Seat/venue/place saga continues: Supreme Court reverses view and declares earlier judgments bad law

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Introduction

On 10 December 2019 a three-judge bench of the Supreme Court passed a judgment in *BGS SGS SOMA JV v NHPC Ltd*,**(1)** deciding key issues relating to the interpretation of arbitration clauses and the scope of appealable orders under the Arbitration and Conciliation Act 1996.

In particular, the Supreme Court held that:

- an appeal against an order transferring proceedings under Section 34 of the Arbitration Act is not maintainable under Section 37 of the act;
- the designation of a seat confers exclusive jurisdiction on the courts of said seat; and
- a place of arbitration – regardless of its designation as a seat, venue or place – is the juridical seat of arbitration unless there is an indication to the contrary.

Through its decision, the Supreme Court has specifically declared that its earlier judgment in *Hardy Exploration***(2)** and the Delhi High Court's decision in *Antrix***(3)** are incorrect.

Facts

A contract was signed between NHPC Limited and its contractor, BGS SGS SOMA JV, for India's largest hydroelectric project on the Subransi River in Assam and Arunachal Pradesh. The contract provided that:

- disputes with Indian contractors would be settled under the Arbitration Act; and
- disputes with foreign contractors would be settled under the Arbitration Act read with the United Nations Commission on International Trade Law Arbitration Rules, with the Arbitration Act to prevail in the case of inconsistencies.

The arbitration clause in the contract further stated that the "arbitration proceedings shall be held at New Delhi / Faridabad".

Disputes arose between NHPC and JV and arbitration proceedings were commenced. The arbitration proceedings were conducted in New Delhi and the consequent award was also signed there. Since the award was in JV's favour, NHPC filed an application under Section 34 of the Arbitration Act challenging the award before the Faridabad District Court.

JV filed an application under Section 151 – read with Order VII, Rule 10 of the Code of Civil Procedure 1908 – and Section 2(1)(e)(i) of the Arbitration Act, seeking the return of the Section 34 application to the appropriate court in New Delhi (since the arbitration had taken place in New Delhi) or Assam (since the cause of action had arisen in Assam.) A special commercial court constituted in Gurugram to decide the matter transferred the Section 34 application from Faridabad to the appropriate court in New Delhi (transfer order).

Aggrieved by this transfer order, NHPC filed an appeal under Section 37 of the Arbitration Act before the Punjab and Haryana High Court. The high court held that:

- the appeal under Section 37 of the Arbitration Act was maintainable;
- the court with relevant jurisdiction was the Faridabad court because the cause of action had arisen there; and
- New Delhi was not the seat of arbitration and only a convenient venue (impugned order).

JV subsequently filed a special leave petition before the Supreme Court challenging the impugned order.

Issues

Under the special leave petition, the Supreme Court had to consider the following questions of law:

- Is a Section 37 appeal maintainable against an order that transfers Section 34 proceedings from one court to another?
- Does the designation of a place of arbitration confer exclusive jurisdiction on the courts of said place to decide disputes arising out of the arbitration agreement?
- What was the seat of arbitration in the present dispute?

Reasoning

Is a Section 37 appeal maintainable against an order that transfers Section 34 proceedings from one court to another?

The Supreme Court observed that Section 37 appeals are maintainable only against orders which:

- refuse reference to arbitration under Section 8 of the Arbitration Act;
- grant or refuse to grant interim relief under Section 9 of the Arbitration Act; or
- are made under Section 34 of the Arbitration Act and set aside or refuse to set aside an arbitral award.

Accordingly, the Supreme Court held that an order which merely transfers Section 34 proceedings from one court to another, as stipulated in the transfer order in the present case, is not tantamount to an outright refusal to set aside the award under Section 34 of the Arbitration Act. The Supreme Court relied on both *Kandla Export Corporation***(4)** and *SDMC v Tech Mahindra***(5)** and held that NHPC's appeal under Section 37 of the Arbitration Act in the Punjab and Haryana High Court was not maintainable.

Does the designation of a place of arbitration confer exclusive jurisdiction on the courts of said place to decide disputes arising out of the arbitration agreement?

In the Supreme Court, NHPC relied on Paragraph 96 of the prolific *BALCO* judgment,**(6)** which states that the court with jurisdiction over the place where a cause of action arises is competent to hear a Section 34 application. Paragraph 96 states that:

> *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.*

A plain reading of this paragraph indicates that in *BALCO* the Supreme Court allowed for two courts to have jurisdiction over arbitration applications: the court of the seat and the court of the cause of action.

However, in *BALCO* the court went on to give detailed consideration to the English judgment in *Roger Shashoua*,**(7)** which clearly states that:

- the courts of the seat of an arbitration have exclusive jurisdiction over all proceedings arising from said arbitration; and
- the allowance of multiple venues is only a matter of convenience.

BALCO even acknowledges that the terms 'seat' and 'place' are used interchangeably.

In light of *BALCO*'s deference to *Roger Shashoua*, and every other portion of the judgment which speaks of conferment of exclusive jurisdiction on the court of the seat of arbitration, in the present case, the Supreme Court held that *BALCO*'s ratio is to be interpreted in the same manner, despite the abovementioned line in Paragraph 96. The Supreme Court supported this holding by referring to *Indus Mobile*,**(8)** *Reliance Industries*,**(9)** *Enercon***(10)** and *Brahmani River Pellets*,**(11)** all of which state, in no uncertain terms, that the designation of a seat of arbitration is tantamount to conferment of exclusive jurisdiction on the appropriate court at the seat of arbitration.

Antrix contrary to established law

In *Antrix* – the basis of Paragraph 96 of *BALCO* – the Delhi High Court held that the court which has jurisdiction over the place where a cause of action arises has concurrent jurisdiction with the courts in the place of arbitration.

In the present case, the Supreme Court disagreed with *Antrix's* interpretation of *BALCO* and Section 42 of the act in light of a holistic reading of the rest of the *BALCO* judgment and *Roger Shashoua*. Accordingly, in the present dispute, the courts of the place of arbitration had exclusive jurisdiction to hear the Section 34 application.

What was the seat of arbitration in the present dispute?

At this juncture, while the Supreme Court had established the exclusive jurisdiction of the courts in the 'place' of arbitration, it had yet to determine the 'seat' of the arbitration. The arbitration agreement stated that the arbitration should be held at a particular place, without designating this place as either the seat or the venue. This issue revolved around a discussion of:

- whether the place of arbitration referred to in the arbitration clause was a juridical seat or merely a venue; and
- which of the two places (ie, Delhi or Faridabad) was the relevant seat.

Is a reference to a 'place of arbitration' a reference to a juridical seat or just a convenient venue?
The Supreme Court held that a reference to a place of arbitration is a stipulation that such place will be the seat of the arbitration and consequently determine the *lex fori*. In order to demonstrate this, the Supreme Court deferred to *Roger Shashoua,* which discussed the 'significant contrary indicia' test. This test propounds that if an arbitration clause states that an arbitration will take place, for example, in London, the arbitration is seated in London and will be governed by UK law in the absence of any obvious or significant indicator that the parties intended otherwise. The Supreme Court discussed other prolific judgments such as *Naviera Amazonica***(12)** and *Enercon v Enercon***(13)** to support this finding.

Hardy Exploration conundrum
In light of the above, the Supreme Court examined the judgment of another three-judge Supreme Court bench delivered in *Hardy Exploration*. In this case, the Supreme Court had stated that:

> *The word 'place' cannot be used as seat. To elaborate, a venue can become a seat if something else is added to it as a concomitant. But a place unlike seat, at least as is seen in the contract, can become a seat if one of the conditions precedent is satisfied. It does not ipso facto assume the status of seat. Thus understood, Kuala Lumpur is not the seat or place of arbitration and the interchangeable use will not apply in* stricto sensu.

In the present case, the Supreme Court held that the decision in *Hardy Exploration* was incorrect because it ignored *Roger Shashoua, BALCO's* reliance thereon and the Indian leg of the *Roger Shashoua* case,**(14)** all of which upheld that the venue of an arbitration is the juridical seat in the absence of any significant contrary indicia. The venue in *Hardy Exploration* was Kuala Lumpur, and only a supranational legal system was involved. There were no indicators contradicting the parties' intent to designate Kuala Lumpur as the juridical seat. Despite this, the Supreme Court held that the Arbitration Act would apply to the arbitration proceedings. The effect that *Hardy Exploration* would have would be to allow a foreign award to be challenged under Section 34 of the act, undoing any progress made post-*BALCO*. Thus, the Supreme Court declared that "the judgment in Hardy Exploration and Production (India) Inc. (supra), being contrary to the Five Judge Bench in BALCO (supra), cannot be considered to be good law".

Is New Delhi or Faridabad juridical seat in present case?
Applying the *Roger Shashoua* principle, New Delhi/Faridabad was the juridical seat because there were no significant contrary indicia. Therefore, the question remained as to which courts had jurisdiction to hear the Section 34 application: the courts of Faridabad or New Delhi?

The Supreme Court considered the fact that the parties had elected for all the arbitration proceedings to take place in New Delhi and that the award had been signed in New Delhi. Accordingly, the Supreme Court overruled the impugned order and concluded that New Delhi was the final juridical seat of the arbitration and that the New Delhi courts had jurisdiction to hear the Section 34 application.

Comment

This judgment does an admirable job of resolving residual ambiguities regarding the issue of exclusive jurisdiction where the seat of an arbitration is situated. It addresses the dichotomy created by *Antrix* relying on *BALCO*. The judgment has clarified the issue and will, in some manner, affect ongoing challenges post-*Hardy Exploration* where Section 34 proceedings have been commenced in other jurisdictions.

Hardy Exploration provided an alternative to a longstanding view, which the Delhi High Court summarised in *Indus Mobile*, and instead treated a venue as a convenient geographical location. In contrast, the present judgment and *Roger Shashoua* have conclusively stated that places and venues are the same as juridical seats as long as there is no indicator that the parties intended otherwise. Unless an arbitration agreement specifies the seat and venue separately, the venue will be understood to be the juridical seat of arbitration. This is in consonance with earlier model clauses which used the term 'venue' in lieu of 'seat' and vice versa.

Notably, the judgments in both the present case and *Hardy Exploration* were passed by three-judge benches of the Supreme Court. Therefore, the present judgment's declaration of the latter as "no longer (being) good law" may not be tantamount to an overruling of *Hardy Exploration*, and there is a possibility that the issue may be referred to a larger bench. Whether it is indeed an unresolved question of law remains to be seen. The Supreme Court has recently seen a lot of traction over the issue of a larger bench deciding questions of law relating to the Land Acquisition Act (as amended in 2014) where similarly, a three-judge bench declared another judgment of a three-judge bench *per incuriam*. It is hoped that this issue will be resolved if it is referred to a larger bench.

For further information on this topic please contact Manavendra Mishra, Akash Karmarkar or Rajeswari Mukherjee at Khaitan & Co by telephone (+91 11 4151 5454) or email (manavendra.mishra@khaitanco.com, akash.karmarkar@khaitanco.com or rajeswari.mukherjee@khaitanco.com). The Khaitan & Co website can be accessed at www.khaitanco.com.

Endnotes

(1) Civil Appeal 9307/9308/9309 of 2019.

(2) *Union of India v Hardy Exploration and Production (India) Inc*, AIR 2018 SC 4871.

(3) *Antrix Corporation Ltd v Devas Multimedia Pvt Ltd*, 2018 (4) ArbLR 66 (Delhi).

(4) *Kandla Export Corporation v M/s OCI Corporation* (2018) 14 SCC 715.

(5) *South Delhi Municipal Corporation v Tech Mahindra*, EFA (OS) (Comm) 3/2019.

(6) *Bharat Aluminium Co v Kaiser Aluminium Technical Service, Inc* (2012) 9 SCC 552.

(7) *Roger Shashoua v Mukesh Sharma*, [2009] EWHC 957 (Comm).

(8) *Indus Mobile Distribution Private Limited v Datawind Innovations Private Limited* (2017) 7 SCC 678.

(9) *Reliance Industries Ltd v Union of India* (2014) 7 SCC 603.

(10) *Enercon (India) Ltd v Enercon GmbH* (2014) 5 SCC 1.

(11) *Brahmani River Pellets Ltd v Kamachi Industries Ltd*, AIR 2019 SC 3658.

(12) *Naviera Amazonica Peruana SA v Compania Internacional De Seguros Del Peru* (1988) 1 Lloyd's Rep 116 (CA).

(13) *Enercon (India) Ltd v Enercon GmbH* (2014) 5 SCC 1.

(14) *Roger Shashoua v Mukesh Sharma* (2017) 14 SCC 722.


Manavendra Mishra


Akash Karmarkar


Rajeswari Mukherjee