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Critical Analysis of the Jurisprudential Development of Seat versus Venue Debate in Arbitration

HIRAL KETAN JOSHI[1]

ABSTRACT

The significant increase in the number of choices for arbitration centres across the globe has made it critical for the parties to the arbitration agreement to make the choice after careful evaluation and specific description of the same in the agreement. The fundamentals of "seat" and "venue", even though significant in arbitration matters, have not been specified in the legislation. The two words have been through a long journey through various judicial interpretations and tests to determine what can be considered as a seat and venue. This article is an analytical study of the said journey of interpreting the two terms through multiple court decisions. This article throws light on the importance of seat and venue in arbitration matters, the legislative analysis, a detailed analysis of the various tests established by the judiciary to determine the existence of seat or venue, and a conclusion to establish the meaning and interpretation of Seat and Venue that exists and is applicable at present.

I. INTRODUCTION

The choice of seat and venue of arbitration has been a matter of discussion in India in recent times and has seen a multitude of opinions through various judicial pronouncements. Although the legislation nowhere defines the terms "seat" or "venue" anywhere, their significance cannot be undermined due to their implications in the case of international as well as domestic arbitration. The implication of determining the seat of arbitration is highly critical in the formation of a strong legal foundation for the arbitration proceedings. Conceptually "seat" means the courts of a place that shall have the exclusive jurisdiction to administer and oversee the arbitral proceedings emerging from the arbitral agreement. Conversely, "venue" is merely the geographical location where the stakeholders shall meet for the purpose of arbitral proceedings and shall have no legal significance of its own. The seat of an arbitration is, undoubtedly, one of the most important aspects of an arbitration clause, as are the proceedings that result from the agreement, which not only specifies the court's jurisdiction for

[1] Author is a student at Symbiosis Law School, Pune, India.

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the recognition and enforcement of the conduct of arbitration proceedings but also which court system will have establish acceptable quality over the arbitration and the extent of those powers, particularly in relation to award enforcement. The site or venue where the proceedings or other portions of the arbitration proceedings occur or take place may or may not be the Seat of Arbitration. Even though the distinction between "venue" and "seat" of arbitration is generally acknowledged in international commercial arbitration, the sloppy language of arbitration clauses can muddle this distinction. However, the problem arises when either of the two places has not been clearly and distinctly mentioned in the arbitral agreement. Most often, there are pathological errors in drafting the clauses for an arbitration agreement. The simplest circumstances are such cases in which the parties' agreement overtly or implicitly refers to a single location. 'Multi-directional' scenarios, on the other hand, are such cases in which the agreement refers to more than one probable location and are more problematic. While certain instances are straight-jacketed, what constitutes a choice by the parties becomes more challenging if the parties' agreement incorporates clauses pointing in different ways. In the former type of situation, courts have created a set of interpretation principles that address the majority of the issues raised by potentially confusing terms. However, in the latter kind of scenario, the courts have not addressed the identification of the arbitral seat consistently; they have not established a clear doctrinal framework, and it can be subjected to criticism. This analysis is a critical look into the development of the court's perspective and application of mind through tests to establish the jurisdiction of courts that have developed in India over the years. This article attempts to present an outline of the significance of the concept of Seat of Arbitration in International Commercial Arbitrations in order to discuss the unending confusion and development of the underlying principles of and the difference between the seat and venue of arbitration under arbitration disputes governed by the Arbitration & Conciliation Act, 1996.

II. LEGISLATIVE ANALYSIS

(A) Legislative History

The legislative analysis of arbitration laws in India would be incomplete without a brief introduction to the history and evolution of legislation on arbitration in India. Arbitration in the legislative framework was introduced in India in the nineteenth century and given formal statutory recognition in the year 1899 and was made applicable only to the then presidencies of Madras, Calcutta, and Bombay of British India.[2] Later in the Code of Civil Procedure (CPC),

[2] Indian Arbitration Act, 1899, No.9, Acts of Governor General of India in Council, 1899 (India).

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1908, recognition was furthered to arbitration as a mode of dispute resolution in regions other than the ones covered in the 1899 Act under Section 89.[3] Due to the arbitrariness and technical difficulties, the Act of 1899 was repealed to bring into effect the Arbitration Act of 1940.[4] This Act of 1940 inculcated certain features of Section 89 of the CPC, 1908, as mentioned earlier. However, one of the major criticisms faced by this legislation was that it failed to address the enforcement of foreign awards and only contained provisions for the enforcement of domestic arbitration. Resultantly, it could not achieve satisfactory outcomes. It was Justice D.A. Desai who raised concerns about the defects of the 1940 Act. He said:

"Interminable, time-consuming, complex and expensive Court procedures impelled jurists to search for an alternative Forum, less formal, more effective, and speedy for resolution of disputes, avoiding procedural claptrap and this led them to Arbitration Act, 1940. However, the way in which proceedings under the Act are conducted and without exception challenged in Courts has made Lawyers laugh and legal philosophers weep."[5]

The turn of events after the Liberalisation, Privatisation, and Globalisation movement of 1991 attracted foreign investment in India, which could only happen with a more inviting attitude and legislation that provided ease of doing business in India by creating a more hospitable business environment. This movement, therefore, paved the way for the Arbitration and Conciliation Act, 1996, taking place of the erstwhile 1940 Act. This new Act has been drafted in complete correlation with the UNCITRAL Model Law on International Commercial Arbitration of 1985.[6] The 1996 Act provides for domestic as well as international arbitration and provided a more time-bound procedure for the completion of the arbitral proceedings.

(B) Arbitration and Conciliation Act, 1996

The Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") has been bifurcated into four parts of which part I is applicable where place of arbitration is within India and where the award has been passed in India shall be considered as a domestic award. To further clarify the Act under section 2(2) states on the applicability of Part I that *"this Part shall apply where the place of arbitration is in India"*.[7] The entire legislation on arbitration and conciliation in India is silent on the words "seat", "venue" and "place" of arbitration in an arbitration agreement. However, it does use the reference of the word "place" under section 20

[3] Code of Civil Procedure, 1908, § 89, No.5, 1908, (India).
[4] Arbitration Act, 1940, No.10, Government of India, 1940, (India).
[5] Guru Nanak Foundation v. Rattan Singh and Sons, AIR 1981 SC 2075.
[6] UNCITRAL Model Law on International Commercial Arbitration, 1985, No.A/14/17, United Nations Commission on the International Trade Law (Austria).
[7] Arbitration and Conciliation Act, 1996, § 2 (2), No.26, Acts of Parliament, 1996, (India).

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of the Act, and accordingly, sub-section 1 provides that the parties to an arbitration agreement may choose a place of arbitration mutually. Otherwise, the arbitral tribunal shall determine it for them under sub-section 2.[8] Further, what can be interpreted as a choice of venue is provided under sub-section 3 that the parties can hold the arbitral proceedings at any place as per their convenience. This section defines the term 'Place of Arbitration,' which can refer to either a seat or a venue. Despite the Law Commission's recommendation in the 2015 Amendment Act to assign distinct definitions for seat and venue, such recommendations did not result in actual modifications. In the absence of a defined statutory procedure, the legislation has been decided through a variety of court pronouncements, some of which are inconsistent.

The saga of attempts by the judiciary in resolving these confusing and ambiguous terms began when the Hon'ble Supreme Court of India ("SC") decided in the matter of BALCO[9] regarding the term "place" and held that it refers to the seat of the arbitration under sub-section 2 whereas sub-section 3 refers to the venue of arbitration. Further, the Law Commission also recommended in its report that the word "place" be replaced with "seat" and "venue" as held in the BALCO judgment.[10] However, these amendments were not paid any heed and the present legislation does not differentiate between the two ambiguous terms in the discussion.

(C) Core Principles of arbitration

Before setting off with the analysis of judicial precedents it is important to understand some of the core principles of arbitration; international and domestic as they have been the central point of discussion in the cases under analysis.

- Lex Arbitri: Lex Arbitri means the legislation that governs the arbitral tribunal's existence, powers, tasks, as well as the proceedings. Various phrases have been used to define the phrase lex arbitri, such as 'curial law' and 'procedural law'. However, due to their being insufficiently specific, descriptions like this may produce more confusion than clarity. The laws specified by the parties may govern the procedure of an arbitration, but procedural law is determined by the location of the arbitration.[11]

- Party Autonomy: The basic premise of any arbitration agreement and legislation is to ensure the freedom of the parties to decide for themselves the procedure to be followed during the arbitration. This is the guiding principle when deciding on the procedure to

[8] *Id.* § 20.
[9] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.
[10] Law Commission of India, *Amendments to the Arbitration and Conciliation Act, 1996*, Report No.246, 8 (August 2014).
[11] Johnathan Hill, *Determining the seat of an international arbitration: Party Autonomy and the interpretation of arbitration agreements*, 63, TICLQ 517, (2014) 519.

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be used in international arbitration.[12] It is widely understood, and the UNCITRAL Model Law states that the parties are free to agree on the method to be followed by the arbitral tribunal during the proceedings.[13]

III. CRITICAL ANALYSIS OF JURISPRUDENTIAL DEVELOPMENTS IN SEAT V. VENUE

The absence of any clarification on the terms "seat" and "venue" called for a judicial opinion and guidance. Therefore, the discussion about these two terms is incomplete without involving the jurisprudence and the judicial precedents that have attempted to provide some clarity even though there has been no consensus on the techniques used for the same. Following are the cases wherein the judges applied the judicial mind to reach a conclusion and to establish the tests required in order to determine what is the seat when nothing or incomplete and ambiguous information is mentioned in the arbitration agreement/clause.

1. Bhatia International Case: A three-judge bench of the Hon'ble Supreme Court of India considered its jurisdiction to entertain a request for issuing interim measures in an ICC arbitration matter with its seat in Paris. It was held that "the provisions of Part I of the Act would also apply to international commercial arbitration seated outside India unless the parties had expressly or impliedly agreed to exclude its application."[14] There was chaos in the decisions after this judgment due to compromised party autonomy in cases like Satyam Computers[15] wherein the Indian courts intervened despite the presence of a foreign seat. Later in cases such as the Videocon Industries[16] and Yogiraj[17], the courts ruled that even if the main contract was governed by Indian law, where the parties had implied to exclude the applicability of Part I of the Act. The Courts held that choosing a foreign seat of arbitration can be sufficient to establish the exclusion of supervisory jurisdiction of Indian Courts. Such a contradictory situation was noticed internationally as it was vague whether India supported the basic principle of party autonomy or not.[18]

2. Shashoua Principle: The saga of resolving the matter of seat or venue began with the development of this principle by the English Courts in *Roger Shashoua v. Mukesh Sharma*[19]. As per the facts of this case, the parties had selected London as the venue of arbitration but had

[12] J. Martin Hunter & Ranamit Banerjee, *Bhatia, BALCO and Beyond: One, Step Forward or Two Steps Back?*, 24, NLSIR 1, (2013), 3.
[13] *Supra* note 6, Art. 19 (1).
[14] Bhatia International v. Bulk Trading, (2002) 4 SCC 105.
[15] Venture Global Engineering v. Satyam Computers Services, (2008) 4 SCC 190.
[16] Videocon Industries v. Union of India, (2011) 6 SCC.
[17] Yogiraj Infrastructure Ltd. v. SSang Yong Engineering and Construction Co. Ltd. (2011) 9 SCC 735.
[18] *Supra* note 12, at 5.
[19] Roger Shashoua v. Mukesh Sharma, (2009) EWHC 957.

not selected any place as the seat. Justice Cooke in this case held and applied the ratio that when parties entered into the arbitration agreement by only selecting a venue and not specifying the seat, it is not wrong to establish that the venue shall be considered as the seat of arbitration. However, the parties in such a case must have selected a supernational body of rules to the arbitration without any contrary indications. This rule was later taken by the Indian Courts as the "Shashoua Principle". Later the principles of this case were incorporated by the SC in the same case when filed in India. The SC in *Roger Shashoua*[20] established the following principles:

- The arbitration venue is not always the same as the arbitral seat.
- In exceptional circumstances, where the arbitration agreement describes the venue of arbitration and refers to the supranational body of rules regulating the arbitration without specifically naming a seat. In absence of "*significant contrary indicia*", i.e. facts contributing to the other conclusion, then the venue is the seat of arbitration. The courts must examine this issue in light of the circumstances of each case.

3. BALCO[21]: In this decision, SC made another attempt to resolve the problem of seat and venue of arbitration for the first time after the "Shashoua Principle" was established by the English Court. This decision highlighted, that once decided, the seat of the arbitration acquires a permanent character that determines the scope of the powers and the court that has final supervisory authority over the arbitration. The venue, on the other hand, is described as temporary and solely for administrative purposes. In its decision in this case, the SC stated that choosing a foreign country as the seat of arbitration entails accepting that the legislation of that country for the supervision of arbitrations. If the arbitration agreement/clause is noticed or held to provide for a foreign place as the seat of arbitration, even if the main contract specifically states that the Act shall govern arbitration proceedings, the Indian courts cannot exercise supervisory jurisdiction over the arbitration or the award. The bench addressed the following issues in this case:

- §2(2) of the Act, applicability of Part I of the Act and exclusion of the term 'only': It was clarified and established in consonance with the *Bhatia*[22] judgement that the Act is not an enabling one and that §2(2) of the Act[23] is a mere legislative declaration of the territorial jurisdiction. Hence, Part I of the Act

[20] Roger Shashoua v. Mukesh Sharma, (2017) 14 SCC 722.
[21] *Supra* note 9.
[22] *Supra* note 14.
[23] *Supra* note 7.

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is only applicable in cases which have a seat in India. Further, the court also clarified that the word "only" did not mean that the Act intended to make arbitration matters with seat outside India to fall within the ambit of Part I of the Act.

- Restriction on jurisdiction to grant interim measures: The court held that where it is established that the seat in a matter is outside India, the Indian courts cannot grant interim relief under §9 of the Act. The court while rejecting the arguments that in such circumstances the parties will be left without a recourse and stated that parties can seek suitable remedies in the appropriate jurisdiction chosen by them in the form of seat.As a result of the court's decision, parties having assets in India can dispose of them while the arbitration is still ongoing, thereby defeating the very purpose of interim relief. Thereby, the parties with assets in India are forced to choose India as their seat and to bear the interventionist attitude of the Indian judiciary. The court in this case could have resorted to other jurisdictions, to establish that there was a legislative purpose behind allowing the parties to petition before the courts for interim relief even if the arbitration was held outside of India.
- Seat and Territorial Jurisdiction: It was held by the bench that the law of the country chosen as seat and the country whose law is chosen as applicable to the arbitration cannot function concurrently in terms of jurisdiction.[24] Only in exceptional circumstances where the parties have failed to mention or agree upon a seat, the law chosen by parties shall have jurisdiction to allow the matter.

4. Enercon – application of Shashoua Principle: In *Enercon (India) Ltd. v. Enercon GmbH*[25] the hon'ble SC applied the Shashoua Principle and held 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". It is well-settled that "seat" and "venue" cannot be used inter-changeably.

5. Concomitant Factor Test: The Indian Courts deviated from the Shashoua Principle in the case of *Hardy Exploration and Production (India) Inc.*[26] In the present case, it was agreed between the parties that the venue of arbitration shall be Kuala Lampur and regardless of the

[24] *Supra* note 7, Para 96.
[25] Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1.
[26] Union of India v. Hardy Exploration and Production (India) Inc., AIR 2018 SC 4871.

beginning of arbitration procedures or any outstanding claim or dispute, the parties shall continue to implement the terms of this contract to the greatest extent possible. However, the Union of India approached the Indian Courts to challenge the arbitral award to which the argument by *Hardy* was that this being a foreign award is not within the jurisdiction of the Indian Courts under Part I of the Act. The SC established the following principles in the present case:

- The arbitration venue is not always the same as the arbitral seat. Only when a concomitant element is added to the venue can it be considered equivalent to the seat of arbitration ("*concomitant factor test*").
- Simply mentioning the "location" of arbitration in the arbitration agreement does not make it equivalent to the seat of arbitration. The presence of any opposing evidence would result in the location differing from the seat of arbitration.
- If the arbitration agreement specifies a condition antecedent in relation to the place of arbitration, the condition must be met before the place of arbitration can be the same as the seat.

6. Bright Line Test: In the case of *BGS SGS SOMA JV v. NHPC* [27]a contract was entered into between the parties on terms that, the Act will be applied in case of a dispute with the domestic contractors and UNCITRAL Rules will be applicable in case of a dispute with foreign contractors. It further stated that the arbitration proceedings shall be conducted in New Delhi/Faridabad. When a dispute arose, the arbitration proceedings were conducted in New Delhi and an award was passed. However, on being dissatisfied, the award was challenged before the Faridabad courts, the question of jurisdiction and seat arose. The SC underlined that once the parties identify the seat of arbitration, the court ruling the seat shall have exclusive authority over such arbitration proceedings, and all other courts' jurisdiction is revoked. Further, SC found that when a clause names an arbitration venue and declares that the arbitration would take place there, it suggests that the venue is truly the seat. This, combined with the absence of any "significant contradictory indicia" that the "venue" is only a venue and not a "seat", further proves that such location is in fact the seat.

One of the most contradicting and confusing elements came into picture during this case when the SC established that the *Hardy Exploration*[28] decision was inconsistent with the concept established in *BALCO*, and hence "not being good law" or *per incurium*. The "bright-line test"

[27] BGS SGS SOMA JV v. NHPC, (2020) 4 SCC 234.
[28] *Supra* note 26.

recommended in this case was completely contradictory to the Hardy Exploration approach.

The agreement in question, in this case, provided that "arbitration proceedings should be held at New Delhi/Faridabad". Based on this remark, the court decided, rather unreasonably, that because all of the arbitration proceedings and the award were held in Delhi, the parties had chosen Delhi as the site of the arbitration. As a result, it is still debatable whether this decision may be deemed to overturn *Hardy Exploration's* decision as a contrary decision to that in *Hardy Exploration*, must be pronounced by a larger bench of the Hon'ble SC.

7. Mankastu Impex Case[29]: In this case, another turnaround of views took place regarding the acceptance of the venue as the seat of arbitration. The Memorandum of Understanding (MoU) between the parties wherein it was mentioned that such MoU was governed by the Indian Laws and Courts of Delhi shall have jurisdiction. Another contrary clause stated that disputes arising out of the MoU shall be referred to and resolved in Hong Kong. The factual matrix of this case evolved nearly comparable to the one in *Hardy Exploration*. The petitioner and respondent relied on coordinate bench rulings of BGS SGS and Hardy Exploration, respectively. However, this case did not work as a tie-breaker for the ongoing debate. The bench, while agreeing with the BALCO judgment emphasized the need to distinguish between the words venue and seat, which cannot be used indiscriminately. The decision also reaffirmed *Hardy Exploration's* decision that surrounding circumstances and a comprehensive understanding of the arbitration clause and the parties' intention regarding the seat is to be determined by their actions.

IV. CONCLUSION

The debate over the interpretation of seat and venue is still ongoing and has not been absolutely resolved even in recent cases such as the *Inox Renewables Ltd.*,[30] wherein the division bench of SC held that when the parties agreed to transfer, the venue indicated in the arbitration agreement from Jaipur to Ahmedabad by mutual agreement, they meant the new 'venue' to be the 'seat' of arbitration rather than a mere 'venue'. As a result, the Courts of the new 'seat' shall have exclusive authority to hear the matter. This judgement will be binding in circumstances when the arbitration provision solely specifies the site of arbitration. If the parties' conduct demonstrates that the location was intended to function as the seat, the Court will consider the venue to be the seat of arbitration in such situations. It is understandable that select the seat of arbitration in the backdrop of the parties' intentions and by considering the conceptual essence

[29] Mankastu Impex (P) Ltd. v. Airvisual Ltd., (2020) 5 SCC 399.
[30] Inox Renewables Ltd. v. Jayesh Electricals Ltd., 2021 SCC OnLine SC 448.

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of a seat in relation to the venue of arbitration. This is a positive approach, and it can be anticipated that this decision would set the growing Indian jurisprudence on the debate of seat v. venue of arbitration on the right track.

As a result of the eternal confusion created, litigation on the present topic has become rampant over the years. One of the apparent reasons for this, as demonstrated by the preceding cases, is a lack of competent drafting of arbitration agreements/clauses, highlighting the need for a carefully planned and drafted dispute resolution agreement between the parties to avoid litigation. Arbitration agreements should clearly state the "seat" and "venue" of arbitration to guarantee that the efficacy and finality of the arbitration proceedings are not overshadowed by lengthy litigation actions later on.

Furthermore, by implementing the recommendations of the 246th Law Commission Report[31], clarity can be incorporated into Section 20 itself. The usage of the word 'place' has produced significant uncertainty; thus, to align the Arbitration Act with judicial interpretation, 'place' in Section 20(2) should be substituted with 'seat' and 'venue' in Section 20(3).

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[31] *Supra* note 10.

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