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THE NEXT CHAPTER IN THE SEAT / VENUE / PLACE SAGA: SC REVERTS TO VIEW TAKEN IN ROGER SHASHOUA AND BALCO, DECLARES ANTRIX AND HARDY EXPLORATION BAD LAW

13 December 2019

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

In particular, the SC has held that: (a) an appeal against an order transferring proceedings under Section 34 of the Arbitration Act is not maintainable under Section 37 of the Arbitration Act; (b) the designation of a seat confers exclusive jurisdiction upon the courts of the said seat; and (c) a place of arbitration, regardless of its designation as venue / seat / place is the juridical seat of arbitration, unless there are significant contrary indicators.

In doing so, the SC has specifically declared that its earlier judgments in *Union of India v Hardy Exploration and Production (India) Inc* (AIR 2018 SC 4871) (*Hardy Exploration*) and *Antrix Corporation Ltd v Devas Multimedia Pvt Ltd* (2018 (4) ArbLR 66 (Delhi)) (*Antrix*) are incorrect.

Factual Background

A contract was signed between NHPC Limited (NHPC) and its contractor, BGS SGS SOMA JV (JV), for India's largest hydroelectric project in Assam and Arunachal Pradesh. The arbitration clause in the contract stated that the "*arbitration proceedings shall be held at New Delhi / Faridabad*".

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

The JV filed an application under Order VII Rule 10 of the Code of Civil Procedure 1908 and Section 2(1)(e)(i) of the Arbitration Act, seeking 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). Accordingly, the Section 34 application was transferred from Faridabad to 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:

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

The JV appealed before the SC challenging the Impugned Order.

Issues

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

Reasoning of the SC

1. *Whether Section 37 appeal is maintainable against an order that transfers Section 34 proceedings?*

   Appeals under Section 37 of the Arbitration Act may only lie against: (a) orders refusing reference to arbitration under Section 8 of the Arbitration Act; (b) orders granting / rejecting interim relief under Section 9 of the Arbitration Act; and (c) orders under Section 34 of the Arbitration Act, which set aside / refuse to set aside an arbitral award.

   Accordingly, an order merely *transferring* the Section 34 proceedings from one court to another, as stipulated in the Transfer Order, is not tantamount to an outright *refusal* to set aside the Award. Therefore, NHPC's appeal under Section 37 of the Arbitration Act was not maintainable.

   (Reliance placed on *Kandla Export Corporation & Anr v M/s OCI Corporation & Anr* ((2018) 14 SCC 715) and *South Delhi Municipal Corporation v Tech Mahindra* (EFA (OS) (Comm.) 3 of 2019))

2. *Whether the designation of a place of arbitration confers exclusive jurisdiction upon the courts of the said place?*

   NHPC relied on paragraph 96 of *Bharat Aluminium Co v Kaiser Aluminium Technical Service, Inc* ((2012) 9 SCC 552) (*BALCO*) and *Antrix* to contend that two courts have jurisdiction over arbitration applications – the court of the seat *and* the court of cause of action.

   The SC on analysing paragraph 96 of *BALCO* held that it must be read together with other portions of the judgment. In particular, *BALCO* relies upon the English judgment of *Roger Shashoua & Ors v Mukesh Sharma* ([2009] EWHC 957 (Comm)) (*Roger Shashoua*), which held that courts of the seat of arbitration have exclusive jurisdiction over all proceedings arising out of the arbitration. The existence of multiple venues is only a matter of convenience. Other portions of the *BALCO* judgment also confer exclusive jurisdiction upon the court of the seat of arbitration and acknowledge that the terms 'seat' and 'place' are used interchangeably.

   The SC further held that *Antrix's* reliance on paragraph 96 of *BALCO* to conclude that the court of cause of action and the court of the seat have concurrent jurisdiction, was incorrect, in light of the aforesaid reasoning.

Accordingly, the SC has held that the courts of the place of arbitration have the exclusive jurisdiction to hear the Section 34 application.

(Reliance placed on *Indus Mobile Distribution Private Limited v Datawind Innovations Private Limited & Ors* ((2017) 7 SCC 678), *Reliance Industries Ltd v Union of India* ((2014) 7 SCC 603), *Enercon (India) Ltd & Ors v Enercon GmbH & Anr* ((2014) 5 SCC 1) and *Brahmani River Pellets Ltd v Kamachi Industries Ltd* (AIR 2019 SC 3658)).

3. *What is the seat of arbitration?*

In the present case, the arbitration agreement stated that the arbitration shall be held at a particular place, without designating it as either a seat or venue. The SC considered the following questions:

- *Is reference to a 'place of arbitration' a reference to a juridical seat, or just a convenient venue?*

  A place of arbitration is a stipulation that such place shall be the seat of the arbitration, and consequently determine the *lex fori*. In this regard, the SC relied on *Roger Shashoua*, which discussed the 'significant contrary indicia' test. This test was also applied in *Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru* ((1988) 1 Lloyd's Rep 116 (CA)) and *Enercon (India) Ltd & Ors v Enercon GmbH & Anr* ((2014) 5 SCC 1).

  Applying the *Roger Shashoua* principle, the SC held New Delhi / Faridabad to be the juridical seat, because there were no significant contrary indicia.

  The Hardy Exploration conundrum

  The SC held that the decision in *Hardy Exploration* (please see our Ergo update on *Hardy Exploration* here) is incorrect in its conclusion that the 'venue' of arbitration need not be the juridical seat, unless there are 'concomitant factors' which indicate that the parties intended for the venue to also be the seat.

  This was because *Hardy Exploration* ignores *Roger Shashoua, BALCO's* reliance thereon, and the Indian leg of the *Roger Shashoua* case (*Roger Shashoua & Ors v Mukesh Sharma & Ors* ((2017) 14 SCC 722)), all of which uphold that a venue of the arbitration is the juridical seat, in the absence of any significant contrary indicia. By allowing Indian law to apply to the arbitration agreement which designated Kuala Lumpur as the venue, *Hardy Exploration,* in effect, allowed a foreign award to be challenged under Section 34 of the Arbitration Act, undoing any progress made post-*BALCO*.

  Therefore, the SC held, "*Hardy Exploration and Production (India) Inc. (supra), being contrary to the Five Judge Bench in BALCO (supra), cannot be considered to be good law.*"

- *New Delhi or Faridabad? What is the juridical seat in the present case?*

  The SC took into consideration the fact that the parties had elected for all the arbitration proceedings to take place in New Delhi, and that the Award was signed in New Delhi. Accordingly, the SC overruled the Impugned Order and came to the conclusion that New Delhi was the final juridical seat of the arbitration, and the courts of New Delhi would have the jurisdiction to hear the Section 34 application.

Comment

This judgment of the SC does an admirable job in clarifying the issue of exclusive jurisdiction where seat of the arbitration is situated. This addresses the dichotomy created by *Antrix* relying on *BALCO*. The judgment lends clarity to the said issue, and will also, in some manner, impact the ongoing challenges post *Hardy Exploration,* where Section 34 proceedings may have been commenced in other jurisdictions.

Hardy Exploration came up with an alternative to the long standing view, which was summarised in *Indus Datawind* by Delhi High Court, and instead, treated a 'venue' as a convenient geographical location. In contrast, the present judgment and *Roger Shashoua* have conclusively stated that a place or venue is the same as a juridical seat, as long as there is no indicator of the parties' contrary intention. Unless, an arbitration agreement specifies the seat and venue separately, venue will be understood to be the juridical seat of arbitration. This is in consonance with some of the earlier model clauses which used to the term venue in lieu of seat, and vice-versa.

What remains to be seen is that both the present case and *Hardy Exploration* were judgments passed by a three-judge benches of the SC. Therefore, the present judgement's declaration of the latter as "*no longer* (being) *good law*" may not tantamount to an overruling of *Hardy Exploration*, and there is a possibility that the issue may be referred to a bench of greater strength. Whether it is indeed an unresolved question of law, remains to be seen. Recently, the SC has 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.* We hope the instant issue is either addressed or resolved smoothly, if it is indeed referred to a larger bench.

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