SEAT OF ARBITRATION

INTRODUCTION

(A) THE CONCEPT OF 'SEAT' OR 'PLACE' OF ARBITRATION; THE *LEX ARBITRI*

If an international arbitration is held in India, the laws of India will govern (or control, if you prefer) the arbitration. This position is recognition of what is known in the world of international arbitration scholarship as the 'territoriality principle' or the territorial link between arbitration and law of the place where it is held.[1]

What exactly is meant when it is said the laws of India will govern the arbitration? Simply that those Indian laws which relate to governance and conduct of arbitration will mandatorily apply (except if the law itself says something can be waived or excluded). In India, this type of law is contained in

[1] This theory "is based on the general principle of international law that a state is a sovereign within its own borders and that its law and its courts have the exclusive right to determine the legal effect of acts done … within those borders". Another basis for the territorial principle is that arbitration must be connected to a system of law, it cannot hang in air and "requires a legal framework to give it legitimacy, to permit judicial assistance … and to provide a degree of judicial supervision".
Dr. Francis Mann is often cited as the proponent of this territorial doctrine from an essay 'Lex Facit Arbitrum' published in 1967. On the other side of the theoretical model are proponents of "delocalised" or "a-national" arbitration. This theory advocates an arbitration unconnected with any system of law in accordance with a set of universal rules (so to speak, a "universal *lex arbitri*").
The New York Convention and the Model Law adopted the territorial principle. The Supreme Court of India declared in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.,* (2012) 9 SCC 552 that India clearly adopted the territorial principle and under the ACA the seat of the arbitration is the centre of gravity.

the ACA. That is why Section 2 of the ACA says, "this Part shall apply where the place of arbitration is in India."[2]

The expression place in Section 20 ACA is synonymous with 'seat.' 'Place' is often used internationally to signify the same concept of the seat.[3]

The law of the 'place of arbitration' or the 'seat of arbitration' is called the *lex arbitri*.

A confusion must be avoided. The *lex arbitri* may not necessarily be the same as the substantive law of the main contract or the law governing the arbitration agreement.

The substantive law of the main contract governs the substantive rights and obligations of the parties are determined. In an arbitration seated in India, the substantive law of the main contract may be of another country. In an arbitration seated in, say, England or Singapore, the substantive law of the main contract maybe Indian.

Lex arbitri must also not be confused with the law governing the arbitration agreement. These two may be different.

(B) THE **CONTENT OF LEX ARBITRI**

What is the practical consequence? In other words, in what way does the *lex arbitri* govern the arbitration? The answer is that it depends on the content of the national laws. Let us see what laws India has laid down to govern an arbitration within its territory[4]: -

(i) The definition and form of an agreement to arbitration (Section 7);

(ii) The constitution of the arbitral tribunal and the grounds for the challenge (Sections 10-15)

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2 The expression place in Section 20 is synonymous with 'seat'. The expression 'place' is often used internationally to signify the same concept. There may be confusing exceptions like Section 20 (3) ACA.

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4 Classification borrowed from N. Blackaby, et al. (eds.), *Redfern and Hunter on International Arbitration*, (5th ed. 2009).

(iii) The entitlement of the tribunal to rule on its jurisdiction (Section 16);

(iv) Equal treatment of the parties (Section 18);

(v) Freedom to agree upon detail rules of procedure (Section 19);

(vi) Interim measure of protection (Section 9 & 17);

(vii) Statements of claim and defense (Section 23);

(viii) Hearings (Section 24);

(ix) Form and contents of the arbitration award (Section 31);

(x) The fee of the arbitrators (Section 31A);

(xi) Right to challenge the arbitration award (Section 34).

(C) SIGNIFICANCE OF SEAT

One significance of the seat of arbitration is that it is widely recognised that the court at the seat will have exclusive jurisdiction over the conduct of the arbitration. "The seat of an arbitration is analogous to an exclusive jurisdiction clause." "Courts at the seat are competent (usually exclusively competent) to entertain actions to annul or set aside the award."

We can also usefully refer to this observation from a recent decision from the Singapore Supreme Court in [2019] SGCA 65, *ST Group Co. Ltd. and others* v. *Sanum Investments Limited*: -

> The choice of the seat in and of itself represents a choice of forum for remedies. In *PT Garuda Indonesia* v *Birgen Air*, [2002] 1 SLR (R) 401, this court recognised that a Singapore court only has the power to set aside an arbitration award if that arbitration was seated in Singapore. As a collorary, in *Hilton International Manage (Maldives) Pvt Ltd* v. *Sun Travels & Tours Pvt Ltd*, [2018] SGHC 56, Belinda Ang Saw Ean J held that an agreement to arbitrate gives rise to a negative obligation not to set aside or otherwise actively attack an arbitral award in jurisdictions other than the seat of the arbitration.

(D) SEAT IN INDIA

1. Jurisdiction of Court

Because India is a Union of several States and each state has its own courts' hierarchy with limited territorial jurisdiction, the question which court has jurisdiction over the arbitral process has arisen often.

The 5-judge bench in *Bharat Aluminium Company and Ors.* v. *Kaiser Aluminium Technical Service, Inc. and Ors.* (2012) 9 SCC 552, which declared the law on several key issues had considered the aspect of court's jurisdiction too. It enunciated a theory of concurrent-jurisdiction of the seat-court as well as the cause-of-action-court. At paragraph 96, the court held that under the ACA: –

> *"The legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place."*

An example was also given in the same paragraph: –

> *"For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order Under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located".*

Some latter cases (*Enercon*, *Reliance,* and *Indus*–cited *infra*) focused on the principle that the designation of the seat is akin to conferring exclusive jurisdiction on the seat-court.

A Delhi High Court judgment (*Antrix*, cited *infra*), relying on a Bombay High Court judgment, struck "discordant notes." It said that since *BALCO* "unmistakably" outlined the concurrent-jurisdiction principle both in the

"substantive holding" of paragraph 96 "as well as the example …", the ratio in *Indus* will have to be "restricted" considering *BALCO*.

Was there an internal conflict in the *BALCO* judgment? What was its true ratio? Was the Delhi High Court in *Antrix* right in its reading of BALCO? Again, which court has jurisdiction over the arbitral process? These were the matters discussed and decided in *BGS SGS Soma JV* v. *NHPC Ltd.*, SCC OnLine SC 1585, as noted below.

2. Determination of Seat

In *Union of India* v. *Hardy Exploration*, 2018 SCC OnLine 1640, the arbitration clause had provided that the "arbitration proceedings shall be conducted in accordance with the UNCITRAL Model Law …". Further, the venue of arbitration proceedings shall be Kuala Lumpur. The court had concluded that Kuala Lumpur was not the seat or place of arbitration. Hardy was a decision by a bench of 3-judges.

In *BGS,* it was argued that the 3-judge bench decision in *Hardy* was contrary to *BALCO*. The *BGS* court, a 3-judge bench, therefore, was "exhorted" to consider the "correctness of the judgment in Hardy Exploration …", another 3-judge bench?

The *BGS* court concluded that: –

1. Read properly, *BALCO* stands for the proposition that the seat court has exclusive jurisdiction. Only when the parties do not choose the seat, or it has not been determined, the court where the cause of action arises will have jurisdiction.

2. Wherever:

(i) There is an express designation of a "venue", no designation of any alternative place as the "seat", supranational body of rules governs the arbitration (in an international context), and, there are no other significant contrary indicia—that venue is the seat.

(ii) Venue is designated with the words "*arbitration proceedings*" (that is, not just one or two hearings but proceedings as a whole), that venue is the seat.

(iii) A clause says arbitral proceedings "*shall be held*" at a particular venue; that venue is the seat in the absence of significant contrary indicia.

The court also addressed the question if *Hardy* was decided contrary to *BALCO* and concluded it was. The court did not examine its authority to comment on the correctness of another co-ordinate bench.