Venue versus seat debate: urgent need for reference to larger bench

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- **'Seat' and 'venue' not synonymous: landmark ruling in *BALCO***
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The concepts of 'seat' and 'venue' in the context of arbitration law have been the subject of numerous landmark rulings in India. However, the test for distinguishing between these two concepts has yet to be settled under Indian law.

'Seat' and 'venue' not synonymous: landmark ruling in *BALCO*

One of the foremost Indian decisions distinguishing between the concepts of 'seat' and 'venue' is that of a constitution bench of the Supreme Court in *Bharat Aluminium Co (BALCO) v Kaiser Aluminium Technical Service Inc* ((2012) 9 SCC 552). In this decision, the bench analysed the Arbitration and Conciliation Act 1996 and concluded that the reference to "place" in Sections 20(1) and 20(2) is a reference to the seat of the arbitration, whereas the reference to "place" in Section 20(3) is a reference to the venue.

The bench also acknowledged that the distinction between a 'seat' and a 'venue' can be complex. The bench relied on numerous foreign decisions in this respect – in particular, the English and Welsh case of *Roger Shashoua v Mukesh Sharma* (2009 EWHC 957 (Comm)), wherein the agreement between the parties provided that:

- the venue of arbitration would be London;
- arbitration proceedings would be conducted in accordance with the International Chamber of Commerce (ICC) Rules; and
- the governing law of the shareholders' agreement was Indian law.

On examining the facts of the case, the England and Wales High Court held that although 'venue' is not synonymous with 'seat', as the arbitration clause required arbitration to be conducted in accordance with the ICC Rules and no significant indication to the contrary existed, the provision that the venue was London amounted to the designation of a juridical seat.

Following *Shashoua* principle

A similar view was expressed by a division bench of the Supreme Court in *Enercon (India) Ltd v Enercon GmbH* ((2014) 5 SCC 1), which relied on *Shashoua* and acknowledged that the same had been approvingly quoted by the constitution bench in *BALCO*. The question before the Supreme Court in *Enercon* was whether London was merely the venue or also the seat of the arbitration. The Supreme Court noted that unlike in *Shashoua*, the parties in *Enercon* had not chosen a "supranational body of rules" like the ICC to govern the arbitration and that the Arbitration and Conciliation Act applied to the arbitration proceedings. For this reason, among others, the Supreme Court held that the juridical seat of the arbitration was India.

Notably, the question before the court in *Shashoua* was also considered by the Supreme Court in *Roger Shashoua v Mukesh Sharma* ((2017) 14 SCC 722) (which involved the same parties). In this case, the Supreme Court also quoted with approval the earlier ruling of the England and Wales High Court and held that London was not merely the location or venue of the arbitration. The Supreme Court found that the principle applied by the England and Wales High Court in *Shashoua* had been accepted in *BALCO* and *Enercon*.

Departure from consistent view: *Hardy*

As explained above, following *BALCO*, the Supreme Court consistently accepted the principle set out in the England and Wales High Court's *Shashoua* decision concerning the seat and venue of the arbitration. However, in what was a clear departure from the views expressed in the above decisions, in *Union of India v Hardy Exploration & Production (India) Inc* (2018 SCC Online SC 1640), a three-judge bench of the Supreme Court applied the determination test (as set out below). Notably, the arbitration clause in this dispute provided that:

- the agreement was governed by Indian law;
- arbitration proceedings were to be conducted in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985; and
- the venue of arbitration would be Kuala Lumpur.

The Supreme Court analysed the arbitration clause and held that the parties had not agreed, and the arbitral tribunal had not determined, the place of arbitration. The Supreme Court relied on Article 20 of the UNCITRAL Model Law and further observed that the expression 'determination' requires a positive act to be undertaken by the arbitral tribunal and that if a condition precedent is attached to the term 'place', said condition must

be satisfied before such place can become equivalent to the seat. In other words, the Supreme Court held that since the place had neither been agreed by the parties nor determined by the tribunal, it could not attain the status of the seat. For this reason, the Supreme Court held that India (and not Kuala Lumpur) was the seat of the arbitration. Thus, the Supreme Court failed to apply the English and Welsh *Shashoua* principle.

Recent developments

On 10 December 2019 a three-judge bench of the Supreme Court issued its decision in *BGS SGS Soma JV v NHPC Ltd* (Civil Appeal 9307/2019). One of the questions that arose in this case was whether the seat of the arbitration proceedings was New Delhi or Faridabad (Haryana). As the arbitration proceedings had been held and the award had been signed in New Delhi, the Supreme Court concluded that New Delhi was the seat of the arbitration. The Supreme Court also reiterated that as soon as a seat is designated by the parties, such designation is akin to an exclusive jurisdiction clause.

However, the Supreme Court also accepted the submission that *Hardy* had been incorrectly decided insofar as it contravened *BALCO*. The Supreme Court analysed several Indian and foreign decisions in this respect and concluded that *Hardy* could not be considered good law as it had failed to apply the English and Welsh *Shashoua* principle, which had also been approved by the constitution bench in *BALCO*. Accordingly, the Supreme Court held that New Delhi was not merely a convenient venue but also the juridical seat of the arbitration.

Comment

BGS Soma and *Hardy* were both delivered by three-judge benches. In *Central Board of Dawoodi Bohra Community v State of Maharashtra* ((2005) 2 SCC 673), a Supreme Court constitution bench ruled that the law set out in a decision delivered by a larger bench is binding on any subsequent bench of lesser or equal strength. It was further held that a bench of equal strength may express an opinion doubting the correctness of an earlier view taken by a bench of equal strength, whereupon the matter may be heard by a larger bench.

In light of the above, it cannot be said that *Hardy* stands overruled in view of the opinion expressed in *BGS Soma*. However, this uncertainty could create difficulties in the future unless clarified by a larger bench of the Supreme Court.

It was recently argued before a three-judge bench of the Supreme Court in *Mankastu Impex Private Limited v Airvisual Limited* (Arbitration Petition 32/2018) that *Hardy* cannot be said to have been overruled and that the bench in *BGS Soma* should have referred the matter to a larger bench. However, in this case, the Supreme Court was considering a petition for the appointment of an arbitrator. Therefore, when the Supreme Court delivered its decision on 5 March 2020, it was not inclined to consider the correctness of *BGS Soma* or otherwise, considering the facts and circumstances of the matter.

The seat versus venue debate lives to die another day. However, in order to avoid confusion, inconvenience or conflicting decisions in the future, this issue must be referred to a larger bench of the Supreme Court as soon as possible for its final word on the matter.

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