ELP Arbitration: Article

SUPREME COURT LAYS DOWN THE RULES FOR DETERMINING "SEAT" OF AN ARBITRATION; CLARIFIES THAT DESIGNATING A SEAT AMOUNTS TO GRANTING EXCLUSIVE JURISDICTION TO THE COURTS OF THE SEAT

BGS SGS Soma JV v. NHPC Ltd.[1] (SC, 10 December 2019)

Factual background

BGS SGS Soma JV (**Petitioner**) was awarded a contract (**Contract**) by NHPC Ltd. (**Respondent**) for certain construction works to be carried out in the states of Assam and Arunachal Pradesh. The Contract contained an arbitration clause (**Arbitration Clause**), which inter alia provided that "Arbitration Proceedings shall be held at New Delhi/Faridabad, India…."

Disputes under the Contract arose between the parties, and were referred to arbitration in accordance with the Arbitration Clause. After, seventy-one arbitral hearings in New Delhi, the arbitral award (**Award**) was delivered by the tribunal in August 2016, in favour of the Petitioner.

The Respondent filed an application under section 34 (**Section 34 Petition**) of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**), before the District and Sessions Court at Faridabad, Haryana. The Petitioner challenged the jurisdiction of the court and pleaded that the appropriate court would be at New Delhi (which the Petitioner contended was the seat of the arbitration) or at Assam (where the cause of action partly arose).

The Respondent submitted that the Arbitration Clause did not designate New Delhi as the seat, and therefore the Respondent was free to approach the courts at Faridabad, where the cause of action had arisen (as the Contract was signed there).

The Special Commercial Court, Gurugram[2] agreed with the Petitioner, and returned the Section 34 Petition to the Respondent, to be filed before the proper court in New Delhi. The Respondent appealed this decision, under section 37

[1] *Civil Appeal No. 9307 of 2019, with Civil Appeal No. 9308 of 2019, with Civil Appeal No. 9309 of 2019.*
[2] *The matter had been transferred here from the District and Sessions Court, Faridabad.*

(**Appeal**) of the Arbitration Act, before the High Court of Punjab and Haryana at Chandigarh (**High Court**). Though the Petitioner argued that such an appeal was not maintainable, the High Court disagreed on the basis of section 37(1)(c), and decided the Appeal in favour of the Respondent, thereby restoring the Section 34 Petition before the Special Commercial Court, Gurugram.

Issues and findings

The Petitioner filed the present proceedings before the Supreme Court (SC), wherein the issues which arose were broadly as follows:

i. Whether the Appeal under section 37 had been maintainable before the High Court?

The Respondent contended that its Appeal had been maintainable under section 37 of the Arbitration Act read with section 13 of the Commercial Courts Act, 2015 (**Commercial Courts Act**). The Petitioner placed reliance on the SC's judgment in Kandla Export,[3] and argued that the appeal could not have been maintainable, as it did not fall within the strict bounds of section 37.

The SC agreed with the Petitioner, and strongly relied on its findings in the Kandla Export judgment. It is settled law that the right to appeal is not an inherent right but a creature of statute, i.e., an appeal can be preferred only where expressly permitted by law. The SC observed that section 13 of the Commercial Courts Act does not provide an independent right of appeal, but merely provides the forum for such an appeal. Therefore, appeals under section 37 of the Arbitration Act would necessarily be restricted to the category of orders enumerated therein.

The SC explained that a refusal to entertain an application under section 34 on the basis of lack of jurisdiction would not amount to "refusing to set aside an arbitral award under section 34". In its view, the High Court had failed to appreciate that the refusal to set aside the Award should have been under section 34, i.e., after the court heard the Section 34 Petition on merits and thereafter dismissed the application.

Therefore, the SC concluded that the Appeal was not maintainable before the High Court, and could not have been decided on the basis on section 37(1)(c).

ii. What would be the effect of designating a seat of arbitration?

The SC relied on BALCO[4] to reiterate that under Section 2(1)(e) of the Arbitration Act, 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.

Having said so, the SC had proceeded to provide an example in the said paragraph 96 of the BALCO judgment.

> *"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."*

In the present case, the SC opined that the language of paragraph 96 of BALCO appeared to be incongruous if read in isolation, as it generally stated that courts would have concurrent jurisdiction, but simultaneously provided the

[3] *Kandla Export Corporation v. OCI Corporation, (2018) 14 SCC 715.*
[4] *Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Service, Inc, (2012) 9 SCC 552.*

example that only courts of Delhi would have supervisory jurisdiction over the arbitration proceedings, once Delhi had been selected as the seat of arbitration.

In order to give this a harmonious reading, the SC looked at it in the broader light of the BALCO decision, wherein the court had recognized the principles of party autonomy and of territoriality, and held, that in the context of international commercial arbitrations, choosing a seat of arbitration was akin to granting exclusive jurisdiction to the court of the seat. If anything to the contrary was allowed, there could be a situation where the same award would be subject to challenge in two countries, with possibly conflicting outcomes, which would pose a grave problem to the court where the award was then sought to be enforced.

The SC in the present case applied the same scenario to the domestic example used in BALCO. It found that a harmonious reading of the BALCO judgment necessitated that, even in the domestic context, designating a seat would amount to the parties conferring exclusive jurisdiction upon the courts at the seat.

iii. Whether New Delhi was the seat of arbitration under the Arbitration Clause?

The SC noted that, following the enactment of the Arbitration Act, the Indian courts had not been entirely clear on the distinction between the 'seat' of arbitration and the 'venue' of arbitration, with the latter being merely a convenient location for the tribunal and/or the parties to conduct the arbitral hearings.

The BALCO judgment had attempted to clarify this by distinguishing between the different usages of the term 'place' under section 20[5] of the Arbitration Act.

The court, in BALCO, had clarified that 'place' in the context of sub-section (1) and sub-section (2) would mean 'seat', whereas in the context of sub-section (3) it would mean a convenient 'venue'.

The SC's recent observation in the case of Hardy Exploration[6] had noted this distinction between seat and venue to hold that a mere reference to venue would not, by itself, amount to the designation of a seat.

In the present case, the apex court noted that the judgment in BALCO had entirely approved and applied the 'Shashoua principle', which was derived from the English case of Roger Shashoua[7]. In that case, the arbitration clause had provided that the arbitration was to be conducted in accordance with the Rules of the ICC in Paris, and that the 'venue of the arbitration shall be London'.

The English court had held that

> *"… When therefore there is an express designation of the arbitration venue as London and no designation of any alternative place as the seat, combined with a supranational body of rules governing the arbitration and no other significant contrary indicia, the inexorable conclusion is, to my mind, that London is the juridical seat and English law the curial law."*[8]

Taking note of this, the 'Shashoua principle', the apex court in BALCO had also held that though the word "venue" is not synonymous with "seat", on the facts of that case, London was really the seat of the arbitration, even though it had been described as the venue.

---

[5] *"20. Place of Arbitration. -*
(1) The parties are free to agree on the place of arbitration.
(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."
[6] *Union of India v. Hardy Exploration and Production (India) Inc., 2018 SCC OnLine SC 1640.*
[7] *Roger Shashoua v. Mukesh Sharma, [2009] EWHC 957.*
[8] *Roger Shashoua v. Mukesh Sharma, [2009] EWHC 957, at para 34.*

The SC in the present case not only noted the approval of the Shashoua principle by the BALCO judgment, but also adverted to various other judgments[9] wherein a similar principle had been applied.

Having noted as above, the SC in the present case found that Hardy Exploration had failed to follow the decision of the five-judge bench in BALCO, and hence could not be considered good law.

It concluded that whenever a particular location is designated as the "venue" of the arbitration proceedings, such a "venue" should be considered the "seat" of the arbitral proceedings, since the venue is not being limited to one or more individual hearings, but to the arbitral proceedings as a whole.

The SC, however, stated that that such language needs to be contrasted with other phraseology such as designating a location where the "tribunals are to meet or have witnesses, experts or the parties", or where only hearings are expected to take place at the "venue", which would lead to a conclusion that the same is not the "seat".

The apex court also noted that "the fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings."

On this basis, the SC ruled that, in the facts of the present case, there being no contra indication, the parties had designated either New Delhi or Faridabad to be the seat of arbitration. In addition to this, the fact that all hearings had been held in New Delhi and that the Award had been signed at New Delhi, led to the inexorable conclusion that parties had selected New Delhi as the seat of arbitration.

Based on the finding under issue no. (ii), this further led to the conclusion that the courts at New Delhi would have exclusive jurisdiction, and were the only courts competent to hear the Section 34 Petition. On this basis, the SC set aside the High Court's judgment which was challenged in the present proceedings, and ordered the Section 34 Petition to be presented before the competent court at New Delhi.

Conclusion

One of the most significant aspects of this judgment is that it has not only dealt with the case on hand, but has made a painstaking effort to clarify the entire legal position on two significant issues:

- Designating a seat amounts to exclusive jurisdiction of the courts at the seat; and
- Designating a 'venue' of the arbitration proceedings amounts to designating a seat, in the absence of indicators to the contrary.

It can only be hoped that this puts to rest any further controversy relating to these aspects before various High Courts. At the same time, this judgment also underlines the importance of parties taking care to designate a 'seat' of arbitration at the very outset, given that they are also effectively selecting the courts which would have supervisory jurisdiction thereafter.

For this reason, it is always advisable to have a clearly drafted arbitration clause, setting out the common understanding of both parties, to avoid jurisdictional disputes at a later stage, which only serve to cause unnecessary delays in adjudication of the actual disputes between parties.

[9] Enercon GmbH v. Enercon (India) Ltd., [2012] EWHC 689; Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd., (2011) 6 SCC 179; Videocon Industries Ltd. v. Union of India, (2011) 6 SCC 161.