



## ELP Arbitration Weekly Alert

June 05, 2019

IN THE ABSENCE OF AN AGREEMENT REGARDING THE SEAT OF ARBITRATION, DELHI HIGH COURT RELIES UPON FACTUAL INDICATORS TO DETERMINE THE INTENT OF PARTIES AND CONCLUDES THAT DELHI WAS NOT INTENDED AS THE SEAT OF ARBITRATION

[Dwarika Projects Ltd. v. Superintending Engineer, Karnal, PWD, \(B&R\), Haryana <sup>1</sup>\(10 May 2019\)](#)

### Background

Dwarika Projects Ltd. (**Petitioner**) and Superintending Engineer, Karnal, PWD (**Respondent**) executed an agreement (**Agreement**) for construction and maintenance works at a railway line crossing at Karnal.

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<sup>1</sup> 2019 SCC OnLine Del 8445

Disputes arose between the parties after the Respondent terminated the Agreement on account of purported delays and the disputes were then referred to arbitration.

Two awards, one by the majority members of the arbitral tribunal (**Award**) and another by the dissenting arbitrator were delivered. The Award was signed at Delhi. Both the Petitioner and the Respondent were aggrieved by the Award and while the Petitioner filed an application under Section 34 (**Application I**) of the Arbitration and Conciliation Act, 1996 (**the Act**), before the Delhi High Court (DHC); the Respondent filed an application (**Application II**) under section 34 of the Act, before the Additional District Judge, Karnal, State of Haryana<sup>2</sup>.

In the proceedings before the DHC (in Application I), the Respondent challenged the maintainability of Application I for want of territorial jurisdiction. The question which arose for consideration before the DHC was whether Delhi was the seat of arbitration.

### **Findings of the Court**

The DHC observed that the arbitration agreement was silent on the seat or place, or the venue of arbitration.

#### **Venue cannot be equated with Seat of Arbitration**

The venue of the arbitration was fixed in Chandigarh and thereafter in Delhi. The DHC observed that neither did the parties agree to a jurisdictional seat nor was a finding made by the tribunal to such effect. The DHC concluded that the venue of the arbitration would not be a relevant factor to determine the seat of arbitration.

Upon examining section 20 (3) of the Act, the DHC noted that the same allowed a tribunal to meet at a place other than the jurisdictional place i.e. seat of arbitration for several reasons including inspection of documents or goods or property and hearing of witnesses, experts or parties. Therefore, in a given case, the venue of arbitration can be different from the seat of arbitration.

The DHC observed that the consequence of determining the venue is different from determining the jurisdictional seat of arbitration, and the choice of parties must be considered, before the court fixes the seat of arbitration. The DHC concluded that the seat of arbitration cannot be imposed upon parties by simply regarding the venue as the seat.

The DHC considered the jurisprudence on the issue of whether venue can be equated as seat of arbitration and made the following observations:

1. Relying upon *HLL Lifecare*<sup>3</sup>, the DHC reiterated the settled position that fixing of the venue of arbitration by the tribunal cannot be equated as the fixing of seat of arbitration by the arbitral tribunal.
2. Referring to *Hardy Exploration*<sup>4</sup>, the DHC observed that while the proceedings were held in Kuala Lumpur and the arbitral award was signed in Kuala Lumpur, in view of the facts of the said case, the Supreme Court ruled that Kuala Lumpur was not the seat of arbitration.
3. In *Enercon (India) Limited*<sup>5</sup>, the subject clause referred to London as the venue of arbitration and remained silent on the seat of arbitration. The Supreme Court considered the indicators in the contract between the parties and concluded that since the parties agreed to the applicability of the Act to the arbitration proceedings, the seat of arbitration would be India and not the geographical location of the venue i.e. London.

<sup>2</sup> The DHC observed that Application II was transferred to the Additional District Judge-cum-Presiding Judge, Special Commercial Court at Gurugram from the District Court at Karnal.

<sup>3</sup> *HLL Lifecare Ltd. v. Happy Electricals*, 2018 SCC OnLine Del 9814

<sup>4</sup> *Union of India v. Hardy Exploration and Production (India) INC.*, 2018 SCC OnLine SC 1640

<sup>5</sup> *India Limited v. Enercon GMBH*, (2014) 5 SCC 1

### *Place of signing of the arbitral award cannot confer jurisdiction on the courts of such place*

In view of the above precedents, the DHC observed that the parties intended to vest the courts outside Delhi with jurisdiction in the matter and the fact that the arbitral award was signed in Delhi cannot confer jurisdiction on the DHC when the Agreement establishes otherwise. The DHC clarified that fact that the award was rendered at a place other than the seat of arbitration or the court of natural jurisdiction does not by itself lend jurisdiction to the court in which the award is passed, unless otherwise agreed by the parties.

### *In the absence of an agreement regarding seat of arbitration, relevance can be found in factual indicators*

Since neither the parties agreed to the seat of arbitration nor did the arbitral tribunal fix the seat of arbitration, the DHC found relevance in the following indicators - (a) Place of execution of the Agreement was *Karnal*; (b) Place of execution of subject works was *Karnal*; (c) Stipulations and conditions contained in the Invitation to Bid<sup>6</sup> (i.e. a bid-related document which is subsumed in the Agreement); and (d) Condition No.16 of the Agreement<sup>7</sup> which provides that the jurisdiction of the court would be the district court of the concerned head-quarter. The DHC concluded that these indicators clarify that the parties did not intend for Delhi to be the seat of arbitration.

### *Court rules out applicability of Section 42 of the Act in the present case*

The DHC rejected the contention of the Petitioner that pursuant to section 42 of the Act, the Petitioner ought to have first mover advantage as it filed Application I prior to the Respondent filing Application II. The DHC held that in view of the present factual matrix, the Petitioner cannot seek reliance on section 42 of the Act.

#### Conclusion and Analysis

Based on the above findings, the DHC allowed the preliminary objections raised by the Respondent and directed the Registry to return the Application I with the appropriate endorsement. The DHC noted that the Petitioner is entitled to institute its application under section 34 of the Act before the appropriate court in accordance with the law.

The DHC applied the judicial precedents discussed above to conclude that the venue could not be equated with the seat in the present case. The DHC examined the facts to determine the intent of the parties and concluded that the parties did not intend for the seat of arbitration to be Delhi. Given that the DHC set out the indicators which weighed in on the court in determining whether Delhi was intended as the seat of arbitration, it remains to be seen whether the courts will now apply these indicators (i.e. place of execution of the agreement, place of execution of works etc.) as a yardstick to assess the intent of parties when the agreement is silent on the seat of arbitration.

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<sup>6</sup> "7. The jurisdiction of court will be at Karnal."

<sup>7</sup> "16. The jurisdiction of the court will be the Distt. Court of [the] concerned headquarter."