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Contemporary Trend to Seat vs Venue in Arbitration

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Alternative Dispute Resolution has become very significant in the present day. The importance of this mechanism is growing day by day. But, the major lacunae is that the basic and very important aspect in ADR i.e. determining seat, venue, and jurisdiction that deals with arbitration procedure have been in question for many years. The legal principle on this aspect is being changed continuously. This article deals with this issue and establishes the legal principles that courts are adopting to determine seat, venue, and jurisdiction that deal with arbitration procedures over the past decade. This article further points out the current trend i.e. the legal principle that is being followed presently by various courts to determine seat, venue, and jurisdiction that deals with arbitration procedures.

Keywords: *adr, arbitration, seat, venue, alternative expression, jurisdiction.*

INTRODUCTION

The seat-venue dilemma or the difficulty courts encounter in deciding the seat of arbitration, is the most recent controversy that emerged in arbitral jurisprudence. The word "seat" refers to the location of the arbitration or the focal point of the arbitration process. The decision to choose a specific spot as the arbitration's seat will have an impact because it will imply that the courts of

that region will have jurisdiction over the arbitration proceedings and that the procedural or curial law governing the arbitration proceedings will be those courts' laws.[1]

Although the words "venue" and "seat" are frequently used interchangeably, this may not always be the best strategy.[2] The terms "seat" and "venue" must not be confused with the word "place," which frequently relates to a convenient spot chosen by the parties to conduct the arbitration procedures. Without a doubt, the word "seat" has more significance than venue or location. It's crucial to notice at this point that neither "seat" nor "venue" is defined in the Act. Section 20 of the Arbitration and Conciliation Act, 1996[3] merely defines the "place of arbitration" which is being used interchangeably with the terms "seat" and "venue".[4]

SEAT *v*/s VENUE

The most crucial thing to remember when creating an arbitration agreement is to specify the arbitral seat. Most of the time, it was said that the seat is crucial since it determines the law that will regulate the substantive validity & arbitration procedure. It also determines the legal system and courts that will have jurisdiction over the arbitration. But, there is no legal backup that supports this famous opinion. There is no law that states that the seat determines the legal system and courts that will have jurisdiction over the arbitration. So, then what if the parties avoid mentioning the legal system and courts that will have jurisdiction over the arbitration? In such a situation, does seat/ venue play any role?[5]

Further,[6] if there is no mention of the seat/ venue specified in the agreement between parties, determining the seat becomes the responsibility of either the tribunal or, if that fails, the court when exercising supervisory jurisdiction. Thus, determining the seat/ venue becomes a

[1] Hiroo Advani, 'Seat v. Venue in Contemporary Arbitral Jurisprudence' (*SCCOnLine,* 6 May 2021) <https://www.scconline.com/blog/post/2021/05/06/seat-v-venue-in-contemporary-arbitral-jurisprudence/#_ftn5> accessed 24 August 2022
[2] *Ibid*
[3] Arbitration and Conciliation Act 1996, s 20
[4] *Ibid*
[5] Soumil Jhanwar, 'Jurisdictional Issues in Indian Arbitration Cases: A Uniformed Approach' (2020) 1 Indian Journal of Arbitration Law 142
[6] *Ibid*

complex exercise.[7] Confusion arises when only the venue is specified and not the seat. Confusion even arises when only a seat is specified, not the venue.[8] This dispute between determining seat vs venue and its contemporary trend can be understood with reference to some chain of case laws dealt with by various courts.

Judiciary on settling the issue of seat vs Venue and determining law that regulates arbitration procedure

Seat determines the law that will regulate the arbitration procedure

In the case of *Enercon (India) Limited and others v Enercon GMBH and another*[9], the Supreme Court ruled that the courts with exclusive jurisdiction over the arbitration procedures shall be determined by the location of the Seat. Additionally, it was established that the Seat typically offers the choice of applying the nation's arbitration/curial law.[10]

In *Eitzen Bulk A/S v Ashapura Minechem Ltd. and another*[11], it was decided that just choosing a seat of arbitration draws the law relevant to that region. To put it another way, it is unnecessary to declare which law would govern the arbitration procedures because the law of the relevant nation would apply *ipso jure*. The court in *Eitzen Bulk Case* referred to the below paragraph from Redfern and Hunter on International Arbitration which states that[12]:

By choosing to convene the arbitration in a particular country, the parties have additionally selected the procedural law that will govern the arbitration, which can be heard sometimes. This is overly unclear and doesn't always appear to be true, as an English court found in Breas of Doune Wind Farm. The location of the arbitration has been agreed upon by the parties. The parties are required by this decision to abide by the laws of that nation, along with any mandatory arbitration provisions. The assertion that the parties have "selected" a particular law to govern the arbitral proceedings is analogous to the assertion that an English woman driving

[7] Aman Deep Borthakur, 'A Tale of Two Seats: The Indian Supreme Court on the Seat/Venue Distinction' (2019) 6 McGill Journal of Dispute Resolution 216
[8] *Ibid*
[9] *Enercon (India) Ltd & Ors v Enercon GMBH & Anr* (2014) 5 SCC 1
[10] *Ibid*
[11] *Eitzen Bulk A/S v Ashapura Minechem Ltd & Anr* (2016) 11 SCC 508
[12] *Ibid*

to France in her vehicle has "selected" traffic laws of French, which will necessitate her to continue driving on the right-hand side of the road, give space to vehicles coming from the right, and generally comply traffic laws that she may not be acquainted with. It'd be a strange use of words to say that this fictitious driver choose "French traffic laws," though. She's decided to go to France, after all. Then, French law is automatically applied. She cannot select any of the laws in it. Because of the appeal of the lex arbitri, parties may opt for a particular arbitration venue. Once a location for arbitration is chosen, it comes with its own set of laws, though. If such a law contains parts requiring arbitration, the provisions must be obeyed. It is not a matter of choice, any more than a fictitious driver is free to decide which local traffic laws to abide by and which to disobey[13].

In *Indus Mobile Distribution (P) Ltd. v Datawind Innovations (P) Ltd. and others*[14], it was held that when the seat is chosen, a provision of exclusive jurisdiction is similar to it.[15] According to the court, it is obvious from the facts of the current case that Mumbai would serve as the arbitration's seat, and Clause 19 additionally specifies that Mumbai's courts will have sole authority over any legal disputes. According to the Arbitration law, a mention of "seat" refers to the idea that the parties to an arbitration clause may select a neutral location. The neutral venue might not have jurisdiction in the traditional sense—that is, the cause of action might not have originated in whole or in portion at the neutral venue.[16] Nevertheless, in arbitration, according to what was established previously, the circumstance that the "seat" is at Mumbai would provide courts at Mumbai with exclusive jurisdiction to govern arbitral proceedings emerging out of the agreement between the parties as soon as the "seat" is decided.

If there is no mention of "seat", "venue" doesn't automatically gain the status of "seat"

In the case of *Union of India v Hardy Exploration and Production (India) Inc.*[17]*, (Hardy Exploration Case)* in 2018, a venue does not inherently get to be a seat, according to the Court. It necessitates

[13] *Ibid*
[14] *Indus Mobile Distribution (P) Ltd v Datawind Innovations (P) Ltd & Ors* (2017) 7 SCC 678
[15] *Ibid*
[16] *Ibid*
[17] *Union of India v Hardy Exploration & Production (India) INC* (2018) 7 SCC 374

a positive action and something associated with it. Likewise, when one of the preceding conditions is met, a place becomes a seat. It does not automatically gain the status of a seat.[18]

In *Mankastu Impex Private Limited v Air Visual Limited*[19]*, the* court held that the mere term "place of arbitration" should not be used to infer that the parties desire to use that place as the "seat" of arbitration. Other clauses in the agreement, as well as the parties' behaviour, must be used to assess the parties' intent regarding the "seat". The court stated that the agreement entered into between the parties selecting a place as "Hong Kong" will not, according to the court, conclude that the parties have selected Hong Kong as the "seat" of arbitration. In this case, the court read Clause 17.2 in conjunction with the words "the place of arbitration shall be Hong Kong."[20] Clause 17.2 states that "Any disagreement, conflict, or difference that arises with regard to the MoU shall be reported to and eventually resolved by arbitration administered in Hong Kong." Court observed that on a reference to the arbitration agreement, it can be inferred that the mention to Hong Kong as "place of arbitration" is not simply a reference to the "venue" for the arbitration process; rather, the mention of Hong Kong is for final settlement by arbitration administered in Hong Kong. As a result, the legal principle articulated in this case is that the mere term "place of arbitration" should not be used to infer that the parties desire to use that place as the "seat" of arbitration. Other clauses in the agreement, as well as the parties' behaviour, must be used to assess the parties' intent regarding the "seat".[21]

If there is no mention of "seat", "venue" automatically gains the status of "seat"- criticised judgement in Hardy Exploration Case

In *BGS SGS SOMA JV v NHPC Ltd.*[22]*(BGS Soma Case),* the term mentioned was "arbitration proceedings shall be held at New Delhi/Faridabad". In this case, the Apex Court's three-judge bench ruled that the hearings were conducted in New Delhi& that the awards also were signed there rather than in Faridabad.[23] The court found that in the lack of alternative expression by the

[18] *Ibid*
[19] *Mankastu Impex Pvt Ltd v Air Visual Ltd* **2020 SCC OnLine SC 301**
[20] *Ibid*
[21] *Ibid*
[22] *BGS SGS SOMA JV v NHPC Ltd* 2019 (17) SCALE 369
[23] *Ibid*

parties, it is reasonable to conclude that the parties have selected New Delhi as the arbitration seat. In this case, the Bench ruled that the decision in the case of *Hardy Exploration* is against the judgement in the case of *Bharat Aluminium Company v Kaiser Aluminium Technical Services Inc.*[24] , and therefore, the decision in *Hardy Exploration Case* cannot be considered as good law.[25]

In 2021, in the case of *S.P. Singla Constructions Pvt. Ltd. v Construction and Design Services, UPJL*[26], the Delhi High Court adhered to the rule established in the BGS SOMA Case, which asserted that selecting a venue for a hearing is equivalent to selecting the seat of the arbitration; that once parties select the seat, only the courts presiding over that seat exercise jurisdiction to oversee the arbitration process; all other courts lose their jurisdiction. According to the court's ruling in the SP Singla case, because the parties to the agreement stipulated that Lucknow would be the venue of the arbitration, the courts in Lucknow would have sole jurisdiction over any legal challenges resulting from the disputed agreement.[27]

In 2021, M/s Inox Renewables Ltd. v Jayesh Electricals Ltd.[28], the arbitration was started in accordance with a purchase order that identified Jaipur as the venue, however, the parties mutually chose to hold the proceedings there. The award was resolved in favor of the Respondent and was later contested in Ahmedabad.[29] The petitioner claimed the Ahmedabad courts alone had jurisdiction to consider the issue because the arbitration was conducted there. Following disagreements between the Ahmedabad Court and the High Court, the petitioner turned to the Supreme Court for guidance.[30] It was observed by the Supreme Court that Selecting an arbitration seat is similar to a clause that grants one party exclusive jurisdiction, as the Supreme Court has often explained. When parties name a "venue" or "location" of arbitration rather than the word "seat" in the arbitration agreement, the venue will be taken to be the seat if there is the absence in any information of the opposite in the agreement. The Supreme Court found that the parties had agreed to change the venue to Ahmadabad. Once Ahmedabad

[24] *Bharat Aluminium Company v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552
[25] *Ibid*
[26] *SP Singla Constructions Pvt Ltd v Construction & Design Services, UPJL* 2021 SCC OnLine Del 4454
[27] *Ibid*
[28] *M/s Inox Renewables Ltd v Jayesh Electricals Ltd* MANU/SC/0285/2021
[29] *Ibid*
[30] *Ibid*

became the venue, it also became the "seat" of the arbitration, so the Ahmedabad courts had exclusive jurisdiction over any challenges. In giving this judgement, the court relied on the *BGS Soma case* where it was stated that a chosen venue for arbitration proceedings would become the seat of arbitration in the absence of any "significant contrary indicia".

CONCLUSION

In conclusion, the two recent decisions on the issue of Seat *v/s* Venue which are referred to above have followed the ruling in the *BGS Soma Case* which states that in the lack of alternative expression by the parties, it is reasonable to conclude that the parties have selected venue as the arbitration seat. It can be concluded that the current trend in determining seat, venue, and the law that regulates arbitration procedure can be found by applying the legal principle laid in *BGS Soma Case.*