Seat Vs. Venue- Saga Continues

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In the case of ***Bhartiya Aluminium Company v. Kaiser Aluminium Technical Services Inc.***[1]**,** the Hon'ble Supreme Court of India, held, albeit in the context of an international commercial arbitration having seat outside India, that the seat of arbitration is the center of gravity in an arbitration. Therefore, the courts having jurisdiction over the place where the seat of arbitration situates shall have the supervisory jurisdiction over the arbitration proceedings. Post *BALCO (supra)*, the seat of arbitration and the place of arbitration acquired importance in the matter of conferring jurisdiction to the courts of seat of arbitration even in domestic arbitrations. However, the debate then turned on the difference between seat and venue of arbitration and the impact thereof. Several judicial precedents then held that that seat is different from venue of arbitration and that the venue of arbitration cannot confer jurisdiction to the courts of venue. This issue was addressed by the Hon'ble Supreme Court of India in the case of ***BGS SGS Soma JV v. NHPC Limited***[2]**,** wherein the apex court held that the 'seat of arbitration' need not be the place where any cause of action has arisen and it may be different from the place where obligations are/had to be performed under the contract. The Hon'ble Court

[1](2012) 9 SCCC 552 = 2012(3) Arb LR 514 (SC)
[2] (2020) 4 SCC 224 = 2019(6) Arb LR 393 (SC)

held that in such circumstances, both the courts i.e., the courts within whose jurisdiction the 'subject matter of arbitration' is situated and the court in whose jurisdiction the arbitral tribunal is located, shall have jurisdiction in respect to the arbitral proceedings. It was further held by the apex court that wherever there is an express designation of *"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 stated venue is actually the juridical seat of the arbitration proceedings. Therefore, in the absence of a specific designation of seat of arbitration, the arbitration proceedings must be considered as being governed and subject to the jurisdiction of the court where the arbitration is being held, on the ground that the said court is most likely to be connected with the proceedings.

Again, in the case of ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and others***[3], the Hon'ble Supreme Court of India held that the moment a seat is designated by agreement between the parties, it is akin to an exclusive jurisdiction clause, which would then vest the courts at the seat with the exclusive jurisdiction over the arbitral proceedings. Therefore, the debate was almost put to rest in the cases where the arbitration clause either designates a "venue" or "seat" of arbitration, specifically in the arbitration clause itself.

However, in the cases where the arbitration clause provides for neither the "venue" nor the "seat" of arbitration, the confusion still continues. Recently, in the case of ***BBR (India) Pvt. Ltd. v. S.P. Singla Constructions Pvt. Ltd.***[4] before the Hon'ble Supreme Court of India, a similar situation arose.

Factual Matrix in BBR (India) Pvt. Ltd. Case.

[3] (2017) 7 SCC 678= 2017(3) Arb LR 1 (SC)
[4] 2022 (3) Arb LR 639 (SC)

The arbitration clause was completely silent about venue or seat of arbitration. The contract and letter of intent was executed at Panchkula in Haryana and the corporate office of the respondent was also located at Panchkula, whereas the registered office of the appellant was located in Bengaluru, Karnataka. Upon dispute having arisen, the matter was referred to a former judge of a High Court, who was appointed as the sole arbitrator. In the preliminary hearing, the Ld. Sole Arbitrator recorded that the venue of the arbitral proceedings would be Panchkula, Haryana. Though, the preliminary hearing was attended by only one of the parties, apparently neither party objected to the place of arbitration proceedings as fixed by the Ld. Sole Arbitrator. The subsequent meeting of the tribunal was held at Chandigarh and the Ld. Sole Arbitrator recused himself from the proceedings citing same personal reasons. Thereafter, another sole arbitrator was appointed, who was again a former High Court judge, who conducted the first hearing after his appointment as arbitrator and recorded therein that the venue of the arbitral proceedings would be at Delhi. It so happened that even in this hearing only one of the parties was present. Thereafter, all subsequent proceedings were held in Delhi and the award was signed and pronounced in Delhi on 29.01.2016. The respondent filed an application for interim orders under Section 9 of the Arbitration and Conciliation Act, 1996 ("**Act**") before the Additional District Judge, Panchkula, on 07.05.2016, whereas the appellant filed a petition under Section 34 of the Act before the Hon'ble High Court of Delhi on 28.04.2016. As both the parties had invoked jurisdiction of two different courts, question of jurisdical seat of arbitration arose.

Proceedings before the District Court, Panchkula and P&H High Court

The Ld. ADJ, Panchkula dismissed the Section 9 petition on the ground of lack of territorial jurisdiction. However, the Hon'ble High Court of Punjab and Haryana ("**P&H High Court")** reversed the order of the ADJ, Panchkula and held that court at Panchkula had jurisdiction to deal with the case. The review application filed by the appellant was dismissed.

Decision of the Hon'ble Supreme Court

Aggrieved by the decision of the P&H High Court, the appellant approached the Hon'ble Supreme Court of India. After examining several precedents on the issues relating to "seat" and "venue" of arbitration, the apex court upheld the decision of the P&H High Court. The Apex Court held that as per Section 20(1) of the Act, parties by their mutual consent can determine the seat of arbitration. It was further held that Section 20(2) of the Act authorizes the tribunal to determine the seat of arbitration and once of the tribunal so fixes the seat of arbitration, the arbitrator cannot challenge the seat and only parties can mutually agree that the seat of arbitration should be challenged to another location. On the aforesaid basis, the apex court dispelled th appellant's contention that on appointment of the subsequent sole arbitrator, who fixed the venue of arbitration proceedings at Delhi, the jurisdictional seat of arbitration got changed from Panchkula to Delhi. The appellant relied on the judgment in the case of ***Inox Renewables Ltd. v. Jayesh Electricals Ltd.***[5] where the agreement provided for Jaipur as the seat of arbitration, but the arbitration proceedings were conducted in Ahmedabad. This conduct was held by the Hon'ble Apex Court as changing the seat of arbitration by the parties by their mutual consent. However, in the case of *BBR (India) Pvt. Ltd. (supra)*, the apex court held that unlike in the case of *Inox Renewables Ltd. (supra)*, in the case at hand, the seat of arbitration was not fixed by the parties but instead, by the arbitrator and that the arbitrator cannot change the seat of arbitration except when and if the parties mutually agree and state that the 'seat of arbitration' should be changed to another location, which was not so in BBR (India) Ltd. case..

Conclusion

The aforesaid determination of the Hon'ble Apex Court lays down that in the event the seat of arbitration is fixed by the tribunal under Section 20(2) of the

[5] 2019 SCC Online SC 2036

Act, the same cannot be changed except with the mutual agreement of the parties, specifically agreeing and stating that the seat of arbitration should be changed to another location. The said view, in my humble opinion, is not borne out of the language used in either Section 20or Section 20(2) of the Act. Since the entire Act is premised on party autonomy, the intention of the party assumes supremacy. While Section 20(1) of the Act provides that parties are free to agree on place of arbitration, Section 20(2) operates only when there is no agreement between the parties under Section 20(1) of the Act. There is no bar under Section 20 of the Act preventing the parties from changing the seat of arbitration, even if the same is fixed by the arbitrator, as has also been held by the apex court. Such agreement can be express or implied. Meaning thereby, if despite agreeing to a seat of arbitration in the agreement parties conduct all their proceedings at place other than that of the seat, they can reasonably be held to have changed the seat of arbitration to the place where proceedings were conducted (refer *Inox Renewables Ltd. (supra)*). Same logic should follow where the seat has been fixed by the arbitrator. Initial fixation of the seat either by the parties or by the arbitrator should make no difference. Furthermore, wherever the legislature has intended that subsequent agreement of the parties must be specific and express, it has provided so in the Act e.g., Section 12(5) of the Act states that the parties may subsequent to disputes having arisen between them waive the applicability of that sub-section by an express agreement in writing. Section 20(2) of the Act does not make provision similar to the one contained in Section 12(5) of the Act. In the case of *BBR (India) Pvt. Ltd. (supra)*, parties never objected to the venue of the arbitration being changed to Delhi by the subsequent arbitrator. This was specifically recorded in the minutes of the first meeting held by the subsequent arbitrator after his appointment and was never objected to by even the party not present at the said meeting. All the proceedings of the tribunal were held in Delhi including recording of evidence, arguments and publication of award. Therefore, it was clear that the parties had intended to anchor the arbitration proceedings to Delhi (as held in *BGS SGS SOMA* (supra) para 101). The apex court's reliance in

*BBR (India) Pvt. Ltd. (supra)*on Section 20(2) of the Act, to hold that the fixation of seat by the arbitrator cannot be changed unless parties expressly so agree, does not seem to be aligned with its recording in para 22 of the judgement to the effect that in the case of *BGS SGS Soma (supra),* the apex court held that while exercising jurisdiction under Section 20(2) of the Act, an arbitrator is not to pass a detailed or a considered decision and that the place where arbitration tribunal holds the arbitration proceedings would, by default be the venue of the arbitration and consequently the seat of arbitration.

However, as the judgment in *BBR (India) Pvt. Ltd. (supra)*is an expression of law, we are bound by the same. Keeping in mind the varying circumstances giving rise to different results, following actions may help resolve some of the issues:

(a) Seat of arbitration should be specifically provided for in the arbitration clause.
(b) If the arbitration clause does not mention the seat or provides only the venue of arbitration, parties must ensure to fix the seat of arbitration in the first/preliminary hearing of the arbitral proceedings, by mutual consent.
(c) Seat of arbitration should, as far as possible, be the place having connection with the subject matter of the arbitration. A place completely unconnected with the subject matter of arbitration, though can be designated as seat but should be avoided to be so designated, at least in the case of domestic arbitrations.
(d) A clause conferring exclusive jurisdiction on courts of a particular place must be aligned with seat / venue of the arbitration, if so designated in the arbitration clause. The exclusive jurisdiction of the court as well as seat/venue of arbitration should be at the same place.
(e) All the hearings of the arbitral tribunal should be held at the place designated as the seat of arbitration in agreement. In case the hearings of the arbitration tribunal are held at place other than the seat of arbitration, it should be clearly recorded in the minutes of the meetings of the arbitral

tribunal prior to conducting such hearings, or in some other form in writing, that conducting the hearings of the arbitral tribunal at place other than the seat, is only for convenience and would not result in change of seat of arbitration.