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VENUE / SEAT / PLACE - FINALITY OR MORE COMPLEXITY? - SUPREME COURT OF INDIA DECIDES

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Introduction

A three-judge Bench of the Hon'ble Supreme Court of India (Supreme Court) has by its judgment dated 25 September 2018 in *Union of India v Hardy Exploration and Production (India) Inc*, (Civil Appeal No. 4628 of 2018) examined whether a determination as postulated in Article 31 of the UNCITRAL Model Law had taken place in the instant Award to determine what the seat of the arbitration was. The Apex Court held that in this matter where no seat / place was prescribed, and only venue was stated, Indian law being the governing law of the Contract, courts of India will have jurisdiction to hear the challenge of an award, admitted, signed and passed outside India (Kuala Lumpur in this case).

The three-judge bench of the Supreme Court was deciding a reference made to it from a two-judge Bench of the Supreme Court in the same matter [(2018) 7 SCC 374]. The Supreme Court held that, in the instant case there was no adjudication or expression of an opinion by the Tribunal as to the seat and thus, the word 'place' cannot be used as seat. The Supreme Court elaborated that a venue can become a seat if something else is added to it as a concomitant, but a place in order to become a seat, must meet with the conditions prescribed, and cannot *ipso facto* assume the status of seat.

Factual Background

The present Appeal arose from the final judgment of Delhi High Court in FAO No 59 of 2016. The Single Judge of the Delhi High Court accepted the preliminary objection in the Section 34 proceedings filed before it, to hold that Indian courts have no jurisdiction to entertain the application. The two-judge Bench of Delhi High Court concurred with the opinion of the Single Judge. A SLP was preferred to the Supreme Court which was referred by the two-judge Bench of the Supreme Court to the instant three-judge Bench. The dispute was primarily premised on the interpretation of an arbitration agreement between the Union of India (Appellant) and Hardy Exploration and Production (India) Inc (Respondent), the relevant portions of which read as follows:

"Article 33.9 - Arbitration proceedings shall be conducted in accordance with the UNCITRAL Model Law on International Commercial Arbitration of 1985 (Model Law) [24 ILM 1302 (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.

Article 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."

The relevant provisions of the Model Law are 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 among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 31. Form and contents of award - (3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place."

The arbitral tribunal appointed by the parties held one meeting in Kuala Lumpur and signed the final award there as well.

Issue

The Supreme Court thus examined the present arbitration clause at length to examine whether it ousted the jurisdiction of Indian Courts.

View of the Supreme Court

Before dealing with the question of law posed in the case, the Supreme Court considered a wide variety of judicial pronouncements on the difference between seat and place and venue of arbitration (venue), and the law that is applicable to the validity of an arbitration agreement and the enforcement of an award. The Appellant relied on *Sumitomo Heavy Industries Limited v ONGC Limited & Ors* (Sumitomo) [(1998) 1 SCC 305] to prove that in the absence of an express seat, the challenge to an arbitration must be governed by the proper law of contract. However, the Supreme Court was of the view that the case was irrelevant as it was decided in light of the Arbitration Act, 1940, and subsequent developments in *Bharat Aluminum Company v Kaiser Aluminum Technical Services Inc.* [(2012) 9 SCC 552] had rendered *Sumitomo* otiose.

The Supreme Court observed that there may be two courses of action in situations where the seat has not been specifically agreed by the parties. Firstly, the seat may be inferable when the arbitration agreement contains a venue plus other concomitant factors that may lead to the deduction of the *lex fori*. In this regard, it placed reliance on *Union of India v Reliance Industries Limited & Ors.* [(2015) 10 SCC 213] and *Harmony Innovation Shipping Limited v Gupta Coal India Limited & Anr.*, [(2015) 9 SCC 172].

Secondly, as is in the present case, the Model Law under Article 20 provides for the "determination" of the place of arbitration / judicial seat. The meaning of the term determination was discussed and held to be the equivalent of an "expressive opinion". In furtherance of this, the Supreme Court cited *Imax Corporation v E-City Entertainment (India) Pvt. Limited*, [(2017) 5 SCC 331] where the arbitration agreement contained no seat, but an incorporation of the ICC Rules, which provide that the ICC Court of Arbitration will determine the seat if parties fail to agree on the same. Although one party proposed the venue to be Paris, the Court of Arbitration decided that seat was London in view of Article 14(1) of the ICC Rules.

The Supreme Court held that the Tribunal had failed to determine the seat of the arbitration, despite the parties having failed to agree on the same. Further, it was held that such determination was not clearly stated in the 'form and contents of award' postulated in Article 31 of the Model law.

The Supreme Court reiterated that the term "place" can be interchangeably used with the term "seat", when no conditions are postulated. However, in the event of condition precedents such as agreement of parties or determination by the tribunal, "place" can only be the equivalent of "seat" when such conditions are met.

Accordingly, the Supreme Court decided that it was the "irresistible conclusion" that the jurisdiction to hear a challenge of the award lies with the Courts of India, because, as stated previously, Indian law governs the underlying contract. Therefore, it was pleased to set aside the order of the High Court and direct the High Court to decide the application under Section 34 of the Act.

Comment

This decision by the Supreme Court may have interesting ramifications on the jurisdictional challenges which will arise in awards where such express determination may not have been made. The Arbitration and Conciliation Act, 1996 (Act), as amended also contains the same language in Section 20 and 31 adopting the Model law. The proviso to Section 2 (2) of the Act, mandates specific agreement to bar the application of Sections 9, 27 and 37 (1) (a) and 37 (3).

The terms seat / venue and place have often been used interchangeably in arbitration agreements and proceedings in the past. Given the judgment in the case of *M/s Lion Engineering Consultants v State of Madhya Pradesh & Ors.* (Civil Appeal Nos. 8984-8985 Of 2017, dated 22 March 2018) decided by Supreme Court in April 2018, jurisdictional challenges may now be raised for the first time even at the time of challenging the Award. Thus, it may be open for the parties to challenge Awards relying on this judgment if jurisdictional objection with regards to determination of seat have not been raised by them in the arbitration proceedings. Alternatively, it would be interesting to see that in awards passed outside India, which are amenable to challenge under the Indian court's jurisdiction, where a tribunal has determined place of arbitration, would it be open to the courts to get into the question of determination as to whether the tribunal has rightly or wrongly determined the same? It is however, clear now that such determination in any event, must be express and state the place of arbitration as determined by the Tribunal in the Award to avoid any challenge, post the instant judgment.

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