

# SEAT OF ARBITRATION

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## INTRODUCTION

- In case of an International Commercial Arbitration, at more than a few times, question arises as to what is the law governing the substance of dispute between the parties, the law governing arbitration which includes construction and validity of the Arbitration agreement and the procedure of Arbitration ?

## LAW OF CONTRACT

- The law of a particular country or some other considerations agreed between the parties may govern the rights and obligations arising out of the contract between the parties. If a local law is selected, it is referred to as the governing or proper law of contract. The proper law is determined in accordance with the general principles of the conflict of laws, namely the law chosen by the parties, or in the absence of such choice, the law of the country with which the agreement is most closely connected as inferred from the intention of the parties to the contract depending upon surrounding factors.

## LAW GOVERNING ARBITRATION AND PROCEDURAL LAW

- The law governing the Arbitration has importance because it determines the validity, effect and interpretation of the Arbitration agreement and such law is relied upon by the arbitrator to determine the scope of his powers and the procedure to be followed by the arbitral tribunal (unless the parties expressly agree to submit themselves to an institutional arbitration like SIAC etc and follow the procedure prescribed by such institution which is different from the law governing the arbitration and procedural law of arbitration).

## Concept of Seat of Arbitration and its Significance

- The Seat of Arbitration determines the applicable law governing the Arbitration including the procedural aspects. When the parties specify an applicable law for the Arbitration agreement, that law governs the Arbitration agreement including the procedural aspects of Arbitration. However, if the parties have not specifically chosen the law governing the conduct and procedure of Arbitration, expressly or by necessary implication, the conduct of the Arbitration will be determined by the law of the place of the Seat of Arbitration. The regulation of conduct of Arbitration and challenge to an award would have to be done by the courts of the country in which the Seat of Arbitration is located as such Court would be the supervisory court possessed with the power to annul the award.

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- The Supreme Court in its decision given in the case of Bharat Aluminium Company Ltd v. Kaiser Aluminium Technical Service Inc ("**Balco**")<sup>1</sup> held that the choice of another country as the Seat of Arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of Arbitrations will apply to the proceedings.
  - If the Arbitration agreement is found or held to provide for a Seat / place of Arbitration outside India, then even if the contract specifies that the Indian Arbitration Act shall govern the arbitration proceedings, Indian courts cannot exercise supervisory jurisdiction over the Arbitration or the award.
  - However, in the new proposed amendments to the Arbitration and Conciliation Act, 1996 ("**Act**"), the Law Commission Report ("**Report**")<sup>2</sup> has recommended that Part I of the Act, such as Section 9 (interim relief), Section 27 (court assistance for evidence), Section 37(1)(a) (appeal able orders), will remain available to parties in a foreign Seated Arbitration which now has been accepted by the Union Cabinet. Further, in one of the other amendments suggested in the Report, the definition of Seat would be inserted to mean the juridical Seat of the Arbitration.

## DIFFERENCE BETWEEN SEAT AND VENUE OF ARBITRATION

- The Seat of Arbitration may well be quite independent of the place or the venue where the hearings or other parts of the arbitral process occur or take place. The Seat of Arbitration it is of vital importance, for it is the courts of the Seat that have the supervisory jurisdiction over the arbitral process. Identification of the Seat of Arbitration post Balco has become one of the most important features of an arbitration clause. The selection of the Seat determines the law governing the Arbitration procedure and often, more importantly, the process and rights relating to enforcement of the arbitration award.
- It is not necessary for the Seat of Arbitration and the venue of the Arbitration to be the same. Location and even when hearings take place during the course of the Arbitration in several different countries, the chosen Seat of Arbitration will remain unaffected independent of the geographical place where the hearings take place.

<sup>1</sup> (2012) 9 SCC 552

<sup>2</sup> 246 Law Commission Report

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- In the case of Enercon (India) Ltd and Ors v Enercon GmbH<sup>3</sup> and Anr before the Hon'ble Supreme Court of India a dispute arose for non-delivery of supplies under an Intellectual Property License Agreement ("**IPLA**") containing an arbitration clause. The relevant aspects of the arbitration clause in dispute were as under:
    - ❖ *The governing law of the IPLA was Indian law; the venue of the arbitration was London; and the provisions of the Indian Arbitration and Conciliation Act, 1996 were to apply.*
  - There was a sequence of proceedings initiated both in India and in England seeking declarations on the validity of the arbitration clause and asking for anti-suit injunctions. When the matter was before the Hon'ble Bombay High Court it had concluded that though London was not the Seat of Arbitration, the English Courts would have concurrent jurisdiction since, venue of arbitration was London. The matter then went before the Hon'ble Supreme Court where the main issue was that assuming that the Seat of Arbitration was India, whether the English Courts would have concurrent jurisdiction as the venue of arbitration is in London?
  - The Hon'ble Supreme Court of India held that "the express mention in the arbitration clause that London was the venue of the arbitration could not lead to the inference that London was to be the Seat because although London was termed as the venue, the law governing the substantive contract, the law governing the arbitration agreement and the law governing the conduct of the arbitration were chosen to be Indian law and the closest and most real connection was with India. Once the Seat was in India, Indian Courts would have exclusive supervisory jurisdiction and English Courts cannot have concurrent jurisdiction".

## Two Indian parties whether can choose a Foreign Seated Arbitration?

- The Bombay High Court in the recent case of M/s Addhar Mercantile Private Limited vs Shree Jagdamba Agrico Exports Pvt Ltd<sup>4</sup> in a section 11 Application under the Act had considered the important issue as to whether two Indian parties can chose a Foreign Seat of Arbitration?

<sup>3</sup> SLP (C) No. 10924 of 2013

<sup>4</sup> Arbitration Application No. 197/2014 along with Arbitration Petition No. 910/2013.

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- The Hon'ble Bombay High Court relying upon the judgement passed by Hon'ble Supreme Court in the case of TDM Infrastructure Private Limited v UE Development India Private Limited<sup>5</sup> has held that the intention of the legislature would be clear that Indian parties and Companies incorporated in India should not be permitted to derogate from Indian law which being part of the public policy of the country and hence cannot chose a foreign Seat of Arbitration and therefore relying upon the same went ahead to appoint an Arbitrator in the aforesaid case. However, there is also a judgment of Reliance Industries Limited & Anr v Union of India<sup>6</sup> which mentions that a foreign Seated Arbitration between two Indian parties is valid. There seems to be some uncertainty with respect to the aforesaid issue as on date. A conclusive finding on the same from the Hon'ble Supreme Court of India would be welcome.



5 2008 (14) SCC 271

6 (2014) 7 SCC 603

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## OUR VIEW

In our view, while drafting an arbitration clause in a particular contract, especially in case of International Commercial Arbitration; one should keep in mind the following points:-

- a. Arbitration clause shall clearly provide the composition of the arbitral tribunal, time for appointment and the language of the proceedings;
- b. Parties must decide on law governing the arbitration agreement;
- c. The procedure rules for conducting Arbitration like SIAC, LCIA etc should be expressly stated ;
- d. Parties must expressly agree upon the Seat of the Arbitration and not to use any other words like venue or place interchangeably and
- e. In case, the arbitral hearings are to be held at locations other than the Seat of Arbitration, then expressly mention in the contract that the Seat of Arbitration would be the governing law of arbitration and the same will remain impervious even if the hearings happen at various places/locations.

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