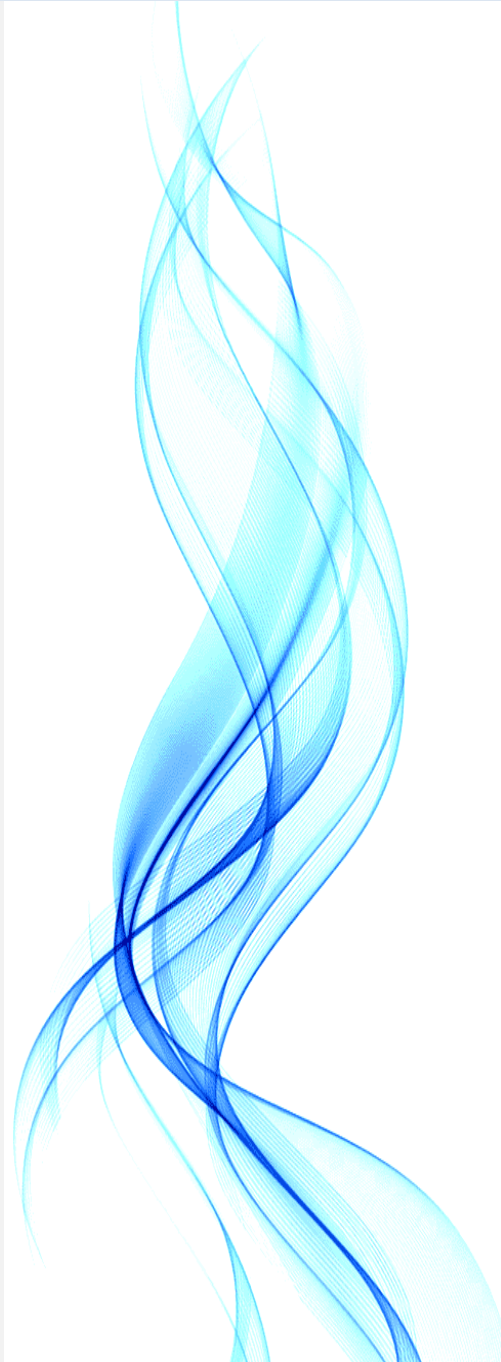




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Seat & Venue of Arbitration: Is the difference obliterated?

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VOL-I/DSN/Arb/02;15th May, 2020

Issue:

The recent development in law has brought 'Seat of Arbitration' to the fore because it is the sole factor which determines the territorial jurisdiction of the Court in terms of supervision of the Arbitral Proceeding and challenge of the arbitral award. However, despite the parties to the agreement having freedom to choose the place of arbitration, in terms of section 20 of the Arbitration and Conciliation Act, 1996 or otherwise, the identification as to whether the parties have chosen, the place as the seat of arbitration or not is a perennial issue, the complexity of which is aggravated by ambiguous drafting of arbitration clauses and 'lack of unanimity' in stands of different benches of the Supreme Court particularly in three judgments of coordinate benches.

Developments

CASE-1

06.09.2012

Bharat Aluminium Co. Vs. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552

Bench Strength: **FIVE**

S. H. Kapadia, D. K. Jain, **Surinder Singh Nijjar**, Ranjana Prakash Desai & Jagdish Singh Khehar

POINTS OF LAW

1. If the Arbitral Agreement is construed to provide for the 'Seat'/'Place' of Arbitration being outside India, Part –I of the Arbitration and Conciliation Act, 1996 will not apply.
2. The court while considering the case law of *Naviera Amazonica Peruana SA vs. Compania Internacional De Seguros Del Peru*, 1988 (1) Lyod's Law Reports 116 and *Braes Doune Wind Farm Scotland Limited vs. Alfred McAlpine Business Services Ltd.*, [2009] EWHC 426 (TCC) observed that the court must discern from the agreement and the surrounding circumstances, the intention of the parties as to whether a particular place mentioned in the agreement refers to the 'Venue' or 'Seat' of the arbitration. It further observed that where in substance the parties have agreed that the law of one country will govern and control the arbitration, the place where the arbitration is to be heard will not dictate the governing law.

CASE-2

14.02.2014

Enercon (India) Ltd vs. Enercon GmbH, (2014) 5 SCC 1

Bench Strength: **Two**

Surinder Singh Nijjar & Fakkir Mohamed Kalifulla

POINT OF LAW

1. A 'Venue of Arbitration' is not necessarily the 'Seat of Arbitration' even if specifically named in the agreement. There should be other factors connecting Arbitration to the 'Venue' for the venue to become the 'Seat of Arbitration'.
2. Unless the parties intend to have the 'Venue' as the 'Seat' of Arbitration, the 'Venue' will not be 'Seat' of Arbitration. The Seat of the Arbitration will be the place, which the parties intended as such. Such intention can be inferred from the choice of law as well.
3. In case of Arbitration, there are three laws in respect of which parties have a choice to make:
 - i. The law governing substantive contract.
 - ii. The law governing the agreement to arbitrate and performance of that agreement.
 - iii. The law governing conduct of arbitration.

If the parties choose all the three laws or latter two of the laws mentioned above of a place/country which is different from the law of the venue, the seat of arbitration will not be the 'Venue' but the 'Place' whose laws applies.

CASE-3

25.09.2018

Union of India vs. Hardy Exploration and Production (India) Inc., (2019) 13 SCC 472

Bench Strength: **Three**

Dipak Misra, A.M. Khanwilkar & Dr. D.Y. Chandrachud

POINTS OF LAW

1. In case of failure of Parties to determine the 'Seat of Arbitration', the Arbitral Tribunal is required to determine the same and if there is determination of the 'Seat of Arbitration' by the Arbitral Tribunal the same should reflect in the contents of the Award.
2. The determination requires positive act. In case there is no such determination, the 'Venue' will not be 'Seat' of Arbitration.
3. Merely holding meetings of the Arbitral Tribunal and signing of the award at a place does not determine the 'Seat of Arbitration'.
4. The 'Venue' of Arbitration by itself is not 'Judicial Seat of Arbitration'.
5. When there is contextual determination of place of arbitration, it will be 'Judicial Seat of Arbitration'. Words 'Place' and 'Seat' of Arbitration are used interchangeably. When only the term 'place' is stated or mentioned and no other condition is postulated it is 'Seat of

Arbitration'. But if a condition precedent to it is mentioned, the place will become equivalent to 'seat' on fulfilment of such condition.

CASE-4

10.12.2019

BGS SGS Soma JV vs. NHPC Ltd., (2019) 17 SCALE 369

Bench Strength: **Three**

R.F. Nariman, Aniruddha Bose & V. Ramasubramanian

POINTS OF LAW

1. Where there is express designation of a 'Venue' and no designation of an alternate place as the 'Seat' combined with supranational body of rule governing arbitration and no other contrary indicia, the stated 'Venue' is the 'Seat of Arbitration'.
2. Where there is designation of place of arbitration in arbitration clause as being the 'Venue' of the arbitration proceedings, the 'Venue' is the 'Seat' of Arbitration.
3. Where the language used is "tribunals are to meet" or "to have witnesses, expert or the parties", etc., the 'Venue' is the convenient place of meeting and not the "Seat of Arbitration".
4. The fact which indicates that the proceeding shall be held at a particular place signifies that 'Place' as 'Seat of Arbitration'.
5. In international context, if a supranational body of Rules is to govern the arbitration, the 'Venue' is the 'Seat' of arbitral proceeding.
6. In the national context, the stated 'Venue' of arbitration is the 'Seat of Arbitration'.
7. Holds judgment of a coordinate bench in *Union of India vs. Hardy Exploration and Production (India) Inc.* as bad law being contrary to Five Judges bench judgment *Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services Inc.*

CASE-5

05.03.2020

Mankastu Impex Private Ltd. vs. Airvisual Ltd., Arbitration Petition No. 32 of 2018

Bench Strength: **Three**

R. Banumathi, A.S. Bopanna & Hrishikesh Roy

POINTS OF LAW:

1. 'Seat of arbitration' and 'Venue of Arbitration' cannot be used interchangeably. Mere mention of a place as 'Seat' of arbitration is not conclusive for determination of 'Seat of Arbitration'. There should be intention of the parties to have the place as 'Seat of Arbitration'. The intention should be conferred from other clauses of the agreement and conduct of the parties.

2. Choice of parties about 'Place of Arbitration' brings with it submission of the parties to law of that Place/Country.
3. Even the decision of parties to have the choice of law of a country other than the country of 'Place of Arbitration' is to apply in regard of administration of arbitration and its supervision.
4. Though the issue about contradiction between two judgments of two coordinate benches of the Supreme Court on the issue of determination of 'Seat' and 'Venue' was raised, the court opted to not answer it.

ANALYSIS

Within a short period of almost a year and half, three Benches of the Supreme Court of same strength (of three judges each) have delved into the issue of difference between 'Seat' i.e. 'Judicial Seat' and 'Venue' i.e. 'Geographical Venue' of Arbitration, where former carries with it administrative and supervisory Jurisdiction of the Court. However, in determination of the criteria for ascertaining judicial Seat of Arbitration, the judicial concurrence is apparently lacking. The three judgments cannot be reconciled in unanimity. This difference in views of coordinate benches sans *stare decisis* and leaves us on our own to solve the riddle. In ascertaining the 'Seat of Arbitration', the context and wording of the arbitration agreement and the conduct of the parties have to be properly appreciated. It has to be ascertained if the agreement mentions or omits to mention about any, some or all of the below factors:

- | | | |
|----|---|--|
| A. | 'Place' where the arbitration takes place. | The place where the arbitration substantially takes place and not only for the convenience in recording evidence of the members of the tribunal but also taking opinion of experts, etc. The place may be judicial Seat of Arbitration if there are other factors to indicate that it was chosen as 'Seat' of Arbitration. |
| B. | Law applicable in respect arbitral agreement and administration of Arbitral proceeding. | It has emerged as one of the most important factors, determinative of 'Seat of Arbitration'. It overrides even a named place of arbitration and sans it of its status of Seat. |
| C. | Substantive Law under which the dispute is to be decided. | Not that relevant. |
| D. | Jurisdiction of a Court. | Not determinative. Rather 'Seat of Arbitration' carries with it jurisdiction of Court of its place in regard of administration and supervision of the Arbitration. |
| E. | Choice of Supranational Rules. | It determines the 'Seat of Arbitration'. |

F.	Place where arbitration award is signed.	It is not determinative in itself. Rather, in absence of the parties deciding the ‘Seat of Arbitration’ by choice of the place in the agreement and by choice of applicability of law etc., the tribunal must determine the seat of arbitration by a positive act i.e. by deciding seat in the contents of the award.
G.	Intention.	Determinative. It should be inferred from the terms of the agreement, its contents and conducts of the parties.

CONCLUSION

Since the three judgments of the coordinate benches of the Supreme Court lack unanimity in expression of their opinion on specific point of law and they having expressed their view on what the only larger bench judgment dealing with issue has said, we are left with no option to apply the rule: *stare decisis*. However, there are certain situations in which the place has to be considered as ‘seat of arbitration’ and those are:

- i. The parties mention the ‘place’ of arbitration and law of the same place as the law governing arbitral agreement and arbitral proceeding.
- ii. The parties mention the ‘place’ of arbitration and there are circumstances (other clauses of the agreement and conduct of the parties) indicative of the fact that they decided the same place as seat of arbitration.
- iii. The parties mention the ‘place’ of arbitration and Supranational Rules of the arbitration of a body situated at the same ‘place’.
- iv. The parties do not mention the ‘place’ but the arbitral tribunal determines a place as the ‘Seat of Arbitration’ and mentions it in arbitral proceeding or the contents of the award and the place is the same where the arbitral proceeding substantially takes place.

The situations where there is likelihood of confusion because of lack of clarity in law are:

- i. The Parties mention only the ‘place’ of Arbitration;
- ii. The parties mention only law governing arbitration agreement and Arbitral proceeding, which is of a place other than where arbitral proceedings are substantially conducted;
- iii. The parties neither mention law governing arbitration agreement/ Arbitral proceedings or the place of Arbitration, nor does the Arbitral Tribunal determine the seat of Arbitration, by positive act.

