from the main contract between parties.

[5] The Indian Contract Act, 1872; sec. 28.
[6] *NTPC* v. *Singer Co.*, (1992) 3 S.C.C. 551.
[7] *Arbitration of Commercial Disputes: International and English Law and Practice*, Andrew Tweeddale, Keren Tweeddale, pp. 180-181.

Although this clause is the part of the main contract, the clause stands on a different pedestal and therefore it is treated as a separate agreement between the parties. Hence, any dispute pertaining to the validity of the contract, does not leaves the arbitration agreement inoperative, except in some cases involving egregious fraud that perpetrates the main agreement itself.[8]

The law applicable to the arbitration clause can be classified in two categories, namely,

1. The juridical seat (lex arbitri), and
2. The curial law.

1. JURIDICAL SEAT OR LEX ARBITRI

Juridical seat of the arbitration or more commonly referred to as lex arbitri is the law that is applicable to the arbitration proceedings**. The lex arbitri determine the courts which may exercise supervisory jurisdiction over the arbitration proceedings.** Parties may choose a legal system which has no nexus with the parties simply to eliminate the possibilities of bias or unfamiliarity, that may exist in a system which naturally exercises jurisdiction over a party as the seat of arbitration proceeding,

The term "Lex arbitri" can be explained by referring to the judgment in *XL Insurance Ltd.* v. *Owens Corning*.[9] An American party *A* entered into a contract with a British party *B.* The law applicable on the contract was New York State law and the agreement to arbitrate was subject to the English Arbitration Act, 1996. Insured party *A* brought proceedings before the Delaware Court (USA) for indemnification of certain losses which were insured. *B,* the Insurer initiated proceedings in London seeking to restrain *A* from pursuing proceedings in Delaware. ***The English Court held that the choice of law being different from the lex arbitri would not invalidate the arbitration clause.*** Since the parties have resort to English Law for arbitration, the provisions of the English Arbitration Act, 1996 would be applicable and English Law shall **solely** govern the matters falling within the scope of the arbitration agreement/clause, including formal validity of arbitration agreement and the jurisdiction of the arbitrators.

2. CURIAL LAW

The procedural law applicable to the conduct of arbitration is known as the curial law. It is consistent with the procedural law in litigation. Mostly the curial law is always the same as lex arbitri. It governs the internal arbitration procedures like commencement of proceedings,

[8] *A. Ayyasamy* v. *A. Paramasivam*, (2016) 2 S.C.C. 386.
[9] (2000) 2 Lloyd's Rep 500, (2001) 1 All ER (Comm) 530.

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appointment of arbitrators, pleadings, manner of conducting evidence, etc.

V. Relevant Provisions under Arbitration and Conciliation Act, 1996 (A&C Act)

The A&C Act is bristled with vague and ambiguous provisions. The provisions of the A&C Act themself didn't incorporate the concepts of seat and venue of arbitration and the same have largely been developed by judicial precedents. Due to various pitfalls in the Act, the Law Commission submitted its 246th Report suggesting a surfeit of amendments radically reforming the entire A&C Act. Despite having recommended comprehensive changes, only few suggested amendments were actually enacted by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) (the 2015 Amendment).

Before adverting to the case laws which have supplied interpretations to the 1996 Act and the 2015 Amendment, a brief analysis of the provisions of the 1996 Act is obligatory to understand the lacunae in the legislation, the judicial precedents remedying the lacunae, and the new position of laws under the 2015 Amendment Act.

The A&C Act is divided into four parts. Parts I, II and IV of the 1996 Act govern arbitrations, and Part III governs conciliation. For the sake of the present article, Part I is relevant. Part I of the 1996 Act, explains all the provisions governing the conduct of arbitration proceedings taking place in India, and the extent of judicial intervention which may be sought by the parties to assist the process.

A conflict between two different jurisdictions would necessarily arise only in international commercial arbitrations. The term "international commercial arbitration" is defined under Section 2(1)(*f*) of the 1996 Act and is self-explanatory. The provisions relevant for understanding seat and venue of the arbitration under the 1996 Act are Sections 2(2) and 20. Section 2(2) reads as follows:

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

On a bare reading of the said section, it appears that the A&C Act was applicable only to arbitrations which were taking *place* in India. Whether "place" meant seat (conferring jurisdiction to Indian courts) or merely venue was clearly ambiguous, calling for judicial interpretation. Further, Section 20 of the same Act also in a similarly ambiguous 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.

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(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.

The word "place" in the Section 20 of the Act necessarily should connote different meanings in the sub-section (2) and (3). A bare perusal of this section would imply that the parties are at liberty to choose only the "place" (meaning venue) of arbitration and nothing further [refer sub section (3)]. This thoroughly undermines and restricts the autonomy of parties to choose the convenient legal systems and the manner in which arbitrations can be conducted [refer sub section (2)].

VI. Judicial Interpretation of the Section 2(2) and Section 20 of the Arbitration and Conciliation Act, 1996

The concept of party autonomy under Section 20 of the A&C Act was ultimately synthesized by the Supreme Court by furnishing it with proper interpretations. As a result, an analysis of the judgments is vital to understand the evolution of the 1996 Act.

A. Bhatia International v. Bulk Trading SA[10]

Brief facts of the case are that the parties had entered into a contract wherein the arbitration clause said that the arbitration was to be according to the rules of International Chamber of Commerce (ICC). Disputes arose between the parties and the respondent initiated the arbitration proceedings at ICC. In addition to arbitral proceedings the respondent also filed an application under Section 9 of the A&C Act seeking an injunction against the appellants restraining them from alienating in any manner their business assets and properties. **The District and High Court both held that the courts in India have jurisdiction to adjudicate the application despite the "*place of arbitration*" being outside India.** These orders were challenged before the Supreme Court. Referring to Section 2(2) of the A&C Act, the contention raised by the appellant before the Supreme Court was that, unless the international commercial arbitration is taking place in India, Part I will not apply.

According to the interpretation cast by the Supreme Court, an international commercial

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

arbitration where an Indian party is involved, being proceeded with in any part of the world, would confer jurisdiction on Indian courts to exercise powers under Part 1 of the 1996 Act.

Although the intention of the Court was noble so far as it wanted to grant parties a remedy to secure or freeze assets which would in the future help them to realize their claims, the consequences were far reaching.

Rightly, a Constitutional Bench of the Supreme Court in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc***. overruled this judgment.

B. BHARAT ALUMINIUM COMPANY V. KAISER ALUMINIUM TECHNICAL SERVICES INC. (BALCO CASE)[11]

The Supreme Court, while dealing with the poorly drafted Arbitration and Conciliation legislation, vide this judgment provided conceptual clarity to the legislation with respect to seat and venue of the arbitration. The Supreme Court interpreted the word "place" in the impugned Sections to mean "seat" or "venue" depending on the section in which the word was used. The Court while dealing with Sections 2(2) and 20, very intricately laid out the concept of seat and venue, which have already been discussed above in the article.

Expressly overruling the interpretations of Section 2(2) in *Bhatia International case*[12], the Court observed that the Section has to be interpreted to mean **that Part I will apply only when the seat/place of arbitration is in India,** restoring the distinction between seat and venue. Further explaining the doctrine of seat and venue under the A&C Act, **the court clarified that the term "place" used in Sections 20(1) and (2) would connote "*seat*" and the term "place" used in Section 20(3) would connote "*venue*". Reading Section 2(2) with Section 20, the Court inevitably concluded that the Act has no extraterritorial application.**

The Court was aware of the fact that the legislation being seat-centric, parties will be rendered remediless in case they want to secure the assets of the party against which a claim lies, by filing an application under Section 9. However, providing the remedy of Section 9 to parties who have chosen the seat of arbitration to be outside the country would involve interpreting Section 9 in a manner that it was never intended to be interpreted. Any other interpretation being conferred on Section 9 would only amount to judicial overreach and therefore the court rightly stated that such errors, if any, are matters to be redressed by the legislature.

[11] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., (2012) 9 S.C.C. 552.
[12] Bhatia International v. Bulk Trading SA, (2002) 4 S.C.C. 105.

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Subsequently the Supreme Court in its judgment in ***Enercon (India) Ltd.* v. *Enercon GmbH***,[13] and another judgment in ***Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.,***[14] restated and further established the law laid down by BALCO. ***Enercon case***[15] elucidated the position of law in case where the parties have failed to or improperly mentioned the law applicable to the arbitration agreement. The court, referring to the judgment in ***Naviera Amazonica Peruana S.A v. Compania Internacional de Seuros del Peru***[16] delivered by Court of Appeal Before Lord Justice Kerr, Lord Justice Russell and Sir Denys Buckley, **adopted the "closest and most intimate connection test". According to this test when it is unclear as to which law is applicable to the arbitration agreement, the intention of the parties is essential in determining the seat. Further, the legal system in which the arbitration is taking place or the system which has the closest and most intimate connection with the arbitration proceedings is relevant.**

VII. LAW COMMISSION OF INDIA'S REPORT NO. 246

The Law Commission of India in 2014 suggested numerous amendments to the 1996 Act, which would radically change the arbitration jurisprudence developed in India. The Report discussed intricately the need to amend Sections 2(2) and 20. Changes were suggested like replacing the word "place" with the words "seat" and "venue", in accordance with the explanation provided by the Apex Court in *BALCO case*.

The amendment further proposed to add a proviso to Section 2(2) permitting parties to choose to remain under the supervisory jurisdiction of Indian courts. The proviso was suggested to make Section 2(2) a repealable provision in order to extend the doctrine of party autonomy. The recommended proviso read as follows:

Provided that subject to an express agreement to the contrary, provisions of Sections 9, 27, 37(1)(a) and (3) shall also apply to international commercial arbitration, even if the seat of arbitration is outside India, if an award made, or that which might be made in such place would be enforceable and recognized under Part II of this Act.

The Report further suggested replacing the word "place" in Section 20(1) with the words "seat" and "venue", replacing the word "place" with "seat" in Section 20(2) and with "venue" in Section 20(3). However, these amendments were not enacted.

[13] Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 S.C.C. 1.
[14] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2016) 4 S.C.C. 126.
[15] Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 S.C.C. 1.
[16] Naviera Amazonica Peruana S.A v. Compania Internacional de Seuros del Peru, (1988) 1 Lloyd's Rep 116 (CA).

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VIII. 2015 Amendment to Arbitration and Conciliation Act, 1996

The 2015 Amendment to A&C Act is not relevant for the present subject of the article at all, albeit it is essential to state that the conducive for the philosophy of arbitration. The Assembly debates contain absolutely no discussions on any questions of law, and is mostly confined to policy of the subject. The 1996 Act has been subject to constant judicial scrutiny and various interpretations of the provisions of the 1996 Act find their rationale in judgments. Despite such history of constant judicial intervention for supplying interpretation, none of the problems concerning the legal ramifications of the amendment were discussed in Parliament.

The Law Commission Report had suggested certain changes which would have rendered the arbitration process easier and more flexible. Not having incorporated the substantial changes suggested by the LC's Report, the legislation once again remains to be in flux, necessitating constant judicial interpretation.

Not all the amendments discussed hereinabove have been incorporated in the 1996 Act. The Amendment Act has, however, incorporated the proviso to Section 2(2) suggested by the amendment. Inclusion of the proviso does not fundamentally alter the nature of the 1996 Act, which, as per *BALCO case* is a seat-centric legislation. Having granted the parties the autonomy to choose to retain the jurisdiction of Indian courts, the amendment has redressed the lacuna that existed in the 1996 Act. The parties involved in foreign seated international commercial arbitrations can file proceedings under Section 9 in order to secure the assets which may be necessary to realize their claims.

IX. Position after the Amendment of 2015

A. Hardy Exploration Case

In September 2018, the Apex Court delivered ***Union of India v. Hardy Exploration and Production (India) Inc***[17]**.**, in this case, the parties had entered into a production sharing contract containing an arbitration agreement. The arbitration agreement provided that the "*venue of conciliation or arbitration proceedings… unless the parties otherwise agree, shall be Kuala Lumpur…*" and that "a*rbitration proceedings shall be conducted in accordance with the UNCITRAL Model Law on International Commercial Arbitration of 1985…*". After disputes arose between the parties, they commenced arbitration proceedings which were held in Kuala Lumpur and resulted in an award signed in Kuala Lumpur. Union of India challenged the award under the Indian Arbitration and Conciliation Act, 1996 before the High Court of

[17] Union of India v. Hardy Exploration and Production (India) Inc, (2019) 13 SCC 472.

Delhi. It contended that the arbitration agreement did not specify the seat of arbitration and referred to the venue of arbitration only. Therefore, Kuala Lumpur was merely the venue of arbitration and New Delhi was the seat of arbitration.

The Supreme Court held that the parties had not agreed upon the **seat of arbitration** and the arbitral tribunal had also not determined the seat of arbitration in this case. It also clarified that the choice of Kuala Lumpur as the venue of arbitration did not imply that Kuala Lumpur had become the seat of arbitration. **According to the Supreme Court, the venue could not by itself assume the status of the seat; instead a venue could become the seat only if "*something else is added to it as a concomitant*".** The Supreme Court therefore held that Indian courts had jurisdiction to hear a challenge to the award.

The decision in *Hardy Exploration* is of limited assistance because it does not clearly delineate the concepts of "place", "seat" and "venue". This decision of the Supreme Court ultimately did not provide any substantial clarity on this issue except the simple conclusion that a chosen venue could not be treated as the seat of arbitration in the absence of additional factors indicating that such chosen venue was intended to be the seat of arbitration.

B. SOMA JV CASE

Thereafter, in December 2019, the Supreme Court revisited this issue in ***BGS SGS Soma JV v. NHPC Ltd.,***[18] which concerned an arbitration agreement stipulating that "*Arbitration Proceedings shall be held at New Delhi/Faridabad, India*…" The Supreme Court prescribed the following bright-line test for determining whether a chosen venue could be treated as the seat of arbitration:

1. If a named place is identified in the arbitration agreement as the "*venue*" of "*arbitration proceedings*", the use of the expression "*arbitration proceedings*" signifies that the entire arbitration proceedings (including the making of the award) is to be conducted at such place, as opposed to certain hearings. In such a case, the choice of venue is actually a choice of the seat of arbitration.
2. In contrast, if the arbitration agreement contains language such as "*tribunals are to meet or have witnesses, experts or the parties*" at a particular venue, this suggests that only hearings are to be conducted at such venue. In this case, with other factors remaining consistent, the chosen venue cannot be treated as the seat of arbitration.

[18] BGS SGS Soma JV v. NHPC Ltd., (2019) S.C.C. Online SC 1585.

3. If the arbitration agreement provides that arbitration proceedings "*shall be held*" at a particular venue, then that indicates arbitration proceedings would be anchored at such venue, and therefore, the choice of venue is also a choice of the seat of arbitration.
4. The above tests remain subject to there being no other "*significant contrary indicia*" which suggest that the named place would be merely the venue for certain proceedings and not the seat of arbitration.
5. In the context of international arbitration, the choice of a supranational body of rules to govern the arbitration (for example, the ICC Rules) would further indicate that the chosen venue is actually the seat of arbitration. In the context of domestic arbitration, the choice of the Indian Arbitration and Conciliation Act, 1996 would provide such indication.

The bright-line test prescribed in *Soma JV* was contradictory to the principle laid down in *Hardy Exploration case.* While *Hardy Exploration* laid down that a chosen venue could not by itself assume the status of the seat of arbitration in the absence of additional indicia, *Soma JV* prescribed that a chosen venue for arbitration proceedings would become the seat of arbitration in the absence of any "*significant contrary indicia*".

Although the bright-line test prescribed in *Soma JV* provided much needed clarity, it was itself frustrated by some problems. The Supreme Court did not specify which factors constitute "*significant contrary indicia*" and thereby contemplated the conclusion that a chosen venue is actually the seat of arbitration. It also did not consider whether the existence of a jurisdiction clause in favour of the courts of a place other than the chosen venue or the choice of curial law of a place other than the chosen venue constituted "*significant contrary indicia*".

In addition, the Supreme Court completely adopted the "*Shashoua principle*", a principle that had first been formulated and applied in the specific context of London arbitration. This principle was articulated by the High Court of England and Wales in ***Roger Shashoua and Ors. v. Mukesh Sharma,***[19] wherein the Court held that the chosen venue (London) was the seat of arbitration because the parties had: (a) chosen London as the venue of arbitration; (b) not designated any other place as the seat of arbitration; (c) chosen a supranational body of rules to govern the arbitration, and (d) there were no contrary indicia. The High Court's decision was premised on London arbitration being "*a well-known phenomenon which is often chosen by foreign nationals with a different law*". This underlying rationale evidently did not

[19] Roger Shashoua and Ors. v. Mukesh Sharma, [2009] E.W.H.C. 957 (Comm).

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apply in the Indian context.

It may be noted that the Supreme Court in *Soma JV* also held that its earlier decision in *Hardy Exploration* was *per incuriam* since it failed to follow the "*Shashoua principle*" already approved by the five-judge bench decision in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services.***[20] As a result, it appeared that *Hardy Exploration* was no longer good law and *Soma JV* would hold the field instead.

C. MANKASTU IMPEX CASE

Finally, in March 2020, the Supreme Court again considered the issue of choice of seat and venue in arbitration agreements in ***Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.***[21]

In this case, Airvisual (a Hong Kong company) and Mankastu (an Indian company) had entered into a MOU containing an arbitration agreement. The arbitration agreement provided that "a*ny dispute, controversy… shall be referred to and finally resolved by arbitration administered in Hong Kong*" and "t*he place of arbitration shall be Hong Kong…*". The governing law clause in the MOU provided that "t*his MOU is governed by the laws of India… and courts at New Delhi shall have the jurisdiction*." After disputes arose between the parties, Mankastu approached the Supreme Court of India under the Indian Arbitration and Conciliation Act, 1996 for appointment of a sole arbitrator.

Mankastu contended that since Indian law was the governing law and courts at New Delhi had jurisdiction, hence, the seat of arbitration was New Delhi, and accordingly, the Supreme Court could appoint a sole arbitrator. It further said that Hong Kong was only the venue of arbitration and not the seat of arbitration and relied on *Hardy Exploration case* for this purpose.

On the other hand, Airvisual contended that since the arbitration agreement provided that the place of arbitration shall be Hong Kong and such arbitration shall be administered in Hong Kong, the seat of arbitration was Hong Kong. Accordingly, Indian courts had no jurisdiction to appoint a sole arbitrator. It relied on *Soma JV* for this purpose.

In the response to above contention, Mankastu incorrectly argued that since *Hardy Exploration case* and *Soma JV case* were both judgments from a three-judge bench, *Soma JV* could not have decided that *Hardy Exploration* was *per incuriam* and therefore *Hardy Exploration case* continued to be good in law.

The Supreme Court, instead of decisively settling the controversy by affirming *Soma JV*,

[20] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, (2012) 9 S.C.C. 552.
[21] Mankastu Impex Pvt. Ltd. v. Airvisual Ltd, 2020 S.C.C. OnLine S.C. 301.

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decided to sidestep it altogether. **The Court laid down that, the use of the expression "place of arbitration" could not decide the intention of the parties to designate that place as the seat of arbitration and such intention had to be determined from other clauses in the agreement between 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. **Though, because the parties had also agreed that such arbitration was to be administered in Hong Kong, the Supreme Court ultimately held that the parties had chosen Hong Kong as the seat of arbitration.**

X. CONCLUSION

The result in *Mankastu Impex case* is correct insofar as Hong Kong was determined to be the seat of arbitration, but the Supreme Court's avoidance towards affirming the position of law laid down *Soma JV case* has cast doubt on the precedential value of *Soma JV*. Furthermore, the Supreme Court did not explicitly follow *Hardy Exploration case*, albeit, it seemed to have adopted a similar approach in reaching its conclusion, **particularly by emphasizing the need for additional evidence of the intention of parties' rather than the mere use of the expression "place of arbitration".**

As a result, it is unclear whether *Hardy Exploration* remains good in law or the bright-line test in *Soma JV* holds the field. According to me, the bright-line test laid down in *Soma JV* is certainly clearer, administered with more objectivity and aligned with the principle of party autonomy. Therefore, this controversy continues till Supreme Court decides these issues at the next suitable opportunity.

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