DETERMINING THE SEAT OF ARBITRATION

~ A FRESH PERSPECTIVE BY THE SUPREME COURT OF INDIA

The atmosphere of arbitration is globally expanding. More and more commercial decisions are favouring arbitration as a preferred dispute resolution mechanism. Each day, new steps are taken by Courts as well as legislators to improve the viability of India as a preferred seat of arbitration. This is being done for varied reasons such as improving the international ease of doing business ranking of India and in turn resulting in improving foreign investment in India. Amidst all the fervour of making India a preferred seat, what implications essentially follow? The implications which follow are that the seat of an arbitration, brings with it, the implications of the courts which will have supervisory jurisdiction over the arbitration.

The Supreme Court of India has recently, on 25th of September, 2018 dealt with the question of the difference between the "seat", the "place" and the "venue" of arbitration, in the case of Union of India v. Hardy Exploration and Production (India) INC, C.A. No. 4628 of 2018. This is a follow up post from an earlier short post.

ARBITRATION CLAUSE

In order to better understand the stipulations and the agreement between the parties regarding arbitration, it is important to understand the arbitration clause.

"32.1	*This contract shall be governed and interpreted in accordance with the laws of India.*
32.2	*Nothing in this contract shall entitle the contractor to exercise the rights, privileges and powers conferred upon it by this contract in a manner which will contravene the laws of India.*
32.3	*The English language shall be the language of this contract and shall be used in arbitral proceedings. All communications, hearing or visual materials or documents relating to this Contract shall be written or prepared in English.*
33.1	*The Parties shall use their best efforts to settle amicable all disputes, differences or claims arising out of or in connection with any of the terms and conditions of this Contract including the validity and existence hereof or concerning the interpretation or performance thereof.*
33.2	*Matters which, by the terms of this Contract, the Parties have agreed to refer to a sole expert and any other matters which the Parties may agree to so refer shall be submitted to an independent and impartial person of international standing with relevant qualifications and experience appointed by agreement between the Parties. Any sole expert appointed shall be acting as an expert and not as an arbitrator and the decision of the sole expert on matters referred to him shall be final and binding on the Parties and not subject to arbitration. If the Parties fail to agree on the sole expert, then the sole expert shall be appointed, upon request by one of the Parties, by the Secretary General of the Permanent Court of Arbitration at the Hague, from amongst persons who are not nationals of the countries of any of the countries of any of the Parties.*
33.3	*Subject to the provisions herein, the Parties hereby agree that any unresolved dispute, difference or claim which cannot be settled amicably within a reasonable time may,*

except for those referred to in Article 33.2 be submitted to an arbitral tribunal for final decision as hereinafter provided.

The arbitral tribunal shall consist of three arbitrators.

33.4 *The Party or Parties instituting the arbitration shall appoint one arbitrator and the Party or Parties responding shall appoint another arbitrator and both parties shall so advise the other Party. The two arbitrators appointed by the parties shall appoint the third arbitrator.*

33.5 *Any Party(ies) may, after appointing an arbitrator request the other Party(ies) in writing to appoint the second arbitrator. If such other Party(ies) fails to appoint an arbitrator within forty five (45) days of receipt of the written request to do so, such arbitrator may, at the request of the first Party(ies), be appointed by the Secretary General of Permanent Court of Arbitration at Hague, within forty five (45) days of receipt of such request, from amongst persons who are not nationals of the country of any of the parties to the arbitration proceedings.*

33.6 *If the two arbitrators appointed by the Parties fail to agree on the appointment of the third arbitrator within thirty (30) days of the appointment of the second arbitrator and if the Parties do not otherwise agree the Secretary General of Permanent Court of Arbitration at Hague may at the request of either Party and in consultation with both, appoint the third arbitrator who shall not be a national of the country of any Party.*

33.7 *If any of the arbitrator fails or is unable to act, his successor shall be appointed in the manner set out in this Article as if he was the first appointment.*

33.8 *The decision of the arbitral tribunal and in the case of difference among the arbitrators, the decision of the majority, shall be final and binding upon the Parties.*

33.9 *Arbitration proceedings shall be conducted in accordance with the Suncitral Model Law on International Commercial Arbitration of 1985 except that in the event of any conflict between the rules and the provisions of this Article 33, the provisions of this Article 33 shall govern.*

33.10 *Notwithstanding anything to the contrary contained in Article 30, the right to arbitrate disputes and claims under this Contract shall survive the termination of this Contract.*

33.11 *Prior to submitting a dispute to arbitration, a Party may submit the matter for conciliation under the UNCITRAL conciliation, rules by a sole conciliator to be appointed by mutual agreement of the Parties. If the Parties fail to agree on a conciliator in accordance with the said rules, the matter may be submitted for arbitration. No arbitration proceedings shall be instituted while conciliation proceedings are pending.*

33.12 *The venue of conciliation or arbitration proceedings pursuant to this Article unless the parties otherwise agree, shall be Kuala Lumpur and shall be conducted in English language. Insofar as practicable the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitration proceedings and any pending claim or dispute.*

33.13 *The fees and expenses of a sole expert or conciliator appointed by the Parties shall be borne equally by the Contractor and the Government. Assessment of the costs of arbitration including incidental expenses and liability for the payment thereof be at the discretion of the authorities."*

From a perusal of the above clause, a few important considerations emerge:-

1. The substantive law of the contract is the law of India (Clauses 32.1 and 32.2)
2. The procedural law of arbitration is the UNCITRAL Model Law.
3. The venue of arbitration is Kuala Lumpur

WHAT HAPPENED

To elaborate a little on the background of this case, the agreement between the parties was entered into in 1997. The agreement dealt with Hardy Exploration's rights of the search for and potential extraction of hydrocarbons in India. The award was rendered in February, 2013 in favour of Hardy Exploration.

The entire arbitral proceedings took place at Kuala Lumpur and the award was also signed at Kuala Lumpur, as was contemplated in the Agreement. To the knowledge of the writer, never during the arbitration proceedings was there any dispute raised regarding the venue, seat or place of arbitration.

Cutting the long story short, the issue before the Supreme Court of India was whether Kuala Lumpur would be considered to seat of the Arbitration and in effect would that result in the Indian Courts lacking the jurisdiction to entertain a Section 34 Petition before the Delhi High Court.

WHAT LAW APPLIES

1. **The Agreement between the parties was entered into in 1997**.

- The effect of this is that the Agreement between the parties would be governed by the Pre-BALCO law including the implied exclusion principle of *Bhatia International*. BALCO[1] laid down prospectively(from 06.09.2012), that in a foreign seated arbitration neither Section 9 nor any other provision of Part I would be applicable.
- Prior to *BALCO*, the law laid was as laid down in *BhatiaInternational*[2]. *Bhatia International* laid down, that the provisions of Part I would apply even to arbitrations held outside India, unless it was expressly or impliedly excluded by parties. It is pertinent to note, that *Bhatia International* still continues to govern the law as far as arbitration agreements pre-dating *BALCO* are concerned.
- The jurisprudence of implied exclusion has been developing Bhatia International onwards, where various factors such as:-

i. Foreign law being the Proper law of the contract (Substantive law);

ii. Foreign law being law governing the arbitration agreement;

iii. A Foreign seat;

iv. Absence of mention of other laws;

could lead to an implication of exclusion of Part I[3].

(Keep in mind, the 2015 amendment is nowhere in the picture)

2. UNCITRAL model law is the procedural law that applies. Thus any matters of interpretation or ambiguity would have to be resolved by making a reference to UNCITRAL model laws.

WHAT THE COURT DECIDED

Based on the implied exclusion jurisprudence which developed on the basis of *Bhatia International* and continued to develop even post *BALCO* with respect to pre-dated arbitration clauses, the court came to a conclusion that there were not enough factors to hold that Kuala Lumpur, Malaysia being the venue of arbitration was sufficient to impliedly exclude Indian Courts' jurisdiction.

Another important factor, which is a novel concept developed in this case is the interpretation of the UNCITRAL Model law's Article 20. Article 20 reads as follows:-

"Article 20. Place of arbitration – (1) The parties are free to agree on the place of arbitration. Failing such agreement, 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.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation amount its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents."

While interpreting the above clause, the Court held that while clause (1) of Article 20 dealt with a determination of the "seat", clause (2) dealt with merely the venue of convenience.

The Court then held that while the award was signed in Kuala Lumpur and the place of signing the award was mentioned at Kuala Lumpur, it was not a "determination" of the seat of arbitration, but merely of the venue. It was on this basis that the Court determined that Kuala Lumpur was not the seat but only the venue and the jurisdiction of Indian Courts was not excluded, courtesy the *Bhatia International* jurisprudence of implied exclusion.

AUTHOR'S COMMENTS

There are a lot of controversies and questions which this judgment raises. A few of them in very concise form are as below:-

1. **Was a determination of the seat by the Court, really required?**

As explained above, the implied exclusion jurisprudence clearly applies to this case. The determination of seat and place of arbitration occurs only if the *BALCO law applies.* To recapitulate, the *BALCO* judgment held, that once the seat of arbitration is outside India, Part I of the Arbitration & Conciliation Act, 1996 cannot apply. This is owing to the interpretation given to Section 2(2) of the Act. However, before *BALCO,* the law was in consonance with *Bhatia International* which clearly laid down that seat or no seat, it needed to be adjudged on surrounding circumstances and various facts, whether Part I was impliedly excluded.

The Court was simply required to look into different factors, such as substantive law being Indian, the requirement for rights to abide to Indian laws, and also the subject matter of the dispute to be in India. These factors could have been sufficient to apply the implied exclusion jurisprudence to adjudicate that Indian Courts would have jurisdiction.

What was the requirement of determining the seat of arbitration, as no purpose is served.

2. Determination of seat, contrary to law followed in various jurisdictions

The Court has interpreted the UNCITRAL model law to come to a conclusion that the place where the award is signed cannot be interpreted to be the seat of arbitration.

However, the UNCITRAL model law is the basis of the arbitration laws in several jurisdictions and the Courts have held otherwise. Simply, a bare perusal of Article 30.3 of the UNCITRAL model itself clarifies that an award is to state its date and place and the award has to be deemed to be made at that place of arbitration mentioned in the award. (Indian courts, including the Supreme Court in this judgment interpret the place to mean the seat of arbitration). However, reading down this provision the Supreme Court held, that the 'place' mentioned in Article 30.3 has to be 'determined'. Since it was not 'determined', and merely stated, the same would not amount to it being the place/seat of arbitration.

On the contrary, the English Court in the judgement of *Hiscox v. Outhwaite*[4], decided that an award was made at the place where it was signed, and this is how it would be determined whether New York Convention would apply or not. The Supreme Court on the contrary has held that the place of the signing of the award would be irrelevant to determine the applicability (or inapplicability) of the New York Convention, ie. To effectively hold that the place of signing of the award is irrelevant to determine whether Part I or Part II would apply to the arbitration. It is important to also mention that the English Arbitration Act now stands amended to read that the award would be treated to be made at the seat of arbitration, 'regardless of where it was signed'. No such language is contained in the

UNCITRAL model law, which is the subject matter of interpretation before the Supreme Court in this case.

The position in Netherlands also appears to be different from the stand taken by the Supreme Court. Netherlands law provides that if the place of arbitration has not been determined, either by the parties or the tribunal, the place of making the award, as stated in the award is deemed to be the place of arbitration[5].

3. Did the parties ever really dispute the seat?

The Supreme Court's primary reason for Kuala Lumpur not being the seat was that the tribunal had not 'determined' the place(seat) of arbitration as defined under Article 20 of the UNCITRAL model law. What the court essentially meant was that the word 'determination' means that there should be an effective expression of opinion which ends a controversy or a dispute. Since the place in the award was not an expressive opinion, there has been no adjudication.

But did the parties really raise a controversy or a dispute to be adjudicated before the arbitrator, which was to be "determined"? The answer to this, is a simple no. There was never any controversy or issue raised during the arbitration regarding the seat.

CONCLUDING REMARKS

This judgment can be termed a lot of things, other than a disposition on what can be termed as a seat in an International Commercial Arbitration. While the judgment surely throws light on the entire *implied exclusion* jurisprudence, it is not very vocal about it. Further, the fresh disposition on the interpretation of what a "seat" is, in terms of UNCITRAL model laws is also very ambiguous. This would surely create many controversies in the time to come.

[1]*Bharat Aluminium and Co. vs. Kaiser Aluminium and Co. (2012) 9 SCC 552.*

[2]*Bhatia International v. Bulk Trading S.A. (2002)4SCC105.*

[3]*Videocon Industries Ltd. v. Union of India, (2011)6 SCC 161*; *Yograj Infrastructure Ltd. vs. Ssangyong Engineering Construction Co. Ltd.(2012) 12 SCC 359*; The rule of implied exclusion has been upheld in arbitration clauses pre dating *BALCO* in *Reliance Industries v. Union of India, 2014 (4)* and CTC 75 *Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd., (2015) 9 SCC 172*, which have been decided post *BALCO.*

[4][1992]1AC562

[5]Netherlands Arbitration Act 1986, Art. 1037