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# READING BETWEEN THE LINES OF INDIA'S VENUE AND SEAT DEBATE

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## Introduction

In the context of international commercial arbitrations, the term 'venue' refers to any suitable physical or geographical location for holding arbitral proceedings. In contrast, the word 'seat' has been interpreted as the jurisdictional location of the arbitration, where courts would have supervisory authority over the arbitral proceedings. The terms "seat" and "venue" are not defined in either the 1940 Arbitration Act or the 1996 Arbitration and Conciliation Act ["**the Act**"]. Section 20 of the Act specifies "Place of Arbitration," which is synonymous with "seat" and
"venue." Despite the Law Commission's recommendation that the 2015 Amendment Act include separate definitions for seat and venue, such proposals did not result in real modifications.[1] In the lack of a clear legislative framework, the law has been established via a variety of judicial declarations, some of which are inherently contradictory.

The Supreme Court of India rightly recognised this difference in *Bharat Aluminium Company Ltd v Kaiser Aluminium Technical Services Ltd* ["**BALCO**"].[2] The Supreme Court, citing the decisions of the English Court of Appeal in *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru*[3] and *Union of India v McDonnell Douglas Corpn*,[4] held that while the 'seat' is the centre of gravity of arbitral proceedings, this does not necessitate that all proceedings be physically conducted at the seat of arbitration. In reaching its conclusion, the Supreme Court implicitly acknowledged the distinction between 'seat' and 'venue.' With respect to this difference, however, the judgements of the Supreme Court and various High

[1] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Report No. 246, 2014).
[2] *Bharat Aluminium Company Ltd v Kaiser Aluminium Technical Services Ltd,* (2012) 9 SCC 552.
[3] *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru,* [1988] 1 Lloyd's Rep 116 (CA, England & Wales).
[4] *Union of India v McDonnell Douglas Corpn*, [1993] 2 Lloyd's Rep 48.

Courts in India post-*BALCO* have been confusing and contradictory. Such confusion has also been emphasised by Justice Navin Chawla in his recent webinar on territorial jurisdiction in arbitral proceedings.[5] An overview of the applicable case law reveals the different perspectives of the courts.

**When a 'Venue' of Arbitration, in Conjunction with an Additional Element, might be Understood as a 'Seat'**

In *Enercon (India) Ltd v Enercon GmbH* ["**Enercon**"],[6] the Supreme Court determined, considering

*BALCO*, that 'venue' and 'seat' cannot be regarded as synonymous. London was specifically designated as the 'venue' for the underlying arbitration in *Enercon*. The Court determined, however, that India was the seat because (i) Indian law is the substantive law governing the contract, (ii) Indian law governed the arbitration agreement, and (iii) Indian law governed the conduct of the arbitration.

In *Indus Mobile Distribution Pvt Ltd v Datawind Innovations Pvt Ltd* ["**Indus**"],[7] the Supreme Court subsequently reaffirmed this stance. In this case, Mumbai, India, was designated as the 'venue' of the arbitration. In addition, the parties agreed to subject any issues to the exclusive jurisdiction of the courts in Mumbai. It was also acknowledged that the designation of the 'seat' of arbitration was analogous to an exclusive jurisdiction clause in litigation so that only the courts of the seat had the authority to hear any dispute pertaining to the arbitration proceedings, regardless of where the cause of action originated. Therefore, Mumbai was deemed to be the 'seat' of the arbitration.

In *Mankashi Impex Pvt Ltd v Airvisual Pvt Ltd* ["**Mankashi Impex**"],[8] the Supreme Court revisited the debate between 'venue' and 'seat'. In this instance, the dispute settlement provision stipulated:

i. This case would fall within the jurisdiction of the courts in New Delhi; ii. Hong Kong would serve as the 'place of arbitration';
iii. Any issue will be 'referred to and finally resolved by arbitration administered in Hong Kong.'

[5] Chawla, J., 2020. Territorial jurisdiction in Arbitration – Seat v. Venue: Unravelling the mystery of 'Place' that matters. *In: The Delhi High Court Bar Association*. Delhi.
[6] *Enercon (India) Ltd v Enercon GmbH*, Civil Appeal No 2086 of 2014 (Order dated 14 February 2014).
[7] *Indus Mobile Distribution Pvt. Ltd v Datawind Innovations Pvt. Ltd*., (2017) 7 SCC 678.
[8] *Mankashi Impex Pvt Ltd v Airvisual Pvt Ltd,* Arbitration Petition No 32 of 2018 (Order dated 3 May 2020, SC).

In its ruling, the Supreme Court, once again while emphasising the distinction, stated unequivocally that Hong Kong should not be regarded as the seat of arbitration just because it was mentioned as the 'place' of arbitration since such a stipulation was insufficient to provide Hong Kong the status of the seat of arbitration. However, this provision, along with the fact that the arbitration would be 'managed in Hong Kong,' showed that Hong Kong was meant to be the seat of the arbitration.

**'Venue' and 'Seat' as Separate**

The Supreme Court referred *Union of India v Hardy Exploration and Production (India) Inc* ["**Hardy Exploration**"] [9] to a three-judge bench of the Supreme Court to examine the foundation and principles upon which the 'seat' of the arbitration is to be decided where the arbitration agreement mentions the 'venue' but not the 'seat'. In the current instance, Indian law governed the substantive contract. The arbitration procedures were governed by the UNCITRAL Model Law. The arbitration procedures were held in Kuala Lumpur. Article 20 of the UNCITRAL Model Law states that the parties may agree on the 'place' of arbitration, failing which the arbitral tribunal will select the site of arbitration. A three-judge bench of the Supreme Court said that when 'place' is indicated without any other conditions, it is equivalent to 'seat' and thus settles the question of jurisdiction. However, if a condition is connected to the word' place,' the requirement must be met for 'place' to become synonymous with 'seat.' The three-judge bench decided that in this instance, neither the parties had chosen a 'seat' nor the arbitral tribunal had expressly determined the 'seat' in the arbitral award. Therefore, the requirements associated with the word 'place' were not met. Asserting the well-established difference between the 'seat' and 'venue' of arbitration, the

Supreme Court ruled that Kuala Lumpur could not be designated the 'seat' simply because it was the 'venue' and the award was signed in that location. In light of the above, the three-judge panel concluded that Indian courts had the authority to consider the application for setting aside under Section 34.

*Hardy Exploration* is of limited assistance as it does not explain objectively how a seat may be chosen when none is specified in the arbitration agreement. Examining other clauses of the contract and/or the conduct of the parties is very subjective. Through this decision, the Supreme Court did not provide any clarity on this issue other than the simple conclusion that a chosen venue could not be treated as the seat of arbitration in the absence of additional factors indicating that the chosen venue was intended to be the seat of arbitration.

**When 'Venue' of Arbitration Equates to 'Seat'**

[9] *Union of India v Hardy Exploration & Production (India) Inc*, (2018) 7 SCC 374.

Several Indian court judgements have contradicted each other and have interpreted 'venue' as 'seat.' The first judgement worthy of note is the Supreme Court's ruling in *Brahmani River Pellets Ltd v Kamachi Industries Ltd.* ["**Brahmani River Pellets**"].[10] In this case, the dispute resolution provision said that the arbitration would take place in Bhubaneshwar. The Court ruled that

Bhubaneshwar should be considered the 'seat' of the arbitration. In doing so, reliance was placed on the *BALCO* and *Indus* verdicts, many English court decisions, and the views of several jurists.

This problem occurred again in the ruling of *BGS SGS Soma JV v NHPC Ltd.* ["**Soma**"],[11] where the arbitration clause stated, 'Arbitration procedures shall be heard in New Delhi/Faridabad...' It was determined that the reference to 'Delhi/Faridabad' should be interpreted as a reference to the seat because (i) the phrase 'arbitration proceedings' should include the entire arbitration proceedings and not just the venue, and (ii) if the parties intended 'venue' to be interpreted in this manner, they would have used language such as 'Tribunals are to meet or have witnesses, etc.' where hearings were to occur at the 'venue.'

It is significant to note that, in *Soma*, the Supreme Court not only established the law on the premise that the designation of 'venue' should be understood as 'seat' but also clearly stated that its ruling in *Hardy Exploration* was legally flawed. Here, the Supreme Court had concluded that 'venue' could only be understood as 'seat' if certain further auxiliary criteria were also met (as stated in the decisions referred to in Section II of this article). *Hardy Exploration* was deemed bad law because it did not seem to comply with *BALCO*, which acknowledged the premise established in *Roger Shashoua v Mukesh Sharma*.[12]

In this respect, however, it is important to emphasise that the *Mankashi Impex* ruling was issued after the *Soma* position was brought to the Court's attention. It can be safely assumed that *Mankashi Impex* studied and interpreted *Soma*, hence it may be claimed that the stance referenced in the preceding portion of this article is not implicitly overturned. On the other hand, it may be claimed that the *Mankashi Impex* ruling was *per incuriam* since it neglected to consider the *Soma* ratio.

In *Noy Vallensina Engineering SPA v Jindal Drugs Ltd.*,[13] which similarly dealt with this dilemma in a post-award situation, the Supreme Court subsequently interpreted the designation

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[10] *Brahmani River Pellets Ltd v Kamachi Industries Ltd,* 2019 SCC Online SC 929.
[11] *BGS SGS Soma JV v NHPC Ltd,* (2019) 17 SCALE 369.
[12] *Roger Shashoua v Mukesh Sharma,* Civil Appeal Nos 2841-2843 of 2017 (Order dated 4 July 2017, SC). [13] *Noy Vallensina Engineering SPA v Jindal Drugs Ltd,* (2021) 1 SCC 382.

of London as 'place' in the contract to be the 'seat' since the arbitration processes and the award was conducted in London.

This judgement was followed by *Inox Renewables Ltd v Jayesh Electricals Ltd*.[13] in the Supreme Court.

In this case, it was determined that a change of venue constituted a change in the Court's jurisdiction for the purposes of initiating procedures to set aside the award. This resulted in an inferred conclusion that 'seat' should be interpreted as 'venue' since only the courts of the seat had the authority to hear applications to set aside an award.

In addition, the rationale of the Madras High Court's ruling in *Balapreetham Guest House Pvt Ltd v Mypreferred Transformation and Hospitality Pvt Ltd*[14] is noteworthy. In this case, New Delhi was designated as the place for arbitration, while the courts of Chennai were granted exclusive jurisdiction. Drawing a contrast between the topic of the agreement and the subject of the arbitration, the Madras High Court determined that New Delhi was the seat of arbitration and that New Delhi courts had jurisdiction over the arbitration proceedings. The courts of Chennai would only have jurisdiction if the parties chose to forego their right to arbitrate and file a lawsuit. This conclusion was reached by placing reliance on *Soma*.

The position that 'venue' should be interpreted as 'seat' was also acknowledged by the English courts in *Process & Industrial Development Ltd v Federal Republic of Nigeria*,[15] wherein London was interpreted as the seat despite having been designated as the 'venue' and in the absence of other factors. Similarly, the Singapore Court of Appeal[16] and the Swiss Federal Tribunal[18] have interpreted the mere reference of a location in the arbitration clause as implying 'seat,' even in the lack of additional supporting circumstances explicitly stating this aim.

**Confusion**

Evidently, there is much uncertainty in the jurisprudence of judgements discussed. These indicate that the question of selecting the seat is subject to the Court's whims and fancies. According to the author, both approaches adopted by the courts lack objective analysis and would have unjust consequences for the parties for the reasons outlined below.

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[13] *Inox Renewables Ltd v Jayesh Electricals Ltd,* Civil Appeal No 1556 of 2021 (Order dated 13 April 2021, SC).

[14] *Balapreetham Guest House Pvt Ltd v Mypreferred Transformation and Hospitality Pvt Ltd*, OP No 438 of 2020 (Order dated 19 March 2021, Madras HC); *Raman Deep Singh Taneja v Crown Realtech Pvt Ltd*, Arb P 444/2017 (Order dated 23 November 2017, Delhi HC).

[15] *Process & Industrial Development Ltd v Federal Republic of Nigeria,* (2019) EWHC 2241.

[16] *BNA v BNB,* [2019] SGCA 84; *ST Group Co Ltd v Sanum Investments Ltd.,* [2019] SGCA 65. [18] Decision no 4A_376/2008, judgment of 5 December 2008, 27 ASA Bull 762 (2009).

i. The *BALCO* judgement made the difference between 'venue' and 'seat' known to the parties in the proceedings in 2012, but it has been around a decade since the judgement.

Nonetheless, the conscious use of the term 'venue' and the absence of the term 'seat' indicated that the parties did not intend for 'venue' to be interpreted as 'seat', regardless of the inclusion of the other elements. In addition, this strategy would contradict the parties' business acumen. ii. Based on India's Code of Civil Procedure 1908, the parties' right to address suitable forums may be compromised. In accordance with the *BALCO* ruling, they would have specified 'venue' or purposely removed any reference to 'seat' to preserve access to those forums. iii. Lastly, since the law established by the Indian Supreme Court applies retrospectively, it would have a significant impact on the judgments given by the different High Courts after the *Hardy Exploration* ruling. Numerous cases would be reopened needlessly, and the situation of the parties involved in those rulings would remain unclear.

**Recommendation and the Way Forward**

The position generated by the judgments outlined above would create a scenario in which the parties would come to blows regarding the interpretation of every arbitration clause in courts. In addition, the adoption of the 'venue + additional factor' method would result in an exercise centred on the facts, which would be different for each case, making the law on the interpretation of arbitration agreements exceedingly ambiguous.

To ease worries over current issues, the Indian government should alter the Arbitration and Conciliation Act of 1996 ["**1996 Act**"] to define the terms' venue' and 'seat' and to include an explicit provision granting exclusive jurisdiction to the courts of the 'seat' alone.

Alternately, and until the anticipated legislative activity is carried out, it is recommended that the Indian Supreme Court adopt the method outlined below.

i. Only if there is a clear and unambiguous indication of the 'seat' of arbitration should the courts of the seat have authority over its interpretation. The interpretation of 'venue' as the 'seat' of arbitration should be accorded deference, with or without the aid of other circumstances.

ii. In the event of domestic arbitrations, if the parties fail to expressly identify a seat of arbitration, the courts granted exclusive jurisdiction according to the provisions of the contract shall be regarded as the courts of the seat. Moreover, in the absence of an exclusive jurisdiction provision, the courts at the location where the cause of action arose should be understood as the seat courts, and parties should be free to approach any of those forums. In this regard, it is important to highlight that, according to Section 42 of the 1996 Act, once a party chooses to pursue a specific venue with jurisdiction over the issue, the parties are precluded from contacting other courts. iii. In international

commercial arbitrations, if the parties fail to specifically specify a seat of arbitration, the nation whose laws control the contract should be considered the seat of arbitration. This conforms to the procedures used by English[17] and Singaporean courts.[18]

This approach was likewise taken by the Indian Supreme Court in *NTPC v Singer & Co* ["**NTPC**"][19] but in an open-ended fashion. In this case, it was determined that the law controlling the contract would govern the arbitration agreement unless there was a contrary purpose. This judgement, when interpreted considering *BALCO*, would indicate that the contractual law is inapplicable when the seat is specified, thereby safeguarding party autonomy. However, the significance of the NTPC ruling should be defined to reflect that only a clear, unequivocal, and direct specification of 'seat' would render the contractual law inapplicable.

The suggested judicial method would give contracting parties the privilege of avoiding protracted litigation, which is one of the major reasons for the inclusion of the arbitration clause in their contract. Further, it would lead to a consistent approach, which is essential in India's current arbitration climate.

**Conclusion**

This article's discussion of the conundrum of 'seat' and 'venue' is undoubtedly a hindrance to India being a centre for arbitration. Thus, the Indian government's objective of making India an arbitral hub, as evidenced by the Srikrishna Report,[20] can only be achieved when the grey areas have been addressed and settled through proactive joint legislative and judicial efforts. These efforts would be crucial to attaining the government's objective and making the law consistent in India.

[17] *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb,* [2020] UKSC 38.
[18] *BCY v BCZ,* [2016] SGHC 249.
[19] *NTPC v Singer & Co,* (1992) 3 SCC 551.
[20] Justice B. N. Srikrishna, Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (Ministry of Law and Justice 2017).