



- The number of arbitrators shall be one. The arbitration proceedings shall be conducted in English language.
- 17.3 It is agreed that *a party may seek provisional, injunctive, or equitable remedies, including but not limited to preliminary injunctive relief, from a court having jurisdiction, before, during or after the pendency of any arbitration proceeding.*

## FACTUAL BACKGROUND

- On October 14, 2017 a company named IQAir AG (**proposed Respondent No.2**) informed the Applicant that it had acquired all technology and associated assets of the Respondent. However, IQAir AG stated that it would not assume any contracts of the Respondent. Disputes arose between the parties, and the Applicant filed an application under section 9 of the Act before the Delhi High Court seeking interim reliefs against the Respondent and IQAir AG (**Section 9 Application**). By an interim order dated February 28, 2018 the Delhi High Court restrained the Respondent from selling any of its products in India. As on the date of this judgment, the application under section 9 was pending adjudication before the Delhi High Court.
- While the matter in the Section 9 Application was ongoing, the Applicant issued a Notice of Arbitration dated December 8, 2017. Resisting the invocation of arbitration, the Respondent submitted a response dated December 15, 2017 and January 5, 2018 whereunder the Respondent *inter alia* contended that the MOU provides for arbitration to be “*administered*” and seated in Hong Kong. In the circumstances, the Applicant filed an application under section 11 of the Act seeking court assistance for the appointment of an arbitrator before the Supreme Court (**Section 11 Application**).

## OBSERVATIONS AND FINDINGS

- In the section 11 Application, the Applicant contended that the arbitration is an “*International Commercial Arbitration*” as per Section 2(1)(f) of the Act with the seat of arbitration in Delhi. Further, the Applicant sought to substantiate the maintainability of section 11 Application on the following grounds:
  - Clause 17.1 of the MoU clearly stipulates that the MoU is governed by the laws of India;
  - Clause 17.1 of the MoU states that the courts at New Delhi have jurisdiction;
  - Through Clause 17.2 of the MoU, the parties have only agreed to Hong Kong as the “*venue*” of arbitration and Hong Kong is not the juridical seat of the arbitration;
  - *Hardy Exploration*<sup>2</sup>, postulates that a “*venue*” can become a “*seat*” only if - (i) no other condition is postulated; (ii) if a condition precedent is attached to the term “*place*”, the said condition/indicia has to be satisfied first for “*venue*” to be equivalent to “*seat*”; and
  - Since Clause 17.1 is clear that the parties have clearly agreed that the MoU has to be governed by the laws of India and the courts at New Delhi would have the jurisdiction, Part-I of the Act is applicable.
- The Applicant further submitted that the parties have agreed that the proper law of the contract shall be the laws of India. Further, since the MOU is clearly silent on the proper law and the curial law of the arbitration, in the absence of the clear stipulation as to the proper law and curial law of the arbitration, clause 17.1 of the MOU would govern the proper law and the curial law.
- The Respondent submitted that the words “*administered in Hong Kong*” used in clause 17.2 of the MoU and the fact that the place of arbitration was agreed as Hong Kong clearly shows that the parties have agreed that the arbitration between the parties would be seated in Hong Kong.
- **Supreme Court did not delve into the issue of correctness of BGS SGS SOMA JV v. NHPC Ltd.**
- Relying upon the recent decision of the Supreme Court in *BGS SGS*<sup>3</sup>, the Respondent further contended that the expression “*arbitration proceedings*” would make it clear that the “*venue*” is really the “*seat of arbitration proceedings*” as the aforesaid expression does not include just one or more single or part hearing but the arbitration proceedings as a whole including making of the award at that place. However, the Applicant challenged the correctness of *BGS SGS* and contended that (i) *Hardy Exploration* and *BGS SGS*, both being pronounced by a three-judges Bench, declaration by the later Bench that *Hardy Exploration* is not a good law,

<sup>2</sup> *Union of India v. Hardy Exploration and Production (India) INC, (2018) 7 SCC 374*

<sup>3</sup> *BGS SGS SOMA JV v. NHPC Ltd., 2019 (17) SCALE 369*

may not tantamount to overriding of *Hardy Exploration*; (ii) since both the judgments were pronounced by Benches of equal strength, it is not open to the Bench pronouncing the decision in *BGS SGS* to hold that *Hardy Exploration* was incorrect. The learned Bench in *BGS SGS* ought to have referred the matter to a larger Bench; and (iii) the doctrine of binding precedent is of utmost importance in the administration of judicial system as held in *Chandra Prakash*<sup>4</sup>.

- After hearing the submissions of both parties, the three-judges Bench of Supreme Court, in the present case, held that considering clause 17 of the MOU and the definite clauses therein and in the facts and circumstances of the case, it was not inclined to go into the question on the correctness of *BGS SGS* or otherwise.
- ***Mere expression “place of arbitration” cannot be the basis to determine the intention of the parties that they have intended that place as the “seat” of arbitration.***
- The Supreme Court observed that - it is well-settled that “*seat of arbitration*” and “*venue of arbitration*” cannot be used inter-changeably. It has also been established that the mere expression “*place of arbitration*” cannot be the basis to determine the intention of the parties that they have intended that place as the “*seat*” of arbitration. The intention of the parties as to the “*seat*” should be determined from other clauses in the agreement and the conduct of the parties.
- Reflecting upon the jurisprudence, the Supreme Court *inter alia* observed that in *Enercon (India) Limited*<sup>5</sup>, it was held that “*the location of the Seat will determine the courts that will have exclusive jurisdiction to oversee the arbitration proceedings. It was further held that the Seat normally carries with it the choice of that country’s arbitration/curial law*”.
- Referring to *Eitzen Bulk*<sup>6</sup>, the Supreme Court observed that when the parties have chosen a place of arbitration in a particular country, that choice brings with it a submission to the laws of that country. Referring further to *Datawind*<sup>7</sup>, the Supreme Court observed that in the context of domestic arbitration, it has held once the “*seat*” is determined, only that jurisdictional court would have exclusive jurisdiction.
- Applying the above tenets to the present facts, the Supreme Court held as under:
  - The Arbitration Agreement provides Hong Kong as the place of arbitration.
  - The agreement between the parties choosing “*Hong Kong*” as the place of arbitration by itself will not lead to the conclusion that parties have chosen Hong Kong as the seat of arbitration.
  - However, reference to Hong Kong as “*place of arbitration*” is not a simple reference as the “*venue*” for the arbitral proceedings. The words, “*the place of arbitration*” shall be “*Hong Kong*”, have to be read along with Clause 17.2, which provides that “*...any dispute, controversy, difference arising out of or relating to the MoU shall be referred to and finally resolved by arbitration administered in Hong Kong....*”.
  - The words in Clause 17.2 that “*arbitration administered in Hong Kong*” is an indicia that the seat of arbitration is at Hong Kong and clearly suggests that the parties have agreed that the arbitration be seated at Hong Kong, and that laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award.
  - Addressing the Petitioner’s contention, the Supreme Court considered Clause 17.1 of the MOU which stipulates that the MOU is governed by the laws of India and the courts at New Delhi shall have jurisdiction. The Supreme Court agreed that Indian law would be the substantive law governing the contract. However, the Supreme Court disagreed that the same would be indicative of the seat of arbitration being India. The Supreme Court observed that Clause 17.1 which includes the language “*without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction*” does not take away or dilute the intention of the parties in Clause 17.2 that the arbitration be administered in Hong Kong.

<sup>4</sup> *Chandra Prakash v. State of U.P.*, (2002) 4 SCC 234

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

<sup>6</sup> *Eitzen Bulk A/S v. Ashapura Minechem Ltd.*, (2016) 11 SCC 508

<sup>7</sup> *Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd.*, (2017) 7 SCC 678,

- Thus, the Supreme Court found that the seat of arbitration being Hong Kong, it had no jurisdiction to appoint an arbitrator. Referring to *BALCO*<sup>8</sup>, the Supreme Court observed that section 11 Application was not maintainable since the arbitration is seated at Hong Kong, and liable to be dismissed.
- As regards the section 9 Application, the Supreme Court stated that the words “without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction” in Clause 17.1 are to be read in conjunction with Clause 17.3. Such reading would permit parties to obtain injunctive remedies from the court having jurisdiction and which would include the courts at New Delhi as envisaged in clause 17.1. The Supreme Court observed that since Part-I which includes the right to seek interim relief from Indian courts can be made applicable to arbitrations seated outside India, in order to enable the parties to avail the interim relief from the courts at New Delhi as well, clause 17.3 appears to have been added.

## CONCLUSION AND ANALYSIS

- Based on the above findings, the Supreme Court dismissed the section 11 Application, with liberty to the Applicant to approach Hong Kong International Arbitration Centre for appointment of the arbitrator, if it so desired.
- Although the Supreme Court in paragraph 22 of its decision seems to have resorted to the approach adopted in *Hardy Exploration*<sup>9</sup>, the Supreme Court did not delve into the innumerable decisions pertaining to seat, venue and place. It was perhaps appropriate that the Supreme Court did not go into the correctness of *BGS* in this case as the arbitration agreement in question had enough definitive indicators to guide the court. Also, the issue in the said matter did not involve a determination whether a venue could be considered a seat which perhaps was the underlying reason that the Supreme Court did not consider the other cases. Be that as it may, the Supreme Court’s observations in paragraph 20 on the effect of seat are noteworthy as is its assessment of the intent of the parties which it gathered from the contract itself.

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<sup>8</sup> *BALCO*, (2012) 9 SCC 552

<sup>9</sup> The specification of a location does not automatically lead to the conclusion that it is the seat.