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Choice of Seat and Its Significance

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ABSTRACT

Arbitration is the preferred mode of dispute resolution for international commercial disputes as it facilitates speedy disposal of the dispute with the added benefit of party autonomy. The principle of party autonomy is the quintessence of arbitration and permits parties to choose, by agreement, the legal framework governing the arbitration proceeding and the courts that exercise supervisory jurisdiction over the proceedings. The "seat of arbitration" is a vital element of an arbitration agreement and signifies the legal domicile of the arbitration. By designating the seat, the parties implicitly decide the procedural law of arbitration and the supervisory jurisdiction of the national courts. The concept of the seat of arbitration and its significance are examined in this article.

Keywords: *seat, seat of arbitration, place of arbitration.*

I. INTRODUCTION

Arbitration has become the preferred mode of dispute resolution, particularly in cases of international commercial dispute, as it offers speedy disposal of disputes by circumventing long, drawn-out legal battles. Arbitration curtails the jurisdiction of courts over any dispute covered under an arbitration agreement; however, it does not mean that the Courts have no role to play in an arbitration proceeding. The Courts retain supervisory jurisdiction over arbitration proceedings for the purpose of implementing arbitral awards, challenging and setting aside arbitral awards and granting interim relief.

Unlike litigation, in which the jurisdiction of the court is determined on the basis of the place at which the cause of action arose or on the basis of the place at which the parties reside or carry on business, in arbitration, the parties are free to choose the court which will exercise supervisory jurisdiction over the arbitration proceedings. The principle of party autonomy which is the quintessence of arbitration, allows the parties to choose the 'Seat of Arbitration', which establishes the legal framework governing the arbitration proceeding and the jurisdiction of the court. If the arbitration agreement contemplates a supranational body of Laws which is often the case in international commercial agreements, the seat of arbitration is pivotal for identifying the Lex Arbitri or the curial law and the supervisory court. However, despite its importance, Arbitration agreements do not always unequivocally specify the seat of arbitration,

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leading to uncertainty regarding the procedural law that is applicable to the arbitration proceedings. In such cases, it has been left to the Courts to interpret the arbitration agreement and determine the seat of arbitration. This article will discuss the concept of the Seat of Arbitration and the judiciary approach in identifying the seat of arbitration in the absence of express agreement between the parties.

II. THE CONCEPT OF SEAT

The term "seat of arbitration" is not uniformly applied across the board, and the term "place of arbitration" is used interchangeably with "seat of arbitration". English law uses the terminology “seat of arbitration” and the UNCITRAL model law employs the term “place of arbitration”; however, the English concept of "seat of arbitration" is the same as "place of arbitration" under the UNCITRAL model law.

The UNCITRAL model law on commercial[2] arbitration under Article 20 provides that the parties are free to choose the “Place of Arbitration”, it further states that the arbitral tribunal may meet at any convenient place for the purpose of consultation among its members, hearing witnesses, experts, or the parties, or for inspection of goods, other property, or documents.[3] Article 1(2) provides that the provision of Articles 8, 9, 17 H, 17 I, 17 J, 35 and 36 apply only if the place of Arbitration is in the territory of the state. [4] A bare reading of the above provisions makes it abundantly clear that the "seat of arbitration" or "place of arbitration" does not merely refer to the venue or location at which the arbitration proceedings are held, but rather it refers to the juridical seat of the arbitration.

The United Kingdom’s Arbitration Act, 1996 defines the seat of arbitration as the juridical seat of the arbitration designated— (a)by the parties to the arbitration agreement or (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or (c)by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties’ agreement and all the relevant circumstances.[5]

The “arbitral seat” or “place of arbitration” is a legal construct, not a geographic location. The arbitral seat is the nation where an international arbitration has its legal domicile or juridical home. [6] The seat of Arbitration, therefore, denotes the place at which the arbitration is legally

[2] UNCITRAL Model Law on International Commercial Arbitration 1985: With Amendments as Adopted in 2006, United Nations Publications, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (hereafter UNCITRAL Model law)
[3] UNCITRAL Model law, Article 20
[4] UNCITRAL Model law, Article 8
[5] Arbitration Act 1996 (c 23), § 3, Acts of Parliament, 1996 (UK).
[6] Gary b. born, International arbitration: law and practice (Kluwer Law International BV 2012)

centred and is intended to be its centre of gravity.[7]

III. DETERMINATION OF SEAT

The seat of arbitration determines the procedural law governing the arbitration proceedings and the jurisdiction of the supervisory court; therefore, a well-drafted arbitration agreement must clearly and unequivocally specify the seat of arbitration. However, more often than not, arbitration agreements are ambiguous in specifying the "seat of arbitration," leading to conflict between the parties. In such cases, it is left to the courts to interpret the arbitration agreement and identify the seat. There is no universally accepted rule or test for determining the seat of arbitration; hence, the courts, in deciding on the question of "seat of arbitration," will take into consideration the intention of the parties, the terms of the contract, and the arbitration agreement.

The Supreme Court of India, in the case of *Roger Shashoua V. Mukesh Sharma*,[8] where the arbitration agreement provided that the arbitration be conducted according to ICC rules in Paris and that the venue shall be London. The Court accepted the principle laid down by English Courts in the Shashoua case and held that:

"*When there is an express designation of the arbitration venue and no designation of any alternative place as the seat, combined with a supernational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is that the venue is the juridical seat and English law the curial law."*[9]

In the case of *Bgs Sgs Soma Jv vs Nhpc Ltd*[10] the Supreme court of India observed that "*whenever there is the designation of a place of arbitration in an arbitration Clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place……..The fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a Clause designates a "seat" of*

[7] Bharat Aluminium Co. Ltd. V. Kaiser Aluminium Technical Service Inc, (2012) 9 SCC 552
[8] (2017) 14 SCC 722
[9] Roger Shashoua & Others V. Mukesh Sharma & Others , (2017) 14 SCC 722
[10] (2020) 4 SCC 234

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the arbitral proceedings. In an International context, if a supranational body of Rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996, as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration."[11]

In its recent judgement, the Supreme Court of India deviated from its decision in *Shashoua* and *BGS Soma* and held that *"The 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."*[12] *- Mankastu Impex Private Limited vs Airvisual Limited*

The English Courts have placed reliance on the nexus between the seat and Lex arbitri in order to determine the seat of Arbitration in the absence of express agreement between the parties. In *Naviera Amazonica Peruana SA v Cia Internacional de Seguros del Peru*[13] case, The arbitration clause provided that disputes shall be settled by arbitration in London or Lima and that the arbitration will be conducted according to the laws of London. The court of Appeal held that the seat of arbitration is London and observed that:

"In the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also to be the 'seat' of the arbitration . . . A further consequence is then that the Courts which are competent to control or assist the arbitration are the Courts exercising jurisdiction at X."[14]

There is no hard and fast rule for determination of the seat of arbitration; if the parties have not agreed on the seat, the courts will refer to the parties' choice of curial law or lex arbitri, the jurisdiction clause in the agreement, or clauses designating venue to infer the seat of arbitration.

IV. SIGNIFICANCE OF SEAT

The significance of the place of arbitration lies in the fact that, for legal reasons, the arbitration is to be regarded as situated in that state or territory. It identifies a state or territory whose laws will govern the arbitral process.[15] The legal consequence that flows from selecting the seat of

[11] Bgs Sgs Soma Jv vs Nhpc Ltd, (2020) 4 SCC 234
[12] Mankastu Impex Private Limited vs Airvisual Limited
[13] (1988) 1 Lloyd's Rep 116 (CA)
[14] Ibid
[15] P.T. Garuda Indonesia v Birgen Air, (2002) SGCA 12

arbitration is the implied selection of Curial law (procedural law of arbitration) and the supervisory jurisdiction of the national Courts. *"An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause. Not only was their agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration."*[16]

The curial law of the arbitration is determined by the seat of arbitration. In international commercial arbitration, it is necessary that the conduct of the arbitral proceedings is connected with the law of the seat of arbitration, which would regulate the various aspects of the arbitral proceedings. The parties have the autonomy to determine the choice of law, which would govern the arbitral procedure, which is referred to as the lex arbitri and is expressed in the choice of the seat of arbitration.[17] The courts at the seat of arbitration exercise supervisory or "primary" jurisdiction over the arbitral proceedings, except if the parties have made an express and effective choice of a different lex arbitri, in which event, the role of the courts at the seat will be limited to those matters which are specified to be internationally mandatory and of a nonderogable nature. [18] It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award.[19]

The New York Convention and the UNCITRAL model law on commercial arbitration confer on the courts of the seat the exclusive jurisdiction to set aside the arbitral award on the grounds available under the national laws of the seat. The India Arbitration and Conciliation Act, 1996, which is based on the UNCITRAL model law, incorporates the territoriality principle under Section 2(2) and provides that the provision available under section 34 for setting aside an arbitral award shall not apply to foreign seated arbitration.

Thus, the seat of arbitration is vital for deciding the supervisory jurisdiction of national courts and determining the proper law of conduct of the arbitration.

V. CONCLUSION

The seat of arbitration is a vital element of the arbitration agreement. It signifies the place of legal domicile for international commercial arbitration. The choice of seat imports the national laws of the seat as the procedural law of arbitration and confers supervisory jurisdiction over

[16] Shashoua case [2009] 2 All ER (Comm) 477.
[17] Government of India v Vedanta Ltd28, 2020 SCC Online (SC) 749
[18] Ibid
[19] C v. D (2008) Bus LR 843

the proceeding on the national courts of the seat. Therefore, it is imperative that an arbitration agreement must expressly and unequivocally designate the seat of Arbitration.

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