Choice of Seat or Venue: Supreme Court of India Dithers

Kluwer Arbitration Blog
May 13, 2020

Anjali Anchayil (J. Sagar Associates) and Ashutosh Kumar (AnchayilKumar)

Please refer to this post as: Anjali Anchayil and Ashutosh Kumar, 'Choice of Seat or Venue: Supreme Court of India Dithers', Kluwer Arbitration Blog, May 13 2020, http://arbitrationblog.kluwerarbitration.com/2020/05/13/choice-of-seat-or-venue-supreme-court-of-india-dithers/

This blog has previously discussed the issue of jurisdiction of Indian courts over foreign-seated arbitrations and the issue of Indian parties choosing a foreign seat of arbitration. However, a more fundamental issue concerns the interpretation of arbitration agreements to determine the choice of seat. Since September 2018, the Supreme Court of India ("Supreme Court") has considered this issue on three occasions. Yet, the jurisprudence resulting from these three judgments does not provide consistent and clear guidance on this issue. Consequently, parties pursuing arbitrations having a connection to India are likely to continue facing expensive and time-consuming litigation related to this issue.

We consider each of the three judgments of the Supreme Court and identify specific areas of concern. It may be noted that all three judgments were delivered by three-judge benches composed of different judges.

Hardy Exploration

In September 2018, the Supreme Court delivered ***Union of India v. Hardy Exploration and Production (India) Inc.,* (2019) 13 SCC 472**, the first of these three judgments. In this case, the parties had entered into a production sharing contract containing an arbitration agreement. The arbitration agreement provided that the "*venue of conciliation or arbitration proceedings... unless the parties*

otherwise agree, shall be Kuala Lumpur…" and that "[a]*rbitration proceedings shall be conducted in accordance with the UNCITRAL Model Law on International Commercial Arbitration of 1985…*". After disputes arose, the parties commenced arbitration proceedings which were held in Kuala Lumpur and resulted in an award signed in Kuala Lumpur. Union of India sought to challenge the award under the Indian Arbitration and Conciliation Act, 1996 before the Delhi High Court. It contended that the arbitration agreement did not specify the seat of arbitration and referred to the venue of arbitration only. Therefore, Kuala Lumpur was merely the venue and New Delhi was the seat of arbitration. Hardy Exploration argued otherwise.

The Supreme Court held that the parties had not chosen the seat of arbitration and the arbitral tribunal had also not determined the seat of arbitration. It further held that the choice of Kuala Lumpur as the venue of arbitration did not imply that Kuala Lumpur had become the seat of arbitration. According to the Supreme Court, the venue could not by itself assume the status of the seat; instead a venue could become the seat only if "*something else is added to it as a concomitant*". The Supreme Court therefore held that Indian courts had jurisdiction to hear a challenge to the award.

The decision in *Hardy Exploration* is of limited assistance because it does not clearly delineate the concepts of "place", "seat" and "venue" and because it does not identify the additional factors needed to justify treating the chosen venue as the seat of arbitration. Through this decision, the Supreme Court ultimately did not provide any clarity on this issue except the simple conclusion that a chosen venue could not be treated as the seat of arbitration in the absence of additional factors indicating that such chosen venue was intended to be the seat of arbitration.

Soma JV

Thereafter, in December 2019, the Supreme Court revisited this issue in ***BGS SGS Soma JV v. NHPC Ltd.*, 2019 SCC OnLine SC 1585**, which concerned an arbitration agreement stipulating that "*Arbitration Proceedings shall be held at New Delhi/Faridabad, India…*". The Supreme Court prescribed the following bright-line test for determining whether a chosen venue could be treated as the seat of arbitration:

1. If a named place is identified in the arbitration agreement as the "*venue*" of "*arbitration proceedings*", the use of the expression "*arbitration proceedings*" signifies that the entire arbitration proceedings (including the making of the award) is to be conducted at such place, as opposed to certain hearings. In such a case, the choice of venue is actually a choice of the seat of arbitration.
2. In contrast, if the arbitration agreement contains language such as "*tribunals are to meet or have witnesses, experts or the parties*" at a particular venue, this suggests that only hearings are to be conducted at such venue. In this case, with other factors remaining consistent, the chosen venue cannot be treated as the seat of arbitration.
3. If the arbitration agreement provides that arbitration proceedings "*shall be held*" at a particular venue, then that indicates arbitration proceedings would be anchored at such venue, and therefore, the choice of venue is also a choice of the seat of arbitration.
4. The above tests remain subject to there being no other "*significant contrary indicia*" which suggest that the named place would be merely the venue for certain proceedings and not the seat of arbitration.
5. In the context of international arbitration, the choice of a supranational body of rules to govern the arbitration (for example, the ICC Rules) would further indicate that the chosen venue is actually the seat of arbitration. In the context of domestic arbitration, the choice of the Indian Arbitration and Conciliation Act, 1996 would provide such indication.

The bright-line test prescribed in *Soma JV* was diametrically opposite to the principle laid down in *Hardy Exploration.* While *Hardy Exploration* stipulated that a chosen venue could not by itself assume the status of the seat of arbitration in the absence of additional indicia, *Soma JV* prescribed that a chosen venue for arbitration proceedings would become the seat of arbitration in the absence of any "*significant contrary indicia*".

Although the bright-line test prescribed in *Soma JV* provided much needed clarity, it was not without its own share of problems. The Supreme Court did not identify which factors constitute "*significant contrary indicia*" and thereby displace the conclusion that a chosen venue is actually the seat of arbitration. It also did not consider whether the existence of a jurisdiction clause in favour of the courts of a place other than the chosen venue or the choice of curial law of a place other than

the chosen venue constituted "*significant contrary indicia*".

In addition, the Supreme Court wholeheartedly adopted the "*Shashoua principle*", a principle that had first been articulated in the specific context of London arbitration. This principle was articulated by the England and Wales High Court in ***Roger Shashoua and Ors. v. Mukesh Sharma***, **[2009] EWHC 957 (Comm)** wherein the High Court held that the chosen venue (London) was the seat of arbitration because the parties had: (a) chosen London as the venue of arbitration; (b) not designated any other place as the seat of arbitration; (c) chosen a supranational body of rules to govern the arbitration, and (d) there were no contrary indicia. The High Court's decision was premised on London arbitration being "*a well known phenomenon which is often chosen by foreign nationals with a different law*". This underlying rationale evidently did not apply in the Indian context.

It may be noted that the Supreme Court in *Soma JV* also held that its earlier decision in *Hardy Exploration* was *per incuriam* since it failed to follow the "*Shashoua principle*" approved by the five-judge bench decision in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services,* (2012) 9 SCC 552. As a result, it appeared that *Hardy Exploration* was no longer good law and *Soma JV* would hold the field instead.

Mankastu Impex

Finally, in March 2020, the Supreme Court yet again considered the issue of choice of seat in arbitration agreements in ***Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.*, 2020 SCC OnLine SC 301**.

In this case, Mankastu (an Indian company) and Airvisual (a Hong Kong company) had entered into an MoU containing an arbitration agreement. The arbitration agreement provided that "[a]*ny dispute, controversy… shall be referred to and finally resolved by arbitration administered in Hong Kong*" and "[t]*he place of arbitration shall be Hong Kong…*". The governing law clause in the MoU provided that "[t]*his MoU is governed by the laws of India… and courts at New Delhi shall have the jurisdiction*." Once disputes arose between the parties, Mankastu approached the Supreme Court under the Indian Arbitration and Conciliation Act, 1996 for appointment of a sole arbitrator.

Mankastu argued that since Indian law was the governing law and courts at New Delhi had jurisdiction, the seat of arbitration was New Delhi, and accordingly, the Supreme Court could appoint a sole arbitrator. It further argued that Hong Kong was only the venue of arbitration and not the seat and relied on *Hardy Exploration* for this purpose.

On the other hand, Airvisual contended that since the arbitration agreement provided that the place of arbitration shall be Hong Kong and such arbitration shall be administered in Hong Kong, the seat of arbitration was Hong Kong. Accordingly, Indian courts had no jurisdiction to appoint a sole arbitrator. It relied on *Soma JV* for this purpose.

In response, Mankastu incorrectly argued that since *Hardy Exploration* and *Soma JV* were both judgments from a three-judge bench, *Soma JV* could not have decided that *Hardy Exploration* was *per incuriam* and therefore *Hardy Exploration* continued to be good law.

The Supreme Court, instead of decisively settling the controversy by affirming *Soma JV*, decided to sidestep it altogether. It noted that the use of the expression "place of arbitration" could not decide the intention of the parties to designate that place as the seat of arbitration and such intention had to be determined from other clauses in the agreement between the parties and their conduct. The Supreme Court held that the choice of Hong Kong as the "place of arbitration" itself did not lead to the conclusion that the parties had chosen Hong Kong as the seat of arbitration. However, because the parties had also agreed that such arbitration was to be administered in Hong Kong, the Supreme Court ultimately held that the parties had chosen Hong Kong as the seat of arbitration.

Conclusion

Although the result in *Mankastu Impex* is correct insofar as Hong Kong was determined to be the seat of arbitration, the Supreme Court's disinclination towards affirming *Soma JV* has cast doubt on the precedential value of *Soma JV*. Moreover, although the Supreme Court did not explicitly follow *Hardy Exploration*, it appears to have adopted a similar approach in reaching its conclusion, particularly by emphasising the need for additional evidence of the intention of parties' rather than the mere use of the expression "place of arbitration".

As a result, it is unclear whether *Hardy Exploration* remains good law or the bright-line test in *Soma JV* holds the field. The bright-line test laid down in *Soma JV* is certainly clearer, more objective and aligned with the principle of party autonomy. Therefore, it merits consideration and affirmation by the Supreme Court at the next suitable opportunity. In the meantime, parties would be well advised to use express language referring to the "seat" of arbitration specifically to avoid unnecessary litigation on this issue.

Anjali Anchayil and Ashutosh Kumar are advocates practising in New Delhi, India. The views expressed in this article are personal.