Importance of Specifying Seat of Arbitration in Arbitration Clause in International Agreements

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Abstract :- Arbitration clause is the basis for setting up of an arbitration tribunal and also for regulating the proceedings of the tribunal. An arbitration clause can mention various details. It is open to the contracting parties to specify the seat / place of arbitration in the arbitration clause. This research paper examines the law in India related to seat / place of arbitration with reference to the law as passed by the Parliament and the case law. An attempt is made to understand the importance of seat of arbitration and also to distinguish it from venue of arbitration. In addition to Indian law, the researcher also looks at the provisions of English law.

Keywords :- International arbitration, arbitration clause, seat of arbitration, place of arbitration, venue of arbitration, arbitration and conciliation act, Indian arbitration law.

Introduction :- As per Indian laws, arbitration with a seat in India involving a foreign party is regarded as International Commercial Arbitration, subject to Part I of the Act.

Arbitration is a private form of binding dispute resolution, conducted before an impartial tribunal, which emanates from the agreement of the parties but which is regulated and enforced by the state. The state requires the parties to honour their contractual obligation to arbitrate, provides for limited judicial supervision of arbitral proceedings and supports the enforcement of arbitral awards in a manner similar to that for national court judgments.

Arbitration clause is the basis on which the exercise of setting up an arbitration tribunal as well as its conduct rests. The clause may be a skeletal one with minimal details or may be a detailed one covering all aspects of the process of arbitration. Of the various details that an arbitration clause should include, seat of arbitration is an important one.

Seat of arbitration is one of most crucial elements of an arbitration agreement. It is sometimes confused with place of arbitration. Seat of arbitration decides the court that will have jurisdiction over the arbitration proceedings.

Place of arbitration means where the arbitration proceedings will be held. Notably, there is a difference between seat of arbitration and place of arbitration. An arbitration tribunal may meet at various places while there can be only one seat of arbitration. There can be only one seat of arbitration whereas there can be several places where arbitration meetings can take place. Seat of arbitration is fixed and cannot be changed. While, place of arbitration can be changed according to the convenience of arbitrators or parties or both. Hence, it is utmost important that the agreement must provide for seat of arbitration in clear terms.

This paper analyses the law related to seat of arbitration in international agreements in India seeking to understand the concept of "seat of arbitration" as it has been defined by the Arbitration and Conciliation Act, 1996[20] and also its evolution by various judgements of Honourable Supreme Court.

Methodology :- This research paper is based on doctrinal research on the subject of seat of arbitration in arbitration clauses in international

[20] Laws: Arbitration and Conciliation Act, 1996

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agreements in India. As a first step, the provisions related to seat of arbitration and international commercial arbitration in the relevant law passed by Parliament is studied. Subsequently, the researcher has studied the relevant judgements of Honourable Supreme Court of India. In addition, the researcher also examines briefly the provisions related to the subject in English Law.

Provisions under Arbitration and Conciliation Act, 1996 -

International Commercial Arbitration :- Section 2(1)(f) of the Arbitration and Reconciliation Act, 1996[21] ("the Act") defines International Commercial Arbitration as an arbitration arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country. Thus, as per Indian laws, arbitration with a seat in India involving a foreign party is regarded as International Commercial Arbitration, subject to Part I of the Act.

Place of Arbitration :- Section 20 of the Act reads as follows:

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.

(3) 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.

While the term used in the Act is "place of arbitration", the term is used as synonymous to "seat of arbitration".

Supreme Court Judgements :- Concept of seat of arbitration was discussed at length in Bharat Aluminium vs. Kaiser (2012)[22] by Honourable Supreme Court. Relevant extract is as follows:

96 . ... In our view, 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. This was necessary as on many **occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties**. Therefore, the **courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process**. 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

[21] Laws: Arbitration and Conciliation Act, 1996

[22] Domestic Court Judgments: Bharat Aluminium & Ors. v. Kaiser Aluminium Technical Service Inc. & Ors.,2012

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which the dispute resolution, i.e., arbitration is located. (Emphasis added)

In the context of place of arbitration, following paragraphs of judgement in the case of Balco[23] are also interesting:

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai etc. In the absence of the parties' agreement thereto, Section 20(2) authorizes the tribunal to determine the place / seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of the reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings - or even hearings - in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses... It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country - for instance, for the purpose of taking evidence..... In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.

This, in our view, is the correct depiction of the practical considerations and the distinction between "seat" (Section 20(1) and 20(2)) and "venue" (Section 20(3)). We may point out here that the distinction between "seat" and "venue" would be quite crucial in the event, the arbitration agreement designates a foreign country as the "seat"/"place" of the arbitration and also select the Arbitration Act, 1996 as the curial law/law governing the arbitration proceedings. It would be a matter of construction of the individual agreement to decide whether:

(i) The designated foreign "seat" would be read as in fact only providing for a "venue" / "place" where the hearings would be held, in view of the choice of Arbitration Act, 1996 as being the curial law - OR

(ii) Whether the specific designation of a foreign seat, necessarily carrying with it the choice of that country's Arbitration / curial law, would prevail over and subsume the conflicting selection choice by the parties of the Arbitration Act, 1996.

ONLY if the agreement of the parties is construed to provide for the "seat" / "place" of Arbitration being in India - would Part I of the Arbitration Act, 1996 be applicable. If the agreement is held to provide for a "seat" / "place" outside India, Part I would be inapplicable to the extent inconsistent with the arbitration law of the seat, even if the agreement purports to provide that the Arbitration Act, 1996 shall govern the arbitration proceedings.

The above ruling by Honourable Supreme Court underlines the importance of specifying the seat of arbitration in the arbitration agreement. The seat of arbitration will decide the court which will have jurisdiction over the arbitration. Even though the seat is decided, the arbitrators are free to hold meetings at any place or places of their choice. The place where the meetings are held is a venue and it does not normally affect the seat of arbitration unless the parties have failed to specify the seat of arbitration in their arbitration

[23] Ibid.

agreement.

The issue of seat vs. venue of arbitration came up before Honourable Supreme Court in the matter of BGS SGS JV vs. NHPC[24] and the court ruled as under:

79. Reference was made to Roger Shashoua (supra) in paragraphs 124 to 128, and then to various other judgments, including BALCO (supra), as follows:

134. It is accepted by most of the experts in the law relating to international arbitration that in almost all the national laws, **arbitrations are anchored to the seat/place/situs of arbitration**.

These observations have also been noticed in Union of India v. McDonnell Douglas Corporation [(1993) 2 Lloyd's Rep 48]

84. On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration Clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. (Emphasis added)

English Law :- Regarding the seat of an arbitration, it is interesting to also look at the concept in English law as mentioned in the Roger Shashoua vs. Mukesh Sharma[25] of England and Wales High Court. Relevant extract reads as follows:

25.The concept of the seat of an arbitration was known to English law prior to the 1996 Arbitration Act but section 3 of that Act set out a statutory definition as follows:-

"3 The Seat of the Arbitration

In this part "the seat of the arbitration" means the juridical seat of the arbitration designated –

(a) by the parties to the arbitration agreement, or

(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or

(c) by the arbitral tribunal if so authorised by the parties,

Or determined in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

England and Wales High Court laid down the famous Shashoua principle in the said judgement. The principle reads as follows:

34. "London arbitration" is a well known phenomenon which is often chosen by foreign nationals with a different law, such as the law of New York, governing the substantive rights of the parties. This is because of the legislative framework and supervisory powers of the courts here which many parties are keen to adopt. 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 the English law the curial law. In my judgment it is clear that either London has been designated by the parties to the arbitration agreement as the seat of the arbitration or, having regard to the parties' agreement and all the relevant circumstances, it is the seat to be determined in accordance with the final fall back provision of section 3 of the Arbitration Act.

[24] Domestic Court Judgments: BGS SGS Soma JV v. NHPC Ltd., 2019

[25] International Court Judgments: Roger Shashoua and Ors. v. Mukesh Sharma, 2009

Honourable Supreme Court of India referred approvingly to the Shashoua principle in the matters of Roger Shashoua vs. Mukesh Sharma[26], and BGS SGS SOMA JV[27].

Conclusion :- Seat / place of arbitration is a notional concept and defines the place whose courts will have jurisdiction over the arbitration process and award. It is distinct from venue of arbitration. Arbitration may be held at multiple venues and may even be held online. However, there will only be one seat of arbitration. It is advisable that the parties entering into an arbitration agreement clearly specify the seat of arbitration. This is most important and even crucial for international arbitration agreements.

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